

CANADA / JUDGMENT

British Columbia v. Tolko Industries Inc.

2022 BCSC 2097

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Supreme Court of British Columbia

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2022 BCSC 2097 British Columbia v. Tolko Industries Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia v. Tolko Industries Inc.,

2022 BCSC 2097

Date: 20221202

Docket: S215797

Registry: Vancouver

Between:

His Majesty the King in the Right of the Province of British Columbia

APPELLANT

(Plaintiff)

And

Tolko Industries Inc. and Forest Appeals Commission

RESPONDENTS

(Defendants)

- and -

Docket: S221167

Registry: Vancouver

Between:

His Majesty the King in the Right of the Province of British Columbia

PETITIONER

And

Tolko Industries Ltd. and Forest Appeals Commission

RESPONDENTS

Corrected Judgment: The text of the judgment was corrected on the front page on December 7, 2022 and further corrected on March 28, 2023.

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

In Chambers

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Place and Dates of Hearing:

Vancouver, B.C.

April 19-21, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2022

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Introduction

- [1] The appellant/petitioner (the "Province") brings this appeal and judicial review concerning a decision of the Forest Appeals Commission (the "Commission") to set aside a cost recovery order imposed on the respondent, Tolko Industries Ltd. ("Tolko"), for one of four wildfires caused by its timber harvesting operations.
- [2] Timber harvesting results in a significant amount of debris piled alongside a forest road for subsequent disposal by burning, usually in winter. Occasionally, "holdover fires" occur when debris piles continue to smoulder underground after a debris pile fire appears to be extinguished.
- [3] Tolko burned approximately 65,000 debris piles in the 2015/2016 harvesting season. In four instances, holdover fires smouldered under the snow-covered ground from six weeks to five months and triggered active fires in the spring of 2016. Of the four fires that were reported to the BC Wildfire Service ("BCWS") during April 2016, one escaped the cutblock of Tolko's harvesting operations and caused a large wildfire over 398 hectares, referred to as the Second Nazko Fire.

- [4] The Deputy Fire Centre Manager, Coastal Fire Centre, acting as a delegated decision maker (the "Decision Maker") on behalf of the Minister of Forests, Lands Natural Resource Operations and Rural Development (the "Minister"), found that Tolko contravened the Wildfire Act, S.B.C. 2004, c. 31 (the "Act") and the Wildfire Regulation, B.C. Reg. 38/2005 (the "Regulation") (together, the "Wildfire Scheme"), imposed an administrative penalty of \$15,000 for all contraventions, and issued a cost recovery order (including fire suppression costs of \$343,495.20) for the Second Nazko Fire.
- [5] On appeal by Tolko, the Commission determined that Tolko was exempt from paying the government's fire suppression costs pursuant to s. 29 of the Regulation. Section 29 provides in part that the minister may not order a person to pay fire control costs where the person, "through their acts or omissions, did not wilfully cause or contribute to the start or spread of the fire, and (b) the fire that gives rise to the government's costs results from" certain specified activities including "timber harvesting" or "silviculture treatments" by a licence holder who is not in annual rent arrears [emphasis added.] In its ruling applying the exemption in s. 29 from the ministerial power to make a cost recovery order, the Commission interpreted "the fire" in s. 29(b) of the Regulation as meaning a wildfire (a term not defined in the Act or the Regulation that would appear to connote a larger, destructive and initially uncontrolled forest fire) and not the burn pile fires lit by Tolko. It also found that the wildfire (the Second Nazko Fire) resulted from timber harvesting or silviculture treatment.
- [6] The Province seeks to set aside the Commission's decision. By consent of the parties, the appeal and the judicial review were heard together.
- [7] The Province submits the Commission incorrectly interpreted s. 29 of the Regulation, by finding that the term "fire" in that section meant only the ensuing wildfire and not the debris pile fires lit by Tolko's contractors that caused the wildfire. The Province further submits that the result of the Commission's decision is to undermine the Act and the Regulation because unless a person starts a wildfire intentionally, fire control costs will not be recoverable. Finally, the Province submits that the Commission erred in its interpretation of the terms "timber harvesting" and "silviculture treatments" that permitted the application of the exemption.
- [8] Tolko submits that, to the extent the decision is reviewable, this appeal turns on whether the Commission properly found that Tolko's debris pile burning operations fell within the range of forestry activities contemplated by s. 29(b) of the Regulation. If it did, Tolko says there is no basis on which to withhold the cost recovery exemption. Tolko also submits that the Province is essentially criticizing the Commission's findings of fact and its application of the statutory framework under the guise of a question of law to ground a statutory appeal. In any event, Tolko submits that the Commission's findings are well-supported. Tolko submits that the Province's appeal, and its application for judicial review, ought to be dismissed.

- [9] For its part, the Commission took no position on the merits of the decision but made submissions about the context in which the Commission operates, the role of the court in reviewing its decisions, and the standards and methodology for applying them.
- [10] For the reasons that follow, I find that the Province has raised a question of law based upon the proper interpretation of s. 29 of the Regulation: (a) whether or not lighting a debris pile fire is a willful cause or contribution to the start or spread of the "fire"; and (b) whether or not debris pile burning is part of "timber harvesting" or "silviculture treatments." I conclude that the Commission fell into a reviewable error in interpreting the Regulation and that its decision exempting Tolko from a cost recovery order must be set aside.

The Wildfire Scheme

- [11] As the applicable legislative provisions are central to this matter, I will begin with a brief review of the relevant sections of the Act and the Regulation.
- [12] The Act provides a comprehensive regulatory scheme for preventing and controlling forest and grassland fires. It also prescribes a mechanism for the Minister to recover costs and penalties from anyone who contravenes the Act or the Regulation.
- [13] Sections 6 and 10 of the Act ground the penalties assessed against Tolko. Section 6 provides:

Industrial activities

6 (1) Except in prescribed circumstances, a person carrying out an industrial activity must not light, fuel or use an open fire in forest land or grass land or within 1 km of forest land or grass land.

