Forest Appeals Commission

Citation: *Eldon Whalen v. Government of British Columbia*, 2023 BCFAC 3

Decision No.: FAC-WFA-22-A004(a)

Decision Date: 2023-05-16

Method of Hearing: Conducted by way of written submissions concluding on February 27, 2023

Decision Type: Final Decision

Panel: Cynthia Lu, Panel Chair

Appealed Under: *Wildfire Act*, S.B.C. 2004, c. 31

Between:

Eldon Whalen

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Lane J. Perry, Counsel

For the Respondent: Tyna Mason and Shaun Ramdin, Counsel

FINAL DECISION

INTRODUCTION

[1] Eldon Whalen (the "Appellant") appeals Contravention Order No. DSS-39523 and Administrative Penalty and Cost Recovery Order No. R40216 (collectively, the "Orders"), issued by Carol Loski, Strategic Advisor, BC Wildfire Service, acting as a delegated decision maker ("DDM") on behalf of the Minister of Forests (the "Respondent") under section 58(1) of the *Wildfire Act*, S.B.C. 2004, c. 31 (the "*Act*").

[2] The Orders were issued following an investigation into a complaint filed by the BC Wildfire Service ("BCWS") upon responding to a wildfire reported on May 10, 2019, located near Muldoon Road in the Kispiox Valley within the Skeena-Stikine Region of BC.

[3] The Orders were based on a finding that the Appellant had contravened s.5(1) of the *Act* and s.21(2) of the *Wildfire Regulation* (the "*Regulation*"). Under s.27(1) of the *Act*, the Respondent levied a $3,000 administrative penalty and ordered the Appellant to pay $100,688.12 for the government's costs of fire control.

[4] The powers of the Forest Appeals Commission (the "Commission") in an appeal under the *Act* are set out in s.41(1) which states that 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] The Appellant asks the Commission to rescind all aspects of the Orders, including the finding of contravention, the administrative penalty, and the order for cost recovery. The Respondent asks the Commission to confirm the determination of contraventions under the *Act* and the associated administrative penalty and cost recovery order.

BACKGROUND AND FACTS

[6] The Appellant owns a property located on Muldoon Road in the Kispiox Valley (the "Property"). On March 31, 2019, the Appellant lit a Category 2 Open Fire on the Property to dispose of some vegetative material (the "Burn Pile") generated by land clearing. The Appellant remained at the site of the Burn Pile on March 31, and regularly returned to monitor and attend to the Burn Pile with buckets of water and hand tools over the following days and weeks.

[7] The Appellant was driving by the Property on May 10, 2019, and saw smoke and flames near the Burn Pile site. The Appellant called 9-1-1 to report a wildfire, he told dispatchers he did not have water or tools to actively fight the fire.

[8] BCWS was immediately dispatched to the wildfire and a crew was on scene within 1 hour of the fire being reported. The fire was assigned fire number R40216 (the "Wildfire").

[9] BCWS responded to the Wildfire with ground crews, helicopters, air tankers, and fire retardant. The Wildfire was deemed "under control" by BCWS on May 16, 2019, and declared extinguished on June 17, 2019. Overall, the Wildfire covered 11.5 hectares of land, including 10.8 hectares of private land and 0.7 hectares of Crown land. The Wildfire burned fence lines and trees and threatened homes and infrastructure. Ultimately there were no major infrastructure losses that resulted from the Wildfire.

[10] During this time, investigations were also underway. On May 10, 2019, BCWS submitted a complaint to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry") regarding the Wildfire and Natural Resource Officer Doug Gow ("NRO Gow") was assigned to investigate the complaint. NRO Gow interviewed the Appellant on May 10, 2019, and interviewed a neighbour, Mr. Henderson, on May 14, 2019.

[11] Wildfire investigators from the BCWS investigated the Wildfire's origin and cause ("FOC") on May 11, 2019. Investigators determined the Wildfire was caused by an open fire left unattended and not extinguished, which smouldered and escaped due to fire creep and gusting winds weeks after its initial ignition. The Appellant contends that the Burn Pile fire was not left unattended. It is not disputed by the parties that the Burn Pile fire was the origin of the Wildfire.

