



Forest Appeals Commission

Citation: *Eldon Whalen v. Government of British Columbia*, 2026 BCFAC 1

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

Decision Date: 2026-01-26

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

Decision Type: Final Decision

Panel: Jeffrey Hand, Panel Chair

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

Between:

Eldon Whalen

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Lane J. Perry, Counsel

For the Respondent: Tyna Mason and Shaun Ramdin, Counsel

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INTRODUCTION

[1] Eldon Whalen (the “Appellant”) appeals a Contravention Order and Administrative Penalty and Cost Recovery Order dated May 2, 2022 (the “Determination”). The Determination was issued by Carol Loski, the delegated decision maker for the Minister of Forests, concerning a wildfire that originated in a debris pile ignited by the Appellant on his property (the “Wildfire”). The Wildfire spread to adjacent private property and Crown land. The Determination found that the Appellant had contravened section 5(1) of the *Wildfire Act*, SBC 2004 c. 31 (the “Act”), and section 21(2) of the *Wildfire Regulation*, B.C. Reg 38/2005 (the “Regulation”), by failing to ensure the fire did not escape. The Determination levied an administrative penalty of \$3,000 and required the Appellant to pay the Province’s fire control costs of \$100,688.12.

[2] The Appellant says he exercised due diligence to extinguish the debris pile and to prevent the escape of fire. He also says he was under a mistaken belief of fact such that he reasonably believed the fire was extinguished and had this been true there would be no contravention. He asks that the Determination be set aside.

[3] Despite not being a decision made in the Determination, the Respondent says that the Appellant failed to extinguish the fire, which is a violation of section 21(1)(e) of the *Regulation*, in addition to allowing the fire to escape the debris pile. She says none of the statutory defenses of due diligence or mistake of fact are established on the facts the case. The Respondent asks that the appeal be dismissed, the Determination be upheld, and the Appellant be found in contravention of section 21(1)(e) of the *Regulation*.

FACTS

[4] The Appellant is a realtor. He and his spouse are the owners of a rural property located in Kispiox, BC (the “Property”). The Appellant submitted a sworn affidavit in this appeal. He also gave a statutory declaration dated July 8, 2022 (the “Statutory Declaration”).

[5] In the autumn of 2018, the Appellant cleared some trees from the Property to make room to construct a house. The resulting debris was piled to be burnt at a later date when he thought the risk of fire escaping would be low. The Appellant says the dimensions of the debris pile were no more than 2 meters high and 3 meters wide.

[6] On or about March 31, 2019, the Appellant believed conditions were such that he could safely burn the debris pile. He says there was two feet of snow on the ground around the debris pile, and, with warming temperatures and melting snow, he believed

this would keep the pile and surrounding areas wet and less likely to ignite from any stray embers. He says it was not windy the day in question.

[7] Before igniting the debris pile, the Appellant states he had a shovel, a pickaxe, and 25 gallons of water with him.

[8] The Appellant says he ignited the pile in the morning and remained with it the entire day while it burnt down. At the end of the day, he says he poured the 25 gallons of water on the pile. He says at this point there was a lot of steam and the pile smoldered somewhat, but he saw no active signs of fire. He believed the pile had burnt out.

[9] He returned the next day to observe the remnants of the pile and poured another 25 gallons of water on the pile. He says there was steam and the smell of smoke, but he did not observe any flame or embers, which caused him to think the pile was no longer burning.

[10] For each of the next 7 days, the Appellant returned to the pile. The Appellant says he poured a further 5 gallons of water on the pile on each visit. He says he saw no signs of fire on any of his visits.

[11] Sometime in the first week of April, the Appellant spoke to a neighbor, Aaron Henderson, about what he might do to ensure the fire was extinguished. Mr. Henderson suggested the Appellant dig into the pile with a shovel to see if the fire was still active. He says he did so, digging approximately 2 feet down into the pile, but found no evidence of the fire. He says the pile was wet and cool to the touch.

[12] After speaking with Mr. Henderson, the Appellant says he checked the BC Wildfire website and reviewed the conditions under which a category 2 fire could be ignited. He was satisfied he had complied with those requirements. There was no information provided on the website about how to ensure a debris pile had been extinguished.

