



Forest Appeals Commission

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DECISION NO. 2015-WFA-003(a)

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

BETWEEN: Ralph Stevenson **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Michael Tourigny, Panel Chair

DATE: Conducted by way of written submissions
concluding on May 24, 2016

APPEARING: For the Appellant: Ralph Stevenson
For the Respondent: Bill Wagner, Counsel

APPEAL

[1] Ralph Stevenson appeals under section 39 of the *Wildfire Act*, S.B.C. 2004, c. 31 (the "*Act*") from a determination (the "Determination") made on November 9, 2015 by Harry Spahan, Deputy Fire Centre Manager (the "Manager"), Kamloops Fire Centre, as a delegate of the Minister of Forests, Lands and Natural Resource Operations. The Determination was made in relation to open fire burning conducted by Mr. Stevenson on his rural property located near Hudson's Hope, BC, over the first few days of May 2013, and a fire on Crown land across a public road from Mr. Stevenson's property that was reported on May 5, 2013. The fire was suppressed by the BC Wildfire Service.

[2] The Determination included the following orders against Mr. Stevenson:

- (a) an order under section 26 of the *Act* for contravening section 5(1) of the *Act*, and based on that contravention;
- (b) an administrative penalty order of \$300 under section 27(1)(a) of the *Act*; and
- (c) a determination under section 27(1)(b) of the *Act* regarding the amount of government's costs of fire control carried out under section 9 of the *Act*, and a related cost recovery order under section 27(1)(d) in the amount of \$34,192.28.

[3] At Mr. Stevenson's request, the appeal was conducted by way of written submissions as opposed to an oral hearing.

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

- 41** (1) On an appeal under section 39 by a person or under section 40 by the board, the commission may
- (a) consider the findings of the decision maker who made the order, and
 - (b) either
 - (i) confirm, vary or rescind the order, or
 - (ii) with or without directions, refer the matter back to the decision maker who made the order, for reconsideration.

[5] Mr. Stevenson asks the Commission to rescind the Determination on the basis that he did not contravene section 5(1) of the *Act*, or alternatively, if he did, to vary the administrative penalty and cost recovery orders, and set up a payment plan. Mr. Stevenson also seeks to rescind the Determination on the following bases:

- a. the Determination was statute barred because the three-year limitation period set out in section 33(1) of the *Act* had expired; and
- b. the evidence on which the Determination was based contained irregularities, and gaps in the Respondent's evidence undermine the validity of the Determination or fairness of this appeal.

[6] The Respondent seeks confirmation of the Determination together with an order for payment.

BACKGROUND

[7] Mr. Stevenson is the registered owner of a tract of rural land legally described as the South West $\frac{1}{4}$ of district Lot 480, Peace River District, located near Hudson's Hope (the "Property"). At the time of the fire, Mr. Stevenson was retired and had a small number of cattle on his Property that he was making his living off of in addition to his pension income.

[8] Mr. Stevenson admits that, over a couple of weeks before and specifically on May 2, 3, and 4, 2013, he lit open fires on his Property to burn the old dry grass on portions of his land to allow for new growth for his cattle to graze upon.

[9] There is no issue in this appeal that the fires lit by Mr. Stevenson were each an "open fire" as that term is used under the *Wildfire Regulation* in effect under the *Act* (the "*Regulation*"), or that the act of lighting the fires in question was not an "industrial activity" or that each fire was located within 1 km of "forest land" or "grass land" as those terms are defined in section 1 of the *Act*.

[10] While the overall burn area on the Property exceeded 0.2 hectares (ha), Mr. Stevenson and the Respondent have agreed in their submissions that each individual fire lit by Mr. Stevenson did not exceed 0.2 ha and the fires were, accordingly, "category 2 open fires" as defined in the *Regulation*.

[11] On May 5, 2013, a fire on Crown land on the opposite side of a public road from the Property was reported by phone to the BC Wildfire Service by Matt Bishop, who is a neighbour of Mr. Stevenson.

[12] On May 7, 2013, BC Wildfire Service, which is a division of the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), responded to suppress the fire. The wildfire burned 2.7 ha of Crown land.

[13] On May 7, 2013, Wildfire Investigators Steven Richburg and Calvin Groll, who are Ministry employees, attended on the Property, spoke about the wildfire with Mr. Stevenson and Mr. Bishop, and then conducted a field investigation to determine the cause of the wildfire on Crown land.

[14] Mr. Richburg and Mr. Groll prepared a Wildland Fire Origin & Cause Determination Report (the "Fire Origin Report") in which, based on evidence noted in the field and the elimination of other potential wildfire causes, they concluded that the wildfire on Crown land was caused by the fires lit by Mr. Stevenson on his Property over the days preceding May 5, 2013.

[15] Paul Meckler, who was then a Natural Resource Officer ("NRO") working for the Ministry, attended at the Property on May 16 and June 7, 2013. He took informal statements about the fires from Mr. Stevenson and made observations. On June 26, 2013, Mr. Meckler spoke with witness Ryley Stevenson, who is Mr. Stevenson's son. On June 27, 2013, Mr. Meckler spoke with Mr. Bishop, who had reported the wildfire on May 5, 2013. Mr. Meckler prepared a written "Continuation Report" in relation to his actions and witness interviews.

[16] Case Report FPG-31100 (G80036) (the "Case Report"), which alleges that Mr. Stevenson contravened section 5(1) of the *Act* by causing the fire on Crown land, was prepared by another Ministry-employed NRO, Trevor Kosloski. The Case Report incorporates the Continuation Report prepared by Mr. Meckler and a draft of the Fire Origin Report. A copy of the Case Report was provided to the Manager.

[17] By letter dated April 30, 2015, the Manager provided a copy of the Case Report to Mr. Stevenson, and also provided him with an opportunity to be heard ("OTBH") before making the Determination, under section 26 of the *Act*.

[18] In response to the OTBH, Mr. Stevenson responded by letter dated May 26, 2015 to the Manager, supported by copies of letters dated May 28, 2015 from Mr. Stevenson's daughter Amanda Stevenson and his son-in-law Jeremy Halladay (together the "OTBH Response").

[19] Having considered both the evidence provided by Mr. Stevenson in the OTBH Response and the evidence from the Ministry in the Case Report, the Manager made the Determination that is the subject of this appeal.