[12] On May 4, 2021, a NRO Investigative Report was submitted to the Ministry, concluding that the Appellant had contravened s.5(1) of the *Act* and s.21(2) of the *Regulation.* On November 5, 2021, the Appellant was notified of the results of the investigation. The DDM held an Opportunity to be Heard (OTBH) oral hearing with the Appellant on December 7, 2021. Following the OTBH, the DDM issued the Orders on May 2, 2022.

ISSUES

[13] For the purposes of this analysis, I identify and address the following issues as raised by the parties:

1. Did the Appellant contravene Section 5(1) of the *Act*, and/or Section 21(2) of the *Regulation*?

If the Appellant contravened the above sections of the *Act* or *Regulation*,

2. Do the defences of due diligence or mistake of fact under Section 29 of the *Act* apply?
3. If no statutory defences apply, what is the appropriate administrative penalty amount to levy on the Appellant?
4. Is the Appellant responsible to pay the government's costs of fire control?

ANALYSIS AND DISCUSSION

1. Did the Appellant contravene Section 5(1) of the *Act*, and/or Section 21(2) of the *Regulation*?

Appellant's Submissions

[14] The Appellant submits that the intent of s.5(1) of the *Act* is to place liability on those who are unfamiliar with fire restrictions, irresponsible, and who act stupidly. The Appellant submits that he does not fit these criteria and, therefore should be able to rely on the provisions found in s.27 and s.29 or the *Act.*

[15] Additionally, the Appellant submits that he lit a Category 2 Open Fire in accordance with s.21(1) of the *Regulation:*

> **Category 2 open fire**
>
> 21 (1)The circumstances in which a person described in section 5(1) or 6(1) of the Act may light, fuel or use a category 2 open fire 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 and there is a risk of the fire escaping the person ensures that
>
> (i) the fuel break is maintained,
>
> (ii) a fire suppression system is available at the burn area, of a type and with a capacity adequate for fire control if the fire escapes, and
>
> (iii) 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;
>
> (e) before leaving the burn area, the person ensures that the fire is extinguished.

> (2) Without limiting subsection (1), a person who lights, fuels or uses a category 2 open fire in the circumstances set out in subsection (1) must ensure that the fire does not escape.

[16] The Appellant submits he satisfied s.21(1)(a) to (d) of the *Regulation:* he was not prohibited from lighting a Category 2 open fire (s.21(1)(a)), he determined conditions were safe and were likely to continue to be safe (s.21(1)(b)), the snow and water around the Burn Pile meets the requirement for a fuel break (s.21(1)(c)), he was equipped with water and at least 1 fire-fighting hand tool (s.21(1)(d)).

[17] In addition, the Appellant submits there is a distinction between the terms "burning fire" and "embers." The Appellant submits that the "burning fire" was extinguished and was not left unattended (s.21(1)(e)). The Appellant submits that he ensured the Burn Pile fire, on March 31, 2019, did not escape the perimeter of the Burn Pile (s.21(2)(2)).

[18] The Appellant submits "after March 31 when the Burn Pile was lit it is believed that embers travelled underground, through water-soaked ground through some fuels before reaching the forest. A "burning fire" cannot be treated the same as the embers. A "burning fire" suggests flames, crackling of wood, and something that is clearly alive or active. A "burning fire", the Appellant submits, does not include embers surreptitiously travelling underground without emitting any palpable signs that it is active. There is a recognizable difference between a "burning fire" and embers."

[19] The Appellant submits that he did not leave the Burn Pile unattended. While the Burn Pile was found smouldering on April 1, the day after it was lit, it was not "left to smoulder."

Respondent's Submissions

[20] The Respondent submits that the Appellant's obligations to the Burn Pile fire was to comply with all requirements set out in s.21 of the *Regulation*. The Orders state that the Appellant contravened s.5(1) of the *Act* and s.21(2) of the *Regulation.* The Respondent submits the Appellant contravened both Sections 21(1)(e) and 21(2) of the *Regulation* and, as a result, he failed to comply with s.5(1) of the *Act.*

[21] Section 21(1)(e) of the *Regulation* states: "before leaving the burn area, the person ensures that the fire is extinguished." The Respondent submits there is no credible evidence that the fire was extinguished prior to the Appellant leaving the burn area. The Respondent points to the Appellant's interview with NRO Gow on May 10, 2019, where the Appellant stated that he noted the Burn Pile fire was smouldering the day after it was lit and that he noticed smoke from the pile 2-3 weeks prior to the Wildfire ignition. The Respondent also points to the FOC Report completed by BCWS wildfire investigators who noted that the Burn Pile was unextinguished and unattended when it escaped due to fire creep and winds, causing the Wildfire.