[13] After April 8, 2019, the Appellant reduced the frequency of his checks on the pile to 3 or 4 times a week until April 15. After April 15 he checked on the pile once per week. During these visits the Appellant says he was looking for signs of fire, but he says he did not observe smoke, flame, or embers within the area where the pile was burned.

[14] On May 10, 2019, the Appellant was travelling in the vicinity of the Property. He saw smoke rising above the treeline and when he went to the Property, he observed flames in the trees adjacent to the area where the pile had been. A call was made to BC Wildfire Service, who attended the Property on May 10 and began fighting the Wildfire. The Wildfire was given an identification number R40216.

[15] Natural Resource Officer ("NRO") Douglas Gow interviewed the Appellant on May 10, 2019. NRO Gow also interviewed the neighbor, Mr. Henderson, on May 14, 2019.

[16] Two BC Wildfire Service fire origin and cause investigators, Alan Donohoe and Cian Carroll, investigated the fire and prepared a report (the "Origin and Cause Report"), which ultimately found the point of origin of the Wildfire was the debris pile. They concluded that temperatures warmed in May and the ground dried. This, coupled with the presence of

windy conditions, caused fire from the debris pile to creep into the adjacent trees and result in the Wildfire.

[17] The Wildfire grew to a size of 11.5 hectares, damaging nearby private land and Crown land. While there were homes nearby, no buildings were destroyed by the fire.

[18] On June 17, 2019, the Wildfire Service declared the fire extinguished.

[19] The Appellant was informed an administrative penalty against him was under consideration and he attended an opportunity to be heard hearing regarding this penalty on December 7, 2021. The Determination was issued on May 2, 2022, which found that the Appellant had contravened section 5(1) of the *Act* and section 21(2) of the *Regulation*. The Determination levied an administrative penalty of \$3,000 and required the Appellant to pay the Province's fire control costs of \$100,688.12.

[20] On May 26, 2022, the Appellant filed a Notice of Appeal to the Commission.

[21] The Commission's powers on appeal are found in section 41(1) of the *Act*:

[22] 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.

[23] The appeal was originally heard by the Commission by way of written submissions concluding on February 27, 2023. A decision was issued by the Commission on May 15, 2023.¹ The Appellant applied for a judicial review and a statutory appeal of that decision, and the Supreme Court of British Columbia issued its decision in that matter on June 12, 2024.² The Court allowed the statutory appeal and remitted the matter back to the Commission for a new hearing.

[24] This decision is made after the rehearing of the appeal. The parties agreed to conduct the rehearing based on the existing record, and no new evidence or argument was submitted.

ISSUES

1. Did the Appellant contravene section 21(2) of the *Regulation*, which would constitute a breach of section 5(1) of the *Act*?

¹ *Eldon Whalen v. Government of British Columbia*, 2023 BCFAC 3 (CanLII).

² *Whalen v. British Columbia*, 2024 BCSC 1015 (CanLII).

2. If the Appellant contravened the *Act* or *Regulation*, do any of the statutory defenses found in section 29 of the *Act* apply?
3. If there was a contravention and the statutory defenses do not apply, what is an appropriate administrative penalty and what are the fire control costs?

DISCUSSION AND ANALYSIS

1) Did the Appellant contravene section 21(2) of the *Regulation*, which would constitute a breach of section 5(1) of the *Act*?

Position of the Parties

Appellant's Submissions

[25] The Appellant submits that when he left the pile at the end of the day that he ignited it, the fire was out and no longer burning. Thereafter, during his many attendances at the pile, he says he saw no evidence of an active fire. He says that the requirement to prevent the escape of fire, found in section 21(2), is satisfied if the Appellant took reasonable steps to comply to extinguish the fire and to prevent its escape.

Respondent's Submissions

[26] The Respondent submits that the Origin and Cause report found the Wildfire originated in the debris pile and later escaped to the surrounding area due to fire creep and wind. The Respondent says this confirms that the original debris pile was not extinguished, although the fire may have been dormant, and this establishes the contravention of the requirement to extinguish the fire. While the Determination did not make this finding, the Respondent says there is evidence before me that the fire was not extinguished and the Respondent submits I can find a contravention of section 21(1)(e) of the *Regulation*.

