Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.fac.gov.bc.ca
E-mail: facinfo@gov.bc.ca

DECISION NO. 2012-WFA-002(b)

In the matter of an appeal under the *Wildfire Act*, S.B.C. 2004, c. 34.

BETWEEN:	Robert Unger	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
BEFORE:	A Panel of the Forest Appeals Commission David H. Searle, C.M., Q.C., Panel Chair	
DATE:	November 18 and 19, 2014	
PLACE:	Victoria, BC	
APPEARING:	For the Appellant:	Neil R. MacLean, Counsel
	For the Respondent:	Cory Bargen and Darcie Suntjens, Counsel
	For the Third Party:	John Pennington, Counsel

APPEAL

[1] This is an appeal brought by Robert J. Unger in respect of the May 28, 2012 Review Order issued by Darrell Orosz, Fire Centre Manager, Cariboo Fire Centre, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), the Designated Decision Maker ("DDM") for this matter pursuant to section 58(1) of the *Wildfire Act* (the "*Act*").

[2] The Review Order was issued following a determination dated May 24, 2011 (the "Determination"), also issued by the DDM, which concluded that Mr. Unger had contravened section 5(1) of the *Act* and section 20(2) of the *Wildfire Regulation.* In the Determination, the DDM declined to levy an administration penalty under section 27(1)(a) of the *Act*. However, he did, pursuant to section 25(1)(a) of the *Act*, order that the government's fire control costs of $861,356.06 be paid by the Appellant, as prescribed by section 25(2) of the *Act.* The DDM also ordered that his orders pursuant to sections 25 and 26 be stayed pending any review or appeal.

[3] In the Review Order, the DDM confirmed his order that the Appellant pay the government's fire control costs.

[4] The powers of the Commission on an appeal are set out in section 41(1) of the *Act*, which states:

> **41** (1) On an appeal under section 39 by a person or under section 40 by the board, the commission may

> (a) consider the findings of the decision maker who made the order, and
>
> (b) either
>
> (i) confirm, vary or rescind the order, or
>
> (ii) with or without directions, refer the matter back to the decision maker who made the order, for reconsideration.

[5] In his Notice of Appeal, the Appellant requested the following relief from the Commission:

STATEMENT OF RELIEF REQUESTED

1. An order to vacate the Order of the DDM dated May 28, 2012 that Mr. Unger pay $861,356.06 for the Government's fire control costs;
2. An order that Mr. Unger is not required to pay any of the Government's fire control costs;
3. In the alternative, an order to reduce the amount of the Government's fire control costs ordered against Mr. Unger;
4. In the further alternative, an order to refer the matter back to a DDM with the direction that:
   a. The DDM has discretion under the *Wildfire Act* as to the amount of the Government's fire control costs to be awarded, if any, against Mr. Unger; and
   b. The DDM is to consider the Ministry policy described in Chapter 9.1 of the Ministry Policy Manual, Volume 1, effective July 11, 2008.

BACKGROUND:

[6] The facts giving rise to this matter are not in dispute because, at the commencement of this appeal, the Parties filed an Agreed Statement of Facts and Agreed Witness Statements. Consequently, no *viva voce* evidence was required during the appeal hearing.

[7] The fire occurred on May 2, 2009, after the Appellant lit a fire to dispose of a root wad, and the fire escaped. Final control of the fire was established by May 7, 2009, at 5:00 p.m. Though the Ministry's fire service was also engaged fighting a fire at 70 Mile House, crews and helicopters managed to arrive within an hour of the fire being reported.

[8] The Opportunity to Be Heard ("OTBH"), required by section 25(3) of the *Act* before a determination may be made by the DDM, was held on May 10, 2011, and the Determination is dated May 24, 2011.