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

- (a) at a time, and
- (b) in a manner

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

(3) If, except in the prescribed circumstances referred to in section 5 (1) or subsection (1) of this section, a fire starts at, or within 1 km of, the site of the industrial activity, the person carrying out the industrial activity must

- (a) immediately carry out fire control and extinguish the fire, if practicable,
- (b) continue with fire control for the fire until
 - (i) the fire is extinguished,
 - (ii) it becomes impracticable to continue with fire control, or
 - (iii) an official relieves the person in writing from continuing,

- (c) as soon as practicable, report the fire as described in section 2, and
 - (d) in accordance with prescribed requirements, rehabilitate the land damaged by fire control carried out by the person.
- [14] Section 10(1)(a) and (b) of the Act provides an appropriate official with broad discretionary authority to make an order restricting, in a specified area, the lighting of new fires and requiring existing fires to be extinguished.
- [15] Section 7 of the Act requires a person carrying out an industrial activity under s. 6 to conduct fire hazard assessments and abate fire hazards.
- [16] Section 25 of the Act provides that the Province may recover fire control costs on Crown or private land and prescribed categories of leases; s. 26 of the Act grants authority to make contravention orders; and s. 27 of the Act provides the authority for the Minister to levy administrative penalties and sets out a cost recovery scheme.
- [17] The key provision relevant to this appeal is s. 29 of the Regulation. It provides for an exemption from the Minister's power to impose a cost recovery order in certain circumstances (the phrases that form the basis of the Province's appeal are underlined):

Circumstances for not seeking cost recovery

29 The circumstances in which the minister, under section 25 (2) or 27 (1) (d) of the Act, may not by order require a person to pay to the government the government's fire control costs determined under section 25 (1) (a) or 27 (1) (b) of the Act are that the person, through their acts or omissions, did not willfully cause or contribute to the start or spread of the fire, and

- (a) before the government has carried out fire control for the fire that gives rise to the government's costs,
 - (i) the person has entered into a wildfire response agreement with the government,
 - (ii) the agreement is in effect at the time of the fire, and
 - (iii) any failure of the person to act in accordance with the agreement did not directly or indirectly cause or contribute to the start or spread of the fire, or
- (b) the fire that gives rise to the government's costs results from timber harvesting, silviculture treatments, road construction, road maintenance or road deactivation by a person who
 - (i) is the holder of an agreement or licence under the Forest Act, and
 - (ii) as of the date of the fire, is not in arrears for the annual rent payable for the agreement or licence under the Annual Rent Regulation, B.C. Reg. 122/2003.

[Emphasis added.]

- [18] Hence, pursuant to s. 29(b) of the Regulation, the Minister may not require a person to pay the government's fire control costs if the person, through their acts or omissions, did not willfully cause or contribute to the start or spread of the fire, and the fire that gave rise to the government's fire control costs resulted from timber harvesting, silviculture treatments, or other defined activities by a person holding an agreement or licence under the Forest Act and who is not in arrears for the annual rent payable for the agreement or licence. There is no dispute that Tolko's antecedents qualify it as such a "person." The main disagreement rests on the proper interpretation of the underlined words in the circumstances.

Circumstances

- [19] The following background is based upon the parties' summaries of the evidence before the Commission.
- [20] Tolko is a privately-owned integrated forest products company headquartered in Vernon, BC. Tolko's lumber products manufacturing operations in B.C. include three mills in the Cariboo Forest Region and five mills elsewhere in B.C. The Cariboo Forest Region includes both the Quesnel and Cariboo-Chilcotin Forest Districts.
- [21] Tolko harvests between 15,000 to 20,000 hectares of forest land in the Cariboo Forest Region alone. In 2016, Tolko harvested approximately 2.4 million cubic meters of timber to maintain operations at its three mills in this region.
- [22] Tolko's logging operations are governed by timber harvesting agreements and forest licences under the Forest Act, R.S.B.C. 1996, c. 157. The Forest Act requires Tolko to pay the annual rent set out in the Annual Rent Regulation, B.C. Reg. 122/2003, which includes a fire preparedness levy.
- [23] Tolko is required by the Wildfire Scheme to abate hazards created by its logging operations. Tolko has regularly abated the hazards created by its logging operations by burning roadside debris piles as part of its logging operations.
- [24] Tolko's operations span from initial planning, road construction, cutting, limbing, and topping of felled timber to debris piling, debris disposal, road deactivation, grass seeding, and tree planting.
- [25] Roadside logging is a clear-cut harvesting process which utilizes a road system constructed within each of the cutblocks to be logged. About 98 percent of the approximately 65,000 debris piles burned by Tolko in the 2015/2016 burn season were generated through roadside logging operations.
- [26] Tolko begins harvesting once it receives cutting permits from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). Felled trees are dragged with a skidder from where they were cut down to work areas along the roads within the cutblock. A cutblock is a specific area of land with defined boundaries which has been authorized for harvest.

- [27] At those work areas, a processor machine picks up each tree individually, knocks off limbs, bucks the tree into log lengths according to Tolko's mill specifications, and bucks off tops less than 4.5 inches in diameter. The processor operator also assesses the tree and cuts out the rot, crook, and other defects that prevent a log from being processed into lumber. This is the debris that eventually makes up the debris piles.
- [28] Once the processor has bucked the trees, a log loader is used to load the logs onto logging trucks. While the loader waits for the next logging truck to arrive, the loader collects debris into a pile.
- [29] In 2016, the debris piling process was governed by Tolko's 2011 Piling of Logging Debris Standard Operating Procedures, and enforced by Tolko's harvesting supervisors. A Tolko harvesting supervisor may require a harvesting contractor to re-pile an area based on daily or weekly inspections.
- [30] Responsibility for disposing of logging debris has historically been shared by Tolko's harvesting and silviculture groups. Log harvesting creates debris that must be disposed of in order to abate the fire hazard of leaving fuel in the bush.
- [31] Silviculture treatments require disposing of logging debris in order to clear land for new trees to be planted. Each hectare logged will generate approximately three to four roadside debris piles. A kilometer of cutblock road typically services 30 hectares of forested land, which means that each kilometer may have between 90-120 roadside debris piles.
- [32] A typical debris pile is about 7 metres high, 10 metres wide, and 10-30 meters long.
- [33] The forest industry regards burning as a standard, cost-effective method of disposing of logging debris and preparing a site for replanting.
- [34] Before burning the roadside debris piles in question, Tolko received a burn registration number from the Ministry, which authorizes debris pile burning on particular cutblocks between specified dates.
- [35] Tolko hires burn contractors to conduct their debris pile burning operations. Tolko's burn contractors typically burn between 30,000 and 120,000 debris piles each burn season in the Cariboo Forest Region. The burn season starts in the late fall and winter months because winter conditions provide at least three to four inches of snow.
- [36] During the 2015/2016 winter season, these burn contractors went through areas Tolko had logged and lit the roadside debris piles, as permitted by the burn registration numbers. The Commission accepted that Tolko had a valid burn registration number when all of its debris piles were lit.
- [37] A holdover fire is a dormant fire that continues to smolder underground for weeks or even months with limited oxygen and no detectible smoke or smell. A "hotspot" is heat detected in the remains of a burnt debris pile indicating the presence of a holdover fire.

