



Forest Appeals Commission

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DECISION NO. 2009-WFA-004(b)

In the matter of an appeal under the *Wildfire Act*, S.B.C. 2004, c. 31.

BETWEEN: Louisiana-Pacific Canada Ltd. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
James Hackett, Panel Chair
Blair Lockhart, Member
Reid White, Member

DATE: May 5 – 7, 2010

PLACE: Golden, BC

APPEARING: For the Appellant: Scott King
For the Respondent: Ian Wiebe, Counsel

Majority decision: James Hackett and Blair Lockhart

APPEAL

[1] This appeal is brought by Louisiana-Pacific Canada Ltd. ("LP") against Contravention Order No. 07-N40835 and Administrative Penalty and/or Cost Recovery Order No. 07-N40835. These Orders are contained in a single decision document dated October 15, 2009. They state that LP contravened sections 22(3) and 22(4)(a), (b) and (c) of the *Wildfire Regulation*, B.C. Reg. 38/2005 (the "*Regulation*"), by failing to ensure that its category 3 open fires did not "escape", and by failing to take the required actions when the fires "spread beyond the burn area or otherwise became out of control". These contraventions are alleged to have occurred after LP personnel had burned some debris piles during routine forest management operations on Block 10 of Cutting Permit ("CP") 827.

[2] The Orders were issued by Mr. E. Desnoyers, RPF, Manager, Southeast Fire Centre (the "Manager"). The Manager levied a total administrative penalty in the amount of \$4,230 for the contraventions.

[3] This appeal was filed with the Commission pursuant to section 39, Part 3, Division 3 of the *Wildfire Act* (the "*Act*"). The powers of the Forest Appeals Commission on an appeal are set out in section 41(1) of the *Act*:

Powers of Commission

- 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.

[4] LP asks the Commission to rescind the Orders.

BACKGROUND

[5] LP was issued CP 827 under Forest Licence A17645. CP 827 consists of a number of cutblocks, including Block 10, located on Crown land in the Beaverfoot Valley, which is in the Kootenay River drainage, south of Golden, BC.

[6] The fires at issue on Block 10 were located between the elevations of 1450 and 1650 metres. The slope on this block ranged from a minimum of 10% to a maximum of 86%, with a southwest aspect.

[7] LP conducted harvesting operations on this block in the winter of 2006/2007. It replanted the block in early October of 2007.

[8] To deal with some of the debris (slash) left over from harvesting, LP applied to the then Ministry of Forests and Range ("MFR")¹ for a burn registration number. A burn registration number is a prerequisite for burning under the *Regulation* but is neither a permit nor an authority to burn.

[9] LP sought a registration number for category 3 open fires. A category 3 open fire, as defined in section 1 of the *Regulation*, is as follows:

"Category 3 open fire" means an open fire that burns:

- (a) material concurrently in 3 or more piles each not exceeding 2 m in height and 3 m in width,
- (b) material in one or more piles each exceeding 2 m in height or 3 m in width,
- (c) one or more windrows, or
- (d) stubble or grass over an area exceeding 0.2 ha.

¹ As of October 2010, the Ministry of Forests, Lands and Natural Resource Operations has authority over this aspect of fire protection.

[10] On September 27, 2007, LP obtained burn registration number (R07-N00236) for 14 piles or windrows on CP 827, Blocks 10, 11 and 14. The registration expired on November 19, 2007.

[11] At approximately 9:30 am (Mountain Time) on Friday, October 19, 2007, Mssrs. Gord Mozell and Darcy Zimmer, both Road Supervisors for LP, ignited logging debris piles on Block 10 in three locations, referred to at the hearing as landings 1, 2 and 3. This was the first debris pile burning operation by LP of the fall season. Snow was present on the block and was considered an adequate fuel break. A "fuel break" is defined in section 1 of the *Regulation* as:

(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.

[12] Mr. Zimmer and Mr. Mozell left the block at approximately 1:00 pm.

[13] On October 20, 2007, Mr. Mozell returned to Block 10 to check the condition of the 3 burned debris piles and discovered that the fires had spread beyond the piles and into the fuel break.

[14] Mr. Mozell walked the perimeter of the fire and determined that an adequate fuel break of snow was still in place and that a fire would not start again or spread any further.

[15] LP staff checked the site daily between October 22 and 25.

[16] On October 24, 2007, Alex McLean, Compliance and Enforcement Officer, MFR, also visited Block 10. He observed that the fires had burned beyond the piles and had burned approximately 3.0 hectares of LP's plantation. He observed smoke coming from some of the debris piles themselves, as well as a number of smaller "smokes" in the areas where the fires had spread. Mr. McLean reported these findings to the MFR Southeast Fire Center and to LP. Mr. McLean's evidence is that he observed approximately 8 smokes, some on the perimeter of the spread, and that there were wind gusts of 30 kph.

[17] While Mr. McLean was inspecting Block 10 on the 24th, he met Mr. Mozell and Ms. Bonnie Thompson, a colleague of Mr. Mozell's from LP. They had a brief discussion and then Mr. Mozell and Ms. Thompson left the site.

[18] The following day, Mr. McLean sent an email to Scott King, Silviculture Forester with LP, asking 6 questions about the fires, including: who lit the piles, what were the weather conditions at the site at the time of ignition, when were the escapes discovered and by who, why weren't they immediately extinguished upon discovery and were they reported to the MFR? He asked Mr. King to provide a written response.

[19] Mr. King responded to the questions in an email dated October 26, 2007, advising that the spread was not reported to the MFR, that the weather conditions

when Mr. Mozell and Mr. Zimmer ignited the piles were cool and calm with snow on the ground, and that the fires weren't extinguished for the following reason:

... fall burning conditions are followed. If the perimeter is out (i.e. no active movement) it is acceptable to let the remaining part of the burn self extinguish. However, to ensure conditions don't change we keep a pretty close eye on it. Gord was there Monday and Wednesday, and I was there Tuesday and Thursday. Wednesday nights' rain pretty much killed it.

[20] Mr. King also states, "You probably know as well as anyone else about the bizarre and unpredictable winds that occur in the Beaverfoot valley. How often does snow disappear overnight?"

[21] There is no dispute that all of the fires self-extinguished some time between October 24 and November 1, 2007.

[22] There is also no dispute that the MFR did not formally notify LP that it was investigating a suspected contravention prior to February 2008.

The Orders

[23] In a letter dated February 11, 2008, the Manager advised LP that he was considering whether LP contravened the *Regulation* and offered LP an opportunity to be heard.

[24] On April 3, 2008, LP attended the opportunity to be heard and made submissions to the Manager.

[25] On October 15, 2009, the Manager issued the Orders.

Contravention 1

[26] The Manager found that LP contravened section 22(3) of the *Regulation* which states:

Category 3 open fire –

22 (3) Without limiting section (1) or (2), a person who lights, fuels or uses a category 3 open fire must ensure that the fire does not escape.
[Emphasis added]

[27] He interpreted escape in the context of this section to mean "beyond the fuel break". He concluded that an escape occurred because the fuel break was not adequate to prevent a "reasonable chance" of the fire spreading on the day of ignition, or until the fire is declared "out". He states:

In a results based regime it is incumbent on the Forest Company to ensure the fire does not escape and to take appropriate actions to ensure this. The measure of adequate in a results based regime is determined after an escape.

[28] The Manager was particularly concerned that LP had not provided any policies or procedures to employees carrying out prescribed burning and, in particular, no guidance on requirements for ongoing monitoring or what to do when an escape occurs.

Contravention 2

[29] The Manager also concluded that LP contravened sections 22(4)(a), (b) and (c) of the *Regulation*, which provides as follows:

- 22** (4) If a category 3 open fire lit, fuelled or used in the circumstances set out in subsection (1) spreads beyond the burn area or otherwise becomes out of control, the person who lit, fueled or used the open fire must
- (a) carry out fire control immediately,
 - (b) extinguish the fire if practicable, and
 - (c) as soon as practicable, report the fire as described in section 2 of the Act.

[30] The reporting requirements set out in section 2 of the *Act* are as follows:

General duty to report fire

- 2** A person, other than a person acting in accordance with section 5 (2) or 6 (3), who sees an open fire that is burning in forest land or grass land or within 1 km of forest land or grass land and that appears to be burning unattended or uncontrolled must immediately report the fire
- (a) to an official employed in the ministry,
 - (b) to a peace officer, or
 - (c) by calling a fire emergency response telephone number.

[31] The Manager found that the site condition, photos and comments before him pointed to ongoing "smokes" in the area up to 14 days after ignition and escape, and that LP did not take any of the required actions. He rejected LP's contention that, as long as an escape remained within the block, it was acceptable. The Manager determined that LP's representatives were on site at various times and could have extinguished and reported the fires, but did not do so.

Defences

[32] At the hearing before the Manager, LP raised a defence of due diligence and officially induced error. In particular, LP relied on its experience and practices with respect to burning piles over many years, and submitted that a previous forest official had accepted "escapes" as long as they didn't leave the block.

[33] The Manager found that the facts did not support either defence.

Penalty Assessment

[34] After reviewing the factors in section 27(3) of the *Act*, the Manager levied a total penalty of \$4,230 for the contraventions. This penalty is based on the following.

[35] The Manager levied a penalty of \$2,000 for the contravention of section 22(3). He states:

This penalty reflects the requirement to ensure any fuel break being utilized is adequate during the entire duration of the burn.

The [penalty] also reflects the need to have complete direction to delegated staff to define actions required when an escape occurs.

[36] He levied a penalty of \$1,000 for the contravention of section 22(4)(a), "to reflect the lack of actions taken at the onset of discovery to control the fire and to ensure no further risks or losses would occur."

[37] For the contravention of section 22(4)(b), the Manager levied a penalty of \$1,000 to reflect "the lack of any efforts to extinguish or accept the need to extinguish areas of the escaped fire that continued to present a risk to growth and ongoing losses [sic] to the plantation."

[38] Finally, for the contravention of 22(4)(c), he states:

I am levying a penalty that is based on the violation ticket for failing to report a fire (\$115). I have doubled this amount to \$230 to reflect the lack of LP to continue to fail to report the fire even when its employees had reported it to them.

The Parties' Arguments on the Appeal

The Appellant

[39] Regarding the contravention of section 22(3), LP submits that the fire did not "escape" because it did not go beyond the boundaries of Block 10. It submits that the block is the legal unit of land that LP manages under CP 827. If fires do not escape from that legal unit of land, there is no escape. It also submits that, contrary to the Manager's determination, the fires did not escape the fuel break. Therefore, there was no escape.

[40] Regarding the contravention of sections 22(4)(a), (b), and (c), LP submits that it did not contravene any of these sections of the *Regulation* because the fires did not escape from the burn area and were not out of control.

[41] LP also argues that the contravention process was flawed because the MFR did not follow policy 16.6. This policy states that the MFR will notify responsible persons of the suspected contravention "as soon as possible", other than where doing so may compromise the integrity of the investigation. LP submits that it did not learn of the investigation and enforcement actions until February 11, 2008, long after the events occurred. Consequently, it was denied the opportunity to evaluate the scene, collect evidence, collect site-specific weather data, photograph the scene and, if required, draw upon expert analysis. LP originally asserted that the failure to notify it of the investigation breached the *Canadian Charter of Rights and Freedoms*, but withdrew this claim at the hearing.

[42] LP also maintains that if a contravention occurred, it has made out a defence of officially induced error and due diligence. It submits that there are numerous examples of varying degrees of "escapes" from debris pile burns where no concerns were noted by MFR staff and no contraventions issued.

[43] Regarding due diligence, it submits that most fires "escape" from the piles to some degree and, in this case, LP took all reasonable care to ensure that conditions

were safe to ignite the piles on October 19, and that all reasonable care was taken to ensure that the fires would not spread further once the initial escapes were discovered. It submits that an unusual wind was a contributing factor to the initial spreads in this case, and that it is "unrealistic to expect licensees to account for unusual and unforeseen weather pattern changes." It further submits that LP's pile burning procedures and safety program meet the requirements for compliance with the *Act* and the *Regulation*.

[44] LP submits that it repeatedly reviewed the block and confirmed compliance with the MFR's June 8, 2007 Interpretive Bulletin on the "Application of the *Regulation* for Compliance and Enforcement and Protection Staff". It states that reasonable care is demonstrated by the fact that the escape remained dormant and self extinguished.

