A Spark Neglected: Liability for Wildfires

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The 17th Century poet, Robert Herrick, wrote, "A spark neglected makes a mighty fire." With recent changes to Alberta's *Forest and Prairie Protection Act* ("FPPA") and related regulations, and comparable legislation in other provinces, a neglected spark may well give rise to considerable fines, new administrative penalties and other significant consequences to the violator.

The FPPA amendments came into effect on March 29, 2017 and provide Alberta with additional protections and recovery mechanisms for costs incurred for firefighting and wildfire suppression. The changes are aimed at reducing the number of wildfires caused by human activity. As of May 31, 2017, over 500 wildfires had been reported since the beginning of Alberta's 2017 wildfire season.

On the heels of the Fort McMurray disaster, the Alberta amendments aim to deter individuals and corporations from engaging in high-risk activities that may result in wildfires. Fines have been increased significantly. Individuals who knowingly contravene the FPPA or the regulations may be subject to a fine of up to $100,000. A violation can also result in up to two years in jail. Minimum fines for corporations are increased to $1,000,000. This is a major leap from the $5,000 maximum fine prior to the amendments.

The FPPA now provides for the imposition of administrative monetary penalties (AMPs) against corporations. These can add up. The director under the FPPA may give notice requiring a person who has contravened a provision of the FPPA or the regulations to pay up to $10,000 for each contravention or for each day that the contravention continues. According to the Alberta Government, these new AMPs are intended to encourage corporations to use preventative and mitigation measures.

The buck does not stop at the corporate front door. Any officer, director, or agent (which could include an employee) of a corporation who directed, authorized, assented to, acquiesced in, or participated in a contravention is separately liable for the offence.

Alberta is not the only province that imposes penalties and potential cost recovery for wildfires. Most provinces have some form of similar legislation. The British Columbia *Wildfire Act* and regulations permit that province to recover both costs related to firefighting and losses for damage or destruction to Crown timber and other natural resources.

The amendments to the FPPA have created an administrative process in Alberta for the recovery of firefighting costs. Alberta now has the option to recover costs by proceeding pursuant to the FPPA cost recovery provisions or by way of court action. The FPPA did not however, extend cost recovery for damage to natural resources.

To date, recovering costs by way of court action has proven difficult. In the 2006 case of *Alberta v. Fossheim*, Alberta launched a claim to recover firefighting costs. Although the defendant admitted that he did not strictly comply with one of the conditions of his permit, the claim did not succeed. The Court found that Alberta had failed to produce enough evidence that Fossheim had caused the fire.

In the 2007 case of *British Columbia (Ministry of Forests) v. Pope & Talbot Ltd.*, the Province brought an action for firefighting costs of over $1,000,000. BC argued that Pope & Talbot's workers failed to fire watch for at least one hour after operations were shut down, as required by the regulations. The Court found that the Province was unable to prove that the failure to comply with the provision caused the spread of the fire.

For the provinces, administrative cost recovery processes have a number of advantages. The costs, losses, and appropriate AMPs are determined by officials acquainted with the purposes of the regulations, rather than by a court. They also set an appeal process. In 2009, Robert Unger lit a fire that later escaped, costing the Province of British Columbia over $860,000 in firefighting costs. The Minister determined that Mr. Unger had contravened the Act and was responsible for the fire. The Minister ordered Mr. Unger to pay for the Province's firefighting costs. In 2014, the Forest Appeals Commission confirmed the Minister's Order, finding that Mr. Unger did not exercise due diligence or reasonable care to avoid the contravention.

Administrative processes, like those in the FPPA, put pressure on corporations, and their officers, directors, and employees to take active steps to mitigate risk in order to avoid breaches that could result in AMPs, cost recovery and fines.

The Canadian courts have also recognized the ability of a province to make a civil claim and sue for natural resource damages. In the 2004 case of *British Columbia v. Canadian Forest Products Ltd.*, the Supreme Court of Canada recognized that "… it is open to the Crown in a proper case to take action as *parens patriae*, for compensation and injunctive relief on account of public nuisance, or negligence causing environmental damage to public lands…". This decision leaves the door open for a province to make a civil claim that may serve as a third mechanism to recover additional compensation for damage to natural resources, such as lost timber, wildlife or recreational benefits. Nothing in the FPPA or in the legislation of other provinces removes this common law right.

The recent amendments to the FPPA have sparked major change in the area of wildfire prevention in Alberta. We can expect a similar trend across Canada. Increased fines and new administrative penalties provide additional deterrents to individuals and corporations from

engaging in activities that may result in entirely preventable wildfires. A failure to exercise appropriate diligence in the prevention of wildfires can give rise to an entirely different firestorm of fines, AMPs and other cost recovery actions by government.

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