

GUILBERT ENTERPRISES LTD., ET AL. V. ECONOMICAL MUTUAL – ARSON AND EXPERT EVIDENCE

Arson in which the insured is complicit is a defence to a first party insurance claim. The onus of proof for such an allegation is on the insurer. The standard is the normal civil one of a balance of probabilities.

There are three components to the defence. There must be motive, opportunity and the fire must be incendiary. The opportunity need not be exclusive. An incendiary fire is a set fire. It is not the case that each of the three elements need be proved on a balance of probabilities. One element may be inferred from the evidence supporting the others.

In *Guilbert Enterprises (o/a Neepawa Home Hardware) v. Economical*, the evidence of motive was so overwhelming that it was admitted by the insured. One and perhaps the chief reason for the admission having been made by the insured – and it was made quite early in the litigation process – was to attempt to avoid the impact of evidence connected to it being adduced. Economical contended that the timing of certain events related to the issue of motive was also probative in the context of the opportunity to set a fire. So, no matter what admissions were made relating to motive, the evidence proving the particulars of motive would be submitted in detail on behalf of Economical at the trial.

For example, the insured had two years before the fire constructed four apartments above his Home Hardware Store. His plan was to convert these apartments into condominiums and then sell them. Home Hardware was concerned with the financial state of the insured's business. In that context, the insured over the course of the ten months before the fire had been telling Home Hardware that the condominiums had been sold and that he was shortly to receive the sale proceeds of \$500,000.00. But, in fact, by the time of the fire on February 25, 2015, none of the apartments had even been converted to condominiums. They could not have been sold. The money he claimed would imminently be arriving and which he asserted would reduce his debt load was never going to arrive.

In the same vein, for about three months before the fire, the insured had been discussing off and on with a Neepawa businessman the possibility of the latter purchasing the insured's business. The businessman was interested. Financial information was disclosed to him. The interested purchaser had the information reviewed by his accountant. Two days before the fire the insured and the businessman met. In that conversation, the businessman stated that he would not pay anything near what the insured had said he wanted for the business and he recommended that the insured make an assignment in bankruptcy. Given that the insured's wife had no inkling that the business was in a dreadful financial condition, this was not for him a serious option.

In the course of the adjustment of the loss the insured stated to the independent adjuster that though he had had discussions with the businessman before the fire about the possibility of it being sold to him, the discussions remained general and no offers had

been exchanged. (In fact, there had been a typewritten proposal prepared by the insured and delivered to the businessman.) The businessman's wife worked with the insured's wife. So the businessman was not candid when questioned. Of course, he did not owe a duty of good faith to Economical, unlike the insured. Fortunately, the businessman had had an intended silent partner in connection with the potential purchase of the insured's business and that person was more forthright when interviewed. That the only person who had discussions about buying the business had two days before the fire indicated he would not do so was significant.

You will discern how evidence which in some sense relates to motive may illuminate the other necessary components of an arson defence.

The building had been entirely destroyed by the fire. Any physical evidence related to the cause of the fire was destroyed at the same time. So the fire could not be proved to have been incendiary through an analysis of the physical evidence.

Smoke from the fire was first observed at 6:13 p.m., four minutes after the insured had set the building's alarm. Emergency services was called at that time and arrived at about 6:19 p.m. They entered the building at 6:21 p.m. At that time there was no fire or even much smoke in the store. The fire was in the attic space of the store, which was below the floor space of the apartments.

An employee of the store (hereafter called "AR") let into the store and guided the firefighters to the receiving area. In the receiving area was the only door to the building's basement. That door was in and part of the floor when it was shut. The door was normally left open. When the firefighters arrived, the door was closed. Indeed, they did not know there was a door in the floor, or that there was a basement in the building. This was significant because above the door in the floor was the hatch to the attic. When the firefighters lifted and moved that hatch aside the fire was right there. And the door in the floor would have had to have been closed for a ladder to have been placed on the floor beneath the hatch. The hatch could not be reached without a ladder.

The last person in the store before the firefighters arrived had been the insured. He denied having closed the door to the basement. He denied having set a fire in the attic. His testimony about the chronology of events was clearly intended to show that he could not have had time to close the door to the basement and set a fire in the attic between when the other employees departed and when he set the alarm.

The combination of the strong evidence of motive and the timing of the onset of the fire strongly suggested that the insured had set the fire. But this nice propinquity was complicated by a post-fire report of some employees that they had smelled something burning in the store, at ceiling level, early in the afternoon of the fire. Though they thought it might be associated with a fluorescent light burning out, they obviously could not be sure. And there was electrical wiring in the attic.

On the bases that there was electrical wiring in the attic and that employees had smelled something burning at ceiling level a few hours before the fire, the very experienced representative of the Office of Fire Commissioner (OFC) and a fire investigator hired by Economical both concluded the cause of the fire was undetermined, probably electrical.

About a month after the fire AR approached Economical's representatives to say that she thought the insured may have set the fire. Of particular moment was her statement that when the other employees left the building just after 6 p.m. the day of the fire, the trapdoor to the basement had been open, but when she guided the firefighters to the receiving area after they arrived, the trapdoor was shut. Subsequent interviews with the firefighters confirmed that the door to the basement was indeed closed when they arrived. In fact, as stated earlier, they were unaware that there was a basement or a door in the floor to it.

In due course the insured engaged an independent expert fire investigator (hereafter "H"). H did not investigate and could not have investigated the physical scene. It no longer existed. He was given all of the statements of witnesses, whether to Economical's independent adjuster, the RCMP or otherwise, along with the report of the OFC. He concluded that the proper conclusion as to the cause of the fire was that it could not be determined. An electrical fire, he opined, was a real possibility.

Economical engaged its own independent fire investigator (hereafter "B"). But he was not asked to determine the cause of the fire. He was asked to review H's report. He noticed a significant error in H's interpretation of the drawings for the building. H had stated that the attic space where the fire had originated had had a drywall ceiling. This supported his contention that the fire might have been a long smoldering one of electrical origin. B pointed out that the ceiling of the attic space was not drywall, but OSB (oriented strand board), which is much more flammable than drywall (which actually does not burn, but rather melts).

More significant for what occurred later was the following. H had the statements of AR and of the firefighters which clearly stated that the trapdoor was closed when the firefighters arrived. AR in her statements indicated that the trapdoor was open when the other employees left the store about five minutes before the insured, just before the fire. H gave no real weight to this anomaly, in large part because the OFC report had stated that the firefighters had found no fire in the basement. In effect, H said that the memories of the firefighters which were created during these stressful events were not reliable and he thought that the second-hand report of the OFC representative suggested that nothing much could reasonably turn on the trapdoor issue.

B viewed this very differently. He relied on AR's statement and the statements of the firefighters to conclude that the evidence was consistent with this being a set fire.

Shortly before trial the insured changed counsel. In that context, it was made clear that the insured and both his new and former counsel desired that the former counsel conduct the cross-examination of B at trial. Economical's counsel consented to that.

As noted above, B like H relied entirely on statements and interview transcripts and photographs and drawings in forming his views. Economical's counsel surmised that the insured's former counsel intended to attempt to undercut B's opinion by attacking AR's credibility.

In the course of presenting the insured's case, employees of the insured other than AR were called to give evidence. In cross-examination these employees testified that the trapdoor had been open when they left the building before the fire. So the evidence in AR's statement which had been relied upon by B was before the court through *viva voce* testimony of other persons and was essentially undisputed.

Before trial it was decided by Economical that AR would not be called as a witness. In due course the evidence of other witnesses, called by the insured, confirmed that AR's testimony was entirely unnecessary.

Among a trial judge's functions is to determine if expert opinion evidence is properly admissible and if it is, what weight it should be given. Before B testified, the insured's former counsel submitted to the trial judge that he expected the trial judge should and would ultimately give no weight whatever to B's evidence. Since B is a highly distinguished expert, who had been qualified many times in the past as an expert, and who the insured's former counsel acknowledged on the record was highly qualified to give expert opinion evidence, this submission could only have been made in the belief that his cross-examination was in some way going to demonstrate the utter unacceptability of the conclusion that B had expressed in his report and in his trial evidence.

A significant portion of the cross-examination of B by the insured's former counsel was an attack on AR and AR's credibility. But AR did not testify. Essentially the insured's former counsel was attacking a ghost. The propositions in AR's interview transcripts which had been relied upon by B in his report in coming to the conclusions he had (e.g., that the trapdoor had been open when the employees had left the building before the fire but closed when the firefighters arrived) were in effect proved at trial through other witnesses. Counsel was attacking obliquely the credibility of a person who did not testify and from whom there was in any event no evidence the trial judge could have relied upon. Such an attack could not diminish the foundation upon which B's opinion rested. Because the opinion expressed by B **at trial** was founded upon the evidence of other persons (though it was to the same effect as what was in AR's pre-trial interview transcripts).

One can, in theory, diminish the weight which should be given to an expert's conclusions by attacking the foundation of the opinion. But the conclusion does not really rest on the person who made the statements, but rather upon the statements themselves.

The trial judge rightly stated that he was not bound to accept or prefer the evidence of any expert. In this case, expert evidence was arguably unnecessary and provided limited assistance to the court. The aim of the insured in calling H to give the evidence he did was to bolster the idea that it was reasonable to conclude that the fire might have been of electrical origin and not incendiary. It was important for Economical that the weight

given to H's evidence be diminished. To a large extent this was accomplished in the cross-examination of H and a copy of the transcript of that cross-examination is attached at Schedule "A" hereto. In the end, he acknowledged, in effect, that if the trapdoor was open when the employees left but closed when the firefighters arrived, the evidence was consistent with arson being the cause.

One might ask whether experts would actually be more fair and forthright if they understood what occurs in cross-examination. There is good reason to doubt this. We all know lawyers who appear to believe the dubious arguments they are making. Why would experts be any different?

MGF

SCHEDULE "A"

CI15-01-98227

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:

PATRICK GUILBERT and
GUILBERT ENTERPRISES LTD.,

Plaintiffs,

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY
trading as THE ECONOMICAL INSURANCE GROUP,

Defendant.

EXCERPT FROM PROCEEDINGS, CROSS-EXAMINATION OF
MATTHEW DAVID HOPLEY BY MR. FINLAYSON, before The
Honourable Mr. Justice Kroft, held at the Law Courts
Complex, 408 York Avenue, in the City of Winnipeg,
Province of Manitoba, on the 18th day of October, 2018.

APPEARANCES:

MR. M. DAVIDS and MS. S. FAST, for the plaintiffs

MR. M. FINLAYSON and MS. G. LISI, for the defendant

1 EXCERPT FROM PROCEEDINGS OCTOBER 18, 2018

2

3 **MATTHEW DAVID HOPLEY**, previously
4 affirmed, testified as follows:

5

6 CROSS-EXAMINATION BY MR. FINLAYSON:

7 Q Mr. Hopley, you're aware you're in Manitoba?

8 A Yes.

9 Q This was a Manitoba fire?

10 A Yes.

11 Q You're not licensed to practice engineering in
12 Manitoba, are you?

13 A No.

14 Q You graduated with your degree in mechanical
15 engineering in 2008?

16 A Yes.

17 Q Your internship was four years; is that right?

18 A Internship?

19 Q Yes. You got a degree, and don't you have to
20 article practice, go to a firm somewhere for a few years
21 before you actually get the ring, or not?

