Forest Appeals Commission

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

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

Website: www.fac.gov.bc.ca
Email: facinfo@gov.bc.ca

DECISION NOS. 2017-WFA-005(a) and 2017-WFA-006(a)

In the matter of two appeals under 40(1) of the *Wildfire Act,* S.B.C. 2004, c. 31.

BETWEEN:	Forest Practices Board	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	D.N.T. Contracting Ltd. and 391605 British Columbia Ltd.	**THIRD PARTIES**
BEFORE:	A Panel of the Forest Appeals Commission: Susan E. Ross, Panel Chair	
DATE:	Conducted by way of written submissions concluding on May 10, 2018	

APPEARING:	For the Appellant:	Mark Haddock, Counsel John Pennington, Counsel
	For the Respondent:	Darcie Suntjens, Counsel
	For the Third Parties:	Mark S. Oulton, Counsel

APPEALS

[1] The Forest Practices Board (the “Board”) appeals two companion decisions made under section 26 of the *Wildfire Act*, S.B.C. 2004, c. 31. The decision-maker was Madeline Maley, RPF, Executive Director, BC Wildfire Service (the “Executive Director”), acting as a delegate of the Minister of the Ministry of Forests, Lands and Natural Resource Operations (the “Ministry”)[1].

[2] The decisions concern Wildfire 2014-G40425, which started on August 11, 2014 as a result of timber harvesting by D.N.T. Contracting Ltd. (“DNT”) in Block 4 of Timber Sale Licence A91168 (the “TSL”), in the Stewart Nechako Natural Resource District. 391605 British Columbia Ltd. (“391605 BC Ltd.”) is the tenure holder and DNT was its contractor.

[3] The decisions were made on July 19, 2017 following an opportunity to be heard hearing attended by 391605 BC Ltd. and DNT (together the “Third Parties”), and representatives of the Government of British Columbia (the “Respondent”). In

[1] As of July 18, 2017, the Ministry became the Ministry of Forests, Lands, Natural Resource Operations and Rural Development.

the decisions, the Executive Director concluded that the Third Parties contravened section 6(2) of the *Wildfire Act* and sections 6(2) and 6(3)(a) of the *Wildfire Regulation*, B.C. Reg. 38/2005, but found that they had established a defence to the contraventions. Specifically, she found that the Third Parties contravened the legislation by carrying out timber harvesting when the applicable Fire Danger Class rating was V (extreme), which required a "complete cessation of high risk activities as per Schedule 3 of the *Wildfire Regulation*." However, the Executive Director went on to find that the contraventions were excused by the defence of mistake of fact under section 29(b) of the *Wildfire Act*. The Board argues that the Executive Director erred in finding this defence.

[4] Section 40(1)(a) of the *Wildfire Act* gives the Board a right of appeal despite not participating in the proceedings before the Executive Director. The Board was established by the Legislature in 2005 as the public's "watchdog" on forest practices in British Columbia, and to represent the public interest. Among other things, the Board audits government and industry forestry practices, deals with complaints from the public regarding forest practices and government enforcement, and carries out special investigations. It was also given the authority to appeal enforcement decisions and penalties imposed by the government under the *Wildfire Act*, and other specified forest-related legislation.

[5] The Forest Appeals Commission (the "Commission") may conduct an appeal by way of a new hearing conducted orally, in writing, or a combination of both (*Wildfire Act*, section 40.1; *Forest and Range Practices Act*, S.B.C. 2002, c. 69, Part 8.1). The parties agreed that these appeals would be conducted by written submissions based on the Executive Director's decisions, the record of proceeding before the Executive Director, and supplementary materials.

[6] The record of proceeding before the Executive Director consisted of a case report and attachments from the Respondent, and a written submission and six affidavits from the Third Parties. The Board supplemented this record with an expert report on the key issue of the selection of representative weather data to determine the Fire Danger Class rating for the harvesting operations. The parties also provided written arguments on the appeals.

[7] The Commission's powers on an appeal are set out in section 41(1) of the *Wildfire Act*, as follows:

41(1) On an appeal … under section 40 by the board, the commission may

(a) consider the findings of the decision maker who made the order, and

(b) either

(i) confirm, vary or rescind the order, or

(ii) with or without directions, refer the matter back to the decision maker who made the order, for reconsideration.

[8] The Board asks the Commission to confirm the contraventions but find that no defence has been established, and to order the following:

- a $10,000 administrative penalty under section 27(1)(a) of the *Wildfire Act*;
- an order for payment of the dollar value of the damaged or destroyed Crown timber as well as reforestation costs pursuant to sections 27(1)(c) and (c.1) of the *Wildfire Act*; or
- an order referring the matter back to the Executive Director to determine an appropriate administrative penalty and an appropriate amount for damage to Crown resources and reforestation costs.

BACKGROUND

Undisputed Facts

[9] In January 2014, the Respondent issued the TSL to 391605 BC Ltd. as the licensee. Article 1.01(a) authorized 391605 BC Ltd. to harvest timber from the areas designated for harvest and Article 9.02 required it to comply with the *Wildfire Act* and *Wildfire Regulation* and "ensure that its employees, agents and contractors comply".

[10] 391605 BC Ltd. and Canfor Forest Products Ltd. ("Canfor") entered into a written log purchase agreement for timber in the TSL. They also entered into a verbal agreement for Canfor to select and instruct the contractor to harvest the timber. Under this arrangement, while 391605 BC Ltd. and Canfor both had authority to supervise timber harvesting, Canfor acted and made decisions respecting harvesting operations on behalf of 391605 BC Ltd.: Canfor stood "in the shoes of"[2] 391605 BC Ltd. for harvesting operations, including the selection of representative weather data for the purpose of determining the Fire Danger Class rating for the area to be harvested, and restrictions applicable to it.

[11] Fire Danger Class ratings are set out in Schedule 3 to the *Wildfire Regulation*. They must be considered as part of a licensee's and contractor's obligations under section 6(2) of the *Wildfire Act* and sections 6(2) and (3) of the *Wildfire Regulation* when carrying out an "industrial activity" or a "high risk activity". It is undisputed that the timber harvesting in the TSL was both an "industrial activity" and a "high risk activity".[3]

[12] Section 6(2) of the *Wildfire Act* states:

6(2) A person who carries out an industrial activity must do so

(a) at a time, and

(b) in a manner

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[2] Executive Director's decisions, p. 5; Affidavit of Robert Montague, Canfor General Manager, based out of the Plateau operating region, para. 6; Affidavit of Steven Nevidon, Canfor Forestry Supervisor, para. 3(c).

[3] The definition of "industrial activity" in section 1 of the *Wildfire Act* includes land clearing and other activities stipulated by regulation. Section 1(1) of the *Wildfire Regulation* defines "high risk activity" to include various timber harvesting activities. Section 1(3)(a) includes "high risk activities", timber harvesting, and other forest management activities as an "industrial activity".

that can reasonably be expected to prevent fires from starting because of the industrial activity.