[27] Further, the Respondent says there is evidence the fire escaped in May which is evidence of a contravention of the requirement that fires not be allowed to escape found in section 21(2).

Panel's Findings

[28] Under the *Regulation*, different categories of wildfire are defined. Of relevance to this decision are category 2 and 3 fires:

"category 2 open fire" means an open fire, other than a category 1 campfire, that burns

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

"category 3 open fire" means an open fire that burns

- (a) material concurrently in 3 or more piles each not exceeding 2 m in height and 3 m in width,
- (b) material in one or more piles each exceeding 2 m in height or 3 m in width,
- (c) one or more windrows each not exceeding 200 m in length or 15 m in width, or
- (d) stubble or grass over an area exceeding 0.2 ha.

[29] The Appellant admits he ignited one debris pile. His affidavit says the size of the pile was 3 by 2 meters, which meets the definition of a category 2 fire.

[30] The Origin and Cause report suggests the debris pile was of a size that would constitute a category 3 fire based on information provided to them by the incident commander. However, the authors of the report took no measurements themselves nor is there any evidence tendered in this appeal from the incident commander.

[31] The submissions made by the Respondent in this appeal notably say the pile was a category 2.

[32] I accept the Appellant's evidence of the size of the pile since he was the only witness to have seen it before it burned. There is insufficient evidence before me to conclude otherwise. I therefore find the fire ignited on or about March 31, 2019, was a category 2 fire.

[33] As a category 2 fire the provisions of 5(1) of the *Act* provide:

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.

[34] The Appellant states that the debris pile was located approximately 30 feet from forest land so the requirements of section 5(1) of the *Act* are triggered.

[35] The prescribed circumstances for lighting a fire are found in the *Regulation*:

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 each pile, grass or stubble area to be burned;

- (d) while the fire is burning and there is a risk of the fire spreading beyond the fuel break, 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 spreads beyond the fuel break, and
 - (iii). the fire is watched and patrolled by a person to prevent the fire from spreading beyond the fuel break and the person is equipped with at least one fire fighting hand tool;
 - (iv). Repealed. [B.C. Reg. 206/2005, s. 9.]

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

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

(emphasis added)

[36] The Respondent only asserts that the Appellant contravened 21(1)(e) and 21(2) of the *Regulation*. No submissions were made that subsections 21(1)(a) to (d) are in issue and thus I will only deal with these specific contraventions asserted by the Respondent.

[37] It is noteworthy that the Respondent only asserted the Appellant contravened section 21(1)(e) of the *Regulation* for the first time during the hearing of this appeal; the Respondent did not find the Appellant had contravened this section in the Determination. As set out above, the powers of the Commission when hearing an appeal include confirming, varying, and rescinding a decision, as well as referring the matter back to the primary decision maker, with or without directions. Notably absent from the powers of the Commission under the *Act* is the ability to make decisions the primary decision maker could have made but did not make.

[38] In an appeal before the Commission, an appellant must know the case they need to meet. Put another way, an appellant must know the legal and factual circumstances which led to the contravention they were found by the Province to have engaged in, and which formed the basis for the determination against them. In an appeal, an appellant must present evidence and argument to the Commission relating to the legal and factual circumstances which led to the contravention, which the Commission will assess, on a balance of probabilities, against the evidence and argument of the Province.

[39] In asserting the Appellant contravened 21(1)(e) of the *Regulation* for the first time before Commission, it did not allow for the Appellant to know the case he would have to meet to address that allegation. However, the Appellant was provided the opportunity to

make the submissions he wanted to, including replying to the Respondent's assertions pertaining to 21(1)(e) of the *Regulation*. In the present case, the Respondent argues the legal and factual circumstances underlying sections 21(1)(e) and 21(2) of the *Regulation* are intertwined, and the Appellant was aware of these circumstances prior to the appeal, so the Commission should consider whether the Appellant contravened section 21(1)(e) of the *Regulation*.

