Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

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

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

DECISION NO. 2015-WFA-001(a)

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

BETWEEN:	Madeline Oker	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Maureen E. Baird, Q.C., Panel Chair	
DATE:	November 23-24, 2016	
PLACE:	Fort St. John, British Columbia	
APPEARING:	For the Appellant: Alison Leong, Counsel For the Respondent: Darcie Suntjens, Counsel	

APPEAL

[1] Madeline Oker appeals a Contravention Order issued on March 24, 2015 by Harry Spahan, Deputy Fire Centre Manager, Kamloops Fire Centre, Ministry of Forests, Lands and Natural Resources Operations (the "Ministry"). Mr. Spahan was delegated the authority to make this decision pursuant to section 58(1) of the *Wildfire Act* (the "*Act*"). He is referred to in this decision as the delegated decision-maker (the "DDM").

[2] In the Contravention Order, the DDM found that Ms. Oker had contravened section 10(3) of the *Act* by lighting a fire when open fires in the area were prohibited by an Open Burning Prohibition Order, and section 5(1) of the *Act* for not complying with the prescribed requirements for lighting, fueling or using a category 2 open fire under section 21(1) of the *Wildfire Regulation*, B.C. Reg. 38/2005 (the "*Regulation*"). Pursuant to section 27(1)(a) of the *Act*, the DDM levied an administrative penalty of $600 for the contraventions and, pursuant to section 27(1)(d) of the *Act*, he ordered payment of the Government's fire suppression costs in the amount of $113,776.78 (the "Cost Recovery Order").

[3] On August 20, 2015, Ms. Oker appealed the Contravention Order to the Commission.

[4] On March 15, 2016, counsel for the Government advised the Commission that there is insufficient proof that a contravention of section 10(3) of the *Act* occurred, and that the Government would not be asserting a contravention of that section in the appeal hearing. However, it clarified that the administrative penalty

and Cost Recovery Order should not be reduced. It submits that the $600 administrative penalty is appropriate for the contravention of section 5(1) only, as is the Cost Recovery Order.

[5] Based upon the Government's submission, the Panel rescinds the contravention of section 10(3) of the *Act* from the Contravention Order, and will not refer to this contravention further.

[6] This appeal has been heard pursuant to section 39(1) of the *Act*. The powers of the Commission on an appeal are set out in section 41 of the *Act*, which states:

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.

[7] Ms. Oker asks the Commission to rescind the Contravention Order on the grounds that she did not contravene section 5(1) of the *Act*. Alternatively, she asks that the administrative penalty be waived, and that the Cost Recovery Order be varied by reducing the amount payable.

BACKGROUND

The Fire

[8] The fire at issue in this appeal occurred on property known as Peterson Crossing, located approximately 22 kilometers west of Fort St. John, BC (the "Lands"). The Lands are within Treaty No. 8 territory.

[9] At all material times, the Lands were Crown land leased by the Doig River First Nation. Ms. Oker is a member of the Doig River First Nation and, at the time of the fire, was a Band Council member.

[10] In or around the end of August or beginning of September, 2012, Ms. Oker and Rick Benson occupied the Lands. During that period, they lit and burned a number of debris piles composed of dried grass and woodchips.

[11] Between May 19, 2012 and September 4, 2012, an Open Burning Prohibition Order was in force. Prince George Fire Center Order PFGC2012-001 prohibited the use of category 2 open fires, as defined in the *Regulation*. The area covered by the Order includes the Peace River Regional District where the Lands are located.

[12] On September 13, 2012, the Wildfire Management Branch (the "WMB") of the Ministry received telephone reports about a fire west of the Doig River Indian Reserve. The fire was assigned number G80476 by the WMB. The WMB fire

suppression crews arrived at the fire at approximately 3:15 pm on September 13, 2012.

[13] By 9:00 pm on September 13, 2012, it was thought that much of the fire would burn itself out overnight. By 10:00 am the next morning, it was estimated that 50% of the fire was contained, and by 2:00 pm on September 14, 2012, the fire was 70% contained.

[14] It is not disputed that the fire burned approximately 8.7 hectares, and was within 1 kilometre of forest land. No buildings or utilities were affected by the fire.

[15] On September 14, 2012, an origin and cause determination was requested by the WMB. On that same day, an origin and cause investigation was commenced by two of the Ministry's Natural Resource Officers: Denise Booy and Hack Waldon. Ms. Booy and Mr. Waldon submitted an Origin and Cause Determination Report to the Prince George Fire Center on October 15, 2012. The report concluded that fire G80476 was an escape from debris piles that had been burned on the Lands.

[16] On February 21, 2013, Natural Resource Officer Waldon began a contravention investigation. As part of the contravention investigation, Mr. Waldon conducted a taped interview with Ms. Oker on April 3, 2013. The results of Mr. Waldon's contravention investigation are set out in a Report of Fire G80476 dated March 13, 2013 (the "Contravention Investigation Report").

The DDM's decision

[17] A contravention order may be issued under section 26 of the *Act*, which states:

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.

