



Posted on: June 10, 2016

## **FIREFIGHTING COST RECOVERY**

### **Richards Buell Sutton Insurance Newsletter**

By: Nicholas M. Safarik

#### **INTRODUCTION**

While the investigation into the cause of the fire is ongoing, with a report due out about a month from now, early indications are that the Fort McMurray wildfire (the "Fire") was likely attributable to human causes.

Given the significance of the Fire for the insurance industry, the following will serve as a reminder on the relevant legislation and jurisprudence regarding provincial rights to recover firefighting costs in Alberta and British Columbia. This legislation can give rise to significant cost consequences for the insurers of individuals or corporations found to be responsible for causing fires.

#### **LEGISLATION**

##### **Alberta**

In Alberta, the *Forest and Prairie Protection Act*, RSA 200, c. F-19 (the "FPPA"), and *The Forest and Prairie Protection Regulations*, Part I, Alta. Reg. 135/72, and *The Forest and Prairie Protection Regulations, Part II*, Alta. Reg. 310/1972 set out the process by which the Province can recover firefighting expenditures from individuals who caused or were otherwise responsible for a fire. Under s. 12 of the FPPA, the Minister is entitled to be reimbursed for the costs and expenses incurred as a result of fighting or suppressing a fire by the persons responsible for it.

The FPPA provides that the procedure for recovering such costs is by way of court action in debt. In this respect, the Alberta legislation differs from the British Columbia legislation which allows the Province to pursue recovery through an administrative procedure that provides the Minister advantages in determining liability, costs, losses and penalties.

##### **British Columbia**

In British Columbia, the *Wildfire Act*, S.B.C. 2004, c. 31 (the "Act") and the *Wildfire Regulation*, B.C. Reg. 38/2005 (the "Regulation") prescribe the duties of individuals conducting activities in the forest and



require that they take steps to prevent, report and fight forest fires. These duties include:

- a general duty to immediately report any open fire observed burning in forest land or grass land or within one kilometer of forest or grass land that appears to be burning unattended or uncontrolled;
- a broad obligation on those carrying out “industrial activities” – which include land clearing and “high risk activities” – to do so at a time and in a manner “that can be reasonably expected to prevent fires from starting because of the industrial activity” and to immediately carry out fire control if a fire starts at or within one kilometer of the industrial activity; and
- specific duties for individuals carrying out industrial or prescribed activities on or within one kilometer of forest or grass land to conduct fire hazard assessments and abatement activities.

In addition, section 30 of the Act provides for vicarious liability of employers, directors and officers for breaches of the Act or the Regulation by their contractors, employees or agents.

The Act also sets out the process by which the Province can recover both the cost of fighting fires and damages for destruction of timber and other natural resources from those whose breaches of the Act or Regulation caused the fire or allowed it to spread, as well as an assignment of an administrative penalty, if appropriate. Section 29 of the Act provides a defence of due diligence in relation to contraventions of the Act and the Regulation.

If a person is considered by the Minister to have contravened the Act or the Regulation, the person is entitled to an opportunity to be heard before a determination is made. The maximum amount of administrative penalty is \$100,000 and firefighting costs are assessed based on the actual cost incurred by the Province, plus 20% overhead.

Section 39 of the Act allows for a right of appeal of the Minister’s determination of a breach of the Act or the Regulation, or the minister’s assessment of damages, determination of costs or administrative penalty. Appeals are heard by the Forest Appeals Commission (the “FAC”).

## **JURISPRUDENCE**

### **Alberta**

There are two reported decisions in which Alberta sought to recover firefighting costs pursuant to the provisions of the FPPA, and it was not successful in recovering its costs in either of those cases. In *Alberta v. Fossheim*, 2006 ABPC 234, the claims were dismissed because the Province was unable to establish the defendant caused the fire.



In *Alberta v. Hay*, 2002 ABQB 282, the Province claimed against a father and two sons who had entered into a grazing lease with the Crown. One of the sons started a fire to clear the lands and the fire spread causing \$3 million in damage. In the civil action, the father and son who had not started the fire applied for summary dismissal of the Crown's claims against them, which were based on liability as parties to the lease and vicarious liability. The Court held that the vicarious liability claim had no reasonable chance of success as the father and son were simple co-tenants who had no involvement with the lands, and were therefore not in a position to exercise control over the others on who started the fire. In dismissing Alberta's claims against the father and son, the Court also found that the FPPA did not apply to those defendants in any event because it only allows the Province to recover costs from individuals who caused a fire, rather than simply the occupiers of land upon which a fire occurred.

