

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tolko Industries Inc. v. British Columbia*,
2023 BCCA 255

Date: 20230606
Docket: CA48792

Between:

Tolko Industries Inc.

Appellant
(Respondent)

And

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

Respondent
(Appellant/Petitioner)

And

Forest Appeals Commission

Respondent
(Respondent)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
December 2, 2022 (*British Columbia v. Tolko Industries Inc.*, 2022 BCSC 2097,
Vancouver Dockets S215797 & S221167).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
June 6, 2023

Place and Date of Judgment:

Vancouver, British Columbia
June 6, 2023

Summary:

The applicant, Tolko Industries Inc., seeks leave to appeal a BCSC decision overturning a decision of the Forest Appeals Commission. The issue on appeal is the correct statutory interpretation of s. 29 of the Wildfire Regulation, a regulation under the Wildfire Act. The judge's decision had the effect of restoring an order against Tolko, requiring it to pay the Province's costs of fire control in respect of a wildfire caused by Tolko's debris burn. Held: Application granted. The correct interpretation of s. 29 is significant to Tolko and may have significance for others in the forestry industry. There is a lack of appellate guidance on the interpretation issue, and given the differing opinions below on the correct interpretation, Tolko's appeal is arguable.

GRIFFIN J.A.:**Overview**

[1] This is a leave to appeal application brought by Tolko Industries Inc. ("Tolko"). It is seeking to appeal from a Supreme Court chambers decision made on December 2, 2022, indexed at 2022 BCSC 2097 ("Chambers Decision"), which allowed a statutory appeal brought by the respondent Province. The chambers judge allowed an appeal from a decision of the Forest Appeals Commission made May 27, 2021, Decision No. 2019-WFA-002(b) (the "FAC" and the "FAC Decision"). In summary, the FAC Decision and the Chambers Decision turned on a question of law, namely, the proper statutory interpretation of s. 29 of the *Wildfire Regulation*, B.C. Reg. 38/2005 [the "*Regulation*"], a regulation under the *Wildfire Act*, S.B.C. 2004, c. 31.

[2] The FAC Decision held that Tolko was exempt, by operation of s. 29 of the *Regulation*, from responsibility for the Province's costs of fire control in respect of a wildfire caused by Tolko that caused extensive damage near Nazko, B.C. in April 2016.

[3] The FAC Decision overturned an April 1, 2019 costs recovery order that had been imposed by the Deputy Fire Centre Manager (the "Manager") on Tolko in the amount of \$343,495.20 (although certain other costs and penalty aspects of the order remained in place). Pursuant to s. 27 of the *Wildfire Act*, the Manager, as a

delegate of the Minister, had the authority to impose a cost recovery order against Tolko if the Manager found that Tolko contravened the *Wildfire Act*.

[4] The Chambers Decision concluded that the FAC had made an incorrect interpretation of s. 29 of the *Regulation*, and restored the costs recovery order.

[5] Two matters raised in this proceeding are now abandoned. The Province sought judicial review at the same time as its statutory appeal. The judge did not decide the judicial review issues, and these issues are no longer pursued. In Tolko's notice of appeal, it submitted that the judge erred in determining that the question before him was a question of law. Tolko has abandoned this position and concedes that the proper interpretation of s. 29 of the *Regulation* is a question of law.

Section 29 of the Regulation

[6] The legal issue in the proposed appeal is the proper interpretation of s. 29 of the *Regulation* which at the time in question read:

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.]

Factual Framework

[7] The questions of statutory interpretation turned on these facts, which I understand to be essentially undisputed and the premise of the appeal:

- a) Tolko engaged in a known forestry industry practice of debris burning, after harvesting timber pursuant to a valid timber harvesting license.
- b) The debris burn continued to smolder in what is commonly known as a holdover fire.
- c) The source of the wildfire was the holdover fire from Tolko’s debris burn.
- d) The Province incurred costs in extinguishing the wildfire.
- e) In its management of the debris fire, Tolko contravened certain statutory provisions which deal with abatement of the risk of wildfires, pursuant to the *Wildfire Act* and *Regulation*, and did not have an available statutory defence under s. 29 of the *Wildfire Act*, such as the defence of mistake of fact or due diligence.

Differing Interpretations of Section 29

[8] There were three different interpretations of s. 29 of the *Regulation* in the proceedings below.

[9] The Manager determined that Tolko violated the *Wildlife Act* and *Regulation* in respect of its management of its debris burns. The Manager found that Tolko did not “willfully cause or contribute” to the wildfire, but its activities were part of hazard abatement, not timber harvesting or silviculture, and so s. 29 did not apply to exempt Tolko from a cost recovery order.

[10] In summary, the FAC Decision analyzed the facts and interpreted s. 29 of the *Regulation*, as follows:

- a) Tolko did not “willfully” cause or contribute to the start or spread of the “fire” in relation to which the fire control costs were incurred, within the meaning of s. 29 of the *Regulation*, as its willful conduct related to its debris burn only and a lack of due diligence, and it did not engage in willful conduct in relation to the wildfire itself as it did not intend to start the wildfire;
- b) The fire that gave rise to the government’s fire control costs resulted from either timber harvesting or silviculture treatments, as a debris burn is part of these operations within the meaning of s. 29(b) of the *Regulation*; and,
- c) As such, Tolko was entitled to the benefit of the costs recovery exemption in s. 29.

[11] At the same time, the FAC Decision also rejected statutory defences raised by Tolko in reliance on s. 29 of the *Wildfire Act*, namely, the defence of mistake of fact and due diligence. Again, Tolko did not appeal these findings and does not seek to challenge them in its proposed appeal.

