



Forest Appeals Commission

Citation: *Damgaard v. Government of British Columbia*, 2026 BCFAC 3

Appeal No.: FAC-WFA-21-A003

Decision Date: 2026-05-22

Method of Hearing: Conducted by way of an oral hearing concluding on September 18, 2024.

Decision Type: Final Decision

Panel: Daphne Stancil, Panel Chair

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

Between:

Duffy Damgaard

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Ian Donaldson, K.C.

For the Respondent: Tyna Mason & Matthew Fingas, Counsel

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APPEAL

[1] Duffy Damgaard (the “Appellant”) appeals a decision made on June 15th, 2021, by Les Husband, Deputy Director with the BC Wildfire Service (the “Deputy Director”). The Deputy Director concluded that the Appellant contravened section 10(3) of the *Wildfire Act*, S.B.C 2004, c. 31 (the “Act”), by lighting, fueling, or using an open fire while a fire prohibition order was in effect and issued Contravention Order No. FCO-37795 under section 26 of the Act (the “Determination”). Based on this contravention, the Deputy Director issued Administrative Penalty and Cost Recovery Order No. V52889 (2018) (the “Order”) under section 27(1) of the Act. The Order established an administrative penalty and required the Appellant to pay the costs of the government’s fire control measures in respect of a wildfire in the area, subsequently assigned incident number V52889 (2018) (the “Wildfire”). The Order also set out the Deputy Director’s determination of the dollar value of the Crown resources lost as a result of the Appellant’s contravention of the Act, including the value of Crown timber and other forest land resources. In total, the Order required the Appellant to pay the government \$2,358,272.95 by July 31, 2021.

[2] The Appellant asks the Forest Appeals Commission (the “Commission”) to revoke or reduce the fire control costs and loss of Crown resources components of the Order or, in the alternative, to refer the Determination to the Deputy Director for reconsideration in a manner consistent with the law. The Deputy Director requests that the Commission dismiss the appeal, thereby confirming the Order. The powers of the Commission under section 41 of the Act are to:

- (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.

BACKGROUND

[3] In 2018, the Appellant lived in San Francisco, California, and owned and operated a 45-foot motor vessel, the Above Board, registered in Washington State.

[4] The Appellant and a female companion (the “Passenger”) travelled on the Above Board in August 2018 from a marina in the Seattle area to Pendrell Sound, an inlet into East Redondo Island. East Redondo Island is part of the Discovery Islands archipelago and lies north of Desolation Sound Marine Park.

[5] In 1971, the Province of British Columbia established an ecological reserve under the *Ecological Reserve Act*, R.S.B.C. 1996, c. 103, on East Redondo Island, the East Redondo Island Ecological Reserve. It covers most of the eastern lobe of the island and is inaccessible by road or ferry. As of August 8, 2018, an order was in place, prohibiting the lighting, fuelling or use of category 2 open fires as defined in the Wildfire Regulation¹ on East Redondo Island (the “Fire Prohibition Order”). The Fire Prohibition Order remained in effect until October 18, 2018. Its application was not in dispute in this appeal.

[6] Apart from the Above Board, there are at least three other vessels that were present in and around Pendrell Sound at times relevant to this appeal.

[7] The first was a classic 1937 52-foot motor vessel owned by Lloyd Shugart, a resident of Washington State which dropped anchor in Pendrell Sound on August 20, 2018. Mr. Shugart had been boating for over 30 years and had visited Pendrell Sound many times since 2004. On August 22, 2018, Mr. Shugart recognized the Appellant when the Appellant motored the Above Board into the sound, as he used the same marina as the Appellant in the Seattle area.

[8] According to Mr. Shugart, the Appellant travelled about 30 kilometres to the north end of the sound. A small cobble beach is located on the east side of Pendrell Sound, on the west side of the eastern lobe of East Redondo Island (the “Cobble Beach”). Mr. Shugart observed the Appellant situating the Above Board just off the Cobble Beach by stern-tying the vessel to the Cobble Beach and dropping anchor from the bow.

[9] Mr. Shugart visited the Cobble Beach on August 22, 2018, in a tender craft (a small craft used for travelling short distances away from a ship) because he saw the Appellant there, seated on a log on the beach and smoking. They talked about an upcoming wooden boat festival to be held in Victoria which they were both scheduled to attend on the Labour Day weekend (September 1–3, 2018). The morning of August 24, 2018, Mr. Shugart left Pendrell Sound to travel to Comox, to seek veterinary services for a pet. He travelled from there to Victoria to attend the boat festival, but the Appellant was not there. Mr. Shugart gave testimony of a deterioration of the relationship between himself and the Appellant which took place between the fall of 2019 and the winter of 2021.

[10] The second vessel was a Beneteau-manufactured, 35-foot sailboat owned by Daniel Coles. Mr. Coles anchored his boat on the west side of Pendrell Sound and slightly south of the Above Board on August 23, 2018. He took an excursion across Pendrell Sound on a paddle board to within about 100 to 150 metres of the Above Board during the late morning of August 24, 2018. He observed a man and woman using a tender craft to go from the vessel to the shore, disembarking on shore and then returning to their vessel. He advised that they made the trip twice in a two-hour period that morning. Mr. Coles returned to his sailboat and after dinner observed, through binoculars, the Appellant and

¹ B.C. Reg. 38/2005 (the “Regulation”).

Passenger make at least two more trips from the Above Board to the shore and back. Mr. Coles learned the following day that the man was the Appellant and the woman was the Passenger.

[11] The third vessel was a 135-foot ocean-going yacht, the Komokwa, owned and piloted by Brian O'Sullivan. Mr. Coles observed the Komokwa entering Pendrell Sound on August 24, 2018. It anchored further north and further away from the shoreline, compared to the location of the Above Board, which remained anchored as it was on August 22, 2018.

[12] Mr. O'Sullivan has over 50 years navigational experience. He commented he had travelled the waters around Desolation Sound since 1973 and had experience on ocean-going vessels. The other witnesses from the Komokwa were two of the many guests aboard: Roderick Senft and Charles Cosman. All three witnesses, referred to as the Komokwa witnesses, stated they anchored in Pendrell Sound in the late afternoon—17:00 to 18:00 hours—before “dinner time.”

[13] The Komokwa witnesses placed the location of the Komokwa roughly mid-channel of the north end of Pendrell Sound and north of the Above Board. While they differed somewhat on the distance between the Komokwa and the Above Board, they all placed the Appellant's vessel, the Above Board, at anchor near the Cobble Beach.

The Start of the Wildfire

[14] The Komokwa witnesses commented on the “ideal” weather conditions that evening while they enjoyed dinner on the deck: clear skies, little to no wind, and warm temperatures. About 21:30, Mr. Cosman spotted sparks or fire at beach level near the Above Board. It quickly moved up the hill behind the Cobble Beach and spread laterally.

[15] Mr. Senft commented that he was watching the moon “come up” over East Redondo Island when he noticed fire on the beach “directly behind the Above Board.” He also reported the fire started small at the beach and then it grew much bigger. He commented that the sight was “really dramatic:” one tree would light, and then one beside it, as the fire took hold and spread. Watching the fire spread was a memorable experience for Mr. Senft.

[16] The Komokwa witnesses reported that, when the fire was about the size of a bonfire, they boarded a tender craft, which Mr. O'Sullivan operated. Other crew members and guests were present as they approached the Above Board to attempt to see what, if anything, they could do about the fire. Mr. Cosman took photographs with his phone while on this excursion. As they were approaching the beach, all three observed the Appellant loosening the stern line of the Above Board. They also observed the Passenger aboard the Above Board.

[17] Mr. Senft reported that someone on the Komokwa tender called to the Appellant as they approached the Above Board asking, “what happened” and “have you called it in?” Mr. Cosman heard either the Appellant or Passenger say they were watching TV, noticed the fire, and tried to “call it in.” Mr. Senft said he did not recall them answering; there was no conversation. Mr. O’Sullivan advised that there was no explanation from the people aboard the Above Board about how the fire started, and he confirmed that although they tried to communicate with the Appellant, “there was no interest in communicating with us.”

[18] Mr. O’Sullivan estimated the stern of the Above Board was about 100 to 150 feet from the fire; Mr. Senft estimated the Above Board to be “safely” offshore at about 100 yards (300 feet); and Mr. Cosman estimated the distance to be either 50 feet or 50 yards. Mr. O’Sullivan stated that he was not concerned for their safety when in the tender, but determined it was unsafe to go ashore. Under cross-examination, Mr. O’Sullivan said he would move a vessel away from the shore under the circumstances he observed for the Above Board. He also commented that there were “lots of anchorages” around the top of Pendrell Sound.

[19] The Komokwa witnesses reported that the cabin lights were on in the Above Board as they approached it in the tender craft. After the interaction between the Komokwa witnesses and the Appellant and the Passenger, the Above Board began to move away from the shore. One of the occupants turned the cabin lights off when the Above Board started to move away from shore. Mr. O’Sullivan did not find it unusual that the occupants turned off the cabin lights to operate with instrument lights in the dark as they got underway on the Above Board but commented that a vessel should not travel at dark without running lights on. He did not see running lights or a stern light on the Above Board as it moved away from the shore. He did notice a white “mast” or “anchor” light on, on top of the cabin. Under cross-examination, he agreed that while at the helm operating a vessel, one may not be able to see if the running lights were on or off. He also commented that that “every boat has an indicator light showing if lights are on or off” and that he would not boat away without running lights on. Mr. Senft confirmed that the Above Board left without running lights and verified that by referring to a photograph taken by Mr. Cosman on the evening of August 24, 2018.

[20] The Appellant called in a “mayday” to the Coast Guard as he was leaving the anchorage at the Cobble Beach. He journeyed from 0.5 to 1.0 hours from Pendrell Sound to Squirrel Cove to anchor for the night. Mr. O’Sullivan returned the tender craft to the Komokwa and reported the fire.

[21] At approximately 22:00 hours on August 24, 2018, the BC Wildfire Service received information that the Wildfire was burning on East Redondo Island adjacent to the location of the Above Board.

[22] A few hours later, at about midnight, Mr. Coles’ partner alerted him that “the mountainside was on fire.” Mr. Coles attempted to use a cell phone and a VHF radio to

contact authorities about the fire but was unsuccessful because he could not “get reception” for either device.

The Investigation

[23] A park ranger attended Pendrell Sound the morning of August 25, 2018, and spoke with several people who were on vessels moored in Pendrell Sound on August 24, 2018, including the Komokwa witnesses and Mr. Coles. The park ranger provided their contact information to the investigators of the Wildfire. A helicopter performed a reconnaissance flight of East Redondo Island on August 25, 2018. Firefighters and equipment were dispatched to the area beginning on August 26, 2018, and for the next few days.

[24] On August 27, 2018, Natural Resource Officer (“NRO”) Mark Scott contacted the Appellant by phone. The Appellant was travelling on the Above Board at the time of the phone call. The Appellant advised that he became aware of the Wildfire at about 21:30 hours on August 24, 2018, that he did not start the fire, and that he attempted to put the fire out. The Appellant explained that he abandoned, near the fire, two used fire extinguisher cylinders before returning to the Above Board. He advised NRO Scott that the Passenger was travelling with him and provided her name. The Appellant also stated he had called the Coast Guard about the fire. He provided NRO Scott with his home address. During this phone call, the Appellant agreed to have a follow up conversation with NRO Scott about the Wildfire.