22 A Ah, yes. So an engineer in training --

23 Q Yeah.

24 A -- which is what somebody is called when they
25 graduate from school. You work for four years and then you
26 can be eligible for your P.Eng. licence.

27 Q Right. So was 2012 when you got your licence?

28 A Yes.

29 Q So at the time that you prepared your first
30 report in this matter, you'd had your licence for five
31 years? Eight plus four is twelve --

32 A Yeah.

33 Q -- sixteen take away twelve is four, or five?

34 A Yeah.

1 Q Four or five years?

2 A It's in that range that, that I would have been
3 working, yeah.

4 Q The first two years of what I'm calling your
5 internship was at Tekmar Control Systems?

6 A Yes.

7 Q You were -- you there conducted research and
8 developed control systems for hot water heating systems; is
9 that right?

10 A Yes.

11 Q And your degree wasn't in civil engineering or
12 electrical engineering or structural engineering, but in
13 mechanical engineering?

14 A Yes.

15 Q When did you receive your certification from
16 NAFI, the National Association of Fire Investigators?

17 A 2011.

18 Q And apart from the hot water heating systems and
19 automatic sprinkler systems, what experience did you have
20 before 2016 in the design, modification, construction or
21 investigation of multi-use mixed occupancy buildings in
22 Manitoba?

23 A The experience following 2010 to 2016 that I
24 would, that I, that I had is in regards to fire
25 investigation from 2010 to 2014 in the region served by our
26 Calgary office, which covers Alberta, Saskatchewan,
27 Manitoba, Northwest Territories and Nunavut. And so
28 throughout that time I travelled that territory conducting
29 fire investigations. And then as I developed experience
30 and completed training courses at Waterloo or through
31 Waterloo for my M.Eng. degree, I began to do more design
32 work where I would assess various fire performance matters
33 relating to buildings.

34 THE COURT: More what, design work you did?

1 THE WITNESS: Yes.

2 THE COURT: Okay.

3

4 BY MR. FINLAYSON:

5 Q So before 2016 you'd been involved in the design
6 of how many commercial buildings in Manitoba?

7 A None.

8 Q Do you claim to have expertise in the structural
9 and electrical codes and professional engineering design
10 standards and construction practices for Manitoba as of
11 2016?

12 A My expertise is with regards to the National
13 building Code and the National Fire Code, which, if memory
14 serves me correct, is, is what's adopted here out of hand.

15 Q How many building, building arson fires have you
16 personally investigated?

17 A Approximately 400.

18 Q Four hundred building fire --

19 A Fires in --

20 Q -- arson fire?

21 A Fire, fire -- 400 fires in general.

22 Q Yeah.

23 A And then of that, most are structure fires of
24 varying types, and then of that some are concluded as
25 incendiary fires.

26 Q On how many occasions have you been qualified to
27 give expert evidence by a court regarding the origin and
28 cause of a building fire?

29 A This is the first time.

30 Q Now, in both your reports, and I'm referring to
31 volume 6, tabs 137 and 139, you acknowledge your duty not
32 to act as an advocate, correct?

33 A Yes.

34 Q And I'm sure you agree that you have a duty as an

1 expert to act in an objective and an unbiased manner,
2 correct?

3 A Yes.

4 Q And that implies to me, and I need to know if you
5 agree that this means it would be wrong of you to omit or
6 deliberately misinterpret evidence to support a particular
7 position; is that fair?

8 A Yeah, I agree.

9 Q And in order to determine the probable cause of
10 any failure or fire or other loss, an investigator such as
11 yourself must be able to identify all the possible causes
12 and then systematically, objectively and scientifically
13 rule out, if possible, all but one of those, if possible?

14 A No.

15 Q Determine all the possible ones, and then, if you
16 can, to determine the one that is most probable?

17 A The fire investigation process is the
18 identification of possible causes and then an assessment of
19 the evidence to determine a probable cause --

20 Q Right.

21 A -- if possible.

22 Q Yes.

23 A I believe that's what you said?

24 Q That's what I said.

25 A Yes. Then, yes.

26 Q Now, you say, at page 17 of your second report,
27 which is document 139, that, and I'll let you get there so
28 you see that I am quoting you correctly. Tell me when
29 you're there.

30 A Page 3?

31 Q No, page 17.

32 A Okay, 17. My mistake.

33 Q Sorry.

34 A Okay, go.

1 Q Very top of the page:

2

3 "The most significant issue
4 presented in the Becker Report is
5 the juxtaposition of a reportedly
6 incomplete investigation performed
7 by the OFC with a new incendiary
8 fire hypothesis that is considered
9 to be more likely than not to have
10 occurred, based solely on the
11 inclusion of the RCMP findings."
12

13 I suggest to you, and you can take your time and
14 read them again if you want, but nowhere does ~~Mr.~~^{Dr.} Becker
15 purport to say that it's more probable than not that the
16 fire of February 25, 2015 at the Neepawa Home Hardware
17 store is more probable than not. What he said was that it
18 was con -- that the fire -- that the evidence he's seen was
19 consistent with it being a set fire; is that fair? Is that
20 fair? Do you want to take a, take a minute?

21 A Partially fair in the sense that I believe
22 there's a comment ...

23 Q Where are you?

24 A I'm just trying to find the space.

25 Q Oh, okay.

26 A Second report of Dr. Becker, page 10, basically
27 final sentence:

28

29 This information that you asked me
30 to review, none of it alters the
31 opinion I expressed in my earlier
32 report to you of 13 May, 2016
33 regarding the probable origin and
34 cause of this fire.

1
2 So that, that statement, to me, is what I'm trying to
3 assess when I talk about the juxtaposition, is it's not
4 clear the extent to which Dr. Becker is opining on a
5 probable origin and cause or not.

6 Q So that's the basis on which you said that he was
7 saying that it was more probable than not to be arson, or a
8 set fire?

9 A That's, that's where it's challenging to get a
10 sense of his report.

11 Q Okay. Now, some -- obviously I have to ask some
12 obvious questions. I apologize for that. The answers will
13 be very easy for you. You were never at the scene of this
14 fire?

15 A No.

16 Q You never saw any physical evidence from the fire
17 with which we are concerned?

18 A No.

19 Q That is, I'm correct?

20 A That is correct.

21 Q So to the extent available, you've relied
22 entirely upon the statements of witnesses or photographs or
23 drawings, and the like, in coming to the opinion you did?

24 A Yes.

25 Q And by the time you were engaged, and this is --
26 I want you to know I'm not being critical of the fact you
27 didn't look at any physical evidence, because it was gone
28 by the time you were engaged, right?

29 A Yes.

30 Q As it was for Dr. Becker?

31 A Right.

32 Q No^w, you are aware that NFPA 921 has an entire
33 chapter devoted to incendiary fires, correct?

34 A Correct.

1 Q And the version that's applicable at the time
2 we're concerned with, or the ~~addition~~ ^{edition}, I guess you'd say,
3 that was in effect at the time we're concerned with. It
4 was chapter 24, correct?

5 A I believe so, yes.

6 Q And within that chapter is the heading, other
7 evidentiary factors, right?

8 A Yes.

9 Q And within that sub part of that chapter on
10 incendiary fires, is a discussion of the issue of motive,
11 right?

12 A Yes.

13 Q And it says that one motive for setting fires is
14 profit, right?

15 A Yes.

16 Q And it says, and I quote from, I'm not sure if
17 it's material, My Lord, but just for your notes,
18 24.4.9.3.6. It's one of those, it's one of those --

19 THE COURT: That's worse than law.

20 MR. FINLAYSON: It's worse than statutes, way
21 worse.

22

23 BY MR. FINLAYSON:

24 Q It says:

25

26 Fires set for profit involves
27 those set for material monetary
28 gain, either directly or
29 indirectly. The direct gain may
30 come from insurance fraud.

31

32 Fair?

33 A Yes.

34 Q Now, when you say, as you have, and I'm not being

1 critical again -- when you say, as you have, that because
2 you're a fire investigator you are to be guided by an NFPA
3 921, right?

4 A Correct.

5 Q And 921 gives you guidance about the potential
6 dangers of relying too strongly on motive, fair?

7 A Correct.

8 Q But you're not saying that in another setting,
9 like the judicial setting, that the decider can't look at
10 that other evidence, correct?

11 MR. DAVIDS: That's not for the witness to say.
12 I'm just saying.

13 MR. FINLAYSON: That's what I'm saying. It's not
14 for him to say, so he'll agree with me.

15

16 BY MR. FINLAYSON:

17 Q It's not -- you're not suggesting that the judge
18 can't look at motive whatever way the judge decides is
19 appropriate, correct? You're saying that fire
20 investigators are guided by what's in nine -- NFPA 921?

21 A That is correct.

22 Q And in, in 24 -- so, 24.4.9.3 -- so it's just
23 another point one, My Lord.

24 THE COURT: Okay.

25

26 BY MR. FINLAYSON:

27 Q It states, among other things, that, and I'm
28 quoting:

29

30 Commercial fraud fires may be set
31 or arranged by an owner to destroy
32 old or antiquated equipment,
33 destroy records to avoid taxes or
34 audits, or for the purpose of

1 obtaining insurance money.

2

3 You agree with that, obviously?

4 A Sure.

5 Q And within the part dealing with other
6 evidentiary factors in NFPA 921, it's stated, and this is
7 24.4.5.2, and I'm quoting:

8

9 Where the deterioration of a
10 building is intentional, other
11 indicators related to financial
12 stress, such as over-insurance or
13 the inability to sell the property
14 may be discovered during the
15 investigation.

16

17 Fair?

18 A Fair.

19 Q And in twenty-four --

20 THE COURT: Sorry, where the deterioration of the
21 building is intentional?

22 MR. FINLAYSON: Yes.

23 THE COURT: Okay.

24 MR. FINLAYSON: And what I -- unless my friend
25 objects, My Lord, what I will do is I will actually copy
26 these NFPA sections and we'll submit them in due course.

27 THE COURT: Okay. I think the offer was made --

28 MR. FINLAYSON: Yes.

29 THE COURT: -- at, at the outset.

30 MR. FINLAYSON: Yeah.

31 THE COURT: We thought it would make more sense
32 when --

33 MR. FINLAYSON: Yeah.

34 THE COURT: -- we're dealing with them to do

1 that.

