** Unedited **

Indexed as:

Canada Shoester Corp. (Trustee of) v. Royal Insurance Co. of Canada

Between
Starkman Kraft Inc., Trustee of the Estate of Canada Shoester Corporation, a bankrupt, plaintiff, and
Royal Insurance Company of Canada, defendant

[1996] O.J. No. 1212
Court File No. 93-CQ-40225

Ontario Court of Justice (General Division)
Toronto, Ontario
Haley J.

Heard: January 10-12, 15, 16 (half day), 17-19, 22-26, 1996.
Judgment: April 11, 1996.
(50 pp.)

Insurance — Fire insurance — Defences — Deliberate act by insured, standards of proof — The loss — Measure of.

This was an action by the trustee in bankruptcy on behalf of a bankrupt company to recover insurance proceeds for fire losses under a fire insurance policy issued by Royal Insurance Co. of Canada. The fire occurred on March 4, 1993 in the premises of Canada Shoester Corporation. The company was placed in bankruptcy in February, 1994. Royal denied coverage because it claimed that the company was in financial difficulty and the fire was deliberately set. The company's business results had been marginal since it was founded in 1989 but the principal of the company, Ernest Simon, was content to continue as it was. He lived a modest lifestyle and his wife's annual income of $60,000 was sufficient to provide for the family's lifestyle. There was conflicting evidence whether the fire was deliberately set. Simon delivered a proof of loss for the goods as soon as practicable and complied with the applicable requirements. The value of the inventory was $259,000 but Simon submitted a claim for $260,000. To reach this value Simon valued damaged or destroyed goods at their original cost, including freight, customs duty and exchange. Simon was well experienced in the shoe business but there was an error in the valuation of the inventory, which reduced the value of the claim to $222,000. A firm of investigating accountants who analyzed this claim valued it at $142,000. A claim was also made for $87,000 as a claim for business interruption loss, on the basis of loss of profit. No material was submitted to show how this claim was arrived at. However, Simon multiplied the value of the goods, which was $260,000, by his markup of 30 per cent.

HELD: Action allowed. The plaintiff was awarded judgment of $214,000. Royal could not prove on a balance of probabilities that the only reasonable conclusion was that the fire was of incendiary origin. Due to Simon's lifestyle and his wife's income, as well as evidence from 1992 that he felt

optimistic about the company's prospects, Royal did not prove that Simon had a motive to set the fire. There was also nothing in the evidence to indicate such a motive to bolster the view that the fire was of incendiary origin. As for the proof of claim, Simon did not overstate the claim by such an amount that the court could have found him either intentionally fraudulent or that he recklessly disregarded the true state of facts when he swore the proof of loss. Simon also did not knowingly extend the prices on the single sample shoes at cost per pair in a deliberate attempt to defraud Royal. The cash value of the inventory was valued at $190,000, which was between the two positions and this was reduced by salvage amount received by the trustee for a net value of $142,000. Added to this amount was $43,000, which represented the company's reasonable costs for dealing with the inventory after the loss and $25,000 in costs incurred by the company because it had to prepare a more detailed inventory since the one prepared by Royal's adjuster was deficient. The company's claim for business interruption loss was not allowed for Simon failed to show that he suffered a reduction in turnover from the standard of turnover from the year before the fire that resulted from a loss of the goods.

Counsel:

Arnold H. Zweig for the plaintiff.
R. W. Heather, Q.C. for the defendant.

¶ 1 **HALEY J.**:— In the late hours of March 3 or the early hours of March 4, 1993 a fire broke out in the premises of Canada Shoester Corporation in Units 3 and 4, 1215 Meyerside Drive, Mississauga. Those premises were the office and warehouse in which the corporation carried on its business as a wholesale distributor of men's, women's and children's shoe fashions in the medium quality range. Sole owner of the corporation was Ernest Simon. The corporation was placed in bankruptcy in February 1994.

¶ 2 The corporation, now represented by Starkman Kraft Inc., its Trustee in Bankruptcy, brings this action for recovery of its losses resulting from the fire under a policy of fire insurance, issued by the defendant, which, it is admitted, was in force at the time of the fire.

¶ 3 The defendant has denied liability under the policy on several grounds foremost of which is an allegation that the fire was an incendiary fire, i.e. one deliberately set by Ernest Simon or some other agent of the corporation.

¶ 4 There is no dispute that the premises were protected by a monitored burglary or intrusion alarm system for which only Ernest Simon, Simon's mother and Breen Duchesne, an employee of the corporation, had the disarming code and therefore had access. There was no suggestion throughout the trial that Mr. Simon's mother was in any way involved with the premises or the fire. The evidence did not disclose that she worked in the business nor was connected with it in any way. Duchesne did not think it likely that she would have set the fire.

¶ 5 Duchesne testified that he was a smoker and as he had a habit of walking in and out of the warehouse with a cigarette in his mouth he said he was paranoid about fire in the premises and that each night before he left he cleaned out the ash trays and checked for fire. He could not recall if he did so on March 3rd but said it was his habit to do so. He left the premises about 6 p.m. that evening.

¶ 6 Mr. Simon, who was not a smoker, was the last to leave the premises and did so about 7 p.m. on the evening of March 3, 1993 having armed the intrusion alarm system.

¶ 7 Sometime just before 3:00 a.m. on March 4, 1993 Thomas Dalmus, who was working in an adjacent unit, heard the sound of rushing water and an alarm bell and looking out saw water rushing from under the shipping door at the rear of the corporation's premises. Believing there was a fire in the

premises he called the fire department. The first fire truck was dispatched at 3.019 a.m. Dalmus testified that he saw no sign of break-in at the rear doors of the premises at the time he observed the water flow. He could not say if he heard the alarm or the water first. He had been working with a lathe for perhaps up to 30 minutes during which time he could not have heard either the alarm or the rush of water over the noise of the lathe.

¶ 8 Captain Dwight Larkin of the Mississauga Fire Department was in charge of the first fire engine to arrive at the scene. He tested the shipping door and the other door in the rear of the premises and finding them locked radioed for another team under Captain Thompson to provide access to the building. Larkin observed no signs of continuing fire at the time of his arrival. He did not remember hearing any alarm bell. He saw the water but from that he could not say how long the sprinklers had been in operation.

¶ 9 Captain Thompson and his crew checked the doors and found them locked. He then had the crew remove a panel from the shipping room door to obtain access. They removed the padlocks from the shipping and rear access doors by cutting them off. He found there was a good deal of water on the floor in the warehouse and that the sprinklers were still on. He could not remember whether he heard an alarm bell or not. Thompson was the first person in the building. On surveying the scene he found that no fire was burning but he was of the opinion that there had been two separate fires. His training was that upon finding two separate fires there was reason to be suspicious of arson and to make sure that the scene, to the extent consistent with ensuring the fire was out, was not disturbed by the crews until the District Chief was alerted and could take charge of the scene.

¶ 10 Thompson was shown photo 21 of Exhibit 11 (burning identified as having taken place on some wooden skids) and identified this as the smaller of the two fire areas he saw. After viewing photo 22 of Exhibit 11 (the racks) he testified that this fire area was across the aisle from the smaller fire area. He said that the distance separating the two fire areas was "6 or 7 feet give or take a foot". In referring to both photos he said "these are different fire scenes and these are the two I found".

¶ 11 After Thompson observed the two fire areas he advised the District Chief and then returned to the scene to ensure that it was not disturbed. He testified that he did not see an extension cord in the area nor smell any gasoline. He remembered seeing a gasoline can at the front of the building towards the office and was concerned because there was no apparent reason for its being there.

¶ 12 Bernard Charon, the acting District Fire Chief, came to the scene and entered the premises. He confirmed hearing an alarm which was not a sprinkler alarm and mentioned it to the police at the scene. He ordered the sprinkler system turned off and asked that the other alarm, which he found aggravating, also be turned off. He found two fire areas, the larger one on skids and the smaller one against the wall in a storage rack. After discussion with Larkin and Thompson he was unable to determine the cause of the fire but thought there had been two separate fires and therefore called in Rick Beaty, the fire inspector for the Mississauga Fire Department. Charon could not swear that the cartons in photo 21 Exhibit 11 were as he had first seen them nor was he able to identify which area it showed. He testified that the two fire areas were fairly close together but could not say for sure how close. He thought "maybe 10 feet".