[25] The Appellant returned the Above Board to the Seattle area on or soon after August 28, 2018. The Appellant called NRO Scott on August 28, 2018, and left a voice mail message. He said that he takes fire seriously, had done nothing wrong, and would be back in touch. NRO Scott tried several times to speak with the Appellant by telephone after receiving the message but was unsuccessful.

[26] Brian Morrison, a Provincial Wildfire Origin and Cause Specialist with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the “Ministry”), joined the investigation of the cause of the Wildfire and undertook a field inspection of the Cobble Beach on August 29, 2018. Specialist Morrison is an expert in assessment and determination of the origin and cause of wildfires in British Columbia and was qualified to provide expert opinion on these subjects during this hearing.

[27] Specialist Morrison prepared a report in which he determined the site of origin of the Wildfire and its cause (the “Report”) and testified to explain the methodology used in developing the Report. He took photographs and conducted a close examination of the fire origin site. The Report included photographs taken by Mr. Cosman of the fire advancing up a slope from the search area into the ecological reserve, the Above Board leaving its anchorage, and two used cylinders from fire extinguishers found by the Komokwa witnesses in a gully to the west of the point of fire origin. Specialist Morrison reported that the only practical way to access the point of origin of the Wildfire was from

the beach, since there were no foot trails evident in the ecological reserve area above the point of origin. He also indicated that the most practical way to access the beach is by watercraft.

[28] The Report considers various causes of the fire: lightning, campfire, category 2 or 3 or resource management open fire, arson or suspicious fire, juvenile fire setter, equipment use, railroads, vehicle, electrical transmission or utility line, and discarded match or smoking substance. After considering each of the sources and the potential for each to have caused the fire, Specialist Morrison excluded many of them. He, however, included campfire, defined in the Report as an open fire in one pile no larger than 0.5 metres in height by 0.5 metres in width, lit and used by any person for recreational purposes. He also included category 2 open fire use, which was defined as the burning of debris in one or two piles not more than 2 metres in height and 3 metres in width.

[29] Specialist Morrison identified the location of the origin of fire to be on the north edge of the Cobble Beach, on a small ledge approximately two metres above the high tide watermark. He ruled out a site within a stone circle located on the beach because he determined, after consulting tide charts for Pendrell Sound, the site would have been covered with sea water at the time of the fire. Specialist Morrison conducted a visual and magnetic search and sifted soil and debris from the area which he concluded to be the point of origin of the fire. The point of origin of the fire contained melted plastic which was blue in colour and had dripped over the edge of the ledge. He also noted burnt moss that was held together with what appeared to be melted plastic, burnt oyster shells, and a burnt beverage can in the search site. Specialist Morrison did not find a specific ignition device but observed that the presence of manmade items and melted plastic suggested that garbage had been burned there. Specialist Morrison concluded that the burning of garbage fell within the definition of a category 2 open fire as did the size of the area examined.

[30] Based on his study of the fire origin site, Specialist Morrison concluded that the materials that were first ignited appeared to be plastic mixed with other refuse. Radiant heat or sparks from this fire source caused the fire to spread to dried mosses covering rocks along the shoreline. The fire continued in the moss and moved up a slope to the dry forest to the northeast. After systematically excluding all other possible causes, Specialist Morrison concluded that the Wildfire was human caused.

[31] NRO Scott left voicemail messages with the Appellant on August 30, August 31, and September 6, 2018, each requesting a call back. NRO Scott sent the Appellant and his counsel a Notice of Inspection on September 13, 2018. He indicated in that letter that NRO Anthony Carroll was the lead investigator into the cause of the Wildfire. NRO Carroll made several attempts to communicate with the Appellant's counsel from October of 2018 until July 23, 2019. The Appellant's counsel responded once, on October 1, 2018, asking if he should be corresponding with NRO Carroll and then again on November 19, 2018, confirming the information he had provided NRO Scott by telephone on August 27, 2018, and requesting additional information. On February 13, 2020, NRO Carroll notified the

Appellant, through his counsel, that the government would be providing the Appellant an opportunity to be heard (the "OTBH") about the Appellant's role in causing the Wildfire and requesting that the Appellant provide answers to written questions. The Appellant did not provide answers to the questions asked of him. On February 12, 2021, NRO Carroll informed the Appellant an OTBH would be held in April of 2021. The Appellant's counsel made submissions during the OTBH on April 22, 2021, and May 7, 2021.

[32] On December 8, 2020, Joanna Hirner and Rod Dalzeil, both employees of BC Parks, made a helicopter flight over East Redondo Island. They collected information from which they prepared a report regarding the damage to the East Redondo Island Ecological Reserve caused by the Wildfire. They reported that many areas of forest were completely burned and topsoil was completely removed over much of the area affected by the Wildfire. The BC Parks employees observed some surviving trees and noted that regeneration of the forest understory was underway in some areas of the reserve. They determined that because burn severity was high in many areas throughout the burn perimeter, regeneration of the forest and the understory would be slow due to a lack of soil and of living trees to provide seeds. They noted that for portions of the affected area, the physical effects of the fire on the landscape may increase over time. This was due to the possibility of slope failures and windthrow, especially where the Wildfire damaged the roots and bases of trees.

[33] Ms. Hirner, who was working as a Conservation Specialist at the time of preparing the report, testified and compared Crown timber to other forest land resources: "...there's different layers in a forest, so there's the forest canopy, so those are the tallest trees in the forest, and ... those are referred to sometimes as the overstory or the forest canopy, but then there's the vegetation that's growing underneath that top layer of trees, and that's called the understory, and the understory in itself has ... layers as well. So you'll have younger less tall trees coming up under ... the tallest trees of the forest. You also have shrubs, and then under the shrubs you'll have ... the lower growing vegetation like mosses ... and herbs and ... grasses."

[34] In October of 2020, James Smith and Sheila Crombie, with assistance from Frederich von Westarp, all of whom were Ministry employees, prepared a damage assessment report. They determined the area of damage within the perimeter of the Wildfire and finalized a report regarding the area of damage and monetary value for the loss of Crown timber on January 15, 2021. Ms. Crombie, a registered professional forester, was employed as a Damage Specialist. She testified about how the area of damaged or destroyed forest was established. She explained that the measurement of chlorophyll captured by satellite imagery was collected over the damaged area. These data were translated by a specialized software program and mapped to show burned and non-burned areas of timber.

[35] Once these areas of damage were determined, a tool was applied to calculate the volume of timber lost in the burned areas to which the stumpage rate was applied to determine loss of Crown timber. Mr. von Westarp, a registered professional forester,

undertook the analysis of the value of the mature timber damaged or destroyed by the Wildfire. He considered 332.5 hectares of timber, within the fire perimeter of 659 hectares, to determine that a total volume of 149,904 cubic metres of Crown timber had been damaged or destroyed through burning. Using a stumpage rate of \$2.04 per cubic metre, estimated by following the Coast Cruise Manual, he concluded that the loss in Crown timber was valued at \$305,804.16. The January 15, 2021, report valued the other forest land resources within the 332.5 hectares of protected area, damaged or destroyed by the Wildfire, at \$1,662,500 and valued the 0.6 hectares of wildlife retention area outside the reserve at \$600, for a total of \$1,663,100.

The Determination and Order

[36] After providing the Appellant an opportunity to be heard, the Deputy Director decided that, on a balance of probabilities, on August 24, 2018, the Appellant ignited materials constituting a category 2 open fire on the shore of East Redonda Island that caused the Wildfire. He therefore concluded that the Appellant contravened section 10(3) of the *Act*. The Deputy Director issued the Order on June 15, 2021.

[37] The Deputy Director determined that the government's costs to control the Wildfire, carried out under section 9 and pursuant to section 27(1)(b) of the *Act*, should be included in the Order. The Deputy Director considered if the circumstances for not seeking cost recovery set out in section 29 of the *Regulation* applied to the Appellant and determined they did not.

[38] While considering the government's costs to control the Wildfire, the Deputy Director also considered Ministry Policy 9.1—Wildfire Control Responsibilities and Costs, effective March 30, 2017 (the "Policy"). The Policy provides guidance in evaluating when the BC Wildfire Service will not provide fire suppression services or, as in this case, when fire suppression will be prioritized based on a range of factors including risks to human life and property. The Deputy Director stated: "No reasons have been brought to my attention for departing from Policy 9.1 or otherwise deciding not to order you to pay the government's fire control costs" and ordered fire control costs in the amount of \$386,868.79.

[39] The Deputy Director next considered whether to allocate a dollar value to Crown timber or other forest land resources damaged or destroyed as a direct or indirect result of the Wildfire. The Deputy Director adopted the assessment of Mr. Smith, Ms. Crombie, and Mr. von Westarp of a value of \$305,804.16 for Crown timber and a value \$1,663,100 for the other forest land resources damaged or destroyed by the Wildfire. In total, the Deputy Director ordered the Appellant to pay a total amount of \$2,358,273 to the Province.

[40] The Deputy Director considered section 27 of the *Act* and determined and ordered that the Appellant should pay an administrative penalty of \$2,500 under section 27(1)(a).

[41] By correspondence of July 5 and 14, 2021, the Appellant requested that the Deputy Director review the Order. On October 13, 2021, after conducting a review, the Deputy Director declined to dismiss the Order but stayed its effect until the Appellant “has no further right to appeal them.” The Appellant filed an appeal with the Commission on November 10, 2021.

The Appeal Process

[42] On the application of the Appellant, the Commission postponed the hearing of this appeal, which was originally set to begin December 7, 2022. The hearing occurred virtually from June 12 to 14, 2023, and from June 12 to 13, 2024, with closing submissions being presented on September 18, 2024. The parties submitted an agreed statement of facts that certain documents prepared for the OTBH would be included as evidence in this hearing (the Joint Statement of Facts). Included in the parties’ Joint Statement of Facts were:

- the Investigation Report prepared by NRO Carroll, which included
 - the Fire Origin and Cause Report prepared by Specialist Morrison,
 - the BC Wildfire Service Suppression Costs Summary,
 - the BC Parks Report prepared by Ms. Hirner and Mr. Dalziel; and
 - the Damages Assessment Report prepared by Mr. Smith, Ms. Crombie and Mr. von Westarp;
- witness statements of Messrs. Coles Cosman, O’Sullivan, and Senft, prepared at the time of the OTBH;
- notes of NRO Scott and Carroll and the Park Ranger who attended Pendrell Sound on August 25, 2018;
- all correspondence pertaining to the Investigation, leading to the OTBH, regarding the OTBH and after;
- maps of Pendrell Sound;
- photographs taken by Mr. Cosman and the Park Ranger;
- the Fire Prohibition Order;
- statement of purpose for the establishment of the East Redondo Ecological Reserve and related documents;
- excerpts from the Coast Guard Operations log of contacts for August 24, 2018; and
- excerpts from the BC Wildfire Service Activity log for August 24 to August 29, 2018.

