



Forest Appeals Commission

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DECISION NO. 2019-WFA-008(b)

In the matter of an appeal under section 39 of the *Wildfire Act*, S.B.C. 2004, c. 31

BETWEEN: AltaGas Ltd. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Jeff Hand, Panel Chair

DATE: Conducted by way of written submissions
concluded on December 11, 2020

APPEARING: For the Appellant: Robert M. Lonergan, Counsel
David McLean, Counsel
For the Respondent: Graham Rudyk, Counsel

APPEAL

[1] AltaGas Ltd. ("AltaGas") appeals contravention order no. DSS-35819 and administrative penalty and cost recovery order no. R90049 (2016), which were issued in a decision dated June 18, 2019 (the "Order"). The Order was made by the Deputy Director (the "Deputy Director"), BC Wildfire Service, Ministry of Forests, Lands, Natural Resource Operations and Rural Development. The Deputy Director was acting as a delegate of the Minister under the *Wildfire Act*, S.B.C. 2004, c. 31 (the "Act").

[2] In the Order, the Deputy Director:

- a) determined that AltaGas had breached section 21(2) of the *Wildfire Regulation*, B.C. Reg. 38/2005 (the "*Regulation*"), resulting in a wildfire;
- b) determined that the Province had incurred fire control costs totaling \$345,347.77;
- c) ordered AltaGas to pay those costs of \$345,347.77 to the government;
and
- d) imposed an administrative monetary penalty in the amount of \$500.

[3] AltaGas appealed the Order, but the parties were able to resolve items (a), (b), and (d) by consent, leaving only the requirement to pay the government's fire control costs to be dealt with in this appeal.

[4] AltaGas says that the Deputy Director should not have ordered it to pay the government's fire control costs, and it requests that the Commission set aside this aspect of the Order. Alternatively, AltaGas asks the Commission to reduce the amount of the fire control costs to reflect AltaGas' conduct.

[5] The Government says the Deputy Director properly exercised his discretion to require AltaGas to pay the full amount of the government's fire control costs in the circumstances of this case. The Government submits that the legislation does not contemplate negating or reducing fire control costs that resulted from a contravention and those costs were calculated correctly.

BACKGROUND

[6] AltaGas operates the Forest Kerr Hydroelectric facility, a run-of-river hydroelectric plant on the Iskut River, approximately 450 km north of Smithers, British Columbia. AltaGas holds a permit from the Ministry of Environment allowing it to burn trash and other debris from their camp in an open burn pit. These burns occur virtually every week.

[7] On the afternoon of June 27, 2016, Eric Robinson, an AltaGas employee, lit a category 2 open fire¹ to dispose of wooden construction waste.

[8] At that time, AltaGas had developed standard operating procedures with respect to on-site burning, summarized in two documents: Open Burn Procedures & Checklist; and, O&M Instructions - Fire Procedures for Pit Burning. They also had an Emergency Response Plan to be implemented in the event of fire.

[9] Mr. Robinson was following these procedures on the day of the burn. However, at approximately 3:00 PM, an ember escaped from the burn pit and resulted in a wildfire.

[10] Mr. Robinson contacted his supervisor, Brandon Marion, who quickly determined that AltaGas needed to contact the Northwest Fire Centre to enlist their help. The call to the Fire Centre was made at approximately 3:30 PM.

[11] AltaGas undertook efforts to suppress the wildfire by mobilizing their employees and equipment to construct fire breaks. They hired the services of two air water tankers and one helicopter to assist in their efforts. The following day, the BC Wildfire Service assumed command of the firefighting efforts.

[12] The wildfire eventually consumed 60 hectares of Crown land. The fire was declared out on August 9, 2016.

[13] AltaGas incurred costs of approximately \$287,000 in fighting the fire and repairing associated damage to its hydro lines. In addition, it took their hydroelectric facility off-line for a period of four days, resulting in production losses of approximately \$600,000.

¹ The *Regulation* defines "category 2 open fire" as an open fire, other than a campfire, that: (a) burns material in one pile not exceeding 2 metres in height and 3 metres in width; (b) burns material concurrently in 2 piles each not exceeding 2 metres in height and 3 metres in width; or (c) burns stubble or grass over an area that does not exceed 0.2 hectare.