Summary of Evidence at the May 10, 2011 OTBH

[9] Drawing from the transcript of the May 10, 2011, OTBH, part of the evidence of the Ministry's Compliance Investigator, Diane Lewthwaite, is provided below:

Fire C40053 started on the afternoon of May 2, 2009, approximately 15 kilometres southwest of the municipality of Clinton, in the province of British Columbia. At the time of the fire ignition, winds were gusting to 36 kilometres per hour and fire indices indicated that the Fire Danger Class was calculated at day 4 of Danger Class 3 at the Meadow Lake weather station and day 8 of Danger Class 2 at the Clinton weather station. The area of origin and area of initial fire spread was predominantly dry grass and brush. Initial phone report #51159 was received by Cariboo Fire Centre at 14:51 on May 2, 2009, it identified the location of the fire as 1348 Clinton Pavillion Road and advised that the fire was a controlled burn that had escaped. The size of the fire at this time was unknown, however information received in the initial phone report and subsequent reports indicated that the fire was spreading rapidly. At 15:45 the fire was ground attacked by Forest Service personnel, followed by helicopter bucketing approximately 1 hour later and as of May 7, 2009 at 17:00 final control of the fire had been gained with the final size of the fire estimated at 140 hectares. While only a small portion of the fire entered onto Crown land, the real impact of the fire was to the landowners to the north and west of the fire origin. While no structures were lost to the fire, area residents and property, including livestock, were put at risk. In addition, resources from various agencies including the Ministry of Forests, Lands and Natural Resources, Wildlife Management Branch, local RCMP and the Ministry of Transportation and Infrastructure were required in order to address the incident. In addition, the date of this wildfire event coincided with another significant wildfire event in the town of 70 Mile House creating further stress on available resources and equipment.

During the subsequent fire origin and cause investigation, the origin of fire C40053 was identified as occurring on private property described as district lot 806, in the Lillooet District. The registered owner of the property is currently Violet BYLER, however, at the time of the fire incident the property was registered to Robert UNGER and Violet BYLER. The cause of the fire was determined to be as a result of an escape of a Category 1 open fire on private land. No evidence of any other probable or reasonable fire cause was found at the fire origin. This investigation identified a potential non-compliance of the Wildfire Act and one potential non-compliance of the Wildfire Regulation. It is believed that these non-compliances contributed to the ignition and spread of fire C40053.

Investigator's Conclusion:

Evidence gathered during the course of this investigation, and the Fire Origin and Cause investigation, support the conclusion that Fire C40053 resulted from an escape from a Category 1 open fire located on District Lot 806, Lillooet District. No evidence was found that would imply a wilful or intentionally negligent act and it should be stated that site and weather conditions both played a significant role in this incident. Wind speeds recorded for the date and time of the fire's ignition indicated that wind speeds ranged from 13 – 20 kmph with gusts up to 36 kmph. Winds were generally from the southeast. These wind gusts would have quickly fanned any sparks from a

> small fire into the adjacent fuels. The fuels adjacent to the root wad were primarily cured, dry grass and brush. These fuels would have supported fast and aggressive fire behaviour. Once the fire had advanced into grass and brush it likely would have been impossible to contain. …

[10] Diane Lewthwaite also stated:

> No attempt at containment of the burn site, either by rocks, fuel break or any other form of barrier between the burn site and adjacent dry fuels was found during the fire origin and cause investigation. …

[11] Counsel for the Appellant, Neil MacLean, in his opening remarks, said:

> NM: I will begin and speak very briefly. First of all, I thank the Ministry for the OTBH and to reconfirm what was contained in Mr. Unger's written submission that he accepts Diane Lewthwaite's conclusions concerning the contraventions of Section 5.1 of the Act and Section 22 of the Regulation. …
>
> [Emphasis added]

[12] Robert Unger first apologized for his initial lack of forthrightness, and said of the incident:

> RU: I think I would like to just make an opening comment. This has been a pretty traumatic…this was a pretty traumatic event. I've felt many emotions since the fire event and also in the days and weeks leading up to this hearing. Anxiety about what might happen today. Certainly remorse for the impact this had on the community and considerable guilt for not telling the truth about how the fire actually started. And depression for which I'm currently receiving treatment. I'm also hoping that today will be the start of some closure on this matter; for both the Ministry, for myself and for the community. I'd like to apologize to Diane and the Ministry for not telling the truth about how the fire started initially.
>
> DL: Thank you for that Robert but not necessary but thank you.
>
> RU: After the I discovered that the fire has crossed Kelly Lake Road – I believe it was from a burning ember in one of those fir trees – I immediately got in my truck and headed towards Clinton to try and to notify emergency that there was a fire there. On my way into town, even a km from the site, I noticed that one of my neighbours, Mrs. Scott was outside in her driveway. I didn't have a phone at the house at the time and there was no cell coverage there. So at the time I thought was best that I pull over there and ask Mrs. Scott to make the call for me and also to…that would allow me to go back to the fire site and tend to monitor it or see what I could do about it. It was pretty clear that once it crossed the road it wasn't about to be stopped. The winds were blowing up the slope and of course I was in absolute dread at the time because I couldn't turn back the clock in terms of what was happening. I went back to the…I drove back to the house and stayed there because I wanted to make sure the fire didn't cross back over the street, even though it eventually did. I sent my friend Tim Corkin up the road in my truck to alarm…I sent to ask him…to two of my neighbours to the north…my neighbour