[43] Regarding fire control costs, the parties agreed that fire control costs carried out under section 9 of the *Act* were correctly calculated at \$386,868.79, based on a damaged or destroyed area of timber affected by the Wildfire of 332.5 acres, but the Appellant disputes that he should be ordered to pay for them.

[44] The Appellant appealed the amount determined and ordered for fire control (\$386,868.79), removal of Crown timber (\$305,804) and damage to other forest land resources (\$1,663,100). He did not appeal the amount established as an administrative penalty of \$2,500.

[45] During the hearing, the Appellant did not call any witnesses, including the Passenger. He did not provide evidence himself. Appellant's counsel made submissions on behalf of the Appellant formulating submissions, when based on evidence, relying on the evidence submitted by witnesses who appeared on behalf of the Respondent.

[46] The Deputy Director called 11 witnesses, whose evidence is summarized above:

- three witnesses were provincial government employees actively involved in the investigation of the cause of the Wildfire— NRO Scott, NRO Carroll, and Specialist Morrison;
- three witnesses were provincial government employees who provided information about the type of resources lost because of the Wildfire (Ms. Hirner) and assigning dollar values for damage to Crown timber and other forest land resources (Ms. Crombie and Mr. von Westarp);
- four witnesses who were aboard vessels in Pendrell Sound on August 24, 2018, around the time the Wildfire started. This group of witnesses included:
 - the Komokwa witnesses: Brian O'Sullivan, Roderick Senft, and Charles Cosman; and
 - Daniel Coles, who was onboard another vessel; and
- Lloyd Shugart, who was aboard a vessel that left Pendrell Sound in the morning of the day of the Wildfire.

ISSUES ARISING ON APPEAL

[47] The first question I must decide in this appeal is whether the Appellant contravened a fire prohibition order by lighting, fueling, or using a category 2 open fire on East Redondo Island. If I determine the answer to this question is "no," the appeal will be successful as the factual basis of the Determination would no longer be in place. If, however, I determine that the Appellant did contravene the fire prohibition order, I must then confirm, vary, or rescind the cost recovery order of the Deputy Director or, alternatively, send the decision back to the Deputy Director to make again, with or without directions.

RELEVANT LEGAL FRAMEWORK

[48] The following provision of the *Act* has primary application to this case:

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

- (a) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount,
- (b) may determine the amount of the government's costs of fire control under section 9 for a fire that resulted, directly or indirectly, from the contravention, calculated in the prescribed manner,
- (c) may determine the amount that is equal to the dollar value of any
 - (i) Crown timber,
 - (ii) other forest land resources,
 - (iii) grass land resources, and
 - (iv) other property

of the government damaged or destroyed as a result, directly or indirectly, of the contravention, calculated in the prescribed manner,

... , and

- (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.

[49] The following provisions of the *Regulation* are pertinent:

1(1) In this regulation:

"protected area" means

... , or

- (c) an area established or continued as an ecological reserve under the [Ecological Reserve Act](#) or by the [Protected Areas of British Columbia Act](#);

30 For the purposes of section 25(1)(b) and 27(1)(c) of the *Act*, the manner in which the dollar value of

- (a) Crown timber, if it is mature timber, is to be calculated is by ascertaining the amount of stumpage applicable to that timber under the *Forest Act* and assigning that amount as the dollar value for that timber,

...

(c) other forest land resources is to be calculated is by multiplying the number of hectares of other forest land resources damaged or destroyed,

(i) if in a protected area or an area that is the subject of an order under section 7, 8, 10, 12, 14 or 15 of the Government Actions Regulation, by \$5 000, or

(ii) if in any other area, by \$1 000

and then assigning the product obtained as the dollar value for those other forest land resources,...

DISCUSSION AND ANALYSIS

Issue One: Did the Appellant contravene the Fire Prohibition Order by lighting, fueling, or using a category 2 open fire on East Redondo Island?

SUBMISSIONS

Appellant's Submissions

[50] The Appellant's main submission in this appeal is that the evidence does not establish, on a balance of probabilities, that he caused the Wildfire. The Appellant says that there is no direct evidence that he started the Wildfire: the direct evidence is to the contrary. The Appellant argues the evidence of various witnesses supports this assertion, including the statement of Mr. Senft that the Appellant and his companion on the Above Board indicated they did not know how the fire started. Further, the Appellant argues the statement that "he did not know how the fire started," which he made to the Komokwa witnesses on the night of August 24, 2018, is direct and compelling evidence that he did not start the fire, as is his statement to NRO Scott on August 27, 2018, that "he did not start the Wildfire."

[51] The Appellant submits that any evidence in support of the allegation that he caused the Wildfire is entirely circumstantial. The Appellant says that circumstantial evidence requires a decision maker to draw an inference to establish a fact but that the inference drawn could be wrong. The Appellant argues that where evidence is circumstantial, the evidence must be more consistent with the alleged conclusion; if it is not and another rational conclusion exists, an inference of contravention cannot be drawn. In drawing an inference from circumstantial evidence, the decision maker should avoid speculation, and the inferences must be logical and reasonable.

[52] The Appellant says that Mr. Coles was mistaken when identifying the individuals going to shore from the Above Board on August 24, 2018, since he did not know the Appellant or the Passenger. Also, Mr. Coles' sailboat was too distant (1.5 kilometres) from the Above Board to allow him to make accurate observations. Mr. Coles therefore wrongly inferred that a person going to the Cobble Beach came from the Above Board.

[53] Even though the Appellant submitted that Mr. Coles could not have identified the Appellant and the Passenger, the Appellant submitted, on September 18, 2024, after orally amending his written submissions during the hearing of this appeal, that the only person on the beach on August 24, 2018, other than himself was the Passenger. The evidence the witnesses provided of people aboard the Above Board and going to shore from the Above Board, pertained to both, the Appellant and the Passenger. The Appellant therefore argues that a conclusion as to who started the Wildfire, the Appellant or the Passenger, cannot be preferred as both are equally likely to have started the Wildfire.

[54] The Appellant further submits that no inference should be drawn from the timing and manner of the departure of the Above Board from Pendrell Sound on August 24, 2018. The Appellant argues that because the Above Board was a wooden boat, he was anxious about its safety as there was a risk that a wooden boat could burn due to its proximity to the fire on the shore. This concern caused the Appellant and the Passenger to weigh anchor and leave Pendrell Sound to seek a safe harbour. The Appellant submits that the “mayday” call he made to the Coast Guard around 22:00 hours on August 24, 2018, supports this submission since a “mayday” call is a distress signal given by ships in emergency. The Appellant did not have time to discuss his situation with people aboard the tender craft from the Komokwa, who approached the Above Board the night of August 24, 2018, as the Wildfire burned above the Cobble Beach near the site where the Above Board was anchored.

[55] The Appellant next considered “after the fact conduct” presented as evidence in this appeal. The Appellant says evidence of “after the fact conduct” is circumstantial evidence and the principles of drawing inferences from circumstantial evidence apply. Any inferences drawn from such conduct must be reasonable, not speculative, and rooted in the context of the surrounding circumstances. The Appellant argues that it was reasonable for him to depart from the anchorage near the Cobble Beach as he did, and that remaining in place on a wooden vessel would not have been reasonable. The Appellant argues that his conduct must be considered within the context of his being responsible for a wooden boat anchored a “few boat lengths” offshore from a rapidly growing fire which the Appellant was unable to extinguish. The Appellant submits that the explanation that his departure from Pendrell Sound was because he feared for the safety of his vessel is both reasonable and compelling.

[56] The Appellant submits Mr. O’Sullivan’s testimony is compelling when he stated he thought it was reasonable for the Appellant to move the Above Board where there was a fire burning above the Cobble Beach near the location of the moorage of the Above Board. Mr. O’Sullivan also said he would have moved a wooden boat or a steel hulled vessel in the same circumstances. The Appellant asserts that Mr. O’Sullivan’s evidence is compelling on the basis that he, as captain of the Komokwa, had more boating experience than his passengers. They testified that they were not concerned for their welfare when in the tender craft. The Appellant submits that these witnesses were experiencing the Wildfire in a different context than the Appellant was, having just come from the

Komokwa, a much larger vessel than the Above Board, which was anchored further away from the origin of the Wildfire.

[57] The Appellant asserts that his conduct reflects his concern for his vessel, himself, and the Passenger, and that it is reasonable to infer that he wished to avoid immediate risk to life from the catastrophic outcome of the Above Board catching fire and the Appellant and the Passenger consequently having to abandon ship into the water in the dark. The Appellant urges that this reasonable inference should be drawn rather than the inference that the Appellant was “fleeing the scene.” The Appellant submits his concern for the safety of the wooden vessel is the innocent and overwhelming explanation for how (in darkness without lights on) and when (after the Wildfire broke out) the Appellant left the anchorage in Pendrell Sound, and further that this is the only reasonable inference that should be drawn from all the inferences available.

[58] The Appellant submits that the photograph in evidence, taken by Mr. Cosman and depicting the Above Board on the night of August 24, 2018, was taken before the Appellant turned on the running lights of the Above Board or, alternatively, in and due to the circumstances, the Appellant forgot to turn them on. The Appellant submits that his departure from Pendrell Sound in darkness without running lights should not result in an adverse inference and does not imply “consciousness of guilt” on the Appellant’s part. The Appellant argues that his actions were not concealed nor furtive in nature and should not lead to a conclusion that he had something to hide.

[59] The Appellant submits that most safe anchorages in Pendrell Sound are at the head of the Sound and many of these anchorages were not available to the Appellant because they were occupied by other vessels on August 24, 2018. The Appellant further states that even if there were safe anchorages available within Pendrell Sound, or outside the Sound but closer than Squirrel Cove, it was reasonable that he chose to anchor within Squirrel Cove on the night of August 24, 2018. It would have taken the Appellant about 0.5 to 1.0 hours to travel to Squirrel Cove. The Appellant argues, therefore, that I should draw no adverse inference from his selection of anchorage after leaving Pendrell Sound.

[60] In summary, the Appellant submits that where there is an alternate rational inference to be drawn from “post offence conduct” and the evidence is not incriminating, that alternate inference should be drawn as it is preferable to any competing explanation. The Appellant argues that the circumstantial evidence in this appeal does not support a finding that he contravened the Fire Prohibition Order. The Appellant instead argues the evidence demonstrates he did not contravene the Fire Prohibition Order, including that he:

- noticed the fire first;
- went to shore and attempted to put the fire out, as was confirmed by the Investigation findings;

- notified the Coast Guard that a fire was burning and provided its location and the name of his vessel, since he could not rely on cellular service to notify the BC Wildfire Service; and
- identified himself and the Above Board, and took steps to bring these actions to the attention of the authorities.

[61] Given all of the above, the Appellant submits that the evidence is consistent with a finding that he did not start the Wildfire, did not contravene the Fire Prohibition Order, and did not contravene the *Act*.