[14] Following the wildfire, AltaGas suspended all burning on site while it conducted an internal investigation and undertook corrective action which included:

- performing a risk assessment and hazard analysis for open pit burning;
- updating its standard operating procedures;
- training maintenance personnel, operations personnel, and other workers on new open burn procedures;
- training its fire watch personnel to be aware of changing weather conditions; and
- purchasing an on-site fire weather monitoring station at a cost of \$30,000.

[15] On March 18, 2019, the Deputy Director advised AltaGas that he was considering issuing orders with respect to a contravention, an administrative penalty, and recovery of the government's fire control costs pursuant to the *Act*. He provided AltaGas with an opportunity to be heard on May 1, 2019.

[16] On June 18, 2019, the Deputy Director issued the Order. The Deputy Director found that AltaGas had contravened section 21(2) of the *Regulation* by permitting the escape of embers from the category 2 open fire which in turn caused the wildfire. He found that AltaGas had not carried out the category 2 burn with sufficient due diligence to prevent the wildfire from occurring. After considering the factors set out in section 27(3) of the *Act*, he levied a penalty of \$500 for the contravention. He also determined that fire control costs in the amount of \$345,000 had been incurred by the government. These amounts were calculated pursuant to section 31(1) of the *Regulation*.

[17] The Deputy Director then considered whether there were circumstances for not seeking cost recovery. Section 29 of the *Regulation* sets out circumstances in which the Minister (or the Deputy Director, as the Minister's delegate) may not require a person to pay to the government's fire control costs. The Deputy Director found that those circumstances did not apply. The Deputy Director also considered Ministry Policy 9.1, entitled "Fire Control Responsibilities and Costs" (the "Policy"). He found that there was no reason to depart from the Policy. He ordered AltaGas to pay the government's fire control costs of \$345,347.77.

[18] On July 17th, 2019, AltaGas filed a notice of appeal with the Commission.

[19] The parties initially intended to have this appeal heard at an in-person hearing, but the Commission temporarily suspended oral hearings in 2020 due to the COVID 19 pandemic, which delayed the progress of this appeal.

[20] Before the appeal was heard, the parties reached an agreement that resolved some of the issues in the appeal, as set out in a consent order dated September 24, 2020:

- a) AltaGas abandoned its appeal of the determination that it breached section 21(2) of the *Regulation*;
- b) the Deputy Director waived the levying of the administrative monetary penalty without prejudice to his position regarding the order to pay the government's fire control costs;

- c) AltaGas' appeal of the order to pay the government's fire control costs would proceed based on certain grounds set out in AltaGas' notice of appeal.

[21] The parties elected to conduct this appeal by way of written submissions. The Commission received the following written submissions:

- AltaGas' Statement of Points dated October 23, 2020, with an affidavit sworn by Brandon Marion dated October 20, 2020;
- the Government's Statement of Points dated November 23, 2020; and
- AltaGas' Reply dated December 11, 2020.

[22] This appeal is heard pursuant to section 39(1) of the *Act*. The powers of the Commission on appeal are set out in section 41(1) of the *Act*, which provides that the Commission may:

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

[23] AltaGas submits that the order to pay the government's fire suppression costs should be set aside because the Deputy Director:

- failed to properly interpret the *Act* as providing the Deputy Director with a broad discretion to determine whether fire control costs should be paid;
- failed to consider evidence before him that should have informed his exercise of discretion;
- failed to prepare a written decision that was clear, transparent, and fully reasoned;
- improperly fettered his discretion by treating the *Act* and the Policy as requiring him to order the payment of fire control costs if the exceptions prescribed in section 29 of the *Regulation* were not met; and
- treated the legislation and/or the Policy as not allowing a discretion to order AltaGas to pay less than the total amount of the government's fire control costs.

[24] The Government submits that the Deputy Director's cost recovery order was properly considered and fully explained in the Order, and the Deputy Director did not fetter his discretion. The Government also says that upon analysis of the *Act* and the *Regulation*, there is no reason to conclude that a cost recovery order can be made for less than the costs as calculated under the *Regulation*, where, as in this case, such costs resulted, directly or indirectly, from the contravention, and where the calculation of such costs is not in dispute.