¶ 13 Beaty has been a fire inspector for Mississauga for 19 years. He has special training in fire investigation and was called in by Chief Charon for that purpose. He testified that when he arrived at the scene he entered by the shipping door and walked to the opposite side of the warehouse to the racking where he found heavy fire damage in the racking with heavy charring on one side and lighter charring on the other. He identified the area in photo 21 as the rack with the heaviest burn but was unable to locate the metal part of the rack in the photo. He said, in his opinion, there were two points of origin for the fire, one on each side of the aisle, and that the fire points were 4 to 4-1/2 feet apart.

¶ 14 When presented with photos 23 and 24 of Exhibit 11 on cross-examination he said that they were photos of the same rack taken at different angles and that he thought photo 39 of Exhibit 11 showed the rack on the office wall. He had not seen the photos before the trial.

¶ 15 Beaty did not see any electrical cord nor was it later pointed out to him by Mr. Heyerhoff, the inspector from the Fire Marshal's Office. He was however suspicious of the gasoline can since he found no motor which might have required it. As a result of his inspection he called in the Fire Marshal's Office and then stayed to assist the inspector. He helped the inspector "dig out", which meant shovelling things aside, to see if there was anything significant to the fire in the debris.

¶ 16 Also present at the scene was police constable O'Neill of the Peel Region police. From his notes he testified that he arrived at the scene just before 4 a.m. and met there the District Fire Chief who advised him of suspected arson. O'Neill checked for a possible break-in but found none other than that by the fire department. He was directed to the fire area by the Chief and was told there were two fire areas, the larger of these at the racks near the furnace and the other just south of that in the middle of the warehouse. No other witness could remember anything about a furnace.

¶ 17 Detective Stephen Jones interrogated Simon at the scene shortly after 7 a.m. on March 4, 1993 and arranged for Simon to go to the station for further questioning.

¶ 18 In addition to this evidence of these witnesses Duchesne had testified that there was an extension cord in the warehouse near the power panel which was to the right of the shelving unit where the fire was. The cord ran from the power panel across the top of a false wall, lay along the top of that wall, and then ran some place but Duchesne did not know to where it ran or why.

¶ 19 Minh Duong, the shipper-receiver, testified on cross-examination that the cord went along the top of the shelf to the plug which was over his desk which was on the west wall of the warehouse. He said that the cord was used for the fan in the summer but that it stayed plugged in over the winter. Duong also testified that the distance between the shelf where the burning took place and the charred boxes on the skids was two metres apart. [6-1/2 feet]

¶ 20 There was no location for the power panel, where Duchesne said the cord was plugged in, identified in the photos by any of these witnesses. Mr. Armitage, an electrical engineer, testified later that the power panel was on the north wall of the warehouse at its eastern end, and shown in his sketch to be at the easterly end of the three metal shelving units.

¶ 21 Duchesne also testified that solvent was used in the warehouse for the cleaning of shoes and that he was always concerned about any smoking in that area. None of the witnesses who had been at the scene prior to the Fire Marshal's investigation nor the Fire Marshal's inspector made reference to finding any such solvent.

¶ 22 Peter Heyerhoff was sent from the Fire Marshal's Office to investigate the fire at the request of Rick Beaty. Heyerhoff served as a fire investigator with the Office of the Ontario Fire Marshal for 18 years prior to his retirement at the end of June, 1993. Before that he had served with the Ottawa Police Force for 15 years, 6 of which were spent primarily in arson and fraud investigations. Since his retirement he has continued in his own business as a fire investigative consultant. He estimates that he has investigated some 1700 post-fire/explosion scenes in his professional life. He attended at the fire scene in this action at 8.05 a.m. on March 4, 1993 and released the premises to Mr. Simon at 12.05 p.m. once his investigation of the premises was completed.

¶ 23 Before considering the testimony of Mr. Heyerhoff I turn to the legal principles applicable to this case.

Onus of Proof

¶ 24 The defendant has admitted that the fire policy under which the plaintiff is claiming was in force at the date of the fire. Leaving aside the sufficiency of the proof of loss and the damages to be proved, once the policy is admitted the onus is on the defendant to show that it has no liability under the policy because an arson has been committed by the plaintiff or its agents. The defendant says that Mr. Simon had the motive and opportunity for setting the fire and that his testimony is not credible and ought not to be accepted by the court.

Standard of Proof

¶ 25 The allegation of arson is a serious one. It is one that falls within the consideration which has been given by the court to the weight of evidence required before the court can be satisfied on a balance of probabilities that serious occurences have taken place. The definitive and often quoted statements on this matter are to be found in the judgment of Laskin C.J.C. in Continental Insurance Co. v. Dalon Cartage Co. Ltd. (1982), 131 D.L.R. (3d) 559 at p. 563:

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial Judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in Bater v. Bater, supra, as follows [at p. 459]: [1950] 2 All E.R. 458]
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> > It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
>
> I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.

¶ 26 Keeping in mind this approach to the evidence it is then incumbent on the defence to satisfy the court on certain elements. These elements are summarized by Farley J. at p. 433 of his judgment in Rizzo v. Hanover Insurance Co. (1990), 68 D.L.R. (4th) 420 (as amended on appeal at (1993), 14 O.R. (3d) 98 at 105):

> Therefore it seems to me that, for the defendant insurance company to be successful in its defence against the plaintiff's claim, it must prove on the balance of probabilities that the only reasonable conclusion to be drawn from the facts as they have been found in this case was that the fire was started by the plaintiff or at his request based on the

elements that:

a) the fire was of an incendiary origin;

b) that the plaintiff had sufficient motive that the fire be set; and

c) that the plaintiff had the opportunity to do so.

¶ 27 I will now consider the evidence in this case with regard to each of the three elements commencing with the testimony of Mr. Heyerhoff, the inspector from the Ontario Fire Marshal's office.

Origin of the Fire

¶ 28 Heyerhoff described his modus operandi in assessing a fire scene. He had been advised by the fire personnel at the scene that in their opinion there were suspicious circumstances surrounding the origin of the fire. Heyerhoff therefore first took an overall view of the premises. In his notes he made a sketch of the warehouse which was later worked up into the sketch marked as Exhibit 23 at the trial. He also made brief notes of his observations and took a number of coloured photographs of the premises and in particular of the fire site areas. These photographs were also made exhibits at the trial and were referred to extensively by various witnesses, some of whose testimony I have already reviewed.

¶ 29 In his preliminary viewing Heyerhoff made several findings:

1. There was a red gasoline can in one of the shelving units some distance from the fire area. Although the police and the fire personnel were concerned about this can Heyerhoff early in his investigation decided that the gasoline was not related to the fire as the can had no odour of gasoline about it, was closed and was placed on the shelf in an orderly way. He disregarded it as being involved with the fire. He took three pictures of the can showing its position on the shelving.

2. There was no soot settlement throughout the warehouse or in the office area. He was struck by this absence of soot which was a consideration in his ultimate findings.

3. The furnace, which was a natural gas unit, was not a factor, either primary or secondary. There was no breakout of fire in the combustion chamber of the furnace nor were the furnace ducts connected with the fire area.

4. Two sprinkler heads had been activated. While the sketch (Exhibit 23) shows a fire area directly under a sprinkler line Heyerdoff admitted that his positioning of the sprinkler line was slightly off when he considered the sketch in his notes. The ceiling in this area is 17.5 feet in height. The sprinklers were rated to come on at 160 degrees Fahrenheit.

¶ 30 Heyerhoff found two areas of burning. The first was on both sides of steel shelving with masonite peg-board backing which created separate shelves on both sides of a central support. Fire had burned through the peg-board. The second was in cardboard boxes piled on wooden skids in an area directly south of the first area. Heyerhoff testified that the mostly southerly edge of the shelf in fire area number 1 was seven feet from the most northerly edge of the centre wooden skid of fire area

number 2. His notes show his observation: "two areas of origin separated by 7' of space without a path". The sketch attached to the notes does not show the location of the skids or verify the distance of 7 feet by diagram. His observations also include the following:

> #2 across from #1 7' apart to cardboard boxes piled on wooden skids, the boxes were badly burned between the first and second set of boxes, see drawing

¶ 31 After the initial inspection Heyerhoff then had the fire department personnel assist him by "digging out", i.e., going through the fire debris shovelful by shovelful starting at the top. Heyerhoff watched as this was done to see if there was anything which could be linked to the origin of the fire.

¶ 32 The only thing of note found on the floor under the debris was an electric cord. Heyerhoff said in his notes:

> an extension cord had been heat damaged. I examined it and found no existence of fire origin.