Respondent's Submissions

[62] The Respondent begins their submission with a review of the Report, which determined that a human caused the Wildfire by burning garbage in a category 2 open fire at a site above the Cobble Beach. The Respondent submits it does not need to prove the Appellant caused the Wildfire beyond a reasonable doubt and the applicable standard is a balance of probabilities: that it is more likely than not that the Appellant caused the Wildfire. The Respondent argues that this burden is easily met given the evidence. The Respondent relies on both the direct and circumstantial evidence in this appeal to submit that the only reasonable inference to be drawn from the evidence is that the Appellant ignited the Wildfire in contravention of the Fire Prohibition Order.

[63] The Respondent says the evidence demonstrates that the Appellant was present at the location where and when the Wildfire started. Mr. Shugart testified that he saw the Above Board enter Pendrell Sound on August 22, 2018, and he visited with the Appellant, whom he knew well, on the Cobble Beach near the Above Board the same day. Mr. Shugart positively identified the Appellant. Each of the Komokwa witnesses observed the Above Board to be the only vessel in direct proximity to the Cobble Beach where Specialist Morrison identified the origin site of the category 2 open fire which led to the Wildfire.

[64] Mr. Coles testified that before crossing Pendrell Sound on August 24, 2018, he observed people moving between the Above Board and the Cobble Beach several times. Mr. Coles said he observed, after coming within 100 to 150 metres of the Above Board on his paddle board, one man and one woman aboard that vessel. Mr. Coles reported seeing from the west side of Pendrell Sound, at approximately midnight on August 24, 2018, a fire spread up the side of the hill and eventually to the hilltop above the Cobble Beach.

[65] The Respondent submits that the evidence of the Komokwa witnesses supports the conclusion that the Appellant caused the Wildfire. The Komokwa witnesses described themselves as sitting on deck of the Komokwa on the night of August 24, 2018, when, after dinner, they spotted a small fire near the shoreline of the Cobble Beach near the location of the Above Board around 20:30 to 21:00 hours. After approaching the Above Board in a tender craft from the Komokwa, the Komokwa witnesses observed the Appellant pulling up anchor at about 22:00 hours. When these witnesses enquired as to what happened, the Appellant and the Passenger provided them with little information.

From this, and the demeanour of the Appellant and the Passenger, the witnesses concluded that the Appellant and the Passenger did not seem eager to engage in conversation or to receive help.

[66] Mr. O'Sullivan reported that, after successfully securing the anchor on the deck of the Above Board, the man and woman aboard that vessel shut off the interior cabin lights, left the exterior mast or anchor light on for a short time while motoring away, and then turned the mast light off to depart in complete darkness—without any exterior or running lights on. The Respondent submits that it is implausible and unreasonable to conclude that any other party than the Appellant could have caused the Wildfire.

[67] The Respondent submits that, given the limited access to East Redondo Island as described by Specialist Morrison (limited trails and shoreline access by boat only) and based on the evidence of Mr. Shugart, Mr. Coles, and the Komokwa Witnesses, there is strong consistent evidence that the Appellant and the Passenger were the only people aboard the Above Board and, therefore, were the only people in proximity to the Wildfire when it started on August 24, 2018. This evidence, the Respondent argues, places the Appellant in a place and at a time to have started the Wildfire.

[68] NRO Scott provided testimony that the Appellant told him he had left two cylinders from fire extinguishers where the fire started, but he could not put the fire out. NRO Scott provided evidence that he learned, early in the investigation, that the Appellant was registered to attend a boat festival in Victoria which was scheduled to begin on either August 30 or August 31, 2018, extending through the Labour Day weekend. After leaving Pendrell Sound, the Appellant cancelled the registration and did not attend the festival. Although the Appellant replied to one of NRO Scott's voicemail messages by return voice mail, he did not speak to him directly again by telephone after August 27, 2018, despite NRO Scott's numerous calls, emails, and correspondence. The Respondent says that this evidence is part of the conduct of the Appellant from which I should infer that the Appellant was hiding information.

[69] The Respondent submits that the circumstantial evidence in this hearing is both admissible and sufficient to find that the Appellant contravened section 10 of the *Act*. The Respondent relies on *R. v. Villaroman*, 2016 SCC 33 (CanLII) ("*Villaroman*"), at paragraphs 37 to 43, as applied in *Widdowson v. Rockwell*, 2017 BCSC 385 (CanLII) ("*Widdowson*"), at paragraph 54, and submits that this panel may rely on circumstantial evidence by considering a "range of reasonable inferences that can be drawn" from the circumstantial evidence. Those inferences must be "considered in light of all the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." The party having the burden of proof may have to negate other reasonable possibilities based on the evidence, but they do not have to negate "every possible conjecture no matter how irrational or fanciful." Alternate theories must be reasonable not just possible (*Villaroman*, at paragraph 52).

[70] The Respondent argues that the utility of post-offence conduct evidence depends on the inferences that can be fairly drawn from the overall circumstances: *R. v. White*, 2011 SCC 13 (CanLII) ("*White*"). In assessing post-offence conduct, the Respondent asserts that the Commission must consider other explanations of a person's behaviour. The Respondent asserts the Appellant had the onus to lead evidence of alternative explanations for his behaviour: *R. v. Bartkowski*, 2004 BCSC 321, at paragraph 46. The decision maker can draw inferences relying on logic, common sense, and experience. The inferences drawn should be measured according to the measuring stick of human experience: *R. v. Wheyee*, 2019 ABQB 548, at paragraph 105.

[71] The Respondent argues that none of the witnesses in this matter have provided evidence as to the possibility of any other party causing the Wildfire. The Respondent urges me to consider the evidence of the Appellant's after-the-fact conduct, from about 22:00 hours on the night of August 24, 2018, and determine that it is more likely than not that the Appellant, and not the Passenger or anyone else, started the Wildfire. The circumstantial evidence pertains to the Appellant, and not the Passenger, and the Appellant did not adduce any evidence to show that the Passenger or any other person started the Wildfire, as required to discharge his onus of proving that fact.

[72] Based on all of the evidence surrounding the Appellant's conduct as the Wildfire burned—departing in darkness without running lights on, the Appellant's demeanour when spoken to, as well as the Appellant's subsequent conduct in not attending the boat festival and refusing to provide relevant information to investigators—the Respondent asserts that the only reasonable inference available to the Commission is that the Appellant caused the Wildfire through unlawful burning.

[73] The Respondent submits I should draw an adverse inference from the Appellant's failure to give evidence in this hearing when he had the power to do so. The Respondent argues that the Appellant could have testified as to whether it was him or the Passenger who lit the Wildfire, but did not. Consequently, the Respondent says that since an adverse inference can be drawn against the Appellant for failing to provide evidence, I should draw the inference that the evidence the Appellant would have provided would have been unfavourable to him. The Respondent says this principle also extends to the Appellant's failure to testify about the role of the Passenger in contravening the Fire Prohibition Order.

[74] In summary, the Respondent asserts that although there is evidence of two people being proximate to the origin of the Wildfire, the Appellant chose not to attend the hearing of this appeal to provide evidence against the Passenger or to call her as a witness. Since this appeal was conducted by way of a new hearing, the Appellant could have led evidence that someone else caused the Wildfire. The Respondent argues that the Appellant should have attended the hearing to provide that evidence and be subjected to cross-examination in support of his submission that the Passenger could have started the Wildfire. Based on the strong circumstantial evidence relating to the Appellant starting

the Wildfire, the Respondent argues it is implausible and unreasonable to conclude that that any person other than the Appellant could have caused the Wildfire.

Appellant's Reply Submissions

[75] The Appellant says the evidence of the witnesses who were present in Pendrell Sound confirms: there were two people on the Above Board; the Above Board was anchored near the Cobble Beach and the origin of the Wildfire; and two people travelled between the Above Board and the Cobble Beach on August 24, 2018. The Appellant urges me to reject much of the evidence Mr. Shugart provided in this appeal because it varied in material ways from the information he provided during the investigation into the cause of the Wildfire and therefore could not be truthful. While the Appellant does not dispute that Mr. Shugart identified the location of the anchorage of the Above Board, he says that any evidence Mr. Shugart provided in this appeal about the Appellant's conduct after returning to the Seattle area was untruthful.

[76] The Appellant submits that there was a possibility that the Passenger could have started the fire. In making this submission the Appellant asserts he has no burden to lead evidence regarding this possibility because the evidence of the many witnesses called by the Respondent consistently placed two persons on the Above Board. The Appellant concludes and submits that it is equally likely that one or the other of the Appellant or Passenger caused the fire. Therefore, the Respondent has not "made out" the burden of proof: that, on a balance of probabilities, the Appellant started the Wildfire.

THE PANEL'S ANALYSIS AND FINDINGS

[77] In determining if the Appellant contravened the *Act* by failing to comply with the Fire Prohibition Order by lighting, fueling, or using an open fire on East Redondo Island, I must assess and weigh the evidence provided in this appeal, including the evidence agreed to by the parties in the Joint Statement of Facts. The assessment of this evidence is guided by the relevant and applicable case law and legislation.

The Onus and Burden of Proof

[78] The parties agree that the standard for determining if the evidence supports a decision that the Appellant caused the Wildfire, also known as the standard of proof, is the balance of probabilities. Unlike some other legal determinations, such as determinations of contraventions within the Criminal Law, I do not need to be satisfied beyond a reasonable doubt that the Appellant contravened the *Act*—I need only be satisfied of this on the balance of probabilities. This is not a case where raising a reasonable doubt will automatically exonerate the Appellant from a determination of contravention. I may still be satisfied on the balance of probabilities that the Appellant contravened the *Act* as alleged even if a reasonable doubt is raised.

[79] The Commission's Practice and Procedure Manual sets out that the responsibility for proving a fact lies with the party that asserts it, and that fact is to be proven on a

balance of probabilities. I adopt and rely on the Commission's Practice and Procedure Manual for these purposes. The decision under appeal concluded that the Appellant started the Wildfire and the Appellant bears the burden of proof to establish otherwise, on a balance of probabilities.

[80] The Appellant says the evidence does not support a finding that the burden of proof has been met and says he has no burden to lead evidence that another person started the fire. The Respondent argues that based on the evidence the burden is "easily met" and says the evidence shows that it is more likely than not that the Appellant started the Wildfire.

Evidence and Evidentiary Rules

Prior to the Departure of the Above Board from its Anchorage on August 24, 2018

Expert Evidence

[81] Specialist Morrison prepared the Report—based on his field inspection of August 27, 2018, to determine the site of origin of the Wildfire and its cause—and testified to explain the methodology used in its preparation. After systematically excluding all other possible causes, he concluded that the Wildfire was human caused. Specialist Morrison also found that the point of origin of the category 2 open fire which led to the Wildfire was a small rock ledge approximately two metres above the high tide watermark on the north end of the Cobble Beach adjacent to the anchorage site of the Above Board, and that the source was burning garbage. Specialist Morrison concluded that the materials that first ignited appeared to be plastic mixed with other refuse. Radiant heat or sparks from this fire source caused the fire to spread to dried mosses which covered rock above the rock ledge. The Wildfire continued in the moss and moved up a slope on the side hill to ignite the dry forest to the northeast of, and above, the Cobble Beach.