[18] In a letter dated May 5, 2014, the Ministry notified Ms. Oker that it believed that she had contravened sections 5(1) and 10(3) of the *Act*, and offered her an opportunity to be heard. Only section 5(1) is now relevant to the appeal. It states:

Non-industrial use of open fires

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

[Emphasis added]

[19] The "prescribed circumstances" in section 5(1) of the *Act* are set out in

section 21(1) of the *Regulation*, as follows:

> **21**(1) The circumstances in which a person described in section 5(1) or 6(1) of the *Act* may light, fuel or use a category 2 open fire in or within 1 km of forest land or grass land are as follows:
>
> (a) the person is not prohibited from doing so under another enactment;
>
> (b) to do so is safe and is likely to continue to be safe;
>
> (c) the person establishes a fuel break around the burn area;
>
> (d) while the fire is burning and there is a risk of the fire escaping the person ensures that
>
> (i) the fuel break is maintained,
>
> (ii) a fire suppression system is available at the burn area, of a type and with a capacity adequate for fire control if the fire escapes, and
>
> (iii) the fire is watched and patrolled by a person to prevent the escape of fire and the person is equipped with at last one firefighting hand tool;
>
> (iv) Repealed [B.C. Reg. 206/2005, s. 9.]
>
> (e) before leaving the burn area, the person ensures that the fire is extinguished.

[20] Ms. Oker did not respond to the invitation to be heard. The DDM, therefore, proceeded to make a decision based upon the information available to him at that time. Specifically, the DDM considered evidence contained in the Ministry's reports, including: the origin and cause investigation, the Origin and Cause Determination Report, a summary of the interview with Ms. Oker on April 3, 2013, a report from the Incident Commander of a discussion with Ms. Oker on the date of the fire (September 12, 2012), the Contravention Investigation Report, the Open Burning Prohibition Order, and a costs summary provided by the Ministry for suppression of the fire. The DDM also considered the relevant legislation.

[21] Based on the evidence before him, the DDM issued the Contravention Order on March 24, 2015. He concluded, on a balance of probabilities, that the cause of the wildfire was a flare up of embers from one of the debris piles that Ms. Oker had lit weeks prior to the wildfire. The DDM concluded that the fire lit, fueled and used by Ms. Oker was an "open fire" under the *Act*. This is not in dispute. He also concluded that Ms. Oker's fire was a category 2 open fire, as defined in section 1(1) of the *Regulation*. This is also not in dispute. As a result, the DDM concluded that Ms. Oker was required to comply with the requirements prescribed in section 21(1) of the *Regulation* governing category 2 open fires.

[22] The DDM reviewed the evidence before him and concluded, on a balance of probabilities, that Ms. Oker had failed to establish a "fuel break", as defined in section 1(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.

[23] Therefore, Ms. Oker had not met section 21(1)(c) of the *Regulation*.

[24] In addition, the DDM concluded that the fire suppression system available at the burn site was inadequate for fire control if the fire escaped and, therefore, Ms. Oker had not met section 21(1)(d)(ii) of the *Regulation*.

[25] The DDM further concluded that Ms. Oker failed to ensure that the debris piles were watched and patrolled to prevent fire escaping from the piles, in contravention of section 21(1)(d)(iii) of the *Regulation*.

[26] The DDM found that the evidence supported a finding of a contravention of section 5(1) of the *Act*, provided that the defences set out in section 29 of the *Act* did not apply; specifically, the defences of due diligence, mistake of fact, and officially induced error.

[27] The DDM noted that no defences had been raised by Ms. Oker. He considered whether she might have been reasonably mistaken about whether or not the fire was extinguished, and concluded that it was not reasonable for Ms. Oker to hold such a belief in the absence of a greater effort by her to make that determination.

[28] The DDM then considered whether to levy an administrative penalty and/or an order to recover the Government's costs of fire control under section 27 of the *Act*, which states, in part:

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,

(b) may determine the amount of the government's costs of fire control under section 9 for a fire that resulted, directly or indirectly, from the contravention, calculated in the prescribed manner,

...

(d) except in prescribed circumstances, may require the person to pay the amounts determined under paragraphs (b) and (c) and the costs determined under paragraph (c.1), subject to the prescribed limits, if any.

...

(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.

[Emphasis added]

[29] The DDM considered the statutory factors set out in section 27(3) of the *Act* and assessed an administrative penalty of $600, based on contraventions of sections 5(1) and 10(3) of the *Act*. In doing so, he considered the fact that Ms. Oker was cooperative with investigators, that she had already incurred certain costs, and that she would be required to pay for the government's fire suppression costs.

[30] Regarding the recovery of the Government's fire suppression costs, the DDM applied the calculation set out in section 31 of the *Regulation* to the costs provided by Ministry staff, and assessed fire suppression costs of $113,776.78 against Ms. Oker.

The Appeal

[31] In her Notice of Appeal, Ms. Oker asks that the appeal be allowed for the following reasons summarized by the Panel:

1. The DDM failed to consider relevant information or considered irrelevant factors in making the Contravention Order. In particular:
    a. he failed to investigate the possibility of a persistent ground fire as the cause of the wildfire;
    b. he failed to speak with Ms. Oker, Mr. Benson, or any other witness to the fire regarding the circumstances of the fire;
    c. he relied on information from, and findings of, Mr. Waldon who failed to conduct any, or a sufficient, investigation of the circumstances of the wildfire;
    d. he relied on unreliable, uncorroborated, insufficient, and inconsistent testimony contained in the Origin and Cause Determination Report and the Contravention Investigation Report; and
    e. he relied upon irrelevant factors in relation to Ms. Oker's due diligence and fire suppression efforts.
2. There was a lack of procedural fairness by the DDM by:
    a. failing to disclose the basis for his conclusions on the nature and extent of Ms. Oker's diligence in tending to, and extinguishing, the fire;
    b. redacting portions of field notes of Ms. Booy, which were integral to the preparation of the Origin and Cause Determination Report; and
    c. delaying the commencement of the contravention investigation.
3. The DDM erred in finding that Ms. Oker was not entitled to rely on the statutory defences of mistake of fact and due diligence.