2 MR. DAVIDS: Precisely, My Lord.

3 THE COURT: Yeah.

4 MR. FINLAYSON: Yeah, okay. So I will do that.

5 So you can --

6 THE COURT: That would be helpful.

7 MR. FINLAYSON: -- could check my, check my
8 quotation skills.

9

10 BY MR. FINLAYSON:

11 Q In 24.4.3.2 it says:

12

13 Although possible motives do not
14 determine a fire's cause ...

15

16 You agree with that?

17 A Yes.

18 Q

19 ... motives may lead the
20 investigator to approach the
21 investigation, such as the search
22 for evidence and possible suspects
23 differently.

24

25 Fair?

26 A Fair.

27 Q Now, in the context of motive, please let me know
28 as I go through the following list which, if any, of these
29 facts you were aware of at the time you were conducting
30 your assessment. All right?

31 A Okay.

32 Q Okay.

33 MR. FINLAYSON: And My Lord, please tell me to
34 slow down if you need me to.

1 THE COURT: I haven't been shy.

2 MR. FINLAYSON: Okay.

3

4 BY MR. FINLAYSON:

5 Q That Mr. Guilbert's business had missed many
6 payments to Home Hardware in the months before the fire.
7 Were you aware of that?

8 A Yes.

9 Q Were you aware that Home Hardware, as a
10 consequence, had imposed on Mr. Guilbert's business certain
11 restrictions with regard to what merchandise he could
12 acquire from Home Hardware?

13 A Yes.

14 Q Were you aware that there had been on, actually,
15 14 occasions, NSF cheques to employees?

16 A I think I was aware of that.

17 Q Were you aware that a certificate of debt had
18 been registered against the property of the Neepawa Home
19 Hardware, that is, Mr. Guilbert's business, by the province
20 for unpaid sales, retail sales tax at the end of December
21 2014?

22 A Yes.

23 Q Were you aware that Manitoba Hydro had threatened
24 to cut off the power to the Neepawa Home Hardware because
25 of non-payment or late payment?

26 A Possibly.

27 Q Were you aware that Home Hardware was behind --
28 Mr. Guilbert's Home Hardware was behind in its payment of
29 municipal taxes?

30 A Possibly.

31 Q Were you aware that the inventory within the
32 store had become quite depleted?

33 A Yes.

34 Q Were you aware that several months -- for several

1 months before the fire, Mr. Guilbert had been representing
2 to Home Hardware that he had sold the -- they were
3 apartments but he was intending to convert them to
4 condominiums -- he kept saying he'd sold the condos and
5 that he was about to receive about five hundred thousand
6 dollars?

7 A I'm not sure I'm aware of any representation, but
8 I am aware of discussions around possible sale of those
9 units.

10 Q Were you aware that, at the time of the fire,
11 there was still about a hundred thousand dollars owed to
12 his father-in-law in connection with the business?

13 A I don't think I was aware of that.

14 Q Were you aware that two days before the fire
15 occurred, Mr. Guilbert had a meeting with the only person
16 who had expressed potential interest in buying the store
17 and that person had said to Mr. Guilbert that he should go
18 bankrupt?

19 A Yes, I remember some documentations that include
20 those.

21 Q You're aware of that?

22 A Yes.

23 Q Now, I'd suggest that the collection of these
24 circumstances would put an unbiased investigator in the
25 frame of mind where, in reviewing all of the evidence, the
26 possibility that the fire was an incendiary one should be
27 kept in mind; is that fair?

28 A Absolutely.

29 Q Now, at page 4 of your first report, you talk
30 about, at the bottom of the page under the reference to
31 figure one, you say:

32

33 "It is our understanding that the
34 day leading up to the fire was a

1 typical business day ..."

2

3 Is that what you were told?

4 A That's an assessment based on the information
5 available and that there's no particular piece of
6 information that says something special happened on that
7 day.

8 Q You're aware that there was a partial basement
9 beneath the store?

10 A Yes.

11 Q And you're aware that the employee lockers, the
12 only washroom in the facility, one of the employees'
13 offices, the staff or coffee room, were all in the
14 basement?

15 A Yes.

16 Q And you were aware there was only one door to the
17 basement?

18 A Yes.

19 Q And you are aware that it was in the receiving
20 area generally under the point you've called the hatch on
21 your figure one at document 137, correct?

22 A Yes.

23 Q Now, were you aware that, at least based on the
24 evidence we have, that until a week or two before the fire
25 it was uncommon for Mr. Guilbert to actually stay till the
26 store closed? You're aware of that?

27 A I'm aware of that in the context of comments
28 saying it's unusual. I don't know what his usual
29 operations are.

30 Q Right. Okay. So you'd been advised that that
31 might be the case?

32 A Yes.

33 Q And were you aware -- did you actually have
34 access to and look at the alarm activity logs for the

1 building?

2 A Yes.

3 Q So you would have been aware that Mr. Guilbert
4 went back to the store after closing on the night that he'd
5 been told by the potential buyer to go bankrupt and he was
6 there for an hour and forty-five minutes; were you aware of
7 that?

8 A No, I don't think I remember seeing that.

9 Q Were you aware that on the day of the fire, after
10 all the employees, and I'm excluding Mr. Guilbert when I
11 use "all the employees", all the employees, excluding
12 Mr. Guilbert, left, they left through the rear door, that
13 is, the west side door; were you aware of that?

14 A Yes.

15 Q Were you aware that they had gathered after they
16 departed in the parking lot for, say, three to five minutes
17 to chat?

18 A Yes.

19 Q Now, you state in the second-last line at page 4
20 of your first report, document 137:

21

22 "Two employees reportedly smelled
23 the odour, ..."

24

25 Which you refer to as a smoke smell just before that:

26

27 "... and two additional employees
28 assisted in investigating the
29 source to no avail."

30

31 That's what you wrote, correct?

32 A Correct.

33 Q And were you just intending to conclude that
34 neither of them found what they thought was the source? Is

1 that what you were trying to say?

2 A What I'm trying to say is, given the context of
3 the preceding sentence, I'm saying the day leading up to
4 the fire was a typical business day.

5 Q Right.

6 A Here is the first piece of evidence I'm aware of
7 that's a unique factor relating to a fire on the day.

8 Q Okay.

9 A And that the smoke smell, or a smell was noted in
10 the store on the day of the fire, in the afternoon, and
11 that no one figured out what that smell was.

12 Q All right. So we've had evidence from three
13 people who were there that day. One was Mr. Guilbert,
14 right? He smelled nothing.

15 A Okay.

16 Q Okay. One was from a woman named Vicki Adamyk.
17 You would have seen her statement?

18 A Yes.

19 Q And she's the one who initially first reported a
20 burning smell?

21 A Okay.

22 Q And her evidence was to the effect that after
23 they did their walkabout to look for the source, she, she
24 located a fluorescent light that had just burnt out and
25 that from her perspective, she was satisfied the source
26 of the smell had been found. You were unaware of
27 that, obviously, since it just came out in evidence this
28 week?

29 A Right.

30 Q And if it's true, obviously, that the source of
31 the smell was the fluorescent light that had burnt out
32 around two o'clock, just before the smell was noticed, then
33 it could very well be that the source of the smell had been
34 found, correct? Unless you're assuming already, which you

1 wouldn't do as an unbiased investigator, that there's a
2 fire up in the attic, right?

3 A You couldn't assume that that's the case --

4 Q Right.

5 A -- as an unbiased investigator. But it's an --
6 it, it could be a piece of evidence to consider during an
7 investigation.

8 Q Oh, for sure. Yeah, no, I understand what you're
9 saying.

10 A Okay.

11 Q You're saying that somebody smelled something, it
12 seemed unusual, and so you have to keep that in mind?

13 A Yes. Yes.

14 Q Yeah, yeah.

15 A It doesn't, it doesn't imply fire cause
16 necessarily.

17 Q No. Right. Especially because we know the
18 following things, right, which tend to suggest there was no
19 -- well, first of all, the smouldering fire that is your
20 scenario, that at least four hours, approximately four
21 hours smouldering fire, that, I take it, comes from
22 electrical arcing, is that right, on your theory?

23 A There could be a range of potential ignition
24 sources, and so the smouldering theory has more to do with
25 the fire dynamics or the nature of the combustion within
26 insulation or cellulose materials.

27 Q A smouldering fire is a fire?

28 A Yes.

29 Q On your theory of smouldering fire, what caused
30 the fire if not arcing?

31 A It could be high resistance heating, it could be
32 a --

33 Q Fire resist --

34 A -- ballast overheating, it could be a ballast

1 otherwise leaking hot fluid.

2 Q You mean a light ballast?

3 A Yes.

4 Q That's within the store?

5 A Sure.

6 Q Yeah. Not in the attic space?

7 A Right.

8 Q Right. So you -- and you're also aware, I take
9 it, that there were five people, five people working in the
10 store that day who smelled nothing unusual, correct?

11 A Correct.

12 Q And you're aware that, so far as we know, no
13 customers complained of anything unusual, correct?

14 A Correct.

15 Q Now, the other person who smelled, or said she
16 smelled something was Judy Masters Collins (phonetic);
17 you're aware of that?

18 A Yes.

19 Q And she said she smelled it in one spot in the
20 lighting department and that it was a very faint smell.
21 You're aware that's what she said?

22 A I'm aware that she smelled something and I'm
23 aware that there was limited, like it wasn't a strong of
24 potent smell.

25 Q You're aware that nobody smelled anything the
26 rest of the day?

27 A Yes.

28 Q Did you actually read Vicki, Victoria Leona
29 Adamyk's statement to Mr. LaBrash of March 11th of '15? Is
30 that something you would have read? You're looking at your
31 list.

32 THE COURT: Yes, Mr. Davids?

33 MR. DAVIDS: Is that document before the witness?
34 I may have missed that it's been presented to him.

1 MR. FINLAYSON: No, no, no. No, I'm, I'm --

2 THE COURT: I think there's a list in the report.

3 MR. FINLAYSON: He's got a list in his report.

4 I'm just asking --

5 THE WITNESS: There is. You're talking about --

6 MR. FINLAYSON: -- him if that's one of the
7 things he got.

8 MR. DAVIDS: Oh.

9 THE WITNESS: Looking in section 1.3 I have
10 transcript of Victoria Leona Adamyk interview. And so
11 I ...

12

13 BY MR. FINLAYSON:

14 Q Do you think that's the March 11th one?

15 A That's what that's dated, yes.

16 Q Oh, it is. Okay. So then you would have
17 considered what she says at page 2. And it's in -- if you
18 want to look, it's at volume 3, tab 67.

19 A Okay.

20 Q Page --

21 THE COURT: Let me get there, please.

22 MR. FINLAYSON: Sure. Page 2.

23 THE COURT: Yes.

24 MR. FINLAYSON: Tab 67, page 2.

25

26 BY MR. FINLAYSON:

27 Q There a, sort of a run-on answer at the top
28 third, almost halfway down the page, and roughly a third of
29 the way into that she's saying, and I just start at random
30 to get to the point:

31

32 I don't know, I don't have anybody
33 else I really need to acknowledge
34 except those, 'cause they're the

1 ones I told in the first place.
2 I'm like, if you don't smell it,
3 that's fine. But I remember I was
4 coming back from lunch, that one
5 of the light ballasts were burnt
6 out over where the garbage can
7 area is, about 15 feet from where
8 our tills were. And I thought and
9 Sharon says, well, sometimes
10 ballasts burnt out.