- [38] A holdover fire or hotspot can be covered by snow and even once the snow melts, there may not be visible signs of a holdover fire.
- [39] Holdover fires do not start to smoke until just before they ignite. Ignition of a holdover fire requires a number of factors to come together to create the right conditions.
- [40] The weather conditions in spring 2016 were warmer and drier than prior years in the Cariboo Forest Region. Warm temperatures and early snow melt occurred at the end of March and beginning of April 2016, which was unusual.
- [41] During the 2015/2016 burn season, Tolko had been operating under its 2011 Slash Management Standard Operating Procedures (the "Slash SOP") for several years, which contained specific precautions aimed at reducing the risk of fire spreading beyond the intended burn radius. A representative of Tolko testified at the hearing before the Commission that Tolko had not experienced any holdover fires in roadside debris piles between 2011 and 2016. However, the Commission concluded that there was insufficient evidence for it to find that Tolko had no holdover fires in its roadside debris piles between 2011 and 2016.
- [42] Consistent with industry practice, the Slash SOP did not require contractors to come back to all burn sites to check for possible holdover fires. The Slash SOP included various precautions designed to attenuate the risk of a holdover fire.
- [43] In April 2016, four fires were reported on Tolko's cutblocks in the Cariboo Forest Region. These fires were defined in the proceedings below as the First Nazko Fire, the Second Nazko Fire, the Dash Creek Fire, and the Bishop Lake Fire. The table below summarizes the key information with respect to each of these fires.

Name

Debris pile burn date

Burn reg'n no. expiry date

Wildfire discovery date

Description

First Nazko Fire

Feb. 21, 2016

Feb. 28, 2016

Apr. 2, 2016

Burned 0.73 hectares; did not escape cutblock

Second Nazko Fire

Feb. 21, 2016

Feb. 28, 2016

Apr. 8, 2016

Escaped cutblock and burned 398 hectares

Dash Creek Fire

Mar. 12 and Apr. 1-2, 2016

Apr. 4, 2016

Apr. 18, 2016

Burned 2 hectares; did not escape cutblock

Bishop Lake Fire

Dec. 3, 2015

Feb. 28, 2016

Apr. 26, 2016

Did not expand beyond debris pile itself

- [44] As the table above illustrates, the length of time between the debris pile burn date and the discovery of the wildfires varied significantly. The Bishop Lake fire was ignited by a holdover fire that remained dormant under snow-covered ground for almost five months. The Second Nazko Fire was ignited by a holdover fire that was dormant for more than six weeks. That fire is the only wildfire for which the government sought cost recovery against Tolko.
- [45] The Second Nazko Fire was reported on April 8, 2016. The Commission accepted that unseasonably dry weather was a major factor in the ignition and spread of the Second Nazko Fire. Based on the Nazko weather station data, the temperature reached 20.6 degrees Celsius on April 8, 2016 and the relative humidity dropped suddenly from 38 percent on April 7 to just 14 percent on April 8. The evidence indicated that when the relative humidity drops below temperature, it creates the potential for extreme fire behaviour.

The Determination by the Delegated Decision Maker

- [46] On June 6, 2016, the Ministry advised Tolko by letter that it was investigating the 2016 wildfires and considering the possibility that Tolko's debris pile burning activities may have contravened the Wildfire Scheme.

- [47] On January 7, 2019, Tolko was advised that the Ministry had completed its investigation and that it had evidence that Tolko may have contravened the Act and Regulation. Tolko was given an "an opportunity to be heard" pursuant to ss. 25 and 26 of the Act, and a hearing was held on March 1, 2019 before the Decision Maker.
- [48] On April 1, 2019, the Decision Maker made the determination that Tolko had violated the Act and the Regulation.
- [49] The Decision Maker found that Tolko contravened s. 6(1) of the Act in relation to all four wildfires by lighting, fueling, or using category 3 open fires in forest land or within 1 km of forest land while carrying out an industrial activity.
- [50] The Decision Maker went on to conclude that Tolko failed to comply with the Regulation by failing to: take all necessary precautions to ensure the fire was contained in the burn area; establish a fuel break around the burn area or each debris pile; and maintain a fuel break while the fire was burning and there was a risk of the fire escaping.
- [51] The Decision Maker also found that Tolko contravened s. 10(4) of the Act in relation to three of the wildfires (not the First Nazko Fire) by failing to comply with the April 4, 2016 order made by the BCWS prohibiting category 3 open fires (the "Order"). The Decision Maker concluded that each of the debris piles that gave rise to the Second Nazko Fire, Bishop Lake Fire, and Dash Creek Fire met the definition of a category 3 open fire that ought to have been extinguished by noon on April 4, 2016, as required by the Order. Each of those three debris piles contained a holdover fire after April 4, 2016.
- [52] The Decision Maker found that Tolko contravened s. 22(2) of the Regulation in relation to the three wildfires set out in the preceding paragraph because it failed to extinguish the debris piles by the dates specified in their applicable burn registrations. The Decision Maker additionally found that Tolko contravened s. 22(3) of the Regulation in relation to the Second Nazko Fire, "when [the fire] escaped the boundary of the cutblock on which it originated."
- [53] In addition to the \$15,000 administrative penalty for the contraventions, the Decision Maker considered the circumstances set out in s. 29 of the Regulation for not seeking recovery of the government's fire control costs.
- [54] As noted, pursuant to s. 29 of the Regulation, the Minister may not require a person to pay the government's fire control costs if the person, through their acts or omissions, did not willfully cause or contribute to the start or spread of the fire, and the fire that gave rise to the government's fire control costs resulted from timber harvesting, silviculture treatments, road construction, road maintenance, or road deactivation by a person holding an agreement or licence under the Forest Act and who is not in arrears for the annual rent payable for the agreement or licence.

