

CANADA / JUDGMENT

Whalen v. British Columbia

2024 BCSC 1015

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Supreme Court of British Columbia

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2024 BCSC 1015 Whalen v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whalen v. British Columbia,

2024 BCSC 1015

Date: 20240612

Docket: S19096

Registry: Smithers

Between:

Eldon Whalen

Petitioner

And

His Majesty the King in the Right of British Columbia and Forest Appeals Commission

Respondents

- and -

Docket: S19230

Registry: Smithers

Between:

Eldon Whalen

Petitioner

And

His Majesty the King in the Right of British Columbia and Forest Appeals Commission

Respondents

Before: The Honourable Justice Tammen

Reasons for Judgment

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Smithers, B.C.

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Introduction and Overview

- [1] The appellant/petitioner, Eldon Whalen, seeks to quash Decision No. WFA-22-A004(a) (the "Decision") of the Forest Appeals Commission (the "Commission"), which upheld a contravention order issued against the appellant and imposed an administrative penalty of \$3,000 and a costs recovery order of \$100,688.12. The contravention order found that the appellant had contravened the Wildfire Act, S.B.C. 2004, c. 31, and the Wildfire Regulation, B.C. Reg. 38/2005 [Regulation]. Specifically, the appellant was found to have contravened s. 5(1) of the Wildfire Act and s. 21(2) of the Regulation, by failing to ensure that a category 2 open fire started by him did not spread. It was common ground that the appellant lit a "category 2 open fire" on March 31, 2019, and that on May 10, 2019, on visiting the burn site, he discovered that the fire had spread and become a wildfire. The appellant has always maintained that he attempted to extinguish the fire on March 31 and April 1, 2019, and believed from his frequent visits to the site in the ensuing weeks that the fire was extinguished.
- [2] The original contravention and penalty orders were made on May 2, 2022, by a delegated decision maker ("DDM"). The appellant appealed both orders to the Commission, pursuant to the statutory scheme. On May 16, 2023, the Commission rendered its Decision, dismissing the appeal and confirming the contravention and penalty orders.
- [3] On June 5, 2023, the appellant filed an appeal to this Court, pursuant to s. 140.7(1) of the Forest and Range Practices Act, S.B.C. 2002, c. 69 [FRPA], which permits appeals to the BC Supreme Court on questions of "law and jurisdiction." On June 14, 2023, the Commission filed a Notice of Interest in the appeal. On June 15, 2023, His Majesty The King in Right of British Columbia (the "Province") filed a Notice of Interest in the appeal.
- [4] On November 20, 2023, the appellant filed a petition seeking judicial review of the Decision. The petition seeks to have the Court review matters beyond the scope of what is permitted by s. 140.7(1) of the FRPA.
- [5] On December 12, 2023, the Commission filed a response to petition. On December 27, 2023, the Province filed its response to petition.
- [6] At the commencement of this hearing, with consent of all parties, I made an order that the two proceedings be joined and heard together, and that evidence filed in each proceeding would be evidence in the other proceeding.

- [7] Counsel for the Commission restricted her submissions to the question of availability of judicial review pursuant to the statutory scheme, which provides for a limited statutory right of appeal. The Commission submitted that I should restrict the hearing to a consideration of the statutory appeal, and decline to entertain the application for judicial review. The Province took no position on that issue. Mr. Whalen submitted that I should decide both the statutory appeal and his petition on their merits.
- [8] After the hearing, but prior to this judgment, counsel for the Commission brought to my attention the Supreme Court of Canada decision of *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, which considered the availability of judicial review of administrative decisions which are also subject to a limited statutory right of appeal. At my invitation, counsel then provided additional written submissions on the impact of *Yatar* on this hearing.

Statutory Framework

- [9] The Wildfire Act provides a comprehensive regulatory scheme for preventing and controlling forest and grassland fires. It also provides a mechanism for the minister, following an opportunity to be heard, to recover costs and penalties from anyone who contravenes the Wildfire Act or the Regulation.
- [10] One of the sections of the Wildfire Act which is aimed at preventing wildfires is s. 5(1), which provides:

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

- [11] With respect to "prescribed circumstances", the Regulation sets out the criteria under which a person may light an open fire in or near forest land or grass land, including category 2 (s. 21) open fires, with which we are here concerned.