The Respondent

[45] The Respondent agrees that the definition of "an escape" is open to interpretation since the word is not defined in the legislation. However, the Respondent does not agree with LP's definition of escape as meaning "from the block". Rather, it submits that "an escape" in section 22(3) of the *Regulation* means that the fire travelled beyond the intended burn area.

[46] To determine the intended burn area, the Respondent refers to the burn registration number for CP 827, Block 10. The registration number references the burning of piles. By inference, the Respondent argues that this means that "the burn area" is the area occupied by debris piles or windrows. Consequently, the Respondent submits that the intended burn area is the debris pile area. If the fires spread beyond these piles or windrows, which they did in this case, the Respondent submits that they "escaped" as defined in section 22(3) of the *Regulation*. In his summation, however, the Respondent conceded that the burn area could be extended to include a small buffer area surrounding the debris piles, but no more.

[47] The Respondent also suggests that this accords with the normal or usual understanding of the word "escape" by employees of LP as is evident by their references to the fire "escaping", or "the escape", in emails and in their oral evidence.

[48] Regarding section 22(4) of the *Regulation*, the Respondent submits that LP contravened all three subsections because the fire spread beyond the burn area. The Respondent submits that:

- LP did not carry out fire control immediately, or at all, thereby contravening section 22(4)(a);
- LP made no attempt to extinguish the fires even though they were aware of them, thereby contravening section 22(4)(b); and
- LP never reported the fires in the manner described in section 2 of the *Act* as they are required to do and, therefore, contravened section 22(4)(c).

[49] Regarding the notice of investigation, the Respondent submits that policy 16.6 is an internal MFR policy, for internal use only; it does not confer any legal rights on those companies or individuals being investigated. Further, LP ultimately

had notice of the contravention and has had two opportunities to be heard: first before the Manager, and second before the Commission.

[50] Regarding the defenses, the Respondent notes that the Commission may consider the defence of due diligence but only as it applies to the actions of LP, not the individual employees. The Respondent submits that the contraventions were foreseeable and that LP did not have adequate policies and procedures in place to satisfy a defence of due diligence.

[51] As for officially induced error, the Respondent submits that the legal test has not been met. It submits that officially induced error only applies where an accused has relied upon erroneous legal advice of an official who is responsible to the administration of the particular law. There is no evidence of this in the present case.

[52] The Panel notes that LP was not represented by legal counsel in this case. Although its representative went to considerable effort to review and present legal argument, the Panel agrees that the legal test for officially induced error is set out in *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.) and in *R. v. Jorgenson*, [1995] 4 S.C.R. 55 (S.C.C.), and has not been met. The Panel makes this finding in advance to narrow the issues to be decided on the appeal.

ISSUES

[53] There was a great deal of evidence presented by LP on the weather and site conditions present when LP ignited the piles on October 19th. However, LP's decision to light the fires is not the subject of these Orders. At issue in the appeal is the MFR's investigation procedure and the interpretation and application of sections 22(3) and 22(4) of the *Regulation*. Specifically, the issues to be decided by the Panel in this appeal are as follows:

Whether the MFR's failure to advise LP that it was investigating LP's pile burning activities on Block 10 taints or nullifies the subsequent determination process such that the Orders should be rescinded.

If the answer to Issue 1 is "no", did LP contravene section 22 of the *Regulation* by allowing the fire to "escape", contrary to section 22(3), and/or by failing to perform the prescribed actions in section 22(4)?

If LP contravened any or all of these sections, has it established a defence of due diligence?

If the defence has not been established, is the penalty appropriate in the circumstances?

THE EVIDENCE

The Appellant's Evidence

[54] LP called six witnesses to testify at the hearing: Peter Russell, Bernie Heuvalman, Tim Arnett, Darcy Zimmer, Gord Mozell and Scott King.

Peter Russell

[55] Mr. Russell has been an employee of LP for 3 1/2 years. He is LP's Harvesting Supervisor.

[56] Mr. Russell described LP's employee safety program. LP has a safety manual which contains a section on "pile burning procedures" (section 3.17). LP also holds safety meetings, one of which was held in Golden on October 10, 2007. An updated version of section 3.17 of the safety manual was discussed at this meeting. Mr. Russell attended that meeting.

[57] There are 18 paragraphs under section 3.17 of the safety manual. Some of them address WCB safety requirements (e.g., clothing, personal fitness, being aware of fire preparedness plan), as well as certain documentation requirements. More specific to the issues in this case are the following:

12. Unless fire season has ended ... or winter burning conditions are in effect, a minimum of one hand tool and hand tank pump must be on site during the pile burning operation.
- ...
14. Before proceeding with pile burn operations, ensure a minimum of one of the following two conditions are met:
 - Snow is on the ground (i.e. 100% moisture content);
 - The moisture content of the adjacent slash is greater than 16% without a 10% Cw (western red cedar) component and greater than 20% if there is a 10% Cw component present. There must be a minimum 6% moisture spread between the slash pile and the adjacent slash, and the average wind speed must be less than 20km/hr.
15. When commencing with pile ignition, always ignite the pile on the side furthest away from the highest potential hazard. (*Generally this is the adjacent standing timber; therefore ignite the pile on the side furthest away from the standing timber.*)
- ...
18. If, due to shifts in wind, weather or unforeseen circumstances arise, the pile burn begins to behave erratically, threatens to escape or begins to escape, notify the local FRD immediately, advise them of the situation, and ensure both the Silviculture Forester and the Area Forest Manager are apprised of the situation. Call for additional support as soon as possible (Hit it quick, hit it hard, hit it fast).

[Italics in original]

[58] Looking at the photographs taken of the fires on Block 10 by Mr. Mozell on October 20, 2007, Mr. Russell expressed the view that the Block 10 piles for burning were typical debris piles. He also noted that there was water on the road and a light covering of snow on the ground. In his view, no other types of fuel break were necessary because of the snow, which has a moisture content of 100%.

[59] Mr. Russell also said that the shape of the blackened burn lines in the photographs indicates that the wind came from the south which, he states, is not characteristic of the area.

[60] Mr. Russell was provided with the weather data from the Marion Fire Station, which he notes is at a lower elevation than the cutblock.

[61] Mr. Russell referred to the hourly weather conditions as shown on the hourly data sheets from the Marion Fire Station. The piles were ignited at 9:30 am. The 9:00 am data shows that the temperature at the Station was 2.7 degrees Celsius with 97% relative humidity, a wind direction of 45 (northeast) and a wind speed of 4 kph. The fine fuel moisture content was 69.5 and the precipitation was 0.2 mm.

[62] When the crew left the site around 1:00 in the afternoon, they said that it was raining. Mr. Russell notes that this is confirmed by the hourly data. That night, the temperature went below zero and the wind direction changed. According to the hourly data, the fine fuel moisture content went down to the 20s, where it remained until the 21st when it rose slightly.

[63] In a document showing wind gusts on an hourly basis, the wind speed increased to 24.1 kph at 18:00 on the 19th. Mr. Russell was asked about, and agreed with, an excerpt from a BC Forest Service workbook on Basic Fire Suppression and Safety which states:

Wind

Wind is the single most important weather factor affecting fire behaviour and influences fire behaviour by:

- Increasing or decreasing fuel moisture
- Bending the flames ahead, heating, drying and igniting new fuels
- Carrying sparks and embers into new fuel sources (spotting)
- Feeding more oxygen to a fire
- Driving the direction of a fire

[64] In Mr. Russell's view, the data for the day did not indicate a risk to the fires.

[65] On cross-examination, Mr. Russell acknowledged that he had no personal involvement with the events at issue in this hearing, and had not visited Block 10 in October, 2007. He acknowledged that his understanding of the events at issue is based on a review of the photographs and conversations in LP's office.

[66] Mr. Russell was also referred to photographs showing other debris pile burns taken after the subject burn, showing fires that had spread beyond the piles. He said that no enforcement action was taken on those spreads, and that it is common for a burn to extend beyond the piles.

Bernie Heuvalman

[67] Mr. Heuvalman is the Area Forestry Manager for LP's Golden operation. He has worked for LP for 20 years.

[68] Mr. Heuvalman was at LP's safety meeting on October 10th and confirmed that fire plans and the updated pile burning procedures were discussed.

[69] In his view, the legal area for managing a fire is the cutblock area, not the burn area. Like Mr. Russell, he testified that it is common for a fire to spread from the burn pile.

[70] Mr. Heuvalman was referred to the MFR's Interpretive Bulletin dated June 8, 2007 on the "Application of the *Wildfire Regulation* for Compliance and Enforcement and Protection Staff." As background, the document states:

Background

Two of the cornerstones of the *Wildfire Act* and the *Wildfire Regulation* [no italics in original] are for it to be results-based and to incorporate the concept of professional reliance.

[71] On page 4, fuel breaks are discussed. This section states:

How does one assess whether a fuel break is adequate?

"Fuel Break" – means

- (a) a barrier or change in fuel type or condition, or
- (b) a strip of land that has been modified or cleared to prevent fire spread

(Reference: *Wildfire Regulation* section 1.)

First, it is important to remember that a fuel break does not necessarily mean a bladed guard. Anything – natural, engineered or constructed that modifies or removes the fuel so that there is no reasonable chance of a fire spreading would be acceptable. For example, snow, water, natural bare rock or high fuel moisture could be an adequate fuel break. A fuel break may also be created using a sprinkler system that increases the moisture content of fuel above its ignition point, or it could be that the complete removal of all fuel to mineral soil would also constitute an adequate fuel break. When constructing a fuel break, due consideration should be given to the fire environment at hand (weather, fuels, topography).

It is also important to remember that in a results-based regime, we would not commonly assess the sufficiency of a fuel break until after fire escapes beyond the fuel break, as part of an incident inspection or investigation. It is also understood that there are conditions under which a fuel break could not completely prevent a fire from spreading. The fact that a fire escapes does not automatically infer non-compliance with fuel break requirements.

...

There are situations where it is obvious that the existing fuel break or the lack thereof would not be sufficient to prevent a fire from spreading beyond the area given reasonably expected fire conditions.

[72] In Mr. Heuvalman's view, the words in the last paragraph "spreading beyond the area" reflects a concern about the fire burning wildlife tree patches or surrounding timber. In other words, environmental damage outside of the block.

[73] Mr. Heuvalman testified that the LP burns did not extend to standing timber and did not escape the block. He also agreed that, when the fires had spread beyond the piles in this case, monitoring was the correct course of action to take. In his opinion, there was very little risk to the surrounding timber from the subject fires.

Tim Arnett

[74] Mr. Arnett is a Planning Forester and has been employed by LP for 13 years. He testified that, in the fall, the prevailing winds for the Beaverfoot Valley are from the northwest; winds from the southeast typically occur from early to mid-summer.

Darcy Zimmer

[75] Mr. Zimmer is LP's Road Supervisor for its entire operating area. He has 13 years of experience burning debris piles. Mr. Zimmer has reviewed LP's employee safety program and was at the safety meeting in October.

[76] Mr. Zimmer attended Block 10 on October 19th with Mr. Mozell. He testified that there was snow on the ground at 1400 metres and there was approximately 5 cm of snow on the block.

[77] Mr. Zimmer testified that he and Mr. Mozell burned the piles at the highest elevation first (landings 1 & 2), and then worked their way downhill to the lower landing piles. There was some rain on this day, approximately 0.2 mm.

[78] He testified that the fires showed no abnormal behaviour. The smoke went straight up; no bad weather was forecast. LP normally receives wind warnings from the Southeast Fire Centre: no wind warnings had been received for this day.

[79] Mr. Zimmer said that he and Mr. Mozell stayed on the block for approximately two hours, looking for erratic behaviour (e.g., smoke not going straight up). Given that there was lots of snow and it had begun to rain, Mr. Zimmer felt it was "O.K." to leave the site. After starting a burn, he does not necessarily go back and check it.

[80] Mr. Zimmer said that LP has a "check system for burns", performs reviews of its procedures (Mr. Heuvalman), and that senior management reviewed the new wildfire legislation with them. He also said that LP keeps records of reviews of burn pile activity, and documentation on burn pile reviews by date and person reviewing the piles. He is not aware of what is done if there is an error.