[82] Specialist Morrison also testified that the only practical way to access the point of origin of the Wildfire was from the beach, since there were no foot trails evident in the ecological reserve area above the point of origin. He also indicated that the most practical way to access the beach is by watercraft. The Appellant does not dispute Specialist Morrison's testimony or the Report and having agreed to the inclusion of Specialist Morrison's report within the Joint Statement of Facts, accepts his conclusions.

[83] In addition to the fact the parties submitted the Report within the Joint Statement of Facts, I find Specialist Morrison's conclusions as summarized above about the cause, site of origin, and source of the Wildfire to be logically derived from the information he collected and evaluated and I accept his conclusions. I also find that the parties agreed to Specialist Morrison's findings in the Report and I make the same findings that:

- a human caused the Wildfire; and
- the only practical way a human could access the beach and upper shoreline where the Wildfire started, was by watercraft from the Pendrell Sound side of the eastern lobe of East Redondo Island.

Evidence of Witnesses in Pendrell Sound

[84] The evidence of Messrs. Coles, O’Sullivan, Cosman, and Senft confirm the presence of the Appellant and the Passenger on the Above Board, which was anchored near the Cobble Beach on August 24, 2018.

[85] Although the Appellant submits, in his reply submissions, that I should reject portions of Mr. Shugart’s evidence as untruthful, this concern does not extend to the evidence Mr. Shugart provided about recognizing the Appellant and the Above Board when the Above Board entered Pendrell Sound and where it anchored. Based on the descriptions Mr. Shugart provided in his statement for the OTBH and his testimony provided in this appeal—regarding the arrival of the Above Board in Pendrell Sound on August 22, 2018, and his relationship with the Appellant at that time—I find Mr. Shugart’s evidence to be credible and reliable. Mr. Shugart testified about his conversation with the Passenger on August 22, 2018, in this appeal but did not include this information in his previous statement. Except for this piece of evidence, his evidence regarding the anchorage of, and Passenger aboard, the Above Board is confirmed by four other witnesses (Messrs. Coles, O’Sullivan, Cosman, and Senft). I find Mr. Shugart’s evidence of the location of the Above Board to be consistent with that provided by the other witnesses. While testifying about the encounter with the Appellant on August 22, 2018, Mr. Shugart demonstrated a calm demeanour. For these reasons I find Mr. Shugart and the evidence he gave regarding the Appellant up to the time he departed from Pendrell Sound on August 24, 2018, reliable and credible. I make these findings about the consistency of Mr. Shugart’s evidence and his demeanour because he also gave testimony about interactions he had with the Appellant after October 2019. Mr. Shugart was excited and animated while giving that later testimony and his testimony was impassioned. I found the evidence about interactions he had with the Appellant after October 2019 not to be relevant to deciding this appeal because they took place at a time well beyond the time frame that I considered. I considered evidence of events that took place to October of 2018.

[86] Mr. Coles and the Komokwa witnesses all prepared and presented witness statements for the OTBH. Mr. Coles testified in this hearing that he observed, by viewing through binoculars, the Appellant and the Passenger travel, using a small watercraft, from the Above Board to the beach and back a few times during daylight hours on August 24, 2018. This testimony is consistent with his statement in the OTBH. Mr. Coles was confident the people he saw were the Appellant and the Passenger because Mr. Coles had seen the Above Board, the Appellant, and the Passenger from 100 to 150 metres away, when paddle boarding. Mr. Coles testified that the Above Board was the only vessel anchored near the Cobble Beach, its occupants were the only people on the Cobble Beach near the location of its anchorage, and that the Above Board was stern tied to the shore. Because Mr. Coles testimony was consistent with the statement he gave to the OTBH and because it is corroborated by the Komokwa witnesses, as discussed below, I find Mr. Coles evidence to be reliable and credible.

[87] The Komokwa witnesses all testified that after their dinner, at a time of 20:30 to 21:00 hours as darkness was increasing, they spotted a fire on the shore near the location of the Above Board. They boarded a tender craft from the Komokwa and approached the Above Board. The Above Board was stern tied to the shore: Mr. O'Sullivan noted it to be about 100 to 150 feet from shore, Mr. Senft said it was about 300 feet from shore and Mr. Cosman said, it was either 50 feet or 50 yards from shore. These witnesses all testified two people were aboard the Above Board, a man and a woman; the man, the Appellant, was in the process of pulling up the anchor when they arrived. None of these witnesses said they saw anyone else in addition to the Appellant and the Passenger on or near the beach adjacent to the Above Board on August 24, 2018.

[88] Mr. Cosman, relying on photographs he took the night of August 24, 2018, confirmed the testimony of Messrs. O'Sullivan and Senft regarding the general location of the Above Board in relation to the Cobble Beach and the Wildfire, the Above Board's passengers, and the time Messrs. O'Sullivan and Senft observed the Wildfire. The testimony of the Komokwa witnesses about these matters was generally consistent with the statements they made during the OTBH and with each others' testimony. For these reasons, I find the evidence of Messrs. O'Sullivan, Senft, and Cosman to be reliable and credible. I find, based on the evidence of the Komokwa witnesses, that the Appellant did not directly answer their questions about how the fire started and the Appellant did not deny starting the fire when asked on August 24, 2018.

Circumstantial Evidence

[89] In their submissions, the parties agree that circumstantial evidence is admissible before the Commission. The Respondent makes submissions, summarized above, regarding the principles of relying on circumstantial evidence as established in *Villaroman*. I adopt and apply those principles to conclude that I should consider the range of reasonable inferences that can be drawn from the circumstantial evidence, in the context of all of the evidence, and assess them logically according to common sense and life experience. The inferences I draw must be reasonable, not just possible. Also, if another rational conclusion exists, that conclusion must be evaluated in the context of all the evidence to decide on the outcome.

[90] Based on the preceding summary of the testimony of witnesses who were in Pendrell Sound, which includes both direct and circumstantial evidence, I draw inferences as necessary from the facts to find as follows:

- the only vessel located near the Cobble Beach on August 24, 2018, was the Above Board;
- the only humans on board the Above Board were the Appellant and the Passenger; and

- the Appellant and the Passenger used a small watercraft to travel from the Above Board to the Cobble Beach and back, and they did so several times on August 24, 2018, including in the afternoon of that date.

[91] The direct evidence of NRO Scott regarding information about abandoned fire extinguisher cylinders, provided by the Appellant by telephone on August 27, 2018, places the Appellant at the scene of the Wildfire when it was burning and I find that the Appellant was present at the scene of the origin of Wildfire on August 24, 2018.

[92] Based on these findings, I find further that it was either the Appellant or the Passenger who ignited garbage on August 24, 2018, which burned to start the Wildfire, contrary to the Fire Prohibition Order and therefore, contravening section 10(3) of the *Act*.

During and After the Departure of the Above Board from its Anchorage on August 24, 2018

[93] Much judicial consideration of post-offence conduct arises within the context of the criminal law. However, I find that even though the cases referred to by the parties do not arise from administrative law matters, judicial guidance from criminal cases on how to consider the conduct of an alleged contravener after an alleged contravention has occurred is useful to my analysis of this issue. An assessment of a person's behaviour after an alleged wrongdoing can assist with understanding if the person was aware of the wrongdoing, feels sorry or guilty, and is attempting to prevent others from finding out. Its admissibility is therefore determined by its relevance, and its relevance and value are to be determined from their applicability: *White*, at paragraphs 21, 23, and 26.

[94] The principles outlined above from *Villaroman* and adopted in *Widdowson* also apply in this situation. Inferences must be "considered in light of all the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." The party having the onus to prove a fact may have to negate other reasonable possibilities based on the evidence, but they do not have to negate "every possible conjecture no matter how irrational or fanciful." As set out above, the Appellant bore the onus to prove that he did not start the Wildfire. As the party making the assertion, the Appellant had the obligation to show that the Passenger started the Wildfire instead of himself.

[95] Turning to the scenario of the Appellant and the Passenger leaving on the night of August 24, 2018, when asked about how the fire started, Mr. Senft said in his statement during the OTBH "They indicated they didn't know how the fire started..." and in testimony for this appeal said "when asked they didn't engage with us, so we didn't really get a response." Mr. O'Sullivan testified "we didn't get much of a response from the gentleman" and Mr. Cosman testified in this appeal "Yeah, I mean, there was very little engagement, but from my recollection it was the -- the female onboard that -- that did say "We were just watching TV and we tried to contact, to call it in, and I'm not sure if we were successful.'" Based on this evidence, I find that the Appellant was intentionally vague in his responses to the Komokwa witnesses when questioned about the start of the Wildfire, particularly

given my finding that the Appellant and the Passenger were at the Cobble Beach when the Wildfire started.

[96] The question of whether the Appellant was seeking to conceal his departure from occupants of Pendrell Sound other than the Komokwa witnesses requires further consideration. Based on Mr. O'Sullivan's testimony that he would have moved a boat in the same circumstances as the Above Board was in on the night of August 24, 2018, I find it reasonable that the Appellant moved the Above Board. Given the darkness I also find it reasonable that the Appellant left Pendrell Sound to anchor in Squirrel Cove given it was 0.5 to 1.0 hours away, and since it would have been difficult for the Appellant to find an anchorage north of the Cobble Beach when other vessels were scattered throughout that area.

[97] Mr. O'Sullivan testified that the Above Board left without running lights on. Based on Mr. O'Sullivan's evidence in which he stated that there would be an indication of whether the running lights were "on" or "off" in the cabin, and which I accept, I find that the Appellant should have been aware that the running lights were not "on" when departing. From this I draw the reasonable inference that it is more likely than not that the Appellant hoped it would be difficult or impossible for people in Pendrell Sound, other than the Komokwa witnesses, to see that the Above Board was departing just after 22:00 hours on August 24, 2018. On this basis I conclude that the Appellant did not want to be seen leaving the sound.

[98] The evidence provided by NRO Scott, after he spoke with the registrar for the festival, was that the Appellant did not attend the wooden boat festival held in Victoria Harbour due to a health concern. The evidence provided by Mr. Shugart concerning the same event, conveyed to him by the Appellant when they met in the Seattle marina in the fall of 2018, was that the Appellant had to return to Seattle earlier than planned for business reasons and therefore could not attend the festival. Even though this evidence is not within the time frame which I based my earlier findings of reliability and credibility of Mr. Shugart's evidence, I similarly find the evidence he gave regarding the Appellant cancelling his attendance at the boat show to be truthful. I find the discrepancy in the rationale for the Appellant's return to the Seattle area to be evidence from which I draw the inference that the Appellant did not wish to disclose the actual reason for his earlier return. In reaching this conclusion, I am not relying on either statement for the truth of its contents, but simply accepting that the Appellant provided inconsistent reasons for his non-attendance at the festival.