11
12 So that's consistent with the evidence Vicki gave
13 yesterday to the effect that she had interpreted it to be
14 like the smell she had smelled before, she said, of a light
15 burning out within Home Hardware. And you have no physical
16 evidence to the contrary, correct?

17 A Correct.

18 Q Yeah. And so you admit it's completely possible
19 that the smell that Vicki and Judy smelled at 2:00 or 2:20,
20 whenever it was that afternoon, was something entirely
21 innocent; it could have been an electric heater, it could
22 have been a light, it could have been something else; it
23 was just a transitory dust on an element like they thought.
24 That's possible?

25 A Yes.

26 Q Now, go to page 5 of your report. In the first
27 paragraph in the fourth last line ...

28 THE COURT: You're in the May report?

29 MR. FINLAYSON: Yes. 137, page 5, first
30 paragraph on that page.

31 THE WITNESS: Okay.

32

33 BY MR. FINLAYSON:

34 Q The fourth last line of that paragraph, it says,

1 so:

2

3 "Mr. Guilbert indicated ... he was
4 the last person in the store, ...
5 that he gathered his personal
6 affairs and left through the back
7 door of the structure. He
8 estimated that he was in the
9 building for about 30 seconds ..."

10

11 Do you see that?

12 A Yes.

13 Q

14 "... after all of the staff had
15 left."

16

17 A Correct.

18 Q And did you evaluate that in a critical sense or
19 did you just assume that that was the case?

20 A I evaluated that in the sense that we have short
21 period of time in the store following when the staff leave
22 and then following when Mr. Guilbert says he leaves. And
23 then we have the first hard time, which is when the alarm
24 is set. And so that gives us an outer bound.

25 Q Yes.

26 A And then the length of time that someone spends
27 in the store is, is variable and the degree of critical
28 analysis on that point has to do with how recollections can
29 be challenging, and that I basically assessed that he was,
30 he estimated 30 seconds. There is other evidence that
31 suggests it might be a minute. There's a length of time.
32 And that's -- I kind of stopped at assessing that there was
33 a length of time on the order of minutes.

34 Q Well, what I'm getting at, Mr. Hopley, is that if

1 you're fairly and objectively and independently and in an
2 unbiased way considering the idea that perhaps Mr. Guilbert
3 set the fire that day before he left, that one would want
4 to consider how long he was in the store and whether it was
5 possible for him to have done that. Is that fair?

6 A That's fair.

7 Q Okay. So did you evaluate whether the 30-second
8 timeframe was enough or did you just say, well, he says 30
9 seconds, it's 30 seconds, he probably didn't do it? What,
10 what was your thought?

11 A So my thought is conveyed, for example --

12 Q I don't -- just tell me what you were thinking.
13 I ...

14 A Okay. Fair enough. So essentially, what I was
15 thinking and looking at is that if the fire is incendiary,
16 and this is, this is a common thought analysis that I do in
17 a fire investigation, is assume something is the case and
18 then if that's the fact, what could you look at or evaluate
19 or examine to test if that were possible. And so in
20 thinking about an incendiary fire, there's a fixed length
21 of time between when the staff is leaving, we don't
22 necessarily have hard times on that, and then we have an
23 outer bound when the alarm is set. Within that period of
24 time, something could take place.

25 Q Yeah.

26 A And I assessed in the incendiary fire scenarios,
27 and I've considered, the factors that would need to be
28 understood to make an incendiary fire feasible.

29 Q Right. In the, in the incendiary fire scenario
30 we're talking about, Mr. Guilbert is the person setting the
31 fire, right?

32 A Right.

33 Q Right. So you'll agree with me that if the
34 hypothesis you're consider^{ing} is that Mr. Guilbert set the

1 fire, it might be the case that you wouldn't take at face
2 value everything he tells you, right?

3 A Sure.

4 Q Okay. And it might be the case that if he wants
5 you to think that he didn't have time to set the fire, that
6 he might diminish the amount of time he remained in the
7 store after everybody else left, fair?

8 A That would be possible, yes.

9 Q Yes. And did you look at the statement that
10 Mr. Guilbert gave to Constable Woytkiw the day after the
11 fire? That's at tab 41. It's in book two, tab 41. Tell
12 me when you're there.

13 A I'm here.

14 Q Okay. I need to let His Lordship get there, as
15 well.

16 THE COURT: Two. I'm there.

17

18 BY MR. FINLAYSON:

19 Q All right. So if you turn to page 3, here's the
20 first thing I want you to keep in mind, Mr. Hopley, and
21 that is that you'll see that about a third of the way down
22 after the first reference to the word, or an earlier
23 reference to the word "right" it says, and this is
24 Constable Woytkiw saying to Mr. Guilbert: But with a file
25 like this, like you're the owner, it's undetermined, I'd be
26 lying to you if I said that you're not a suspect, okay.

27 So you see, this is a guy who's introduced
28 himself as being with major crimes in Brandon, it's the day
29 after the fire, and he's warning him, you're a suspect.

30 A Right.

31 Q Okay. And then on the next page, page 4, Woytkiw
32 says, near the bottom, it's two-thirds of the way down,
33 he's confused about the time, originally thinks it's 5:05
34 but it's 6:05, of course. P.G., Pat Guilbert: Six, like

1 we shut down 6:05, 6:10 generally we're leaving. Are you
2 there, Mr. Hopley?

3 A Yes, I'm seeing that.

4 Q Okay. Constable Woytkiw: Okay. Now, you've
5 said that you, you said at around -- I have it down as 5:05
6 but it was, it wasn't 5:05, it was 6:00. I don't know what
7 SS means. So Woytkiw says: We were talking about -- and
8 they talked over each other -- Guilbert: Right.

9 Woytkiw: So at about 6:05 you said you left.
10 Who's we? Who was leaving when you left? Pat Guilbert:
11 All of us.

12 Woytkiw: You all left together? Yeah, like this
13 -- we don't leave anybody in the store, like we all
14 just ...

15 Woytkiw: So you all left at the same time? Yep.

16 Woytkiw: Who was the last one of the store --
17 last one out of the store, though? Guilbert: That was me.
18 I set the alarm and then we all left, like.

19 So we've gone from zero when he's talking to
20 major crimes Brandon and he's been told he's a suspect, to
21 30 seconds when he talks to LaBrash. Are you with me so
22 far?

23 A Yeah.

24 Q Okay. And then the evidence was clear yesterday,
25 from Sharon Howe and Vicki Adamyk, who worked that day and
26 left within a few minutes after 6:00 that day, that they
27 went into the parking lot and spoke with two or three --
28 two other employees for three to five minutes with
29 Mr. Guilbert still in the store. You with me so far?

30 A Yeah.

31 Q Okay. So it's not right away, and it's not 30
32 seconds, and it's three to five minutes. You with me?

33 A Yes.

34 Q All right. So you'll agree with me that if

1 there's a deliberate effort to shrink the time by him, if
2 he deliberately says something like, I was in the store
3 only for this amount for time, when actually he was in the
4 store for a longer time, that's suspicious; is that fair?

5 A A changing, a changing statement could be --

6 Q Suspicious.

7 A -- suspicious, yes.

8 Q And yes, let's, let's go one step further.
9 Suppose what happened is that when it came down to it, what
10 he did was he, he created this story about the sequence of
11 people leaving, so that he said first Vicki left and then
12 Val left, and then a minute later Sharon left, and the last
13 one to leave was Arlene. What time did she leave? Six o-
14 eight.

15 How long were you in the store after she left?
16 Sixty to ninety seconds.

17 Let's suppose he invented a scenario like that in
18 the light of what I've just said before. That would be
19 suspicious, too, fair?

20 A It would be inconsistent with other evidence,
21 yes.

22 Q I mean, here we are, we are three and a half
23 years after the fire, and the day after the fire the story
24 was, I left right away, when he's talking to somebody
25 that's told him he's a suspect --

26 A Um-hum.

27 Q -- in a fire that happened four minutes after he
28 left the store, okay. He's talking to the police officer
29 and he says, I left with them right away. Three and half
30 years later, at trial, he's saying, I left one minute after
31 the -- one minute to ninety seconds after the last
32 employee. That would raise concerns; let's put it that
33 way?

34 A It could raise concerns. It could also show the

1 fallibility of memory.

2 Q Yeah. Now, I didn't see anywhere in your, either
3 of your reports, 137 or 139, where you did this kind of
4 evaluation in the context of an assessment of incendiary
5 fire as a possibility. Did you do that somewhere else
6 outside your reports?

7 A I think I treated the incendiary fires within the
8 context of my reports.

9 Q No, no, I meant where you said -- well, you said
10 30 seconds. In this statement he said, at the same time;
11 in this statement -- and you, you looked at the employees'
12 statements and saw that they said they chatted in the
13 parking lot for a while and that his truck was still
14 running. Did you, did you look at them with that
15 particular purpose in mind?

16 A I understood that there was a period of time
17 between when he left and that the available information
18 included changing or inconsistent evidence.

19 Q Okay.

20 A And so, yes, I was aware of that, yes, I assessed
21 it.

22 Q Right. You were aware that Mr. Guilbert had,
23 before the day of the fire, been in the attic space, right?

24 A Yes.

25 Q And you thus were aware that he obviously knew
26 how to access it?

27 A Yes.

28 MR. DAVIDS: Sorry, I didn't get the timing my
29 learned friend said. My apologies.

30 MR. FINLAYSON: Before the fire.

31 MR. DAVIDS: Oh, simply before.

32 MR. FINLAYSON: If any time before the fire,
33 yeah.

34 THE COURT: Okay. Thank you. Sorry.

1 MR. FINLAYSON: No.

2

3 BY MR. FINLAYSON:

4 Q Now, in the second paragraph at page 5 of your
5 first report, document 137 of volume 6, you say.

6 THE COURT: Sorry, what page again?

7 MR. FINLAYSON: Same page, page 5. It's the --

8 THE COURT: Yeah.

9 MR. FINLAYSON: -- second new paragraph. It
10 says:

11

12 "One of Home Hardware's employees,
13 Mrs. Arlene Vaughan, was also a
14 tenant in an upper level apartment
15 above the store. She reported
16 that after leaving for the night,
17 she went upstairs and was about to
18 leave for dinner with her husband
19 when she noticed smoke in the
20 hallway ..."

21

22 BY MR. FINLAYSON:

23 Q Now, was it deliberate that you left out the
24 intervening part about her chat in the parking lot with the
25 other employees, or did you just not think it was
26 significant?

27 A I don't think it was significant. It wasn't a
28 deliberate --

29 Q No.

30 A -- attempt to misrepresent timing.

31 Q Okay. But, but what you and I have -- I thought
32 we had agreed a minute ago that the time that -- we do
33 agree that the time that Mr. Guilbert was in the, in the
34 store is something to be considered in the context of

1 opportunity to set a fire?