[40] It is clear the Determination found the Appellant contravened section 5(1) of the *Act*. Section 21 of the *Regulation*, including sections 21(1)(e) and 21(2), provide particulars that an individual operating under section 5 of the *Act* must follow. If an individual does not follow the particulars of section 21 of the *Regulation*, they have contravened section 5 of the *Act*. It is therefore the contravention of section 5 of the *Act* the Appellant is appealing, and the way in which section 5 was contravened was found to be a contravention section 21(2) of the *Regulation*. While the factual and legal circumstances of sections 21(1)(e) and 21(2) of the *Regulation* are intertwined, they are nevertheless distinct paths by which an individual can be said to have contravened section 5 of the *Act*. However, because of the particular circumstances of this appeal discussed below, I find I do not need to make a determination as to whether the Appellant contravened section 21(1)(e) of the *Regulation*. I also accordingly do not need to decide whether the Commission ought to address that question.

[41] The Origin and Cause Report says the Wildfire originated from the debris pile and eventually escaped when conditions dried out and the temperatures warmed. There is insufficient evidence to the contrary submitted by the Appellant on the origin of the fire. I find the Origin and Cause Report more persuasive and accept its conclusion. The fact the fire later emerged demonstrates the fire ignited by the Appellant in March was never completely extinguished and it escaped into the adjacent forest, resulting in the Wildfire.

[42] I reject the Appellant's submission that causation cannot be established if he took reasonable steps to avoid the contraventions. Whether the Appellant acted with due diligence is a separate matter to be considered under section 29 of the *Act*. I have found the analysis in the Origin and Cause Report to be persuasive and have determined causation by relying on that evidence.

[43] I find the Appellant contravened section 21(2) of the *Regulation* by allowing the fire to escape, which in turn constitutes a contravention of the prescribed circumstances that are to be met in section 5(1) of the *Act*.

2) If the Appellant contravened the Act or Regulation, do any of the statutory defenses found in section 29 of the Act apply?

[44] Section 29 of the *Act* provides:

For the purposes of an order of the minister under section 26 [contravention orders], a person may not be determined to have

contravened a provision of this Act or the regulations if the person establishes that

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

Position of the Parties

Appellant's Submissions

[45] The Appellant says he acted with due diligence to extinguish the fire and to prevent its escape.

[46] He relies on the following factors, which have been set out in more detail above:

- a) the weather conditions and time of year when he ignited the pile;
- b) his repeated checks on the pile during the 5 weeks post ignition;
- c) his repeated applications of water;
- d) he disturbed the pile with a shovel and found no evidence of fire; and,
- e) there was no information available from the BC Wildfire Service website that would have alerted him to do anything other than what he did to assess the risk of a wildfire.

[47] The Appellant further submits he was under a reasonably held mistake of fact that he had extinguished the fire. He says had the circumstances of his belief been true (i.e. the fire was extinguished) there would be no contravention since the fire would not have continued to burn and ultimately escape. As such, he says the defenses available under section 29 (a) and (b) of the *Act* are established.

Respondent's Submissions

[48] The Respondent says the Appellant did not make diligent efforts to extinguish the fire because he:

- a) ought to have made better inquiries of the wildfire service to understand what level of post ignition monitoring was appropriate;
- b) did not confirm the fire was extinguished;
- c) did not apply any water to the pile;
- d) told BC Wildfire Service on the day the wildfire was discovered that he did not have the ability to fight the wildfire; and,
- e) did not use a machine, such as a backhoe, to disturb the debris pile.

[49] In addressing the Appellant's arguments pertaining to his mistaken belief, the Respondent submits that the Appellant could not have had a reasonably held belief because he:

- a) was aware that the debris pile was smoldering for a number of weeks;
- b) told NRO Gow that he saw smoke in the vicinity of the pile 2-3 weeks before the wildfire was discovered; and,
- c) had not researched information on conducting open category 2 burns.

[50] The Respondent says I should consider the statement the Appellant gave to NRO Gow and the Statutory Declaration he signed in 2022, to the extent they differ from his affidavit filed in this appeal. The Respondent argues the Appellant's statement and Statutory Declaration are more reliable evidence on the issue of whether the Appellant saw smoke after he thought the fire was extinguished.