The Determination

[20] In making the Determination, the Manager made a number of findings, which the Panel has summarized as follows:

- It was more likely than not that the source of the wildfire on Crown land were the fires lit, fuelled and used by Mr. Stevenson to burn grass and brush, consistent with the findings of the Fire Origin Report.
- While small pockets of snow were present in a number of places and some areas may well have been wet, much of the area appeared to have been dry and snow free on May 5, 2013 and susceptible to burning.
- On balance, it appears that sometime on the afternoon of May 5, 2013, embers left smoldering on the Property flared up due to winds. Winds blowing from a north westerly direction had picked up and more likely than not fanned the embers and carried them off into the dry grass on the Crown land on the opposite side of the public road, igniting the wildfire.
- Other possible causes of the wildfire were either ruled out by the authors of the Fire Origin Report or deemed unlikely, and the Manager agreed with their opinion that the fires started on the Property and spread to Crown land.
- The fires lit by Mr. Stevenson were "open fires" and were each less than 0.2 ha in size making them category 2 open fires, and accordingly, section 21 of the *Regulation* applied.
- Under section 21(1)(c) of the *Regulation*, a "fuel break" was required for each individual category 2 open fire. This required each individual fire to be surrounded on all sides by a fuel break. The public road around the boundary of the Property and the creek running east to west through the Property did not constitute a fuel break for each individual category 2 fire. There was insufficient snow on the ground to constitute fuel breaks and the ground appeared to have been predominately dry. On a balance of probabilities, no fuel break was established around each individual category 2 open fire.
- The fire was still burning on the afternoon of May 5, 2013, and escaped from the Property as a result of dry conditions and strong winds. Accordingly, there was then a fire burning and a risk of escape obliging Mr. Stevenson to comply with the requirements of section 21(1)(d) of the *Regulation*, including section 21(1)(d)(ii) requiring that a fire suppression system was available at the burn area, of a type and with a capacity adequate for fire control if the fire escapes, and section 21(1)(d)(iii) that the fire was watched and patrolled by a person to prevent the escape of fire and the person is equipped with at least one firefighting hand tool.
- The evidence with respect to the kind of fire suppression system that was available at the burn areas indicate that the system was quite basic, consisting of a shovel and chainsaw that Mr. Stevenson carried with him on his quad, and a refillable pump fire extinguisher he kept at his house. This fire suppression system was not of a type or capacity adequate for fire control if the fire escaped, and therefore, the requirement in section 21(1)(d)(ii) of the *Regulation* was not met.
- In their interviews with Mr. Meckler, both Mr. Stevenson and his son Ryley indicated that they checked the fires on May 4, 2013, at which time they say they saw wisps of smoke and a few smoldering popular trees, which they left unattended and not extinguished. Consequently, Mr. Stevenson failed to

ensure that the fire was watched and patrolled to prevent a fire escape, and the requirement in section 21(1)(d)(iii) of the *Regulation* was not met.

- Based on the above findings, Mr. Stevenson lit, fuelled and used an open fire within 1 kilometer of forest land without first ensuring that the circumstances prescribed in section 21(1)(c), (d)(ii) and (iii) of the *Regulation* were met, contrary to the requirements of section 5(1) of the *Act*.
- The defence of due diligence under section 29 of the *Act*, which was raised by Mr. Stevenson, did not apply based on the facts as found. A prudent person acting reasonably would have taken greater care to ensure that the open fires lit on the Property were fully extinguished before leaving them. Greater care should have been demonstrated in ensuring that the requirements of the *Regulation* were met as they apply to category 2 open fires.
- The defence of mistake of fact under section 29 of the *Act*, which was raised by Mr. Stevenson, also did not apply based on the facts as found. Having considered whether Mr. Stevenson might have been reasonably mistaken about whether or not the open fires were adequately extinguished, such a belief would not have been a reasonable belief to hold in the absence of a greater effort by Mr. Stevenson to extinguish the smoldering fire.
- Having considered the factors in section 27(3) of the *Act* and the maximum penalty of \$10,000 for a contravention of section 5(1) of the *Act*, a penalty in the amount of \$300 was levied as a deterrent. This penalty amount would have been higher if it were not for the government's fire suppression costs that Mr. Stevenson was also required to pay.
- The government's fire suppression operation was necessary to control a fire that threatened forest and grass land. Under section 27(1)(b) of the *Act* it was determined, using the calculation set out in section 31 of the *Regulation*, that the amount of the governments fire control costs that resulted, directly or indirectly, from the contravention total \$34,192.28.
- Having determined that the circumstances for not seeking cost recovery set out in section 29 of the *Regulation* did not apply and having considered Ministry policy that occupants of private land should be billed for the government's fire control costs if the person caused or contributed to the wildfire or to its spread, and having not been provided with any reasons for departing from this policy, the total amount of recovery for fire suppression that Mr. Stevenson must pay by order under section 27(1)(d) of the *Act* is \$34,192.28. This amount is in addition to the \$300 penalty levied.

The appeal

[21] On November 24, 2015, Mr. Stevenson filed his Notice of Appeal against the Determination. In his Notice of Appeal, Mr. Stevenson requested that the appeal be heard based on written submissions. By a letter dated January 20, 2016, the Commission granted his request, and a schedule for the exchange of written submissions was established.

[22] Following the Commission's ruling that this appeal shall be conducted by way of written submissions, further document production was made by the Respondent to Mr. Stevenson. Included in the disclosure of records evidencing fire suppression costs was an invoice from Yellowhead Helicopters Ltd. which included a

printed invoice dated "31-May-12". The significance of that document is discussed below under Issue 1.

[23] This appeal has been conducted as a new hearing of the matter, based on the written submissions and evidence filed by the parties. Some of the evidence before the Commission was considered by the Manager, and some of the evidence is new evidence that was not considered by the Manager.

ISSUES

[24] In deciding this appeal, the Panel has considered the following issues and sub-issues:

1. Whether the Determination is invalid because it was made outside of the limitation period set out in section 33 of the *Act*.
2. Whether irregularities in the evidence on which the Determination was made or alleged gaps in the Respondent's evidence on the appeal affect either the validity of the Determination or the fairness of this appeal, such that the final form of the Fire Origin Report should be disregarded or that the Determination should be rescinded.
3. Whether Mr. Stevenson contravened section 5(1) of the *Act*.
 - a. Did Mr. Stevenson establish a fuel break around the open fires he lit over the days immediately preceding the May 5, 2013 wildfire on Crown land?
 - b. Were any of the open fires that Mr. Stevenson lit still burning with a risk of fire escaping on either May 4 or 5, 2013?
 - c. If so, was an adequate fire suppression system available at the burn area?
 - d. If so, did Mr. Stevenson watch and patrol the fire to prevent the escape of the fire, and was he equipped with at least one firefighting hand tool?
 - e. Before leaving the burn area on May 4, 2013, did Mr. Stevenson ensure that the fire was extinguished?
4. Whether Mr. Stevenson has established on a balance of probabilities that he exercised due diligence to prevent the contravention, or that he reasonably believed in the existence of facts that if true would establish that he did not contravene section 5(1) of the *Act*.
5. Whether the open fires Mr. Stevenson lit over the days immediately preceding May 5, 2013 escaped the Property and caused the wildfire on Crown land on May 5, 2013
6. Whether the administrative penalty order or the cost recovery order should be varied in the circumstances.

RELEVANT LEGISLATION

[25] The relevant portions of the *Act* and the *Regulation* are reproduced where they are referred to in the body of this decision.

DISCUSSION AND ANALYSIS

1. Whether the Determination is invalid because it was made outside of the limitation period set out in section 33 of the *Act*.

[26] Section 33 of the *Act* states as follows:

Limitation period

- 33** (1) The period during which an order may be made under section 26 determining that a contravention occurred is 3 years beginning on the date on which the facts that led to the order first came to the knowledge of an official.
- (2) A document purporting to have been issued by an official, certifying the date on which the facts referred to in subsection (1) first came to the knowledge of an official,
- (a) is admissible in an appeal under section 39 from the order, without proof of the signature or official character of the individual appearing to have signed the document, and
 - (b) in the absence of evidence to the contrary, is proof of the matter certified.