He testified that he examined both ends of the cord and found it was not connected to anything. Both ends were dirty from the fire. It was found in a loose heap over an area of two or three feet. The insulation on a section of some 7 to 8 feet was affected by the heat. He was satisfied that it had nothing to do with the fire as an ignition source and had been on the floor when the debris fell on top of it. He discarded it. He took no pictures of it.

¶ 33 Heyerhoff also took four samples from the debris which were sent to the Centre of Forensic Sciences for analysis. The samples were charred debris including pieces of wood and paper from both sides of the shelf identified as fire area #1 and pieces of burnt cardboard from two of the skids identified as fire area #2. The samples were collected in sealed mason jars to capture odours. The report from the Centre states:

> No volatile petroleum product or other flammable liquid was identified in items C1 to C4 inclusive. [the samples referred to]

¶ 34 Gareth Jones, the forensic chemist from the Centre, testified that the absence of any accelerant in the samples analysed was not conclusive that no accelerants were present at the fire scene. He testified that some accelerants, such as alcohol in various forms, were soluable in water and could therefore be washed away by water at the scene. He had no contact with Heyerhoff, the request for analysis having been sent by the police. Heyerhoff had not told him that he believed methanol (a form of alcohol) had been used as an accelerant. Jones had tested for alcohol, described in the report as "other flammable liquid", and had found none. He said that it was possible to take a sample for testing for an accelerant from flooring made of porous concrete. Heyerhoff testified that the floor in the warehouse was unpainted finished concrete but that he had not taken a chip sample from the floor.

¶ 35 Heyerhoff filed a report dated May 5, 1993 with the Fire Marshal's Office. In it he classifies the fire as an arson. He shows as the ignition source "matches/lighter - unable to distinguish". There is no mention of any accelerant. Heyerhoff explained that the format of the report does not allow for any additions or explanations but attached to the report is a narrative of the investigation which makes no mention of an accelerant. It reads in part:

> There are two areas of origin situated in a skid of cardboard boxes and the boxes on a steel shelve (sic) in the north end of the warehouse. Police Ident Officer J. Lavigne took possession of the debris samples to be submitted to CFS.

¶ 36 The conclusion shown in the report is:

> This is a two area of origin incendiray (sic) fire with a possible fraud motive. Peel Regional Police are actively investigating the circumstances.

¶ 37 At the trial Heyerhoff went beyond the contents of his report of May 5, 1993 and also the notes he made at the investigation scene. He presented in his testimony a theory as to the cause of the fire. He stated that he was convinced that an accelerant had been used which burnt from the underside of the skids and also on the top of the skids. When asked about the burning shown between the cartons on the skids he said that would have to be caused by liquid accelerant spilled on the skids and then ignited. He said that he was convinced this was not a creeping fire but rather one that blazed up quickly creating sufficient heat to activate the sprinklers before the fire spread. He said that the absence of soot, the limited area of the fire and the lack of "deep" burning in the cartons negatived the possibility of a "creeping" or smouldering fire.

¶ 38 When asked about a cigarette having possibly started the fire he pointed out that would require two cigarettes for two separate fires and that a cigarette left on top of a carton would not ignite it or if it fell between the cartons it would result in a smouldering fire and therefore in soot and heat. The firemen at the scene had not encountered heat. Heyerhoff emphasized that he found the absence of soot significant.

¶ 39 In his testimony Heyerhoff stressed as well as the absence of soot the burning pattern on the skids and the cartons. He says, using his photographs to illustrate, that accelerant was poured on or under the skids and that accelerant on the floor burnt up on the underside of the skids. He emphasizes the condition of the skids after they had been up-ended as shown in photograph 33 of Exhibit 11, and in photograph 34 of Exhibit 11 which shows a side view of the skid placed back on the floor. He points to blackening on the bottom of the cross supports of the skids which he says is charing of the wood. The skid however does not have any burn marks on the underside of the top slats of the skid which one would have expected to be burnt from fire moving up from the floor. Photograph 34 shows no burning to the top side of the bottom member, again as one would expect if the fire had burned up from the bottom. The charring on the top side of the skids is in some areas very marked except for areas which Heyerhoff says were covered with cardboard boxes which he and the fire personnel pushed off the skids. Exhibit 29 shows the position of the burnt cardboard boxes on the skids before they were moved. The extent and type of burn on the cardboard boxes indicated to Heyerhoff that it was caused by a fast fire following accelerant spilled on the boxes and was not a smouldering fire, again with emphasis on the absence of soot.

¶ 40 Finally Heyerhoff testified that the fire in the other area of origin started on the north side of the third shelving unit rather than on the south side. When asked why he thought that was so he replied that any experienced fire investigator could figure that out from the photographs. He said the fire started on the north side (he made no mention of an accelerant having been used) because of the sagging of the upper shelf and the burning through of the peg board. He was of the opinion that for there to be radiation burning between fire area #1 and fire area #2 the fire would have to have started on the south side of the shelf and not the north side.

¶ 41 In summary it was Heyerhoff's opinion that he had eliminated all other causes for the fire and that this fire of short duration with intense burning which had not produced appreciable soot and with two areas of origin was an incendiary fire.

¶ 42 In assessing the validity of this opinion I consider other evidence presented at the trial and inferences to be drawn both from that evidence and Heyerhoff's own testimony.

¶ 43 John Henry Armitage, a forensic engineer dealing with causes of equipment failure, was retained by the independent adjuster acting for the defendant on the suggestion of Heyerhoff. Armitage

checked the operation of the intruder detection system. It consisted of magnetically actuated sensors mounted on each of the three doors to the premises and three motion detectors, one in the office area and two in the south east and south west areas of the warehouse. The system was equipped with a local alarm horn and was monitored off the premises by a monitoring company. There was no fire alarm linked to the system. Armitage tested the system when he attended at the premises on March 5, 1993 and found it inactive. A check with the monitoring company indicated that at 2.27 a.m. March 4, 1993 the system had not responded to the monitor's daily check.

¶ 44 Armitage's conclusions taken from his report were:

> There was no remaining evidence to conclude that the intruder detection system would not have transmitted an alarm signal to the monitoring station prior to the operation of the fire sprinkler system had the system been armed and one or more of the detectors had been activated. The evidence is suggestive of the intruder alarm system not being properly armed on March 3, 1993 or that a person having knowledge of a valid access code disarmed the system upon entering after approximately 7.30 p.m. on March 3, 1993.

¶ 45 Included in his observations were the following:

> The office area exhibited evidence of soot and water damage. However, no evidence of burning or charring was noted. The warehouse area south of the office space also exhibited evidence of soot and water damage throughout the warehouse.

¶ 46 On cross-examination Armitage said that the soot was clearly evident on the day after the fire and was "generally speaking all over". He would have expected Heyerhoff to have noticed the soot. Heyerhoff's notes of his observations made in the morning of March 4, 1993 say: "no evidence of soot settlement". There was no evidence as to the time required for soot to settle which may have explained the difference between Heyerhoff's observations and those of Armitage on March 5, 1993. However Ronald Rayner, the salvager, who has been involved in some 6000 salvage operations from fire and water, also testified that he saw soot on the cartons that he inventoried on the site early in March. He said that it was clearly soot and not easy to miss.

¶ 47 Vincent R. Rochon was called as a fire investigative expert by the plaintiff. In reply, having heard the evidence of Heyerhoff, Rochon said it was his opinion after seeing the photographs exhibited at the trial that there was soot damage in the building, especially in the area of fire origin. Rochon did not indicate which photographs he was referring to. However if one examines photographs 16, 17 and 18, the photographs showing the gasoline can on one of the shelves which is not the shelving unit on which the fire occurred, one sees blackening on the shoe boxes which is inconsistent with Heyerhoff's testimony in chief that there was "absolutely no soot" and cannot be explained by his suggestion that some of the cartons had soiling on them which was dust and not soot.

¶ 48 Rochon was an electrical engineer who graduated from Queen's University in 1986. That same year he was employed by the Ontario Fire Marshal's Office as a fire protection engineer. In his three years there he completed over 100 fire scene investigations and over 30 equipment examinations dealing with electrical failures. In 1989 and 1990 he was an investigative engineer and adjuster dealing with 60 failure and fire scene investigations and since 1990 he has had his own firm of Forensic Consulting Engineers for which he has completed 500 fire scene and failure (electrical, mechanical and chemical) investigations. He has given expert evidence some 25 to 30 times at various levels of courts. He has completed a range of courses in fire investigation. I am satisfied that although he lacks the experience of Heyerhoff in the number of investigations done he was well qualified to give expert

evidence at the trial.