- [55] The Decision Maker concluded that Tolko did not willfully cause or contribute to the start or spread of the fire, was the holder of an agreement under the Forest Act, and was not in arrears for annual rent.
- [56] However, the Decision Maker found that Tolko's debris pile burning was for hazard abatement, and therefore, the exception in s. 29 did not apply. The Decision Maker concluded that debris pile burning for the purposes of hazard abatement was not part of Tolko's timber harvesting or silviculture operations.
- [57] In the result, the Decision Maker issued a cost recovery order in relation to the Second Nazko Fire that burned 398 hectares. The order required Tolko to pay the following:
- a) the government's fire control costs of \$343,495.20;
 - b) \$84,937 for the value of Crown timber and other forest land resources that were damaged or destroyed as a result of the contraventions; and
 - c) \$46,223 for the government's cost of reforestation and silviculture to re-establish free growing trees on the burned area.

The Review by the Forest Appeal Commission

General Findings of the Commission

- [58] Tolko appealed the Decision Maker's decision to the Forest Appeal Commission.
- [59] Before the appeal was heard, Tolko applied to the Commission for further document disclosure from the Province. The Province was ordered to produce cost recovery orders involving any analysis of s. 29 of the Act and s. 29 of the Regulation issued while the Province was authorized to issue cost-recovery orders under the Act, up to April 1, 2019. Approximately twenty decisions were disclosed. The Province points out that these decisions were made by lower decision makers and are not binding on the Commission.
- [60] On appeal, Tolko argued that: (a) it did not contravene the Act and the Regulation; (b) if it did, it was duly diligent when it lit the burn piles at issue, and relied on a mistake of fact, and should therefore be relieved of liability; and (c) it was engaged either in timber harvesting or silviculture at the time the fires were sparked, and therefore its actions fell within s. 29 of the Regulation.
- [61] As noted above, the Commission largely confirmed the Decision Maker's findings, except in relation to the s. 29 cost recovery order, which it set aside.
- [62] The Commission found as a fact that the debris pile fires Tolko lit gave rise to the wildfires in question:
- [70] The Panel therefore agrees with the submission of the Respondent. The fires lit in Roadside Debris Piles by Tolko's burn contractors continued to burn as holdover fires that subsequently spread to become the Wildfires. Each Roadside Debris Pile contained one "fire"

throughout, for purposes of determining the contraventions of section 6(1) and 10(4) of the Act and sections 22(2) and 22(3) of the Regulation. Accordingly, the Panel concludes that the various contraventions are addressing the fires lit at each of the Roadside Debris Piles in question, which ultimately gave rise to the Wildfires.

[63] The Commission concluded that Tolko contravened s. 6(1) of the Act by failing to comply with the Regulation:

[165] The Panel finds, based on the evidence before it in this appeal, that Tolko did not comply with section 22(1)(d) of the Regulation in relation to the Roadside Debris Pile burns that caused the First and Second Nazko and Dash Creek Fires, and therefore, did contravene section 6(1) of the Act in relation to each of those Wildfires.

[168] Section 22(2)(b) of the Regulation required Tolko to ensure that the Roadside Debris Pile fires in question were extinguished by the expiration date specified in the Burn Registration. The DDM found that Tolko contravened section 22(2) of the Regulation when it failed to extinguish category 3 open fires by the DECISION NO. 2019-WFA-002(b) date specified in its burn registration numbers. While the DDM did not specifically say so, the Panel reads this finding of the DDM to be that Tolko contravened subsection 22(2)(b) of the Regulation. The Respondent has not submitted that compliance by Tolko with subsection 22(2)(a) of the Regulation is in issue on this appeal, and the Panel makes no findings in that regard

[173] All of the Wildfires were reported to the BCWS as burning on dates in April 2016. Those dates were after the expiry dates of the applicable Burn Registrations, as is clear from the chart above. The Panel has found, above, that each Roadside Debris Pile contained one "fire" throughout, for purposes of determining the contraventions of section 6(1) and 10(4) of the Act and sections 22(2) and 22(3) of the Regulation.

[174] In result, the Panel finds that Tolko contravened section 22(2)(b) of the Regulation in relation to all four Wildfires.

[Emphasis added.]

[64] The Commission then found that Tolko had not made out either of the statutory defences. Specifically, the Commission found that Tolko had not made out a defence of mistake of fact and did not exercise due diligence.

[65] In rejecting a defence of mistake of fact, the Commission found as follows:

[247] The Panel finds on the evidence that after the Roadside Debris Piles in question were lit by the burn contractors and they submitted their Burn Reports to Tolko, it took no steps to confirm that the Roadside Debris Pile fires were extinguished other than to designate those Roadside Debris Piles for scanning (except the Bishop Lake Debris Piles lit in December

2015). The Panel rejects Tolko's assertion that it could not reasonably have known of the existence of the holdover fires, having not taken appropriate steps to confirm its assumption that the fires were no longer burning. Mr. Blackwell's opinion evidence was that Tolko could have hired its burn contractors to return to a representative sample of the burn sites periodically to confirm whether the fires were extinguished. Tolko could have initiated its scanning program earlier than it did. Tolko also could have conducted cold trailing in a timely manner or could have required its contractors to do so. However, the evidence is that Tolko did not undertake these reasonable steps, or others, to confirm its assumption that there were no holdover fires in the debris piles. Tolko has accordingly failed to establish a mistake of fact defence.

[66] In rejecting a due diligence defence, the Commission held as follows:

[252] The Panel has found that Tolko knew or ought to have known of the holdover fire hazard in its Roadside Debris Piles. The question remains as to whether Tolko has established that it exercised due diligence by taking all reasonable steps to avoid the hazard that led to the Contraventions.

[261] Based on the evidence, the Panel finds that Tolko's standard practices as well as its Slash Management SOP procedures covering its Roadside Debris Pile burns, up to and including the "active burning phase" of this activity, were directed at reducing the risk of holdover fires. Its objectives of building clean piles and lighting those piles in conditions conducive to achieving a complete burn are consistent with an intention to reduce holdover fire risk. The burn contractors made it clear they would not light piles if they contained too much dirt, and that they did their best to achieve a hot, clean burn. The Panel is satisfied that Tolko took reasonable steps to ensure the effective operation of its systems through the "active burning phase" of this activity.