[27] In making his submission on this issue, Mr. Stevenson relies on the fact that at the bottom of page 8 of the draft Fire Origin Report that was included in the Case Report, the date "2012-10-05" was present and the fact that the date "31-May-12" is printed on one Yellowhead Helicopters Ltd. invoice, produced by the Respondent. Based on these printed dates, Mr. Stevenson argues that the Determination made on November 9, 2015 was made more than three years after the date on which the facts that led to the order first came to the knowledge of an official. Mr. Stevenson submits that the portion of the draft Fire Origin Report in question constituted a date certification document as contemplated in section 33(2) of the *Act*.

[28] The Panel finds that page 8 of the draft Fire Origin Report is not a date certification document as contemplated in section 33(2) of the *Act*. The date stamp at the bottom of page 8 of that document was not intended to nor did it certify that "2012-10-05" was the date on which facts that led to the Determination first came to the knowledge of an official.

[29] The affidavits of both Mr. Groll and Mr. Richburg confirm that their investigation took place on May 7, 2013, and that the date "2012-10-05" is an error that was corrected in the final version of the Fire Origin Report. The balance of both the draft and final version of the Fire Origin Report state repeatedly that the wildfire and investigation in question all took place in May of 2013.

[30] It is clear on the face of the Yellowhead Helicopters Ltd. invoice on which the date "31-May-12" is printed that the invoice related to events in 2013, and not 2012, and that the printed date is clearly an error. The flight date is noted on that same document as 06-May-2013, and all other date notations on it were in 2013, not 2012.

[31] The Panel further finds that the balance of the record on this appeal, including the submissions by Mr. Stevenson himself in his OTBH Response, make it clear that the facts that led to the Determination occurred and came to the knowledge of an official in May 2013, not May 2012.

[32] Accordingly, the Panel finds that the three-year limitation period prescribed by section 33 of the *Act* had not expired by the time the November 9, 2015 Determination was made. This ground of appeal is dismissed.

2. Whether irregularities in the evidence on which the Determination was made or alleged gaps in the Respondent's evidence on the appeal affect either the validity of the Determination or the fairness of this appeal, such that the final form of the Fire Origin Report should be disregarded or that the Determination should be rescinded.

[33] Mr. Stevenson questions the validity of the Determination on the basis that it was made in reliance on an unsigned draft of the Fire Origin Report containing some errors, and that the Manager only received the draft Fire Origin Report in the Case Report.

[34] In their affidavits, Ms. Vandale, Mr. Groll, Mr. Richburg and the Manager attest that there was no material difference between the substantive contents of the draft and final version of the Fire Origin Report. The Panel accepts and agrees with this assessment. In fairness to both parties, the Panel will consider the final version of the Fire Origin Report as part of the record on this appeal.

[35] Mr. Stevenson also raises an issue of the validity of the Determination and the fairness of this appeal based on the fact that Mr. Meckler left his employment with the Ministry before completing the matter, and the fact that Mr. Kosloski is unavailable to give evidence concerning his role in completing the Case Report.

[36] With respect to the fact that Mr. Meckler left his employment with the Ministry before completing the matter, the Panel finds that this fact does not raise any reasonable question of fairness to Mr. Stevenson in this appeal. An affidavit from Mr. Meckler forms part of the record on this appeal relating to his evidence in this matter. The Panel also notes that the Respondent offered to make Mr. Meckler available for cross-examination by video-conference upon request of Mr. Stevenson. Mr. Stevenson made no application to the Commission to cross-examine Mr. Meckler on his affidavit.

[37] With respect to the unavailability of Mr. Kosloski to give evidence in relation to his role in the preparation of the Case Report, the Panel is satisfied that the affidavit of his supervisor, Ms. Anderson, adequately explains the role performed by Mr. Kosloski as a report preparer, and the reason for the Respondent being unable to produce him as a witness. However, in order to avoid any potential unfairness to

Mr. Stevenson due to the absence of Mr. Kosloski as a witness, the Panel will disregard the contents of the Executive Summary portion of the Case Report prepared by him.

[38] The Commission has previously held that procedural defects or irregularities below can be cured by a full and fair hearing of the matter before the Commission (for example, see: *Frank Schlichting v. Government of British Columbia*, Decision No. 2013-WFA-003(a), issued April 8, 2015 [*Schlichting*]). The Panel finds that the grounds raised by Mr. Stevenson have been addressed and remedied by the full and fair hearing afforded to him by this appeal, and the ruling the Panel has made that the Executive Summary portion of the Case Report prepared by Mr. Kosloski will be disregarded.

[39] Accordingly, this ground of appeal is dismissed.

3. Whether Mr. Stevenson contravened section 5(1) of the Act

[40] Section 5(1) of the *Act* reads as follows:

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.

[41] As it is common ground that the fires lit by Mr. Stevenson were category 2 open fires, the relevant "prescribed circumstances" referred to in section 5(1) of the *Act* are those set out in section 21(1) of the *Regulation*.

[42] Section 21(1) of the *Regulation* reads as follows:

Category 2 open fire

21 (1) The circumstances in which a person described in section 5 (1) or 6 (1) of the *Act* may light, fuel or use a category 2 open fire in or within 1 km of forest land or grass land are as follows:

- (a) the person is not prohibited from doing so under another enactment;
- (b) to do so is safe and is likely to continue to be safe;
- (c) the person establishes a fuel break around the burn area;
- (d) while the fire is burning and there is a risk of the fire escaping the person ensures that
 - (i) the fuel break is maintained,
 - (ii) a fire suppression system is available at the burn area, of a type and with a capacity adequate for fire control if the fire escapes, and
 - (iii) the fire is watched and patrolled by a person to prevent the escape of fire and the person is equipped with at least one firefighting hand tool;

(iv) Repealed.

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

[43] As a preliminary point, the Panel agrees with the Respondent's submission that a failure to meet any of the relevant requirements of section 21 of the *Regulation* would constitute a failure to meet the "prescribed circumstances" excepted in section 5(1) of the *Act*. In other words, the Panel finds that a failure to meet any of the relevant requirements of section 21 of the *Regulation* constitutes a contravention of section 5(1) of the *Act*.

[44] Below, the Panel has considered whether Mr. Stevenson failed to meet any of the relevant requirements of section 21 of the *Regulation*.

a. Did Mr. Stevenson establish a fuel break around the open fires he lit over the days immediately preceding the May 5, 2013 wildfire on Crown land?

[45] Section 21(1)(c) of the *Regulation* required Mr. Stevenson to "establish a fuel break around the burn area".

[46] Section 1 of the *Regulation* defines "fuel break" to mean:

- (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;

[47] The Panel agrees with the Manager's finding in the Determination regarding section 21(1)(c) of the *Regulation*, that the requirement to establish a fuel break "around" the burn area means that each individual category 2 open fire lit by Mr. Stevenson had to be surrounded on all sides by a fuel break.

[48] Mr. Stevenson submits that each category 2 open fire did have a fuel break around the burn area. He submits that, when the fires were lit individually, they were each surrounded by lots of snow and the ground was very wet. He submits that the public road running east to west and north to south of his Property, and the creek running east to west through his Property, meet the definition of fuel breaks.

Did the public road and creek constitute fuel breaks?

[49] There is no evidence from Mr. Stevenson setting out the location of the individual category 2 open fires lit by him in the first few days of May 2013 relative to the location of the public road or the creek which he submits were fuel breaks.

[50] No reference to fuel breaks is made in the Continuation Report prepared by Mr. Meckler.