4. In issuing the Contravention Investigation Report, Mr. Waldon showed actual bias, or a reasonable apprehension of bias, and prejudged the outcome of the investigation. Specifically, Mr. Waldon:

   a. issued, authored or reached the conclusions set out in the Contravention Investigation Report prior to interviewing Ms. Oker, Mr. Benson and other witnesses; and

   b. conducted the investigation and issued the report with a closed mind.

5. The Government failed to establish on a balance of probabilities that Ms. Oker contravened the *Act*.

[32] Ms. Oker asks the Commission to rescind the Contravention Order, the administrative penalty, and the Cost Recovery Order. In the alternative, Ms. Oker asks the Commission to exercise its discretion to vary the Contravention Order and reduce the fire suppression costs ordered, and to waive the administrative penalty issued.

[33] The Government submits that the appeal should be dismissed because the evidence supports the DDM's findings that Ms. Oker contravened section 5(1) of the *Act*, and that Ms. Oker is not entitled to rely on the statutory defences of mistake of fact and due diligence set out in section 29 of the *Act*. The Government also submits that the administrative penalty and the Costs Recovery Order should be upheld because they are appropriate in the circumstances.

ISSUES

[34] This appeal was conducted as a *de novo* oral hearing, with both parties having an opportunity to call witnesses, examine and cross-examine witnesses, and submit relevant documentary evidence. The Commission has previously held that procedural defects in the process below can be cured by a full and fair hearing of the matter before the Commission (see: *Frank Schlichting v. Government of British Columbia*, (Decision No. 2013-WFA-003(a), April 8, 2015), citing *Rudy and Cecilia Harfman v. Government of British Columbia*, Appeal No. 1999-FOR-006, February 1, 2001).

[35] With respect to Ms. Oker's grounds for appeal regarding the DDM's failure to consider relevant information, consideration of irrelevant factors, and the allegations of unfair procedure by the DDM, the Panel finds that these matters have either been cured by the new hearing before the Panel, or they were not pursued by Ms. Oker at the hearing.

[36] Regarding the allegations of bias, counsel for Ms. Oker did not question Mr. Waldon, or any other witness, including Ms. Oker, on this issue. Further, no submissions were made regarding bias, and no legal authority in support of a bias allegation was cited. Accordingly, Ms. Oker appears to have abandoned these grounds for appeal. If not, the Panel finds that they have not been made out, and it will not consider them further.

[37] The Panel has addressed the following issues in the appeal:

1. Did Ms. Oker contravene section 5(1) of the *Act*?

2. If Ms. Oker contravened section 5(1) of the *Act*, has she established either of the statutory defences of due diligence or mistake of fact?

3. If Ms. Oker contravened section 5(1) of the *Act* and neither statutory defence is established, is the administrative penalty and/or the Cost Recovery Order appropriate in the circumstances?

RELEVANT LEGISLATION

[38] In addition to the legislation set out in the body of this decision, the following legislation is relevant to this appeal:

The *Act*

Defences in relation to administrative proceedings

29 For the purposes of an order of the minister under section 26 [Contravention Order], 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,

(b) the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or

(c) the person's actions relevant to the provision were the result of an officially induced error.

The *Regulation*

Definitions

1(1) In this *Regulation*:

"category 2 open fire" means an open fire, other than a campfire, that

(a) burns material in one pile not exceeding 2 m in height and 3 m in width,

(b) burns material concurrently in 2 piles each not exceeding 2 m in height and 3 m in width, or

(c) burns stubble or grass over an area that does not exceed 0.2 ha;

"fire suppression system" means a system for suppressing fire by delivering

(a) water,

(b) a suppressant,

(c) a surfactant, or

(d) any combination of the substances listed in paragraphs (a) to (c)

and may include a water delivery system;

"fuel break" means

(a) a barrier or a change in fuel type or condition, or

(b) a strip of land that has been modified or cleared

to prevent fire spread;

1(2) In the *Act*:

"open fire" does not include a fire vented through a structure that has a flue and is incorporated in a building.

THE EVIDENCE

Ms. Oker's evidence

[39] Ms. Oker gave evidence at the hearing of the appeal. In addition, there were a number of admissions made in her Statement of Facts and in the transcript of her interview with Mr. Waldon on April 3, 2013.

[40] Ms. Oker is a member of the Doig River First Nation. She describes herself as a craft person and a teacher. At the time of the subject fire, Ms. Oker was a Band Council member.

[41] Ms. Oker admits that it was a debris pile that she had lit that was the origin of the wildfire. She also admits that the debris piles that she burned were less than 1 kilometre from forest land.

[42] In her evidence-in-chief, Ms. Oker said that she lit the debris piles in late August, 2012. She was able to pinpoint the date because her Aunt had died on August 26, 2012, and she had been given two weeks off of work to grieve. Ms. Oker went to her cabin on the Lands to get away. She said that she was drying meat during the time that she was at the cabin, a process that takes seven days.

[43] In cross-examination, Ms. Oker was asked if she was positive that she had been burning the debris piles in late August, not a day or two before the wildfire started on September 13, 2012. She said that she was positive that it was late August when she was burning the debris piles.

[44] Ms. Oker testified that she was burning debris piles to clean up a garden area that she intended to plant in the Spring. This is something that she does every year, as had her grandparents. She said that she had been traditionally taught about, and understood, the dangers of fire.

[45] Ms. Oker made 12 debris piles, but she burned them one at a time because that is all she could handle; she did not want the fire to "get away".

[46] In her evidence-in-chief, Ms. Oker states that she burned only two debris piles in total; however, in cross-examination, she said that it may have been four piles.