[13] Sections 6(2) and (3)(a) of the *Wildfire Regulation* provide that:

6(2) A person who carries out a high risk activity on or within 300 m of forest land or grass land on or after March 1 and before November 1, unless the area is snow covered, must determine the Fire Danger Class for the location of the activity

(a) by reference to representative weather data for the area,

(b) by reference to

(i) the Danger Region from Schedule 1,

(ii) the applicable numerical rating under the Buildup Index, and

(iii) the applicable numerical rating under the Fire Weather Index, and

(c) by cross-referencing the Buildup Index with the Fire Weather Index, for the applicable Danger Region, under Schedule 2.

(3) If there is a risk of a fire starting or spreading, a person carrying out a high risk activity on or within 300 m of forest land or grass land must

(a) do so in accordance with the applicable restriction and duration set out in Schedule 3 for the Fire Danger Class, and

(b) ...

[Emphasis added]

[14] Canfor selected DNT to harvest Blocks 3 and 4 in the TSL. DNT started work in Block 3 in the TSL on or about July 28, 2014, and in Block 4 on or about August 7, 2014. Canfor's Forestry Supervisor, Steven Nevidon, instructed DNT to use data from the Kluskus weather station ("Kluskus") to determine the Fire Danger Class rating and harvesting restrictions. His email to DNT on July 31, 2014, stated: "I reviewed our weather station map. The closest is Kluskus."

[15] Kluskus was, in fact, 37.4 kilometres away. The Chilako weather station ("Chilako") was only 27.4 kilometres away. Chilako was also representative of the area, whereas Kluskus was not. As such, Chilako should have been used. Canfor had intended to identify the weather station representative of the harvesting area, but had mistakenly identified Kluskus.

[16] DNT monitored the Kluskus weather data and applicable Fire Danger Class rating and restrictions on a daily basis. Canfor also monitored the Kluskus weather data to provide direction to DNT as and when necessary.

[17] On August 6, a small fire broke out in Block 3 and was extinguished by DNT. On August 11, when DNT's operations in Block 3 were largely complete, Wildfire 2014-G40425 was started in Block 4 by a feller buncher striking rocks during harvesting. At about noon, a DNT employee discovered the fire. DNT attempted to extinguish it without success. The BC Wildfire Service was called and incurred fire suppression costs of $707,087.

[18] The Chilako weather data was at Fire Danger Class rating V (extreme) from August 1 to 11. The Kluskus weather data was at Fire Danger Class rating IV (high) from August 4 to 10, and went to Fire Danger Class rating V on August 11. Weather data at the other government weather station in the area, Carrot Lake, was at either Fire Danger Class rating IV or V from August 4 to 11.

[19] For Fire Danger Class rating IV, Schedule 3 of the *Wildfire Regulation* requires the maintenance of a fire watch for at least two hours after work and, after three consecutive days of Fire Danger Class rating IV, the cessation of high risk activity between 1:00 pm (pacific daylight time) and sunset each day.

[20] For Fire Danger Class rating V, Schedule 3 of the *Wildfire Regulation* requires the maintenance of a fire watch for at least two hours after work, and the cessation of high risk activity between 1:00 pm (pacific daylight time) and sunset each day. After three consecutive days of Fire Danger Class rating V, all high risk activity must cease.

[21] Had DNT used Chilako instead of Kluskus weather data to determine the Fire Danger Class rating, it would have completely ceased harvesting in the TSL after August 3.

The Decisions under Appeal

[22] In separate decisions, the Executive Director found that the Third Parties effectively agreed that DNT had contravened sections 6(2) and (3)(a) of the *Wildfire Regulation*. She found that DNT harvested on forest or grass land after March 1 and before November 1 when it was not snow covered. The *Wildfire Regulation* required DNT to use representative weather data for the area to determine the applicable Fire Danger Class rating for its operations, and to govern its activities according to the restrictions for that Fire Danger Class.

[23] Instead of determining the Fire Danger Class rating using representative weather data from Chilako, DNT used weather data from Kluskus, which was not representative of the area. As a result, the Executive Director found that DNT failed to determine the Fire Danger Class rating by reference to representative weather data. The Executive Director found that DNT harvested in contravention of the applicable restriction on its operations causing Wildfire 2014-G40425 on August 11, 2014. Since the restrictions for the Fire Danger Class rating for Kluskus did not require a complete cessation of operations, there would not have been a contravention had Kluskus weather data been representative of the area.

[24] The decision issued to 391605 BC Ltd. is the same as the decision issued to DNT, except that the Executive Director added a reference to section 30 of the *Wildfire Act* as her reason for finding that 391605 BC Ltd. also contravened the legislation. Section 30 provides that, "[s]ubject to section 29 [the statutory defences], if a person's contractor [e.g., DNT], employee or agent contravenes a provision of this Act or the regulations in the course of carrying out the contract, employment or agency, then the person also contravenes the provision".

[25] The Executive Director then considered whether any defences applied under section 29 of the *Wildfire Act*, which states:

29 For the purposes of an order of the minister under section 26, a person may not be determined to have contravened a provision of this Act or the regulations if the person establishes that

(a) the person exercised due diligence to prevent the contravention,

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

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

[26] The Executive Director concluded that the Third Parties established the defence of mistake of fact to the contraventions under the *Wildfire Regulation* because it was reasonable for 391605 BC Ltd. to rely on Canfor to instruct DNT on the selection of representative weather data, and because it was reasonable for DNT to rely on Canfor's direction to use Kluskus. She accepted that Canfor had the necessary personnel, equipment, familiarity and operational experience, and policies and procedures for the task. The Executive Director found that the Third Parties' reasonable reliance on Canfor's identification of Kluskus was a mistake of fact integral to their contraventions of the *Wildfire Regulation,* which were therefore excused by section 29(b) of the *Wildfire Act*.

[27] The Executive Director also concluded that the facts supported a finding that the Third Parties contravened section 6(2) of the *Wildfire Act* by failing to harvest at a time and in a manner reasonably expected to prevent fires from starting. The Third Parties argued that those contraventions were barred by the rule against multiple convictions for the same wrongful conduct. After observing that this rule did not seem to apply in the context of forest management legislation, the Executive Director concluded that the contraventions of section 6(2) of the *Wildfire Act* were, in any event, also excused by the defence of mistake of fact.

[28] Because the Executive Director found that the defence of mistake of fact in section 29(b) of the *Wildfire Act* was established, she made no contravention orders under section 26.

[29] Although the Third Parties and the Respondent provided evidence to the Executive Director on the cost of re-establishing free-growing stands in the area, she did not address this matter as it was not relevant to determining the contraventions, and was not necessary to be decided once the defence in section 29(b) was established.