[51] Wildfire Investigators Mr. Richburg and Mr. Groll attended the Property on May 7, 2013, arriving by helicopter. Their onsite investigations included taking informal statements from Mr. Stevenson and Mr. Bishop, taking numerous photographs, and locating and charting data they observed both in a field data entry form and on maps. This evidence, including their analysis and opinion in relation to the cause of the wildfire on Crown land, was set out in their Fire Origin Report. A copy of the draft and final form of the written report portion of the Fire

Origin Report are attached as exhibits to Ms. Vandale's affidavit #1. A copy of the draft Fire Origin Report together with supporting data, maps and photographs form part of an exhibit to Ms. Vandale's affidavit #2. A digital copy of the photographs and maps is an exhibit attached to Ms. Vandale's affidavit #2.

[52] The Fire Perimeter Map prepared as part of the Fire Origin Report shows both the size of the Property relative to the fire on and off the Property, and the western perimeter of the fire which was well within the Property and was a significant distance from both the road and creek. The Panel concludes, based on this map and other evidence, including the predominant west to east wind direction at the time, that the individual category 2 open fires were likely located near the western perimeter of the fire area depicted on the Fire Perimeter Map, far from both the public road and the creek.

[53] Based on the available evidence, the Panel finds that the public road and the creek did not constitute "fuel breaks" for the individual category 2 open fires as required by section 21(1)(c) of the *Regulation*. The public road and creek were located too far away from the burn area, with flammable grasses between the burn areas and the public road and creek, respectively. The presence of those flammable grasses in close proximity to the category 2 open fires, in windy conditions, would allow the category 2 open fires to spread well beyond the original burn area before reaching the public road or the creek.

Was there sufficient snow on the ground to constitute a fuel break?

[54] Mr. Stevenson submits that aerial photographs included in the Fire Origin Report support his assertion that when the fires were lit individually they were each surrounded by lots of snow and the ground was very wet. Photocopied and digital versions of the photographs are exhibits to Ms. Vandale's affidavit #2.

[55] The Panel has reviewed both the photocopies of the photographs and their digital versions. The digital versions of the aerial photographs are far clearer to view, and the Panel relies on those photos over the photocopies. These photographs were taken by Mr. Richburg and Mr. Groll as they approached the Property by helicopter on the morning of May 7, 2013. The Panel finds that these photographs are indicative of ground conditions both on May 7 and the first few days of May when the open fires were lit by Mr. Stevenson. The Panel further finds that aerial photographs 1 through 15 do not support the assertion that each individual category 2 open fire was completely surrounded by snow at the time the fires were lit in early May. In fact, the snow depicted in the photographs is located predominately in the treed areas, with small pockets of snow in shady areas. Where there is visible evidence of burnt grasses, there is little or no snow to be seen.

[56] In the written body of the Fire Origin Report, it was noted that the relevant weather from the Hudson's Hope weather station for early May 2013 indicated a buildup of the fire danger class, with most days in a Danger Class 2 (i.e., low danger) or 3 (i.e., moderate danger). Numerous other photographs included in the Fire Origin Report depicted dry ground conditions on the Property.

[57] While there may well have been more snow and wet ground conditions present when Mr. Stevenson began burning “a couple of weeks before” early May, based on an objective examination of the photographic evidence and weather data in the Fire Origin Report, the Panel finds that on a balance of probabilities there was not sufficient snow or very wet conditions on the ground surrounding the individual category 2 open fires lit by Mr. Stevenson in the few days before May 5, 2013 to constitute fuel breaks as required by section 21(1)(c) of the *Regulation*. In other words, the snow and wet ground that was present when he lit the fires was insufficient to constitute a “barrier or a change in fuel type or condition” which would meet the definition of “fuel break”.

b. Were any of the open fires that Mr. Stevenson lit still burning with a risk of fire escaping on either May 4 or 5, 2013?

[58] Section 21(1)(d) of the *Regulation* imposes specified obligations on a person described in section 5(1) of the *Act* “while the fire is burning and there is a risk of the fire escaping”.

[59] While the terms “escape” or “escaping” are not defined in the *Act* or the *Regulation*, the meaning of the word “escaping” as used in section 22(1)(f)(i) of the *Regulation*, (which is identical to the wording of section 21(1)(d)(i) of the *Regulation* in question here), was considered by the Commission in *Schlichting*. In that decision, the Commission found (at para. 91) that the emphasis in section 22(1)(f)(i) is specifically on maintaining fuel breaks to prevent escapes from them. The Panel finds that this interpretation is equally applicable to section 21(1)(d)(i), (ii), and (iii) of the *Regulation*. According, the risk of “escaping” addressed by section 21(1)(d) is the risk of escape of fire over the fuel break mandated by section 21(1)(c) if one is in place, or the risk of escape from the “burn area” if no fuel break is established, as the Panel has found to be the case in this appeal.

[60] While the phrase “burn area” is not defined in the *Act* or the *Regulation*, that phrase was interpreted by the Commission in *Louisiana-Pacific Canada Ltd. v. Government of British Columbia* (Decision No. 2009-WFA-004(b)), May 16, 2011; upheld on appeal in *British Columbia v. Louisiana Pacific Canada Ltd.*, 2012 BCSC 1546). The phrase was also considered by the Commission in the *Schlichting* decision referred to above. While these decisions were dealing with different facts under different subsections of the *Regulation*, the Panel finds them to be helpful in interpreting the phrase as used in section 21 of the *Regulation* in the context of the present case. The Panel agrees with the Commission’s approach in *Schlichting* that what constitutes a “burn area” for purposes of the *Regulation* depends on the circumstances of each particular case.

[61] Based on Mr. Stevenson’s evidence that each of the open fires he lit were intended by him to only burn stubble or grass over a confined area, which the parties agree were each less than 0.2 ha, the Panel finds that the “burn area” of each open fire lit by Mr. Stevenson during the first few days of May 2013 was that area of less than 0.2 ha immediately surrounding the point on the Property where he lit each open fire.

[62] Mr. Stevenson submits that he made sure the fires lit previous to and on May 2, 3 and 4 were extinguished to the best of his abilities, and that no flames,

sparks etc. were present. He further submits that on May 4, when he and his son saw wisps of smoke and a few smoldering poplar trees, they believed the fires to be out and to be of no risk.

[63] According to the Fire Origin Report Mr. Stevenson advised the Ministry investigators on May 7, 2013 that the fires he lit were still burning on May 4. He also advised the investigators that, on May 5, he and his son drove an atv (all-terrain vehicle) on his Property to the river crossing, and they noted a couple of areas smoldering.

[64] According to the Continuation Report, in his May 16 interview with NRO Meckler, Mr. Stevenson stated that on May 4 at approximately 17:30, he and his son Ryley went by quad to check out the fires, and there were a few poplars smoldering with wisps of smoke present. Mr. Stevenson got off his quad in a couple of spots, and had a stick to check and see if there were any fires still burning or any sparks present. Mr. Stevenson was unable to find anything other than smoke present. Mr. Stevenson further stated that it was quite warm and windy on the night he and his son Ryley checked the fire.

[65] Also, according to the Continuation Report, Ryley Stevenson told NRO Meckler in a phone interview on June 26 that when he and his father checked the fires on their quads, he saw some larger trees smoldering a little, but he didn't think it was necessary to get off the quads and check any closer than they were because it seemed like the fire was out.

[66] The Panel notes that the word "smolder" is defined in the Concise Oxford Dictionary as "burn with smoke but without flame". "Smoke" is defined as "visible volatile products of burning".