¶ 49 He prepared his report from Heyerhoff's notes, report and photographs and other information obtained from interviews and the discovery transcripts but had never seen the premises at any time. He was in court to hear the testimony of Heyerhoff, Armitage and the other witnesses whose testimony dealt with details surrounding the fire.

¶ 50 It was Rochon's opinion that Heyerhoff ought to have referred the electrical extension cord for expert engineering examination and was of the view that Heyerhoff was not qualified to determine from the cord whether it had been involved in the fire ignition. He pointed out that Heyerhoff through the Fire Marshal's office had experts available to him for this purpose. He also noted that Heyerhoff took no pictures of the cord and discarded it instead of keeping it as an exhibit. Rochon was of the opinion that the cord, which Duong testified was plugged in prior to the fire and ran along the top of a shelf, could have been wrenched from the receptacle by the falling of the shelf contents into the aisle. Once the cord was under the fire debris both ends would be blackened by the debris.

¶ 51 Rochon was critical of the way Heyerhoff carried out his investigation because he said it was not done in accordance with the guidelines of the National Fire Protection Association (NFPA). I note, however, that these are guidelines only and did not bind Heyerhoff. It was Rochon's opinion that Heyerhoff did not proceed to eliminate all possible causes of accidental fire before coming to his conclusion of arson. He says that Heyerhoff did not eliminate electric fire in a proper manner and did not deal at all in his report with careless smoking as a possible cause.

¶ 52 Rochon was of the opinion that there was only one area of fire origin. From his testimony at trial it was clear that Rochon had misread Heyerhoff's notes when he said the location of the two fire areas were only 2 to 4 feet apart. He misread 7 feet for 2 feet. His own estimate of 2 to 4 feet was derived from photograph 25 which shows a broom in relation to the space between the two fire areas. Rochon believed that even with 7 feet separating the fires there was only one point of origin. He says in his report:

> The two points of origin identified in Investigator Heyerhoff's report were located approximately 2 to 4 feet apart with an aisle separating them. Photographs taken immediately after the fire depict a completely clogged aisle, since combustible shoe boxes on each side of the aisle had fallen into the aisle during the fire. The various methods of heat transfer described in NFPA 921 are accepted fire protection engineering principles. The proximity of the two points of origin as described in Investigator Heyerhoff's notes (i.e. between 2 and 4 feet apart) and the physical condition and location of combustible materials should have led Investigator Heyerhoff to conclude that it was more probable that there was only one point of origin. From the evidence made available to us, we have concluded that if a fire started on one side of the aisle, it could easily have spread to the other side by either radiation or convection currents.
>
> There are a number of heat transfer mechanisms which can explain the fire damage on either side of the aisle and Investigator Heyerhoff's conclusion that there were two points of origin is contrary to accepted fire protection engineering principles.

¶ 53 It was Rochon's opinion that there was only one point of origin for the fire and not two as was Heyerhoff's opinion and that since electrical ignition and careless smoking had not been satisfactorily eliminated Heyerhoff should have found the fire to be one of undetermined origin.

¶ 54 Heyerhoff admitted on cross-examination that his theory depended on the fire in area one

having started on the north side of the shelving unit, i.e., away from the aisle across which the skids stood. Rochon took issue with this conclusion. He referred to the burn patterns in the pictures of the shelving. Fire spreads out as it burns. If there is a wall against which it burns it will form a V burn pattern. If there is no wall then the burning will take the form of a cone with the narrow part at the bottom - the lowest point of burning. This he said was evident in the photographs 38, 39 and 40 and showed that the burning started on the south side of the shelving, where the boxes toppled into the aisle towards the skids, and out and up on the north side of the shelving where the top shelf twisted and collapsed from the heat.

¶ 55 Rochon also disagreed with Heyerhoff's theory of use of an accelerant based on the burning pattern of the skid. He questioned the lack of burning on the underside of the centre skid and was of the opinion that what Heyerhoff said was charring on the bottom members of the skid was simply dirt from the debris of the fire.

¶ 56 From this evidence I must decide whether the defendant has persuaded me on a balance of probabilities that this was an incendiary fire. Given the weight of evidence required for such persuasion I am not satisfied with the findings of Heyerhoff. I am not persuaded that he considered adequately the state of the electrical cord. Unexplained is the fact that he neither retained nor photographed the cord. In contrast he took three photographs of a gasoline can which he said he had discounted early in his investigation. Without knowing of the evidence of Doung and Duschene, who both said the cord was kept plugged in, Heyerhoff discarded the cord.

¶ 57 It is also clear that up to at least May 5, 1993 Heyerhoff had made no note or mention of the use of an accelerant but by the time of the trial he had developed his theory that an accelerant (methanol) had been used. When the samples were submitted to the Centre of Forensic Sciences on March 11, 1993 there was no request for testing for methanol from the police with whom Heyerhoff had discussed the fire, although at that time the test was routinely done by the Centre whether or not requested. The inference to be drawn is that Heyerhoff developed his theory only after reading Rochon's report in preparation for the trial. When advancing his theory he could not account for the fact that the underside of the slats on the centre skid were unburnt which was not consistent with the burning upwards of accelerant on the floor. There is a conflict in the evidence about soot between Heyerhoff and Armitage but that cannot be resolved on the evidence as it does not deal with what amount of soot is significant to indicate a smouldering fire in contrast to a fast fire.

¶ 58 While I find some weaknesses in Rochon's report and would give deference to Heyerhoff's long experience in fire investigation I am satisfied that Rochon has raised sufficient question about there being two points of origin for the fire that I must reject Heyerhoff's conclusion that this was an incendiary fire. This is a most telling point because it was agreed by both experts that in 99% of the cases of fires with two separate points of origin the fire is a set fire.

¶ 59 I find that the defendant has failed to prove the first of the elements listed by Farley J. in the Rizzo case.

¶ 60 While that alone is sufficient to defeat the defendant's position on the fire there was considerable evidence given as to the motive which would tend to support a finding of arson as well as about opportunity.

¶ 61 There is no doubt that Simon on behalf of the plaintiff had the opportunity to set the fire. He was the last person to leave the premises on the evening of March 3, 1993. He left about 7.30 p.m. He lived about a 20 to 25 minutes' drive from the business premises. There was ample time for him to return to the premises, disarm the intruder alarm, set the fire and return home and be in bed by the time he was called by the fire department about 3:00 a.m. He offered no alibi other than he had spent a normal evening at home with his wife. Though invited to do so by the defence he did not suggest that

he had been occupied in the evening by religious study classes which he attended several times a week in the evening.

¶ 62 Only three persons had the code with which to disarm the intruder alarm system; Simon, Duschene and Simon's mother. There is no suggestion that Duschene or Simon's mother were in any way involved with the fire.

¶ 63 The time of the fire was not established in the evidence. The intruder alarm was working at the time the fire personnel broke the door panel to gain entry some time after 3.00 a.m. Simon was requested by Chief Charon to turn it off. The monitoring company reported the system was not activated when it did a check at 2.27 a.m. on March 4. Dalmus said he heard an alarm at the time he saw water rushing from the shipping doors but it is not clear if this was the sprinkler gong or the intruder alarm horn. The fire was reported by Dalmus and the fire department despatched at 3.019 a.m. By that time the water from the two sprinkler heads at the north end of the warehouse had reached the doors at the south end in such volume that Dalmus saw a substantial amount of water coming from under the doors. By the time the fire department arrived the fire had been extinguished by the sprinklers. There was no evidence as to when the sprinklers were first activated since the system at that time was not monitored by an outside agency. There is therefore no evidence which would either support or refute Heyerhoff's opinion that this was a fast as opposed to a smouldering fire which would affect the nature of Simon's opportunity. If it were a fast fire, set much later than Simon's normal time to be at home and preparing to go to bed, which was said to be about 12 midnight then any false alibi of Simon's would require the involvement of Mrs. Simon. Having heard her testimony and observed her in the witness box I would find this highly unlikely. I found her to be a credible witness and I accept her testimony that she and her husband spent a normal evening at home and that there was nothing out of the ordinary that occurred that evening which would mark it in her mind. If it were a smouldering fire set much earlier then Heyerhoff's opinion is not supportable on the evidence.