[304] Based on the forgoing analysis, the Panel finds that Tolko has failed to establish that it exercised due diligence. The systems it used to prevent the risk of holdover fires causing wildfires were insufficient to establish a defence of due diligence, as were the steps it took to ensure the effective operation of those systems. Tolko's compliance with its Slash Management SOP generally, and particularly the scanning procedures, did not reach the threshold for a finding of due diligence.

The Commission's Interpretation of "Fire" in the Regulation

[67] The Commission found that Tolko caused the debris pile fires in issue, contravened ss. 6(1) and 10(4) of the Act, and could not rely on the statutory defences to the strict liability offence created through the Wildfire Scheme. Nevertheless, the Commission found that Tolko was exempt from a cost recovery order by virtue of s. 29 of the Regulation.

[68] The Commission held that the "fire" addressed by s. 29 of the Regulation was the Second Nazko Fire, not the original roadside debris pile fires:

[335] Based on the Panel's analysis regarding the meaning of the word "fire" in this context, the Panel finds that the fire being addressed by section 29 of the Regulation was the Second Nazko Fire fought by the BCWS as a wildfire that an official considered endangered life or threatened forest land as provided for under section 9 of the Act. It is not the original Roadside Debris Pile fires lit by Tolko's burn contractor on February 21, 2016.

[Emphasis added.]

[69] Earlier in its reasons, the Commission found for the purposes of s. 22 of the Regulation that there was no distinction between the debris pile fires and the resulting wildfire:

[192] The Panel finds on the evidence that the Second Nazko Fire did escape for purposes of section 22(3) of the Regulation. The Panel has already found that, for the purposes of all the contraventions being faced by Tolko, including section 22(3) of the Regulation, there is no distinction to be drawn between the Roadside Debris Pile fires, the associated holdover fires that caused the Second Nazko Fire, and that Wildfire itself.

[Emphasis added.]

[70] The Commission acknowledged that its interpretation of "fire" under s. 29 of the Regulation differed from the above interpretation under s. 22 but defended its interpretation as "not logically inconsistent."

[336] The Panel notes that this finding is not logically inconsistent with its earlier finding that the "fire" for purposes of the Contraventions was the Roadside Debris Pile fires containing the holdover fires that subsequently spread to become the resultant Wildfires. As a matter of statutory interpretation, the meaning of a word in a statute or regulation is to be taken from the context in which the word is used. The context in which the word "fire" is used under section 29 of the Regulation differs from that of the sections that relate to the Contraventions, in that in section 29 of the Regulation, the word "fire" is in reference solely to the fire for which fire control costs were incurred, and the Panel makes this distinction.

[71] The Commission noted that s. 29 of the Regulation exempts unintentional or accidental fires from cost recovery. It found that for the purposes of s. 29 of the Regulation, both the cause and contribution to the start or spread of the wildfire must have been intentional or deliberate:

[346] The Panel has found above that the term "willfully", for purposes of section 29 of the Regulation, means intentionally, and not accidentally. When reading the provision as a whole therefore and keeping in mind the Panel's finding on the meaning of the word "fire" in this context, the Panel finds that both the act and omission, and the cause and contribution to the start or spread of the wildfire, must have been intentional or deliberate. The Respondent appears to agree with this interpretation.

[347] Tolko's failure to have systems in place to identify holdover fires is a failure of due diligence. However, for purposes of interpreting section 29 of the Regulation in the context of the facts of this case, the Panel finds that Tolko's lack of due diligence was not a "willful" cause or contribution to the start or spread of the "fire" as the Panel has defined that term. In the same way, the lighting of the Roadside Debris Piles was also not a "willful" cause or contribution to the start or spread of the "fire". Neither the acts nor omissions can be interpreted as a deliberate or intentional cause or contribution to the start or spread of the Wildfire.

[348] The Panel is aware of the potential significance of this interpretation but finds that the plain and ordinary meaning of every word used in the introductory language of section 29 of the Regulation must be given weight and legal effect. If the drafters intended another outcome, the word 'willfully' could have been deleted from section 29 of the Regulation. Also, as referenced earlier in this decision, section 8 of the Interpretation Act states that 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.

[Emphasis added.]

[72] In summary, the Commission adopted a narrow interpretation of the word "fire" in s. 29 of the Regulation as the wildfire that endangered life or threatened forest land but not the burn piles lit by Tolko. Similarly, the Commission's interpretation of the word "willfully" exempted Tolko from liability given that it did not intend to start the wildfires from the debris pile fires that it (by all accounts, willfully) started. The effect of this interpretation was to help establish Tolko's exemption from the cost recovery scheme.

The Requirements of Timber Harvesting and Silviculture

[73] As noted above, s. 29(b) requires that the fire that gives rise to the government's costs result from timber harvesting, silviculture treatments or another listed activity. The Decision Maker found that Tolko's debris pile burning was for hazard abatement rather than one of the prescribed activities, and hence the s. 29(b) exemption did not apply. The Commission disagreed, and found that Tolko was engaged in timber harvesting or silviculture treatments when it lit the fires in issue. While these terms are alternative preconditions for the application of s. 29, they are not defined in the Act or the Regulation. The interpretation and application of these terms was a central issue before the Commission.

[74] The Commission concluded as follows:

[392] Having considered the parties' evidence and the submissions, the Panel finds that Tolko's burning of Roadside Debris Piles was either timber harvesting or a silviculture treatment for purposes of section 29(b) of the Regulation.