- [12] Section 1 of the Regulation defines a "category 2 open fire" as follows:

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

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

- [13] Section 21 of the Regulation governs the criteria for permissible lighting of a category 2 open fire. It reads:

21(1) The circumstances in which a person described in section 5 (1) or 6 (1) of the Act may light, fuel or use a category 2 open fire in or within 1 km of forest land or grass land are as follows:

- (a) the person is not prohibited from doing so under another enactment;

- (b) to do so is safe and is likely to continue to be safe;
 - (c) the person establishes a fuel break around each pile, grass or stubble area to be burned;
 - (d) while the fire is burning and there is a risk of the fire spreading beyond the fuel break, the person ensures that
 - (i) the fuel break is maintained,
 - (ii) a fire suppression system is available at the burn area, of a type and with a capacity adequate for fire control if the fire spreads beyond the fuel break, and
 - (iii) the fire is watched and patrolled by a person to prevent the fire from spreading beyond the fuel break and the person is equipped with at least one fire fighting hand tool;
 - (iv) Repealed. [B.C. Reg. 206/2005, s. 9.]
 - (e) before leaving the burn area, the person ensures that the fire is extinguished.
- (2) Without limiting subsection (1), a person who lights, fuels or uses a category 2 open fire in the circumstances set out in subsection (1) must ensure that the fire does not spread beyond the fuel break.
- (3) If a category 2 open fire, lit, fuelled or used in the circumstances set out in subsection (1), either spreads beyond the fuel break or becomes out of control, the person who lit, fuelled or used the open fire must
- (a) carry out fire control immediately,
 - (b) extinguish the fire if practicable, and
 - (c) as soon as practicable, report the fire as described in section 2 of the Act.
- (4) A person to whom subsection (3) applies may discontinue carrying out fire control if relieved from doing so by an official.
- (5) A person carrying on an industrial activity who is required under subsection (3) to carry out fire control in respect of a category 2 open fire must make available to fight the fire at least the greater of
- (a) one piece of heavy equipment, one fire suppression system and 6 workers who are each equipped with at least one fire fighting hand tool, and
 - (b) the workers, fire suppression systems, heavy equipment and fire fighting hand tools as described in section 13 (1) in relation to whichever is applicable, Crown land or land other than Crown land.
- (6) The person who, under subsection (5), is required to make workers, fire suppression systems, heavy equipment and fire fighting hand tools available must deploy them as appropriate, given the circumstances and conditions applicable to the fire.

- [14] Part 3 of the Wildfire Act is the scheme that applies following a wildfire that occurs as a result of human activity. Division 1 sets out powers in relation to investigations as to the cause of a wildfire, while Division 2 relates to the Province's ability to impose penalties and recover costs associated with those wildfires.
- [15] Following a wildfire and an investigation, the minister or their delegate may hold a hearing to determine whether a person has contravened the Wildfire Act or the Wildfire Regulations (s. 26 of the Wildfire Act); meanwhile, s. 29 of the Wildfire Act expressly makes available the defences of due diligence, mistake of fact and officially induced error. It reads:
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.
- [16] Section 27 of the Wildfire Act outlines the minister's powers to impose monetary penalties and make costs recovery orders following a hearing. The initial decision maker is generally, as in this case, a delegate of the minister.
- [17] At the first stage of proceedings, the individual has an opportunity to be heard, including the right to adduce evidence and make submissions.
- [18] A person against whom orders are made pursuant to s. 27 of the Wildfire Act has two statutory routes of review. Section 37 provides for a request for review or reconsideration, and permits new evidence to be adduced which was unavailable at the time of the original hearing.
- [19] Section 39 permits an appeal to the Commission of either the original s. 27 order or a s. 37 review decision. Appeals to the Commission are effectively hearings de novo, pursuant to s. 140.6 of the FRPA. The appellant is permitted to adduce evidence that was not before the original decision maker.
- [20] Section 140.7 of the FRPA provides for an appeal of the decision of the Commission, restricted to questions of law or jurisdiction. It reads:
- 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.