ISSUES

- 1) Are the alleged deficiencies in the Deputy Director's reasons grounds to set aside the cost recovery order?
- 2) Is ordering the payment of fire control costs under section 27(1)(d) of the *Act* a discretionary decision?
- 3) Does the *Act* permit the reduction of fire control costs, and if so, do the circumstances of this case justify a reduction?
- 4) If fire control costs cannot be reduced, should AltaGas be required to pay the government's fire control costs?

RELEVANT LEGISLATION

[25] Section 27(1) of the *Act* provides that if the Minister determines that a person has contravened the *Act* or its regulations, the Minister by order:

- (b) may determine the amount of the government's costs of fire control ... 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) ..., subject to the prescribed limits, if any.

[26] Section 29 of the *Regulation* provides that the Minister may not require a person to pay to the government's fire control costs if the person, through their acts or omissions, did not willfully cause or contribute to the start or spread of the fire, and:

- (a) before the government has carried out fire control for the fire that gives rise to the government's costs,
 - (i) the person has entered into a wildfire response agreement with the government,... , or
- (b) the fire that gives rise to the government's costs results from timber harvesting, silviculture treatments, road construction, road maintenance or road deactivation by a person who
 - (i) is the holder of an agreement or licence under the *Forest Act*, ...

ANALYSIS**1. Are the alleged deficiencies in the Deputy Director's reasons grounds to set aside the cost recovery order?**

[27] AltaGas submits that the reasons in the Order with respect to cost recovery do not comply with the requirements identified by the Supreme Court of Canada in

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 [Vavilov], and therefore, the cost recovery order must be set aside. *Vavilov* requires that written reasons be clear and intelligible, and demonstrate that the decision maker has considered the evidence before her or him in rendering the decision.

[28] The Government submits that the Deputy Director's reasons were justified, transparent and intelligible, and should not be set aside.

[29] I note that *Vavilov* concerned the standard of review to be applied by a court when performing a judicial review of an administrative decision. Where a reasonableness standard applies, a lack of transparency and a failure to consider the evidence could indicate whether the decision was reasonable.

[30] However, appeals before this Commission are conducted as a new hearing pursuant to section 140.6 of the *Forest and Range Practices Act*. The Commission is not a court and is not engaged in a judicial review. The parties are free to submit evidence and argument afresh so that the Commission can reach its own findings on the issues under appeal. Viewed in this way, the Commission is not concerned with the Deputy Director's decision, beyond of course reviewing it to understand the decision that was made, but rather the Commission must decide whether the circumstances of this case are such that the order requiring AltaGas to pay fire control costs ought to be made.

[31] It is not necessary to determine whether the reasons in the Order adequately explain the Deputy Director's decision for making the cost recovery order. If he did not, that is effectively cured by the appeal process. The Commission will determine if an order for payment of fire control costs should be made, taking into account the applicable legislation and the facts of the case, and give reasons for its decision.

[32] Consequently, I find the alleged deficiencies in the Deputy Director's reasoning are not grounds to set aside the cost recovery order.

2. Is ordering the payment of fire control costs under section 27(1)(d) of the Act a discretionary decision?

[33] AltaGas submits that there are two discretionary elements to the treatment of fire control costs under section 27. Both are said to arise because of the use of the word "may" in sections 27(1)(b) and 27(1)(d) of the *Act*.

[34] The first discretionary element is in section 27(1)(b) of the *Act*, which provides that the Minister, after having determined that a person has contravened a provision, "may" determine the amount of the government's fire control costs, calculated in the prescribed manner.

[35] AltaGas concedes that it committed a contravention of the *Act* when it allowed an ember to escape and it concedes that the escape caused the wildfire. AltaGas is no longer appealing the determination of the amount of fire control costs so it is not necessary to decide whether the discretion to determine those costs ought to have been made. The Minister did so, and AltaGas does not challenge that exercise of discretion in this appeal.