[22] The Respondent submits that the Appellant's obligation under *Regulation* s.21(2) remained in effect as long as the Category 2 open fire continued to burn, through April and early May 2019. The Respondent takes the position that the Wildfire, which ultimately burned 11.5ha, was plainly not contained in the Burn Pile area.

[23] The Respondent submits that the Appellant's affidavits submitted in November 2022 for this appeal contradict earlier admissions made in the Appellant's May 10, 2019 interview with NRO Gow and written submissions provided during the OTBH process preceding the determinations that occurred November 5, 2021. The Respondent submits that evidence provided closer to the date of the Wildfire should be preferred to the new evidence as it is more likely to be accurate, as it is based on recollections recorded closer in time to the relevant events.

[24] To this point, the Appellant's reply submissions caution that the May 10, 2019 interview with NRO Gow is unreliable, as the Appellant admitted during the interview he was under stress and his brain was not at full capacity at the time. The Appellant also submits that the neighbour interviewed by NRO Gow, Mr. Henderson, should not be considered a reliable witness due to the location of the neighbour's home. It has not been proven that Mr. Henderson has an unobstructed view of the Appellant's Property and the site of the Burn Pile. Nor has it been described or demonstrated how often Mr. Henderson observed the Burn Pile site following the initial day the Burn Pile was ignited.

Panel's Findings

[25] The term "fire" is not defined in the *Act* or *Regulation*. Similar and related terms, such as "campfire", "category 2 open fire", and "category 3 open fire", are defined in the *Regulation*. However, while these are specific examples of types of fires, these examples are best understood as subsets of fire, and as such do not limit the meaning of "fire" within the *Act* and *Regulation*. Looking beyond the *Act* for assistance in determining the ambit of what is meant by the legislature as "fire", Merriam-Webster defines "fire" as the phenomenon of combustion manifested in light, flame, and heat[1]. By definition, fire is the effect of combustion, a chemical process. "Burning" is an adjective defined as being on fire[2]. In *British Columbia v. Tolko Industries Inc.,* 2022 BCSC 2097, ("*Tolko*") at paragraph 91, the Court stated:

> "First, the grammatical and ordinary sense of the language in s. 29 does not support the Commission's restrictive interpretation. The word "fire" is unqualified. The word "wildfire" (presumably a type of fire) is not found in the section or defined in the *Act* or the *Regulation*." [emphasis added]

---

[1] "Fire" Merriam-Webster.com, 2023. https://www.merriam-webster.com/dictionary/fire.

[2] "Burning" Merriam-Webster.com, 2023. https://www.merriam-webster.com/dictionary/burning.

[26] Neither the *Act* nor the *Regulation* limit or otherwise qualify the term fire by use of the terms "burning fire" or "embers". Indeed, neither the *Act* nor the *Regulation* refer to the term "embers." The Appellant did not direct me to any submissions that further support the notion that a "burning fire" suggests "flames, crackling of wood, and something that is clearly alive or active." The Appellant did not make submissions to further describe this distinction between a "burning fire" and "embers," or why "embers" fall outside of the definition of a fire, why the interpretation of the term "fire" in the *Act* and *Regulation* should be limited to fire that is clearly or visibly active through flame or smoke, and/or burning on or above the ground's surface. In *Tolko,* the court held that the word "fire" is unqualified. No evidence was presented to me that suggests "fire" should be interpreted as the Appellant has suggested on the facts of this case.

[27] The Appellant does not submit any evidence, expert or otherwise, to support the assertion that a burning fire requires visible flames or smoke. Similarly, the Appellant does not submit any evidence to support the assertion that fires are only above-ground events and that a person who lights a fire in accordance with the *Regulation* is only responsible for fires which are visible or detectable by smoke or flame above or on the surface of the ground.

[28] Rather, it is clear to me that a person who lights an open fire as described in the *Regulation* has obligations that flow from the open fire so long as it is burning. The Appellant's obligations pertaining to the Burn Pile Category 2 Open Fire extended beyond the day he lit it. The Appellant was aware of this obligation, as is clear from his detailed account of the number of times he patrolled the Burn Pile fire following the ignition day, poured water on the pile, and dug into the ashes with a shovel. The fact that the Appellant ensured the Burn Pile fire did not escape its perimeter on March 31 or the day after, while required under the *Regulation*, is not sufficient to fulfil his obligations.