[81] Regarding LP's safety manual and policy 3.17 for the pile burning procedure, Mr. Zimmer interprets the words in paragraph 18 "threatens to escape or begins to escape" as threatening or going into surrounding timber. Mr. Zimmer's view of escape is "leaving the cutblock". He is not aware of any LP document or policy defining escape.

[82] Mr. Zimmer returned to the block on the 20th with Mr. Mozell. In his view, the rain that had occurred had "beefed up the guard".

[83] On cross-examination, Mr. Zimmer agreed that 5 days of clear weather would increase the risk of a fire spreading, and that 4 days of clear weather would possibly increase the risk. He also agreed that between October 19 and the 24, precipitation levels decreased.

Gord Mozell

[84] Mr. Mozell is now retired after working for LP for 34 years. He has approximately 16 years of experience with pile burning. At the time of the debris pile burning at issue, Mr. Mozell was LP's Road Area Supervisor.

[85] Mr. Mozell had fire suppression training and completed the annual training updates. He had also attended LP's safety meeting on October 10, when LP's revised pile burning procedures were reviewed. He advised that LP employees' training and updates are tracked on LP's "Forest Resources Training Matrix -2", which was tendered in evidence.

[86] While working for LP, Mr. Mozell carried a moisture meter, a camera and a sling psychrometer, an instrument used to determine relative humidity. He also carried a wind meter.

[87] Mr. Mozell testified that on October 19, 2007, he and Mr. Zimmer drove to Block 10. They had with them the plantation project map. They first reviewed some piles lower down in the block but did not burn them because there was no snow. Snow was located below the main forest service road at approximately 1400 metres. Mr. Mozell estimates that there was 2 to 4 cm of fresh snow on the block, with more at the top than the bottom, and very little wind. Given the conditions, he decided to burn the top two piles (landings 1 and 2). He did not take moisture meter readings of the surroundings since there was a large snow cover indicating that the moisture content of the logging debris was high enough.

[88] Mr. Mozell has worked in the Beaverfoot Valley for 33 years and, in his experience, the prevailing winds are from the west-northwest, generally from the direction of Golden. Although he has received wind-warning documents from the Southeast Fire Centre before, none were received on that day.

[89] Mr. Mozell and Mr. Zimmer watched the top two burn piles for approx 20 to 30 minutes. Smoke was going straight up; there was no noticeable wind. They monitored the piles until they were burning well. There was no erratic fire behaviour.

[90] They then proceeded to landing 3. They could see the top two landings burning from landing 3. They appeared to be burning well; no indication of anything unusual. The smoke column was still going straight up, indicating little to no wind.

[91] Mr. Mozell reviewed the conditions and decided to burn the landing 3 pile. There was snow cover around the landing, and the other fires were doing fine. He estimates that they watched it for ½ to 1 hour to make sure it was burning properly.

[92] Mr. Mozell agreed that if a "fuel moisture difference" is used as the fuel break, it can dry out as the pile is burning. In the present case, he said that snow was the fuel break in addition to the landings themselves. He states that, at landing 3, the road also constitutes a fuel break. He testified that the fuel break of snow remained intact as long as he and Mr. Zimmer were there.

[93] Mr. Mozell states that they decided to leave the block because the fires were burning normally: no erratic fire behaviour, no wind, the snow guard remained intact and the weather was deteriorating with rain which, he states, increases the strength of the fuel break. When he left the fire, the flames were 3-4 metres above the woody debris. They were not at the peak of their heat (at maximum flames).

[94] He and Mr. Zimmer returned to Golden, where it was raining heavily.

[95] On the morning of October 20th, Mr. Mozell drove back to the Beaverfoot Valley to check the piles. He described the valley as a relatively wide, U-shape valley, having a "broad line of sight". As he drove up the valley, he could see the block from a distance and observed big black patches, indicating that the fires had burned into the fuel break. He agreed that he was surprised by the spread of the burn.

[96] He arrived at approximately 9:30 to 10:00 am. The conditions were cold and overcast. The temperature was around -3 to -5 degrees Celsius. He observed a number of "smokes", surrounded by snow. He traversed the burned area to the standing timber above landings 1 & 2. He took some photographs. Mr. Mozell then drove down to landing 3, where he extinguished some patches of small open flames (which he described as small sharp flames in the fine fuel) along the edge of the spread using a pulaski (a fire axe). The burn from landing 3 was not far from standing timber along the edge of that cutblock area. There were also some smokes generally, and some smoldering along the duff line. Mr. Mozell took some more photographs.

[97] Mr. Mozell estimates that the area of the spread was 2 to 3 hectares in total.

[98] Mr. Mozell's truck has a hand pump with a tank that could be used to put out a fire. However, he did not believe there was a need to use it given the conditions. He estimates that there was still 2 to 4 cms of patchy snow, it was cold and the fire behavior was calm – there was some smoldering, but very few open flames.

[99] When he left, the piles themselves were still very hot. He said that in his 33 years of experience, he has found that it can take a few days until the piles themselves cool down enough to get close. However, the fires that had spread appeared stagnant. He did not take a moisture reading because there was still patchy snow on the ground from 1400 metres up, so he felt that the fuel break was still intact. He felt it was safe to leave.

[100] The Marion Weather Station data records for the 20th show a precipitation reading of 5.6 mm.

[101] Mr. Mozell returned to Golden and called Scott King of LP. He described the fire event and discussed whether it required further evaluation. Mr. Mozell said that the fire was quiet. He was not told to take any further fire control action.

[102] Mr. Mozell was not sure when he next attended the site before Wednesday the 24th, but did recall observing Block 10 from Block 1 on CP 836 on Tuesday the 23rd, where he and a colleague were burning approximately 20 piles. He recalls using the moisture meter for those burns as there was no snow present.

[103] Around mid-day on Wednesday, October 24th, Mr. Mozell attended Block 10 with Bonnie Thompson of LP. He recalls that there was no snow, the piles were still warm, and there were some small smokes. He did not go to the top 2 landings.

[104] He also recalls that Alex McLean from MFR was there and they had a short discussion. He does not recall much of the conversation, but believes they discussed the events that had occurred and confirmed the radio frequencies that the MFR was using.

[105] Mr. Mozell does not recall there being any noticeable wind that day. He was asked whether Mr. McLean had mentioned wind to him, but does not recall any mention of wind. Nor does he recall Mr. McLean pointing out smokes on the perimeter of the spread. Although Mr. Mozell recalls some smokes, he does not recall them being along the perimeter.

[106] The following day, October 25th, there was 11.4 mm of rain.

[107] Mr. Mozell explained the review process after a burn. After a burn, there are no formal written inspections. Rather, an informal discussion takes place regarding what happened: it is a "hands-on" description of events.

[108] Mr. Mozell was asked about LP's policies and procedures regarding "escapes" from debris pile burns. Mr. Mozell could not recall whether LP had any documents defining an "escape". He states that LP has procedures dealing with the spread of a fire outside of a cutblock boundary, e.g., into standing timber, adjacent slash or adjacent cutblocks, and for wildfire situations. However, he is not aware of any special direction for a fire spreading from the piles. In his view, what happened on Block 10 was not an escape although it did escape from the objective, which was to burn piles.

[109] Mr. Mozell has seen fires escape cutblocks before, but not in the fall. He agrees that winds behave unpredictably.

Scott King

[110] Mr. King is LP's Silviculture Forester. Since he started working for LP in 1996, he has also been responsible for organizing the pile burning program. He described a typical debris pile burn with the aid of photographs. He states that, at their peak, the flames in a debris pile burn can reach 26 to 28 meters in height. He also notes that, during wet conditions, there is often steam from the perimeter of the pile burn which tells you that the fire is reducing the fuel moisture content in the surrounding area. If the person igniting the fire is using a fuel moisture guard as the fuel break, Mr. King states that the fire will gradually dry out that moisture break. He states that this is expected, and "you don't have a choice". Logging waste close to debris piles will often char or burn. However, in his view, this does not mean that moisture is not an effective fuel break as is evident from the fact that the MFR's Interpretive Bulletin allows moisture to be used as a fuel break. He notes that it is not the presence of moisture that is of most concern, but the level of fuel moisture.

[111] Mr. King also explained how debris pile burns are reviewed by LP personnel. It is not always the person who burns the pile that goes back to review it. To keep things efficient in a forestry operation, people's tasks change. As a result, lots of

people help out with pile burning operations. For example, if there are two harvesting operations going on in different directions, he may ask someone to go and burn piles in location "X", but they might not be there the next day. Then a "floater", like Mr. King, may go out and inspect the burns in location "X", and he may also burn more piles at or near that location. He describes this process as "fluid" and "dynamic" – people are moved to where they are needed at the time. If he is in one area, others cover off reviews in another area.

[112] As a general rule, Mr. King explained that piles are lit in the morning. The person igniting the fire will keep an eye on the piles and then go to inspect other debris piles. If time permits, the person will go back to check the first piles. Alternatively, others will step in.

[113] When inspecting the burn, the person will consider two things: (1) how the fire is behaving, and (2) whether the person that did the piling dealt with or addressed all of the hazards. He states that there is only a certain amount of time to address all of the hazards in the block.

[114] Mr. King described LP's safety meetings and said that he was present at the safety meetings in 2006 and in October of 2007, when the revised pile burning procedures were reviewed and discussed. In addition to the pile burning procedures, LP has a Fire Preparedness Plan which he issues to LP staff and contractors.

[115] Regarding the burns at issue in this appeal, Mr. King testified that he first learned of the "escape" on October 20th from Mr. Mozell. He recalls Mr. Mozell reporting that there was snow on the block, it was wet and cold, the debris pile burned into the guard, it was an abnormal situation, the burn was kept within the block, that it wasn't a problem and no additional crew were needed. Mr. King recalls asking Mr. Mozell what the weather was like and, if it changed, to call him (King).

[116] Mr. King recalls checking the forest service's weather station on the internet to assess the weather conditions, as well as the danger class rating.

[117] Having reviewed the photographs of the spread, Mr. King believes that there was an unexpected wind that came up from an unexpected direction and pushed the fire into the break - from the right to the left across the slope. This is evident from the "points" in the dark burned patches on the slopes. In his view, the photographs indicate that, after the wind died down, the fire stopped as there is no evidence of the burn proceeding straight uphill.

[118] On Monday, October 22, Mr. King attended the site with Bonnie Thompson to check the burn piles. He "cold trailed" the site, meaning that he walked the perimeter of each of the fire footprints, checked the moisture content and found that the average was greater than 20% [LP's safety manual requires the fuel moisture content of the adjacent unburned slash to exceed 16%]. He also checked the temperature of the soil and the slash at various points, using his hands to check for heat.

[119] On that day, Mr. King observed a few small smokes; no flames were observed. He wrote in his journal "no action required". His journal also states,

"Touched base with Gord [Mozell] on who would go into Beaverfoot each day." He then left the site and went to burn debris piles elsewhere. The 2007 "Landing Burn List" shows that he lit approximately 34 piles that day.

[120] On October 23rd, Mr. King said that Bonnie Thompson went with Mr. Mozell to check the landings. They reported to him that the previously ignited piles were dormant.

[121] On October 24th, Mr. King received a call from the Southeast Fire Centre about the fires on Block 10, which had just been reported to the Fire Centre by Mr. McLean, who was on the block. Mr. King advised the Fire Centre that LP was aware of the incident. He advised of the weather and moisture conditions on the block at the time the fires were lit and advised of his moisture meter readings from the 22nd. He said that he felt that no further action was required, and that LP would monitor it regularly until the escape was extinguished. He explained that the Fire Centre did not ask him to take any further action.

[122] Mr. King recalls talking to his supervisor, Mr. Heuvalman, about the call.

[123] Mr. King radioed Mr. Mozell and Ms. Thompson and told them that Mr. McLean was on the block. Although Mr. King heard Mr. Mozell's evidence that it was a "coincidence" bumping into Mr. McLean on the block, Mr. King recalls telling Mr. Mozell that Mr. McLean was there, and to go and have a chat with him.

[124] On October 25th, Mr. King returned to Block 10 after burning several piles in another block. He did not see snow on the block, but he recalls seeing lots of moisture and puddles on the road. He felt that heavy rain had extinguished the fires, but noted that the landing piles were still smoking.

[125] Mr. King's November 1, 2007 journal entry states that the piles were checked in Beaverfoot Valley and "no concerns noted".