Factual Background

- [21] The appellant and his spouse own property on Muldoon Road in the Kispiox Valley, on which they planned to build a home. In early 2019, the appellant wished to dispose of some vegetative debris that resulted from a partial clearing of the property. On March 31, 2019, the appellant lit a category 2 open fire in order to effect the disposal.
- [22] When the fire had burnt down to the point that only charred logs remained, the appellant poured 25 gallons of water on the fire, and believed it was extinguished. He then left the site.
- [23] From April 1-8, 2019, the appellant returned to the burn site several times, and made further checks on the fire, at all times believing it was extinguished.
- [24] Thereafter, for the next several weeks, the appellant returned to the site less frequently, but intermittently. On May 10, 2019, while driving by the property, the appellant saw smoke and flames in the area. He immediately called 911, and firefighters attended the scene within an hour.
- [25] By that time, the fire had become a wildfire, and ultimately covered 11.5 hectares of land, including 10.8 hectares of private land and 0.7 hectares of Crown land. The BC Wildfire Service ("BCWS") utilized ground crews, helicopters, air tankers and fire retardant to combat the wildfire. The wildfire was deemed to be "under control" by BCWS on May 16, 2019, and declared extinguished on June 17, 2019.
- [26] The total cost to control the fire was \$100,688.12.
- [27] On May 10, 2019, BCWS submitted a complaint to the responsible government ministry, and an investigation was commenced by a natural resource officer ("NRO"). The appellant was interviewed and made a statement as part of that investigation.
- [28] On May 11, 2019, BCWS determined that the wildfire was caused by an open fire which was not extinguished, and then smouldered and escaped due to fire creep and gusting winds weeks after initial ignition. Those findings became part of a report submitted to the ministry by the NRO on May 4, 2021. On November 5, 2021, the appellant was notified of the results of the investigation, and provided an opportunity to be heard. That resulted in an oral hearing on December 7, 2021, from which orders against the appellant were issued on May 2, 2022.

[29] On May 26, 2022, the appellant appealed the DDM's decision to the Commission. Among the materials submitted by the appellant for consideration on the appeal were a statutory declaration, made July 8, 2022, an affidavit sworn November 16, 2022, and written submissions dated November 23, 2022 and February 24, 2023.

[30] The Commission rendered its Decision on the appeal on May 16, 2023.

Issues

[31] The following issues arise for determination:

- a) Should the statutory appeal be allowed, and if so, what order should be made?
- b) Should I conduct a judicial review of the Decision despite the limited statutory right of appeal, and if so, is the Decision reasonable?

Analysis

The Statutory Appeal

[32] The parties agree that the standard of review for the statutory appeal, confined to questions of law or jurisdiction, is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37. The parties also agree that if I proceed to judicial review of the Decision, which can include questions of fact and mixed fact and law, the standard of review is reasonableness: *Vavilov* at para. 23.

[33] Obviously, the first thing I must determine is the classification of the errors alleged by the appellant/petitioner. The distinction between a question of law and a question of mixed fact and law is not always readily apparent. Reviewing courts must be assiduous in their identification of each question, to ensure that the correct standard of review is applied.

[34] In this regard, I cannot improve on what was said by Justice Sharma in *Canadian National Railway Company v. British Columbia*, 2022 BCSC 2263, at paras. 70-80. I reproduce that part of the judgment below, and respectfully adopt the analysis in its entirety.

[70] Because the court's task on a judicial review is different than on a statutory appeal, it is prudent to classify the errors before analyzing them to ensure the correct standard of review is applied. To do otherwise creates the risk that the court will subject issues to a higher level of scrutiny than is appropriate, thereby blurring the important distinction between the Court's role when acting as an appellate body (i.e. ensuring the correctness of an issue) and its supervisory role when engaged in a judicial review.

[71] It is also helpful when considering the proper classification of issues to be mindful of the law regarding applying different standards of review.

1. Classification of Errors

- [72] The Supreme Court of Canada has provided guidance for classifying the nature of the issues before a tribunal: legal questions are questions about what the correct legal test is, factual questions are questions about what actually took place between the parties, and questions of mixed fact and law are questions about whether the facts satisfy the legal test: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43 [Teal]. See also *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35, 1997 CanLII 385 [Southam].
- [73] The "key difference" between a question of law and a question of mixed fact and law is the question's degree of generality, or "precedential value": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 51. As a challenged proposition's degree of generality nears "utter particularity" or "pure application", it approaches an "unqualified question of mixed law and fact": *Southam* at para. 37.
- [74] Where, precisely, the line is drawn between questions of law and questions of mixed fact and law turns on whether there is an extricable error of law: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 34, 37. In *Teal*, the majority opinion cautioned that due to the haziness of this distinction, reviewing courts must be careful not to inadvertently conflate the two types of issues:
- [45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question -- for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments -- are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).
- [75] Applying this distinction to an adjudicator's assessment of evidence, there are limited circumstances where a finding of fact or assessment of evidence may give rise to an extricable legal error.
- [76] For example, it is an error of law for an adjudicator to base the finding of a material fact on no evidence or irrelevant evidence: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 22, citing (among others) *J.M.H.* at paras. 25-32; *Murphy v. Saskatchewan Government Insurance*, 2008 SKCA 57 at para. 5.
- [77] It is also an error of law for an adjudicator to fail to consider relevant evidence where:

- a) the omission is able to ground a "reasoned belief" on the part of the reviewing court that the adjudicator has forgotten, ignored, misapprehended, misconceived or otherwise completely failed to take this evidence into account; and,
- b) this omission has either:
 - i. affected the adjudicator's conclusion; or,
 - ii. excluded evidence whose consideration is required by law (e.g. the evidentiary elements of a balancing test).

See *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15; *Shooters Sports Bar Inc. v. Alcohol and Gaming Commission*, 238 O.A.C. 9 at paras. 38-39, 2008 CanLII 25052 (S.C.); *Southam* at paras. 41, 43; *Pope & Talbot v. British Columbia*, 2009 BCSC 1715 at para. 92.

[78] While adjudicators are not required to mention every item of evidence or to detail the way in which each item was assessed, their "burden of explanation increases with the relevance of the evidence in question to the disputed facts": *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. 53 at paras. 16-17, 1998 CanLII 8667; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 53.

[79] In contrast to these legal errors, situations involving matters of mixed fact and law include where an adjudicator (*Southam* at paras. 41, 43):

- a) considers all required evidence but reaches the wrong conclusion; or,
- b) incorrectly assesses the weight assigned to evidence as required within a balancing test.

[80] Preferring the evidence from one witness over another does not, on its own, represent a legal error: *Housen* at para. 46. Relatedly, it is neither an error nor unreasonable for a decision maker to simply give reasons for why they accept one witness's story, as these reasons are implicitly why they prefer it over the alternatives: *Clark v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 487 at para. 28 [Clark].

[Emphasis in original.]

[35] Here, the appellant alleges several discrete errors of law made by the Commission in its Decision. The alleged errors, distilled from the appellant's written submissions, are these:

- a) The Commission used the incorrect legal test in its application of ss. 21(1)-(2) of the Regulation;
- b) The Commission applied the incorrect legal test for the defence of mistake of fact under s. 29(b) of the Wildfire Act;
- c) The Commission applied the incorrect legal test for the defence of due diligence under s. 29(a) of the Wildfire Act; and

- d) In its consideration of both defences, the Commission erred in law by failing to consider relevant evidence, and by basing findings on no evidence or irrelevant evidence.

Sections 21(1)-(2) of the Regulation

[36] The submission that the Commission erred in its consideration of ss. 21(1)-(2) of the Regulation is devoid of merit. As I understand the appellant's submission, he says the Commission misinterpreted both ss. 21(1)-(2), which he says must be read disjunctively, in finding a *prima facie* breach of the provision.

[37] The appellant takes issue with paras. 30-31 of the Decision, which I reproduce here:

The Appellant does not dispute he lit his Burn Pile, a Category 2 Open Fire, and that the Burn Pile fire was the origin of the Wildfire. The Wildfire reported by the Appellant on May 10, 2019, was larger than the 2m by 3m pile that he ignited weeks before. The evidence is conclusive that the Wildfire originated at the Burn Pile and burned beyond the perimeter of the Burn Pile. The FOC Report notes "fire creep" from the open fire as the cause of the Wildfire. The logical conclusion is that the open fire lit by the Appellant was not extinguished: it escaped and burned beyond its perimeter, resulting in a 11.5-hectare wildfire.

Consequently, I find that the Appellant did not satisfy his obligations under Regulation s. 21(1)(e). Additionally, the Appellant contravened s. 21(2) of the Regulation as the Burn Pile fire was not contained to its original burn area of 2m by 3m.

[38] Immediately after the above-quoted paragraphs, the Commission considered the defences raised by the appellant, mistake of fact and due diligence.