[99] In evaluating the conduct of the Appellant, I consider the evidence of NRO Scott, whose notes disclose that the Appellant said he had seen the fire at about 21:30 hours, that the Appellant had not started the fire, and that the Appellant had taken two fire extinguishers to shore at that time and attempted to put out the fire. The Appellant did not disclose to NRO Scott that the Passenger started the Wildfire. The Appellant did not respond to requests for information from NRO Scott after August 27, 2018. After an exchange of voice mail messages on August 28, 2018, the Appellant did not reply to NRO

Scott's phone calls of August 30 and 31, and of September 6, 2018. The Appellant did not reply to correspondence of September 13, 2018, in which NRO Scott provided notice of investigation and requested that the Appellant set up a time to be interviewed by NRO Carroll about the Appellant's activities in Pendrell Sound. A letter from the Appellant, dated October 1, 2018, arrived on October 17, 2018, but did not respond to NRO Scott's request.

[100] I find it more likely than not that the Appellant wished to avoid admitting any wrongdoing and I also find that the Appellant was untruthful when he told NRO Scott that he did not start the Wildfire. I make these findings based on the Appellant's after-the-fact conduct, specifically:

- the Appellant failing to state to the Komokwa witnesses that he did not start the fire or explaining that he had gone ashore to fight the fire, as he later reported;
- the Appellant leaving the anchorage in darkness without illuminated running lights;
- the Appellant providing two differing explanations for why he did not attend the wooden boat festival; and
- the Appellant's reluctance to engage directly with investigating officers after August 28, 2018, as demonstrated by his refusal to return several phone calls to NRO Scott and to answer correspondence.

[101] I also draw an adverse inference from the Appellant's refusal to provide evidence in this hearing and infer that any evidence under oath he would have provided would have been detrimental to his submission that he did not start the Wildfire.

[102] The evidence adduced by the Respondent demonstrates that either the Appellant or the Passenger started the Wildfire, and I have made this finding. The Appellant says the alternate conclusion is that the Passenger started the Wildfire. He posits that I cannot determine which of the two it was, since the Passenger was not party to this hearing and did not adduce any evidence. I do not need to make this determination.

[103] The onus of proving that he is not legally responsible for the Wildfire under the *Act* rests with the Appellant, based on my earlier determinations, and he must prove he is not legally culpable. The Appellant was given many procedural opportunities during the investigation and during this appeal to provide evidence to demonstrate that he did not start the Wildfire and that it was the Passenger who did, as he now argues. Evidence that the Passenger caused the Wildfire would be relevant evidence in support of the Appellant's assertion that he did not do so.

[104] Since the Passenger is not party to this appeal, nor was the Passenger subject to the Determination or the Order, there is no requirement for the Passenger to prove anything in this appeal. The scope of the appeal before me is established by the decision under appeal and the Appellant's grounds of appeal. The parties to an appeal must

present evidence and argument on relevant grounds within the scope of the appeal. Having found that the Appellant, who is subject to both the Determination and the Order, was factually responsible for starting the Wildfire, it is irrelevant, within the scope of this appeal and the submissions made before me, that another person was, or could, also have been factually responsible for starting the Wildfire. Since the Appellant did not rely on any procedural opportunities to include the Passenger or her evidence in this appeal, and the Passenger took none herself, in addition to the fact the Appellant did not provide sufficient evidence that the Passenger started the fire, I find that the Appellant did not discharge his burden of proof to demonstrate that the Passenger started the wildfire instead of himself.

[105] This reasoning is similar to that within *Cook v. Lewis*, 1951 CanLII 26 (SCC). In *Cook v. Lewis*, the Supreme Court of Canada was faced with a situation where it could not be determined which of two people fired a gun causing a person injury. Unable to decide which of the two made the injurious shot, both were found liable, and the onus then shifted to the wrongdoer to exculpate himself.

[106] While *Cook v. Lewis* dealt with a situation where the two people involved were both parties to that litigation, this is not the situation before me. Here, the Appellant is the sole appellant in this appeal and, while it was available to him, as a matter of evidence and argument, to demonstrate, on a balance of probabilities, that a person other than himself had caused the Wildfire, he has not done so. Consequently, any determination that the Passenger also caused the Wildfire has no bearing on the determination that the Appellant caused the Wildfire and I decline to make such a finding.

[107] In conclusion, I find that as the Appellant was determined, in the decision under appeal, to have started the Wildfire, he bears the burden of proof to show that he did not. This includes his assertion that the Passenger was at least as likely to have started the fire instead of him. I find that the Appellant did not discharge this burden. Based on the evidence before me, I find that the Appellant contravened the *Act* by failing to comply with the Fire Prohibition Order by lighting an open fire on East Redondo Island, on August 24, 2018, in contravention of the *Act*, and that this contravention led to the Wildfire.

Issue Two: Should the cost recovery portion of the Order be confirmed, varied, or rescinded, or should the Order be sent back to the Deputy Director?

[108] The Order requires the Appellant to pay the government's costs of fire control and of destroyed resources that are attributable to the Wildfire. The monetary value of these costs and damages is based upon three categories: the government's fire control costs, Crown timber damaged or destroyed by the Wildfire, and other forest land resources damaged or destroyed by the Wildfire. In these reasons, I consider each of these categories separately.

[109] An analysis of these categories requires an understanding of the legislative provisions which authorized the Order. These legislative provisions are best understood after applying the modern approach to statutory interpretation. I adopt and apply the following guidance from *Canadian National Railway v. Government of British Columbia*, 2022 BCSC 2263 (CanLII) (“CNR 2022”)², at paragraph 127, which endorses the approach the Appellant submitted I use to discern the meaning of various parts of the scheme:

An adjudicator’s interpretation of a statute must be guided by two seminal principles:

- a) “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837 [Rizzo].
- b) “Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”: *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.

[110] It is with this modern approach to statutory interpretation in mind that I proceed to determine these separate categories that underpin the monetary payment required by the Order.

Fire Control Costs – Section 27(1)(b) of the Act

Appellant’s Submissions

[111] The Appellant submits that section 27(1)(b) of the *Act*, by use of the permissive term ‘may,’ provides the Deputy Director with the discretion to determine which of the prescribed categories for calculating costs should be considered when a person is required to pay a monetary amount under this section. Further, the appellant argues that the Respondent retains this discretion when determining the monetary amount that should be attributed to each of the prescribed categories in section 27. The Appellant says the Deputy Director provided insufficient reasons for establishing the fire control costs attributable to the Wildfire under section 27(1)(b) of the *Act*.

[112] The Order set the government’s cost in controlling the Wildfire at \$386,868.79, approximately \$215,000.00 of which resulted from helicopter fuel costs and flight costs. The Appellant argues the cost attribution for helicopter use was excessive when “little if any fire suppression actions were undertaken,” and the helicopters were used for “flying

² Confirmed on appeal (*Canadian National Railway Company v. British Columbia* (2024 BCCA 309 (CanLII)).

around to look at the fire.” The Appellant submits that although helicopter fuel costs and flight costs are prescribed as being cost recoverable under section 31(1)(a)(vi) of the *Regulation*, the amount of about \$215,000 accepted by the Deputy Director as a cost cannot be attributed to government’s fire control costs to combat the Wildfire. The Appellant asserts that “nothing was done by helicopter to fight the fire,” and that the Deputy Director did not properly consider if the helicopter use supported the control of the Wildfire. The Appellant asserts the Deputy Director did not properly exercise his discretion to exclude those costs and therefore the costs attributed to that use are not properly recoverable.

[113] The Appellant argues that the full cost of helicopter fuel costs and flight costs of approximately \$215,000 cannot be justified when the Deputy Director did not consider if that amount was reasonable given the limited overall fire suppression effort undertaken to combat the Wildfire.

Respondent’s Submissions

[114] The Respondent asserts that the Appellant agreed that the fire control costs for the Wildfire were correctly calculated at \$386,868.79 in the agreed Joint Statement of Facts submitted by the parties in this appeal. The Respondent states that the Appellant is now resiling from this agreement.

[115] The Respondent relies on paragraph 120 of CNR 2022 to say that a decision maker must be guided by the language of the *Act* to determine if the costs of fire control resulted directly or indirectly from the contravention. If a decision maker determines these costs resulted from the contravention, section 31 of the *Regulation* identifies which items may be included in the cost calculation. The Respondent says that once a cost item has been identified as coming within the prescribed list in section 31 of the *Regulation*, the Commission does not have the jurisdiction to critique how the government relied on or used the cost item to control the fire or to consider if that control was effective. The Deputy Director submits that the Commission must restrict its determination of costs under this section of the *Act* to if the cost was expensed to control the fire. If the Commission determines the helicopter fuel costs and flight costs resulted, directly or indirectly, from the Wildfire, the Commission may not vary these costs.

Panel’s Analysis and Findings

[116] The government’s costs in controlling the Wildfire are itemized, based on section 31(1)(a) of the *Regulation* as follows:

- hourly wages and overtime wages of responding employees, including payroll loading costs (\$30,702.24);
- food, transportation, and accommodation expenditures (\$4,406.72);
- helicopter fuel costs and flight costs (\$214,033.84);

- replacement, repair, or cleaning of damaged or used vehicles or equipment, directly resulting from the fire control (\$48.16); and
- private goods and services contracted, hired, rented, or purchased (\$73,199.71).

[117] On a plain reading of the words “may determine the amount of the government's costs of fire control” found within section 27(1)(b) of the *Act*, I find fire control costs is a category the Legislature intended to be recovered when those costs result directly or indirectly from a contravention the *Act*. In the circumstances of this appeal, I have previously found that the Appellant contravened the Fire Prohibition Order and the *Act* and caused the Wildfire.

[118] Section 31(1) of the *Regulation* states that “For the purposes of section ... 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...**” (emphasis added). In other words, there are two conditions precedent to including a cost under section 27 of the *Act*: the cost was incurred to control the fire and the cost is listed by the *Regulation*. Section 1(2) of the *Regulation* defines “fire control” as an action to contain, extinguish, or limit the spread of a fire, which informs the actions which are cost recoverable as set out in section 31(1). The language of section 27(1)(b) is clear and unambiguous: if the government expends an amount of money to control a fire that results from a contravention, a decision maker **may determine** the amount of the government's costs to control the fire calculated in the prescribed manner.

[119] The Appellant has challenged only one of the potential costs attributed to fire control, the amount the Respondent determined was payable for “helicopter fuel costs and flight costs.” The words “helicopter fuel costs and flight costs” provided in section 31(1)(a)(vi) are not further qualified by the *Regulation*. Their meaning must therefore be determined from the context in which they are used. The first listed cost under section 31(1)(a) which may be recovered by the government is for “hourly wages and overtime wages of responding employees” Transporting employees to and from a fire location was essential to fire control and was, in this case, only available by helicopter or boat. Firefighting equipment, and the people trained to use that equipment, are necessary elements to achieve fire control. I find the cost of transporting people and equipment necessary to undertake an action to contain, extinguish, or limit the spread of fire, through the use of helicopter may be both reasonable and necessary to undertake fire control in areas with reduced accessibility, and that this is appropriately captured by section 31(1)(a)(vi) of the *Regulation*.