GROUNDS FOR APPEAL AND REMEDIES SOUGHT

[30] The sole ground for the Board's appeals is that the Executive Director erred in accepting the defence of mistake of fact under section 29(b) of the *Wildfire Act.*

[31] The Board asks the Commission to make an order that the Third Parties contravened section 6(2) of the *Wildfire Act,* and sections 6(2) and (3)(a) of the *Wildfire Regulation*. The Board asks the Commission to impose a $10,000 administrative penalty under section 27(1)(a) of the *Wildfire Act*. It also asks the Commission to make an order for payment of the dollar value of the damaged or

destroyed Crown timber, plus reforestation costs, under sections 27(1)(c) and (c.1). In the alternative, the Board asks the Commission to refer the matter back to the Executive Director for determination of appropriate amounts for the orders requested.

[32] The parties agree that section 29 of the *Wildfire Regulation* exempts the Third Parties from liability for the Respondent's fire control costs.

ISSUES

[33] The issues are:

1. Is the defence of mistake of fact established because the Third Parties reasonably relied upon the mistaken instruction of 391605 BC Ltd.'s agent[4], Canfor, as to the representative weather data to determine the Fire Danger Class rating and restrictions on harvesting under the *Wildfire Regulation*?
2. If the defence of mistake of fact is not established, does the common law principle barring multiple convictions for the same wrongful act shield the Third Parties from liability for any of the contraventions?
3. If the defence of mistake of fact is not established, are administrative penalties warranted and in what amounts? Are orders warranted for timber damage and destruction and reforestation costs and, if so, in what amounts?

DISCUSSION AND ANALYSIS

1. Is the defence of mistake of fact established because the Third Parties reasonably relied upon the mistaken instruction of 391605 BC Ltd.'s agent, Canfor, as to the representative weather data to determine the Fire Danger Class rating and restrictions on harvesting under the *Wildfire Regulation*?

The Parties' Positions

The Board

[34] The Board says that the Third Parties are both directly responsible for the prohibited activities but in different ways.

[35] For 391605 BC Ltd., the issue is whether 391605 BC Ltd., acting through Canfor, had a reasonable belief in the selection of Kluskus for representative weather data. To establish this, 391605 BC Ltd. must prove that Canfor selected Kluskus with reasonable care which includes considering, not just its proximity to

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[4] The Third Parties' Statement of Points, paras. 18 and 19, acknowledge that Canfor stood in the shoes of 391605 BC Ltd. for matters relating to timber harvesting operations under the TSL, including selection of the weather station used to determine the Fire Danger Class, and that unless expressly indicated otherwise in the Statement of Points [there are no such indications] actions and decisions of Canfor referred to were undertaken or made on behalf of 391605 BC Ltd. as the legal tenure holder for the TSL.

the harvesting area, but also geographic and climatic factors and on-site weather conditions.

[36] For DNT, the Board submits that the issue is whether, having been on the ground for two weeks before Wildfire 2014-G40425, and having experienced the small fire in Block 3 on August 6, DNT took all reasonable care to evaluate fire conditions in the area of its operations. In the Board's view, this requires justification of why DNT did not undertake on-site monitoring of weather data, accepted Kluskus for representative weather data when it had recently used Kluskus in a different drainage 80 kilometres away, and did not re-evaluate fire conditions after the fire in Block 3. [Unlike the Board's argument regarding 391605 BC Ltd. (above), the Board does not attribute Canfor's lack of reasonable care in selecting Kluskus to DNT because Canfor did not act on DNT's behalf. Rather, DNT relied on Canfor because of Canfor's relationship with 391605 BC Ltd. and working history with DNT.]

[37] The Board provided an expert report of Del Williams dated December 20, 2017, with an addendum dated February 27, 2018. Mr. Williams has been a Registered Professional Forester since 1984. He has worked as a forester in government and industry, and is currently employed as the Board's Manager, Audits and Investigations. Mr. Williams was asked to opine on the choice of weather station to determine the Fire Danger Class rating for the TSL. No one objected to his qualifications for that assignment.

[38] Mr. Williams' report explains that the overall goal is to select a weather station that is most representative of the conditions at the site of the forest activity so that decisions on when to switch to early shift, shut down, or take other actions to reduce the likelihood of starting a wildfire, are made with the best available information. Key factors in determining the most representative weather station are: proximity, biogeoclimatic ("BGC") subzone, elevation, geographic location, topography and local knowledge. Proximity can be used to short list weather stations, with the closer ones being assessed using the other factors.

[39] Mr. Williams states that the BC Wildfire Service operates over 260 weather stations. Their geographic location and elevation are available online and, with a little more digging, also their BGC zone and subzone. This data is also available by calling the BC Wildfire Service. Environment Canada operates weather stations as well, and some forest companies gather their own weather data.

[40] Mr. Williams notes that Chilako is closer to the logging sites in distance and elevation than is Kluskus. Chilako is also in the same BGC subzone/variant and the same valley as the logging sites (i.e., Chilako River valley). Kluskus is in a different valley, in a different BGC subzone/variant, further from the logging sites, and roughly 200 metres higher in elevation. The Kluskus moist cold BGC variant is generally moister and cooler than Chilako and the logging sites. Chilako, Kluskus and the logging sites have similar overall topography, but Kluskus is closer to the Coast Mountains.

[41] In Mr. Williams' opinion, the descriptions of the different BGC subzones/variants for Chilako and Kluskus strongly suggest that weather data from Chilako is more representative of the forestry sites. The weather station map used

by Canfor is a print of a very small-scale Wildfire Management Branch map (about 1:1,182,000), showing weather station locations with Canfor's hand drawn lines dividing the zone assigned to each station. Mr. Williams observes that:

> The hand-drawn lines used to delineate the boundaries between the Kluskus and Chilako weather station zones did not seem to follow any known boundaries (such as nearby Finger-Tatuk Provincial Park). The two areas logged are very close to Canfor's hand drawn boundary between the Kluskus and Chilako weather station zones. On a map of this scale, and with this little detail, it is very difficult to ascertain what side of the boundary that the logging actually sat on. (page 6)

[42] Mr. Williams notes the possibility of local knowledge as a relevant factor for consideration when determining the most representative weather station. He offers no opinion on this factor as he does not have local knowledge of the area.