[36] The second discretionary decision, and the one relevant to this appeal, arises in section 27(1)(d) of the *Act*, which says that except in prescribed circumstances, the Minister “may” require a person to pay the fire control costs determined under section 27(1)(b).

[37] The prescribed circumstances are found in section 29 of the *Regulation*, which says the Minister “may not” order a person to pay the government’s fire control costs in two circumstances, which I summarize below:

- a) the person has entered into a wildfire response agreement with the government, and the person did not willfully cause or contribute to the start or spread of the fire; or
- b) the fire results from timber harvesting, silviculture treatments, road construction, road maintenance or road deactivation by a person who holds an agreement or licence under the *Forest Act*, and the person did not willfully cause or contribute to the start or spread of the fire.

[38] Accordingly, the Minister *may* require persons, who do not come within the prescribed exceptions, to pay fire control costs. The *Act* and the *Regulation* are silent on what criteria might guide the exercise of the discretion to require those costs to be paid.

[39] The Government says that if a person does not come within the prescribed exceptions, fire control costs should be ordered. But I find that accepting this interpretation would require me to ignore the use of the word “may” and to read section 27(1)(d) instead as a requirement that these costs “shall” or “must” be paid if the prescribed exceptions do not exist, rather than as they “may” be paid.

[40] Such an interpretation, in my view, would not follow the well accepted rule of statutory interpretation that says words in the statute must be read in their entire context and in their grammatical and ordinary sense. It is beyond controversy that the word “may” denotes a permissible, but not mandatory, act. This is confirmed in section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, and in *R. v. Jeremiah Johnson*, [2003] 2 SCR 357, at para. 16. The plain meaning of section 27(1)(d), in my view, is that it affords the Minister the discretion to decide whether a person who caused the fire through a contravention should pay the government’s fire control costs, unless the person qualifies for one of the prescribed exceptions.

[41] Because section 27 of the *Act* does not set out a list of considerations for the exercise of this discretion, I am left to conclude that the discretion was intended to be very broad, within the range of decisions that are compatible with the legislation’s purpose, and any relevant consideration that would inform that discretion may be considered.

[42] I find that the relevant provisions in the *Act* and the *Regulation* provide discretion to decide whether a person who has contravened the *Act* or its regulations should be required to pay the government’s fire control costs, unless the person qualifies for one of the prescribed exceptions.

3. Does the *Act* permit the reduction of fire control costs, and if so, do the circumstances of this case justify a reduction?

[43] The parties refer to this issue as the “all or nothing” approach to the recovery of fire control costs.

[44] AltaGas submits that the “all or nothing” approach leads to potential unjust or absurd outcomes, since persons who contravene the *Act* and cause a fire would all be treated the same regardless of circumstances. In particular, AltaGas submits that its exemplary efforts post-fire and the significant costs it incurred should not result in it being treated the same as an individual who ignores the fire.

[45] The Government submits that the *Act* only provides for the Minister to order payment of all of the government’s fire control costs, because fire control costs are calculated in a prescribed manner under section 27(1)(b). Since section 27(1)(d) says the Minister may order payment of “the amounts determined under subsection (b) and (c)”, the Government says there is no jurisdiction to vary the amount of fire control costs that are payable.

[46] The Government says there are no grounds to find that the legislature intended the amount of the costs as calculated could be negated or reduced by comparing the relative gravity of a contravention in one case to contraventions in other cases, on a sliding scale involving “degrees of diligence” falling short of a defence to a contravention.

[47] The Government relies on a previous Commission decision: *Canadian National Railway v. Government of British Columbia*, Appeal No. 2008-WFA-001(a), June 27, 2011 [CN 2008]. In that case, Canadian National Railway (“CN”) appealed a decision issued by a Manager which found that CN had contravened the *Act* and the *Regulation*, resulting in a wildfire. The Manager ordered CN to pay an administrative penalty and an amount for the value of Crown timber that was damaged or destroyed by the wildfire. The Manager reduced the value of the Crown timber to be recovered by 75 percent. No order for fire control costs was made because there was a firefighting agreement between the Government and CN, which brought CN within one of the exemptions in section 29 of the *Regulation*.