> Bev Henricks…I asked him to call or stop in at Bev's – I didn't have a phone – and ask her to alarm…to call the neighbours. I was concerned about the one place on the hillside – the fire was going up there but I didn't know how they…I'd never gone up there before so I didn't drive up there. I felt that Bev would make the calls and let our neighbours know that there was a wild fire. After that, Tim came back and we fought the fire for a bit and it started to go south and then it crossed the road again and was heading towards my neighbour to the south and southwest. I knew his house had considerable fire break around it. He wasn't there at the time but I drove up there and I noticed the neighbour south of him, Darrell, had mobilized some equipment and he was building a fire brake around the house so I felt that this situation had – that they would be able to control this situation. I'm not sure when the fire department arrived. I don't think they had arrived by that time. Then I went back and spent a lot of time trying to control the fire from moving towards my house on the south side of the road. It was heading south and west and this was south and east. …

[13] Mr. Unger continued:

> RU: So I think we went…I was staying in a hotel in town and I think we left the site probably…once the Ministry arrived they ran their pumps in there and we were sure the guard would hold. The fire also went up south but it petered up on the bank and there was grass there but it had been logged before so it didn't go anywhere in that direction. I think about 11:00 or 11:30 that night we back to town. I showered up – maybe a half hour back in town – and I went…I came back out to make sure that in the area C there, where the big fire was smouldering and where it was at its perimeter, I made sure…I pulled back with a shovel any debris that might reignite the fire. I think that's essentially what I'd like to say about the efforts we made after the fire crossed Pavillion Clinton Road. You know this was a traumatic event for me. When I saw that fire burning up the side of the road…on the other side of Pavillion Clinton Road, I was full of adrenalin and my heart was racing. I recall thinking…absolute dread at what had occurred. I realized that I couldn't stop it. That it had escaped. Not only the burn pile but the area I thought it was confined in.

The Review Order

[14] The Appellant then requested a review by the DDM, on the issue of whether he should have to pay the government's fire control costs. The Appellant did not request a review of the findings in the Determination that he had contravened the *Act* and the *Wildfire Regulation*.

[15] The review was preceded by a review hearing before held on May 11, 2012, a year later, and the Review Order is dated May 28, 2012. The Review Order deals in depth with the Ministry's policy 9.1. It is unnecessary to relate the discussion in the Review Order about policy 9.1, because the version of the policy that applied at the time of the fire was withdrawn and replaced, and the Panel has found, for the reasons provided below, that the DDM's discretion was not fettered by the policy. However, for the purpose of understanding the Appellant's appeal submissions, a

brief summary is provided as follows. At the time of the fire, policy 9.1 provided that owners/occupiers of private land would be billed for fire suppression costs for fires they caused on their land, unless there was proof of fire insurance coverage for the cost of the fire control activities to protect forest lands or grass lands (or proof of a Cost Sharing Agreement or Service Agreement, which are irrelevant to the present appeal). If the owner/occupier caused or contributed to the fire by a willful act or omission, they would be billed for fire control costs regardless of those exceptions.

[16] Unknown to Mr. Unger, shortly before the Determination was issued, a revised or "interim" policy 9.1 was circulated within the Ministry, to address a potential inconsistency between section 25 of the *Act* and the insurance policy exemption in policy 9.1. Under revised policy 9.1, there was no reference to an exemption for private land owners with proof of valid fire insurance coverage for the cost of fire control activities to protect forest lands or grass lands. However, the revised policy continued to include an exemption for the government's costs associated with wildfire control in support of a fire department.

[17] In Mr. Unger's case, the DDM found that the government's fire control costs were not in support of a fire department, as his land was not within the jurisdiction of a fire department. The DDM concluded that the exceptions in the former policy 9.1, and the remaining exception in the revised policy 9.1, did not apply to Mr. Unger.