Panel's Findings

[51] The Parties refer to various decisions of the Courts in British Columbia and of the Commission which have previously considered the defenses of due diligence and mistake of fact. A useful summary of the applicable principles is set out in *Forest Practices Board v. Government of British Columbia*, 2018 BCFAC 4 (CanLII), where it was said:

[61] The common law defence of due diligence permits a person to escape strict liability for contravention of a regulatory statute by proving that the person took all reasonable steps to avoid the contravention (the due diligence branch) or had a reasonable belief in mistaken facts which, if true, would render the contravention innocent (the mistake of fact branch). [The former is incorporated into section 29(a), and the latter into section 29(b) which is at issue in this appeal.] The common law defence can be established on either branch, both of which are negligence-based, the principle being that reasonable care was taken to either avoid the prohibited event or know the relevant facts.

[62] Although each branch is a separate and distinct defence, reasonableness is the touchstone of both. Due diligence focuses on reasonable care to avoid the prohibited event, whereas mistake of fact focuses on reasonable care to know the true facts. The assessment of reasonable care is a factual one (*Sault Ste. Marie*, at pp. 1314-1315, 1330; *Libman on Regulatory Offences in Canada* (Salt Spring Island, BC: EarlsCourt Legal Press Inc., 2002 loose-leaf), at p. 7-205 ("Libman").

[63] To much the same effect, the majority in *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510, at paras. 47-48, explained that the due diligence branch applies when the accused knew or ought to have known of the hazard, but establishes that reasonable care was taken to avoid the contravening event. The question is whether the accused took all reasonable steps in the context of the particular event. The mistake of

fact branch applies when the accused establishes that they did not know, and could not reasonably have known, of the existence of the hazard in question. The Court in *Hegel v. British Columbia (Forests)*, 2011 BCCA 446, at para. 30, recognized that reasonableness is a necessary element of both due diligence and mistake of fact, and that consideration of this common factor does not amount to treating the two defences the same.

[52] The principles I take from those decisions are:

- reasonableness is a necessary element of both due diligence and mistake of fact;
- due diligence considers whether a person took reasonable steps to avoid the contravention;
- a mistake of fact considers whether the individual can establish they did not know the true facts and could not reasonably have known;
- in both defences the standard is objective, being what a reasonable person would have done or what a reasonable person would have known in the circumstances; and,
- in neither instance is the standard one of perfection.

[53] I will now consider each defense set out in subsections (a) and (b) of section 29.

Due Diligence

[54] I accept the Appellant's evidence that he waited until late March to ignite the debris pile when there was still snow on the ground and he believed conditions in the area were expected to remain wet for the coming weeks as the snow melted.

[55] He consulted the weather forecasts for the day of ignition and determined it was cool and not windy. He equipped himself with a shovel, a pickaxe, and a generous supply of water.

[56] He ignited the fire in the morning and remained with the pile the entire day, until the fire, to all visual observations, had burnt out. The pile was steaming and smoldering at this point but not actively burning.

[57] He returned the next day and poured 25 gallons of water on the pile. He saw no visible signs of an active fire within the area where the pile was burned after this point.

[58] The Appellant returned to the site of the burned pile every day for the next 7 days and thereafter for 2-3 times a week for several weeks. He applied more water to the site of the burned pile. The evidence demonstrates the Appellant did not ignore the pile even after he thought it was fully extinguished. I find he was vigilant in returning to the pile for some 5 weeks after he believed it had been extinguished.

[59] The Appellant recognized he was not experienced in debris pile burning and so he consulted a neighbor for advice, as he understood this neighbor had more experience in burning debris piles. He was told to disturb the pile with a shovel, and he did so by digging

into the pile to a depth of 2 feet. He says there was no evidence of the fire continuing to burn. He found cold ash.

[60] The Appellant consulted the BC Wildfire Service website for information about igniting a category 2 fire during the first week after ignition. He considered that he had followed those steps listed on the website for igniting and extinguishing a category 2 fire.