[126] Mr. King points out that, between the 19th and the 25th, LP lit a total of 77 other piles in the area, which required making 77 separate assessments that it was safe to burn and, in those 77 cases, no problems arose. In his view, the Block 10 fires spread as a result of unexpected winds, from an unexpected direction. Mr. King states, "had Mr. Mozell not been caught by those winds, we wouldn't be here right now."

[127] When asked about Mr. McLean's statement that there were 8 smokes evident on the 24th and gusty winds of up to 30 kph, Mr. King replied that he is not convinced there were 8 smokes, and having looked at Mr. McLean's photographs taken on the 24th, he disagrees that there were 30 kph winds; in many photographs taken on that day, the smoke was rising straight up.

[128] In regard to the reasonableness of LP's actions on Block 10, Mr. King explains that all of the actions were, in fact, reasonable as they were "practicable". They were based on the weather and site conditions. He also states their actions were consistent with LP's usual practices which have worked well over the years.

[129] In support, he gave evidence on the factors that go into the Forest Fire Danger Rating System and how they relate to the possibility of a fire spreading or escaping. There is no dispute that the fire danger factors were "low", as shown on

Marion Weather Station data for the 19th. He notes that the Initial Spread Index (ISI) for October 2007 was 0, which is extremely low.

[130] Mr. King acknowledged that the Marion Fire Station is located 8.8 kms from Block 10, at an elevation 150 metres below the lowest burn piles on Block 10, and on a flat aspect (as opposed to a slope). While he states that its weather data will not reflect the actual weather on the block, he says that this is not a “negative” in this case as the higher elevations will be cooler and wetter, as evidenced by the different tree species and growth rates at higher elevations.

[131] Regarding LP’s history with pile burning, in Mr. King’s 15 years of experience, he states that he has only seen 3 examples of fires escaping the block perimeter, and all were reported. In those cases, the MFR did not take any enforcement action. Further, ever since the new wildfire legislation came into effect, Mr. King referred to instances where the MFR did not consider similar fires to have “escaped”; the MFR took no action.

[132] Mr. King also placed some emphasis on the past actions of a MFR Compliance and Enforcement Officer, Gary Gelette. Mr. King’s evidence is that the past practices of the forest service were inconsistent with Mr. McLean’s conduct in this case, which was to take action because the fires burned into the fuel break. For example, Mr. Gelette, an officer under both the previous *Forest Practices Code of BC Act* and the new wildfire legislation, called and notified LP that the fuel break perimeter (pile perimeter) was weakening. No enforcement action was taken at that time.

[133] Finally, Mr. King was asked about the MFR’s estimate that the fires burned 3 hectares of LP’s plantation. Mr. King believes that the actual burned area is 2.5 hectares, but he agreed that LP did not measure the area.

[134] Although Mr. King sometimes used the word “escape” to describe the fires (e.g., in his journal entry and in some emails), he says that he was using the word loosely to mean that the fire had spread beyond the debris piles; he did not mean that it was “an escape” under the legislation.

The Respondent’s Evidence

[135] The Respondent called one witness, Alex McLean.

Alex McLean

[136] Mr. McLean has been a Compliance and Enforcement Officer with the MFR for 4 years. He worked for 15 years as a consultant prior to joining the Ministry.

[137] On October 24, 2007, Mr. McLean attended Block 10 at approximately 11:30 am. He took notes of his site visit, which he referred to at the hearing.

[138] He was driving into the Beaverfoot Valley to perform a road inspection when he noticed an escaped fire from a debris pile that had burned into the cutblock. There was no one on site; no evidence of any action having been taken; and there were some smokes that were still active on the edge of the burn.

[139] He noticed the lower fire first (landing 3) and traversed it (walked the perimeter) with his handheld GPS. He estimated the burned area as approximately 1.4 hectares in size on a 42% slope. He observed that the slash/debris appeared

dry, with no visible snow or rain. Mr. McLean also noted that the cloud cover was overcast with gusting winds which he estimated at 30 kph. He also observed approximately 5 small smokes still burning in the duff and logs on the edge of the burn, but observed no visible flame.

[140] There was standing timber (a 20-year old plantation) south and downslope from the landing 3 burn. Mr. McLean testified that the timber was very close to the burn, so there was a possibility that if the fire flared up, it may have burned down to the plantation given the lack of snow and dry conditions. However, as the winds were from the south, he agreed that the risk to that plantation was small.

[141] Mr. McLean radioed the head office in Revelstoke and asked them to notify LP and report the fire to the Southeast Fire Centre.

[142] There is a transcription of a later conversation with the Fire Centre after the Fire Centre had contacted LP to advise of the burns. At 11:52 am, Mr. McLean is reported to say to the Fire Centre:

...there are a few smokes along the perimeter of the burn not just the landing pile itself. Um and with the gusty winds it probably won't do anything but the key word there is probably.

[143] Mr. McLean believes that he then heard Mr. Mozell on the radio around that time talking to someone, so he radioed Mr. Mozell and let him know about the escaped burn. Mr. Mozell said that LP was aware of it.

[144] Mr. McLean then continued on to the upper burns. He traversed those burns (landings 1 and 2) with his GPS. He noted two or three small smokes, but no visible flame. According to his journal entry, he measured the burned area from these fires as 2.3 hectares on a 54% slope in "fairly dry slash". He then radioed Mr. Mozell about these burns. Mr. Mozell advised that LP was aware of them also.

[145] At approximately 1:20 pm, Mr. McLean said that he met Mr. Mozell and Bonnie Thompson on the block. Mr. Mozell explained the history of the debris pile burns, the discovery of the spread, and said that he had it under control. Mr. McLean writes in his journal "I informed Gord and Bonnie of the smokes on the fires' perimeter and mentioned the strong winds that we were currently experiencing. They looked around from the landing and then drove off."

[146] Mr. McLean left the site at approximately 1:45 pm. It should be noted that Mr. McLean did not use a moisture meter, wind gage or sling psychrometer when he was on the block. He testified that his assessment of the conditions was based upon his observations.

[147] While on Block 10 that day, Mr. McLean took a number of photographs. He was asked to describe the photographs during his evidence, including a description of the "smokes" shown. None of the photographs showed smokes along the perimeter of the burn. Only 1 photograph showed a clear "smoke" outside of the piles.

[148] On October 25th, Mr. McLean emailed Scott King with 6 questions about the fires. One of the questions was:

Why weren't the escapes immediately extinguished upon discovery? They were still burning as of yesterday afternoon. The lower fire had approx. 5 small smokes still burning in the duff and logs right on the fire's edge while the upper one had maybe 2 or 3. The landing accumulations were still burning as well and had a small amount of visible flame (the smokes on the fire's edge had no visible flame as of 1345 hours yesterday).

[149] Mr. McLean asked Mr. King for a written response to the questions.

[150] On October 26, Mr. McLean received Mr. King's response. Mr. King confirmed that LP hadn't reported the fires and, in response to the question above, Mr. King states, "In these situations, prescribed burn fall burning conditions are followed. If the perimeter is out (i.e. no active movement) it is acceptable to let the remaining part of the burn self extinguish. However, to ensure conditions don't change we keep a pretty close eye on it. Gord was there Monday and Wednesday and I was there Tuesday and Thursday. Wednesday nights' rain pretty much killed it."

[151] Mr. McLean testified that he never indicated to LP that monitoring was an appropriate response to these fires. He also testified that he did not notify LP that he was investigating the fires as a potential contravention. He assumed that, because he was dealing with a corporate licensee in today's results-based environment, the licensee would know the law about escapes and spreads and, when a forest officer starts asking questions about a fire spread, they would have known it was an investigation. Further, he thought that it would have been obvious from his line of email questions and his request for a written response that he was investigating the burns.

[152] Mr. McLean continued his investigation throughout the fall of 2007. He returned to the site on November 1 and 2, 2007, and double-checked his calculations of the area that had been burned beyond the piles using a more precise GPS. He used this data to create a detailed map, which was referred to during the hearing. Mr. McLean completed his investigation in the winter of 07/08.

[153] In the course of his investigation, Mr. McLean states that he reviewed the Marion Weather Station data and came to the conclusion that it is not representative of Block 10 in general. He notes that the weather station is located on a flat aspect, 8.8 km from Block 10 which is on a southwest aspect. While he agrees with Mr. King that wind played an important part in the spread of these fires, he also points out that, at the Marion Weather Station, no high winds were recorded. He also states that, when he attended the site on October 24th, the winds were stronger on the block than those measured at the station. His field notes state that, at 11:30 am that day, he estimated that the winds were gusting to 30 kph (based on his experience), whereas the reading at the Marion Fire Weather Station shows 7 kph at 12:00 noon, increasing to 20 kph at 4:00 in the afternoon. Also, the Initial Spread Index recorded at the station between October 19th and the 20th, is very low, yet the fire did spread during that time. In his view, this discrepancy in weather conditions between the station and Block 10 was foreseeable, as were the results that the fires escaped and spread beyond the debris piles.

RELEVANT LEGISLATION

[154] Section 22 of the *Regulation* is set out in full below:

Category 3 open fire

- 22** (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 3 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 obtains a burn registration number for the fire
 - (i) by
 - (A) calling the telephone number made known by the government for that purpose, or
 - (B) contacting an official by other means, and
 - (ii) by providing the information referred to in section 24 of this regulation;
 - (d) the person takes all necessary precautions to ensure the fire is contained in the burn area;
 - (e) the person establishes a fuel break around
 - (i) the burn area, or
 - (ii) each debris pile or windrow;
 - (f) 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,
 - (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, and
 - (iv) the fire does not exceed the capacity of the persons, fire fighting tools and heavy equipment on site for timely action to prevent any fire from escaping.

- (2) A person who, in the circumstances set out in subsection (1), lights, fuels or uses a category 3 open fire on a burn area must ensure that
- (a) no windrow on the burn area exceeds 200 m in length or 15 m in width, and
 - (b) the category 3 open fire is extinguished by the date specified by the official or person who issued the burn registration number.
- (3) Without limiting subsection (1) or (2), a person who lights, fuels or uses a category 3 open fire must ensure that the fire does not escape.
- (4) If a category 3 open fire lit, fuelled or used in the circumstances set out in subsection (1) spreads beyond the burn area or otherwise becomes out of control, the person who lit, fueled or used the open fire must
- (a) carry out fire control immediately,
 - (b) extinguish the fire if practicable, and
 - (c) as soon as practicable, report the fire as described in section 2 of the Act.
- (5) A person to whom subsection (4) applies may discontinue carrying out fire control if relieved from doing so by an official.
- (6) A person carrying on an industrial activity who is required under subsection (4) to carry out fire control in respect of a category 3 open fire must make available to fight the fire at least the greater of
- (a) 2 pieces of heavy equipment, 2 fire suppression systems and 11 workers who are each equipped with at least one fire fighting hand tool, and
 - (b) the workers, fire suppression systems, heavy equipment and fire fighting hand tools as described in section 13 (1) in relation to whichever is applicable, Crown land or land other than Crown land.
- (7) The person who, under subsection (6), is required to make workers, fire suppression systems, heavy equipment and fire fighting hand tools available must deploy them as appropriate, given the circumstances and conditions applicable to the fire.

[Emphasis added]

DISCUSSION AND ANALYSIS

1. **Whether the MFR's failure to advise LP that it was investigating LP's pile burning activities on Block 10 taints or nullifies the subsequent determination process such that the Orders should be rescinded?**

[155] There is no dispute that the MFR did not formally notify LP that it was investigating the spread of the fires on Block 10 as a potential contravention. LP submits that the Ministry's own policy 16.6 sets out a notification requirement. The Respondent submits that this is simply an internal document for staff; it is not a precondition for a determination, nor is it meant to be used or relied upon by the public.

[156] The Respondent also submits that, when Mr. McLean emailed the questions to Mr. King on October 25th and asked for a written response, this was sufficient notice to LP that the Ministry was looking into things: it was a sufficient indication that an investigation was occurring.

[157] LP states that when it receives email questions from the MFR it has no problem answering those questions, as it did in this case. However, if the same questions are asked, but it is clear that they are part of an investigation, the person responding is likely to take more time and put more thought into its answers. That is why, LP submits, it is important to be put on notice of an investigation.