[47] Ms. Oker testified that, when a debris pile is burning, she stands beside it and rakes it as it is burning to contain the fire. The piles were each about two feet by three feet in size, and consisted of dried grass and wood chips, most of which was dry. Ms. Oker said that she only lit the debris piles in the evening, around

5:00 pm – 5:30 pm, when it was cool and the air was “heavy” with no wind. She believes that these were safe conditions. Ms. Oker did not burn during the day, as it would be dangerous because of the wind and heat.

[48] For fire suppression, Ms. Oker said that there was a truck with a water tank measuring about four feet by two and a half feet on the Lands, as well as 12 containers of water.

[49] Ms. Oker was not aware of any fire prohibition. She did not have radio, cellular service, or television at the cabin. Further, she states that no notices about a burning prohibition had come to the Band office.

[50] Ms. Oker explained that she made a fuel break around each debris pile using a rake. She removed vegetation so that only sand was visible around the pile. When asked in cross-examination why a firebreak could not be seen in a photograph around the debris pile site where the wildfire started, she said that it was because the picture was taken after the fire.

[51] Ms. Oker was asked about a photograph, which she agreed was of the ashes from the pile where the wildfire started. When asked why a root would not be exposed if the area had been thoroughly raked, she responded that, if she had seen a root, she would have picked it out.

[52] In cross-examination, Ms. Oker further described her pile burning process. She said that she burned each pile thoroughly to ash. She then checked all around for anything burning, poured water around the rim of the fire, raked, and even walked through, the ashes. Ms. Oker testified that, when she poured water on the rim and on the ashes, there was no fire. She did not put her hands on the ashes.

[53] Ms. Oker explained that she would extinguish fires between 9:30 pm and 10:00 pm, and would start new ones at 5:30 pm the next day. She accepts that a fire would continue to smolder in the evening, even after water had been put on it.

[54] In response to a question about why a photograph of the debris pile, which she agreed was the source of the wildfire, did not show signs of raking or crustiness from water, Ms. Oker said that it had not looked like this when she left it.

[55] In cross-examination, Ms. Oker testified that it had been a long, hot summer: the plants were starting to dry, some grass was yellow and more likely to start a fire. She said that she knew it was dry, but she did not realize just how dry it was. She admitted that she did not check the weather report or the fire Danger Class rating before lighting the fires.

[56] Ms. Oker believed that the fire started by roots underground from willow trees that had grown there in the sandy soil. She believed that the cause of the fire was a root which had continued to burn. Ms. Oker admits that, at the time that she was burning the piles, she did not know about root fires and that, if she had, she would have “dug more”.

[57] Ms. Oker was not on the Lands on September 13, 2012 when the fire was noticed by a neighbor who telephoned her. Ms. Oker called in a fire report. The WMB fire suppression crews arrived at the Lands at approximately 3:15 pm on September 13, 2012.

[58] On September 17, 2012, Logan Ralph, a Forest Officer with the Ministry, ordered Ms. Oker to immediately extinguish the fire, which persisted on the western side of the burn area. This order was made pursuant to section 3(2) of the *Act*. Ms. Oker immediately took action to comply with the order and extinguish the fire.

[59] On September 20, 2012, a ground fire emerged on the southeast corner of the burn area. Ms. Oker, by this time, had a Caterpillar and water truck on site at her own expense. Ms. Oker continued to watch the fire for approximately one month after she assumed responsibility for its suppression. She spent $6,700 in this effort.

[60] Ms. Oker was interviewed by Mr. Waldon on April 3, 2013, for the purpose of a contravention investigation. Ms. Oker recalls receiving a copy of the transcript of that interview, but says that she did not read it.

[61] Ms. Oker apologized for the fire and said that she had learned a lesson. She said that the fire, its aftermath, and the consequences flowing from the fire, have been "a nightmare" for her. It has adversely affected many aspects of her life. She has been overwhelmed by the fact of the fire, and by the Cost Recovery Order. She became depressed, and no longer went into the bush or practiced cultural traditions. At the time of the hearing, Ms. Oker was unemployed.

The Government's evidence

[62] Denise Booy gave evidence of her investigation of the fire. In 2012, she was a Natural Resource Officer trained in fire investigation. She attended the fire site on September 14, 2012 for the purpose of an origin and cause investigation and report. Neither Ms. Oker nor Mr. Benson were present when she attended the site, and Ms. Booy did not interview either of them as part of her investigation.

[63] The Origin and Cause Determination Report was issued by Ms. Booy on October 15, 2012. In it, she concludes that the wildfire was caused when the burning of a small debris pile escaped. The report also states that, "Lack of attendance and suppression tools appears to be a factor for this fire." The report notes that the fire Danger Class rating for the relevant time period was five, which is the highest danger rating.

[64] Ms. Booy identified the location of one of Ms. Oker's burned debris piles as the origin of the wildfire.

[65] Ms. Booy testified that there was no sign of raking around the debris pile where the wildfire started, nor did she see any visible fuel break around the area.

[66] In cross-examination, Ms. Booy was asked whether it was possible that the fire had "held over" in a root. She said that, for a fire to hold over, it would have to be a deep root. As she had not dug at the site, she could not say with any certainty that "no" root was present at the site of the fire; however, in her view, it was very unlikely.

[67] Hack Waldon also gave evidence. In 2012, Mr. Waldon was a Natural Resource Officer trained in fire investigation. He assisted Ms. Booy with the origin and cause investigation. He said that he did not see any fire breaks in the area of

the fire. Further, there was no evidence of mineral soil, which would be an adequate fuel break. Mr. Waldon described mineral soil as being soil below the top soil. In order to reach the mineral soil on this site, a shovel would have been necessary to dig through the topsoil and remove the vegetation. Mr. Waldon highlighted the abundance of small dead, dry fuel in the area of the burn site, which he said could allow a fire to escape.