[43] Mr. Williams' report appends part of the Ministry's June 2011 "Interpretive Bulletin on the Application of the *Wildfire Regulation* for the Forest Industry" (the "Interpretive Bulletin") that advises forest practitioners about determining representative weather data. The Interpretive Bulletin states that representative weather data can be sourced from the weather station(s) of the person conducting the high risk activity, or from government or third-party weather stations. It explains how to obtain information about establishing a portable weather station and states that, when operating for prolonged periods of higher Fire Danger Class rating, the requirement for accurate weather information could include using hand held monitoring equipment to verify local Fire Weather Index ("FWI") and Fire Danger Class rating levels. The Interpretive Bulletin continues:

> Periodic weather observations from the site of the industrial activity may be used to correlate with observations at the representative weather station to confirm its representativeness for the site of the industrial activity, or make DGR [Fire Danger Class] adjustments. If a professional, or a person under the guidance of a professional, conducting an industrial activity has access to FWI and DGR calculations for their operating area and can demonstrate awareness of the relative appropriateness of the DGR estimate to their site of the industrial activity(s) then the "representativeness" test should be met. (page 12)

[44] The Board submits that the Third Parties did not establish that Canfor, as agent of 391605 BC Ltd., exercised reasonable care in selecting Kluskus as the representative weather station, or that DNT, as 391605 BC Ltd.'s contractor conducting the harvesting operations, exercised reasonable care in relying on Canfor's direction to use the Kluskus weather data.

The Third Parties

[45] As already noted, the Third Parties acknowledge that Canfor stood in 391605 BC Ltd.'s shoes for matters relating to timber harvesting in the TSL. Canfor's acts and decisions were made on behalf of 391605 BC Ltd., including the selection of representative weather data. DNT relied on Canfor's selection of Kluskus, and DNT

then independently monitored the data from Kluskus to determine the Fire Danger Class rating.

[46] The Third Parties' affiants depose that they were aware of their legal responsibilities under the wildfire legislation, including the obligations to monitor representative weather data, determine the Fire Danger Class rating, and comply with applicable operating restrictions. 391605 BC Ltd. was aware that Canfor selected DNT to carry out the timber harvesting and was giving direction to DNT. The Third Parties intended to comply with all regulatory requirements, and were unaware of circumstances calling into question Canfor's direction to DNT to use the Kluskus weather station. (Affidavit of Paul Heit, Woods Manager of 391605 BC Ltd., paras. 7-10; Affidavit of David Neufeld, President of DNT, para. 9; Affidavit of Clint Ludwig, DNT Safety Coordinator, paras. 4, 11, 13-14; Affidavit of Robert Montague, Canfor General Manager based out of the Plateau operating region, para. 10; Affidavit of Steven Nevidon, Canfor Forestry Supervisor, paras. 6, 24)

[47] Steven Nevidon explains Canfor's practices and procedures for monitoring and communicating weather data and determining representative weather data in July 2014. He states that Canfor obtained weather data from government weather stations on a daily basis, which it compiled into a weather station report that included the Fire Danger Class rating for each station. These reports were distributed in a daily email to operations supervisors and contractors. Mr. Nevidon states that he and other supervisors regularly reviewed the weather station reports, and contacted relevant contractors to ensure that they were aware of changes in the Fire Danger Class rating that imposed, or changed, an operating restriction. (Nevidon Affidavit, paras. 8-11)

[48] Mr. Nevidon further explains that, in June 2011, Canfor employee Jay Shumaker had prepared a hard copy map of the Plateau operating region with hand drawn boundaries to delineate distinct geographic areas for the different government weather stations. A copy of this map is attached as an exhibit to Mr. Nevidon's affidavit. It bears Mr. Shumaker's signature over the date June 2, 2011, and the handwritten note: "generally, geographic areas are defined by topographic breaks & similar topographic areas." This is the Canfor weather station map examined by Mr. Williams for his expert report.

[49] Canfor employees referenced this map when selecting representative weather data. In most cases the closest weather station was chosen, using the hand-drawn boundaries as an aid, with exceptions made if other factors such as elevation, ecotype, or topographical features, suggested that the most representative station was not the closest one. Canfor had an internal policy not to change the weather station after logging started on a tenure in order to avoid cherry-picking data from whatever station had the most favourable Fire Danger Class rating for continued operations. (Nevidon Affidavit, para. 13)

[50] Mr. Nevidon recalls selecting Kluskus for DNT's harvesting operations in the TSL, but has no independent memory of the process that he followed, or his July 31, 2014 email to DNT. He explains his usual practice this way:

> 15. Specifically, my standard practice was to refer to Canfor's Weather Station Map, locate the harvesting area at issue on that map,

> and identify the closest weather station. In doing so, I had reference to my expertise and experience in the operating area and its geographic features, developed during my several years working and living in this area.
>
> 16. I have no reason to believe I would have departed from my usual practice in selecting the representative weather station for DNT's operations. In fact, based on the email I sent to DNT as described below, I believe I did in fact follow my usual practice in choosing the representative weather station.

[51] He gives the following explanation for his mistake in selecting Kluskus instead of Chilako:

> 21. I understand today [June 16, 2017] that my determination that Kluskus was the closest weather station was mistaken, and that the Chilako weather station ("Chilako") was approximately 10 km closer than Kluskus as "the crow flies". However, I note that based on my understanding that Chilako is 27.4 km away, and Kluskus is 37.4 km away, neither is particularly "close" to blocks 3 and 4. In my experience, weather patterns can vary considerably across the area in or around Vanderhoof, including in the area of the Fire.
>
> 22. I was unaware until recently that Chilako, and not Kluskus, is the closest weather station to blocks 3 and 4. Indeed, I was surprised to learn that was the case.
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> 23. At the time I selected Kluskus as the representative weather station, and at all times up to and including the day of the Fire, I believed and understood that Kluskus was the closest and most representative weather station for DNT's operations on blocks 3 and 4. I am unaware of any facts or circumstances that would have brought my mistake in determining that Kluskus was the closest weather station to my attention prior to or at the time of the Fire.

[52] DNT's affiants depose that its general practice when working for Canfor was to take Canfor's direction regarding representative weather data. In this case, DNT Safety Supervisor Clint Ludwig conferred with Mr. Nevidon, and then followed the instruction in Mr. Nevidon's email. DNT's practice was based on a lengthy operating history and relationship with Canfor which had the necessary personnel, equipment, familiarity with and operational experience in the area, and policies and procedures in place to select the representative weather station. (Neufeld Affidavit, para. 4; Ludwig Affidavit, paras. 7-10)

[53] The Third Parties argue that Canfor made an honest mistake in determining which weather station was closest to, and most representative of, the harvesting area. They submit that the defence of mistake of fact is established because this error led the Third Parties to honestly and reasonably believe that the weather data from Kluskus was representative and, had that been true, they would have been in compliance with the applicable restrictions on harvesting.

[54] The Third Parties submit that the Board conflates the defences of due diligence and mistake of fact by importing considerations of reasonable care from the exercise of due diligence into the defence of mistake of fact. They also deny that Canfor selected Kluskus solely on the basis of proximity. The Third Parties say that Mr. Nevidon used the word "closest" in the same sense as "representative", which includes, but is not limited to, "most proximate". Further, had Canfor relied on proximity alone, that would have led to a correct determination because Chilako was the most proximate weather station.