¶ 64 I find that the fact of Simon's opportunity is not sufficiently compelling in weight when taken with Heyerhoff's opinion to prove that this was an incendiary fire.

¶ 65 Much evidence was given about Simon's possible motive for setting the fire. It was noted that some ten years before this claim he had made a proof of loss for a fire claim arising out of a fire at the family slipper manufacturing business which he ran. His personal life-style was modest and unassuming and in keeping with the stereotype of a family man who had a wife and six children. His wife was the principal of a Hebrew elementary school earning about $65,000 a year plus certain benefits. Simon had been in the footwear business, either that of his family or his own, for most of his adult life, he now being 55 years old. In the period 1980 to 1986 his salary had been in a range of $50,000 to $60,000 a year.

¶ 66 In 1986 after the family business was sold Simon went into business for himself under the name of Concept III in which he supplied retail shoe departments in existing department stores operated by a company called Raz Fashions. Simon then decided to open retail stores himself under the name of Family III. When these stores were unsuccessful Simon removed the stock from some of the stores. Concept III then went bankrupt. Buchanan, an employee of Simon's, placed certain security with the bank for a loan to enable him to buy a 25% interest in Concept III. When Concept III went bankrupt Buchanan found himself out of a job and Simon suggested he start his own business. Buchanan then incorporated Buchanan Footprints in 1991. In the Concept III bankruptcy Simon paid off the bank and took its place as the secured creditor of Concept III thereby making himself Buchanan's creditor. Buchanan bought the bankrupt stock of Concept III and used it in his Buchanan Footprints business. When Buchanan Footprints also went bankrupt, Simon acquired its stock. Buchanan testified that by that time some of the Concept III stock which he had bought was four years old.

¶ 67 In 1989 Simon changed his approach and incorporated Canada Shoester to carry on his own business designed to sell shoes on a wholesale basis to independent shoe stores. In the intricacies of these financial arrangements he was able to obtain the bankrupt stock of Concept III and also to buy the bankrupt stock of Buchanan Footprints but the evidence is not clear what happened to that bankrupt stock. Buchanan's testimony is tinged by the acrimony he continues to feel against Simon because of the Concept III bankruptcy and I cannot give much weight to what he says about the nature of Canada Shoester's inventory prior to the fire because he was not in a position to know but only to make assumptions from what he knew of the earlier bankruptcies.

¶ 68 In 1989 Breen Duchesne who had been in the show business since 1953 and had known Simon from the days of the family slipper business joined Canada Shoester to take charge of the sales end of the business. He testified that in the years ending in 1989 and 1990 the corporation made a satisfactory amount of sales. 1990 sales were over a million dollars and up over 1989 sales. The 1991 and 1992 years showed reduced sales. Duchesne testified that in those latter years business conditions were bad and that his coast-to-coast sales force had not performed as expected. In 1992, realizing that increased sales were vital Duchesne and Simon decided to add work boots to their lines. The new line looked to them like a good opportunity with early results in sales being very promising in the fall of 1992. However prior to the fire the supplier of the boots said that shipments would be delayed until April when they had expected the shipment in March. Later the shipments were further delayed through August from May and ultimately in September or October they were advised that there would be no shipment.

¶ 69 I found Duchesne to be a knowledgeable, straight-forward and credible witness. I accept his testimony about the development of a new line of business, his assumption that the shipment was backed by the necessary letter of credit and his efforts to create new sales for the corporation. While such testimony might be of less weight if it came from Simon alone I am satisfied that the facts were as Duchesne has stated them.

¶ 70 The defence called a number of witnesses including Buchanan in an attempt to show that Simon's business was in such a state that he had ample motive to set the fire. Luciano Cancian, landlord of Simon's earlier business premises, was called to show that Simon had defaulted in payment of taxes as required under the lease and then moved out without proper notice. On cross-examination it was demonstrated that Simon had some dispute over the common expenses to be paid and the matter was ultimately settled between them. Cancian described Simon as "a great complainer" and "always difficult to collect from" which may well have been the case but does not prove that Simon was in straitened circumstances.

¶ 71 James Lance King, the comptroller of the landlord for the Meyerside premises, testified that Simon was late most months in payment of the rent and that in 1992 rent payments had stopped when there was dispute over flooding at the premises. Payments were also stopped when there were disputes over taxes, maintenance and insurance. The lease expired in August, 1993 and King admitted that the rent was paid up in full at the end of the term. As of April, 1993 the corporation had a credit with the landlord. Again this evidence does not indicate that at the time of the fire the corporation was in default under the lease.

¶ 72 Buchanan's testimony was that Simon engaged in sharp practice in the removal of shoes from the Family III stores when that business was faring badly and in the manipulation by Simon in the Concept III bankruptcy whereby he took out the bank and himself became the secured creditor of Concept III and hence of Buchanan. I have commented on the weight to be given Buchanan's testimony. However even allowing that Simon indulged in sharp business practices, was a difficult and complaining tenant who made his rent payments late, was slow in paying his employees, as indicated by Duchesne, avoided paying income tax where possible and had been involved in a fire claim ten

years earlier, I am not persuaded that any of these, or all of them taken together indicate a motive for Simon to have set the fire in March, 1993.

¶ 73 The defence also submitted the report of Lesley E. Cleveland, a chartered accountant with Hayes Smith & Associates, Investigative Accountants, dated September 1, 1995. Mrs. Cleveland is also now qualified as a certified business evaluator. Her first task assigned to her by the independent adjuster was to review the books and records of Canada Shoester and to comment upon the financial position of the corporation at the date of the fire loss.

¶ 74 Mrs. Cleveland based her analysis on the corporation's books and records, her discussions with Simon, his accountant and others. She received no financial statements for the year ending December 31, 1993 as she was advised that the corporation's records had not been kept up-to-date for the year 1993. She based her analysis on the corporation's financial position at December 31, 1992 and at the date of the receivership, February 7, 1994.

¶ 75 Her analysis of the corporation's asset and liability position was affected by difficulties she had in the inventory valuation used in the financial statements for December 31, 1992. Her conclusions on this aspect were:

As at December 31, 1992, the company had net assets (total assets less liabilities) of only $1,448. Therefore the company had not built up any net worth over its operating years and had no tangible underlying assets.

> ...It is thus evident at December 31. 1992, before the fire, that Mr. Simon's company had limited value, the recoverability of his $345,518 investment by way of shareholder's advances is questionable, and he had never received any remuneration for his role as President and day-to-day manager of the company since 1989.

¶ 76 She also noted that the company had a bank loan outstanding with the Toronto-Dominion Bank at December 31, 1992 of $360,000 secured against the company's assets.

¶ 77 At December 31, 1992 Cleveland found the accounts payable to be fairly low at $28,486, consistent with Simon's statement to her that merchandise was paid for upon delivery or by presentation of a letter of credit.

¶ 78 Cleveland then analysed the corporation's operating results from December 31, 1989 to December 31, 1992. She found that sales had peaked in 1990 and thereafter were in a declining trend established well before the fire on March 4, 1993.

¶ 79 Gross margins from 1990 to 1992 were reasonably consistent, though the 14 month period to February, 1994 showed an improved margin which Cleveland thought cast doubt on the reliability of the records on which her review was based.

¶ 80 Small amounts of net income were made in 1989 and 1990 and small losses were recorded in 1991 and 1992.

¶ 81 Her conclusion on the corporation's operations was:

> The company was thus generating losses in the two years prior to the fire and given the reduction in sales observed in 1993, it appears the trend continued beyond March 4, 1993. This demonstrates the deterioration in the company's operating position prior to the fire.

¶ 82 In considering motive for Simon to set the fire I find that Cleveland's report may be somewhat misleading. Her comparisons between the position at December 31, 1992 and the date of the

bankruptcy in February, 1994 show a definite worsening after the fire but the relative time for motive must be prior to the fire and must have been a position known to Simon. I have difficulty in accepting Cleveland's statement as to deteriorating operating results to the end of 1992 as a basis for motive. It is clear from the evidence of Duchesne that both he and Simon were optimistic in early 1993 about the sales they expected to achieve from the new line of work boots they were working on. In the fall of 1992 they had discussed the line with customers and had received orders for 1000 pairs in one month. This success in obtaining orders in British Columbia had persuaded them to order more samples with a view to supplying them to their sales force across Canada. They placed an order with a supplier for 3300 pairs for delivery in March, 1993. Duchesne testified that he "saw the line pulling us out of the dip we had gone into".