[68] Mr. Waldon testified that the ash piles at the site appeared quite fluffy and did not appear to have been dug up or spread out. Further, it did not appear to him that water had been put on the ashes. Mr. Waldon said that the piles looked like they had just burned out, and had not been dug up.

[69] Mr. Waldon reviewed the weather data for the period of the fire, and said that it was not a good time to be burning anything. Mr. Waldon confirmed that the Danger Class 5 rating in place at the time is the highest, or most extreme, risk rating.

[70] Mr. Waldon testified that, at the time that Ms. Oker lit the subject fires, the Open Fire Prohibition Order was in effect in the region, and included the Lands. That order prohibited category 2 open fires, and ordered the extinguishment of any existing fires. The Prohibition Order was rescinded as of September 4, 2012. There was nothing to contradict this evidence.

DISCUSSION AND ANALYSIS

1. Did Ms. Oker contravene section 5(1) of the *Act*?

[71] Ms. Oker submits that the Panel should consider the facts as they existed at the time of the fire. Further, as she was the only witness with first-hand knowledge of circumstances leading up to the wildfire, Ms. Oker submits that her evidence should be given greater weight where the evidence of the Government is inconsistent, or silent, on a fact. Based on a proper evaluation of the evidence, Ms. Oker argues that her conduct met the criteria set out section 21(1) of the *Regulation*; therefore, she did not contravene section 5(1) of the *Act*.

[72] The Government disagrees.

[73] In order to determine whether a contravention of section 5(1) of the *Act* has been established, it is necessary to review the prescribed circumstances set out in section 21(1) of the *Regulation*. Both parties agree that the fire was a category 2 open fire as defined in section 1 of the *Regulation*.

[74] At the hearing, the Government argued that Ms. Oker contravened subsections 21(1)(b), (c) and (e) of the *Regulation*, which are as follows:

> **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:
>
> ...
>
> (b) to do so is safe and is likely to continue to be safe;
>
> (c) the person establishes a fuel break around the burn area;

...

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

[75] The Panel notes that the subsections that the Government now alleges to be contravened are different from those found to be contravened by the DDM in the Contravention Order (subsections 21(1)(c) and (d)(ii) and (iii) of the *Regulation*). However, as this has been a new hearing, Ms. Oker had the opportunity to call evidence, cross-examine the Government's witnesses, and respond to these new allegations. Further, the Panel has broad decision-making authority. Therefore, the Panel has considered whether Ms. Oker contravened sections 21(1)(b), (c) and (e), as opposed to subsections 21(1)(c) and (d) of the *Regulation*. This change in the subsections at issue, ultimately, had no impact on the Panel's overall decision on the appeal.

Section 21(1)(b) – it is safe, and is likely to continue to be safe, to light, fuel or use a category 2 fire

[76] Section 21(1)(b) requires a consideration of the conditions that existed at the time the fire was lit, fueled and used. Ms. Oker's evidence is that she was burning the piles sometime between August 27 and 31, 2012. There was no direct evidence to contradict Ms. Oker's testimony. The Panel, therefore, finds that the relevant time for considering the issue of safety is August 27 to 31, 2012.

[77] Ms. Oker says that, based on her traditional knowledge and experience with fire, she made an assessment that it was safe to light the debris piles. She lit them in the evening when it was cooler, and the winds were lighter. She lit them one at a time so that she could monitor the piles to ensure that they did not escape. She did not foresee that the weather at Peterson Crossing would change so that the danger of fire increased.

[78] Ms. Oker did not elaborate on the details of the traditional methods that she used, other than to describe what she did. She advised the Panel that she was knowledgeable about fire, from long experience and having been taught about its dangers.

[79] Ms. Oker's evidence is that it had been a long, hot summer, that the grass was yellow and was more likely to start a fire. She admitted that she did not check any weather report or the fire Danger Class rating before lighting the debris piles.

[80] The Government provided local weather station data, which confirmed that the fire Danger Class rating for August 27 to 31, 2012 was either 4 or 5. Mr. Waldon described the general conditions in the area at the time of the fire as being extremely hot and dry, basically drought conditions. It had been a very active fire season. Ms. Booy gave evidence that the humidity during this period was very low. There was no evidence that the fire Danger Class rating decreased during the evening hours.

[81] Under subsection 21(1)(b) of the *Regulation*, the question for the Panel is whether the conditions were safe to light, fuel or use fires between August 27 and 31, 2012, and whether the conditions were likely to continue to be safe.

[82] Ms. Oker knew that the conditions made it too dangerous to light a fire before 5:00 pm. There was no evidence that the fire Danger Class rating diminished at 5:00 pm, so as to make it safe to light fires after that time. The Panel appreciates, and accepts, that Ms. Oker believed that lighting the debris piles in the late afternoon, extinguishing them at night, and restarting them the next afternoon was safe. However, the issue of whether it was safe from August 27 to 31, 2012 to light, fuel and use a category 2 fire requires an objective consideration of the conditions as they existed during that period of time.

[83] Given the evidence of high temperatures, low humidity, wind, the extremely dry conditions in late August, an active fire season, and the very high fire Danger Class rating at the time that the fires were lit, the Panel finds that it was not safe to light, fuel or use category 2 open fires between August 27 and August 31, 2012. Ms. Oker, therefore, contravened subsection 21(1)(b) of the *Regulation*.

Section 21(1)(c) – a fuel break is established around the burn area

[84] The Government asserts that Ms. Oker did not establish a fuel break around the debris piles. "Fuel break" is defined in section 1(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.

[85] Ms. Oker testified that she created a fuel break by raking around the debris piles in order to remove vegetation so that sandy soil was exposed around each pile. She believed that this provided a sufficient fuel break. Ms. Oker did not use a shovel to dig around the debris piles.