[61] To meet the legal standard of due diligence, the Appellant must have taken reasonable steps to prevent the escape of the fire. As noted by the Respondent, the factual and circumstances surrounding sections 21(1)(e) and 21(2) of the Regulation are intertwined. Based on the facts before me, the due diligence analysis of sections 21(1)(e) and 21(2) would be identical, as each would require the assessment of the Appellant's actions in extinguishing the fire. While this analysis may differ as between sections 21(1)(e) and 21(2) in different circumstances, I find the analysis of the Appellant's due diligence would apply equally to both sections based on the factual circumstances which led to the fire's escape.

[62] I understand the reasonable objective standard means the Appellant's actions should be measured against what a reasonable lay person in his circumstances would know and would do. Based on the information submitted into evidence, I find the Appellant is not an expert in fire detection or fire behaviour and his actions should not be assessed against the standard of expertise in this area.

[63] With these facts in mind, I turn to the specific points raised by the Respondent in answer to the due diligence defense.

The Appellant ought to have made better inquiries of the Wildfire Service to understand what level of post ignition monitoring was appropriate

[64] The Respondent did not submit any evidence of what information, beyond the BC Wildfire website, was available to residents of British Columbia to alert them to the risks of debris pile fires laying dormant and escaping at a later date.

[65] The affidavit from NRO Gow attaches, as Exhibit L, the information booklet on the BC Wildfire Website that was available to the public in respect to category 2 fires. I will summarize that information below:

- a fire should not be ignited if there is any restriction in place prohibiting such fires;
- conditions are such that it is safe to ignite and will continue to be safe;
- a fuel break, or fire break is to prevent the escape of fire;
- while the fire is burning and there is potential for escape, a fuel break should be maintained;
- a fire suppression system should be available should the fire escape;
- a fire should be watched and patrolled by someone with at least one hand fire fighting tool;

- the fire should not exceed the capacity of the available means to control it; and,
- the ashes should be cool to the touch before leaving the area for any length of time.

[66] I find there was insufficient information in the information booklet that would have assisted a lay person in understanding fire behavior. Beyond saying the ashes should be cool to the touch, which I note the Appellant confirmed, there is little information describing what fire monitoring should be performed after the visible signs of fire are no longer present. Neither did the information suggest that compliance with these efforts could nonetheless still result in a fire remerging several weeks later. I reject the Respondent's submission that the steps the Appellant took to inform himself were not reasonable, and therefore that he was not duly diligent.

The Appellant did not confirm the fire was extinguished

[67] The Respondent has not established what steps ought to have been taken to confirm the fire was extinguished beyond what was done in this instance. The question from a due diligence standpoint is whether the Appellant took reasonable steps to determine if the fire was extinguished. Actual extinguishment in fact is not determinative of the diligence requirement. I find the Appellant took reasonable steps to confirm he had extinguished the fire based on his repeated attendances at the fire site, his repeated applications of water to the pile as discussed below, and his digging into the pile to search for signs of fire.

The Appellant did not apply any water to the pile

[68] The Appellant says he poured 25 gallons of water on the pile on or about March 31 and poured more water on the pile during his visits in the following days and weeks.

[69] The Respondent asks me to find that no water was ever applied based solely on the observations of the neighbor Mr. Henderson, who told NRO Gow he did not observe water being applied to the fire. The Appellant submitted a sworn affidavit describing the various applications of water he performed. There is no sworn evidence to the contrary from Mr. Henderson.

[70] I note that Mr. Henderson did not tell NRO Gow that he observed the Appellant on the day of ignition, and so he would not be able to say whether the Appellant applied water that day. Neither did Mr. Henderson say he ever left his property to observe the debris pile at a closer distance. He says he was not paying particular attention to the Appellant or the debris pile. It is apparent Mr. Henderson made only occasional observations from his home, and at a distance, and that he sometimes saw the Appellant.

[71] His statement that he did not see water is insufficient, in my view, to refute the Appellant's sworn evidence that he had water with him on the day of ignition or the evidence of the Appellant's regular visits when he says he applied more water. Mr. Henderson may not have been observing on the days the Appellant was on site, or the days when water was applied.

[72] I accept the Appellant's evidence that he applied water to the pile on several occasions, including the day on which the pile was ignited. This is evidence of due diligence.