[158] LP also emphasizes that, in this situation, time is of the essence to be notified of an investigation: weather conditions change rapidly and, to be able to gather relevant data and assess the situation, it needs to know right away of an investigation. In its view, Mr. McLean should have notified LP of the investigation on the 24th. At that time, Mr. McLean was taking photographs and was clearly investigating the site because he suspected a contravention. Had LP been given notice that day, LP submits that it had staff on the block with the relevant instruments and equipment to check the moisture, temperature and relative humidity. LP would have been able to provide clear evidence of the conditions on the block, on that day. It would not be required to extrapolate from the Marion Weather Station data, or rely upon people's memories to prove its case. In particular, LP refers to Mr. McLean's evidence that the site was dry on the 24th and there were wind gusts of 30 kph. Had it known of the investigation, LP would have had accurate measurements to provide to the Panel, rather than having to defend against Mr. McLean's "guesstimates" and extrapolate from the Marion Weather Station data.

[159] LP also referred to a previous decision of the Commission in *Tembec v. Government of BC*, Decision No. 2008-FOR-011(a), December 16, 2009, where the Respondent gave formal notice to Tembec that it was under investigation. Tembec was able to hire an expert and defend its actions. In the present case, LP was denied the opportunity to do the same. LP submits that proper notice of an investigation would have made an enormous difference to its ability to defend its actions before the Manager, and the Commission.

[160] The Panel understands and agrees with LP that being notified of an investigation would likely have changed LP's responses to the email questions and

its approach to gathering information and data on the site. Although there is no requirement for MFR officials to provide notice of an investigation, it is certainly a good practice, which is likely why it is in the MFR's policy. The Panel is also of the view that, on October 24th, Mr. McLean suspected a contravention. That is why he notified the Southeast Fire Centre and LP of the fires, traversed the burned areas, took photographs, and, the next day, sent those email questions to LP for a written response.

[161] However, on the facts of this case, the bigger problem for LP is not in relation to its data collection on the 24th and afterwards. By then, the fire was already 4 days old. While notice of an investigation on the 24th would have been beneficial to LP, as it could have gathered the data which may have helped the Panel to understand and evaluate LP's overall risk assessment, this particular case is not just about the risk of the fire spreading after October 24th. It is largely about the spread that had already occurred. The spread occurred on October 19th or in the early hours of the 20th.

[162] The contraventions at issue require an evaluation of whether that initial spread from the burn piles constitutes an "escape", and whether LP contravened section 22(4) by failing to perform the actions set out in that section, once it had spread beyond those burn piles or otherwise had become out of control. In the Panel's view, the most important and relevant data for the purposes of the contraventions at issue is the data from those early days. By the time that Mr. McLean arrived on the site, the Panel agrees with the evidence of LP, as was ultimately acknowledged by Mr. McLean, that the risk of a further spread was fairly low. Had LP staff taken notes of the field conditions when they attended the site on the 19th and the 20th, as appears to be the practice of Mr. King and Ms. Thompson, LP would have been better prepared to reply to an investigation, and to this Panel on appeal.

[163] Given that the evidentiary basis for the contraventions is not substantially reliant on the facts that occurred on or after October 24, 2007, the Panel finds that the failure to provide notice of the investigation is not fatal to the later enforcement proceedings and the Orders.

2. Did LP contravene section 22 of the *Regulation* by allowing the fire to "escape", contrary to section 22(3), and/or by failing to perform the prescribed actions in section 22(4)?

[164] To determine whether LP allowed the fire to "escape", contrary to section 22(3) of the *Regulation*, and whether LP failed to take the required actions once the fire "spread beyond the burn area or otherwise become out of control", a number of words must be interpreted: "escape", "burn area" and "out of control". None of these words or terms is defined in the *Act* or the *Regulation*.

[165] Although there was a great deal of focus at the hearing on what the witnesses understood these words to mean, the meaning of these words in the context of the *Regulation* is a question of law and, as such, is a question to be determined by the Panel. In that regard, the Panel does not view the witnesses' use of the word escape in their evidence or emails as an admission of a contravention.

“Escape”

[166] There is no indication that escape is used as a “term of art” in this legislation. To the contrary, the legislation applies to (and is to be understood by) a wide variety of people who use the land base such as hikers, campers and residents, as well as forestry companies and others performing “industrial activities” as defined in the legislation. Thus, the Panel has considered the common dictionary definition.

[167] In the context of section 22(3), “escape” is used as a verb. The most relevant dictionary definitions are as follows:

Merriam-Webster online: (a) to get away (b): to issue from confinement

Oxford Dictionary Online: break free from confinement or control

Cambridge Online Dictionary: to get free from something.

[168] This leads to the next question: get away from or free from what or where?

[169] LP appears to make 2 different arguments on the meaning of escape. At various times, it submits that an escape occurs when the fire spreads beyond the cutblock boundary. However, in closing argument, LP also characterized an escape as going beyond the fuel break; which, in this case, was snow.

[170] Regarding the first argument, LP states that the burn registration that LP is provided by the MFR shows under the general heading “geographic”, the legal description “CP 827, Block 10 and Block 11”. LP submits that this is the area for which LP is legally responsible and that this interpretation makes sense because a licensee has to deal with slash hazards throughout the entire block, and slash piles can occur anywhere in a block. It submits that there are hand-made piles, machine piles, naturally occurring piles, and piles created through the mechanical harvesting operations themselves. The piles are not restricted to the landings. In its view, it is LP’s job to ensure that a fire doesn’t escape the block proper; its legal area of responsibility.

[171] In LP’s view, this is also consistent with the results-based philosophy underpinning the legislation. In a results-based regime, LP submits that the government is saying: “we don’t care how you do something provided that the result is X”. In the context of this case, LP says this means: “we [the government] don’t care what type of fuel break you use, just don’t let it spread beyond the legal boundary and into our forest.”

[172] In its closing argument, LP argued that an escape occurs when the fire escapes the guard (the fuel break); a term often used in this situation is that the fire has “jumped the guard”. LP observes that since the legislation encompass all kinds of situations, from “mom and pop operations” to forest companies, the legislation covers everything from the burning of stubble to industrial burns. And, regardless of who is doing the igniting, a fuel break must be established somewhere. Therefore, LP submits that the fuel break in question is what you have to assess an escape against. This interpretation appears to be consistent with the MFR Interpretive Bulletin of June 8, 2007 when it states:

we would not commonly assess the sufficiency of a fuel break until after fire escapes beyond the fuel break, as part of an incident

inspection or investigation. It is also understood that there are conditions under which a fuel break could not completely prevent a fire from spreading. The fact that a fire escapes does not automatically infer non-compliance with fuel break requirements.

[173] However, the Respondent submits that an escape occurs if the fire goes beyond the burn area, which it defines as the debris pile area, extending to include a small buffer area.

[174] Neither party provided any analysis of the legislation to support their respective interpretations.

[175] The problem with the Respondent's interpretation is that it defines "escape" in subsection 22(3) to mean, in essence, the same thing as "beyond the burn area" in subsection 22(4). In the Panel's view, this is contrary to the "presumption of consistent expression" – one of the presumptions used in statutory interpretation. This presumption is described by Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Vancouver: Butterworth's 1994) as follows:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. ... Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended. (p. 163)

[176] Sullivan also notes that there are times when this presumption may be "discounted". Factors that affect the strength of the presumption include the proximity of the words to one another, the similarity of their contexts, how often they recur in the legislation and the extent to which they constitute distinctive patterns of expression.

[177] Given that the word escape is used in various places in the *Regulation*, that escape is used in a subsection in close proximity to "beyond the burn area" (one subsection above), and that "beyond the burn area" is also a commonly used phrase in the *Regulation*, the Panel finds that there is no reason to discount the presumption in this case. If the intent had been for escape to mean the same thing as "beyond the burn area", it could have used the word escape in section 22(4) instead of "beyond the burn area", or it could have used "beyond the burn area" in section 22(3), instead of the word "escape".

[178] The Panel finds that, given the use of the different words and phrases in these two consecutive sections of the *Regulation*, the Legislature intended the word "escape" in section 22(3) to mean something different from "spreads beyond the burn area or otherwise becomes out of control", the phrase used in section 22(4) of the *Regulation*. In our view, the difference in wording is intentional; the Legislature intended the word "escape" to mean something different from "spreads beyond the burn area". However, this raises the next question. If escape does not mean "beyond the burn area", what does it mean? To answer this, the Panel must review the legislation as a whole to try to ascertain the legislative intent.

Legislative Intent

[179] Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, states that every enactment must be construed as being remedial and must be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” Further, the “modern” approach to statutory construction which has been endorsed on many occasions by the Supreme Court of Canada, is that:

the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.)

[180] It is clear from the *Act* as a whole that it represents the legislative policy of protecting forest land and grass land (forest resources) ², as well as people lives, by controlling, ameliorating and, where possible, eliminating the risk of wildfires caused by the burning activities in or near forest and grass lands. In the MFR’s Interpretive Bulletin #39, dated June 2009, it describes the purpose of the *Act* in simpler terms: “The provisions of the *Wildfire Act* are designed largely to prevent wildfires.” It states, “Wildfires can cause an extraordinarily large amount of damage and, potentially, the loss of life.”

[181] One of the means used to accomplish these objectives is to regulate the use of open fires in or near forest and grass lands. By regulating the use of open fires, the Legislature has implicitly acknowledged people’s desire, and often the need, to burn materials. In the forestry context for instance, the Legislature has recognized the need for companies to deal with the debris left over from harvesting which can become a fire hazard. One method for doing so is to burn it. The objective of burning slash (debris) piles is to reduce the risk of a future fire igniting from the debris, which could damage or destroy the regenerated forest plantations in the block, as well as the mature timber in the surrounding area. It is a hazard abatement procedure.

[182] However, to deal with one hazard, there is the potential for creating another hazard: forest fires. This is the same dilemma faced by many other companies who perform activities in or near forest land. In the Panel’s view, the *Regulation* reflects an attempt to balance these competing objectives and minimize risk to forest land, grass land and, of course, to public safety. To do so, it has created categories of open fires and set out a number of conditions that must be met for each category in order to reduce the risk of the fire spreading to those forest resources it seeks to protect, and beyond.

“Escape” in this context

[183] Based on this analysis of the legislative intent, the Panel finds that, unless otherwise stated in the legislation, “escape” means from the legal boundary of responsibility which, in this case, is the cutblock. Debris piles and windrows can be created throughout an entire cutblock area. This may be why the burn registration

² Both “forest land” and “grass land” are defined in section 1 of the *Act* to include lands that previously supported trees and grass (e.g., harvested cut blocks).

in the forestry context uses the blocks in the legal description, rather than a more precise area.

[184] In the Panel's view, an escape must extend to a larger area than that covered by debris piles or even small buffers surrounding the debris piles. In this case, the legal boundary of a cutblock, within the definition of an approved cutting permit, is the legal area of responsibility from which fires would escape. Although a cutblock is large, this interpretation takes into consideration the presumption of consistent expression referenced above, and it also recognizes the legislative intent of protecting forest land and grass land beyond the cutblock boundary, among other things like human safety.

[185] The Respondent argues that, if an escape applies to the cutblock boundary, the whole block could be burned before there is a contravention. To this, the Panel responds as follows.

[186] First, there are separate obligations to keep a fire within the burn area, to keep the fire from spreading beyond the burn area or out of control, as well as an obligation to maintain the fuel break.

[187] Second, in the forestry context, the trees in a cutblock have been, or will be, harvested from the block prior to a category burn. With respect to leave strips, wildlife tree patches, or other protected values within a block, there is other legislation that addresses any loss or damage to those items.

[188] Finally, the Panel notes that this is an "ensure" section. The person igniting the fire is to "ensure that the fire does not escape." Other sections require a fire to be kept within the burn area and in control. This section emphasizes that, at the end of the day, regardless of the other requirements, the person igniting the fire must make sure that the fire does not spread to the forest and grass lands sought to be protected. If it does spread to those areas (escapes), the Panel notes that serious consequences may follow. Section 33(1) establishes maximum administrative penalties for contraventions of the *Regulation*. It sets a maximum of \$100,000 for contravention of 22(3).

[189] The Panel has also considered LP's argument that an escape occurs when a fire burns beyond or jumps the fuel break. As already stated, there are other sections that require the fire to be kept within the fuel break or burn area (the meaning of burn area will be addressed below). If "escape" meant beyond or into the fuel break, this would essentially render those other sections meaningless or redundant, and contrary to the principle of consistent expression referred to above.