The Appeal

[18] The Appellant's Notice of Appeal to the Commission is dated June 18, 2012. The Notice of Appeal sets out several grounds for appeal, including that the DDM erred in interpreting Ministry's policy, fettered his discretion, and exercised his discretion unreasonably and unfairly. The Appellant made additional arguments in his revised statement of points and at the appeal hearing. Those additional arguments are summarized below.

[19] By a letter dated June 21, 2012, the Forest Practices Board requested that it be added as a party to the appeal, pursuant to section 39(2) of the *Act* and section 131(7) of the *Forest Practices Code of British Columbia Act*.

[20] On April 9, 2013, the Appellant applied to the Commission for an order requiring the Respondent to produce certain documents prior to this appeal proceeding. At that time, the appeal hearing was scheduled to commence on June 25, 2013.

[21] In a decision dated April 22, 2013 (Decision No. 2013-WFA-002(a)), the Appellant's application was granted in part, with compliance required by April 25, 2013.

[22] On June 14, 2013, counsel for the Respondent wrote to the Commission on behalf of all parties, and advised that the parties had consented to an adjournment of the appeal hearing, on the basis that they needed additional time to prepare. Accordingly, the Commission adjourned the hearing. In the months that followed, the parties requested further time for preparations, and advised that they would be able to estimate of the number of days needed for the hearing after they had all

submitted revised statements of points. By January 15, 2014, the Commission had received all of the revised statements of points.

[23] In a letter dated February 3, 2014, the Commission requested that the parties indicate their availability for hearing dates in July, August or September 2014. However, due to the parties' schedules, the hearing was scheduled to commence on November 18, 2014.

[24] While this matter was finally brought before the Commission for a hearing on November 18 and 19, 2014, approximately five years and six months after the fire, the delay seems to be mainly due to the parties' availability, or lack thereof.

[25] Administrative tribunal proceedings are intended to be relatively expedient compared to proceedings in a court of law. "Expedient" is not how this Panel would describe these proceedings, taken in their totality from fire to final disposition.

[26] The Appellant submits that the Review Order and the Determination should be "vacated" on the basis that:

- the Review Order and the Determination are incorrect at law, as the DDM misinterpreted sections 25 and 27 of the *Act* as providing him with no discretion to order that a person pay a portion of the fire control costs;
- the Review Order and the Determination are unlawful and unsupportable as they were made in violation of the fundamental rule of law, and were contrary to Ministry policy at the time of the fire;
- the DDM's discretion was unlawfully fettered by a new policy that the Ministry developed before the Determination was issued, and the opinions of other Ministry staff regarding that policy;
- the Review Order and the Determination were made in a manner that breached the Appellant's right to procedural fairness, as he was not provided with document disclosure necessary for him to have a meaningful opportunity to be heard, and there was institutional and individual bias against the Appellant in relation to the Ministry's new policy; and
- the Review Order and the Determination are unreasonable and based on mistaken factual assumptions, including a purported admission by the Appellant that he lit the campfire when it was unsafe to do so (the Appellant submits that he thought it was safe to do so).

[27] At the appeal hearing, the Appellant also argued that he was duly diligent, based on the defence of due diligence under section 29 of the *Act*.

[28] The Respondent opposes the appeal, and submits that:

- the DDM has no discretion under section 25 of the *Act* to make an order for fire control costs that is less than full costs;
- the rule of law required the Ministry's former policy to be amended, and required the DDM to make an order that is consistent with the legislation;
- the DDM's discretion was not fettered by a Ministry policy or an opinion expressed by other Ministry staff;

- there was no breach of procedural fairness, and even if there was a breach, it may be cured by the appeal hearing given that the Appellant had the opportunity to present fresh evidence and arguments based on that evidence;
- the DDM's decision was not unreasonable or based on mistaken factual assumptions; whether the Appellant admitted that he lit the fire believing it was unsafe to do so was not determinative; fault or negligence may be a factor in determining whether to order fire control costs; and, the fact that no defence of due diligence or mistake of fact was advanced before the DDM was no doubt a factor in the DDM's decision.