2 A Yes.

3 Q Okay. Take up volume 2, please. Tab 52.

4 A Okay.

5 Q So just to put you in the frame and remind you,
6 so this is a statement of Constable Cawthra -- pardon me,
7 statement to Constable Cawthra by Gwen Barilla who did work
8 that day. And at page 2 of the statement, Ms. Barilla
9 says, in the middle of the page, actually, Constable
10 Cawthra is asking about, you know, what happened before
11 the, before the fire and what after they left. It says:
12 So normally we go out the front door but we all decided to
13 go out the back door last night and we probably stood
14 outside probably for five minutes or so just yacking. You
15 see that?

16 A Yes.

17 Q All right. Is this a statement that you had when
18 you prepared your report, do you know?

19 A Yes, I believe that's why I commented on people
20 trailing in the parking lot after.

21 Q Okay. Now, you have something called an incident
22 timeline at the bottom of page -- or you, pardon me, you
23 begin your incident timeline at 2.2 at the bottom of page
24 5, document 137, correct?

25 A Yes.

26 Q And you defined timeline in your direct
27 examination as sort of the series of human activities or
28 events till the 911 call?

29 A Yes.

30 Q And you begin with this smell of an odour at 2:20
31 by Ms. Adamyk. Is that because you've already concluded
32 that it's connected to the fire or just because you think
33 it's a significant thing to consider?

34 A It's the first piece of information that I'm

1 aware of that relates to a fire --
2 Q Or --
3 A -- on the day of the incident.
4 Q That potentially relates to a fire?
5 A Relates to the investigation of a fire.
6 Q And the incident timeline, the incident is the
7 fire?
8 A So I start where we -- or ...
9 Q Oh, I'm do -- no, no, you've got a heading,
10 incident timeline. The incident is the fire?
11 A Yes. Yes.
12 Q Yeah.
13 A Yes.
14 Q Now, you mention a few things between 2:20 and
15 6:09. It strikes me, and I believe it will, it strikes
16 Dr. Becker, and he'll say this, that one of the things
17 that's significant between those two times, 2:20 and 6:09,
18 is the fact that nobody else ever smelled anything like
19 smoke again during the day. Do you agree that that's
20 significant?
21 A Potentially, yes.
22 Q Okay. And likewise, you don't mention that
23 between 2:20 and 6:09 there are no electrical problems in
24 the store. That's potentially significant, too; like,
25 there's no lights flickering, there's no power failures,
26 the computers work, the phones work, the plugs work, paint
27 shaker works, everything works. That's potentially
28 significant, too?
29 A Yes.
30 Q Right?
31 A Yeah.
32 Q Yeah. Because if there -- for example, if there
33 were a smoldering fire and if it were caused by arcing,
34 then you'd expect some power interruption somewhere,

1 potentially?

2 A Or some unusual behaviour, yes.

3 Q Yes.

4 A Yes.

5 Q And another thing that, that isn't mentioned in
6 your incident timeline is something that I thought was
7 significant even by the very high standards of NFPA 921,
8 and that is, let's go to volume four, tab 78.

9 So this is a statement, actually, which I think
10 you alluded to in your direct examination of Adrian, and
11 believe it or not they like to be called Revet, but it's
12 true. So he said -- I'm looking at pages 4 and 5 of the
13 statement. And again, it's --

14 THE COURT: Sorry, I'm in the wrong tab. What
15 tab?

16 MR. FINLAYSON: 78.

17 THE COURT: 78?

18 MR. FINLAYSON: 78, in --

19 THE COURT: I was at 170.

20 MR. FINLAYSON: -- volume four. I'm sorry.
21 Volume four, tab 78.

22 THE CLERK: What was the name?

23 MR. FINLAYSON: R-E-V-E-T, in this spelling here.

24 THE COURT: One sec. Okay, I'm there.

25 MR. FINLAYSON: Okay. So page, page 3.

26

27 BY MR. FINLAYSON:

28 Q So Adrian -- so Adrian and Cindy are tenants in
29 one of the apartments above, Mr. Hopley. You're aware of
30 that?

31 A Yeah.

32 Q And if we -- let's just start, Mr. Devlin asks,
33 really, sort of open-ended question, beginning at line 14
34 of page 3: Okay, so going back to the date of the fire,

1 Adrian, maybe just tell me a little about that day, if you
2 can recall? Answer: I was just looking out the window
3 like I usually do. I was, you know, I look out the window
4 because there's lots of things going on there. It's
5 Neepawa. There was construction stuff, and I had seen Rick
6 and Pat.

7 That's Rick Bannerman? Answer: Yeah.

8 And Pat, Pat the owner of Home Hardware? Answer:
9 Yeah. And they were just leaning on the back end of their
10 truck and they were talking about something, pointing at
11 the corner of the Home Hardware building. You could tell
12 they were talking about something.

13 Question: What time of day would this be? About
14 four.

15 And you say out your window. That's out your
16 apartment window you can see them? Yeah, like the co-op is
17 right there and then their parking lot is right there. So
18 I just kind of look and you can see.

19 So you're looking where, north, or are you
20 looking -- I don't know. I get my directions screwed up
21 there.

22 Okay. But you have a clear vision where the
23 truck is parked? Yeah, I can see the parking lot.

24 The truck is parked. Is it parked right behind
25 the Home Hardware? Yeah.

26 In the laneway or actually in -- No, in the
27 parking lot right beside Rick's truck.

28 Okay. And they were just, you know, they were
29 pointing, you can tell, you know, people talk with their
30 hands and they were pointing at the back of the building.

31 Back of the building? Yeah.

32 Home Hardware? Okay. What happened next? Well,
33 then they depart, departed. Rick took off and Pat was
34 still loading boxes into the back of his truck.

1 What was he loading? You said boxes. Yeah, they
2 looked like sealed boxes, like an ice auger, fishing
3 tackle.

4 Question: But Rick had already left by this
5 time? Yeah, he took off. He didn't help him load
6 it, unload it? Uh, no. See, I was too late. He maybe
7 loaded his truck, too, I don't know, but you can't tell
8 because ...

9 So what struck me, Mr. Hopley, was that when you
10 alluded in your report and in your evidence earlier, you
11 referred to stock being removed. But in fact, the evidence
12 is clear, and Mr. Guilbert admitted in his evidence, that
13 this was his own personal ice auger and fishing tackle that
14 was moved from the store that day. With me so far?

15 A Yes.

16 Q Okay. And you'll agree that by the standards
17 NFPA, if somebody removes from the scene of a soon-to-
18 happen fire personal stuff of theirs, that's a factor to be
19 considered?

20 A Yes.

21 Q Okay. And if we, still within the same volume,
22 go to tab 75.

23 A Okay.

24 Q So this is -- sorry, My Lord. Tab 75, this is
25 Cindy. So I, I think I, think I should know this, but I'm
26 not sure whether they're husband and wife or brother and
27 sister. But anyways, it's the over Revet that lives in one
28 of the apartments, and we're at 75. And if we go to page
29 ... Sorry.

30 Oh, yes, page 3, I'm sorry. I should have marked
31 it.

32 In the first big paragraph -- first big answer on
33 that page, so ...

34 THE COURT: Day um?

1 MR. FINLAYSON: Yes, Day um.

2

3 BY MR. FINLAYSON:

4 Q Where we had come home from Gladstone I was doing
5 my thing, doing laundry and stuff, making supper. My
6 husband -- ah, there's the answer -- was looking out the,
7 out the, 'cause, 'cause we have two bedrooms so we had a
8 spare room, and he was looking out the spare room window,
9 which faces the old co-op grocery store, and that's usually
10 where Pat and the employees would park. And Pat and Rick
11 Bannerman, we -- he -- my husband seen him and Pat and Rick
12 seen him, Pat and Rick kept walking back and forth from the
13 back of the hardware to Pat's truck and they were loading
14 up. We seen fishing augers, like ice augers and stuff.
15 And there was tools, and he was loading his truck quite
16 full of stuff. And we just think about it, it was just
17 very odd.

18 So you had this statement when you prepared your
19 report, right?

20 A Yes.

21 Q And you'll agree with me that it might have been
22 better if you'd included that as an adent (phonetic) in
23 your incident timeline, fair?

24 A Yes. I think it could have been included.

25 Q Now, I want to make sure you -- I, I know you
26 appreciate that there's a receiving area with this door to
27 the basement and the hatch to the attic above. I just want
28 to make sure you appreciate the nature of the -- the door
29 was like a, like a regular man door in the floor. Did you
30 appreciate that?

31 A Yes.

32 Q And, and the way it opened is there was like a
33 semi-circular piece of metal, like a half ring, that would
34 have been used to pull it open and it would lean against

1 the east side shelving of the receiving area, which was the
2 opposite side of the carport wall. Were you aware of that?

3 A I don't believe I was aware of the exact
4 orientation but I'm aware of the size and rough position of
5 it.

6 Q All right. And the evidence, it's not disputed,
7 that the way that this would work would be that the door
8 would just swing close^d, gravity would put it in place, and
9 then to access the hatch to the attic, one needed a ladder,
10 so the ladder would be placed, actually, on that door, now
11 that it's closed.

12 A Yeah.

13 Q And then it was an eight, eight foot or eight
14 foot-ish, eight-ish foot ceiling and there was a six foot
15 ladder in the vicinity. You appreciate that?

16 A Yes.

17 Q And so it would just be a matter of swinging the
18 door shut, getting the ladder from wherever it was, opening
19 it, taking a couple steps up, lifting the attic hatch and
20 sliding it over, and then climbing a couple of steps. Were
21 you aware that that's how you would access the attic?

22 A Yes.

23 Q Okay. And you don't doubt that -- again, I
24 apologize, this is so obvious, but if Mr. Guilbert wanted
25 to, he -- whether he's alone or not, whether the store's
26 open or not, obviously at any time he wanted to, he's the
27 proprietor of the store, he could close that door, set up
28 the ladder and go into the attic there, right? It's not --

29 A Um-hum.

30 Q Now, it was interesting to me that when you
31 talked about, when you had this conversation with
32 Mr. Davids about, well, did the fire start on the west side
33 of the brick wall or the east side of the brick wall, you
34 said, well, it seemed more likely to you, given everything

1 that you learned in the course of your reading all the
2 documents, that it would be on the east side of the brick
3 wall first, and then the west side?

4 A Right.

5 Q But if you're considering in a serious way the
6 hypothesis that it was a set fire, an incendiary fire, then
7 -- and let me ask you to assume a couple other things,
8 okay. So we're, we're exploring the hypothesis of a set
9 fire, all right?

10 A Okay. Okay.

11 Q And I'm the owner of the store and I know a few
12 things about it, okay.

13 A Right.

14 Q For example, I know that the apartments are
15 supported, at least externally, on the exterior walls, all
16 right?

17 A All right.

18 Q But that there is one centre beam that's
19 foundational for the apartments and for their structural
20 support. You appreciate that?