[39] The import of paras. 30-31 is that the Commission found that, unless one of the defences applied, the appellant had contravened the statute. I disagree that the Commission should have read the subsections disjunctively. Section 21(2), which creates the broad duty to ensure that a fire does not "escape", begins with the proviso: "without limiting subsection (1)." That subsection sets out multiple duties with which a person must comply, all of which are aimed at overall fire safety, and some of which would be directly related to preventing "escape."

[40] As noted in the introductory portion of the Decision, the appellant did not dispute that his burn pile fire was the origin of the wildfire. Broadly speaking, the primary issue was whether the appellant had taken adequate precautions to "ensure" that the burn pile fire did not "escape", as required by s. 21(2). The manner by which it was alleged the fire had "escaped" was through the appellant's failure to "ensure" that it was fully "extinguished", as required by s. 21(1)(e). The appellant always maintained that he believed at all material times between March 31-May 10, 2019, the fire was extinguished, and thus, there was no risk of escape.

- [41] The appellant was always on notice that it was alleged he had failed to comply with various duties imposed by s. 21(1), and those failures led to the breach of s. 21(2), when the fire "escaped." He adduced evidence and made submissions on all those issues, and suffered no prejudice by the manner in which they were considered by the Commission. That part of the Decision with which the appellant takes issue certainly discloses no error of law.

Statutory Defences

- [42] Likewise, I am not persuaded that any question of law arises from the manner in which the Commission considered the defence of due diligence pursuant to s. 29(a) of the Wildfire Act. The Commission correctly stated and applied the test for what constitutes due diligence, and did not hold the appellant to a standard of "perfection", as the appellant claims.
- [43] I am also not persuaded that there are any questions of law contained within the myriad complaints the appellant makes concerning the treatment of evidence by the Commission, with one exception, as it relates to the statutory defence of mistake of fact. I will address that issue after I consider the other question of law related to mistake of fact under s. 29(b) of the Wildfire Act, i.e., the application of an incorrect legal test.
- [44] The Commission addressed the issue of mistake of fact at paras. 34-44 of the Decision. Paragraphs 34-36 deal with the evidence and submissions of the appellant on this issue. Paragraph 37 sets out the respondent's submissions. Paragraphs 38-39 set out the legal test to be applied. I reproduce those paragraphs here:

The Appellant's submission directs me to interpretations of due diligence and mistake of fact as accepted in Tolko Industries Decision No. 2019-WFA-002(b) ("Tolko"), *Forest Practices Board v. British Columbia*, 2018 LNBCFAC 3 ("Forest Practices Board") and *Apollo Forest Products Ltd. v. Government of British Columbia* (Decision No. 2016-FRP-002(a), September 11, 2018).

In Tolko, the Commission outlined that "...mistake of fact focuses on reasonable care to know the true facts. 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" (para 210). Essentially, before a defence of mistake of fact can be accepted, it must be established that the first hurdle of not having knowledge of the true facts [is] met. Then, a second significantly higher hurdle, that it was not reasonable to have known the true facts, must also be met. While I am not bound by previous decisions of the Commission, I find this line of reasoning to be both sound and helpful in my analysis, and I adopt the same approach to analyzing mistake of fact.

- [45] The analysis, including application of the legal test, is at paras. 40-44.
- [46] The determination of what is the correct legal test is a question of law: *Canadian National Railway* at paras 72 and 74.

- [47] In my view, the Commission, at para. 39 of the Decision, incorrectly stated the test to be applied for the defence of mistake of fact. In particular, the Commission fell into error by finding that there was a "second significantly higher hurdle" which the appellant needed to clear before succeeding in this defence. The Commission compounded this error by framing the issue in a manner that required the appellant to show "that it was not reasonable to have known the true facts."
- [48] All that was required for the appellant to succeed on mistake of fact was to demonstrate a reasonably held belief in a state of facts which, if true, absolved him of liability. Here, the appellant's evidence and position were that he honestly believed the fire was extinguished. The Commission appears to have accepted the sincerity of that belief. Thus, the only additional consideration was the reasonableness of the belief.
- [49] The defence of mistake of fact in the regulatory context, where a conviction may be based on strict liability, was considered in the seminal case of *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 1978 CanLII 11 (S.C.C.). There, Justice Dickson, in defining the contours of the defence of due diligence, said that:

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[Emphasis added.]