[120] The Wildfire Management BC Forest Service Activity Log is a log developed from compiling notations of the various actions taken by people involved in fire control, including the use of helicopters. NRO Carroll explained the use of certain terms used in the log when providing testimony. The log entries for August 25 to 29, 2018, show

helicopter use associated with reconnaissance, picking crews up and dropping them off, and picking up equipment and dropping it off. Based on this log I am satisfied that a helicopter was used for suppression of the Wildfire. I find the helicopter fuel costs and flight costs were attributable to the Wildfire and fall within the list prescribed by the *Regulation*. In making this finding, I am expressly not making a determination on the government's fire control decisions or strategies in combatting the Wildfire as this determination is not available to me.

[121] This Commission previously found that there was no discretion to reduce any of the costs listed in calculating costs at paragraph 63 of *AltaGas Ltd. v. Government of British Columbia*, 2021 BCFAC 2 ("*AltaGas*"). I adopt the reasoning of that case and apply it here to decide that the amount allocated for helicopter fuel and helicopter costs should not be varied. I find that the \$214,033.84 ascertained for helicopter fuel costs and flight costs to combat the Wildfire is within the scope of fire control as defined by the *Regulation* and resulted, directly or indirectly, from the contravention which led to the Wildfire. Therefore, I find that the total amount of \$386,868.79 appropriately reflects the sum of the costs, expenditures, and charges attributable to the control of the Wildfire and that the Appellant has not presented sufficient evidence or argument to demonstrate that these costs, expenditures, and charges should be varied. I decline to vary this amount in any way.

Crown timber and other forest land resources – Section 27(1)(c)(i) and (ii) of the Act *Appellant's Submissions*

[122] The Appellant says that the Respondent's calculation of the cost for Crown timber amounted to a "double counting." The Appellant makes this argument based on the Respondent's inclusion of dollar value for both Crown timber and other forest land resources which were damaged or destroyed as a result of the Wildfire. The Appellant asserts the inclusion of an amount calculated under the *Forest Act* for trees damaged or destroyed by the Wildfire as though the trees were cut for timber as well as an amount for other forest land resources based on the area of ecological reserve damaged or destroyed is not supported by an interpretation of section 27(1)(c) of the *Act* and section 30 of the *Regulation*.

[123] The Appellant further submits, in the alternative, that an amount calculated for stumpage under section 27(1)(c)(i) for Crown timber should not be included in cost recovery because no rights to timber in an ecological reserve can be granted. The Provincial government's authority to grant Crown timber rights under the *Forest Act* does not apply to an ecological reserve by virtue of section 5 of the *Ecological Reserve Act*. The Appellant argues that the wording of section 103(1)(c) of the *Forest Act*, which sets the methodology of establishing the stumpage applicable to timber, does not apply in these circumstances because no rights to harvest timber would ever be granted by agreement under the *Forest Act*. The Appellant asserts that "it would be a legal fiction to grant a rate

of stumpage to timber in an ecological reserve when those rights cannot be granted under an agreement entered into under the *Forest Act*.” As a result of the impossibility of granting timber harvesting rights to timber within an ecological reserve, the Appellant argues the loss due to the Wildfire should be based on the area of damage to other forest land resources only and should not include an amount for stumpage calculated under the *Forest Act*.

[124] The Appellant submits that the East Redonda Ecological Reserve is a protected area under section 30(c)(i) of the *Regulation* and therefore falls within the category “other forest land resources.” Therefore, the *Regulation* establishes the cost recovery for other forest land resources is calculated based on every hectare of other forest land resources damaged or destroyed. The Appellant argues this calculation alone should be applied to estimate losses eligible for recovery. The Appellant relies on paragraph 227 of the decision of the Commission in *Canadian National Railway Company v. Government of British Columbia*, 2017 BCFAC 7 (CanLII) (“*CNR 2017*”), to support this assertion and says that two categories of costs should not be stacked within the same area.

[125] The Appellant submits that the amount determined for loss to other forest land resources is “staggering” because the loss is calculated at \$5,000 per hectare. The Appellant submits further that each hectare cannot be worth \$5,000 when the land in the East Redonda Ecological Reserve does not have commercial value in the usual sense. Establishing that each hectare has the same value is arbitrary and leads to an unjust result.

Respondent's Submissions

[126] The Respondent submits that the cost to be recovered for the Crown timber damaged or destroyed resulting directly or indirectly from the contravention is not based on the stumpage revenue that government would have collected. Rather, the cost amount is based on damages to Crown timber in a protected area because the calculation is a notional amount tied to the trees that were damaged or destroyed, even if there is never a plan to harvest the timber.

[127] As to the Appellant’s assertion that allowing cost recovery based on loss or damage of both Crown timber other forest land resources amounts to “double counting” and is inconsistent with the objects and interpretation of the *Act*, the *Ecological Reserve Act*, and the *Forest Act*, the Respondent says there is no double counting. The Deputy Director argues the *Act* establishes distinct and separate categories of losses, including Crown timber and other forest land resources, each of which are recoverable. The Respondent relies on the past decision of the Commission in *Canadian National Railway Company v. Government of British Columbia*, 2011 BCFAC 6 (CanLII) (“*CNR 2011*”), which approved the recovery of costs for a stumpage revenue calculation for Crown timber and for salvaged timber from the same area. The Respondent says that these two costs items are additive even if they each include “merchantable” timber—they represent two different components of Crown timber.

[128] The Respondent argues, citing paragraph 165 of *Canadian National Railway v. Government of British Columbia*, 2020 BCFAC 2 (CanLII) ("*CNR 2020*"), losses for Crown timber and other forest land resources are both recoverable because the category other forest land resources does not include the dollar value of mature and immature Crown timber. Further, cost recovery for both may be ordered because the costs value the losses differently. Crown timber is based on the volume of timber lost (expressed as m³ by species) and other forest land resources is based on the area of habitat lost (expressed as hectares): *CNR 2020*.

[129] Regarding the Appellant's assertion that not every hectare of other forest land resources can be worth \$5,000, the Respondent says \$5,000 is the statutorily imposed amount prescribed by the Legislature through the wording of section 30(c) of the *Regulation*. The wording "is to be calculated" requires that the prescribed amount of \$5,000 for each hectare must be used in determining the total dollar value of damaged or destroyed other forest land resources. The *Regulation* does not provide discretion to vary the amount. Further, the Appellant did not provide an evidentiary basis from which to justify a variation of the amount of \$5,000 per hectare. The BC Wildfire Service determined the extent of the protected area of other forest land resources damaged or destroyed to be 332.5 hectares, resulting in a dollar value of \$1,662,500. The Respondent submits that an amount of \$600 should be added to this amount based on a calculation of 0.6 hectares of "other area" designated as a wildlife retention area damaged or destroyed by the Wildfire, which is calculated at the rate of \$1,000 for each hectare in accordance with section 30(c)(ii) of the *Regulation*.

Panel's Findings

Crown Timber

[130] The Appellant argues that the *Ecological Reserve Act* states that as the *Forest Act* cannot confer rights to remove trees from ecological reserves, the *Forest Act* was not available to the Deputy Director to include the dollar value attributable to the Crown timber damaged or destroyed by the Wildfire. I do not agree.

[131] I adopt the reasoning of *CNR 2022*, that the *Act* and *Regulation* provide a comprehensive scheme to address wildfires on Crown land throughout British Columbia, and apply it here. The East Redondo Island Ecological Reserve is on Crown land and the timber located on it is Crown timber. The *Act* applies to all Crown land and Crown timber. If this was not so, the argument of the Appellant might prevail. The *Act* establishes the categories for which loss of revenue may be recovered, including for destroyed Crown timber. It refers to the methodology established by the *Forest Act* for calculating stumpage indirectly through regulation. The *Act*, for the relevant purposes, does not incorporate other aspects of the *Forest Act*, such as establishing a tenure in the ecological reserve, which might conflict with the *Ecological Reserve Act*. The *Act* incorporates the method of calculation of the value of Crown timber from the *Forest Act*, but it does not incorporate the aspects of the *Forest Act* as suggested by the Appellant. The valuation of the Crown

timber under the *Act* is not affected by the *Ecological Reserve Act*, as the valuation method under the *Forest Act* is not affected by the *Ecological Reserve Act*. Put simply, the fact that the Crown timber in question was not capable of being sold is immaterial to its valuation under the *Forest Act*.

[132] Further, I find the Appellant's interpretation of the effect of the *Ecological Reserve Act* on the *Forest Act* and the *Act*, if accepted, would result in an outcome which would defeat the legislative purpose of the *Act* of recovering a monetary amount attributable to Crown timber damaged or destroyed by wildfires. The Appellant's interpretation, if accepted, would render the cost recovery of Crown timber under section 27 of the *Act* inapplicable to areas protected by the *Ecological Reserve Act*. Such an interpretation is not supported by the modern approach to interpretation as applied to section 27 of the *Act*. Further, section 30 of the *Regulation*, the section of the *Regulation* that establishes the valuation method of Crown timber under the *Act*, specifically addresses—when discussing valuation of other forest land resources—the valuation of areas protected by the *Ecological Reserve Act*, valuing them more highly, not less. The Legislature would not have included a value for loss of ecological reserve area if the *Forest Act*, and therefore the *Act*, did not apply to ecological reserves. For all of these reasons, I find the Appellant's interpretation of the effect of the *Ecological Reserve Act* on the *Act* to not be persuasive.

[133] The *Act* establishes that an amount can be recovered for Crown timber damaged or destroyed by a wildfire. Where the timber is mature, section 30 of the *Regulation* provides:

(a) Crown timber, if it is mature timber, is to be calculated by ascertaining the amount of stumpage applicable to that timber under the *Forest Act* and assigning that amount as the dollar value for that timber, ...

[134] The method to calculate the loss is found in the *Forest Act*. Section 103(3) of the *Forest Act*, provides for circumstances like this where there was no forest tenure issued to authorize cutting timber:

... a person who cuts, damages, destroys or removes Crown timber **without authorization** must pay, in addition to all other amounts payable under this Act or another enactment, stumpage calculated by multiplying the volume or quantity of the timber that was cut, damaged, destroyed or removed without authorization, as determined by an official designated by the minister, by the sum of...

(emphasis added)

[135] Section 105 provides that the rates are to be determined by an employee of the ministry responsible for administering the *Act*. Mr. von Westarp, an employee of the Ministry of Forest, Lands and Natural Resources, gave evidence that after applying the applicable cruising manual to determine the cubic metres of timber affected and the rate per cubic meter, he applied both to the timber on 332.5 acres of ecological reserve land

and 0.6 acres of wildlife retention area, resulting in a calculation of damages of \$305,804.16.

[136] The *Act* and *Regulation* establish a comprehensive scheme to address wildfires on Crown land. I find that this scheme includes the authority to determine the amount that is equal to the dollar value of Crown timber located within an established ecological reserve and to require a person who has contravened the *Act* to pay that amount to the Provincial government. I further find that the monetary amount of the Crown timber damaged or destroyed by the Wildfire was appropriately calculated for the Deputy Director by ascertaining the amount of stumpage applicable to that timber under the methodology of the *Forest Act*.

[137] Having found that the Deputy Director had the authority to direct calculation of the value of the Crown timber damaged or destroyed by the Wildfire, that he did so appropriately, and that the Appellant has not presented sufficient evidence or argument to demonstrate that valuation of the Crown timber damaged or destroyed by the Wildfire should be varied, I decline to vary this amount.