[48] In *CN 2008*, there were two issues before the Commission: what date should be used to calculate the value of the damaged and destroyed Crown timber; and, did the Manager have the jurisdiction under the *Act* to reduce that amount?

[49] The Commission found that because section 27(1)(c) of the *Act* states that the value of the timber is to be calculated in a prescribed manner, the amount that resulted from that calculation could not be varied. In *CN 2008*, the Commission stated at para. 33:

... The language of this legislation provides discretion to the minister, through the use of the word “may” in relation to the word “determine” and not to the word “calculate”. ...

[50] The Commission further stated at paras. 52 and 53:

The Panel accepts the Government’s submission that the Manager did not have the statutory authority to reduce the amount of stumpage by 25%. ...

... There is no prescribed manner under the *Regulation* or the *Forest Act* to reduce the amount for the reasons described by the Manager. ...

[51] The Commission reached a similar conclusion in *Canadian National Railway Company v. Government of British Columbia*, Decision No. 2018-WFA-002(a), March 12, 2020 [CN 2020]. In that appeal, a Manager determined that CN had caused the wildfire in contravention of the *Act* and the *Regulation*. The Manager ordered CN to pay an administrative penalty, the government's fire control costs, the value of damaged and destroyed Crown timber and other resources, and the government's costs for silviculture and reforestation. On appeal, CN argued that it was not directly responsible for the entire area destroyed by the wildfire, and it sought a reduction in the fire control costs and the value of damaged and destroyed Crown timber and other resources. CN submitted that the wildfire was larger than it should have been because of the Wildfire Service's approach to fighting the wildfire.

[52] In CN 2020, the Commission declined to second guess the Wildfire Service's firefighting efforts, and no reduction in fire control costs was allowed. The Commission relied on CN 2008 in support of its conclusion that section 27(1)(b) of the *Act* and section 31 of the *Regulation*, which sets out the manner in which fire control costs are calculated for the purpose of section 27(1)(b) of the *Act*, restrict the jurisdiction to vary these costs, absent evidence that the fire was not directly or indirectly caused by CN.

[53] The Government submits that the same reasoning should apply in this appeal, and I should find there is no jurisdiction in the *Act* to reduce the fire control costs that AltaGas has been ordered to pay, because there is no question that AltaGas was directly responsible for the wildfire.

[54] AltaGas says the Commission's decision in *Unger v. Government of British Columbia*, Decision No. 2012-WFA-002(b), December 29, 2014 [Unger], left open the possibility that fire control costs could be reduced in some cases, and therefore, I should reject the reasoning used by the Commission in CN 2008 and CN 2020.

[55] In *Unger*, the appellant ignited a debris pile in very windy conditions. He did not implement any form of fire containment around the debris pile, and the escaping fire resulted in a wildfire. The appellant was ordered to pay the government's fire control costs of \$861,000. On appeal, the appellant made several arguments, including that the respondent had misinterpreted sections 25 and 27 of the *Act* as providing no discretion to order that a person pay a portion of the government's fire control costs. The appellant also relied on the defence of due diligence.

[56] The Forest Practices Board participated in that appeal, and argued that an "all or nothing" approach to fire control cost recovery may lead to absurd or unjust results in some cases, and that this interpretation should be avoided.

[57] The Commission found that the appellant lit a fire on his property when it was not safe to do so, failed to establish a proper fuel break, and allowed the fire to escape, contrary to the *Regulation* and the *Act*. The Commission rejected the defence of due diligence, and found the appellant responsible for the full amount of the fire control costs. The panel stated at paras. 50 and 51 of *Unger*:

This Panel cannot find any factors that would mitigate against the making of an order for full recovery of the Government's fire control costs, ...

Having come to this conclusion, on the merits,it is unnecessary to address the "all or nothing" statutory interpretation issue raised by the Forest Practices Board.

[58] The panel went on to say at para. 52:

However, had this Panel decided to order less than 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.

[59] The Government says the comments in para. 52 of *Unger* were *obiter dicta* (i.e., incidental comments that were not essential to the decision). I agree. The panel's comments on what it might have done had the evidence been different are not helpful in deciding the issue before me. Firstly, previous decisions of the Commission are not binding, and secondly, in this appeal I have specific evidence on which to consider the exercise of discretion. In addition, the *Unger* decision does not refer to *CN 2008*.