[55] On the question of on-site weather monitoring, the Third Parties submit that their responsibility was to source representative weather data, whether from government stations or on-site monitoring. They submit that government stations are a proper data source, and that the accuracy and adequacy of that data is not in question. The Third Parties submit that the mistake in this case was the failure to select the right government station, not the failure to use on-site monitoring. Had Chilako weather data been used, they submit that DNT's harvesting operations would have halted and Wildfire 2014-G40425 would not have happened, regardless of on-site monitoring. The Third Parties say that no evidence supports assumptions or inferences that DNT was not vigilant about ground conditions or could have discerned a higher Fire Danger Class rating from those conditions, including the small fire in Block 3 on August 6. They submit that their mistaken belief that Kluskus weather data was representative was reasonable because they relied on Canfor, which had the necessary skill, experience, practices and procedures, and that Canfor simply made a mistake.

The Respondent

[56] The Respondent's case report includes tenure documents, incident reports, an origin and cause report, correspondence, a resource recovery breakdown, interview and investigative notes, fire weather information, and Ministry policies. Most of the salient aspects of these materials were set out in the undisputed facts.

[57] Although the Respondent supported finding contraventions before the Executive Director, it now supports her decisions that the Third Parties established the defence of mistake of fact. The Respondent says that, even if 391605 BC Ltd. and Canfor were in an agency relationship pursuant to section 30(1) of the *Wildfire Act*, 391605 BC Ltd. may still raise its own statutory defences to Canfor's conduct. The issue is the reasonableness of the Third Parties' beliefs, and not whether Canfor had a reasonable belief, or exercised diligence in selecting Kluskus. The Respondent submits that mistake of fact was established because it was reasonable for 391605 BC Ltd. to rely on Canfor, and it was reasonable for DNT to accept instructions from 391605 BC Ltd. to follow Canfor's directions.

Legislation and law

[58] The goal of the wildfire legislation is to prevent fires and, in the alternative, "to detect, contain, and extinguish fires at their smallest possible size" (*British Columbia v. Canadian Forest Products Ltd.*, 2018 BCCA 124, at para. 236, per D. Smith J.A. for the majority [*Canfor*]). Of relevance to these appeals, section 6(2)

of the *Wildfire Act* imposes obligations on those carrying out industrial activity to prevent fires. Section 6 of the *Wildfire Regulation* imposes additional obligations on those carrying out a high risk activity which have been described as "a rising scale of precautions and restrictions proportionate to the calculated fire risk of the activity and the weather conditions" (*Canfor*, at para. 73, per Garson J.A. in partial dissent but not on these points).

[59] Section 6 of the *Wildfire Act* and section 6 of the *Wildfire Regulation* apply regardless of whether the regulated activities cause a fire. No proof of intent to cause a fire is required, but this is mitigated by the availability of the statutory defences in section 29 of the *Wildfire Act*. The burden is on the person claiming one of those defences to establish that it applies.

[60] The counterpart to the defences in sections 29(a) and (b) of the *Wildfire Act* are sections 72(a) and (b) of the *Forest and Range Practices Act*, which have been described as a codification of the common law defence of due diligence for strict liability offences enunciated in *R. v. Sault Ste. Marie*, [1978] S.C.R. 1299 [*Sault Ste. Marie*]. (see, *Pope & Talbot Ltd. v. British Columbia*, 2009 BCSC 1715, at paras. 10, 106)

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

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

[63] To much the same effect, the majority in *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510, at paras. 47-48, explained that the due diligence branch applies when the accused knew or ought to have known of the hazard, but establishes that reasonable care was taken to avoid the contravening event. The question is whether the accused took all reasonable steps in the context of the particular event. The mistake of fact branch applies when the accused establishes that they did not know, and could not reasonably have known, of the existence of the hazard in question. The Court in *Hegel v. British Columbia (Forests)*, 2011 BCCA 446, at para. 30, recognized that reasonableness is a necessary element of both due diligence and mistake of fact, and that consideration of this common factor does not amount to treating the two defences the same.

[64] Libman, at p. 7-204, explains that an honest mistake of fact is not necessarily a reasonable one excusing a strict liability offence:

> Offences involving *mens rea* provide for a defence of honest mistake of fact, since a person who honestly believes that he or she is not committing an essential element of the offence does not possess the requisite mental state necessary for a conviction.
>
> However, in the strict liability offences, the defendant must demonstrate that not only was the mistake of fact an honest one, but also that it was based on reasonable grounds.
>
> ...
>
> The mistake of fact must be "done honestly" and its reasonableness must be based on an objective standard, and not merely the subjective standard of the defendant as to what is reasonable.
>
> [Emphasis added; footnotes omitted]

Analysis

[65] It is undisputed that, subject to the defence of mistake of fact in section 29(b) of the *Wildfire Act*, the Third Parties contravened section 6(2) of the *Wildfire Act* and sections 6(2) and (3) of the *Wildfire Regulation*. It is also undisputed that Canfor intended to select the most representative weather data and to comply with the legislation. Canfor's mistake in selecting Kluskus was an honest one on which the Third Parties honestly relied, and they too intended to comply with the legislation.

[66] However, as discussed above, an honestly held belief in a mistaken set of facts is not enough to establish mistake of fact. The belief must also be reasonably held: due diligence and mistake of fact are both rooted in reasonable care. To the extent that the Third Parties submit that considerations of reasonable care are not part of a reasonably held belief in mistaken facts, their argument is unsound.

[67] The Panel finds that the proper inquiry under section 29(b) is whether the Third Parties exercised reasonable care to know the true facts relevant to selecting representative weather data to determine the Fire Danger Class rating. The adequacy and availability of data from government weather stations is not in doubt. Had the representative data been used from Chilako, the Fire Danger Class rating required harvesting operations to cease on August 4. Had the proper source of representative data been Kluskus, the Fire Danger Class rating would have allowed continued harvesting operations.

[68] In the Panel's view, the Executive Director erred in focusing her analysis almost exclusively on DNT to the detriment of analysis of the basis of 391605 BC Ltd.'s liability and the necessary factual assessment of whether 391605 BC Ltd. had established the defence in section 29(b), taking into account its involvement in the contraventions. In making this finding, the Panel notes that the Executive Director made her decisions without the benefit of Mr. Williams' evidence and the Board's arguments that were provided in these appeals.

[69] The Panel agrees with the Board that 391605 BC Ltd. and DNT were both carrying out the industrial activity and high risk activity in question; harvesting

timber in the TSL. As such, they were each obliged to comply with section 6 of the *Wildfire Act* and section 6 of the *Wildfire Regulation*. The defence in section 29(b) is also available to each of them, based on the facts of their own respective involvements in the contraventions. This not only respects the requirement of section 29 for the defence to be established by the person claiming it, it also ensures a proper assessment of the evidentiary elements of the defence when more than one person is involved in a contravention, and ensures the fair availability of the defence to each of those persons based on the facts of their respective involvements.