[67] Based on the totality of the evidence, including the statements made by Mr. Stevenson and his son Ryley to Ministry staff that the fires he lit were "smoldering" and "smoking", as summarized above, the Panel finds on a balance of probabilities that the fires were still burning on May 4 and 5, 2013, with a risk of escaping the burn area in warm and windy conditions, and therefore, section 21(1)(d) of the *Regulation* applies.

c. Was an adequate fire suppression system available at the burn area?

[68] Section 21(1)(d)(ii) of the *Regulation* requires that, while a fire is burning and there is a risk of the fire escaping, the person who lit the fire (i.e., Mr. Stevenson) is to ensure that 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.

[69] Section 1 of the *Regulation* defines "fire suppression system" as follows:

"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)

[70] Section 1 of the *Regulation* defines “firefighting hand tools” as follows:

“**firefighting hand tools**” includes shovels, axes, pulaskis, hand tank pumps and fire extinguishers;

[71] The evidence from Mr. Stevenson is that his son-in-law had given him a fire extinguisher, which he kept in his house. Mr. Stevenson submits that he had quick access to it, if he needed it, as the fires were around his house. In his May 28, 2015 letter attached to the OTBH Response, Mr. Halladay confirmed that he gave Mr. Stevenson a refillable pump action fire extinguisher in April 2013.

[72] The definition of “firefighting hand tools” in section 1 of the *Regulation* includes “hand tank pumps and fire extinguishers”. The Panel finds that, if the legislature had intended to include hand tank pumps and fire extinguishers in the definition of fire suppression system, it could have done so, but it did not. The Panel finds that the phrase “fire suppression system” contemplates a set of connected components organized together to suppress fire in a more substantial and effective way than a fire fighting hand tool. Consistent with the purpose of the legislation, the Panel notes that sections 21 and 22 of the *Regulation*, which cover category 2 and category 3 open fires, require the presence of an adequate fire suppression system while such larger fires are burning, whereas section 20 of the *Regulation*, which covers smaller camp fires, does not.

[73] Even if the “refillable pump action fire extinguisher” owned by Mr. Stevenson could meet the definition of a “fire suppression system”, which the Panel has found it does not, there is insufficient evidence to determine whether it had “a capacity adequate for fire control if the fire escapes”, as required by section 21(1)(d)(ii) of the *Regulation*.

[74] Section 21(1)(d)(ii) also obliged Mr. Stevenson to ensure that an adequate fire suppression system was “available at the burn area”. Mr. Stevenson does not claim to have taken his fire extinguisher with him at any time to the burn areas, and no evidence was provided as to the actual or approximate distance from the individual burn areas to Mr. Stevenson’s house or how much time it would take to get the fire extinguisher in the event of an escape of the fire from the burn area. Based on the available evidence, the Panel cannot, on balance, find that the fire extinguisher was available at the burn area as required by section 21(1)(d)(ii) of the *Regulation*.

[75] Accordingly, the Panel finds on a balance of probabilities that Mr. Stevenson failed to comply with section 21(1)(d)(ii) of the *Regulation*.

d. Did Mr. Stevenson watch and patrol the fire to prevent the escape of the fire, and was he equipped with at least one firefighting hand tool?

[76] Section 21(1)(d)(iii) of the *Regulation* provides that, while the fire is burning and there is a risk of the fire escaping, Mr. Stevenson was to ensure that he watched and patrolled the fire to prevent the escape of the fire, equipped with at least one firefighting hand tool. The definition of “firefighting hand tools” quoted above includes shovels.

[77] Mr. Stevenson submits that his quad is always equipped with a shovel and a chainsaw. Mr. Stevenson further asserts that he patrolled the fires at all times on his quad, monitoring the fires until he would extinguish them before retiring for the night.

[78] As set out in the Continuation Report, in his May 16 interview with NRO Meckler, Mr. Stevenson stated that, when he checked the smoldering poplars on May 4 at approx. 17:30, he used a "stick" to check and see if there were any fires still burning or any sparks present. When Mr. Stevenson spoke to NRO Meckler on June 7, 2013 he admitted that "when they went out to check the fire he didn't have any type of firefighting equipment with him." In the same interview, Mr. Stevenson stated that on May 5, 2013, he was unaware of the fires that were burning either on his Property or on Crown land until after he noted forestry helicopters flying around the area, and after his daughter advised him that Mr. Bishop had called her about a fire that had 'jumped' the road.

[79] As set out in the Fire Origin Report, Mr. Stevenson told the fire investigators on May 7, 2013 that when he learned of the fire on Crown land on May 5, 2013, he went and looked at the fire, and noted that it had burnt into areas previously not lit by him on his Property as well as across the road on Crown land.

[80] According to the Fire Origin Report, the wildfire ignited around 13:00 on May 5, 2013, and was reported by phone to BC Wildfire Service at 18:54 on that same day.

[81] While the Panel accepts Mr. Stevenson's assertions that, as a matter of practice, he carried both a shovel (which is included in the definition of "firefighting hand tool") and a chainsaw with him on his quad when he patrolled the fires he lit, the Panel finds that he has admitted that he did not in fact do so on the evening of May 4, 2013.

[82] The Panel also finds that it is clear on the evidence that Mr. Stevenson failed to conduct any fire watch or patrol on May 5, 2013. Mr. Stevenson admitted that he was unaware of the fire that had been burning on his Property for some hours until after he was notified about the wildfire by his daughter.

[83] Accordingly, the Panel finds on a balance of probabilities that on both May 4 and 5, 2013, Mr. Stevenson failed to comply with section 21(1)(d)(iii) of the *Regulation*.

e. Before leaving the burn area on May 4, 2013, did Mr. Stevenson ensure that the fire was extinguished?

[84] Section 21(1)(e) of the *Regulation* obliged Mr. Stevenson to ensure that the fire was extinguished before he left the burn area on the evening of May 4, 2013.

[85] As stated above, the Panel has found that the fires were still burning when Mr. Stevenson left the burn area on the evening of May 4, 2013. Accordingly, the Panel finds on a balance of probabilities that Mr. Stevenson also failed to comply with section 21(1)(e) of the *Regulation*.

The Panel's conclusion on Issue 3

[86] Based on the above findings, the Panel finds that Mr. Stevenson lit, fuelled, and used an open fire within 1 kilometer of forest land without first ensuring that the circumstances prescribed in section 21(1)(c), (d)(ii), (d)(iii) and (e) of the *Regulation* were met, in contravention of section 5(1) of the *Act*.

[87] Accordingly, the Panel finds that the Manager's order that Mr. Stevenson contravened section 5(1) of the *Act* should be confirmed, unless Mr. Stevenson has established that he is entitled to rely on any of the statutory defences set out in section 29 of the *Act*.

4. Whether Mr. Stevenson has established on a balance of probabilities that he exercised due diligence to prevent the contravention, or that he reasonably believed in the existence of facts that if true would establish that he did not contravene section 5(1) of the *Act*.

[88] Section 29 of the *Act* sets out statutory defences to section 26 contravention orders, and Mr. Stevenson seeks to rely on the defences provided in subsections (a) and (b). The relevant portions of section 29 state as follows:

Defences in relation to administrative proceedings

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

...

[89] Thus, section 29(a) provides a statutory defence of due diligence, and section 29(b) provides a separate statutory defence known as "mistake of fact." The legal tests for each of these defences have been established by the courts, as discussed below.