21 A Okay.

22 Q Okay. So if I'm the owner of the store and I do
23 want to destroy my building, it would make sense to me that
24 once, when I'm preparing what I'm going to light up on
25 February 25th, 2015, that I set something up on both sides
26 of the brick wall. I mean, how hard can it be, if you're
27 setting up just whatever device it is or kindling, or
28 newspapers and dry wood. I don't know what it would be, we
29 don't know what it would be because the evidence was
30 destroyed, right. But why wouldn't you set it up on both
31 sides of the wall? You're saying there's something
32 inherent in the evidence that you've seen that suggests
33 that it couldn't have been set up on both sides? No.
34 You're not saying that?

1 A You're asking me to assume fuel loads that we
2 don't have evidence for.

3 Q Oh, yeah. No. Yeah, no, I understand.

4 A But --

5 Q There are a million assumptions built into what
6 I'm asking you. I'm just saying, is there something in the
7 evidence that says that could not have happened, based on
8 what you've seen?

9 A That it could not have started --

10 Q Yeah.

11 A -- on --

12 Q On both sides.

13 A -- the left side? Or both.

14 Q Or both sides. No, both.

15 A No. Given, given the area of origin that I've
16 concluded, it could start on both.

17 Q And you know you -- and, you know, you, like
18 other experts in your field, you have to make, you have to
19 use, to some extent, your knowledge of human nature, right?

20 A Yes.

21 Q That influences what you're going to consider
22 likely or probable, or impossible, for example, right?

23 A Sure.

24 Q And so you have no reason to think that the
25 employees of the Home Hardware store that day were
26 unusually stupid, do you?

27 A No.

28 Q Okay. So what I'm getting at is that at two, at
29 two or two twenty in the afternoon, they thought that there
30 might be a fire ongoing in their building in a serious way,
31 in a significant way, you would expect that they might make
32 further inquiries than they did, fair?

33 A I don't think we can conclude that, based on
34 their observations, given the context of the evidence. I

1 think given the concealed nature of the attic space, it's
2 possible that a cursory investigation into a smell could
3 not yield evidence of a fire which has ignited.

4 Q Now, let, let's get right to the smoke through
5 drywall thing because that's -- ever since I heard it I've
6 been dismayed, I guess is the nicest way to put it.

7 So you said that you thought that if there is,
8 was something in the afternoon of the date of the fire,
9 there was something undergoing the processes of combustion,
10 so the smoke is being created?

11 A Um-hum.

12 Q That the smoke might pass through two layers of
13 drywall. That's what you said; am I right?

14 A No, it's not through two layers of drywall.

15 Q Oh.

16 A It's through any available penetrations, it's --

17 Q Okay.

18 A -- through cracks.

19 Q Okay.

20 A It's through --

21 Q So you're saying --

22 A -- gaps.

23 Q -- there might have been aperture somewhere
24 through a screw or around a light or something, and it's
25 possible a wisp of smoke went through there?

26 A Yes, it's not --

27 Q Okay.

28 A -- an implication that the fire is physically --
29 or the fire or smoke is physically transiting --

30 Q Okay.

31 A -- through gypsum.

32 Q Thank you.

33 A No.

34 Q Okay. Because I was very alarmed when I heard

1 you said that. And I'm glad you relieved me about
2 that.

3 So you're not saying smoke -- and the smoke --
4 let me get -- so the smoke is a product of combustion,
5 right?

6 A Yes.

7 Q And the smoke on this, in this hypothetical, it's
8 fairly warm, fair? Right?

9 A Generally, yes.

10 Q Yes. I mean, well ...

11 A It's coming from a fire, so yes.

12 Q It's coming -- that's what I -- that's what I
13 thought was obvious, it's coming from a fire. And
14 generally, it would rise, right?

15 A It could.

16 Q Well, it's hotter than what's around it; would it
17 not tend to rise?

18 A It would tend to rise but it depends on the
19 pressure gradients in that area, it depends on the nature
20 of which the surrounding environment --

21 Q Yes, right. How well the vent -- how good the
22 ventilation is?

23 A That's exactly it.

24 Q Okay.

25 A I suppose one thing further to add to that point
26 is that it may start hot, it will cool as it spreads and
27 could sink again.

28 Q So we have ...

29 THE COURT: Mr. Hopley, if you need a break,
30 speak up.

31 THE WITNESS: I'm okay, thank you.

32

33 BY MR. FINLAYSON:

34 Q So we have in evidence, Mr. Hopley, two

1 photographs taken on or about February 7th. This is
2 Exhibit 3, My Lord. February 7th, 2014. An (inaudible) of
3 the annex.

4 THE COURT: So what's the number again?

5 MR. FINLAYSON: Exhibit 3.

6 THE COURT: I've got it.

7

8 BY MR. FINLAYSON:

9 Q So these were taken by Mr. Guilbert on or about
10 February 7th of '14.

11 A Okay.

12 Q Ballpark. So just about a year before the fire.
13 And this is a, I understand it, the northwest area over
14 roughly the receiving area. Just so you know.

15 A Okay.

16 Q So this gives us a sense of, at least in that
17 vicinity, what was up there. And I think what we see the
18 -- what looks to be grey in this photograph, I'm not saying
19 it was, but that would be cellulose insulation?

20 A That's my understanding of the insulation is
21 that, that's in that space is cellulose.

22 Q And ...

23 THE COURT: Sorry, where are you looking?

24 MR. FINLAYSON: They grey stuff between the
25 studs, between the (inaudible). No, no, Exhibit 3. It was
26 a separate exhibit, 11 --

27 THE COURT: Exhibit 3. Sorry, so what tab?

28 MR. FINLAYSON: It's not -- no, no. No, no,
29 that's exhibit --

30 THE COURT: Oh, Exhibit 3.

31 MR. FINLAYSON: Exhibit 3. That's Exhibit 1,
32 yeah. Yeah.

33 THE COURT: I'm listening to you.

34 MR. FINLAYSON: There you go.

1 THE COURT: Okay.

2

3 BY MR. FINLAYSON:

4 Q So the grey stuff, you agree, is probably
5 cellulose insulation?

6 A Right.

7 Q And the --

8 MR. DAVIDS: Can I ask which, again, going to the
9 attic, which one is that supposed --

10 MR. FINLAYSON: Oh, it's the first.

11 MR. DAVIDS: -- to (inaudible).

12 MR. FINLAYSON: The first.

13 MR. DAVIDS: This, that's supposed to be the
14 lower one.

15 MR. FINLAYSON: Yeah.

16 MR. DAVIDS: Could I have a brief moment with my
17 client, just, just a second just to --

18 MR. FINLAYSON: Sure.

19 MR. DAVIDS: (Inaudible). Thank you.

20

21 BY MR. FINLAYSON:

22 Q And then just, this will help His Lordship if, if
23 he does look at this at all in considering the matter.
24 It's only because I don't know how relevant it is. But the
25 stuff we see sure looks like small stake -- snakes
26 throughout the, across the beams and through the
27 insulation, that would be BX cable, right?

28 A The ones we're seeing is BX, yes.

29 Q Yes. And so that's what's sometime called
30 armoured wiring (inaudible)?

31 A (Inaudible) cable, yes.

32 Q Yeah. It's got some kind of aluminum cladding?

33 A Yes.

34 THE COURT: Is that -- that's the same as --

1 yesterday they called it piped, as well?

2 MR. FINLAYSON: Yes, I believe so.

3 THE COURT: I think that was the terminology.

4 Yeah.

5

6 BY MR. FINLAYSON:

7 Q So let's, let's talk about your, a hypothesis
8 that you consider for some time to have been a serious
9 possibility. So what you're saying is that somehow one of
10 these -- not the ones we're -- that are depicted in this
11 photograph but somewhere in the vicinity of what you call
12 the area of origin, a cable like this somehow gets really
13 hot or starts to arc, right?

14 A That's one possible failure mechanism, yes. So
15 it's, it's a cable like that but there -- that's part of
16 the fundamental premise of my --

17 Q Right.

18 A -- report, is that there are multiple different
19 types --

20 Q Yeah.

21 A -- of electrical systems, not just wires up
22 there.

23 Q But it has to get hot, right?

24 A You need heat to ignite something, yes.

25 Q Right. And then so in, in the scenario we're
26 looking at here, what's it igniting? Not the cellulose
27 insulation underneath it, is it?

28 A Why not?

29 Q Is that what you're saying it is?

30 A It could be.

31 Q Oh, okay. So, but if this insulation were just
32 installed a couple years earlier and treated in the usual
33 way with fireguard that it is, is it likely to combust?

34 A It can still burn, yes.

1 Q I asked if it was likely to combust.

2 A I don't know of the likelihood and the influence
3 of fire retardants in that delay.

4 Q All right. I'm going to leave you with an
5 assumption and it's going to dangle there for a bit and
6 then we'll come back to it, okay?

7 A Okay.

8 Q Okay. Because the evidence before the court is
9 unanimous, so no contrary evidence, that when the last
10 employee, except Mr. Guilbert, left the Home Hardware store
11 before the fire that evening, the door to the basement was
12 open, okay. So, got that there?

13 A Okay.

14 Q Okay. Now, we know that, and this is not
15 disputed and I know you know it, at 6:13 Arlene Vaughan and
16 I think one or two other people observed smoke and the
17 alarm was called, right?

18 A Yes.

19 Q And that was four minutes after Mr. Guilbert had
20 set the alarm?

21 A Right.

22 Q And by the time, my understanding is, and I don't
23 think there's a dispute about this, the firefighters
24 actually arrived, they're the first truck, let's put it
25 that way, arrived at about 6:18, okay?

26 A Okay.

27 Q And what they did was they weren't sure where --
28 they went to the back, the west, first, and then they
29 realized there was smoke coming out of the north side
30 soffits so they weren't going to try to go in on the west
31 side because it seemed it'd be better to go the other way,
32 so they went to the east side doors where Arlene Vaughan
33 unlocked the door and let them in -- and this is confirmed
34 by the monitoring alarm records -- at 6:21.

1 A Okay.

2 Q Okay. You with me so far?

3 A Yes.

4 Q Okay. So at 6:21. So now, if, if the fire were
5 set or ignited at 6:08 or 6:07 or 6:06, it's now been
6 burning for about 15 minutes.

7 A Right.

8 Q You with me so far? Okay.

9 A Yes.

10 Q And then, so she lets them in and now they want
11 -- they're, they're -- they walk all the way through the
12 store from east to the west because Vaughan and the
13 firefighters know that -- and -- that, that the fire's at
14 that end, so they walk towards that end. And when they
15 come in, the lights are on in the store?

16 A Yes.

17 Q Were you aware of that?

18 A Yes.

19 Q Okay. And then they walk to the receiving area,
20 and when they get there, they find -- and we'll get to why
21 I say this is so in a minute, but I want you to assume --
22 when they get there, the door to the basement is closed.
23 Okay? Let's assume that.