[70] The Panel disagrees with the Respondent's suggestion that 391605 BC Ltd. can distance itself from Canfor. The Panel agrees with the Board, and the acknowledgement of the Third Parties, that Canfor's conduct was 391605 BC Ltd.'s conduct. The Panel finds that the issue is 391605 BC Ltd.'s direct liability for contravening the legislation. The defence of mistake of fact is available to 391605 BC Ltd. but, Canfor's conduct being 391605 BC Ltd.'s conduct, the only belief 391605 BC Ltd. had in the existence of mistaken facts was Canfor's belief.

[71] As set out earlier in this decision, section 30(1) of the *Wildfire Act* provides that, "[s]ubject to section 29 [the statutory defences], if a person's contractor, employee or agent contravenes a provision of this Act or the regulations in the course of carrying out the contract, employment or agency, then the person also contravenes the provision." The Board observes that section 30(1) does not apply because the issue is not 391605 BC Ltd.'s liability for contraventions by Canfor; rather, it is whether 391605 BC Ltd. has established the defence in section 29(b). The Panel additionally notes that, even if section 30(1) also applies through the relationship between 391605 BC Ltd. and Canfor, the factual assessment of 391605 BC Ltd.'s involvement in the contraventions would be the same under section 29(b).

[72] Turning to 391605 BC Ltd.'s reliance on the defence, based upon the record before the Panel, there is little or no evidence that Canfor's error in selecting the representative weather station was reasonable. Mr. Nevidon's practice of identifying the closest station on the Canfor weather station map, and also relying on his own expertise and experience developed from living or working in the area, does not explain how those steps led him to select a weather station that was neither closest nor representative. He gives no evidence of local knowledge that he relied on, or is aware of, that was relevant to his selection of Kluskus.

[73] Mr. Montague and Mr. Nevidon attest to Canfor's internal practices and standards that have evolved over time, and the procedures that were followed in 2014. There is no indication of professional guidance. This is in contrast to the affidavit on silviculture costs of Neil Spendiff, Canfor's Silviculture Coordinator, which outlines his qualifications as a Registered Professional Forester. The Panel concludes that there is no evidence that Canfor's practices and procedures were devised or used under the guidance of forestry professionals. Only Mr. Williams' report applies professional standards to the selection of representative weather data, and assesses the adequacy of Canfor's practices and procedures for that purpose. Mr. Williams' uncontradicted evidence is that the relevant factors for determining representative weather data for the harvesting sites strongly favour

Chilako over Kluskus. No factor favours Kluskus. The hand drawn line between the two weather station zones does not seem to follow any known boundaries, and the scale of Canfor's map makes it very difficult to determine into which zone the harvesting sites fall.

[74] The Third Parties' reasoning that Mr. Nevidon could not have used proximity alone because that would have resulted in the right answer, Chilako, ignores the susceptibility of Canfor's small-scale map to error in judging the relative proximity of weather stations to the harvesting sites. Using the Canfor map to the determine a weather station on the basis of proximity alone could easily lead to selecting Kluskus, even though it is 10 kilometres farther from the harvesting sites than Chilako.

[75] Canfor's policy of using one weather station throughout harvesting in order to prevent cherry picking of stations with lower Fire Danger Class ratings does not reasonably justify failing to correct a mistaken selection.

[76] The burden is on 391605 BC Ltd. to establish the defence of mistake of fact. The Panel finds that it has not done so. The evidence does not establish that Canfor's selection of the Kluskus weather station, whether on the basis of proximity alone or in conjunction with other factors, was an exercise of reasonable care. The evidence is, in fact, overwhelming that reasonable care was not exercised. Canfor's, and 391605 BC Ltd.'s, mistake in knowing the true facts was not a reasonable one.

[77] Turning to DNT's reliance on the defence, the inquiry is the same – did DNT exercise reasonable care to know the true facts relevant to selecting representative weather data to determine the Fire Danger Class rating. The analysis is different, however, because DNT was contracted by 391605 BC Ltd. through Canfor. DNT relied on Canfor because of its long working history and DNT's belief that Canfor had the necessary skill, experience, and practices and procedures in place to select the representative weather station. DNT knew that it was operating under at least Fire Danger Class rating IV (high) from August 4, and understood the restrictions that would apply if the fire risk became Fire Danger Class rating V (extreme). Because DNT was conducting the harvesting operations, it was also a direct observer of site conditions and events relevant to fire risk.

[78] The August 6 incident report describes a fire beside the road "the size of a 1 car garage 13 m - 8 m". The weather temperature is marked as "hot". A cat operator noticed the fire during road construction and immediately controlled and extinguished it. The fire was reported to, and investigated by, DNT Supervisor Cliff Neufeld and Safety Coordinator Clint Ludwig. In their report, they determined that the fire was caused by a "possible spark from tracks or blade." The report concluded that no further investigation was needed because the fire was a very small incident that was controlled right away. Under preventative actions, it stated: "Had a safety meeting with crew and reviewed incident, reminded everyone of the fire hazard, and to watch for ground fires, pay attention to rocks on ground, bunchers cutting etc."

[79] Contractors must be vigilant to know the facts necessary to comply with forest management legislation. DNT's reliance on Canfor was honest, but did DNT

exercise reasonable care to know the relevant facts in the circumstances, particularly after the August 6 fire?

[80] The Panel agrees with the Third Parties that reasonable care did not require use of a portable weather station. Alternative sources or means of obtaining weather data and other observable on-site conditions are all relevant to reasonable care in selecting representative weather data, but the gravamen of these non-compliances is the failure to select representative weather data from amongst the government stations, and the resultant failure to comply with the applicable restrictions. Canfor is a large forest company with a well-established presence in the region. On August 6, DNT was operating under conditions of high risk and continued to do so after the small fire in Block 3. Kluskus was not the most proximate or representative weather station, but nor was it so distant to be obviously incorrect. The Panel concludes that DNT took reasonable care to know the relevant facts, and has established the defence of mistake of fact under section 29(b) of the *Wildfire Act*.

Conclusion

[81] Since DNT has established the defence of mistake of fact, the Executive Director's decision is confirmed with respect to DNT.

[82] Since 391605 BC Ltd. has not established the defence of mistake of fact, the next question is whether the common law rule against multiple convictions for the same wrongful act applies to bar any of the contraventions.

2. If the defence of mistake of fact is not established, does the common law principle barring multiple convictions for the same wrongful act shield the Third Parties from liability for any of the contraventions?

Positions of the Parties

[83] The Third Parties submit that section 6(2) of the *Wildfire Regulation* requires the Fire Danger Class rating to be determined by reference to representative weather data, whereas sections 6(2) of the *Wildfire Act* and section 6(3)(a) of the *Wildfire Regulation* prohibit harvesting when there is a risk of fire starting and spreading. They say that the law precludes liability for multiple contraventions based on the same factual and legal misconduct. Therefore, at most two contraventions can be found: section 6(2) of the *Wildfire Regulation* for failure to determine the Fire Danger Class rating by reference to representative weather data and either, but not both, section 6(2) of the *Wildfire Act* or section 6(3)(a) of the *Wildfire Regulation* for harvesting when prohibited by risk of fire.