¶ 83 There is no doubt that the corporation's business results had been marginal at best since it commenced business in 1989. Recession no doubt had some impact on the business. There is nothing to show that Simon was not content to continue as he had been. The family income provided by his wife appears to have been sufficient for their purposes and had been protected from income tax by other loss arrangements they had made on the advice of their accountant. There was no evidence to show that he was anxious about the potential loss of his investment by way of shareholder's loan prior to the fire. Cleveland noted that mortgage payments on Simon's behalf had been made by the corporation after December, 1992 which reduced the amount of the corporation's indebtedness to Simon. This appears to have started in the year 1992 but there is nothing else to indicate that Simon was concerned about his investment prior to the date of the fire. Simon testified that he was not worried about his investment after the December 31, 1991 year end results were known and that in 1992 he felt encouraged by the prospects for the business. This is supported by Duchesne's testimony.

¶ 84 I find that the defendant has not proved that Simon had a motive for setting the fire and there is nothing in the evidence I have reviewed to indicate such a motive to bolster the finding of Heyerhoff that this was an incendiary fire.

¶ 85 The defendant has therefore failed in its defence against liability under the fire policy for the fire of March 4, 1993.

History of the Damaged Goods Following the Fire

¶ 86 Edward Delong, the independent adjuster acting for the defendant, attended at the site on March 4, 1993. He was told by the police of the suspicious nature of the fire and proceeded to deal with the claim on that basis. He called in Ronald Rayner of Consolidated Salvage Co. Ltd. and instructed him to inventory both the damaged goods which were to be removed from the warehouse and also the undamaged goods left in the warehouse.

¶ 87 On March 5th Rayner commenced the inventory and salvage operation and had Simon enter into a salvage agreement with Consolidated. Parties to that agreement are the insured, the adjuster on behalf of the insurers and Consolidated as the salvage factor. The agreement was never signed by Delong for the insurers.

¶ 88 On March 10th Delong met with Simon and gave him a blank proof of loss form and asked him to sign a non-waiver of the insurer's rights which Simon duly signed on March 29, 1993 after apparently taking legal advice.

¶ 89 On April 15, 1993 Delong wrote to Rayner as follows:

> Attached please find a copy of the salvage inventory which has now been priced out by our insured and will assist you in measuring the value of the salvage.
>
> Further, it is our understanding, that our insured wishes to attempt to sell all or part of

> the salvage and therefore we will require a salvage bid from yourselves prior to releasing the salvage to our insured.
>
> Furthermore, until the police and Fire Marshal investigation is complete we will not be in a position to commit our principal, the Royal Insurance Company, to respond to this claim and it will therefore be necessary for you to receive payment directly from our insured prior to releasing the goods.

¶ 90 There is no evidence that the contents of this letter were conveyed to Simon at the time. On April 26, 1993 Rayner sent an invoice to Simon for some $16,000 for costs related to the removal of the goods, including the cost of supplying two copies of the inventories for $8,335.50.

¶ 91 Rayner testified that it was not the usual practice to bill the insured where the insurer had specifically requested the inventory as was done here. He could not say why he had not billed the insurer. He also testified that he had not made a bid for the salvage as requested by Delong. He said it was most unusual for any insured to want to sell the salvage himself. In fact a large part of Consolidated's business was the sale of salvage upon the instructions of the insurer. When Simon and Duchesne came to Consolidated seeking to buy some 200 to 300 pairs of shoes to fill some orders Rayner refused to release them because Consolidated's bill was unpaid.

¶ 92 Simon had argued about the removal from the warehouse of some of the goods which he considered undamaged but after that he made no demands for the inventory other than the request referred to, he made no bid for it, he asked no questions about Consolidated's charges which included accruing monthly storage charges. It was not until the Trustee in bankruptcy questioned the charge for the inventory that Delong arranged for Royal to pay for the inventories. The Trustee then paid the balance of Consolidated's bill and arranged for the sale of the inventory. Simon gave no reason for his failure to press the matter of salvage except through argument of his counsel that he was under no legal obligation to do so.

¶ 93 The inventory-taking process as described by Rayner required the sorting of the goods for drying purposes and the disposal of items which were unsaleable. Boxes were opened as required and the goods were listed as to description and quantity. The handwritten sheets were given to Simon who with Duchesne, using the corporation's records put cost values beside each entry. The necessary extensions and totals were made by Simon. Consolidated then had the inventories typed up and sent to Simon.

¶ 94 On April 19, 1993 Simon sent his completed proof of loss for the damaged goods to Delong. The proof of loss had attached to it the handwritten inventory with the costs, extensions and totals shown. The typed inventory was not sent to Simon until April 26. On April 26 and April 28, 1993, respectively, copies of the typed inventories of both damaged goods and goods retained by Simon were sent by Consolidated to Delong and to Hayes, Smith, the forensic accountants for the insurer.

¶ 95 The Trustee has been critical of the methods used for the salvage operation and the inventory-taking. The Trustee found the goods stacked in such a way that the goods were damaged by the weight, some were mildewed in not having been dried properly and the inventory listing itself did not contain sufficient information to assist a possible purchaser for the goods. While this may have some impact on the amounts received on the sale of the goods I find it has no impact on the valuing of the goods at the date of the loss.

¶ 96 The evidence shows that the adjuster was suspicious of the claim from the outset. It also shows that the salvager may not have acted as efficiently as one would expect. However I find nothing

nefarious in the actions of either or that they were colluding in some way to hinder Simon's claim. But is also clear the adjuster, in treating the claim as an arson, had placed the insurer in opposition to the insured and had acted with Consolidated in contravention of Statutory Condition No. 10 which provides that the insurer has rights of access to the damaged property to permit it to estimate the damage but "is not entitled to the control or possession of the insured property, and without the consent of the insurer there can be no abandonment to it of the insured property". By his instructions to Consolidated not to release the goods to Simon on conditions and to bill Simon directly Delong was forcing Simon to pick up costs properly payable by the insurer in the ordinary course.

Proof of Claim for Lost Goods

¶ 97 The onus is on the plaintiff to prove its claim under the policy. That requires proof of the actual value of the goods damaged or destroyed as of the date of the loss. Statutory Condition No. 6 under the Ontario Insurance Act, R.S.O. 1960, Chap. I.8, s. 148, sets out the requirements to be met by the insured after loss. Pertinent to this loss is clause (b) which reads:

> (b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration,
>
> (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,

¶ 98 I am satisfied that Simon delivered the proof of loss for the goods as soon as practicable and that it complied on its face with other requirements under the Condition. The defendant, however, says that Simon wilfully misrepresented the values shown and thereby intentionally presented a false and fraudulent claim. The onus is on the defendant to prove the falseness of the claim and then it is incumbent on the plaintiff to prove that such misrepresentation was innocent.

¶ 99 If the defendant is successful the law is clear that the plaintiff's claim is vitiated completely by the wilfully false statement. See Niedricla v. St. Lawrence Underwriters Agency of Western Assurance Co. (1923), 53 O.L.R. 599 (OCA). The defendant relies on Statutory Condition number 7 which provides:

> 7. Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration.

¶ 100 In this case we are concerned only with the particulars as to the actual cash value of the goods at the date of the loss.

¶ 101 Simon and Duchesne both testified that they put in the inventory purchase prices for the shoes garnered from suppliers' invoices with additions for customs duty, freight and exchange. Records were provided to Mrs. Cleveland at Hayes, Smith pursuant to her request, although belatedly, and were also in the hands of the trustee in bankruptcy.

¶ 102 At issue was the age of the stock. Both Buchanan and Naud, who were called by the defendant, testified that Simon had old stock in his warehouse from the earlier ventures in Concept III. Naud who had worked in the shoe business since 1966 was an employee of Buchanan and after his bankruptcy worked for Simon in selling off old stock under the name of Sterling Shoes. He was continuing to do this at the time of the fire. He testified that after the fire Simon told him that all the old stock had been burnt in the fire and that he had no more old stock for Naud to sell. Naud said that he had been selling shoes that were 10 to 15 years old. On cross-examination he reduced this to say the

shoes were at least 5 years old. He said that at the time of the fire about 99% of the time he was selling the new shoes with a small markup over cost and the old shoes for much below cost.