- [75] The Commission's reasons on this point are extensive, though much of the reasons are setting out the arguments of the parties and evidence before the Commission. Accordingly, I will quote only excerpts of the Commission's reasons on this aspect of its decision:
- [350] To qualify for the exemption from a fire control costs order under section 29(b) of the Regulation, the person must not willfully cause or contribute to the start or spread of the fire, and the fire that gives rise to the government's costs results from certain activities. The relevant activities in this case are "timber harvesting" or "silviculture treatments".
- [351] The Respondent argues that, even if it is wrong on the question of whether Tolko "willfully" caused or contributed to the fire, Roadside Debris Pile burning is a "hazard abatement" process, not a silviculture treatment or timber harvesting. Therefore, section 29(b) of the Regulation does not apply.
- [352] Tolko submits that its Roadside Debris Pile burning activities that caused the Second Nazko Fire that gave rise to the government's fire control costs were either timber harvesting or silviculture treatments for purposes of section 29(b) of the Regulation.
- [356] Ultimately, Tolko argues that the categorization of debris pile burning need not be limited to either timber harvesting or silviculture, and that it might be considered a part of both.
- [357] The Respondent submits that the burning of debris piles should not be considered either timber harvesting or a silviculture obligation, but is instead fire hazard risk abatement, which is unique and separate from any other licensee obligations relating to harvesting or silviculture.
- [358] The Respondent submits that this is so, in part, because the Act and the Regulation contain separate detailed provisions defining and regulating fire hazard abatement on the one hand, and category 2 and 3 open fires on the other. The Respondent says that if the Legislature intended for section 29(b) of the Regulation to apply to the intentional lighting of fire for hazard abatement, then this would have been prescribed in the list of circumstances.
- [361] Neither the Act nor the Regulation specify what is required for fire hazard "abatement". Standard dictionary definitions of the verb "abate" include to "lower" or "mitigate". The intended meaning of "abate" in the Act and the Regulation can also be determined from how that word is used in this legislation.
- [365] The Regulation uses the phrases "fire hazard" and "fuel hazard" to mean hazards which are not the same but are closely related to one another. Both are used in the context of hazard "abatement".
- [366] Based on the foregoing, the Panel interprets the phrase "fire hazard abatement" in the context of the Act and the Regulation to mean lowering or mitigating the risk of a fire starting and, if a fire starts, reducing the potential fire behaviour.

- [368] The evidence before the Panel makes it clear that if the debris from timber harvesting (i.e., limbs, tops and defects that do not support lumber production) is left behind in the logged cutblock, it would create a fire hazard.
- [371] The Panel finds on the evidence that Roadside Debris Pile burning is a hazard abatement activity. However, this does not necessarily mean that Roadside Debris Pile burning cannot also be part of timber harvesting or a silviculture treatment. The question remains as to whether Roadside Debris Pile burning is also either timber harvesting or a silviculture treatment for purposes of section 29(b) of the Regulation.
- [372] Neither the Act nor the Regulation define the terms "timber harvesting" or "silviculture treatments". Tolko submits that these terms must "be read to give the words their most obvious ordinary meaning" that fit with the context and purpose of the Act and Regulation", citing *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14.
- [373] The Respondent submits that the Panel must first consider the "grammatical and ordinary sense of the words, and then read them in their entire context". The Respondent has provided dictionary definitions which state that "harvesting" means "to reap and gather in", and "silviculture" means "the cultivation of woods or forests".
- [374] While the Panel agrees that the interpretation of these phrases may be informed by the ordinary meaning of the words within each phrase, these phrases must be interpreted in their statutory context. In addition, the Panel is aware that these phrases are specific to the forest industry. Therefore, evidence of the meaning of those phrases as understood in that specific industrial context is more helpful to their interpretation in the Act and the Regulation than standard dictionary definitions of the individual words within those phrases.
- [377] The Panel heard extensive testimony about the appropriate characterization of Roadside Debris Pile burning for purposes of applying section 29 of the Regulation.
- [383] The forgoing evidence supports a finding of fact that burning Roadside Debris Piles, in addition to accomplishing a fire hazard abatement objective, also results in the recovery of forest land for reforestation and prepares the site of the Roadside Debris Piles for subsequent planting. The Panel agrees with Tolko that the nature of a forest licence holder's silviculture obligations necessitates the removal of woody debris in order to allow for reforestation, and Roadside Debris Pile burning is a way of removing that debris to meet those silviculture obligations and to make valuable growing sites available.
- [384] The evidence before the Panel as to the purpose of constructing and burning the Roadside Debris Piles also supports a finding of fact that this activity involves the piling or disposing of logging debris.

[385] The Panel finds that this activity could fall within the definitions of both "silviculture treatment" and "harvest" set out in the Forest Planning and Practices Regulation under the Forest and Range Practices Act. As stated above, the definition of "silviculture treatment" includes "site preparation for the purposes of reforestation", and the definition of "harvest" includes the "act of piling or disposing of logging debris".

[Italics in original; underlining added.]

[76] The effect of the Commission's finding that burning roadside debris piles could constitute "timber harvesting" or a "silviculture treatment" (as opposed to hazard abatement, as found by the Decision Maker) was to further qualify Tolko for the exemption from a cost recovery order in s. 29 of the Regulation.

The Commissions Conclusions

[77] The Commission concluded that: (a) Tolko did not willfully cause or contribute to the start or spread of the "fire" (interpreted as the Second Nazko Fire fought as a wildfire) in relation to which the fire control costs were incurred; and (b) the fire that gave rise to the government's fire control costs resulted from either timber harvesting or silviculture treatments.

[78] As the Commission found that Tolko established that it met the requirements of s. 29 of the Regulation prohibiting the government from recovering fire control costs from Tolko, the Commission rescinded the Decision Maker's fire control cost recovery order.

The Statutory Appeal

Statutory Requirements

[79] The appeal is brought pursuant to s. 140.7(1) of the Forest and Range Practices Act, S.B.C. 2002, c. 69, which provides a right of appeal based on an error of law or jurisdiction:

Appeal to court

140.7 (1) A party to an appeal, or the minister, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction.

- (2) An appeal under subsection (1) must be filed no later than 3 weeks after the date the person filing the appeal receives the decision of the commission.
- (3) On an appeal under subsection (1), a judge of the Supreme Court, on terms the judge considers appropriate, may order that all or part of the decision or order of the commission be stayed.
- (4) An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

[Emphasis added.]

- [80] Section 140.7 limits a party's right to appeal a decision of the Commission to a question of law or jurisdiction. This provision has been interpreted by the Court of Appeal to exclude review on questions of fact or mixed fact and law: *Hegel v. B.C.*, 2009 BCCA 527 at para. 32, per Kirkpatrick J.A. in Chambers. A division of the Court overturned the chambers judge's denial of leave, but on the basis that they considered the appeal to raise an extricable question of law: *Hegel v. B.C.*, 2010 BCCA 289 at para. 19. Ultimately, in the decision on the merits, the Court confirmed the finding in chambers that questions of mixed fact and law are not open to attack on appeal under s. 140.7: *Hegel v. B.C.*, 2011 BCCA 446 at para. 22.
- [81] The standard of review on appeal of a decision by the Commission on a question of law, including questions of statutory interpretation, is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37.