[84] The Commission has previously concluded that the rule against multiple convictions for the same wrongful conduct does not apply to administrative contraventions of forest management legislation. The Third Parties say that those decisions did not consider judicial authority to the contrary. Further, they maintain that the previous Commission decisions reached much the same result, by shifting

the consideration of unfairness underlying the rule from the finding of contravention stage to the penalty assessment stage.

[85] The Board makes no submission on this issue.

[86] The Respondent agrees with the previous Commission decisions, and submits that there should be only one administrative penalty because there was only one wrongful act – the act of not using representative weather data.

Analysis

[87] The rule against convictions for more than one offence out of the same matter is best known from *R. v. Kienapple*, [1975] 1 S.C.R. 729 [*Kienapple*], as a criminal law expression of the common law doctrine of *res judicata*. (*Kienapple*, at pp. 748, 750-51; Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Fifth Edition (Toronto, ON: Lexis Nexis, 2018), at paras. 19.128, 19.157 ("Sopinka")) Sopinka, at para. 19.65, summarizes the rationale for the doctrine of *res judicata* as follows:

> The modern rule of estoppel by *res judicata* is grounded upon two broad principles of public policy: first, that the state has an interest that there should be an end to litigation … and, secondly, that no individual should be sued more than once for the same cause … or punished more than once for the same offence ….

[88] The *Kienapple* rule has been refined to require both the facts and the offences charged to be substantially identical. (Sopinka, at paras. 19.159-19.163, 19.175-19.178) The rule considers professional discipline – and by extension administrative contraventions under other regulatory statutes – to be distinct from criminal or provincial offences. It therefore does not bar contraventions in relation same conduct being found in both an administrative proceeding and an offence proceeding. (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at paras. 27-28)

[89] The Panel disagrees with the Respondent that there was only one wrongful act in this case. The Panel agrees with the Third Parties that section 6(2) of the *Wildfire Regulation* has different legal elements than section 6(2) of the *Wildfire Act* and section 6(3)(a) of the *Wildfire Regulation*. The questions at hand are whether the *Kienapple* rule applies to administrative contraventions of the wildfire legislation and, if so, whether it bars contravention orders under both section 6(2) of the *Wildfire Act* and section 6(3)(a) of the *Wildfire Regulation*.

[90] Although legislation may supplant the common law, the principles of statutory interpretation presume that legislatures respect the common law and do not intend to interfere with it except in clear language. The force of this presumption may be affected by the area of law and type of legislation involved. Comprehensive regulatory schemes (such as forest management legislation) are more likely to be treated as complete codes that are not derived from or dependent upon common law. (R. Sullivan, *Sullivan on the Construction of Statutes*, Sixth Edition (Markham, ON: Lexis Nexis, 2014), at paras. 17.4-17.9)

[91] Previous Commission decisions have rejected the applicability of the *Kienapple* rule to contraventions under the *Forest Practices Code*, R.S.B.C. 1996, c.

159, or its successor the *Forest and Range Practices Act*: see, *International Forest Products Limited v. Government of British Columbia* (Appeal No. 96/02(b), March 19, 1997) [*Interfor*]; *Hayes Forest Services Limited v. Government of British Columbia* (Appeal No. 1997-FOR-07, February 4, 1998) [*Hayes*]; *Slocan Forest Products Ltd. v. Government of British Columbia* (Appeal No. 1997-FOR-23, March 20, 1999) [*Slocan*]; *Canadian Forest Products Ltd. v. Government of British Columbia* (Appeal No. 1998-FOR-09, May 5, 1999) [*Canfor #2*]; and *McBride Community Forest Corporation v. Government of British Columbia* (Decision No. 2014-FRP-002(a), June 1, 2015) [*McBride*]. The basis of these decisions is that the integrated scheme of overlapping general and specific prohibitions in forest management legislation displaces the common law, and that the unfairness of imposing multiple penalties for the same act and legal wrong is, instead, taken into account at the penalty assessment stage.

[92] *Interfor*, *Slocan*, *Hayes* and *Canfor #2* involved contravention of a provision relating to specific conduct that was necessarily also a contravention of a more general provision, such as a general requirement for activities to be carried out in compliance with the legislation. *McBride* endorsed the previous Commission decisions regarding the inapplicability of the *Kienapple* rule to administrative contraventions, but found that unauthorized cutting and removing of Crown timber were not overlapping provisions because they involved different wrongful acts.

[93] These Commission decisions did not consider judicial decisions that applied the *Kienapple* rule to disciplinary proceedings against professionals. The leading case of *Carruthers v. College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 (Div. Ct.) [*Carruthers*], has been applied in *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253, at para. 63, *Danyluik v. Institute of Chartered Accountants of Alberta*, 2014 ABCA 78, at para. 20, and *Macdonald v. Institute of Chartered Accountants of British Columbia*, 2010 BCCA 492, at para. 55. The basis of these decisions is the presumption against interference with the common law in the absence of clear legislative language. Interpreting *Kienapple* narrowly, as required, none of these decisions found that the multiple disciplinary charges at issue, in fact, offended the rule.

[94] *Carruthers* explained the common law principle with reference to both contraventions and penalties:

> … the rule against multiple convictions, the *Kienapple* principle, applies in disciplinary proceedings taken against members of a self-regulated profession. The rule erects no bar to a multiplicity of findings of guilt, each recorded in respect of a different factual event. What it seeks and does do, however, is to bar multiple findings of guilt where the same or substantially the same elements make up the offence. There would seem [to be] no reason in principle to permit the application of the doctrine in respect of "regulatory" offences under provincial law, yet deny it to members of self-regulated professions in the case of prosecutions for alleged misconduct. … There can be no quarrel with the proposition that a registrant/member ought [to] be held liable for each breach of the governing rules of the profession. No one, however, should be twice punished for same delict or matter. ….

[95] *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56, at paras. 90-94, acknowledged that the *Kienapple* rule may be addressed on a practical basis at the contravention stage, or by concurrent sentencing, as both lead to one penalty for one wrongdoing. The rule was not offended in *Merchant* because the Law Society found Merchant guilty on two counts with different essential elements and, in any case, imposed concurrent, not consecutive, penalties for those contraventions.

[96] Does the wildfire legislation supplant the applicability of the *Kienapple* rule? In the Panel's view, section 53 of the *Wildfire Act*, read together with sections 26 to 28, indicates that the legislature put its mind to the rule and chose to supersede it, but only partly.

[97] Section 53 restricts the Respondent from undertaking both offence and administrative penalty proceedings for the same contravention:

Limitation on proceedings

53(1) The government may not proceed under this Act with both an offence and an administrative penalty for the same contravention.

(2) Subsection (1) does not derogate from the government's ability to make an order respecting compensation or remediation.