Interestingly, the Crown's claims in the companion action against the son who started the fire, *R. v. Hay*, 2003 ABQB 1063, were also dismissed, as the Court found that the Crown had failed to establish the defendant was the legal cause of the fire (specifically, that the holdover fire would not have occurred but for the weather conditions), and that there was no negligence on the part of the defendant, who followed all standard practices and fulfilled his obligations under the legislation.

### **British Columbia**

While the Province is not precluded from bringing claims by way of court action, it generally proceeds under the provisions of the Act and the Regulation, which allow the Minister to determine all of the issues, from breach of the Act or the Regulation to costs, damages and administrative penalty. Any determination by the Minister is subject to judicial review.

*British Columbia (Ministry of Forests) v. Pope & Talbot Ltd.*, 2007 BCSC 1600, illustrates the difficulties a province faces in recovering firefighting costs through the courts. In this case, the Province brought an action against the defendants for damages for negligence, breach of contract and breach of statutory duty in relation to a forest fire that burned 159 hectares of Crown land, and resulted in fire suppression costs in excess of \$1 million.

The defendants were forestry companies that operated on Crown lands under a tree farm license. The Province alleged that the defendants were negligent in carrying out their operations through a contractor, and that the fire was caused by the defendants' harvesting operations; specifically, a spark from the tracks of a piece of logging equipment caused a hold over fire the following day.

On the day of the fire, the fire danger rating was a "Danger Class 4", which required that operations shut down at 1:00 p.m. and that a worksite fire watch be maintained for one hour thereafter. The Province



argued that the defendants should have shut down operations completely given the on-site conditions. The Court rejected the claim that the defendants should have voluntarily ceased activities and held they were entitled to take their cue from the terms imposed by the restrictions. Although the Court found the contractor breached their contractual and statutory duties to keep a fire watch over the worksite for one hour after stopping work, it found that a proper fire watch would only have resulted in the fire being discovered 15-30 minutes earlier, and the Province had failed to establish that delay caused the spread of the fire. Accordingly, the Province's action was dismissed.

An example of the Province's right to proceed with recovery steps administratively, rather than through the courts, can be found in the recent appeal to the FAC Commission involving Robert Unger[i], who was determined to be responsible for a wildfire that began on his property and spread to Crown land. Unger was ordered to pay more than \$860,000 for the Province's fire control costs. In the original determination, which was confirmed by the FAC, the Minister determined that Mr. Unger contravened the Act and Regulation by lighting a camp fire on his own land when it was unsafe to do so, failing to establish a fuel break around the fire and allowing the fire to escape.

During his appeal to the FAC, Unger argued that the Minister's order should be set aside on the basis of the due diligence defence. The FAC found he did not exercise due diligence as he did not take all reasonable care to avoid the contraventions. Specifically, the FAC found that Unger should have foreseen the risks associated with lighting the fire during the conditions that day, in particular the wind. Additionally, he failed to establish a fire break around the fire as the evidence showed that the fuels adjacent to the burn area were dry grass and brush and the fire spread quickly to those fuels. Although he had a water pump available, it was too far away to be useful and he was reduced to fighting the fire with a shovel and a rake. He also had no means of communication available on-site and had to rely on a neighbour to report the fire to the Ministry. Based on all of the evidence, the FAC found there were no factors that would mitigate against an order that Unger pay the full amount of fire control costs.

Unger has appealed the ruling of the Forest Appeals Commission to the Supreme Court of British Columbia.

## CONCLUSION

Information from BC's wildfire Management Branch indicates that British Columbia taxpayers have borne more than \$1.25 billion in firefighting costs since 2006, and the Province has recovered less than 1% of that amount in penalties and damages assessed under the Act and the Regulation. Based on our review of the reported Alberta decisions, it appears that Alberta has been similarly unsuccessful in recovering firefighting costs under its legislation. However, given the magnitude of the Fire and the considerable investigative



RICHARDS  
BUELL  
SUTTON  
*Established in 1871*

resources being devoted to determining its cause, if Alberta is able to identify the person(s) who caused it, we expect a claim will ensue.

*[i]2012-WFA-002(b), Robert Unger v. Government of British Columbia (Forest Practices Board).*



700 - 401 W GEORGIA ST.  
VANCOUVER, BC V6B 5A1  
CANADA

TELEPHONE  
604 682 3664

FAX  
604 688 3830

[RBS.CA](http://RBS.CA)