[90] The Commission has considered the application of the defences of due diligence and mistake of fact in several of its decisions including *Schlichting*, which adopted the oft quoted decision of the Commission in *Atco Wood Products Ltd. v Government of British Columbia* (Decision No. 2010-FOR-001(a), February 28, 2012) [*Atco*].

[91] In *Atco*, the Commission discussed and applied the defence of mistake of fact as set out by the BC Court of Appeal in *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510. At para. 248 of *Atco*, the Commission summarized the test for mistake of fact as follows:

In *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510 [*MacMillan Bloedel*], Smith, J.A. described the defence of mistake of fact as applying "where the accused

can establish that he did not know and could not reasonably have known of the existence of the hazard." ...

[92] In *Atco*, after considering the relevant case law including *Pope & Talbot Ltd. v. British Columbia*, 2009 BCSC 1715, the Commission also summarized the test for due diligence as follows at para. 256:

- (1) Can the accused establish that it is innocent under the first branch of the test (mistake of fact); specifically, did it or could it have reasonably known of the existence of the facts giving rise to the particular event (contravention)?
- (2) If not, can the accused establish that it is innocent of the contravention under the second branch of the test (due diligence); specifically, did the accused take all reasonable care to avoid the particular event (contravention)?

[93] The Panel notes that the first part of the legal test for the defence of due diligence incorporates mistake of fact, although mistake of fact is a distinct defence in section 29(b) of the *Act*.

Mistake of Fact

[94] The Panel has considered the defence of mistake of fact in relation to the findings that Mr. Stevenson's failed to comply with the provisions of sections 21(1)(c), (d)(ii), (d)(iii) and (e) of the *Regulation* in contravening section 5(1) of the *Act*.

[95] The question is: has Mr. Stevenson established that he reasonably believed in the existence of facts that, if true, would establish that he did not contravene section 5(1) of the *Act*?

[96] With respect to Mr. Stevenson's stated belief that he had established fire breaks, the Panel finds that Mr. Stevenson has failed to establish that such belief is reasonable in the circumstances. The Panel finds that it is not reasonable to assume that the fires lit by Mr. Stevenson could be contained within a burn area of less than 0.2 ha by a road or creek, which the Panel has found were located a significantly greater distance away from the burn area, or by the amount of snow found by the Panel to be present on the ground at the time the fires were lit in early May 2013.

[97] The Panel further finds that Mr. Stevenson has failed to establish any reasonable basis for his belief that having a refillable pump action fire extinguisher in his house, and a shovel and chainsaw on his quad, could amount to having "a fire suppression system available at the burn area, of a type and with a capacity adequate for fire control if the fire escapes".

[98] The Panel further finds that Mr. Stevenson's admission that a few poplars were smoldering, with wisps of smoke present on a warm windy evening, should reasonably have led him to conclude that the fire was still burning, not that it was extinguished. Likewise, whether he got off of his quad or not, and poked the burn area with a stick and saw no flame or sparks, this activity cannot reasonably be

seen as a basis upon which to conclude the fire was extinguished. Greater efforts would have been called for to reasonably determine the status of the fire.

[99] The Panel finds that Mr. Stevenson has failed to establish on a balance of probabilities that he is entitled to rely on the defence of mistake of fact on this appeal. Specifically, Mr. Stevenson has failed to establish that he reasonably believed in the existence of facts that, if true, would establish that he did not contravene section 5(1) of the *Act*.

Due Diligence

[100] The Panel has already found, based on the evidence, that Mr. Stevenson has failed to establish that he can rely on the defence of mistake of fact. He has failed to establish that he reasonably believed in the existence of facts that, if true, would establish that he did not contravene section 5(1) of the *Act*. Similarly, the Panel finds that Mr. Stevenson did or could have reasonably known of the existence of the facts giving rise to the contravention. Thus, Mr. Stevenson has failed to meet the first branch of the defence of due diligence (mistake of fact).

[101] The next question is: did Mr. Stevenson take all reasonable care to avoid the contravention of section 5(1) of the *Act*?

[102] On the totality of the evidence, the Panel finds that Mr. Stevenson either did not avert to, or showed little concern for, the obligations of a person lighting category 2 open fires required by the *Regulation* to minimize the risk of such fires escaping.

[103] No effort was made by Mr. Stevenson to establish fuel breaks. Instead, he relied on a road and stream located too far away from the burn areas to stop the fire from spreading. He also relied on ground conditions in dry, warming, and windy weather conditions. Mr. Stevenson did not have a fire suppression system, and the fire extinguisher he did have was left by him in his house. On May 4 when he attended the active burn zone, he had no firefighting hand tools with him. Most significantly, even though Mr. Stevenson was aware of the warm and windy weather on the evening of May 4, he did not engage in any patrol of the burn zone on May 5 to determine whether or not the fire was extinguished. If he had, perhaps the wildfire could have been avoided. The Panel finds that Mr. Stevenson has failed to establish, on a balance of probabilities, that he took all reasonable care to avoid the contravention.

[104] In summary, the Panel finds that Mr. Stevenson has failed to establish that he is entitled to rely on the defence of due diligence on this appeal.

[105] As a result, the Panel hereby confirms the order made by the Manager against Mr. Stevenson for his contravention of section 5(1) of the *Act*.

5. Whether the open fires Mr. Stevenson lit over the days immediately preceding May 5, 2013 escaped the Property and caused the wildfire on Crown land on May 5, 2013.

[106] Mr. Stevenson submits that, on the evidence, it has not been proven that the fires he lit caused the wildfire on Crown land. He asserts that alternate possible

causes could not be ruled out, such as arson by his neighbor, Mr. Bishop, or the careless discard of a lit cigarette or match by unknown persons using the public road.

[107] As set out in the Fire Origin Report, when Mr. Stevenson spoke to the fire investigators on site on May 7, 2013, he advised them that in his opinion the fire had started on Crown land and had crossed back into the Property. As set out in the Fire Origin Report, their investigation in the field focused on that issue. Mr. Stevenson also suggested to them that someone had lit the fire on Crown land to get him in trouble.

[108] As set out in the Continuation Report, Mr. Stevenson told NRO Meckler on May 16, 2013, that he did not believe the fire had jumped the road from his Property, and he said that he had seen strange tire tracks in the area, near where the fire had jumped the road.

[109] Mr. Stevenson expanded on his theory of arson in his submissions to the Commission, suggesting that there was ill will between himself and his neighbor, Mr. Bishop, based on past disputes. He submits that this constitutes evidence of a motive for Mr. Bishop to cause him harm by committing this alleged arson.

[110] As set out in the Continuation Report, NRO Meckler spoke to Mr. Bishop on June 27, 2013. Mr. Bishop lives approximately 4 km down the road that borders the Property. Mr. Bishop confirmed that Mr. Stevenson had been burning grass for a couple of days before May 5, 2013. On May 5, Mr. Bishop drove down the road to check out the height of the river, and he saw a fire burning on Crown land across from the Property. Mr. Bishop said that the fire wasn't across the road the day before, but when he saw it on May 5, the fire had already jumped the road. Mr. Bishop said it was quite windy and the wind was pushing up the valley. Mr. Bishop said he called Mr. Stevenson's daughter to report the fire and also called Fire BC.