24 A Okay.

25 Q And there's a ladder very close, like within a
26 couple steps. And the ladder is open, and so what the
27 first firefighter does is he pulls over the ladder, sets it
28 on the door under the -- at a catch, and, and we'll proceed
29 further in a minute. But you'll agree with me that if the
30 door is open, if the basement door is open when everybody
31 but Mr. Guilbert has left, and the door is closed when the
32 next person comes in, that Mr. Guilbert must have closed
33 the door before he left, fair?

34 A Given the assumptions --

1 Q Given --

2 A -- yes.

3 Q Absolute. Okay. Now, let's go to volume four,
4 tab 73.

5 A Okay.

6 Q So ...

7 THE COURT: A minute.

8 MR. FINLAYSON: Sorry.

9 THE COURT: Okay.

10

11 BY MR. FINLAYSON:

12 Q So Mr. Guillas is the deputy chief at the time
13 and he's the, one of the two firefighters that walks with
14 Arlene Vaughan to the receiving area at the west side of
15 the store. You're aware of that?

16 A Yes.

17 Q Okay. And if you turn to page 5, let's just
18 follow through what he says. Now, you -- it's not disputed
19 that what he's calling, what he's calling the warehouse in
20 his interview with Mr. Devlin on April 22 of '15 is the
21 receiving area.

22 He says, at line 7: We went to, to the warehouse
23 and she never left my side. So we went into the store, we
24 walked right through the centre, right down the main store.
25 It was off to the left-hand side where the access door was
26 into the back part. Went into there, she pointed to the
27 hole up this way to her left, and she said, like, that's
28 where it is, that's where the access hole is. And I said,
29 fine. And she said to me, do I have to stay here 'cause,
30 'cause she was panicking. There was still no sign of smoke
31 or fire in the building. This is at line 18 at page 5. My
32 guys were coming through the front door with the hose. I
33 was yelling for that already.

34 Did she have an idea where the fire was or how

1 did she know with certainty that the fire was back there?
2 I think the only reason, she was standing outside looking
3 at it in the roof and that's why she figured the fire was
4 there, 'cause I know how else would she have known.

5 She wanted to leave -- I'm going to line 14 at
6 page 6 -- she wanted to leave so I let her leave. I said
7 she wanted to go out the back -- she said she wanted to go
8 out the back door. I said -- was a steel door, four-foot
9 wide. She opened the door. The alarm went off, which kind
10 of shocked me, is that the alarm went off. She opened the
11 door, she left. I told her to make sure she closed the
12 door when she left, don't lock it. So my guys were coming
13 in with a hose already. I had put the ladder over to the
14 hole, lifted up the hatch, and we sprayed water into the
15 hole.

16 Now, that's the first point I wanted to point
17 your attention to, because you said something that I don't
18 think was fair on the evidence, and that is this: you said
19 one of the reasons you thought that the fire likely
20 originated east of the brick wall as opposed to west was
21 that the firefighters were able to stick their heads up the
22 hatch but they weren't about to stick their heads through
23 the hole in the brick wall. And, and my concern is that
24 what this seems to be saying is that once they lifted the
25 hatch they saw flames right there. And I think we'll come
26 to McGorman or Guilles, or both, say the fire was right
27 there when they opened the hatch, they soaked it and they
28 thought they had the fire out, and it was only whatever it
29 was, five minutes later, after they'd taken a chain saw or
30 an axe, or whatever it was, to widen the opening so they
31 could go higher on the ladder with the breathing apparatus
32 on their back to get through the hatch, that they could
33 look through the hole or look through the hole, depending
34 on which way the ladder was oriented, obviously, and see

1 that the fire was beyond it.

2 So what I -- I guess what I'm in a long-winded
3 way trying to get to is if I'm right in thinking that -- or
4 assume it's true -- I'll make it simpler -- assume it's
5 true that the fire is right there when they move that --
6 when Guilles moves that hatch over, then you're -- you
7 can't really say, especially when -- if, if, as I'm
8 thinking, it's two or three or five minutes later by the
9 time they get up to look through the hole, you can't say
10 which fire -- which side of the brick wall was more
11 involved with fire at the time they arrived there. Is that
12 fair?

13 A No, I don't think that's fair. And the reason I
14 would say that is because they comment on lifting that
15 hatch, opening it, seeing fire right there. I agree that
16 that's in the available documentation, and they spray it
17 down. Then they go up, they climb, they develop, they walk
18 down, after working the whole -- they go out into the
19 store, and then that's where we see the same witness
20 talking about the depth or the degree of char --

21 Q But that, but that's after the, that's after they
22 widen the opening, go up on the ladder, and McGorman tries
23 to stick his hose through the brick wall to spray it, and
24 he says the fire's there and he's trying to go round and
25 spray out, and that's when they -- he says it's gone, it's
26 beyond me, it's gone, spread beyond where he can reach, he
27 says.

28 A Right.

29 Q Okay. So you agree with that?

30 A Yes.

31 Q And that's when they tear down to look and --

32 A Yes. And --

33 Q Okay.

34 A -- I agree it's --

1 Q Okay.

2 A I agree it's after.

3 Q Okay.

4 A But --

5 Q And it's minutes later by then?

6 A Yes, absolutely.

7 Q Yeah. Okay.

8 A But we don't see the same discussion or
9 observations from the fire crews as to the degree of
10 burning or there's some samples, say for example they see
11 that it spread throughout the building, decide to pull
12 defensively. When they see the initial fire, they don't
13 necessarily perceive it to be big, from their vantage point
14 they can't tell.

15 Q No.

16 A They use the hose and get some suppression going
17 and that knocks down the fire to a degree where they're --

18 Q In the --

19 A -- more comfortable to enter that space. And so
20 what I'm trying to say is that the degree of that witness
21 observation contrasted with the size of the hole we talked
22 about, helps increase that likelihood of the spread east to
23 west because a fire starting on the west is it more likely
24 that it's able to burn through that small hole to a large
25 degree or a small degree, and to reiterate my opinion is
26 that the opinion is on the origin being in the attic and
27 then the discussion that we had is on some gradients within
28 that.

29 Q Yeah, east or west of the wall.

30 A Correct.

31 Q How far -- okay. And, but this does nothing --
32 if, if is -- on the scenario I put to you earlier, the fire
33 setter knows and wants to get to the main beam, he knows
34 it's in the centre of the building, so he might very well

1 have set it on the other side of the wall deliberately.
2 There's -- you have nothing, nothing in the evidence to say
3 it wouldn't have been set there, right?

4 A Right. We don't know the precise origin.

5 Q Yeah. Now, if we carry on with Mr. Guilles'
6 statement at the bottom of page 6, line 25: I had put the
7 ladder over to the hole, lifted up the hatch and we sprayed
8 the water into the hole. There was fire on the south side
9 then there at that point in the time.

10 Now, this ladder, this is your ladder you're
11 talking about, the ladder? No, no, the ladder was there.

12 There was a ladder there open? Open.

13 And this trapdoor that we've talked about it, the
14 floor was flush, there was no door open or there was a
15 trapdoor open? There was no trapdoor open.

16 But there was a six-foot ladder, a 10-foot
17 ladder? There was -- well, the ceiling was eight feet,
18 came just underneath the ceiling.

19 Okay. And that's how it was because I slid it
20 over and went right on, right on the ceiling.

21 So you could get up? Like it wasn't like two
22 feet short of the ceiling? Well, so it was set up, the
23 actual ladder just set up in the middle of the floor area
24 or was it leaning against the wall? It was against the
25 wall right there, but open.

26 Was it directly underneath the hole? No.

27 It was moved away from the hole? Yeah. The hole
28 was, like the hole was, like you walked in the door, I'm
29 saying I'm walking in the door, the hole was right there.

30 On your left? On my left.

31 But there was a counter there, right? Then there
32 was a hole, and then there was a wall on the other side of
33 that, and then there's a doorway. And then the ladder was
34 right there.

1 To the right? Of that doorway, going in there to
2 the next room.

3 And then the question: This trapdoor was -- you
4 never saw this trapdoor? I never did see a trapdoor
5 anywhere in that building ever. I didn't even know there
6 was a basement in that building.

7 Do you have any reason to think that he was
8 mistaken when he says that?

9 A This speaks to the challenges identify relative
10 to the position of the trapdoor, and so the initial notes
11 from the fire commissioner --

12 Q But let me stop you there. You did mention that
13 and it is mentioned in your report. Dick Harvey, the fire
14 commissioner, was never there before the fire and right at
15 the time of the fire.

16 A Right.

17 Q Right. And when I look at his notes, which are
18 right here, there's no mention at all of anybody checking
19 the basement. You agree with that? I'm not talking about
20 his report, I'm talking about his notes of his interviews
21 with firefighters. There's no reference to them telling
22 him that they checked the basement.

23 A I believe there is.

24 Q Well, can --

25 A I thought I highlighted one.

26 MR. DAVIDS: Perhaps they can be put to the
27 witness.

28 MR. FINLAYSON: Sure. Okay.

29

30 BY MR. FINLAYSON:

31 Q This is -- I'm looking at the statement -- the
32 note of Dick Harvey, ten forty-two, Derek McGorman, Kyle
33 Kostenchuk went in the front door, some lady made --

34 A Smoke in the exterior --

1 Q -- smoke in exterior northwest corner, no fire in
2 the basement.

3 A That's what I'm talking about.

4 Q That's what you're referring to. Okay. Okay.

5 THE CLERK: (Inaudible).

6 MR. FINLAYSON: Oh, yes.

7

8 BY MR. FINLAYSON:

9 Q So that's what you're relying on?

10 A That and then the translation of it into the OFC
11 report.

12 Q Okay. All right. So -- okay, but Guilles is the
13 first one there, he's the one that moves the ladder on top
14 of the door, right?

15 A That's what he's saying here, yes.

16 Q Yes. And so the reason you're saying it is
17 because it, it's in Dick Harvey's notes and in his report.
18 There's nothing else?

19 A There's Pat Guilbert saying he left it open.

20 Q No, no.

21 A I'm just -- that's --

22 Q Yeah, yeah.

23 A -- that's why I'm trying --

24 Q I know. I know.

25 A -- to go through it in my, in my report in the
26 way I do --

27 Q No, no, I understand.

28 A -- is, is to be even-handed.

29 Q Sure, well to be even-handed. But if you're
30 fairly considering the hypothesis that Pat Guilbert is the
31 setter of the fire, okay --

32 A Yeah.

33 Q -- this is the hypothesis, then you'll agree with
34 me that you're not going to give much weight to his

1 statement that the door was closed if he needed -- open if
2 he needed to close it to set the fire?

3 A Right. And that's why --

4 Q Okay.

5 A -- I would rely on the other things.

6 Q Okay. And, and I can take you there but I
7 suspect you want to get done today, you'll agree with me
8 that in the transcript of the interview of McGorman, he
9 says the same thing, that is, when Shane Devlin interviewed
10 him, McGorman said, I didn't even know there was a
11 basement, right? We can go -- that's okay, we'll go there.