- [50] Thus, Dickson J. envisaged mistake of fact as one of two branches of the due diligence defence.
- [51] Since *Sault Ste. Marie* was decided, the defence of mistake of fact has developed in both strict liability context, and as a defence to true crimes, where mens rea is required. In the latter, the belief of the accused in a factual premise which would render conduct non-culpable need only be honestly held. There is no additional requirement that the belief be reasonably held. For strict liability offences, the accused must establish both the sincerity and reasonableness of a belief in facts which render conduct non-culpable: *Pope & Talbot v. British Columbia*, 2009 BCSC 1715 at paras. 62-63 and 106, citing *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510.
- [52] The requirement that the belief be reasonably held is not, as stated by the Commission, a "significantly higher" second hurdle, which requires the accused to prove a negative, i.e., that it was "not reasonable to have known the true facts." The appellant was only required to prove that his honestly held belief was reasonable: *Hegel v. British Columbia (Forests)*, 2011 BCCA 446 at para. 30. Such proof requires an accused to state the reasons for their belief, and the cognitive processes by which it was formed. The fact finder is then able to assess both the reasonableness and sincerity of the mistake of fact.

- [53] Here, as noted, the appellant said that he believed, both on March 31, 2019 when he left the burn site, and in the subsequent days when he returned to the site, that the fire was extinguished. He outlined the steps he took to attempt to extinguish the fire, and importantly, what additional steps he took to learn if the fire truly was extinguished. The Commission was then in a position to assess the reasonableness of the belief against that conduct, to decide if a reasonable person, in the shoes of the appellant, would have likewise concluded that the fire was extinguished. In the course of that analysis, it was of course open to the Commission to consider if the steps the appellant took to assess whether the fire was extinguished were adequate, i.e., reasonable.
- [54] However, it was not open to the Commission to have considered all the steps the appellant could have, and in the Commission's view, should have taken, prior to lighting the fire in the consideration of mistake of fact. Such matters might well have been relevant to the defence of due diligence, but had no application to the appellant's defence that he honestly believed the fire was extinguished, and therefore there was no risk of it escaping.
- [55] At para. 42 of the Decision, the Commission commented on the absence of expert evidence on the issue of reasonableness of a belief that a fire can be considered extinguished "due to the lack of visible smoke." The reference to expert evidence is confusing, and in my view misconceived. More importantly, the evidence and submissions of the appellant went well beyond absence of visible smoke. I will address that body of evidence when I discuss the appellant's submission concerning the Commission's failure to consider relevant evidence.
- [56] The ultimate conclusion of the Commission was this: "I do not find the Appellant took reasonable steps to determine both what it means for a fire to be extinguished or if the fire was in fact extinguished." The latter finding again circles back to the failure to consider relevant evidence. The former finding relates directly to the error I have just identified, the creation of an artificially high and legally incorrect hurdle for the appellant to clear in his claim of mistaken belief in facts which rendered his conduct non-culpable.
- [57] I repeat, to succeed in his claim of mistake of fact, the appellant was not required to prove that he took all possible reasonable steps, prior to lighting the fire, to be able to know when and if the fire was extinguished. He was only required to prove that he took sufficient steps at the time he formed his belief that the fire was extinguished to permit a conclusion that his belief was reasonable.

Failure to Consider Relevant Evidence

- [58] The other question of law which emerges from the Decision is the Commission's failure to consider relevant evidence related to the mistake of fact defence. As noted at para. 77 of *Canadian National Railway*, it is an error of law for a tribunal to fail to consider relevant evidence where the omission is able to ground a reasonable belief on the part of the reviewing court that the tribunal has failed to take the evidence into account and the omission has affected its decision.