[86] The Government submits that the raking described by Ms. Oker could not meet either aspect of the definition of fuel break.

[87] Mr. Waldon testified that a proper fuel break should expose the soil underneath the surface in order to rid the area of the organic matter on the top level. He testified that, regardless of how sandy the soil in the cleared area was, it remained full of fine fuel and, therefore, the sandy exposed soil could not be a fuel break. Mr. Waldon testified that an adequate fuel break requires the person to dig down to the mineral soil where there is no fuel for the fire.

[88] The Government relies on a series of photographs which, it submits, illustrate that Ms. Oker did not establish a fuel break around the area. The Government points out that there was fine fuel right up to the edge of the debris pile. Ms. Oker was shown these photographs in cross-examination and asked why there were no visible signs of the fuel break that she had described. Ms. Oker's explanation was that, because the picture was taken after the fire, you cannot tell if there was a fuel break.

[89] The Panel finds that there was no fuel break established around the burn area by Ms. Oker. First, there is no sign of a band of exposed sand around the burn pile in the photographs. There appears to be no modification of the surface around the burn pile and, in particular, no digging is visible to expose mineral soil. The

photographs show dry vegetation right up to the ashes of the burned debris pile. There is nothing that can be described as a barrier or a change in fuel type or condition, or a strip of land that has been modified or cleared. Accordingly, the Panel finds that Ms. Oker contravened subsection 21(1)(c) of the *Regulation* by failing to create a fuel break.

Section 21(1)(e) – before leaving the burn area, the person ensures that the fire is extinguished

[90] Ms. Oker testified that she extinguished the fire by raking and watering the burned debris piles. She states that she monitored the burned piles for seven to 10 days after the burning was complete. She did not observe any sign of smoke, embers or smolder. In cross-examination, Ms. Oker was shown photographs from the investigation and asked why the burned debris piles appeared light and fluffy, with no signs of raking or crustiness from water. Ms. Oker said that the post-fire pictures did not look like the burned debris piles when she left them.

[91] The Panel has had the benefit of seeing the photographs, which confirm the evidence of Ms. Booy and Mr. Waldon that the burned debris piles and, in particular, the pile where it is agreed that the fire started, do not show any visible signs of raking or digging; rather, they appear to be fluffy, which is inconsistent with them having been doused with water to extinguish them. Also visible in the photographs are track marks from hoses that had been dragged through at least one of the piles, which illustrates, and confirms, the dry fluffy description given by Mr. Waldon. Therefore, on a balance of probabilities, the Panel finds that Ms. Oker did not ensure that the fire was adequately extinguished before she left the burn area. Accordingly, the Panel finds that Ms. Oker did not comply with subsection 21(1)(e) of the *Regulation*.

Conclusion

[92] Having reviewed and considered all of the evidence presented at the hearing, the Panel finds that Ms. Oker lit, fueled and used an open fire within 1 kilometre of forest land without first ensuring that the circumstances prescribed in subsections 21(1)(b), (c) and (e) of the *Regulation* were met, contrary to section 5(1) of the *Act*.

2. Has Ms. Oker established either of the statutory defences of due diligence or mistake of fact?

[93] Ms. Oker relies on the defences of due diligence and mistake of fact as set out in sections 29(a) and (b) of the *Act*.

[94] The legal test for establishing the defence of due diligence under section 29(a) of the *Act* has been considered in several decisions of the Commission. The Commission has adopted the test set out in a *Forest and Range Practices Act* case, *Charles E. Kucera v. Government of British Columbia*, (Decision Nos. 2011-FOR-001(a) and 2011-FOR-002(a), October 6, 2011)[*Kucera*], as applicable to the defence of due diligence found in section 29 of the *Wildfire Act*. In *Unger v. Government of British Columbia*, (Decision No. 2012-WFA-002(b), December 29,

2014) [*Unger*], the Commission reviewed the law on the defence of due diligence and adopted the test from *Kucera* as follows:

> 38. The Commission has previously applied the test set out in *Kucera* to an appeal under the [*Wildfire*] *Act*. At para. 86 of *Ken Damon Oler v. Government of British Columbia* (Decision No. 2012-WFA-001(a), issued August 19, 2013), the Commission stated as follows:
>
> > The Panel notes that, in *Kucera*, the Commission discussed the legal test for the defence of due diligence, based on the BC Supreme Court's discussion of the statutory defence in *Pope & Talbot v. British Columbia*, [2009] B.C.J. No. 2492. Based on that test, the Commission held that, <u>if a person knew or ought to have known of the existence of the hazard that led to the contravention, the person may only escape liability for the contravention by establishing that he or she took reasonable care to avoid the contravention.</u>
> >
> > [Emphasis in original]

[95] This Panel adopts the same test.

[96] The Panel has found that Ms. Oker contravened section 5(1) of the *Act*. That is, she lit, fueled and used an open fire within 1 kilometre of forest land in circumstances that did not comply with section 21(1) of the *Regulation*. In order to rely on the defence of due diligence, the onus is on Ms. Oker to prove that she took reasonable care to avoid the contravention. This is assessed on an objective standard.

<u>Due diligence</u>

[97] Ms. Oker was only entitled to light, fuel or use a category 2 open fire if she complied with the prescribed circumstances set out in the *Regulation*. The Panel has found that she failed to comply with three of the prescribed circumstances. The Panel has found that Ms. Oker intentionally lit, fueled and used fire on the Lands to burn debris. This was done during a period when it was not safe to do so. Ms. Oker admitted that she knew that it was unsafe to light fires during the daytime. She also admitted that she made no enquiries about fire Danger Class ratings or prohibitions, and did not check weather reports prior to lighting, fueling and using the fires.