[29] The Appellant submits that the fuel break in place was the snow on the ground and water saturated soils surrounding the Burn Pile. Photographs included in the submissions, taken of the Wildfire and surrounding property on May 10, 2019, do not show signs of snow on the ground. There is no evidence before me to indicate when snow melted from the area. The Appellant has not made submissions on any other type of fuel break in place. In the absence of snow on the ground, in addition to no evidence being presented of any other fire break being installed or maintained, I find that a fuel break was not maintained, as required in s.21(1)(d)(i).

[30] The Appellant does not dispute he lit his Burn Pile, a Category 2 Open Fire, and that the Burn Pile fire was the origin of the Wildfire. The Wildfire reported by the Appellant on May 10, 2019, was larger than the 2m by 3m pile that he ignited weeks before. The evidence is conclusive that the Wildfire originated at the Burn Pile and burned beyond the perimeter of the Burn Pile. The FOC Report notes "fire creep" from the open fire as the cause of the Wildfire. The logical conclusion is that the open fire lit by the Appellant was not extinguished: it escaped and burned beyond its perimeter, resulting in a 11.5-hectare wildfire.

[31] Consequently, I find that the Appellant did not satisfy his obligations under *Regulation* s.21(1)(e). Additionally, the Appellant contravened s.21(2) of the *Regulation* as the Burn Pile fire was not contained to its original burn area of 2m by 3m.

2. Do the defences of mistake of fact or due diligence under Section 29 of the *Act* apply?

[32] Section 29 of the *Act* provides for defences in relation to administrative proceedings when a person is alleged to have contravened a provision of the *Act.* The defences under s.29 a person may establish are:

> (a) the person exercised due diligence to prevent the contravention,
>
> (b) the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
>
> (c) the person's actions relevant to the provision were the result of an officially induced error.

[33] The defences advanced by the Appellant are s.29(b) mistake of fact, and s.29(a) due diligence.

Appellant's Submissions on Mistake of Fact

[34] The Appellant submits that the mistake of fact that occurred was the Appellant believed the fire and embers to be extinguished because there were no visible signs of fire, including smoke, for a period of weeks between the initial lighting of the Burn Pile fire on March 31, 2019, and the day the Wildfire was discovered May 10. The Appellant submits that this mistake was reasonable and if the mistake was true, there would have been no contravention.

[35] The Appellant submits he genuinely believed the Burn Pile fire to be extinguished. The Appellant submits it was reasonable to believe the Burn Pile fire was extinguished because he poured water on it, did not see or smell smoke or flames, observed standing water around the pile, and noted that the ashes were cold and wet. The Appellant submits he did not know a fire could "creep" away from its initial burn site.

[36] The Appellant refers to an infographic pertaining to Category 2 and 3 fires, created by the BCWS, which he found during online research. The Appellant submits he believed he was confident he had fulfilled his obligations as described in this infographic. The Appellant also talked to a neighbour, after lighting the Burn Pile, who suggested digging into the ashes of the fire at the Burn Pile. The Appellant submits he dug into the ashes with a shovel.

Respondent's Submissions on Mistake of Fact

[37] The Respondent submits the Appellant is not entitled to rely on mistake of fact. The Respondent submits that the Appellant did not take reasonable steps to know the relevant facts, specifically whether or not the fire was extinguished. The Respondent submits that the Appellant did not research the relevant information to conduct an open burn safely and lawfully. The Respondent submits that given the Appellant's knowledge of smouldering at the burn site on April 1, 2019, smoke observed several weeks after the burn, changing weather conditions, and the fact that the Appellant did not physically pull apart the Burn Pile, it is not objectively reasonable for the Appellant to have assumed the fire was extinguished.

Panel's Findings on Mistake of Fact

[38] The Appellant's submission directs me to interpretations of due diligence and mistake of fact as accepted in *Tolko Industries Decision No. 2019-WFA-002(b) ("Tolko"), Forest Practices Board v. British Columbia, 2018 LNBCFAC 3 ("Forest Practices Board")* and *Apollo Forest Products Ltd. v. Government of British Columbia (Decision No. 2016-FRP-002(a), September 11, 2018).*

[39] In *Tolko*, the Commission outlined that "…mistake of fact focuses on reasonable care to know the true facts. The mistake of fact branch applies when the accused establishes that they did not know, and could not reasonably have known, of the existence of the hazard in question" (para 210). Essentially, before a defence of mistake of fact can be accepted, it must be established that the first hurdle of not having knowledge of the true facts it met. Then, a second significantly higher hurdle, that it was not reasonable to have known the true facts, must also be met. While I am not bound by previous decisions of the Commission, I find this line of reasoning to be both sound and helpful in my analysis, and I adopt the same approach to analyzing mistake of fact.