- [59] I am satisfied that there is a basis to believe that the Commission failed to take into account the appellant's evidence of what steps he took to confirm that the fire was extinguished. The Decision in this regard is somewhat confusing and potentially ambiguous. Below are some of the portions of the Decision which touch on the issue:
- [35] The Appellant submits it was reasonable to believe the Burn Pile fire was extinguished because he poured water on it, did not see or smell smoke or flames, observed standing water around the pile, and noted that the ashes were cold and wet.
- [36] The Appellant submits he dug into the ashes with a shovel.
- [43] The Appellant did not submit any evidence suggesting the Burn Pile was physically inspected and pulled apart to determine if the fire was extinguished. The Appellant did not provide any submissions to describe the degree to which he was able to dig into the pile with his shovel.
- [44] The Appellant has established that he did not know the facts as to whether the Burn Pile was extinguished but has not established that it was reasonable for him not to know the true facts.
- [60] Paragraph 44 concludes with the earlier quoted finding that the appellant failed to take reasonable steps to determine "both what it means for a fire to be extinguished or if the fire was in fact extinguished."
- [61] The most troubling of the above-quoted statements is at para. 43, concerning absence of evidence about the "degree" to which the appellant was able to dig into the burn pile with a shovel. The appellant's affidavit is clear, at para. 36, that he "dug about two-feet deep and, when I did so, I noticed that there was no signs of the fire being anything but extinguished." That is clearly some evidence about the "degree" to which he was able to dig into the burn pile.
- [62] The appellant also stated in his affidavit that on March 31, 2019, after pouring 25 gallons of water on the fire, he "looked into the base of the fire and saw no signs of the fire being active. There were no signs that the fire was not extinguished" (para. 25). Then, on April 1, 2019, the appellant poured a further five gallons of water on the charred debris, which produced no steam. The appellant stated that he then:
31. moved the charred logs to investigate whether there was anything that I had missed. I did not see any smoke, embers or anything to indicate that the fire was active. The fire was dead. It was saturated with the standing water at the base of the burn pile. It showed no signs of being anything but extinguished.
- [63] I interpret the above-quoted passages as being some evidence that the appellant "physically inspected and pulled apart" the fire to see if it was extinguished. However, the Commission expressly noted that the appellant had provided no evidence on this point.

- [64] I note that there was evidence in the appellant's affidavit that was either different or more complete than previous accounts he had given, for instance in an interview with the NRO investigating the wildfire. It was open to the Commission to assess those differences in deciding whether to accept the appellant's explanations. However, no such analysis appears in the Decision. Rather, the tenor of the Decision is that the Commission accepted the appellant's evidence and made several findings in reliance on it.
- [65] In my view, the passages I have quoted from the appellant's affidavit constituted potentially important evidence on the issue of mistake of fact. Those passages certainly contained some evidence of the appellant pulling apart and inspecting the burn pile, and the extent to which he dug into the pile with a shovel. In finding that there was no evidence on those two points, the Commission clearly failed to consider relevant evidence.
- [66] The remaining question is whether the failure to consider this evidence has affected the Decision. In my view, it has. The conclusions of the Commission on mistake of fact point to the absence of evidence on those very issues as important prongs in the conclusion that the appellant's belief that the fire was extinguished was not reasonable.
- [67] Moreover, I am satisfied that the combined effect of the two errors has affected the result. The Commission applied an incorrect legal test in its consideration of mistake of fact, one which required the appellant to prove more than he was required to prove at common law. Then, in expressly considering the reasonableness of the appellant's honestly held belief that the fire was extinguished, the Commission failed to consider extremely relevant evidence, instead stating that there was no evidence.
- [68] The combined effect of these errors deprived the appellant of one of the two defences he advanced as excusing him from liability. It cannot be said that, had the Commission considered the relevant evidence on mistake of fact, and applied the correct legal test, the result would inevitably have been the same. Thus, the errors, certainly the combined errors, were not harmless.
- [69] I would therefore allow the appeal on this basis.
- [70] The remaining question is what order should be made. The appellant submits that I should substitute my view for that of the Commission, and make findings in his favour. I cannot accede to that submission. There was evidence before the Commission from which a contravention finding could be made. It was for the Commission to decide that question, by considering all relevant evidence and applying the correct law. Following the Court's direction in Vavilov, I find that the appropriate remedy is to remit the matter for a new hearing before a different member of the Commission: Vavilov at paras. 139-141.

Judicial Review

- [71] In light of my findings on the statutory appeal, there is no need to conduct a judicial review of the Decision.

[72] Equally, I leave for another day, and another judge, the very interesting question posed by counsel for the Commission, whether this statutory scheme permits parallel proceedings which include both a statutory appeal and judicial review of a decision of the Commission.

Conclusion

[73] Mr. Whalen's appeal of the Decision of the Commission dated May 16, 2023 is allowed. The matter is remitted for a new hearing.

[74] I make no costs order in respect of the Commission.

[75] Mr. Whalen is entitled to his costs of this proceeding at Scale B against the Province.

"Tammen J."

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