[190] For all of these reasons, the Panel finds that "escape", in the context of this case, means from the cutblock.

"spreads beyond the burn area or otherwise out of control"

[191] Section 22(4) states that if a category 3 open fire spreads beyond the burn area or otherwise becomes out of control, the person who lit the fire must complete 3 tasks: carry out fire control immediately, extinguish the fire if practicable and, as soon as practicable, report the fire as described in section 2 of the *Act*.

[192] LP submits that “the burn area” is the legal description contained in the burn registration; in this case, the cutblock. This is also the argument that it made in relation to the meaning of escape (above).

[193] LP also submits that “or otherwise becomes out of control” is where risk assessment comes into play. If the wrong assessments are made with respect to risk, e.g., the fire is building up or the initial spread index is increasing, the fire may become out of control. Even if it doesn’t escape the block, it submits that you still have to assess whether it has become out of control.

[194] As stated above, the Respondent submits that “the burn area” is the debris pile area and a small buffer area. It submits that, if a fire escapes beyond that area, as they allege it did in this case, then it is out of control and must be controlled immediately. Risk assessment is unnecessary. The Respondent submits that this fire was out of control on the night of October 19th, as evident by the large black areas of burned logging debris beyond the burn piles shown in Mr. McLean’s photographs.

[195] As with the interpretation of “escape”, in fact, as with all of the words and phrases at issue in this appeal, neither party provided an analysis of the legislation or any legal support for their interpretations.

[196] Regarding the question, what is “the burn area,” the *Regulation* is not explicit and, in the context of section 22(4), is quite confusing. On the one hand, there appears to be some indication that the burn area is the area “within” or contained by the fuel break. This is based on a review of various sections of the *Regulation* which specifically require the fuel break to be around the burn area. For example, section 20(1)(c) dealing with campfires states:

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:

...

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

[197] Section 21(1)(c), which deals with category 2 open fires, states:

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:

...

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

[198] However, for category 3 open burns, the wording is slightly different. Sections 22(1)(d) and (e) state:

22 (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 3 open fire in or within 1 km of forest land or grass land are as follows:

...

(d) the person takes all necessary precautions to ensure the fire is contained in the burn area;

(e) the person establishes a fuel break around

(i) the burn area, or

(ii) each debris pile or windrow;

[Emphasis added]

[199] This section is confusing because it suggests that the burn area for a category 3 open fire is something different from the area of the debris pile or windrow. After comparing the various sections and the definitions of the various categories, no clear rationale emerges. Unfortunately, the inconsistencies in language and the lack of a definition make it very difficult to get any clear idea of what the Legislature intended the burn area to mean in a category 3 situation, other than that "the burn area" is intended to be contained within the fuel break.

[200] From the evidence at the hearing, it is apparent that all of LP's employees sought to ensure that there was an adequate fuel break around the piles. Despite the peculiar language for category 3 open fires, the Panel is of the view that the usual meaning of the burn area, being within the fuel break, should apply to this section. This Panel finds that "the burn area" is the area between the edge of the piles and the interior edge of the fuel break.

"or otherwise out of control"

[201] When dealing with fires, the Legislature appears to have recognized that, to prevent a wildfire, it is important to contain a planned burn and ensure that it is in control of the people igniting and monitoring it. The Legislature has recognized the need to have the right amount of people and equipment on site while a fire is burning. A number of sections in the *Regulation* address these requirements (see for example, sections 22(1), (6) and (7)).

[202] In addition, the Legislature has recognized that, if a fire is getting out of control, it is important to perform fire control actions promptly and to alert the authorities as quickly as possible to coordinate appropriate monitoring and/or actions in order to prevent its spread into forest land or grass land. In the Panel's view, this is the purpose of section 22(4) of the *Regulation*.

[203] Accordingly, the Panel finds that the words "or otherwise out of control" in subsection 22(4) is a qualifier to the preceding words "spreads beyond the burn area." Therefore, a contravention only lies where the facts support a finding that the fire has spread "beyond the burn area" and is "out of the control" of the people and or equipment required to be present at the time of the burn. In the Panel's view, the main objective of the legislation is for a planned burn or campfire to be

kept in control, and the main issue being addressed in section 22(4) is a fire that is becoming out of control.

[204] In the Panel's view, this must be the intent of the Legislature. Although the Respondent submits that once a fire spreads beyond the piles and a small buffer, the requirements in (a), (b) and (c) apply, this cannot be the intent. As stated by a number of the witnesses, it is not uncommon for a debris pile burn to spread further than the piles and a "buffer" area. However, the spread may be tiny - a shovel may be sufficient to "put it out". Other times, it will self extinguish in the fuel break. It simply cannot be the intent that every small spread beyond the burn area requires reporting, extinguishment and so on under section 22(4). This would be onerous for the person igniting the fire and could overload the Fire Centres.

[205] Rather, the Panel finds the requirements to take fire control action and report the fire are triggered when the fire is beyond the burn area and is out of control. "Out of control" in this context means beyond the capacity or capability of the people, equipment or site conditions to prevent further spread of the fire – to prevent the fire from escaping into the forest land or grass land or other values protected by this legislation.

[206] In the Panel's view, this interpretation also reflects the realities faced by forest companies such as LP. If the Panel had accepted the Respondent's argument that the burn area is the point from which an "escape" occurs, or as an indicator that the fire is "out of control", significant problems would result. Given the scale of forest management operations, a company could not possibly manage the array of debris fires undertaken every year if they had to ensure escapes did not occur from debris pile areas. It would be an impossible task to undertake containing category 3 open fires with available staffing. Backlogs of unburned debris may start to accumulate, increasing fire hazards, and acting counter to the intent of the legislation, which is to reduce fire hazards by burning the debris piles.

APPLICATION OF THE FACTS TO THE LAW

Section 22(3)

[207] Mr. McLean's evidence is clear that the fires burned beyond the debris piles, beyond an area that would include a buffer around the debris piles, and into the snow fuel break. There is no dispute that this occurred.

[208] The parties agree that these fires did not spread into surrounding timber or grass land, although it came relatively close near landing 3.

[209] The fires spread into the block, but did not affect the surrounding timber or grass lands. Neither public nor private property was destroyed, including wildlife, vehicles or logging equipment. There was no evidence of any environmental damage. In fact, the main damage was to LP's replanting efforts as many seedlings were destroyed and had to be replanted. In short, there was little consequence to the protected values from these fires.

[210] Based on the Panel's interpretation of escape above, the Panel concludes that these fires did not "escape". There is no contravention of section 22(3).

[211] Accordingly, this contravention and penalty is rescinded.

Section 22(4)

[212] Even though no one was on site when the fires spread, the Panel finds that the site conditions were such that the fire was not "out of control". It spread beyond the debris pile areas sometime during the night of October 19th or the early morning hours of October 20th. However, the fuel break and weather conditions prevented it from becoming out of control. That is the point of a fuel break and of reviewing the weather conditions before igniting a fire. There is no dispute that the fires self-extinguished within a few days.

[213] The Panel accepts the evidence of LP's witnesses that the fires were monitored and assessed until they self-extinguished. Mr. Mozell was there on the 20th, 23rd and the 24th; Mr. King was there on the 22nd and 25th. These individuals both have many years of experience with debris pile burning and, of particular relevance, pile burning in this area. Despite this, it is true that the fire spread into the fuel break. The evidence is that the spread came as a surprise to Mr. Mozell given the snow cover and weather conditions present on the 19th.

[214] Mr. King's evidence is that the spread was caused by an unexpectedly strong wind that came up between the 19th and 20th from an unusual direction. He supported this opinion through an analysis of the photographs. He explained that the wind pushed the fire into the break, drying out the break in that area as it did so.

[215] Based on the evidence, it appears to be generally understood in the field that a fire will gradually change (reduce) the effectiveness of a moisture-based fuel break. Nevertheless, this is one of the MFR's accepted types of fuel break. At the time the fires were lit, the Panel accepts that there was no indication that the weather conditions were such that this wind was likely to occur.

[216] After the initial spread had taken place, the Panel accepts the evidence of Mr. Zimmer, Mr. Mozell, and Mr. King that the fires were not out of control or of concern; the site and weather conditions would prevent the fire from further spreading or becoming out of control. This view is also reinforced by the evidence of Mr. McLean.

[217] Despite Mr. McLean's evidence of gusty winds of up to 30 kph on October 24th and concerns with 8 smokes, some of which he said were at the perimeter of the spread near the edge of the block (landing 3), Mr. McLean left Block 10 without either:

- advising Mr. Mozell to extinguish the fires or take further fire control actions;
- contacting LP to advise of any concerns; or
- taking any other action that would suggest that he was concerned about the fires "escaping" or becoming "out of control".

[218] The Panel finds on the facts that the fires were beyond the burn area, but not out of control. Therefore, there was no requirement for LP to carry out fire control immediately, as stated in section 22(4)(a). Secondly, there was no need for LP to

extinguish the fire, if practicable, as required under section 22(4)(b). Lastly, there was no need for LP to, as soon as practicable, report the fire as described in section 2 of the *Act*.

[219] Accordingly, LP did not contravene section 22(4) of the *Regulation*. The contravention and penalties are therefore rescinded.

Conclusion on Issue 2

[220] In answer to Issue 2, the Panel finds that LP did not contravene section 22 of the *Regulation* by allowing the fire to “escape”, contrary to section 22(3), and/or by failing to perform the prescribed actions under section 22(4).

[221] Given the Panel’s findings, there is no need to consider Issues 3 and 4.

Comments and Recommendation of Majority

[222] LP put a great deal of effort into its case which the Panel appreciates. Although the evidence supported a finding of no contravention in this case, the Panel also wishes to convey that these findings do not necessarily indicate that LP’s actions should be the standard applied. In this case, LP’s field staff were very experienced at burning debris piles: Mr. Mozell had 33 years of operational experience, including 16 years burning debris piles; Mr. Zimmer had 13 years of experience burning debris piles. That will not be the case all the time. Mr. King’s evidence is that the personnel involved in burning debris piles can vary and staff with less experience than that of Mssrs. Mozell and Zimmer may ignite fires at the wrong time.

[223] Whereas someone with years of experience can judge weather, site conditions and fire behaviour correctly, someone with less experience may not. Even people with years of experience burning debris piles can be taken by surprise, as Mr. Mozell admits that he was when he attended Block 10 on the 20th. In the future, LP’s employees would benefit from further senior management direction on this matter, including explicit fire monitoring instructions following ignition.

[224] This has been a very difficult case for the Panel to decide. The legislation at issue uses terms in a way that may, at first glance, appear to be interchangeable yet the words chosen are different, which leads to different results depending on the principle of statutory interpretation applied. Further, the lack of certainty in the language can have significant results for the various operators who fall under the *Regulation*. In the view of the Panel, this *Regulation* should be amended to ensure that its provisions are clear and may be understood by all of the varied people and industries covered by the legislation.

MAJORITY DECISION

[225] In making this decision, the Panel has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

[226] For the reasons provided above, the Panel rescinds both Orders.

[227] The appeal is allowed.

"James Hackett"

James Hackett, Panel Chair
Forest Appeals Commission

"Blair Lockhart"

Blair Lockhart, Member
Forest Appeals Commission

May 16, 2011

[228] *Minority decision: Reid White*

INTRODUCTION

[229] I agree with the Majority's review of the evidence, arguments and findings on Issue 1.

[230] However, I disagree with their analysis and findings on Issue 2. Specifically, the Majority has a different view of what constitutes an "escape" and what the phrase "spreads beyond the burn area or otherwise becomes out of control" means. Determining if the alleged contraventions occurred turns on the interpretation of these words and phrases which are not defined in the *Act* or *Regulation*.

DISCUSSION AND ANALYSIS

2. Did LP contravene section 22 of the *Regulation* by allowing the fire to "escape", contrary to subsection 22(3), and/or by failing to perform the prescribed actions in section 22(4)?

Interpretation

[231] When words are not explicitly defined in legislation, the modern principle of statutory interpretation is to look at the *Act* and the *Regulation* as a whole for context to interpret their meaning. The commonly quoted principle is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (E.A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87.)