[40] The Appellant did not know the fire was not extinguished and did not know that fires could "creep," burn underground, or be burning without visible or olfactible smoke. However, the question that I must answer is if it was reasonable for the Appellant to know these things.

[41] The very authority referenced by the Appellant, *Tolko,* is of assistance in this matter as it addresses contraventions related to "holdover fires" associated with open burning of debris piles. The term "holdover fire" is defined in the BC Government's Wildfire Glossary, a publicly available list of terms commonly used to describe wildfire and fuel management[3].

---

[3] Holdover Fire is "a fire that remains dormant and undetected for a considerable time after it starts (particularly lightning-caused fires)." See "Wildfire Glossary" Government of British Columbia, 2023. https://www2.gov.bc.ca/gov/content/safety/wildfire-status/about-bcws/glossary#H.

[42] The Appellant has not established that he took reasonable steps to learn the relevant information and facts about burn piles, open burning, and fire before conducting the open fire burn. The Appellant has not demonstrated through his submissions, and he has not provided any expert evidence that suggests it is reasonable to believe, a fire can be considered extinguished due to the lack of visible smoke.

[43] The Appellant did not submit any evidence suggesting the Burn Pile was physically inspected and pulled apart to determine if the fire was extinguished. The Appellant did not provide any submissions to describe the degree to which he was able to dig into the pile with his shovel.

[44] The Appellant has established that he did not know the facts as to whether the Burn Pile was extinguished but has not established that it was reasonable for him not to know the true facts. I do not find it unreasonable to expect persons engaged in open fire burning of debris piles to know about the potential for holdover fires and fire creep. I do not find the Appellant took reasonable steps to determine both what it means for a fire to be extinguished or if the fire was in fact extinguished.

Appellant’s Submissions on Due Diligence

[45] The Appellant submits that due diligence means reasonable care and does not require “superhuman efforts.” The Appellant refers to previous Commission *Wildfire Act* decisions including *Petrus Jacobus Van Der Merwe v Government of British Columbia (Decision No. 2018-WFA-001(b)*, June 3, 2021); *Frank Schlichting v. Government of British Columbia (Decision No. 2013 – WFA-003(a), April 8, 2015)*; and *Ralph Stevenson v. Government of British Columbia (Decision No. 2015-WFA-003(a), July 8, 2016)*. For each of these previous decisions, the Appellant’s submissions identify how the conduct in this case was unlike the conduct of previous appellants and therefore should be considered duly diligent.

[46] In the reasons provided in the Orders, the DDM referred to the Appellant’s professional occupation as a realtor, suggesting that this professional background would mean the Appellant has above average understanding of rules and regulations regarding use of land. The Appellant submits that his occupation as a realtor has no bearing on his knowledge of open burning rules and regulations. The Appellant submits that neither the *Act* nor *Regulations* provide instructions to assist or direct the Appellant to investigate the potential for embers burning underground.

[47] In his July 8, 2022 affidavit, the Appellant states that he had no previous experience with fire related policies or regulations. In his November 16, 2022 affidavit, the Appellant submits that it is unfair to expect that he should have above-average knowledge of regulations due to his profession as a realtor. He trusted and relied on the advice from neighbours. In addition, the Appellant conducted some self-directed research on the internet for additional information and found a BCWS infographic on open fire regulations.

[48] The Appellant submits that the reasonable care taken to avoid the contravening event included:

a. waiting for the optimal time of year to light the fire when there was a blanket of snow on the ground, so that melting snow would saturate the ground with water, reducing risk;
b. staying on site after lighting the pile;
c. pouring water on the pile when it was smouldering;
d. visiting the Burn Pile fire each day for a week, and several times over the following weeks;
e. bringing and pouring water on the remaining debris;
f. researching an infographic;
g. talking to a neighbour with experience with fires; and,
h. digging into the ashes with a shovel, when he found wet and cold ashes.