The Appellant told BC Wildfire Service on the day the wildfire was discovered that he did not have the ability to fight the wildfire

[73] The Respondent appears to equate the requirement to have hand tools at the ready when first igniting a category 2 fire to having the equipment and abilities to fight a wildfire that had escaped and was burning out of control. It is not surprising that when the Appellant notified BC Wildfire Service when the Wildfire was well underway that he was then unable to fight the fire. This is not, in my view, an admission that the Appellant did not act with diligence to either extinguish the fire on or about March 31 or thereafter, or that he was not diligent in his efforts to prevent the subsequent escape.

The Appellant did not use a machine, such as a backhoe, to disturb the debris pile

[74] The requirements for ignition of a category 2 fire say that a person must have one hand tool for fire fighting. There is no mention of machine tools. The advice the Appellant received from Mr. Henderson was to dig into the pile with a hand shovel and he did so. The BC Wildfire Service's information booklet recommends only a hand fire fighting tool, not any machine tools.

[75] The Respondent has not demonstrated that having a piece of equipment to perform machine assisted digging is a requirement of due diligence for igniting a category 2 debris pile.

[76] The requirements also mention having a fire suppression system at the ready, but no description of what such a system would entail is provided. I am satisfied that in the circumstances of this case, the Appellant's possession of a shovel, a pickaxe, and 25 gallons of water was an appropriate fire suppression system.

[77] I also take some guidance from previous decisions of the Commission that discuss activities which were determined to not be duly diligent. For example, in *Apollo Forest Products Ltd. v. Government of British Columbia*, 2018 BCFAC 3 (CanLII), the appellant was found to have contravened the requirement to submit accurate appraisal data for a cutting permit. Apollo claimed to have acted with diligence in relying upon a subcontractor to perform the timber cruise. In rejecting the due diligence defense, the Commission relied on expert evidence describing what a reasonable licence holder would do in monitoring the work of the subcontractor and it found there was no meaningful oversight policy used by Apollo. In effect, Apollo did nothing to ensure the appraisal data was accurate. I contrast this with the evidence before me which demonstrates the Appellant did take several measures he believed extinguished the fire. I also note there is an absence of expert evidence before me to assist me in determining what a reasonable person would do in the situation the Appellant was in.

[78] Similarly, in *Forest Practices Board v. Government of British Columbia*, 2018 BCFAC 4 (CanLII), a license holder performed harvesting when the fire danger class rating was too

high, resulting in a wildfire. The license holder had directed its harvesting contractor to use the incorrect weather reporting station, resulting in the weather forecast relied upon being for a different area. The Commission found that accurate weather data was readily available from a closer weather station and that reasonable care had not been exercised in identifying the proper fire danger rating. I contrast this with the absence of evidence before me that would show the Appellant could reasonably have determined the debris pile had not been extinguished.

[79] In *Ralph Stevenson v. Government of British Columbia*, 2016 BCFAC 2 (CanLII), the Commission found the appellant had allowed an open burn on his property to escape into the surrounding trees. The evidence showed the appellant had not monitored the burn and had even left the burn site unattended after observing smoldering adjacent trees. The Commission found a lack of diligence and no mistaken belief based on this lack of attention to the open burn. In contrast, the Appellant in this appeal remained with the debris pile for the entirety of the day of ignition and returned to the site regularly for a period of 5 weeks. It cannot be said the Appellant was cavalier in his attention to the debris pile even after he believed it was extinguished.

[80] In *Tolko Industries Ltd. v. Government of British Columbia*, 2020 BCFAC 5 (CanLII), roadside debris piles ignited by an experienced contractor later escaped into adjacent trees. Tolko did not meet the test of due diligence simply by relying on the work of the contractor because Tolko did not designate the debris piles for regular monitoring post-ignition or take steps to ensure there was no risk of a holdover fire. There was also expert evidence before the Commission that said the risk of a holdover fires was high in the circumstances of that case and those experienced in the burning of debris piles ought to have known this. The Appellant in the appeal before me did not ignore the debris pile and did implement a regular system of inspection. Again, there was no expert evidence before me on the subject of what a reasonable person would do in the situation the Appellant was in.