[29] The Forest Practices Board's submissions focused on the interpretation of section 25(2) of the *Act*. The Forest Practices Board submits that the Respondent's "all or nothing" approach to ordering fire control costs may lead to absurd or unjust results in some cases, and this interpretation should be avoided. The Forest Practices Board also submits that a person who may be the subject of a determination under section 25 is entitled to procedural fairness. However, the Forest Practices Board took no position on the facts of this case or the amount of fire control costs, if any, that the Appellant should pay.

ISSUES

1. Does the Commission need to address the issues raised by the Appellant, of bias or the perception of bias, fettering of discretion and other breaches of the principles of natural justice alleged in the proceedings below before the DDM at the OTBH and the review hearing?
2. On the merits, has the Appellant discharged the onus to prove due diligence?
3. Does the Commission need to address the issue of statutory interpretation ("all or nothing") raised by the Forest Practices Board?

RELEVANT LEGISLATION

[30] The following legislation is relevant to this appeal:

Relevant sections of the *Wildfire Act:*

Non-industrial use of open fires

5 (1) Except in prescribed circumstances, a person, other than a person carrying out an industrial activity, must not light, fuel or use an open fire in forest land or grass land or within 1 km of forest land or grass land.

...

Government may carry out fire control

9 (1) The government may enter on any land and carry out fire control if an official considers that a fire on or near the land endangers life or threatens forest land or grass land.

...

Recovery of fire control costs and related amounts

25 (1) After the government has carried out, for a fire on Crown land or private land, fire control authorized under section 9, the minister may

(a) determine the amount of the government's costs of doing so, calculated in the prescribed manner,

...

(2) Subject to subsection (3), the minister, except in prescribed circumstances, by order may require a person to pay to the government the amounts determined under subsection (1) (a) and (b) and the costs determined under subsection (1) (c), subject to any prescribed limits, if the person

...

(c) is an owner of the private land on which a fire referred to in subsection (1) originated or is a holder of a leasehold interest in that private land, or is an occupier of that private land with the permission of the owner or holder.

(3) The minister must not make an order under subsection (2) unless the minister, after giving the holder, occupier or owner an opportunity to be heard or after one month has elapsed after the date on which the person was given the opportunity to be heard, determines that the holder, occupier or owner caused or contributed to the fire or the spread of the fire.

Relevant sections of the *Wildfire Regulation:*

Campfire

20 (1) The circumstances in which a person described in section 5 (1) or 6 (1) of the Act may light, fuel or use a campfire in or within 1 km of forest land or grass land are as follows:

(a) the person is not prohibited from doing so under another enactment;

(b) to do so is safe and is likely to continue to be safe;

(c) the person establishes a fuel break around the burn area;

(d) while the fire is burning, the person ensures that

(i) the fuel break is maintained, and

(ii) the fire is watched and patrolled by a person to prevent the escape of fire and the person is equipped with at least

(A) one fire fighting hand tool, or

(B) 8 litres of water in one or more containers;

(e) before leaving the area, the person ensures that the fire is extinguished.

(2) Without limiting subsection (1), a person who lights, fuels or uses a campfire must ensure that the fire does not escape.

(3) If a campfire spreads beyond the burn area or otherwise becomes out of control, the person who lit, fueled or used the campfire

(a) immediately must carry out fire control and extinguish the fire if practicable, and

(b) as soon as practicable must report the fire as described in section 2 of the Act.

Determination of government fire control costs

31 (1) For the purposes of section 25 (1) (a) and 27 (1) (b) of the Act, the manner in which the amount of the government's fire control costs in respect of a particular fire is to be calculated is

(a) by ascertaining the sum of the following costs, expenditures and charges that are attributable to the fire:

(i) hourly wages and overtime wages of responding employees, including payroll loading costs;

(ii) distance charges for use of government and private vehicles;

(iii) food, transportation and accommodation expenditures;

(iv) costs for expendable supplies and materials consumed;

(v) air tanker fuel costs and flight costs;

(vi) helicopter fuel costs and flight costs;

(vii) aircraft basing charges (preparedness) for contracted aircraft;

(viii) retardant and other suppressant costs;

(ix) rent on use of equipment;

(x) replacement, repair or cleaning of damaged or used vehicles or equipment, directly resulting from the fire control;

(xi) private goods and services contracted, hired, rented or purchased;

(xii) investigation, research and analysis services related to

(A) post-incident evaluation,

(B) contingency plan reviews, and

(C) other incident follow-up activities;

(xiii) consulting and other professional charges;

(xiv) rehabilitation and/or slope stabilization costs, and

(b) by adding to the sum ascertained under paragraph (a) for overhead an amount equal to the greater of

(i) $200, and

(ii) 20% of the amount determined under paragraph (a)

to arrive at the total dollar amount of the government's fire control costs for the fire.