12 A Okay.

13 Q It is at, 86, 88 -- sorry, 88. My much smarter
14 junior says --

15 THE COURT: Will you remind me if those notes are
16 appended to the typed ...

17 MR. FINLAYSON: Report.

18 THE COURT: Report.

19 MR. FINLAYSON: Yeah, they are.

20 THE COURT: That's what I thought, yeah. I'm
21 sorry, last, can you give me just the, what was the
22 document number of that, the commissioner's report?
23 It's ...

24 MR. FINLAYSON: One thirty-six.

25 THE COURT: Right. It precedes, right; it's
26 immediately preceding.

27 MR. DAVIDS: One thirty-five I have, My Lord.

28 THE COURT: The reports.

29 MR. FINLAYSON: Yeah, 135.

30 THE COURT: Okay. All right. Thanks.

31

32 BY MR. FINLAYSON:

33 Q At page 23, this is again an interview by
34 Mr. Devlin, this time on January 18th of '16.

1 THE COURT: Document?

2 MR. FINLAYSON: I'm sorry, 88 of volume five.
3 Sorry, I thought I said that already.

4

5 BY MR. FINLAYSON:

6 Q You're there, Mr. Hopley?

7 A Yes.

8 THE COURT: Page again?

9 MR. FINLAYSON: 23.

10

11 BY MR. FINLAYSON:

12 Q Line 18, question: Okay. Now, do you remember
13 seeing underneath there, there's a trapdoor that leads to
14 the basement. Do you remember if that -- did you see that
15 trapdoor? I didn't even know there was one there.

16 Okay. You're standing on top of it, actually.
17 So this is when you -- the way you came in, right?

18 Sir, you'll agree with me at least McGorman's
19 recollection at that time was that he didn't know there was
20 a basement or a trapdoor as well?

21 A Okay. Yes.

22 Q Now, you'll agree with me that if it were the
23 case that Pat Guilbert lied about closing the trapdoor,
24 that that would be a factor that the investigator would
25 consider?

26 A Yes, it could be.

27 Q In, in these circumstances?

28 A Yes.

29 Q Yes. So with respect to the hypothesis that it
30 was a set fire, what you call and NFPA 921 calls an
31 incendiary fire, the following factors are pertinent to
32 consider and I guess you might call them secondary factors,
33 but they're pertinent to consider for a fire investigator,
34 right, the inability to sell the property in a general way?

1 A Right.

2 Q Probably the recommendation by the only person
3 who had expressed interest in buying the property that the
4 person who set the fire go bankrupt two days before the
5 fire; is that fair? That's something you'd consider?

6 A Sure, yes.

7 Q The removal of property on the day of the fire,
8 fair?

9 A Yes.

10 Q Lying about or understating the time available
11 within which he might have set the fire?

12 A Yes.

13 Q Now, you do spend a fair bit of time in your
14 first report on the issue of arc mapping and, and I
15 appreciate what you're saying. You've got somebody saying
16 they smell something burning.

17 A Yes.

18 Q And there's electrical stuff up there?

19 A Yes.

20 Q And electrical fires happen?

21 A Correct.

22 Q And so what you've done is you've set out some
23 possibilities for how electrical fires can start and have
24 started in the past?

25 A Correct.

26 Q But you're not saying you've got physical
27 evidence that one or any of these occurred in this case?

28 A Correct.

29 Q Now, if we go to -- I just want -- this is just a
30 point of clarification because, you know, sometimes what's
31 -- all that the judge^{is} left with are the judge's notes and
32 then the documents. So at page 22 of your first report, at
33 the very bottom you're, you're quoting verbatim from NFPA
34 921, the edition that we're concerned with. That last line

1 in square brackets, and I guess this is why you used square
2 brackets, right, you've added those two words, "including
3 motive", correct?

4 A Yes.

5 Q Now, one of the things that struck me,
6 Mr. Hopley, and this is where -- this is going to be a real
7 test of your impartiality and independence, okay.

8 A Okay.

9 Q We all make mistakes, right, and in, in your
10 first report you had misread certain drawings?

11 A Yes.

12 Q You had the, the hypothesized smouldering fire of
13 electrical origin was occurring within a box where the
14 ceiling of the box was fire-rated drywall and the floor of
15 the box was fire-rated drywall, fair?

16 A Yes.

17 Q Okay. And in fact, the floor of the box in your
18 hypothesis was two layers, I think somebody even said
19 three, but anyways, it's two or three layers of fire-rated
20 drywall and the top is either OSB or plywood or something
21 like that?

22 A Yes.

23 Q And Dr. Becker points that in his report
24 responsive to your report?

25 A Correct.

26 Q And you'll agree with me that OSB, oriented
27 strandboard, plywood, they're just -- they're wooden in
28 adhesive or glue, right? That's what they are, they're
29 pressed --

30 A Yes.

31 Q -- glue and wood?

32 A Yes.

33 Q Right. And they're much more flammable, their
34 fire rating -- they're much more likely to ignite than,

1 than drywall?

2 A Correct.

3 Q I mean, that's, that's why Gyproc or drywall is
4 used as a fire guard?

5 A Yes.

6 Q Yes. It, it doesn't burn, in fact. Eventually
7 it might melt but it doesn't really burn; it's not
8 combustible?

9 A The paper will burn and then the gypsum falls
10 apart.

11 Q (Inaudible). But it's used in preference to
12 steel because it doesn't conduct heat nearly as much,
13 right?

14 A It's, it's used as cladding material for fire
15 barriers.

16 Q Yeah.

17 A And it has a higher fire resistance rating than
18 wood.

19 Q Yeah. Significantly higher?

20 A Yes.

21 Q Now, I think we've covered a lot of I wanted --
22 what I wanted to talk about in your second report in
23 dealing with the things we've gone through, the evidence in
24 particular we've gone through, but I just wanted to say
25 that I was a bit, I was, I was at least puzzled that you
26 didn't seem to be given any pause by the fact that the
27 hypothesis that you came up with about the smouldering
28 electrical fire was actually within an area where what was
29 right above it was significantly more combustible than in
30 your first report. And it seem, seems, when I read your
31 second report, that the fact that what is above the fire
32 that you're hypothesizing ~~as~~^{is} combustible, way more
33 combustible than the drywall that your theory originally
34 had, seems to have no -- have had no effect on you. Is

1 that -- do I have that right? Like, you don't think that
2 there's something combustible above the smouldering fire
3 has any impact on anything to do with your theory; is that
4 right?

5 A Well, I, I think to answer that question I need
6 to clarify, and I think my rebuttal report captures that in
7 the section where I talk about Dr. Becker's observations on
8 the drawings. And so if we look at page 6 --

9 Q Of your second report?

10 A Of my second report, yes.

11 Q Yes. That's tab 139.

12 A I write:

13

14 "The Becker Rebuttal then suggests
15 that 'the foregoing evidence
16 invalidates Mr. Hopley's theory
17 ...'"

18

19 Which is the discussion we're having.

20

21 "Such a suggestion inaccurately
22 simplifies the effect of
23 construction on the fire spread
24 and fire dynamics as described in
25 the Jensen Hughes Report."

26

27 And so that substitution that we're talking about
28 is considered and analyzed in this section of my report,
29 and the third paragraph in comments on the biggest point
30 that I'm trying to make as it relates to attic
31 construction, which is that the open nature of the attic
32 with exposed combustible elements, including beams, or in
33 this case if it's the floors of the, the attic or the
34 apartments above, can produce conditions where fire can

1 spread rapidly and in an unconfined manner in a natural way
2 that does not support a determination of an incendiary fire
3 cause in and of itself..

4 Q Well, okay. I think that's a fair comment. But
5 here's my concern, okay: the way that you originally set
6 up this hypothesis was there was almost like a, you were
7 saying it was Goldilocks solution because you got this
8 smouldering fire that's -- and of course, we don't know
9 exactly what's around, whatever it is, but you've got the
10 Gyproc below, which explains why that doesn't catch fire,
11 and you've got Gyproc above, which explains why that
12 doesn't catch fire, despite whatever heat build-up there
13 is; I mean what's above is, is protected. And then you
14 find out that, in fact, it's two layers of Gyproc below and
15 it's wood right there, just above the smouldering fire,
16 heat rises, and you -- it seems to have had no impact on
17 you, say well, that -- you just said, well, that's, that's
18 just normal construction, I'm not surprised. Like, are you
19 saying it had no impact on your -- on, on anything?

20 A What I'm saying is that the observations of the
21 staff, the witnesses, the fire department and the RCMP, to
22 come to the conclusion that it's a rapid fire spread --

23 Q Well, you don't dispute it could be a rapid fire
24 spread.

25 A That's exactly it.

26 Q Yeah.

27 A But to imply that it's a suspicious or incendiary
28 fire on that basis alone is inappropriate, and so I
29 recognize that a floor assembly that has a higher flame
30 spread rating, for example, would transmit that fire faster
31 across its surface --

32 Q Right.

33 A -- than gypsum.

34 Q Okay.

1 A But the relevant point that rapid fire spread is
2 inherent to the construction method is what I'm trying to
3 say. Is that --

4 Q Right.

5 A -- that no matter when the fire starts, rapid
6 fire spread within the attic is likely.

7 Q Right. Now, in the end you came to the
8 conclusion that the -- from an NFPA 921 perspective, your
9 view is that the proper conclusion is that the cause of the
10 fire was undetermined?

11 A Yes.

12 Q And Dr. Becker ^{and} concluded -- well, his goal wasn't
13 to determine the origin cause of the fire, as you heard me
14 tell Justice Kroft earlier, right? His, his purpose was to
15 evaluate first Dick Harvey's report and then yours. And
16 what he concluded was that the evidence, as he read it, was
17 consistent with, not -- he didn't find that it was a set
18 fire, he found that the evidence was consistent with it
19 being a set fire. You understand that that's what he was
20 saying now?

21 A Right.

22 Q Okay. So actually, the differences between you
23 aren't that great. I mean, if you -- I think you agree
24 that if it were the case that the trapdoor to the basement
25 were closed by Mr. Guilbert after the other employees left,
26 and if the ladder was in an open position in the vicinity
27 when the firefighters arrived, and that they found the
28 trapdoor closed, that is all consistent with a set fire,
29 fair?

30 A Yes. And I think, I think I treat that --

31 Q Yeah. Yeah.

32 A -- with, by, by saying that they can both be
33 demonstrated to be feasible.

34 Q Right. And so the difference between you and

1 Dr. Becker really is that he's more inclined to accept --
2 or his interpretation of the documents that you both looked
3 at is that seems reasonably clear to him that the trapdoor
4 was shut by Mr. Guilbert and you're saying that's not
5 clear?

6 A That's a fair assessment as I say, I'm saying
7 it's not clear.

8 MR. FINLAYSON: Those are my questions. Thank
9 you.

10

11 (EXCERPT CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I hereby certify the foregoing pages of printed matter,
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