[49] The Appellant submits his conduct went beyond basic precautions and his shortcoming was that he failed to detect the below ground "fire creep."

Respondent's Submissions on Due Diligence

[50] The Respondent submits there is no evidence that the Appellant has demonstrated due diligence and took all reasonable steps to ensure the Category 2 Open Fire was extinguished and that it did not escape. The Respondent submits that the Appellant's observations that the Burn Pile was still smouldering on April 1, 2019, and the presence of smoke several weeks later should have reasonably led him to believe the fire was not extinguished. The Respondent submits that a person taking reasonable care would have concluded that the fire was not extinguished.

Panel Findings on Due Diligence

[51] Due diligence applies when reasonable care is taken to avoid a contravention. The question before me is then: Did the Appellant take all reasonable steps to avoid a contravention?

[52] The Appellant acknowledges his lack of knowledge regarding open burning best practices and regulations. I believe it is reasonable to expect someone who acknowledges the potential risk associated with open burning and also identifies that they possess insufficient knowledge in the area to take reasonable steps to address that knowledge gap.

[53] Prior to the burn, the Appellant did not contact any relevant authorities, including the local fire department, the Ministry of Forests, or BCWS, in order to learn more about open burning regulations, expectations, hazards, and potential consequences. Relying on

self-directed online research and the anecdotal knowledge of neighbours does not demonstrate a reasonable standard of care. Assuming neighbours will both have and be able to share all required knowledge and skills pertaining to open burning does not demonstrate a reasonable amount of care. The Appellant did not submit any reasons for why he should consider the advice from neighbours to be accurate, relevant, and complete.

[54] The Appellant submits a number of examples of what due diligence is not, to contrast his own actions in this case. I am not persuaded that since, in comparison, the Appellant's behaviour was different than the appellants in the referenced authorities, this means the Appellant's conduct meets a reasonable standard of care. In the same way that there is a range of reasonable conduct in conducting an open burn, there exists a range of unreasonable conduct. Simply because the unreasonable steps that the Appellant took in relation to the open burn differ from the unreasonable steps of other appellants in similar circumstances, this does not make those unreasonable steps reasonable. There exist myriad examples of conduct that does not meet a reasonable standard of care.

[55] Additionally, I do not believe the Appellant can simultaneously advance both arguments that he had no previous knowledge about open burning regulations and that he took reasonable care to avoid a contravention. Conduct demonstrating due diligence with respect to lighting an open fire is not limited to actions taken to monitor and/or extinguish the fire but must include care taken prior to lighting the fire.

[56] I find it may be useful to the Appellant and to future appeals to identify what conduct may have demonstrated a higher degree of care, or due diligence in this case. When setting out these examples of behaviour demonstrating an increased degree of care, it must be understood that this list is not a closed list. That is to say, these examples are not the only method(s) that an individual may undertake to demonstrate they were duly diligent in conducting an open burn. Additionally, if an individual undertakes an action that is found in this list, this is not dispositive of the issue of if they were duly diligent. That is an issue for the trier of fact in an individual case, based on the specific evidence presented. Rather, these examples are presented to assist individuals in understanding conduct that might be useful to consider prior to conducting an open burn.

[57] Conduct that assists in demonstrating a higher degree of care includes, but is not limited to:

a. seeking out the advice of forest professionals or wildfire specialists (e.g. BCWS, local fire department, Ministry of Forests) prior to conducting the burn in order to understand applicable regulations and best practices;

b. implementing acceptable best practices prior to ignition and through the duration of the burn;

c. maintaining a fuel break before and after weather conditions change;

d. retaining a fire suppression system and tools on site once smouldering or smoke is observed; and,

e. physically deconstructing the pile to check for hotspots and burning materials.

[58] The conduct listed above does not constitute a "superhuman" effort.

[59] During the OTBH, the Appellant noted one of the actions taken after the Wildfire was to hire a contractor to dig up the remnants of the Burn Pile and bury the remaining piles that were planned to be burned. This demonstrates one action within a range of reasonable actions.

[60] In the circumstances of this case, based on the evidence before me, I find that the Appellant has established neither the defence of due diligence nor mistake of fact.