Other Forest Land Resources

[138] The Appellant argues, relying on *CNR 2017*, that the dollar value attributable to other forest land resources (“OFLR”), should not be included in the Order as doing so would be double counting.

[139] The Commission has interpreted the meaning of OFLR previously in *CNR 2020*, and while I am not bound to follow it, I adopt this meaning because it is based on the modern principle of statutory interpretation and is logical and relevant. I therefore find that the category of OFLR in section 30 of the *Regulation* does not include Crown timber and grass land resources, but includes other aspects of a forest ecosystem: flora, fauna, soil and water, replete with associated economic, visual, recreational, spiritual, and other intrinsic values. The evidence of Ms. Hirner supports this finding by describing OFLR as the flora and fauna of the understory beneath the canopy of Crown timber.

[140] The case before me is similar to the situation in *CNR 2017* where the Commission assessed submissions and arguments that damage to or destruction of grass land resources was appropriately encompassed by the OFLR category of cost recovery. The Commission in *CNR 2017* found that grass land resources and OFLR were two distinct categories. In *CNR 2017*, the Commission determined that even though the definitions provided for OFLR and grass land resources were non-exhaustive, the Legislature would not have defined the two if it had intended OFLR to include grasslands. I adopt this reasoning and apply it here: by defining “forest land” (which includes land that previously supported trees and is not in other use, but is separate from other categories defined in section 30 of the *Regulation*), the Legislature intended OFLR to be a separate category of cost recovery distinct from Crown timber. This, plus the fact that the Legislature listed both as categories to be determined under section 27(1)(c), leads me to the conclusion that the loss of revenue associated with each category should be determined separately. I

find therefore, that Crown timber and OFLR are two distinct categories for which costs may be recovered.

[141] As to whether ordering compensation for loss of Crown timber and loss of OFLR is double counting as the Appellant argues, I find it is not. I agree with the Respondent that they are two distinct categories—one is the trees, the other is the plants, soil, and other intrinsic values present beneath the overhead tree canopy. In *CNR 2017*, the Commission found that grasslands and OFLR were distinct categories and the loss of each was recoverable. In this case both Crown timber and OFLR were destroyed or damaged by the Wildfire in an area of about 332 hectares and there was no double counting. I find that the Order correctly reflects this distinction.

[142] The method of calculating the loss of OFLR is provided by section 30(c) of the *Regulation*:

the manner in which the dollar value of (c)other forest land resources **is to be** calculated is by multiplying the number of hectares of other forest land resources damaged or destroyed,

(i) if in a protected area ... by \$5,000

(emphasis added)

[143] The Appellant submits that not every hectare of OFLR can be worth \$5,000 but offers an insufficient evidentiary basis to support this contention. Section 30(c) of the *Regulation* is clear: once the number of hectares of protected area which were damaged or destroyed has been calculated, that number is to be multiplied by \$5,000. I find section 30(c) of the *Regulation* does not provide the decision maker with any discretion as to how to calculate the dollar value of the OFLR damaged or destroyed by a wildfire. Once a decision maker has determined that the OFLR damaged or destroyed by a wildfire was within a protected area, as in the circumstances of this appeal, the dollar value must be calculated by multiplying the relevant hectares of OFLR by \$5,000. I find that the Deputy Director applied this formula correctly to the OFLR damaged or destroyed by the Wildfire and calculated this amount at \$1,662,500 and that the Appellant has not presented sufficient evidence or argument to demonstrate that this valuation should be varied. I decline to vary this amount in any way.

What discretion does section 27(1)(d) provide to vary the amounts determined?

Appellant's Submissions

[144] The Appellant submits that the *Act* provides discretion to reduce the cost recovery amount ordered and that I should exercise that discretion based on the Appellant's ability to pay. The Appellant asserts the relevant legislative provisions do not say that the decision maker must recover the sum of the costs determined for the categories determined: the law as written gives the decision maker discretion to choose which amount should be recovered. The Appellant's position is that the wording of section 27 of

the *Act* does not say that the decision maker must recover the sum of the costs determined for both fire control and damage to other forest land resources, but rather gives the decision maker discretion to choose one or the other. The Appellant argues he should only pay the fire control costs resultant from the Wildfire.

[145] In the alternative, if this panel concludes on an interpretation of section 27 of the *Act* that the Appellant must pay both the fire control cost and the loss for damage to other forest land resources, the Appellant relies on *Robert Unger v. Government of British Columbia*, 2014 BCFAC 6 (CanLII), to submit that the Commission may, and should, reduce the amounts of each category of cost. The Appellant asserts that the wording of the *Act* can reasonably be read to say: the decision maker “may require the person to pay up to the amounts determined” under paragraphs (b) and (c) of section 27(1). The Appellant asserts that seeking partial recovery for each category is consistent with the *Act’s* objects.

[146] The Appellant submits that the Commission erred in its decision in *AltaGas* when it interpreted the *Act* to say that while the decision maker in that case had discretion when ordering recovery under different categories of costs. The Commission in *AltaGas* held that discretion is limited to two options: order a person to pay the full amount determined for each category under section 27(1) or order a person to pay nothing for each category. The Appellant says this interpretation does not accord with the *Act’s* objects and is not supported by policy rationale. The Appellant argues that this result is impractical because individuals “cannot afford to pay millions of dollars to compensate the Crown for damage caused accidentally. ... Such an interpretation gives the Minister no ability to consider a fire’s context or the person’s circumstances.” The Appellant asserts that requiring the payment of the full amounts under section 27 removes a person’s incentive to report a fire and would unfairly eliminate consideration of the person’s ability to pay.

Respondent’s Submissions

[147] The Respondent relies on paragraphs 53 and 56 of *CNR 2011* to say that the Commission decided that the Deputy Director’s jurisdiction is limited to the provisions of the *Act* and *Regulation*, and these do not provide any means to reduce the calculated amounts for each category. Further, compensation may be awarded for multiple heads of damages, once determined to be applicable and calculated.

[148] In summary, the Respondent says that the cost recovery order should not be changed because the government is authorized by the *Act* and *Regulation* to calculate an amount for fire control costs (\$386,868.79), for damaged or destroyed Crown timber (\$305,804.16), and other forest land resources (\$1,663,100) and those costs were calculated as authorized for the separate categories. The Respondent maintains that Appellant should pay the aggregate sum ordered of \$2,355,772.95.

Panel’s Findings

[149] The Appellant asks me to exercise my discretion to reduce the dollar value of the cost of fire control, to determine the Appellant should be responsible for paying for

damages to either Crown timber or OFLR but not both, and to reduce the dollar amount of the damages to OFLR he is required to pay under the Order. I find I am unable to do so. As stated above, I have confirmed the decision of the Deputy Director to order the Appellant to pay the government's costs attributed to controlling the Wildfire, as well as the monetary amounts associated with the damage or destruction of Crown timber and other forest land resources caused by the Wildfire.

[150] Section 29(1) of the *Regulation* establishes the circumstances in which a decision maker, acting under the authority of section 27 of the *Act*, may not require a person to pay the government's fire control costs. These circumstances are limited to where a person did not willfully cause or contribute to the start or spread of the fire and, before the government has carried out fire control for the wildfire that gives rise to the government's costs, the person has entered into a wildfire response agreement with the government or is engaged in other activities listed within this section. These circumstances do not apply to the Appellant.

[151] The *Act* does not provide the authority for me to reduce payment of the loss associated with damaged or destroyed Crown timber or for OFLR. As stated in *AltaGas*, the options available are to order payment of the full amount or none of it, and as stated above, section 29(1) of the *Regulation* dictates when no payment may be ordered.

[152] The factors for consideration when setting the administrative penalty, which is not being appealed, reflect the Legislature's intention regarding penalty and behaviour. They are:

- (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.

[153] Even though this list does not apply to determining the amounts payable for fire control and damages to Crown timber or OFLR, it is noteworthy that the list does not include the ability of an individual to pay. This is a factor that the Legislature did not intend to be considered in setting the administrative penalty. Under these circumstances, I cannot find the ability to pay relevant to ordering payment for fire control costs or damages to Crown timber or OFLR.

[154] I find the Appellant is required by the Order to pay \$2,355,772.95 and the Appellant's ability to pay is not a factor I can consider in reducing that amount.

DECISION

[155] The Appellant submitted that the evidence did not establish, on a balance of probabilities, that he caused the Wildfire and argued that the Passenger could have caused the Wildfire instead of himself. The Appellant argued there was no direct evidence that he caused the Wildfire, and that the evidence in support of the allegation that he caused the Wildfire is entirely circumstantial.

[156] As set out above, I drew an adverse inference from the Appellant's refusal to provide evidence in this hearing to infer that any evidence under oath he would have provided would have been detrimental to his submission that he did not start the Wildfire. I found that as the Appellant was determined, in the decision under appeal, to have started the Wildfire, he bears the burden of proof to show that he did not. This includes his assertion that the Passenger was at least as likely to have started the fire instead of him. The Appellant did not provide sufficient evidence or argument to support this position and I found that the Appellant did not discharge the burden of proof.

[157] I found that the Appellant contravened the *Act* by failing to comply with the Fire Prohibition Order by lighting an open fire to burn garbage on East Redondo Island, on August 24, 2018.

[158] The Appellant asked me to exercise my discretion to reduce the amount payable under each category of costs within the Order: fire control, Crown timber, and other forest land resources. For the reasons provided above, I have declined to do so.

[159] The *Act* allows the Deputy Director to determine the amount of the government's costs of fire control that resulted, directly or indirectly, from the Wildfire. I found that the Deputy Director appropriately determined the costs attributable to the Wildfire that fell within the prescribed categories of costs and that the Appellant has not presented sufficient evidence or argument to demonstrate that these costs should be varied.

[160] The dollar value of the Crown timber damaged or destroyed by the Wildfire may be payable to the Provincial government if an individual is ordered to do so and if the value of that Crown timber is calculated in the manner prescribed by section 30 of the Regulation. I found that the Deputy Director appropriately calculated the dollar value of the Crown timber damaged or destroyed by the Wildfire and that the Appellant has not presented sufficient evidence or argument to demonstrate that this valuation should be varied.

[161] The dollar value of the other forest land resources damaged or destroyed by the Wildfire may also be payable to the Provincial government if an individual is ordered to do so. Section 30(c) of the Regulation sets out that the dollar value for these resources is to be calculated by multiplying the number of hectares of other forest land resources damaged or destroyed by the Wildfire by \$5,000, as the other forest land resources were within a protected area as defined by the *Act*. I found that the Deputy Director appropriately calculated the dollar value of the other forest land resources damaged or destroyed by the Wildfire. Having found that the dollar value attributed to each of the

categories the Appellant was required by the Order to pay under section 27 of the *Act* was arrived at appropriately and that there was insufficient evidence or argument presented by the Appellant to demonstrate that these dollar values should be varied, I declined to vary or rescind these amounts.

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

[163] For the reasons provided above, I confirm the Order. The Appellant's appeal is dismissed.

"Daphne Stancil"

Daphne Stancil, Panel Chair
Forest Appeals Commission