¶ 103 I have difficulty in accepting Naud's testimony as accurate both because of his exaggeration on the age of the shoes which he himself retracted from and because of the testimony of Duchesne. Duchesne testified that at the time of the fire the corporation had old stock. Some were carry-overs from previous seasons but that did not make them necessarily unsaleable. Both he and Michael Klein, a shoe manufacturer and wholesaler called by the plaintiff, testified that some shoes could be sold in later years because they did not go out of style. But Duchesne did admit that not all old stock is saleable regardless of age though he would not say generally if there were unsaleable shoes in the warehouse at the time of the fire. He gave no testimony as to the age of the old stock which had been in the warehouse at the time of the fire. Duchesne also testified that some of the stock that was burnt was new stock just received for shipping out to customers.

¶ 104 Simon gave the following aging of the inventory from purchases made:

Prior to 1991	5%
Summer-fall 1991	20%
Spring 1992	25%
Fall/92-Spring/93 before the fire	50%

¶ 105 He testified that the items prior to 1991 were open stock and basic styles which did not go out of style and so were saleable. He denied telling Naud that all the old stock had been burnt in the fire and I accept his testimony on that point in preference to Naud's sweeping statement.

¶ 106 Both Mrs. Cleveland and Mr. Schiff, the Trustee in bankruptcy, assessed the corporation's records regarding the inventory and in particular its cost and age. Mrs. Cleveland selected 12 samples from the proof of loss inventory (she does not say how these were selected) and requested documentation from Simon to support the value claimed. She found that "the costs incurred as supported by these documents were 11% lower overall than the value claimed and all of the merchandise appears to have been received during 1989 through 1991". She also found that of the samples selected 2.8% were purchased in 1989, 47.3% in 1990 and 49.9% in 1991. She tabulated from the invoices furnished by Simon an aging of those purchases as 1.4% purchased in 1989, 65.3% in 1990, 33% in 1991 and 0.3% in 1992. These figures are much at variance with the aging testified to by Simon as set out above except for the year 1989. Mrs. Cleveland noted that "Mr. Simon did not supply any documentation for 1992 or 1993 purchases". This conclusion is somewhat overstated when one notes that there were purchases in 1992, however small, and that she schedules the 1992 invoices she received from Simon. She also said that Simon had given her his perpetual inventory book kept for the stock and that she was surprised to find it was not well thumbed and that all the sheets had entries only from December, 1992. Simon explained that he had given her the master copy since the binders maintained in the warehouse had been soaked in the fire and he had instructed the warehouse man to replace the old sheets with new ones. Simon says he had taken the old pages out of his master copy and that he had not been asked for them. Mrs. Cleveland testified that she had asked and I accepted her testimony on the point. I did not find that Mr. Simon was accurate in his various recollections and tended to overstate or muddy the waters. Mrs. Cleveland was unable to reconcile the inventory at December 31, 1992 with the sales figures for January and February 1993 and the Consolidated inventory.

¶ 107 Mr. Schiff conducted a cost assessment of that part of the inventory done by Consolidated which represented salvage, i.e. $179,913.55. He reviewed 66% of the inventory, i.e. some $119,000 of the total amount, against invoices from suppliers and costs of freight, customs duty, exchange and financial charges. He found that the value of the inventory might have been understated by 2%. He

made no findings as to the aging of the stock or any break-out from the invoices by year of purchase as Mrs. Cleveland had done.

¶ 108 No invoice documents were produced at trial relating to purchases made in 1993 prior to the fire. Both Simon and Duchesne testified that new stock had been received in early 1993 and presumably these would have been invoiced in late 1992 or early 1993. Simon produced in reply a list of all purchases made in 1993 but it would appear that such a listing was never given to Mrs. Cleveland and although the purchases are by date there was no determination of the total amount purchased prior to the fire. Simon has not otherwise supported by documentation his schedule of aging put into question by Mrs. Cleveland. However what can be drawn from her report is that on the basis of her sample some of the goods were purchased in 1989, but only a very small portion. It is the evidence of Simon, Klein and Duchesne that classic styles can be carried over from year to year and cannot be said to be unsaleable at regular prices just because of age. There was no attempt made by any of the witnesses to look in detail at the style numbers identified on the inventory to determine whether the bulk of the older shoes fell into the classic category. Duchesne said there were some carry-overs. He also said that what was burnt seemed to him to be more current stock and not old stock.

¶ 109 Mrs. Cleveland assessed the shoes in the inventory and inspected some of them at Consolidated's warehouse in their then state. She concluded after removing claims for shoes retained by Simon, sample shoes which had been shown as pairs when in most cases they were single shoes, and bagged shoes whose ownership she thought was in question, that the salvage items were 14,116 pairs and that they should be valued at 11% less than the cost furnished by the insured, or at $10.08 a pair. This would result in a loss valued at the date of the loss of $142,289.28.

¶ 110 Mr. Schiff, after sorting out the salvage he obtained upon payment of the amount owing to Consolidated, turned over 12,212 pairs for disposal at a total value after reduction for the sample shoes of $220,109.54 which results in a price per pair of $18.02. Making adjustment for his view that the costing provided by Simon was understated by 2% or $9,822.93 the price per pair would be $18.83. If one uses Mrs. Cleveland's total number of pairs of 14,116 the average price per pair would be $16.29.

¶ 111 The claim in the proof of loss for lost inventory was $260,431.82. This exceeds the inventory total value of $259,672.17. This discrepancy was not explained and therefore constitutes an overstatement of the claim by $759.65. It is plainly stated in the Consolidated inventory that some, but not all, of the sample shoes were single shoes but these were priced and claimed as pairs. Consolidated's summary of April 26, 1993 shows samples shoes as totalling $60,923.19 but there is no indication whether this includes all sample shoes or just the single sample shoes. I rely therefore on the calculation in the revised claim of the trustee which shows a reduction for single shoes extended as pairs in the amount of $28,095.92. I find the claim overstated for sample shoes by that amount. Also included in the claim is an amount of $8,775 for shoes retained by Simon. The claim is overstated by this amount. After deduction of the three amounts which are not properly claimed there remains a claim for $222,801.25.

¶ 112 Has Simon so overstated his claim that I should find that he was either intentionally fraudulent or recklessly disregarding the true state of the facts when he swore the proof of loss and that as a result the total claim is vitiated? I am not of that view. He proceeded on the premise that the damaged or destroyed goods should be valued at their original cost, including freight, customs duty and exchange and he provided those prices throughout. He was well experienced in the shoe business but did not make any distinction for the pricing of sample shoes which were shown as singles only. But also included in the listing were sample shoes in pairs. I am not persuaded that the evidence is sufficiently cogent for me to find that he knowingly extended the prices on the single sample shoes at cost per pair in a deliberate attempt to defraud the insurer. Consolidated's clerk who was experienced in shoe salvaging appears to have overlooked the pricing error. I make a similar finding for the

inclusion in the claim of goods retained by Simon. The original error in that instance arose from the inventory recording of Consolidated and was one which could reasonably have been unnoticed by Simon. The statement of the claim over the total in the inventory is unexplained but is not of sufficient consequence to void the claim. While the insured is under an obligation to deal with the insurer with the utmost honesty I do not find that Simon breached that principle by these errors or oversights.

¶ 113 There is a considerable margin of difference between Mrs. Cleveland's valuing of the loss at $142,289 which discounts the cost price of the shoes to $10.39 and that of Mr. Schiff's valuing of the loss at $229,932 which uses a full cost price of $18.83. Mrs. Cleveland's price reflects her view that some at lease of the inventory is very old and hence worthless. The evidence of the other witnesses showed that this was not necessarily the case. Her comparison of the inventory figures in the financial statements with the values given for the Consolidated inventory showed that lower values were ascribed to some of the shoes for the purposes of the financial statements. While the financial statements are not conclusive as they are prepared for a different purpose than an insurance claim they give some indication of what Simon's belief as to the value of the shoes was at the end of December, 1992. I am satisfied that the actual value of the loss at March 4, 1993 lies somewhere between the two positions. Mr. Schiff's position does not acknowledge any difference in valuing for the older shoes which were admittedly part of the destroyed inventory and which had been sold off at lower than cost just prior to the fire by Mr. Naud. I find that the actual cash value of the lost inventory at the date of the loss was $190,000. Deducted from this is the amount received for the salvage by the Trustee who shows a net return of $48,538.47 resulting in a net value for loss of inventory under the policy of $141,461.53.

¶ 114 The insured is also entitled to reasonable costs for dealing with the inventory after the loss. In this instance most of that expense was incurred by the Trustee. The items claimed are set out in the Trustee's statement for a total amount claimed of $42,719.31.