3. If no statutory defences apply, what is the appropriate administrative penalty to levy on the Appellant?

[61] Section 27(3) of the *Act* outlines the factors that must be considered before an administrative penalty is levied:

> 27 (3) Before the minister levies an administrative penalty under subsection (1), he or she must consider:
>
> (a) previous contraventions of a similar nature by the person,
>
> (b) the gravity and magnitude of the contravention,
>
> (c) whether the contravention was repeated or continuous,
>
> (d) whether the contravention was deliberate,
>
> (e) any economic benefit derived by the person from the contravention, and
>
> (f) the person's cooperativeness and efforts to correct the contravention.

Appellant's Submissions

[62] In individually addressing each point under s.27(3) of the *Act*, the Appellant submits that (a) there have been no previous contraventions of a similar nature, (b) the gravity and magnitude of the Wildfire was low, (c) the alleged contravention was not repeated or continuous, (d) the alleged contravention was not deliberate, (e) there was no economic benefit derived, and, (f) the Appellant was cooperative and demonstrated efforts to correct the contravention. For the above reasons, the Appellant submits that an administrative penalty is unwarranted.

[63] In the Appellant's reply submissions, he further submits that the administrative penalty levied in the Order is unfair and too high. The Appellant submits that the contravention was not deliberate, and the Wildfire was not the result of deliberate

carelessness. As a consequence, the Appellant argues that the gravity and magnitude of the offence should not be considered as "high." Therefore, a lesser administrative penalty is warranted.

[64] As a comparative event, the Appellant submits that the scale of which the gravity and magnitude of the contravention should be measured against would be the Lytton fires that destroyed an entire town. The Appellant asserts that the destruction at the scale of the Lytton fires would be the benchmark of a "high" magnitude offence.

[65] In his reply submissions, the Appellant states:

> However, the Appellant still asks that consideration is paid to what would the gravity and magnitude of the alleged contravention had been if a house had burnt down if Ms. Loski and the Respondent are characterizing the Appellant's alleged contravention as "high".
>
> The Wildfire was undoubtedly for the Appellant, his wife, and their neighbours, but it also cannot be doubted that it could have been worse.
>
> The scale must consider the fires that tore through Lytton and wiped out an entire town. On this scale, the sheer destruction must be considered "high". To consider the gravity and magnitude as "high" begs the questions what else has been considered "high".

[66] The Appellant invites me to consider this wildfire "high" in gravity and magnitude in comparison to what else may be considered "high." The designation of "high" is an adjective and "must be coloured by just how devastating a wildfire can be on the spectrum of forest fires in British Columbia." The Appellant submits a finding less than "high" is appropriate.

Respondent's Submissions

[67] The Respondent submits that the administrative penalty of $3,000 is appropriate and there is no basis to vary it. The Respondent submits that the gravity and magnitude of the Wildfire is high due to its proximity to homes and infrastructure. The Respondent submits that if it was not for BCWS' immediate response the damage would have been significantly worse.

[68] The Respondent submits that the Appellant committed two contraventions: s.5(1) of the *Act* and s.21(2) of the *Regulation.* The maximum administrative penalty for contravention of s.5(1) of the *Act* is $10,000 and for contravention of s.21(2) of the *Regulation* is $100,000. Given the maximum prescribed penalties, the Respondent submits $3,000 is appropriate.

[69] The Respondent submits while the Wildfire and its consequences may not have been the Appellant's intention, the Appellant's actions, which resulted in the contraventions, were intentional.

Panel's Findings

[70] For the reasons described in sections above, I find the Appellant cannot rely on the statutory defences of mistake or fact or due diligence provided for in s.29 of the *Act*. The Appellant is in contravention of s.21(2) of the *Regulation* and the maximum administrative penalty that may be levied under s.27(1)(a) for this contravention is $100,000*.*

[71] Regarding s.27(3) of the *Act*, the Appellant has no previous contraventions of this nature; the contravention was not repeated or continuous; there was no economic benefit derived; and the Appellant has been cooperative throughout the process. The Appellant may not have deliberately caused the Wildfire nor did he deliberately contravene the *Regulation;* he nevertheless deliberately lit the Category 2 Open Fire that ultimately escaped to cause the Wildfire. There is no requirement that a wildfire be intentionally set in order to contravene the *Act*.