DISCUSSION AND ANALYSIS

Issue 1

Does the Commission need to address the issues raised by the Appellant, of bias or the perception of bias, fettering of discretion and other breaches of the principles of natural justice alleged in the proceedings below before the DDM at the OTBH and the review hearing?

[31] It is the Panel's view that the Commission need not address at length the matters raised below by the Appellant, because the proceedings before the Commission, which are in the nature of a hearing *de novo*, provided the Appellant with a full and fair opportunity to offer new evidence and argument. In *Weyerhaeuser Company Limited v. Government of British Columbia* (Appeal No. 2000-FA-009, March 21, 2002), at page 17 [*Weyerhaeuser*], the Commission considered its statutory powers and procedures, and concluded that it may conduct an appeal as a new hearing of the matter. Under section 131(12) of the *Forest Practices Code of British Columbia Act* (which apply to appeals under the *Act* by virtue of section 39(2) of the *Act*), parties may make submissions as to facts, law and jurisdiction, may present evidence that was not before the person who made the appealed order, and may ask questions. Under section 131(15) of that Act, the parties may question witnesses. Also, under section 41(1) of the *Act*, the Commission has broad powers to confirm, vary or rescind the order that has been

appealed, or refer the matter back to the decision maker who made the order, for reconsideration, with or without directions.

[32] Regarding the Ministry's failure to disclose certain documents to the Appellant before the OTBH regarding the Determination and the Review Order, the Panel finds that the Appellant received full disclosure of the relevant documents prior to the appeal hearing. Also, the Appellant had adequate opportunity at the hearing before the Commission to make submissions on both the former version of policy 9.1 and the revised policy. The Commission has previously held that procedural defects in the process below can be cured by a full and fair hearing of the matter before the Commission (e.g., see: *Rudy and Cecilia Harfman v. Government of British Columbia* (Appeal No. 1999-FOR-006, issued February 1, 2001)). Consequently, the Panel finds that any procedural defects in the proceedings before the DDM regarding the Determination and the Review Order have been corrected by a full and fair hearing of the matter before the Commission.

[33] Further, the Panel finds that the DDM's decisions did not turn on, and his discretion was not fettered by, the revised version of policy 9.1 or the opinions of other Ministry officials regarding policy 9.1. In the Review Order, the DDM stated that his discretion was "guided, in part," by policy 9.1. The Panel finds that the DDM considered the former and revised versions of the policy in his decision-making processes, but the policy was not determinative. Also, there was no institutional bias against the Appellant, based on the evidence.

[34] In any event, the Panel finds that neither version of policy 9.1 relieves the Appellant from liability for the fire control costs. As stated in the Review Order where it referenced policy 9.1, "the government's fire control costs were not in support of a fire department, as [Mr. Unger's land] does not fall within the jurisdiction of a fire department." On that basis, it appears that this exception in both the former policy and the revised policy does not apply to him. Regarding the insurance coverage exception in the former version of the policy, while an insurance policy naming the Appellant as the insured was filed before the Commission, the Panel finds that it is irrelevant for the reasons submitted by the Appellant. Specifically, the Appellant submitted that the availability of insurance funds "is an extraneous and irrelevant factor with respect to an order for fire control costs…." The Appellant also submitted that the DDM's discretion was "improperly influenced by the availability of insurance proceeds." In reaching its decision on this appeal, the Panel has given no weight to the Appellant's insurance coverage.

[35] In view of these findings, and what is stated below on Issue 2, rescinding the Review Order and referring this matter back to the DDM becomes unnecessary. As well, in view of the 5 ½ years that this matter has taken to get to this point, it is in the public interest to now make a final decision.

Issue 2

On the merits, has the Appellant discharged the onus to prove due diligence?