[111] Based on the Fire Origin Report, the Panel finds that the fire was reported to Fire BC at 18:54 on May 5, 2013. The May 28, 2015 letter from Mr. Stevenson's daughter, Amanda Stevenson, confirms that she received the call from Mr. Bishop, but she does not give a time. The Panel finds that it is reasonable to assume that this call took place around the same time as the call to Fire BC.

The Fire Origin Report

[112] As previously stated, Mr. Groll and Mr. Richburg are Wildfire Investigators who conducted the investigation and authored the Fire Origin Report. They also provided affidavits that form part of the record on this appeal.

[113] In Mr. Groll's affidavit, he confirms that he is a trained Wildfire Origin and Cause Investigator with fire investigation experience dating back to 2009. At the time of this investigation, he was a certified Type 2 investigator being mentored by Mr. Richburg.

[114] In Mr. Richburg's affidavit, he sets out his very extensive qualifications and experience as a Wildland Fire Investigator. To summarize, Mr. Richburg is a Certified Type 1 Wild Fire Investigator. He has completed the Wildland Fire Origin and Cause Determination Course, and is a course Instructor. He also received

advanced training in 2006. He has been a lead Wildfire Investigator on a multitude of investigation from 1998 to the present.

[115] Based on their qualifications and extensive experience, in particular Mr. Richburg's, the Panel gives significant weight to their Fire Origin Report, and the observations and opinions expressed by them therein.

[116] With respect to temperature and wind conditions at the Property in the early days of May, and in particular on May 5, 2013, the Wildfire Investigators relied primarily on data from the Hudson's Hope weather station, which is located approximately 26 kilometers south of the Property. The weather data and map showing the location of the Property and the wildfire relative to the weather stations is contained in the Fire Origin Report.

[117] At the top of page 3 of the Fire Origin Report, the Wildfire Investigators note that they conducted onsite temperature and wind measurements during the afternoon of May 7, 2013, and they found that those readings were consistent with the readings recorded at Hudson's Hope for that date.

[118] The Panel finds that the weather data recorded at Hudson's Hope in early May, and in particular on May 5, 2013, is highly probative of the weather and wind conditions at the Property and the wildfire at the times in question. The Hudson's Hope data for the afternoon of May 5, 2013 shows temperatures consistently in the low to mid 20's C, with winds blowing predominately from west to east at speeds of between 20 and 24 km/h. The Panel also notes that the Hudson's Hope data covering April 28 through May 7, 2013 confirms zero precipitation since April 30, 2013.

[119] The Panel finds that, on a balance of probabilities, the weather conditions on May 4 and 5, 2013 at the Property were dry, warm and windy, with the wind blowing predominately from the Property in the direction of the wildfire across the road from the Property (from west to east).

[120] In order to determine the direction of fire travel, the Wildfire Investigators conducted a detailed site investigation, taking numerous photographs and placing burn indicator flags to graphically illustrate the fire direction. The photographs were included in the Fire Origin Report, as was a comprehensive Field Data Collection Form that recorded field observations and comments from the Wildfire Investigators as to what they observed and photographed on site.

[121] The Wildfire Investigators determined the area of fire origin on the Crown land portion of the fire, and observed characteristics of an advancing fire from the adjacent Property, spread by winds from west to east, and spreading uphill along the underside of the public road.

[122] In identifying what ignited the wildfire on Crown land, the Wildfire Investigators state in the Fire Origin Report, under the heading "Igniting Object" that:

Evidence of fire brands or embers was located in the area of the Crown land across the public road. It is believed that the fire advanced from the private land, spread across cured grasses and as it ignited some of the heavier fuels,

some of these embers spread by the wind crossed the road onto the Crown land. Photo 59 shows some of the fire embers recorded by the investigators.

[123] As part of their investigation protocol, the Wildfire Investigators considered all potential causes of the wildfire, including arson and a smoker as posited by Mr. Stevenson, and concluded that the probable cause was the burning on the days preceding May 5, 2013 by Mr. Stevenson on his Property. In their conclusion, the Wildfire Investigators state as follows in the Fire Origin Report:

... a fire started on private land [the Property] several days earlier by the private land owner [Mr. Stevenson] was left in a smoldering stage and when winds picked up they fanned the fire and the wind quickly spread it across the private land and onto the adjacent crown land.

[124] The Panel finds that the evidence and conclusions of the Wildfire Investigators set out in the Fire Origin Report, and in particular those referred to above, establish on a balance of probabilities that the open fires Mr. Stevenson lit over the days immediately preceding May 5, 2013, escaped the Property and caused the wildfire on Crown land on May 5, 2013.

[125] Mr. Stevenson's theories as to alternate causes were considered by the Wildfire Investigators, and they found no physical evidence at the investigation site in support of either arson or a smoker as a cause of the wildfire.

[126] The Panel has considered that Mr. Meckler's affidavit indicates that his observations and conclusions regarding the fire on Crown land were not the same as those in the Fire Origin Report. In his affidavit, he states that based on his observations on site May 16 and June 7, 2013, he did not see evidence of "fuel found on Crown land mentioned in the [Fire Origin] report" as causing the fire. In his affidavit, Mr. Meckler also says that he does not know the cause of the May 5, 2013 fire on Crown land. The Panel notes that Mr. Meckler claims no qualifications as a Wildfire Investigator, whereas the authors the Fire Origin Report are trained and experienced as Wildfire Investigators. Furthermore, Mr. Meckler first attended the site on May 16, over one week after the fire on Crown land began. In contrast, the Wildfire Investigators first attended the site on May 7, two days after the fire began on Crown land, and they took photographs at the site. Whether evidence that was observed, photographed and noted by the Wildfire Investigators on May 7, 2013 was or was not still present a week or two weeks later, when Mr. Meckler attended the Property, in no way undermines the hard evidence of same provided by the Wildfire Investigators in the Fire Origin Report. The Panel prefers the evidence in the Fire Origin Report over Mr. Meckler's affidavit.

6. Whether the administrative penalty order or the cost recovery order should be varied in the circumstances.

Cost Recovery Order

[127] Section 9 of the *Act* provides that the government may carry out fire control under certain circumstances, as follows:

Government may carry out fire control

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

[128] The Panel finds that the government's fire suppression efforts were necessary to control the wildfire that endangered forest and grass land as contemplated in section 9 of the *Act*. As stated in the Fire Origin Report, the fire area contained a mix of standing Trembling Aspen and Spruce with various shrubs and grasses dispersed throughout the area.

[129] Sections 27(1)(b) and (d) of the *Act* provide as follows:

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
- (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.

[130] Having found that the wildfire was caused by Mr. Stevenson's contravention of section 5(1) of the *Act*, the Manager had jurisdiction under section 27(1)(b) and (d) to determine the amount of the government's fire control costs, and to require Mr. Stevenson to pay those costs.