¶ 115 I accept Mr. Schiff's statements about the condition of the goods in the Consolidated warehouse and the need to prepare a more detailed inventory than that done by Consolidated. Consolidated was chosen and retained by the defendant's adjuster. If the work and services supplied by Consolidated were lacking in the circumstances the costs of rectifying those lacks should not be borne by the insured. I find that the following expenditures are a direct result of the fire and its aftermath and are to be paid by the defendant to or on behalf of the plaintiff:

Storage arrears	$16,964.89
Consulting fees, Duchesne	500.00
Moving of the inventory	791.50
Inventory handling	3,210.60
Time spent by Simon on inventory	2,750.00
Total	$24,216.99

¶ 116 The expert fee to Rochon is part of the costs to be assessed. The item for professional fees of the Trustees and costs of $15,926.88 is too vague for me to consider. Some of it may have been charged in arriving at the "net sale proceeds" from the sale of the inventory.

Claim for Business Interruption Loss

¶ 117 The plaintiff was insured under the policy "against loss directly resulting from necessary interruption of business caused by All Risks of direct physical loss, destruction or damage..".

¶ 118 The policy provides for the calculation of such loss limited to the insured's interest in loss of "gross profit due to (a) Reduction in Turnover and (b) increase in Cost of Working", all as defined by

the policy.

¶ 119 A proof of business interruption loss sworn June 21, 1993 was duly given by Simon to the insurer through Delong. The claim was for $87,500 "for profit loss". No material accompanied the proof of loss showing how the amount claimed was arrived at.

¶ 120 In his examination in chief Simon said that he had arrived at the amount claimed by taking the cost of the goods at Consolidated and multiplying it by 30% as his markup, though his customary markup was 35%. Taking the cost of the goods at Consolidated at $260,000, as claimed in the proof of loss for the goods and multiplying by the markup I arrive at a figure of $78,000. There was no explanation as to the difference between this and the $87,500 claimed. If one uses a markup of 35% the result is $91,000.

¶ 121 In Reply testimony Simon testified that he sold about 62% of pre-fire stock in 1993 and in 1994 up to February and 86% of new stock purchased in 1993 for a total percentage of sales of both old and new stock of 77%.

¶ 122 Mrs. Cleveland reviewed the corporation's operations in the period January 1, 1993 to February, 1994 and was of the opinion that the corporation suffered no business loss under the terms of the policy. She describes the basis for the plaintiff's claim of $87,500 as follows:

> The insured has claimed $87,500 as a business interruption loss. No calculation or supporting documentation has been provided to us in this regard but we understand the claim represents an assessment of the lost margin otherwise obtained on the damaged fire merchandise of $260,431. This equates to a sales loss of $347,931, and a gross margin of 25.0%

¶ 123 Mrs. Cleveland doubts that this statement of sales is realistic in light of a declining sales trend from 1989 to and including 1992. She comments at p. 19 of the report:

> There is no evidence to support the insured's claim that it would have sold the damaged stock for sales proceeds of $347,931 in addition to the actual 1993 sales of $474,572. This implies the total expected sales level for 1993 was $822,503, an increase of $218,115, or 36.0% over 1992 sales of $604,388. This expected increase is contrary to the observed declining trends.

¶ 124 Mrs. Cleveland's analysis, however, is flawed by her assumption that sales in the year 1993 included sales of new goods of $200,000. She comments:

> This suggests Mr. Simon may have replaced his damaged inventory and mitigated his loss by selling alternative merchandise.

¶ 125 She was incorrect when she ascribed these sales to work boots because the work boots ordered were never shipped and thus never sold to account for the $200,000 of sales Mrs. Cleveland thought were new. When the error was pointed out to her Mrs. Cleveland admitted she had been in error but said that she did not think it made any difference to her opinion that no business loss had been proved because of the continuation of the decline in sales.

¶ 126 Under the policy the amount payable for business interruption loss is in respect to reduction in turnover. The amount of loss is "the sum produced by applying the rate of gross profit" to the amount by which the "turnover" during the "indemnity period" shall in consequence of the destruction or damage by a peril insured against, fall short of the "standard turnover".

¶ 127 "Rate of gross profit" is defined as the "rate of gross profit" earned on the "turnover" during

the financial year immediately before the date of the damage. Standard turnover refers to the turnover in the 12 months immediately before the date of the damage subject to adjustment for the trend of the business to arrive at a turnover reasonably accurate for the ordinary course of the business.

¶ 128 Mrs. Cleveland thought that there had been no reduction in turnover from the standard turnover of 1992 and thus that there could be no business interruption loss proved. On Schedule 6 of her report she charts the monthly sales from March 1991 to December 1993 and shows that the yearly sales continued to decline after the peak in 1991. In 1992 only one month's sales were improved over the same month in the previous year and the decline in sales for the year 1992 from 1991 was 43%. In 1993 the months before the fire showed declines of 51.6% and 41.21% from January and February of 1992. In the months of April, May and June 1993 the sales actually increased over those same months in 1992 but declined in all the succeeding months except for August. The result for the year was a decline in sales of 21.5% from the year 1992.

¶ 129 I am of the opinion that despite his 1993 sales figures mentioned above Simon has failed to show that he actually suffered a reduction in turnover from the standard of turnover of 1992 resulting from the loss of goods which I have found to have a value of $190,000. It is not for the defendant to disprove the claim, though it relies on Mrs. Cleveland's report in an attempt to do so. Rather the onus is on the plaintiff to prove its loss which means it must prove there was a reduction in turnover as a result of the loss in the fire before one can apply the rate of gross profit as defined in the policy. I cannot accept Simon's bald statement that he would have sold all the salvaged inventory in the year following the fire. If his sales in 1993 were 62% of the old undamaged stock on hand there is nothing to show that there was additional market demand for the stock which would have been available if the fire had not occurred.

¶ 130 The plaintiff has failed to prove the reduction of turnover within the meaning of the policy and therefore is not entitled to any recovery for business interruption loss under the policy.

Mitigation

¶ 131 The defendant says that the plaintiff failed to mitigate its loss when it failed to retrieve the salvage from Consolidated and place it on the market at a much earlier time when the defendant says it would have achieved a greater return for the salvage thereby reducing the loss. I find no merit in this argument for several reasons. The insurer did not pay some $9,000 for the cost of preparing the inventory as it was obligated to do under Statutory Condition No. 9(b) which provides that the insurer "shall contribute pro rata towards any reasonable and proper expenses" in connection with the securing of the property against further damage. Simon entered into the Salvage agreement with Consolidated as requested by Delong. It was Delong, acting for the defendant, who then instructed Consolidated not to release the goods to Simon without giving Delong a bid for the salvage. Rayner could not remember why he had not billed the insurer as he usually did for the inventory. Delong took no action to press Consolidated for its bid though he specifically said it was a prerequisite to releasing the goods to Simon. I am satisfied that the insurer put an impediment in the way of the plaintiff's obtaining the salvaged goods by putting the plaintiff in the position where it must first pay all the expenses to obtain possession of the goods. The plaintiff was under no legal obligation to purchase the salvage. Simon had merely told Delong he was interested. For those reasons I find that the defendant has failed in the onus of proving that the plaintiff failed to mitigate its loss.

¶ 132 The plaintiff has been successful in resisting the attempt by the defendant to show that the fire herein was deliberately set by Simon or someone at his instigation. There were sufficient indications of arson at the scene for the fire personnel to call in the Fire Marshal's Office. The adjuster had proper grounds for treating the matter as he did and the defendant was entitled to deny the claim and oblige the plaintiff to prove it. I found that there was nothing nefarious in the conduct of the adjuster in retaining

the salvager though it was not clear why he should have given Consolidated the instructions he did to bill the plaintiff and not advise Simon why he was doing so. No reason was given why the insurer failed to pay its share of the expenses for the inventory until nearly a year after the fire. However, this is not a case where exemplary damages are called for. The insurer has the right to make the plaintiff prove its claim under the policy and it did not exercise that right frivolously or without reasonable cause.

¶ 133 As to costs the plaintiff shall have its costs of the action on a party and party basis throughout. An award of solicitor and client costs to the plaintiff is not justified. The plaintiff was not successful on the second part of its claim and it is therefore sufficient to allow it costs of the whole action rather than making some adjustments for the defendant's success. This should remind the insurer that it must treat the insured fairly and not high-handedly in the matter of salvage.

¶ 134 Judgment to the plaintiff in the sum of $214,216.99 and costs on a party and party basis.

HALEY J.

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