[36] Section 29 of the *Act* provides for a defence of due diligence in relation to contraventions of the *Act* and regulations. Section 29 of the *Act* states as follows:

> **29** For the purposes of an order of the minister under section 26, a person may not be determined to have contravened a provision of this Act or the regulations if the person establishes that
>
> (a) the person exercised due diligence to prevent the contravention,

[37] The Commission considered the statutory defence of due diligence in *Charles E. Kucera v. Government of British Columbia*, (Decision Nos. 2011-FOR-001(a) and 2011-FOR-002(a), issued October 6, 2011) [*Kucera*]. The Commission discussed the test for the defence at paras. 28 – 30 of *Kucera*:

> The leading case from the Commission's perspective on the test for the defence of due diligence is *Pope & Talbot Ltd. v. British Columbia*, [2009] B.C.J. No. 2492, a judgment of Madam Justice Fisher. In that case, the Court was considering the Commission's interpretation of the statutory defence as found in section 72 of the *FRPA*. The following are, for the purposes of this matter, the relevant comments by the Court:
>
> > 11 The Commission has interpreted this statutory defence in accordance with common law principles, following *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, and *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510. Its leading decision on the application of the defence under the *Forest and Range Practices Act* is *Weyerhaeuser v. The Government of British Columbia* (Decision No. 2004-FOR-005(b), January 17, 2006). The Commission has applied the interpretation in *Weyerhaeuser* in subsequent decisions, including the decision in this case.
> >
> > 12 *Sault Ste. Marie* established "strict liability offences" as offences where the doing of the prohibited act *prima facie* imports the offence but the accused may avoid liability by proving that he took all reasonable care. At p. 1326, Dickson J. (as he then was) set out the defence of due diligence as follows:
> >
> > > The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.
> >
> > 13 In *MacMillan Bloedel*, a majority of the B.C. Court of Appeal concluded that the company had established the defence of due diligence on the basis of a mistaken set of facts. The court described the defence, as set out in the above passage from *Sault Ste. Marie*, as having two alternative branches:

> [47] … The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event".

Consequently, he [Mr. Kucera] may only escape liability by establishing that he took reasonable care to avoid the particular event.

There is nothing in the evidence to suggest that Mr. Kucera did anything "to avoid the particular event" (i.e., the contravention). …

[38] The Commission has previously applied the test set out in *Kucera* to an appeal under the *Act*. At para. 86 of *Ken Damon Oler v. Government of British Columbia* (Decision No. 2012-WFA-001(a), issued August 19, 2013), the Commission stated as follows:

> The Panel notes that, in *Kucera*, the Commission discussed the legal test for the defence of due diligence, based on the BC Supreme Court's discussion of the statutory defence in *Pope & Talbot v. British Columbia*, [2009] B.C.J. No. 2492. Based on that test, the Commission held that, <u>if a person knew or ought to have known of the existence of the hazard that led to the contravention, the person may only escape liability for the contravention by establishing that he or she took reasonable care to avoid the contravention.</u>
>
> [underlining added]

[39] Similarly, in *Atco Wood Products Ltd. v. Government of British Columbia* (Decision No. 2010-FOR-001(a), February 28, 2012) ["*Atco*"], the Commission posed two questions to determine whether the defence of due diligence was proven: (1) what is the "particular event" or "contravention" at issue? and (2) did the person take all reasonable care to avoid the contravention? In addition, the Forest Practices Board noted that, at para. 256 of *Atco*, the Commission summarized the defence of due diligence as follows:

> … can the accused establish that it is innocent of the contravention under the second branch of the test (due diligence); specifically, did the accused take all reasonable care to avoid the particular event (contravention)?

[40] While counsel for Mr. Unger argued the defence of due diligence, and acknowledged that he had the onus of establishing the defence on a balance of probabilities, the Panel finds that he failed to prove it on a balance of probabilities.

[41] The Appellant intentionally started a fire on his private land, to burn a root ball. Section 5(1) of the *Act* states that a person (other than a person carrying out an industrial activity, which was not the case here) "must not light, fuel or use an open fire in forest land or grass land or within 1 km of forest land or grass land" except in prescribed circumstances. Such prescribed circumstances are set out in section 20 of the *Wildfire Regulation*. It provides that a person may light, fuel or use a campfire in or within 1 km of forest land or grass land if criteria listed in

subsections 20(1)(a) through (e) are met. For example, it must be safe to light a campfire, and the person must establish a fuel break around the burn area. Also, while the fire is burning, the person must ensure that the fuel break is maintained, and the fire is watched and patrolled by a person to prevent the escape of fire and the person is equipped with at least one fire fighting hand tool or 8 litres of water. Further, before leaving the area, the person must ensure that the fire is extinguished.