[60] There is a rule of statutory construction that presumes legislation is not intended to produce absurd results; however, this interpretive approach can only arise if section 27 of the *Act* is ambiguous. In the decision of the British Columbia Supreme Court in *521006 B.C. Ltd. v. Pemberton (Village) and Donna Siu*, 2019 BCSC 526, Madame Justice Horsman stated at para. 59:

The common law has established certain presumptions of legislative intent that aid in the interpretive process in case of ambiguity. ... Where ordinary principles of statutory interpretation lead to only one plausible interpretation of legislative intent, the presumptions cannot be used to override that intention.

[61] I find that the wording of section 27(1)(d) of the *Act* is unambiguous. That section states that fire control costs are to be calculated in a prescribed manner. There is discretion to require the costs to be paid, but there is no language that provides discretion in relation to the calculation of those costs. Similarly, section 31 of the *Regulation* sets out a detailed manner of calculation of fire control costs, and there is no mechanism within section 31 for altering the amount of those costs.

[62] The Commission's decisions in *CN 2008* and *CN 2020* likewise found there was no discretion to alter fire control costs once they have been calculated in the prescribed manner.

[63] I find that the wording of section 27 of the *Act* permits a discretion to order recovery of the government's fire control costs, but not the discretion to reduce those costs.

4. If fire control costs cannot be reduced, should AltaGas be required to pay the government's fire control costs?

[64] Having found that the amount of fire control costs cannot be reduced, this leaves the determination of whether the discretion to require AltaGas to pay the full costs ought to be exercised in this case.

[65] AltaGas submits that its pre- and post-fire conduct should result in it not having to pay the government's fire control costs.

[66] The Government says this conduct is already captured in section 27(3) of the *Act*, which sets out the factors that the Minister must consider when deciding to levy an administrative penalty. Those factors include: whether the contravention was deliberate; any economic benefit derived by the person from the contravention; and, the person's cooperativeness and efforts to correct the contravention. The Government submits that those same, or similar factors, should not be used to decide if fire control costs should be paid. The Government says that because section 27(3) of the *Act* provides criteria that the Minister must consider when exercising the discretion to levy an administrative penalty, I should find that the absence of such criteria for fire control costs either restricts that discretion, or must mean that the administrative penalty criteria cannot inform the exercise of discretion when ordering that fire control costs be paid.

[67] While it is correct that the section 27(3) lists certain criteria that the Minister must consider before levying an administrative penalty, I find that this makes some sense because such penalties can be for an amount up to \$100,000 and, unlike fire control costs, there is no prescribed method for calculating penalties. The *Regulation* only prescribes the maximum penalty amounts for various types of contraventions. The fact that the *Act* provides some guidance to the Minister in determining whether to levy an administrative penalty, and if so, the amount of the penalty up to the prescribed maximum, does not mean that the absence of a list of criteria with respect to fire control costs somehow restricts or eliminates the discretion to require fire control costs be paid. In my view, it means the legislature intended the discretion to be broad and unfettered by specific criteria, within the overall scheme of the *Act*.

[68] The Government also submits that the Minister ought not to be called upon to assess individual circumstances when exercising the discretion to order the payment of fire control costs. But I note that such an assessment is the very essence of the exercise of discretion. As stated in *Chandler v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 300, at para. 29, administrative decision makers:

... must exercise their discretion in accordance with the principles of procedural fairness and natural justice and consider legally relevant factors that relate to the specific circumstances of the case.

[emphasis added]

[69] The Deputy Director also considered the Policy in making his decision. AltaGas claims that the Deputy Director fettered his discretion by applying the Policy, but I am conducting this appeal as a new hearing, and I do not find the Policy to be of assistance in the exercise of the discretion to order fire control costs.

Despite the preamble to the Policy, which says it “details the circumstances under which the Province may seek to recover the Province’s fire control costs”, a reading of the Policy reveals that, in fact, it offers no such guidance. The relevant portions of the Policy simply restate the provisions of the *Act* and the *Regulation*, essentially doing no more than repeating that the Minister may require fire control costs to be paid. It also references section 29 of the *Regulation* as setting out circumstances where those costs will not be ordered.