[131] "Fire control" is defined in section 1(2) of the *Regulation* as follows:

"**fire control**" means an action to contain, extinguish or limit the spread of a fire;

[132] Section 31(1) of the *Regulation* prescribes how fire control costs are to be determined, and it states as follows:

Determination of government fire control costs

- 31 (1) For the purposes of section 25 (1) (a) and 27 (1) (b) of the Act, the manner in which the amount of the government's fire control costs in respect of a particular fire is to be calculated is
- (a) by ascertaining the sum of the following costs, expenditures and charges that are attributable to the fire:
 - (i) hourly wages and overtime wages of responding employees, including payroll loading costs;
 - (ii) distance charges for use of government and private vehicles;
 - (iii) food, transportation and accommodation expenditures;

- (iv) costs for expendable supplies and materials consumed;
 - (v) air tanker fuel costs and flight costs;
 - (vi) helicopter fuel costs and flight costs;
 - (vii) aircraft basing charges (preparedness) for contracted aircraft;
 - (viii) retardant and other suppressant costs;
 - (ix) rent on use of equipment;
 - (x) replacement, repair or cleaning of damaged or used vehicles or equipment, directly resulting from the fire control;
 - (xi) private goods and services contracted, hired, rented or purchased;
 - (xii) investigation, research and analysis services related to
 - (A) post-incident evaluation,
 - (B) contingency plan reviews, and
 - (C) other incident follow-up activities;
 - (xiii) consulting and other professional charges;
 - (xiv) rehabilitation and/or slope stabilization costs, and
- (b) by adding to the sum ascertained under paragraph (a) for overhead an amount equal to the greater of
- (i) \$200, and
 - (ii) 20% of the amount determined under paragraph (a) to arrive at the total dollar amount of the government's fire control costs for the fire.

[133] In making his Determination, the Manager determined under section 27(1)(b) of the *Act*, using the calculation set out in section 31 of the *Regulation*, that the amount of the governments fire control costs that resulted, directly or indirectly, from the contravention total \$34,192.28.

[134] Having determined that the circumstances for not seeking cost recovery set out in section 29 of the *Regulation* did not apply, with which finding the Panel agrees, and having considered Ministry Policy 9.1 that occupants of private land should be billed for the government's fire control costs if the person caused or contributed to the wildfire or to its spread, and having not been provided with any reasons for departing from this policy, the Manager ordered that the total amount of recovery for fire suppression that Mr. Stevenson must pay by order under section 27(1)(d) of the *Act* is \$34,192.28.

[135] Documentation in support of the government's fire control costs is included in the record on this appeal.

[136] Mr. Stevenson submits that no major or moderate firefighting was required, and that the firefighters only needed to patrol the area and put out some hot spots.

Mr. Stevenson further submits that the response to the wildfire was an overreaction, and he asserts as follows:

The forestry crew arrived to the already out fire in a pickup and were within sight of the fire area and could have easily have crossed the creek but instead turned back around and drove back to base. They then came back in a helicopter to a fire they had already seen was out with a large crew.

[137] Based upon his criticism about not crossing the creek by truck, Mr. Stevenson requests that the Commission look behind the costs.

[138] The Respondent submits as follows:

Absent any evidence supported argument going to the heart of principles of natural justice and administrative fairness, there is, in the Respondent's respectful submission, no jurisdiction for the Commission to look behind the costs prescribed by the *Wildfire Act* and its regulations.

[139] The Panel does not accept the Respondent's submission. The costs claimed must be "fire control" costs as defined. The amount of the fire control costs must be determined in accord with section 31 of the *Regulation*. The Commission has the clear jurisdiction to consider and "look behind" these determinations. The Commission is not bound by Ministry policy, and retains its discretion in these matters.

[140] The Panel notes that in *Robert Unger v. Government of British Columbia* (Decision No. 2012-WFA-002(b), issued December 29, 2014), the Commission considered its authority in dealing with a challenged cost recovery order. Although that panel of the Commission concluded that the full amount of costs claimed were recoverable, the panel went on to state in paragraph 52 as follows:

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.

[141] The Panel has considered the issues raised by Mr. Stevenson in the context of whether the costs claimed were "fire control" costs, and whether section 31 of the *Regulation* was complied with. The Panel has found that the government's fire suppression efforts were necessary to control the wildfire that endangered forest and grass land, as contemplated in section 9 of the *Act*. The Panel places no weight whatsoever on Mr. Stevenson's criticisms of the level of fire suppression efforts employed or called for in the circumstances. The Panel finds that Mr. Stevenson has presented no evidence that the Ministry's discretionary decisions as to the deployment of fire suppression resources in this case were unwarranted or excessive.

[142] In addition, the Panel finds that the Respondent's evidence explains why the firefighting crew decided to access the fire by helicopter. The Panel notes that in the Daily Activity and Cost Report for May 5, 2013, it states that a fire suppression crew attempted to access the fire by truck, but turned around to return to base.

The reason for this is set out in the Activity Log, where it was noted at 20:26 on May 5, 2013 that:

river has come up quite a bit in volume and no roads access across river at this time, seen a homemade bridge someone was trying to pull in but no road access at this time, will have to ferry crews into fire [by helicopter].

[143] The Daily Activity and Cost Report for May 6, 2013 states:

Flew to fire for recci [reconnaissance], talk to land owner and attempt to find a road way access to fire.

[144] The Daily Activity and Cost Report for May 7, 2013 states:

Drove to staging [area] then bumped into fire [by helicopter]. Hot spots found and put out. Patrolled then deemed extinguished.

[145] Similarly, notes in the Activity Log for the morning of May 7, 2013 state that the crew was "bumped" or "flipped" into the fire "via heli" from a staging area. This indicates that the fire crew drove to a staging area close to the fire, and then the crew took a short helicopter flight to the fire site.

[146] The Panel finds that this evidence demonstrates the reasonable efforts by the Ministry firefighters to get access to the wildfire site by road, and the properly informed decision taken to bring the fire suppression crew into the wildfire site by a short helicopter flight from a staging area.

[147] Having considered the evidence in the context of the definition of "fire control" and the provisions of section 31 of the *Regulation*, the Panel hereby confirms the Manager's determination under section 27(1)(b) of the *Act* that the government's costs of fire control carried out under section 9 of the *Act* totaled \$34,192.28.

[148] The Panel also sees no reason, either on the facts of this case or the submissions made by Mr. Stevenson concerning his personal circumstances, to order Mr. Stevenson to pay anything less than the full amount of the government's fire control costs. Accordingly, the Panel hereby confirms the Manager's order under section 27(1)(d) of the *Act* that Mr. Stevenson must pay \$34,192.28 to the government as a recovery of its fire control costs.

Administrative Penalty

[149] Sections 27(1)(a) and (3) of the *Act* state:

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.

[150] The amount of an administrative penalty for a contravention of section 5(1) of the *Act* is governed by section 33(2)(b) of the *Regulation*, which sets the maximum amount at \$10,000.

[151] In making the Determination, the Manager considered the factors set out in section 27(3) of the *Act*. The Panel has done likewise, and agrees with the Manager's conclusions. Specifically, the Panel finds that Mr. Stevenson has no previous contraventions of a similar nature, he did not benefit from the contravention, and he was cooperative during the investigation. However, although Mr. Stevenson did not deliberately commit the contravention, he was careless in his use of open fire, and the magnitude of the contravention was minimal mainly due to the Ministry's fire suppression efforts. Accordingly, the Panel hereby confirms the order made under section 27(1)(a) of the *Act* that Mr. Stevenson pay an administrative penalty of \$300.

[152] The Panel finds that the administrative penalty, together with fire control costs reimbursement order, are appropriate in the circumstances, and will serve as an adequate deterrent to both Mr. Stevenson and others lighting open fires.

DECISION

[153] In making this decision, the Panel has considered all of the relevant evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[154] For the reasons set out above, the Panel confirms the Manager's Determination, and dismisses the appeal.

"Michael Tourigny"

Michael Tourigny
Panel Chair

July 8, 2016