[81] Considering the whole of the evidence before me, I find the Appellant exercised due diligence in the steps he took to extinguish the fire and to prevent its escape. The fact the fire burned undetected for weeks is not a reason to conclude the Appellant was not duly diligent.

Mistaken belief

[82] I turn now to the Respondent's submission that the Appellant did not have a reasonably held belief the fire was extinguished.

The Appellant was aware the pile was smoldering for weeks

[83] The Respondent says there is evidence that the Appellant knew the debris pile continued to smolder in the weeks after it was first ignited. The Appellant told NRO Gow the pile was smoldering at the end of the day on March 31, 2019, and when he returned to the pile the following day. The statement given to NRO Gow does not say the pile was smoldering after that point; neither does the Statutory Declaration say the Appellant observed a smoldering fire after April 1, 2019. The Appellant's affidavit says he did not

observe a smoldering fire after April 1 and I find there is no inconsistency in the Appellant's evidence on this point.

[84] There is insufficient evidence before me to find that the Appellant understood the pile was smoldering after April 1.

The Appellant observed smoke weeks after the fire was believed to be out

[85] The Respondent says that if the Appellant observed smoke long after he thought he had extinguished the debris pile, this undermines his reasonably held belief that the fire was out.

[86] The Appellant's affidavit says he did not observe smoke after April 1, but the Respondent says I should not believe this testimony because it is inconsistent with the statement given to NRO Gow. The Respondent also refers me to the Statutory Declaration. However, the Statutory Declaration says only the Appellant may have *smelled* smoke on an unidentified occasion, and he believed this smell was associated with other fires in the region and not with the debris pile. He did not say he *observed* smoke from the debris pile after April 1.

[87] In the statement given to NRO Gow on the day of the fire, the Appellant says he observed smoke "2-3 weeks prior at the very least." However, this time frame is imprecise because the Appellant is also recorded as saying he was uncertain as to when the pile was first ignited. It is not clear from this statement that the Appellant considered there was a significant separation in time between seeing smoke in the immediate aftermath of the original ignition and this recollection of observing smoke at least 3 weeks before the Wildfire.

[88] I also am mindful that the interview took place when the Appellant says he was stressed in the immediate aftermath of what was occurring that day. The transcript of the interview confirms he told NRO Gow that he was not thinking clearly that day. The imprecision of the Appellant's statement to NRO Gow about when he may have observed smoke and his admission at the time that he was not thinking clearly, makes his statements less reliable than those made in his affidavit, notwithstanding the affidavit was sworn later in time.

[89] I do not find there to be sufficient reason to reject the affidavit evidence that the Appellant did not observe smoke at the debris pile weeks after ignition.

[90] Considering the whole of the evidence, I find the Appellant had a mistaken, but reasonably held, belief that the debris pile had been extinguished. All indicators he observed gave him comfort that the fire was out. The factual basis for finding the Appellant's efforts were duly diligent, as discussed above, is also a basis for finding his mistaken belief was reasonably held. That belief was informed by the steps he took to avoid the contravention and by the observations he made, all of which led him to conclude the debris pile had been extinguished as of April 1.

[91] I find this was a conclusion that a reasonable person would have reached in the circumstances. Had this been true, there would be no contravention and thus this reasonably held belief satisfies the test for the statutory defense set out in section 29(b).

CONCLUSION

[92] I find that the defenses provided under section 29 (a) and (b) of the Act are applicable to the circumstances before me. I find the Appellant took reasonable steps to avoid the contravention and exercised due diligence in extinguishing the fire and preventing its spread. Further, his belief that the fire was extinguished was a reasonably held belief that, if true, would establish that he did not contravene the Act or the Regulation.

[93] Given these findings it is not necessary for me to consider the amount of the administrative penalty or the Province's fire control costs.

[94] The appeal is allowed and the Determination set aside.

[95] In reaching my decision, I considered all of the submissions and evidence provided by the parties, whether specifically referenced in my reasons or not.

"Jeffrey Hand"

Jeffrey Hand, Panel Chair
Forest Appeals Commission