Whether the Appeal is Based on a Question of Law

- [82] The Province's notice of appeal alleges that the Commission incorrectly interpreted s. 29 of the Regulation when it rescinded the fire control costs order. Tolko argues that the Province's appeal is not properly founded on a question of law.
- [83] To the extent the appeal is founded on an extricable question of law, the parties agree that on a statutory appeal in this context that the applicable standard of review is correctness.
- [84] Here, while I agree the Province's appeal might fail if it was limited to a factual determination of whether Tolko complied with a statute or regulation, this appeal engages the proper interpretation of s. 29 of the Regulation. In particular, the Province's appeal involves the proper meaning and scope of the words "fire," "willfully," "timber harvesting," and "silviculture" within the meaning of the Regulation. The proper interpretation of these words are questions that transcend the application of the law to the particular circumstances of this case and invite a resolution of the meaning of these words in the Regulation beyond its application to a particular set of facts: see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1977] 1 S.C.R. 748, 1997 CanLII 385 at paras. 36-37.
- [85] As the proper construction of these words in the Regulation is a question of law, I am satisfied that the appeal is properly founded.

The Meaning of "Fire" in s. 29 of the Regulation

- [86] As noted above, the Commission adopted a narrower interpretation of the word "fire" in s. 29 of the Regulation as a wildfire that endangers life or threatens forest land but not the burn piles lit by Tolko that accidentally sparked a wildfire. The Commission effectively split the cause and effect of a fire by holding that "fire" included a resulting wildfire but not a deliberately lit roadside debris fire that started the chain of causation.

- [87] As noted above, the Commission acknowledged that its interpretation differed from its earlier finding that the "fire" for purposes of the contraventions was the roadside debris pile fires containing the holdover fires that subsequently spread to become the resultant wildfires, including the Second Nazko Fire. The Commission held, however, that its interpretation of "fire" for the specific purposes of s. 29 of the Regulation was appropriate in the context.
- [88] Tolko defends the Commission's interpretation as correct. It submits *inter alia* that this interpretation is supported by ss. 9 and 27(1) of the Act:

Government may carry out fire control

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

Administrative penalties and cost recovery

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

- (a) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount,
- (b) may determine the amount of the government's costs of fire control under section 9 for a fire that resulted, directly or indirectly, from the contravention, calculated in the prescribed manner,
- (d) except in prescribed circumstances, may require the person to pay the amounts determined under paragraphs (b) and (c) and the costs determined under paragraph (c.1), subject to the prescribed limits, if any.

- [89] Tolko submits that these passages support the interpretation that "the fire" referred to in s. 29 of the Regulation must be the wildfire that endangers life and threatens forest land described in s. 9(1), not the original debris pile fires or holdover fires that could eventually lead to said wildfire. Tolko also submits that the Commission's interpretation did not offend the presumption of consistent expression because there is no genuine ambiguity in the impugned statutory language, and "fire" can properly have a different meaning when its meaning is assessed in context.
- [90] I cannot accept Tolko's submissions on this point. In my view, the Commission fell into error by adopting too narrow an interpretation of the word "fire" in s. 29 of the Regulation.
- [91] First, the grammatical and ordinary sense of the language in s. 29 does not support the Commission's restrictive interpretation. The word "fire" is unqualified. The word "wildfire" (presumably a type of fire) is not found in the section or defined in the Act or the Regulation. The surrounding language in the opening words of s. 29 does not provide a basis for parsing out the second phase of a fire (the wildfire) or ignoring the fact that the person lit

an initially controlled fire, that led to the wildfire, in the first place. The inclusion of the words "start" and "spread" in the opening words ("the person, through their acts or omissions, did not willfully cause or contribute to the start or spread of the fire") mandates that the way in which a wildfire starts or spreads informs the application of the exemption.

- [92] For the exemption to apply, the person cannot have wilfully caused or contributed to the start or spread of the fire. This language of causation and contribution casts a broad net by capturing anyone who wilfully played a role in the start or spread of the resulting fire, without regard to how the fire was started or spread. It saves only a person who, through their acts or omissions, did not willfully cause or contribute to the start or spread of the fire. For instance, persons involved in timber harvesting or road-building operations who played no willful causative or contributory part in the start or spread of the fire are exempt.
- [93] As well, there is no express requirement of double intent inherent in this language. While the impugned language requires the person to wilfully cause or contribute to the start or spread of the fire, the language does not require the person to intend to start a wildfire that accidentally spreads from a willfully lit controlled fire.
- [94] Tolko points out that, in a decision previously considered by the Commission, a delegated decision maker reasoned that lighting a campfire that gets out of control and turns into a wildfire did not constitute "wilfully" causing or contributing to the start of "the fire" for the purposes of s. 29: *Unger v. British Columbia*, 2013 LNBCFAC 4 at para. 6. However, that decision is not binding, and this interpretation suffers from the same problem of endowing the exemption with a requirement of double intent (to intend to start both the controlled fire and the resulting wildfire) that is, again, not inherent in the grammatical and ordinary sense of the language in s. 29. The section is clear: a person who wilfully causes or contributes to the start or spread of the fire is disqualified from the exemption. It does not matter that the intent of the underlying action carried no intent to start a wildfire, an included form of (resulting) fire not found in the language of the section.
- [95] Second, I do not agree with Tolko's submission respecting the significance of ss. 9 and 27 of the Act. Sections 9 and 27 allow administrative penalties to be imposed for the government's fire control costs. Section 9 refers to a "fire on or near the land [that] endangers life or threatens forest land or grass land." As a common sense matter, supported by the plain language of ss. 9 and 27, a debris pile fire could endanger life or threaten forest land if the fire is improperly lit (e.g. too near to forest land) or evolves to threaten the surrounding environment. As with s. 29 of the Regulation, I read "fire" in these sections as including but not limited to a wildfire.
- [96] Third, the purpose of the Wildfire Scheme would be substantially negated by the adoption of the interpretation adopted by the Commission. That purpose clearly includes ensuring that those who use category 3 open fires in their logging operations can be held responsible for fire control costs if, by their act or omission, the fire gets out of control.