[70] Moreover, the Policy does not form part of the legislation. It does not bind the Commission, and, because I do not find the Policy to be persuasive, my decision will be based on a reading of the *Act* and the *Regulation* and the relevant case law.

[71] The pre-fire conduct that AltaGas relies on is that AltaGas had fire pit burning procedures in place before the fire, and it claims to have followed them. It says this is “some amount of diligence” even if it is not due diligence.

[72] AltaGas submits that because it had operating procedures in place before the fire, even though those procedures did not prevent the fire and it did not do all that it could have done to prevent the wildfire, this pre-fire conduct should somehow relieve it from having to pay fire control costs.

[73] While it may be the case that some persons who cause wildfires do not have any operating procedures or safety plans, certainly the expectation is that commercial operations such as those that AltaGas undertakes will have procedures in place to reduce the risk of fire. This is mandated under the *Act* and *Regulation* and we should expect no less.

[74] I have difficulty accepting the argument that some amount of diligence, if it does not rise to the level of due diligence, is a good reason not to require fire control costs to be paid when that lack of diligence directly results in a fire, and fire control costs are incurred by the government.

[75] Section 29 of the *Act* establishes the defense of due diligence such that if a person can demonstrate they exercised due diligence, none of the consequences under section 27 that would flow from a contravention, such as the payment of fire control costs, will be ordered. If the legislature had intended that some lesser form of diligence would suffice, it could have said so, but it did not.

[76] Turning then to the post-fire conduct, AltaGas characterizes this as “exemplary” conduct. AltaGas claims that its post-fire conduct demonstrates:

- a) its effort to share in the cost of fire suppression;
- b) its cooperation with the authorities;
- c) the financial costs it incurred because of the fire;
- d) the steps taken to improve its burn procedures and training; and
- e) its acquisition of a weather station.

[77] AltaGas submits that such conduct is worthy of recognition and that, as a result, it should be treated differently than, for example, a person who causes a fire recklessly and does nothing to suppress it or to alter their procedures, and who incurs none of their own costs because of a fire.

[78] The financial cost of the fire to AltaGas is made up principally of two elements: its cost in fighting the fire; and, its production losses.

[79] AltaGas argues that requiring it to pay fire control costs does not further the objectives of the *Act*. However, on the contrary, I find that having the discretion to require payment of the fire control costs incurred by the government encourages people who are responsible for wildfires to join in the firefighting effort just as AltaGas did, so as to reduce the severity of the fire and potentially reduce what they might have to pay.

[80] As for AltaGas' loss of income due to the shutdown of its hydroelectric facility for four days, I find that this was a consequence of the fire which AltaGas directly caused. I see no basis to relieve it from having to pay the government's fire control costs because its fault resulted in AltaGas incurring not only its own firefighting costs but also production losses from its own hydroelectric facility.

[81] As for AltaGas cooperating with the Wildfire Service investigation, this is one of the criteria that must be considered under section 27(3) of the *Act* before levying an administrative penalty. The Deputy Director recognized this conduct in ordering a \$500 Administrative Penalty. This conduct has been recognized, but in my view, it should not also be considered again in deciding whether AltaGas should have to pay fire control costs.

[82] Lastly, undertaking training and purchasing a weather station are commendable steps to take, but I am not satisfied those steps should relieve AltaGas from paying the government's fire control costs in this instance.

[83] I have addressed the specific arguments raised by AltaGas and concluded that the order for payment of fire control costs should not be rescinded based on those arguments. I have also considered whether AltaGas should be subject to a fire control cost recovery order in the first place, and I conclude that the nature of the contravention leading to a wildfire, as well as its scope and intensity, warrant the imposition of a cost recovery order.

DECISION

[84] In making this decision, I have considered all of the parties' submissions, whether or not specifically referred to herein.

[85] For the reasons provided above, the cost recovery order within the Order is confirmed, and the appeal is dismissed.

"Jeff Hand"

Jeff Hand
Panel Chair

March 17, 2021