[98] In order to rely on the defence of due diligence, Ms. Oker had to take reasonable steps to determine that it was safe to light the fires. Based upon the evidence, the Panel finds that Ms. Oker did not take reasonable steps to make this determination. Therefore, the defence of due diligence has not been established with respect to the contravention of subsection 21(1)(b) of the *Regulation*.

[99] Ms. Oker admits that her efforts to create a fuel break did not include digging to expose the mineral soil below the top soil. While the Panel accepts that Ms. Oker believed that raking the surface around the debris pile was sufficient to establish a fuel break, the Panel finds that this was not a reasonable belief in the

circumstances, and it does not meet the test for due diligence. The evidence of Mr. Waldon was that raking around the fire area was not sufficient, because raking does not remove small pieces of grass and other fuel. In view of the conditions at the time of the pile burning, as demonstrated by the high fire Danger Class rating and the observable conditions, such as the dryness of the grass, the Panel finds that simply raking the surface sand does not amount to reasonable care to create a sufficient fuel break as defined in the *Regulation*. Therefore, the Panel finds that Ms. Oker has not established the defence of due diligence in respect of the contravention of subsection 21(1)(c) of the *Regulation*.

[100] Finally, the question is whether Ms. Oker is entitled to rely on the defence of due diligence with respect to her contravention of subsection 21(1)(e) of the *Regulation*. Ms. Oker is consistent in her evidence that, after the debris pile had burned, she put water around the rim of the fire and on the ashes, walked through the fire to see if there were burning embers, and monitored the burned piles for a period of time between seven and 10 days. There is no evidence that she dug up the fire. When Ms. Oker left the Lands, she observed no smoldering embers or smoke. Ms. Oker testified that her approach to burning on this occasion was consistent with what she has done for many years.

[101] It is clear that Ms. Oker understood the need to fully extinguish the fire. The Panel accepts that Ms. Oker believed that the steps she took were sufficient to extinguish the fire, consistent with her past experience. The question is whether her belief was reasonable in all of the circumstances.

[102] Looking at the evidence objectively, the Panel finds that her belief was not reasonable. Although Ms. Oker said that she put water on the ashes and around the rim, the photographs are not consistent with her evidence. The two Natural Resource Officers were consistent in their interpretation of the photographs. They testified that the ash pile determined to be the cause of the wildfire was fluffy, which is inconsistent with it having been dug up, or watered, to sufficiently extinguish the fire.

[103] Mr. Waldon testified that the fire did not appear to have been “actioned” in any way, by which he meant that it had neither been dug up, nor had there been other attempts to put it out. This evidence was not convincingly challenged. Accordingly, the Panel finds that Ms. Oker has not established, on a balance of probabilities, that she exercised due diligence to extinguish the fire before leaving it.

Mistake of fact

[104] The Commission has previously considered the defence of mistake of fact in *Ronald Edward Hegel and 449970 B.C. Ltd. v. Government of British Columbia*, (Decision No. 2005-FOR-009(a), October 12, 2007) in the context of the *Forest and Range Practices Act*. The language in section 29(b) of the *Act* is substantially the same and, therefore, the Panel adopts the test from *Hegel*, as follows:

> Thus, in determining whether the defence of mistake of fact applies in the present appeal, the question is whether the Appellants reasonably (but mistakenly) believed in the existence of facts which, if true, would

> establish that they did not contravene … [the statutory provisions at issue]. (page 15)

[105] Applying the test to the present case, the question is whether Ms. Oker reasonably (but mistakenly) believed in the existence of facts which, if true, would establish, on a balance of probabilities, that she did not contravene subsections 21(1)(b), (c), and (e) of the *Regulation*.

[106] The Panel finds that the defence of mistake of fact has not been established by Ms. Oker. With respect to whether it was safe, and likely to remain safe, to light, fuel and use a category 2 open fire, the evidence establishes that it was not safe to do so. The Panel accepts that Ms. Oker thought that the method that she used made it safe (i.e., burning after 5:00 pm in the evening); however, there is no evidence to support this belief. The Panel finds that Ms. Oker's belief was not the result of even the most rudimentary of enquiries into the true state of the facts, such as weather conditions or fire Danger Class rating. Therefore, it was not reasonable in the circumstances. Accordingly, the Panel finds that the defence of mistake of fact does not apply to the contravention of subsection 21(1)(b) of the *Regulation*.

[107] With respect to the establishment of a fuel break, the Panel concludes that, in the circumstances, a reasonable person, aware of the danger of wildfire, and knowing that it was unsafe to burn during the day, would have realized that something more that raking around the debris pile to expose sandy soil was necessary to contain the fire. Even if it is accepted that a band around the debris pile had been created by raking the sand, the Panel does not accept that a reasonable person would consider this sufficient to contain a category 2 fire in the conditions that prevailed at the time. A reasonable person would appreciate that raking did not remove the fine pieces of fuel that remained in the sand, and that digging was necessary. Accordingly, the Panel finds that Ms. Oker has not established that the defence of mistake of fact applies to her contravention of subsection 21(1)(c) of the *Regulation*.

[108] The last question is whether Ms. Oker can rely on the defence of mistake of fact in respect of her contravention of section 21(1)(e) of the *Regulation*. The Panel has accepted that Ms. Oker believed that she had extinguished the fire before leaving it. However, the Panel finds that her belief was not reasonable in the circumstances. Firstly, there are no signs of digging up the fire which both of the Natural Resource Officers said was a necessary step of fire extinguishment. Secondly, there is no sign in the photographs of the piles having been doused with water. The Panel finds that these two elements were necessary to demonstrate that reasonable steps had been taken to extinguish the fire, especially in the admittedly dangerous conditions which Ms. Oker acknowledged existed at the time. Accordingly, the defence of mistake of fact does not apply to Ms. Oker's contravention of subsection 21(1)(e) of the *Regulation*.