[232] The *Wildfire Act* addresses all open fires that are within 1 kilometer of forest land and grass land. The focus is on authorizing open fires when it is safe to burn, and specifying what to do when they become unsafe. The *Act* establishes penalties and remedies where a person fails to maintain control of a fire, or fails to take action when control is lost and the fire spreads. The principle purpose is to prevent wildfires and, when they are not prevented, to reduce their harmful effects.

[233] The *Act* contemplates regulations to be made to address different categories of fires and the circumstances under which they may be lit, fueled and used. The *Regulation* at issue establishes three main categories of fires:

- a "category 1 open fire" which is defined in section 1 as "an open fire that burns piled material no larger than 1m in height and 1 m in diameter and includes a campfire that burns such material";
- a "category 2 open fire" which is defined as an open fire that burns material in either one or 2 piles at a time of a specified height and width or burns stubble or grass over an area of .2 hectares; and
- a "category 3 open fire", which is defined as an open fire that burns:

- a. material concurrently in 3 or more piles each not exceeding 2 m in height and 3 m in width,
- b. material in one or more piles each exceeding 2 m in height or 3 m in width,
- c. one or more windrows, or
- d. stubble or grass over an area exceeding 0.2 ha.

[234] LP obtained a burn registration number for a category 3 open fire.

[235] Section 5 of the *Act* states a person may not light or use an open fire except as prescribed by regulation.

[236] The *Regulation* sets out the prescribed conditions for lighting open fires, and the duties and obligations of the person doing so.

[237] For instance, a person responsible for a category 1 open fire, which specifically includes a camp fire, must take precautions to ensure that it remains in the burn area (section 20(1)(c) of the *Regulation*) and that it does not escape (section 20(2)). Similar provisions are set out for category 2 (section 21) and category 3 open fires (section 22).

[238] Of particular relevance to this appeal are the provisions set out for a category 3 open fire. A person responsible for a category 3 open fire must “take all necessary precautions to ensure the fire is contained in the burn area” (section 22(1)(d)), and “does not escape” (section 22(3)).

[239] Given that the legislation applies to “campfires” as well as “industrial activities”, the meaning of undefined terms must be understood in their ordinary sense; not as a term of art or legal nature but rather, the meaning should be understood by all users.

[240] The reasonable interpretation of the words “burn area” and “escape” is the ordinary meaning of these terms as understood by a person operating a campfire, and is the same for a person operating a category 3 open fire.

What does “burn area” mean?

[241] As stated in the definition above, a category 3 open fire is for burning one or more piles or windrows of material.

[242] According to section 22(1)(c), a person who wishes to light a category 3 open fire must first obtain a burn registration number. The information required to get a registration number is set out in section 24 of the *Regulation* and includes identifying the parcel of land that “contains the proposed burn area”. It does not require the applicant to describe where on the site the piles for burning are located. Therefore, the registration itself does not appear to define or specify the “burn area”, but does indicate that it is smaller than the parcel of land.

[243] Of the most relevance, I note that the *Regulation* requires a fuel break to be established “around the burn area” or “each debris pile or windrow” in section 22(1)(e). A plain reading of this section, in conjunction with section 24, is that a burn area is piled material surrounded by a fuel break, and is contained on a parcel

of land; not the entire parcel of land, but a smaller area inside a fuel break on the land. Just as plainly, the fuel break may be established around a well-defined burn area or around several scattered piles or windrows (the burn area) on a parcel of land.

[244] Scott King testified that it was typical for material close to a burning pile to char or burn. This evidence was not disputed.

[245] Considering this evidence and the sections of the *Regulation*, I find that "burn area" means the area under piled material and includes adjacent material that could reasonably be expected to char or burn or otherwise not function as a fuel break, up to, but not including, the fuel break.

What does "escape" mean in the context of section 22(3)?

[246] To determine what the Legislature had in mind when it states that a person "who lights, fuels or uses a category 3 open fire must ensure that the fire does not escape", I have looked to the other provisions in that section and note as follows:

- A person using a category 3 open fire must take "all necessary precautions to ensure the fire is contained in the burn area" (section 22(1)(d));
- A fuel break must be established "around the burn area" (section 22(1)(e));
- "Fuel break" is defined as "a barrier or a change in fuel type or condition, or a strip of land that has been modified or cleared to prevent fire spread" (section 1(1));
- A fuel break is to be maintained while the fire is burning and there is a risk of the fire escaping (section 22(1)(f)(i)); and
- A person who lights, fuels or uses a category 3 open fire must "ensure that the fire does not escape" (section 22(3)).

[247] Taken together, I find that these sections establish that an "escape" is when fire is no longer contained in the burn area.

[248] It is typical for limits to be established in legislation. When these limits are exceeded, Ministry officials have the discretion to take enforcement action, which includes contravention and penalty proceedings. Not every technical breach of this section of the *Regulation* will result in formal enforcement actions or penalties.

Did LP contravene section 22(3) of the Regulation by failing to ensure that the fire did not escape?

[249] Mr. Mozell testified that 2 cm to 4 cm of fresh snow was present on the block when 3 separate piles were ignited. The fires were monitored for about 20 to 30 minutes each. Mr. Mozell stated that the venting was good, burning well and winds were calm. It started to rain when he left the site about 1 pm.

[250] Scott King testified that the fresh snow on the ground was considered an adequate fuel break.

[251] Mr. Mozell testified that when he returned to the site the following day, he could see large black patches as he entered the valley and he knew that the fires had spread.

[252] A photo taken by Mr. Mozell on October 20, 2007 was tendered into evidence by LP. This photo shows that the snow cover claimed to exist on October 19th was no longer continuous on the 20th. Looking at the photograph, Mr. Mozell agreed that the snow appeared "patchy" in the block that day.

[253] A photograph taken by Mr. McLean on Nov 2, 2007 shows all 3 landings. It shows that one of the fires came close to the wildlife tree patch in the foreground. Slash and seedlings were affected by the fire.

[254] In my view, had the wind direction been different, or the wildlife tree patches been in the path of the fire, they could have been damaged. It seems more a matter of good fortune than good management that the wildlife tree patches were not affected.

[255] There is no question that the fires spread well beyond the fuel break. Further, there is evidence of smokes beyond the fuel break for at least 5 days before they eventually self-extinguished, sometime between October 24 and November 1st.

[256] I find that the consequences of the escapes were principally to the detriment of LP's interests; the effect on the Province's resources was minimal.

[257] I also find that the potential for more significant damage to provincial resources existed, and the result of the escape was not "de minimis".

[258] Based on the evidence, I find that an escape occurred, and that enforcement action is appropriate.

Did LP contravene section 22(4)(a), (b) and (c) of the Regulation?

[259] Section 22(4) of the *Regulation* states:

- 22** (4) If a category 3 open fire lit, fuelled or used in the circumstances set out in subsection (1) spreads beyond the burn area or otherwise becomes out of control, the person who lit, fuelled or used the open fire must
- (a) carry out fire control immediately,
 - (b) extinguish the fire if practicable, and
 - (c) as soon as practicable, report the fire as described in section 2 of the Act.

[260] For the subsections (a), (b) and (c) to apply, the precondition is that the category 3 open fire "spreads beyond the burn area or otherwise becomes out of control". The precondition has a logic structure of the form 'if either A or B are true then C applies'. Given this logic, the precondition is satisfied if either the "fire spreads beyond the burn area" or "otherwise becomes out of control".

[261] I find that the *Regulation* imposes two main obligations on a person performing a category 3 open fire: to maintain control of a fire, and to contain it within the burn area. If a person fails to contain a fire within the burn area then, according to section 22(4), the person has lost control of the fire. In my view, the proper reading of this section is that, spreading beyond the burn area is a particular instance of "otherwise becoming out of control". The value of explicitly stating this in the *Regulation* is that a person need not evaluate whether a fire is out of control; rather, the person only needs to determine whether it has spread beyond the burn area.

[262] Based on the evidence presented, I find that the fires spread beyond the burn areas. I therefore find that the fires were out of control; the precondition of this section is met.

Did LP contravene the requirement to carry out fire control under subsection 22(4)(a) of the Regulation?

[263] Based on the evidence the fires spread sometime after LP personnel left the area on Friday, October 19th, but before they returned on Saturday the 20th.

[264] While a fire is burning and there is a risk of it escaping, section 22(1)(f)(iii) of the *Regulation* requires the person to ensure that "... the fire is watched and patrolled by a person to prevent the escape of fire."

[265] Section 22(4)(a) states that, if a category 3 open fire spreads beyond the burn area, the person "must carry out fire control immediately."

[266] "Fire control" means "an action to contain, extinguish or limit the spread of a fire" (section 1(2)).

[267] None of these actions were taken on Friday, October 19, 2007, because no one was on site to do so. Mr. Mozell decided not to watch and patrol the burn area; instead, he chose to leave the site and to return the following day. Therefore, there were no LP personnel on site when the fires spread, and LP was not in a position to respond immediately when fires spread beyond the burn areas.

[268] Moreover, when the escapes were discovered by Mr. Mozell on October 20th, he agreed under cross-examination that he could have extinguished the fires at that time with the equipment that he had with him; it was physically possible to do. However, Mr. Mozell testified that he did not do so.

[269] I note that section 22(5) of the *Regulation* states that "A person to whom subsection (4) applies may discontinue carrying out fire control if relieved from doing so by an official". Although Mr. McLean did not order Mr. Mozell or LP to perform fire control or extinguish the smokes on October 24th, I find that this does not mean that he "relieved" LP from the requirement to perform fire control pursuant to section 22(5).

[270] Based on all of this evidence, I find that LP did not carry out fire control immediately, contrary to section 22(4)(a) of the *Regulation*, and that enforcement action is appropriate.

Did LP contravene the subsection 22(4)(b) requirement to "extinguish the fire if practicable"?

What does "if practicable" mean?

[271] LP submits that "Mr. King and Mr. Mozell also assessed the site under the guidance of the FRPA [*Forest and Range Practices Act*] General Bulletin #3: Use of the Term Practicable" (June 9, 2005) and went on to state "The decision not to extinguish the fire met the practicability test".

[272] The Bulletin states that several Forest Planning and Practice regulations "use the term practicable so it is important that it is understood and applied consistently." It notes that the word "practicable" is sometimes confused with the word "practical" and offers an explanation from "Weseen, Words Confused and Misused" who wrote that "Practicable means capable of being carried out in action", whereas "practical" means "useful in practice".

[273] The Bulletin gives several examples of how the word "practicable" is used "within the planning framework" and "with regards to a practice requirement." One of these examples is about a proposed road in a riparian management area and the need to "balance social, economic and environmental factors" when considering the road alignment.

[274] LP references this example by saying "there was no environmental damage and no social concerns were noted", going on to conclude that the FRPA practicability test had been met on the facts of this case.

[275] Section 22(4) of the *Regulation* states that, when a fire spreads beyond the burn area or otherwise becomes out of control, a person must immediately limit the spread of fire, regain control of the fire, extinguish the fire if practicable, and report the fire as soon as practicable.

[276] I find that the underlying goal of the legislation, and this section in particular, is for immediate action to be taken in order to prevent a wildfire from developing. "Extinguish if practicable" must be understood in this context.

[277] Delaying immediate action to balance social, economic and environmental factors, as LP suggests, is neither warranted or appropriate in the context of section 22(4)(b) of the *Regulation*.

[278] In light of the above, I accept Weseen's description of "practicable" which involves consideration of whether "an action is capable of being carried out".

[279] I find that "extinguish if practicable" means the person must extinguish the fire if capable of doing so, subject only to any other actions required to meet the overarching objective of preventing a wildfire from developing.

Was it practicable for LP to extinguish the fire at issue?

[280] One of the reasons given for lighting the fire on October 19th was that there was fresh snow providing a fuel break.

[281] A photograph taken by Mr. Mozell on October 20th, shows that the snow cover reported to exist on the 19th was no longer continuous on the 20th. The conditions that were thought to be able to contain the fire proved to be inadequate.

[282] Mr. King testified that LP personnel relied on the snow cover as the fuel break. The definition of "fuel break" relied upon by LP is a "change in fuel type or

condition" (in this case snow or high moisture content) "to prevent fire spread". There is no evidence that these conditions existed on Saturday, October 20th. Mr. Mozell testified that he did not take moisture readings of the slash, and the photograph shows that the snow coverage was patchy in the subject area. I find the evidence is insufficient to support the claim that an adequate fuel break was in place on October 20th.