[98] This section extends the rule across *offence* and *administrative penalty* proceedings in respect of the same contravention, with the exception of proceedings for compensation or remediation orders. Since a contravention order under section 26 is a precondition to a cost recovery or remediation order under section 27 or 28, section 53 necessarily permits the finding of duplicative contraventions between offence proceedings and administrative proceedings where administrative cost recovery or remediation orders are involved.

[99] Paraphrasing from *Carruthers*, there is no reason in principle for the rule to apply to regulatory offences but not to apply to administrative contraventions. Since the *Wildfire Act* is otherwise silent on the applicability of *Kienapple* rule, the inference is that the common law is not altered or precluded in relation to multiple offence convictions or multiple administrative contraventions. In the absence of clear statutory language, the Panel finds that there is no reason to confine the rule to the penalty assessment stage of administrative proceedings.

Conclusion

[100] The Panel concludes that the common law rule barring multiple convictions for the same wrongful conduct applies to administrative contraventions under the *Wildfire Act*.

[101] Since the contraventions of section 6(2) of the *Wildfire Act* and section 6(3)(a) of the *Wildfire Regulation* relate to the same wrongful conduct, there will be a contravention order in respect of only the more specific provision. The Panel finds that 391605 BC Ltd. contravened section 6(2) of the *Wildfire Regulation* by failing to determine the Fire Danger Class rating by reference to representative weather data, and section 6(3)(a) of the *Wildfire Regulation* by carrying out harvesting in

the TSL while prohibited by the applicable restriction in Schedule 3 of the *Wildfire Regulation*.

3. If the defence of mistake of fact is not established, are administrative penalties warranted and in what amounts? Are orders warranted for timber damage and destruction and reforestation costs and, if so, in what amounts?

Parties' Positions

[102] The Board seeks an administrative penalty not exceeding a total of $10,000, and an order for payment of an amount equal to the dollar value of timber damaged or destroyed, along with expected reforestation costs. It takes no position on quantification of those amounts.

[103] The Respondent seeks no recovery for the value of damaged or destroyed timber, and requests that an administrative penalty and re-forestation costs be remitted to the Executive Director for determination.

[104] The Third Parties submit that no administrative penalty should be levied or, alternatively, it should be no more than $5,000 for each contravention. They oppose an order for recovery of the value of damaged or destroyed timber. They also oppose an order for the recovery of re-forestation costs on the basis that the Respondent provided insufficient evidence to the Executive Director or, alternatively, that a lesser amount should be ordered.

Analysis

[105] There will be no order for recovery of the value of damaged or destroyed Crown timber under section 27(1)(c) of the *Wildfire Act* because the Respondent is seeking none.

[106] The Panel agrees that the appropriateness and quantification of an order for re-forestation costs under section 27(1)(c.1) should be remitted to the Executive Director, where the parties may refine and supplement their evidence and positions as necessary.

[107] The determination of an administrative penalty need not be remitted to the Executive Director because the appeal record is sufficiently developed on that issue. Section 27(1)(a) of the *Wildfire Act* confers discretion to levy an administrative penalty not exceeding a prescribed amount ($100,000 per relevant contravention). Before levying an administrative penalty, section 27(3) establishes a list of required considerations:

(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.

[108] The Panel accepts that 391605 BC Ltd. had no contraventions of a similar nature and that the contraventions in this case were not deliberate.

[109] The Third Parties submit that the contraventions were not repeated or continuous. Continuous implies a process or event that continues over a period of time. In the Panel's view, the contraventions did have a continuous quality because harvesting was carried out on the basis of non-representative weather data from July 28 to August 11, and the harvesting continued when restricted or prohibited by the applicable restriction from August 1 to 11.

[110] The Third Parties submit that they obtained no economic benefit from the contraventions because the fire destroyed the timber harvested on August 11, as well as the remaining standing timber in the TSL. Further, they submit that the Respondent received full stumpage payable on the TSL, notwithstanding that a significant part was consumed by the fire. The Panel notes, however, that this submission does not address economic benefit to 391605 BC Ltd. from the harvesting and removal of timber from the sites during the August 1 to 10 period of non-compliance.

[111] The Third Parties submit that the gravity and magnitude of the contraventions were relatively low because they were not indifferent, were aware of their obligations, intended to comply and believed that they did. In the Panel's view, consideration of the factor of honesty falls under whether the contraventions were deliberate; the prime consideration under this heading is the seriousness of the contraventions for forest management and public safety. Use of representative weather data is a linchpin requirement for determining fire risk and avoiding wildfires. Non-compliance with that requirement, and continued harvesting when prohibited, are serious contraventions.

[112] The Panel accepts that the Third Parties cooperated with the extinguishment of the fire and the Respondent's investigation. The value of 391605 BC Ltd.'s cooperation with the investigation was limited, however, by the non-cooperation of its agent, Canfor. According to the record of proceeding before the Executive Director, Canfor declined to allow Mr. Nevidon to be interviewed, and provided almost completely non-responsive written answers to the investigator's questions about how and who determined the Fire Danger Class rating for the harvesting sites (See Case Report, Appendix A, Investigation Chronology, September 28, 2015, and Appendix I20, Canfor Correspondence, February 19, 2016).

Conclusion

[113] Weighing the relevant factors, the Panel finds that an administrative penalty should be levied in the amount of $10,000; $5,000 for each contravention.

DECISIONS AND ORDERS

[114] In making this decision, the Panel has fully considered all of the evidence and submissions made, whether or not specifically referred to in this decision.

[115] Based upon the findings above, the Panel's decision is as follows.

[116] Under section 26 of the *Wildfire Act*, the Panel orders that, with respect to TSL A91168:

(1) between July 28 and August 11, 2014, 391605 BC Ltd. contravened section 6(2) of the *Wildfire Regulation* by failing to determine the Fire Danger Class by reference to representative weather data for the area; and

(2) between August 4 and 11, 2014, 391605 BC Ltd. contravened section 6(3)(a) of the *Wildfire Regulation* by harvesting while prohibited from carrying out high risk activity by the applicable restriction in Schedule 3 of the *Wildfire Regulation*.

[117] Under section 27(1)(a) of the *Wildfire Act*, the Panel orders 391605 BC Ltd. to pay an administrative penalty of $5,000 in respect of each contravention.

[118] The issue of compensation payable by 391605 BC Ltd. for re-forestation costs is remitted to the Executive Director for determination on the record of proceeding on these appeals, plus such other evidence and submissions as the Executive Director permits.

[119] The defence of mistake of fact has been successfully established with respect to Appeal 2017-WFA-005 relating to DNT. Accordingly, that appeal is dismissed.

[120] Appeal 2017-WFA-006 relating to 391605 BC Ltd. is allowed.

"Susan E. Ross"

Susan E. Ross, Panel Chair
Forest Appeals Commission

October 2, 2018