Conclusion

As a result, the Panel finds that Ms. Oker has failed to establish either of the defences available in section 29 of the *Act* with respect to her contraventions of

subsections 21(1)(b), (c) and (e) of the *Regulation* and, therefore, she is in contravention of section 5(1) of the *Act*.

3. Is the administrative penalty and/or the Cost Recovery Order appropriate in the circumstances?

[109] Ms. Oker's position is that the relevant legislation allows for flexibility in the determination of appropriate amounts of an administrative penalty and cost recovery order. She submits that the administrative penalty and the Cost Recovery Order issued to her are unnecessarily unjust and punitive. Ms. Oker asks the Panel to exercise its jurisdiction under section 41(1) of the *Act* to rescind or vary these decisions.

[110] The Government supports both the administrative penalty and the Cost Recovery Order as being appropriate, even though the contravention of section 10(3) of the *Act* has been rescinded.

The administrative penalty

[111] Section 33(1)(b) of the *Regulation* establishes $10,000 as the maximum amount of an administrative penalty that may be levied under section 27(1)(a) of the *Act* for a contravention of section 5 of the *Act*.

[112] Section 27(3) of the *Act* sets out the factors that the DDM must consider before levying an administrative penalty. It states:

> (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.

[113] There is no dispute that Ms. Oker has no previous contraventions of a similar nature, the contravention was not repeated or continuous, the contravention was not deliberate, Ms. Oker did not derive any economic benefit from the contravention, she was cooperative, and she made efforts to correct the contravention.

[114] In the Contravention Order, the DDM reviewed the facts relating to each of the relevant factors in some detail. He concluded that, in all of the circumstances, $600 was appropriate, stating:

> Having regard to all the evidence and the factors above, I have decided that it is appropriate to levy a penalty in the amount of

> $600.00. This penalty is intended to Act as a deterrent to similar behavior in the future and to send a message to others that care must be taken when using open fires and that prohibition orders must be complied with. This penalty amount would have been higher if it were not for the government's fire suppression costs that you will be required to pay, which will also serve as a deterrent, and the costs that you have already incurred for the mop up activities.

[115] The Panel has considered whether the administrative penalty ought to be reduced, given that the contravention of section 10(3) of the *Act* has been rescinded.

[116] No cases were provided to suggest that $600 was not in line with other administrative penalties that have been assessed for a contravention of section 5(1) of the *Act*.

[117] Moreover, the Panel finds that the administrative penalty of $600 is on the low end of the administrative penalty range, whether it applies to one contravention or two.

[118] Having considered all of the circumstances, the Panel can find no compelling reason to interfere with the administrative penalty.

[119] Accordingly, the administrative penalty of $600 is confirmed.

The Cost Recovery Order

[120] Ms. Oker did not dispute the calculation of the fire suppression costs ordered pursuant to section 31 of the *Regulation* in the amount of $113,776.78. Ms. Oker's position is that the DDM should not have awarded the full amount of the fire suppression costs because it is unfair, and will cause her financial hardship. In addition, Ms. Oker says that the Cost Recovery Order does not take into account the significant costs that she incurred in her efforts to extinguish the wildfire.

[121] Ms. Oker does not challenge the DDM's finding that the fire resulted, directly or indirectly, from her contravention of section 5(1) of the *Act*. Ms. Oker asks that the Panel exercise its discretion to eliminate or reduce the Cost Recovery Order.

[122] The Government submits that, when a decision-maker has exercised discretion to order payment of fire control costs under section 27 of the *Act*, the Commission has no jurisdiction to order less than the full payment. The Government relies, in part, on statements made in *Unger*, at paragraphs 51–52.

[123] Although the statements in *Unger* could be characterized as *obiter*, they are nevertheless helpful in interpreting the language of the *Act*. In that case, the Commission stated:

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

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

[124] Section 27(1)(d) of the *Act* provides that "except in prescribed circumstances, [the delegated decision maker] may require the person to pay the amounts determined under paragraphs (b) and (c) …, subject to the prescribed limits, if any". The prescribed limits are established by section 29 of the *Regulation*. Ms. Oker, correctly, did not say that any of the prescribed circumstances apply in this case.

[125] The Panel accepts that Ms. Oker is impecunious. However, the Legislature did not establish the ability to pay as a basis for not assessing costs against a person whose actions have directly or indirectly caused a wildfire. Further, like the Panel in *Unger*, this Panel cannot find any factors that would mitigate against the making of an order for the full recovery of the Government's fire control costs, calculated in accordance with section 31(1)(a) and (b) of the *Regulation*, in the amount of $113,776.78.

[126] Ms. Oker's unhappy financial situation may well go to the ability of the Government to collect the costs that it has ordered, but it does not affect the appropriateness of the Cost Recovery Order that has been made in this case.

[127] As a result, the Panel confirms both the administrative penalty and the Cost Recovery Order against Ms. Oker.

DECISION

[128] In making this decision, the Panel has considered all of the parties' submissions, whether or not specifically referred to in this decision.

[129] For the reasons provided above, the Panel confirms the finding that Ms. Oker contravened section 5(1) of the *Act*, and confirms both the administrative penalty and the Cost Recovery Order made by the DDM.

[130] The contravention of section 10(3) of the *Act* is rescinded, by consent of the Government.

[131] The appeal is dismissed.

"Maureen Baird"

Maureen E. Baird, Q.C., Panel Chair
May 2, 2017