- [97] Given the strictures of the regulatory environment, almost any wildfire resulting from logging operations would be started accidentally and without willful intent. If one were to limit the cost recovery scheme to willfully caused wildfires only (e.g., cases of arson), and to exclude roadside debris pile fires deliberately lit by industry participants that accidentally result in wildfires, the resulting cost recovery scheme would be so marginal in scope as to have almost no practical application.
- [98] By its interpretation, the Commission turned an exception in s. 29 (in certain narrowly defined circumstances) into a rule (of general application exempting any designated person who accidentally causes a wildfire after lighting a category 3 open fire). The absurdity flowing from this interpretation is a factor that weighs in favour of rejecting the interpretation adopted by the Commission: *R. v. McIntosh*, [1995] 1 S.C.R. 686 at 704, 1995 CanLII 124.
- [99] Fourth, the legislative basis of the cost recovery scheme supports no free pass for those engaged in debris pile burning who accidentally start wildfires. In fact, the scheme appears designed to ensure the opposite. The legislation itself requires hazard assessment and abatement pursuant to ss. 11 and 12.1 of the Regulation. Tolko and other industry operators have chosen to perform this function by engaging in category 3 open fires of debris piles, an activity that is closely regulated and is done by a permit under the circumstances prescribed in s. 22 of the Regulation. Section 22(2) provides that a person who lights a category 3 open fire must ensure that it is extinguished by a certain date. Section 22(3) mandates that a person who lights such a fire must not let it escape.
- [100] Here, the Second Nazko Fire was caused by holdover fires that should have long been extinguished had Tolko exercised appropriate care and due diligence in accordance with the Wildfire Scheme. Intentionally burning a debris pile in a category 3 open fire as permitted by section 22 of the Regulation, and negligently allowing it to spread, would seem to be the very kind of activity that the scheme is designed to prevent and compensate for.
- [101] Tolko argues that it pays licencing fees into something analogous to a cost-sharing or insurance scheme through its annual rent, a proportion of which constitutes a "Fire Preparedness Levy." Tolko submits that in exchange, companies like itself can rely on the cost recovery exemption as long as the wildfire was accidentally caused by one of the forest-related activities in s. 29(b). As such, Tolko argues that the scheme, which builds in the cost of firefighting to the cost of licenses and annual rent, advances the "polluter-pay" principle found in *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 29.
- [102] However, I cannot find sufficient support for Tolko's position that a quid pro quo exists between a wide interpretation of the exemption in s. 29 and the payment of annual rent by forest companies.

- [103] The fact that the Fire Preparedness Levy in Tolko's annual rent is calculated based on the estimated volume of timber that may be harvested under a company's licence or agreement is too remote a connection to advance Tolko's interpretation on this point. The Wildfire Scheme appears designed so that the industry participant who chooses to willfully use fire in their operations (but negligently allows the fire to spread) pays for firefighting costs, not for those costs to be paid in an effective insurance scheme by all timber harvesters, including those industry participants that took all necessary precautions, made no use of fire in their operations, and caused no wildfires.
- [104] Further, no portion of the annual rent is allocated to any specific purpose, let alone an insurance purpose. The fire levy referenced by Tolko is a preparedness levy, not specifically a firefighting levy.
- [105] In assessing this issue, I would not consider the 2015 Hotte and Nelson report on the impact of the Fire Preparedness Levy tendered by Tolko as an extrinsic aid to interpreting the cost recovery exemption. This report was not before the Commission, and Tolko has not brought a fresh evidence application. I acknowledge Tolko's submission that its insurance scheme argument can be made by looking at the legislation in issue and the Ministry's policy. Nevertheless, I cannot find that the existence of a regulatory regime that includes annual licencing fees advances the interpretation of s. 29 of the Regulation that the Commission adopted.
- [106] Read in proper context, and in the absence of limiting language, the grammatical and ordinary sense of the language in s. 29 is that a fire is a fire. The distinction that the Commission imported into the definition of "fire" (which excludes a deliberately set debris pile fire that accidentally causes a wildfire) is not supported by the language, context, or purpose of the Wildfire Scheme.
- [107] I therefore find that the Commission erred in law by incorrectly interpreting the word "fire" in the Regulation. By willfully lighting the debris pile fire that later became the Second Nazko Fire, Tolko willfully caused or contributed to the start of the "fire" within the meaning of s. 29. It therefore does not satisfy a condition precedent to the application of the exemption in s. 29 of the Regulation.

The Meaning of "Timber Harvesting" and "Silviculture Treatments" in the Regulation

- [108] Subsection (b) of s. 29 of the Regulation requires that "the fire that gives rise to the government's costs results from timber harvesting [or] silviculture treatments." As noted above, the Commission found that Tolko was engaged in timber harvesting or silviculture when it lit the debris pile fires that led to the wildfires. These interpretations aided Tolko in qualifying under s. 29(b) for an exemption from a fire control costs recovery order. The Province disputes this finding and argues that the category 3 open fires Tolko lit are excluded from the definition of timber harvesting or silviculture treatments in the Wildfire

Scheme.

[109] As the foregoing analysis is sufficient to disentitle Tolko from relying upon s. 29 of the Regulation, I need not consider the Commission's interpretation of whether Tolko's debris pile burning that led to the Second Nazko Fire fell within the definition of "timber harvesting" or "silviculture treatments" for the purposes of s. 29(b) of the Regulation.

[110] I would only add that the Commission's interpretation of these impugned terms relied heavily on extrinsic evidence. I agree with the Province that there is a significant issue as to whether the Commission adequately considered whether there was genuine ambiguity in the meaning of these terms before resorting to extrinsic evidence as an interpretive aid. However, as it is unnecessary to decide this issue, I would say nothing further about the proper interpretation of this language in s. 29(b) of the Regulation.

The Judicial Review

[111] On February 14, 2022, the Province filed an application for judicial review that seeks the Court to review matters outside the scope of the statutory appeal--namely, the Commission's findings of fact and mixed fact and law flowing from the Commission's interpretation of s. 29.

[112] The parties differed on the availability of judicial review outside the scope of a limited statutory appeal in the post-Vavilov jurisprudence. However, given my findings above on the statutory appeal, I need not consider this issue further.

Conclusion

[113] The Province's appeal is allowed.

[114] The portion of the Commission's decision addressing s. 29 of the Regulation is set aside, and the cost recovery order imposed by the Decision Maker is reinstated.

[115] The Province is awarded its costs against Tolko.

[116] No award of costs is made in relation to the Commission.

"Brundrett J."

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