[42] Notably, the phrase "fuel break" used in subsection 20(1)(d) of the *Wildfire Regulation* is defined in section 1 of that regulation, as follows:

> **"fuel break"** means
>
> (a) a barrier or a change in fuel type or condition, or
>
> (b) a strip of land that has been modified or cleared
>
> to prevent fire spread;

[43] Thus, the Appellant was obligated to comply with the criteria in section 20(1) of the *Wildfire Regulation* when he lit the fire on his land; otherwise, he was in contravention of section 5(1) of the *Act*.

[44] Due diligence is about "prevention" and foreseeability. The burning of the root ball was a form of clean up that the Appellant had regularly used in the past, even though at least one neighbour had expressed concern. That expression of concern was ignored, with the Appellant continuing to use fire as a method of clean up. On this particular occasion, due to winds ranging from 13 – 20 km/h with gusts up to 36 km/h, the fire got away from Mr. Unger. In these circumstances, the risks associated with lighting the root ball, and the potential for the fire to escape the burn area, were foreseeable.

[45] Regarding prevention, although Mr. Unger had a water pump available, the water source was too far away from the fire, rendering this piece of equipment of no practical value. From the evidence, Mr. Unger was reduced to fighting the fire with a shovel and rake. Significantly, Mr. Unger had failed to arrange communication and had to rely upon a neighbour, who just happened to be home, to report the fire and alert other neighbours using her telephone.

[46] As stated earlier, the Ministry's fire service arrived relatively promptly even though they were also engaged in fighting another fire at 70 Mile House.

[47] Moreover, the Panel finds that the Appellant failed to establish a "fuel break" as defined in the *Wildfire Regulation*. Although he asserts that he had removed a dead willow tree and created a fire guard along the east boundary of his property, the evidence in the agreed statement of facts is that the fuels adjacent to the root wad were primarily dry grass and brush, and the area of initial fire spread was the dry grass and brush. According to Ms. Lewthwaite's investigation report, which has not been challenged, those fuels "would have supported fast and aggressive fire behaviour…" and "No attempt at containment of the burn site, either by rocks, fuel break or any other form of barrier between the burn site and adjacent dry fuels was found during the fire origin and cause investigation. …"

[48] Consequently, based on weighing all of the evidence before the Commission on this appeal, this Panel finds that Mr. Unger lit a campfire on his property when it was not safe to do so, he failed to establish a proper fuel break, and he allowed the fire to escape, contrary to section 20(1) of the *Wildfire Regulation* and section 5(1) of the *Act*.

[49] While the consequences were unintended, Mr. Unger clearly did not take all reasonable care to avoid the contravention. Even though his actions in trying to extinguish the fire are stated to be commendable, the Panel's view is that no less should be expected.

[50] This Panel cannot find any factors that would mitigate against the making of an order for the full recovery of the Government's fire control costs, calculated in accordance with section 31(1)(a) and (b) of the *Wildfire Regulation,* in the amount of $861,356.06.

Issue 3

Does the Commission need to address the issue of statutory interpretation ("all or nothing") raised by the Forest Practice Board?

[51] Having come to the conclusion, on the merits, that the Appellant shall pay to the Government the full amount of the fire control costs, as stated above, it becomes unnecessary to address the "all or nothing" statutory interpretation issue raised by the Forest Practices Board.

[52] However, had this Panel decided to order less than the full amount of fire control costs, this Panel would not have hesitated to do so, mainly as a common sense interpretation of the *Wildfire Regulation* based on the arguments put forward by the Forest Practices Board.

DECISION

[53] In making this decision, the Panel has considered all of the Parties' submissions, whether or not specifically referred to herein.

[54] For the reasons provided above, the cost recovery order made by the DDM in his Review Decision dated May 28, 2012, which confirmed his May 24, 2011 Determination requiring the Appellant to pay $861,356.06 for the Government's fire control costs, is confirmed.

[55] Accordingly, the appeal is dismissed.

"David H. Searle"

David H. Searle, C.M., Q.C., Panel Chair

December 29 , 2014