[283] The requirement in the *Regulation* is to extinguish the fire "if practicable".

[284] Mr. Mozell testified that he walked the perimeter of the escape.

[285] Mr. Mozell testified that he knocked back some "smokes" on landing 3.

[286] Mr. Mozell agreed under cross examination that he had equipment to extinguish the fires.

[287] Based on Mr. Mozell's evidence, I find that LP could have extinguished the additional fires (the smokes), when they were discovered on the 20th. There was no reasonable explanation provided for why this was not done. The assumption appears to have been that the conditions were such that the fires would self extinguish and, therefore, action to immediately extinguish them was not necessary. However, I find that, with minimal effort, the smokes could have been, and should have been, extinguished. It was practicable to do so in the circumstances.

[288] I find that LP contravened section 22(4)(b) of the *Regulation*, and that enforcement action is appropriate.

Did LP contravene the requirement in subsection 22(4)(c) of the Regulation to, "as soon as practicable, report the fire"?

[289] Subsection 22(4)(c) requires a person to report a fire in accordance with section 2 of the *Wildfire Act*, as soon as practicable. Section 2 of the *Act* states that a person is to report the fire "(a) to an official employed in the ministry, (b) to a peace officer, or (c) by calling a fire emergency response telephone number."

[290] In my view, this subsection was included to ensure appropriate authorities are informed of fires that spread or otherwise become out of control as soon as practicable. This enables authorities to assess and monitor these fires for the purpose of preventing wildfires from developing and/or reducing their impact by giving direction or managing and coordinating a response as they find appropriate.

[291] Mr. Mozell advised Mr. King on the afternoon of Saturday, October 20th that the fires had spread beyond the piles and into the fuel break. LP's own evidence is that this spread was not anticipated nor intended.

[292] Mr. King testified that LP did not report the fires on Saturday, October 20th, or on any subsequent date. No evidence was submitted that it was not practicable to do so.

[293] Mr. McLean reported the escapes to the Southeast Fire Center when he discovered them 4 days later, on Wednesday, October 24th.

[294] I find that LP did not report the fires in accordance with subsection 22(4)(c) of the *Regulation*, and that enforcement action is appropriate.

[295] Finally, I note LP's statement that "On October 24th, 2007 ... Mr. King received a call from the SE Fire Centre regarding the escape in CP 827 Block 10. Mr. King advised the SE Fire Centre that he was aware of the situation. Mr. King described the assessment that was conducted to determine that the few scattered smokes were not practicable to extinguish and that a monitoring program was place [sic]. No concerns from the SE Fire Centre were noted."

[296] In my view, had this call to the Fire Centre been initiated by LP on Saturday, October 20th, the subject Orders may well have been avoided. The MFR would not have been surprised to find the escapes on the 24th, and all interested parties could have monitored the situation and considered whether additional actions were required.

Conclusion

[297] Based on my interpretation of the legislation and after considering all of the evidence, I find that LP contravened section 22(3) and section 22(4)(a), (b) and (c) of the *Regulation*.

[298] The next issue to be decided is whether LP has established the defence of due diligence.

3. If LP contravened any or all of these sections, has it established a defence of due diligence?

[299] Section 29 of the *Regulation* states:

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,

[300] LP maintains that its employees were duly diligent when they lit the fires and monitored them after the 19th. It submits that the Commission should find that LP was duly diligent to prevent the contraventions: it exercised all reasonable care.

[301] In particular, LP submits that there was no wind at the time the fires were lit: the winds that came up from the south on the night of the 19th - or early morning on the 20th - were not reasonably foreseeable at this time of the year.

[302] LP further notes that (a) there was snow in the block above 1400 m elevation, and (b) where the majority of spread occurred, the fires not only had to go through snow, but in some locations it had to cross 4.5 metres of road, which also meets the definition of "fuel break". It submits that a standard machine made fuel break is only 2-3 metres wide, so the road width was actually a better break.

[303] LP submits that not only was the event, the unusual wind, unforeseeable, but LP exercised reasonable care to avoid the event.

[304] LP also submits that reasonable care is demonstrated by:

- its repeated reviews of the escapes;

- after the escapes, LP ignited 77 debris piles in the area and no escapes were noted; and
- by the Marion Weather Station data.

[305] LP also refers to Interpretive Bulletin #39 – MFR- June 2009 “Application of the Statutory Defences and Vicarious Liability under the Wildfire Act.” Specifically, it refers to the section on standard of care which states at page 2: “particular attention needs to be paid to the incidence of risk, that is, the likelihood and magnitude of damage occurring. The greater the likelihood of a harmful event occurring or the greater the potential damage if the event does occur, the higher the standard of care expected of persons by the law.”

[306] LP suggests that Mr. McLean’s risk assessment of the situation on the 24th, and the danger posed by the escapes, was exaggerated. LP points out that Mr. McLean took 14 photographs of the escapes on October 24th, but the total number of smokes recorded in the photographs is one, and that smoke is not located on the perimeter of the burn.

[307] LP maintains that its assessment of the situation, and the care that it took to ensure the escapes did not spread further, should be preferred over Mr. McLean’s assessment given that the escapes did, in fact, remain dormant and ultimately self-extinguished.

[308] The Respondent submits, first, that due diligence applies to the actions of LP, not the employees. Regarding the contravention of section 22(3), the Respondent submits that it was foreseeable that the fires would escape. Further, it submits that bizarre winds in the area are entirely foreseeable, as was acknowledged by Mr. King in his email response to the Manager. The question is, “did LP have a system in place to prevent the event from occurring?”

[309] The Respondent notes that LP had policy 3.17 on pile burning. However, it points out that LP did not define the word “escape” in this policy or in any of its standard operating procedures or management documents dealing with fire management. It did not provide any assistance to its employees. Contrary to LPs submissions on what the employees did in the field, the Respondent states that due diligence is something the company must establish, not the employees.

[310] Regarding the contraventions of section 22(4), the Respondent submits that it was foreseeable that employees would not carry out fire control as required under subsection 22(4)(a) because there is no definition of “escape” and an escape triggers the requirement for fire control.

[311] In light of the lack of direction from LP, it was foreseeable that employees would not extinguish and report fires pursuant to subsections 22(4)(b) and (c).

[312] The Respondent submits that LP should have referenced the legislation clearly, informed employees clearly, and must define what an escape is and what to do in the event of an escape.

[313] In terms of the employee’s actions, the Respondent submits that “due diligence would have been to extinguish the smokes, especially along the escape perimeter, immediately upon discovery.”

[314] Both parties referred to the BC Supreme Court's decision on due diligence in *Pope & Talbot v. British Columbia*, 2009 BCSC 1715. In that case, the Court clarified the two branches of the legal test for due diligence as:

- (1) where an accused's conduct is "innocent" as a result of a mistake of fact – i.e., the accused did not know, and could not reasonably have known, of the existence of the hazard; and
- (2) if there is no mistake of fact, where an accused has taken all reasonable steps to avoid the particular event" [paras 62 -63].

[315] "Particular event" is described by the Court in *Pope & Talbot* as follows:

Sault Ste. Marie makes it clear that the "particular event" is the contravention itself, not the circumstances that gave rise to it, as shown in these passages:

In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with evidence of due diligence. (p. 1325)

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. (p. 1331) [Emphasis added.]

[316] At paragraph 72, the Court further explains:

Whether conduct is "innocent" under the first branch of the common law defence, or whether all reasonable steps were taken under the second branch, must be considered in the context of the "particular event": *MacMillan Bloedel*, para. 48. The same focus applies in a foreseeability analysis: *MacMillan Bloedel*, para. 53. Accordingly, the proper inquiry under the second branch of the due diligence defence, as codified in s. 72(a), is whether the company took reasonable care to avoid the contravention (there the unauthorized cutting of the trees).

[317] I accept the Respondent's summary of the law in that the defence must be established by LP's actions, not the actions of its individual employees. Even the document referenced by LP in relation to standard of care states at page 2 that, where the licensee is a corporation, the principles set out in *R. v. City of Sault Ste. Marie* (1978) 2 S.C.R. 1299, apply. That case states that, "the due diligence of a corporation will turn on whether or not it established a proper system to prevent the contravention and whether it took reasonable steps to ensure the effective operation of the system."

[318] In this case, I find that LP did not have a proper system in place to prevent the contraventions. There was no policy or direction on what is meant by "escape"

or "beyond the burn area", and no direction on what steps to take or what is required when a debris pile burn escapes beyond the burn area.

[319] In addition, I note that the revised policy does not provide direction to LP personnel on what is expected of them after lighting a fire. There is no direction on what procedures should be taken before igniting a pile or windrow, how long to stay at the burn site to monitor the burns and when, or who, will perform reviews. This lack of guidance and direction may lead to escapes with far greater consequences in the future.

[320] Finally, even if LP could rely on the defence based on its employee's actions, I find that the employees did not exercise reasonable care to avoid the contraventions for the reasons given under the previous issue.

[321] Therefore, I find that LP failed to establish due diligence.

4. Is a penalty appropriate in the circumstances?

[322] The Orders were issued under sections 26 and 27 of the *Wildfire Act* which state:

Contravention orders

26 After giving a person who is alleged to have contravened a provision of this Act or the regulations 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, the minister by order may determine whether the person has contravened the provision.

Administrative penalties and cost recovery

27 (1) If the minister determines by order under section 26 that the person has contravened a provision, the minister by order

(a) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount,

...

(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.

[323] I have considered each of the factors listed in section 27(3) as well as the Manager's assessment of each of the factors. Among other things the Manager found that:

- there was no evidence of any other similar contraventions;
- the escapes resulted in the loss of approximately 3 hectares of plantation;
- the failure to recognize the importance of reporting a fire and its implications to prevention is of concern;
- LP has no operational procedures in place to deal with an escape;
- The magnitude of the contravention was not as pronounced given the time of year, but LP did not take any action to minimize the contraventions;
- There was some continuity in the contraventions because they weren't reported until found by Mr. McLean and no control actions or actions to extinguish the fires were taken;
- The contraventions were not deliberate;
- LP incurred additional expense to reforest the lost plantation, but may have saved some money by not undertaking fire control actions to contain and extinguish the escapes;
- LP reforested the burnt plantation and cooperated during the investigation and the opportunity to be heard. However, it provided no indication that it has made or will make any changes for due diligence reasons.

[324] I agree with the Manager's findings and assessment of these factors. Although Mr. King testified that the size of the escapes might be 2.5 hectares rather than 3 hectares, I prefer Mr. McLean's evidence (which is the basis for the Manager's finding) as he used a precision GPS to measure the size of the burns.

[325] For the contravention of 22(3) of the *Regulation*, the Manager levied a penalty of \$2,000 to reflect the requirement "to ensure any fuel break being utilized is adequate during the entire duration of the burn."

[326] I find this penalty is appropriate.

[327] For the contravention of 22(4)(a) of the *Regulation*, the Manager levied a penalty of \$1,000 "to reflect the lack of actions taken at the onset of discovery to control the fire and to ensure no further risks or losses would occur."

[328] I find this penalty is appropriate.

[329] For the contravention of 22(4)(b), the Manager levied a penalty of \$1,000 to reflect "the lack of any efforts to extinguish or accept the need to extinguish areas of the escaped fire that continued to present a risk to growth and ongoing losses [sic] to the plantation."

[330] I find this penalty is appropriate in the circumstances.

[331] For the contravention of 22(4)(c), the Manager concluded:

I am levying a penalty that is based on the violation ticket for failing to report a fire (\$115). I have doubled this amount to \$230 to reflect the lack of LP to continue to fail to report the fire even when its employees had reported it to them.

[332] I find this penalty is appropriate in the circumstances.

Recommendation of Minority

[333] The *Regulation* states that while a fire is burning and there is a risk of the fire escaping the person ensures that "... the fire is watched and patrolled to prevent the escape of fire" (section 22(1)(f)(iii)). I recommend that LP develop clear guidelines and communicate these to employees and contractors for determining whether there is "a risk of the fire escaping" and what a person must do when fire spreads beyond the burn area or otherwise becomes out of control.

MINORITY DECISION

[334] In making this decision, I have considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

[335] For the reasons provided above, I would confirm both Orders.

[336] The appeal is dismissed.

"Reid White"

Reid White, Member
Forest Appeals Commission

May 16, 2011