[72] The gravity and magnitude of the contravention is high, or serious. The total area burned was 11.5 hectares but could have been much larger if BCWS was not immediately dispatched and on the scene within the hour. Additionally, I am not satisfied that the Appellant was aware of his obligations or of the consequences of his actions prior to lighting the Category 2 Open Fire. Only after the fire was already lit did he ask, or was told by, a neighbour that it was a good practice to dig at the ashes. The acknowledgement that he did not have knowledge or experience to safely conduct a burn, as well as the lack of effort and care taken to acquire the appropriate degree of knowledge prior to undertaking a burn, contribute to the gravity of the contravention.

[73] Furthermore, I find it troublesome that the Appellant suggests the gravity and seriousness of a contravention should be "coloured by just how devastating a wildfire can be on the spectrum of forest fires in British Columbia." Using this logic, the Appellant places the 2021 Lytton fires at the "high" end of the spectrum for gravity and magnitude. I infer that the Appellant is suggesting fires with less impact than should be considered at a lesser gravity and magnitude.

[74] I reject the notion that gravity and magnitude should be determined in relation to structural losses, and that if a wildfire does not burn houses down is not as serious. I also do not find that gravity and magnitude are viewed solely on the outcome or result of the contravention.

[75] The 2021 Lytton fire cannot be referenced without the appropriate context, including the environmental conditions that may have contributed to its devastating effect, and the particular situation of the fire occurring at the interface of wildland and urban areas. I also reject the notion that in assessing gravity and magnitude of a wildfire, this tragic and devasting fire should in any way be considered as a measuring post for "high" gravity and magnitude as it relates to contraventions of the *Act*.

[76] I find an administrative penalty is appropriate in this case as the gravity and magnitude of the contravention is high, the open fire was deliberately lit, and the

Appellant has not convinced me that a reasonable level of care was taken to understand his obligations under the *Act* and to avoid the contravention. The administrative penalty levied by the DDM is a small fraction of the maximum prescribed in legislation. Given the Appellant's responsibilities to the cost recovery order associated with the Wildfire, I find that the relatively small administrative penalty amount is appropriate. I confirm the administrative penalty amount of $3,000.

4. Is the Appellant responsible to pay the government's costs of fire control?

Appellant's Submissions

[77] The Appellant does not dispute the calculation methods or the final cost recovery amount determined in the Order. The Appellant submits that the due diligence and mistake of fact defences apply, therefore he is not in contravention of the *Act* and not responsible to bear the costs of the government's costs of fire control.

Respondent's Submissions

[78] The Respondent submits that the government's costs of fire control were calculated in accordance with the Ministry's policy on cost recovery and with s.31(1) of the *Regulation*. The breakdown of this cost determination is provided in the Respondent's submissions. Section 29 of the *Regulation* specify exemptions to seeking cost recovery; however, the Respondent submits that none of these circumstances apply and the Appellant has not claimed that any of these circumstances to apply.

Panel's Findings

[79] Under s.27(d) of the *Act* the government may require a person in contravention of the *Act* to pay amounts including an administrative penalty, the government's costs of fire control, and the value of timber and other resources damaged as a result of the contravention. Section 27 of the *Act* refers to the government's costs of fire control and does not contemplate partial cost recovery. The Respondent submits the cost recovery calculation breakdown in accordance with s.31(1) of the *Regulation*.

[80] As stated in *Alta Gas Ltd. v. Government of British Columbia (Decision No. 2019-WFA-008(b), March 17, 2021)*, at paragraphs 61-63, there is no discretion to alter the calculated amount of the government's costs of fire control when calculated in the manner prescribed in s.31(1) of the *Regulation.* The Appellant does not claim to be exempted from cost recovery for any reasons provided for in s.29 of the *Regulation.*

[81] I have found, for the reasons above, that the defences of due diligence and mistake of fact do not apply. Therefore, the Appellant is in contravention of the *Act* and may be held responsible to pay for the government's costs of fire control. The Appellant's submissions in this case have not convinced me that a cost recovery order is

inappropriate. The open fire that caused the Wildfire was deliberately ignited, the defences under s.29 of the *Act* do not apply, and, if not for the immediate response of the BCWS, the impacts of the Wildfire would likely have been even more widespread. I confirm the cost recovery order amount of $100,688.12.

DECISION

[82] In making my decision, I have carefully considered all the relevant documents, the parties' submissions and evidence, whether or not they are specifically referenced in the reasons above.

[83] I confirm the Orders and the appeal is dismissed.

"Cynthia Lu"

Cynthia Lu, Panel Chair
Forest Appeals Commission