[12] The Province’s appeal of the FAC Decision was brought pursuant to s. 140.7(1) of the *Forest and Range Practices Act* [FRPA] which allows a party to bring an appeal from a decision of the FAC to the Supreme Court on a question of law or jurisdiction.

[13] The chambers judge considered the correct interpretation of s. 29 of the *Regulation* to be a question of law.

[14] The chambers judge concluded that the FAC Decision incorrectly interpreted s. 29 of the *Regulation*.

[15] In summary, the chambers judge held that the FAC erred by adopting a narrow interpretation of the word “fire” in s. 29 of the *Regulation*.

[16] First, considering the language of the section, he held that the section did not require a person to intend to start a wildfire. Rather, the section uses language of

causation and contribution. The words “start” and “spread” in the opening words mandates that the way the wildfire starts or spreads informs whether s. 29 applies. He held that there is no requirement of double intent in the provision needing someone to willfully cause a wildfire: at paras. 91, 93.

[17] The chambers judge also declined to accept Tolko’s position relying on other sections of the *Wildfire Act* to inform the narrow interpretation of “fire” in s. 29 of the *Regulation*, namely ss. 9 and 27(1) of the *Wildfire Act*. The chambers judge read the meaning of the word fire in those sections as including but not limited to a wildfire.

[18] The chambers judge also found that the purpose of the wildfire control statutory scheme would be substantially negated by the interpretation adopted by the Commission. He held:

[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.

[19] The chambers judge reached the following conclusion:

[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*.

[20] The chambers judge held that he was not required to assess whether the ignition of the debris piles were within the meaning of “timber harvesting” or “silviculture treatment” since the preceding analysis disqualified Tolko from being exempt under s. 29 of the *Regulation*: at para. 109. However, he added that the Commission’s interpretation improperly relied heavily on extrinsic evidence and likely failed to adequately consider whether genuine ambiguity existed before resorting to it: at para. 101.

Legal Framework for Leave to Appeal

[21] Section 140.7(4) of *FRPA* permits Tolko to appeal the Chambers Decision with leave of a justice of this Court.

[22] The parties are agreed that the approach to considering whether to grant leave to appeal on a statutory appeal was set out by this Court in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 9* (1987), 16 B.C.L.R. (2d) 104, 1987 CarswellBC 216 (B.C.C.A.) at paras. 15–23 (Chambers). This approach was recently summarized in *Canadian National Railway Company v. British Columbia*, 2023 BCCA 187 [CNR] at paras. 18–19 (Chambers):

[18] The factors to be taken into account in an application for leave to appeal from a refusal to set aside the decision of a statutory tribunal were summarized by Justice Taggart in *Queens Plate Development Ltd...*:

- (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from;
 - (b) whether the appeal is limited to questions of law involving:
 - (i) the application of statutory provisions;
 - (ii) a statutory interpretation that was particularly important to the litigant; or,
 - (iii) interpretation of standard wording which appears in many statutes, for example the in-force provisions of retroactive legislation;
 - (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward;
 - (d) whether there is some prospect of the appeal succeeding on its merits; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
 - (e) whether there is any clear benefit to be derived from the appeal; and
 - (f) whether the issue on appeal has been considered by a number of appellate bodies...
- [Citations omitted.]

[19] In addition, an applicant for leave must meet the usual tests for leave to appeal as summarized by Justice Finch in *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254 at para. 9:

...whether the point on appeal is of significance both to the litigation before the court and to practice in general; whether the appellant has an arguable case of sufficient merit; the benefit to the parties of an appellate decision in practical terms; and, most importantly, whether the appeal will unduly hinder the progress of the action.

Positions of the Parties

[23] Tolko submits that its application for leave to appeal meets the test. Tolko says in summary: the appeal raises a meritorious question of law involving statutory interpretation which has never been considered on appeal; this question is important to it and it stands to clearly benefit from the appeal in a practical sense given the sizeable cost recovery order made against it that is at issue; the forestry industry will also benefit from clarity on the issue; and there is no other aspect to the legal proceeding and so the appeal will not hinder the progress of the action.

[24] The Province does not deny that the appeal raises a question of law that has not been previously decided at the appellate level, and that Tolko has an interest in the outcome. However, it says Tolko does not have an arguable case of sufficient merit. Further, it says that recent amendments to s. 29 of the *Regulation* makes the issues on this appeal of limited general significance.

[25] The FAC does not take any position on whether leave should be granted besides noting that this Court should consider its place within the statutory scheme and the limits to its jurisdiction set out in s. 140.7 of the *FRPA*.

Analysis

[26] I turn to my analysis of the relevant factors on this application.

[27] Tolko has clearly established some factors weighing in favour of granting leave to appeal. The appeal is limited to a question of law involving statutory interpretation. Tolko submits that there are other decisions dealing with cost recovery orders that take an inconsistent approach, but in my view, I need not review them here. There was clearly a marked difference in opinions in the decisions below, that of the Manager, the FAC and the chambers judge. There is also no previous appellate interpretation of s. 29 of the *Regulation*.

[28] Where there is controversy on this application appears to be on whether there is any general significance to the statutory interpretation issues, and is there merit in the proposed appeal.

The significance of the statutory interpretation issues

[29] Turning to these additional factors, it is apparent that the statutory interpretation issues raised on the proposed appeal are significant to Tolko, in a very practical sense, as unless it succeeds in appealing the chambers judge's decision, it will remain liable to pay the cost recovery order to the Province.

[30] Tolko says that debris pile burning is the most common method of debris disposal in forestry operations, and that hundreds of thousands of debris piles are

burned by forestry companies each year. This allows forestry companies to comply with their statutory obligations to abate fire hazards and replant de-forested areas.

[31] Tolko submits that the statutory interpretation questions may have far-reaching consequences within the forestry industry and that this supports the conclusion that the appeal raises a question of significant importance, citing a number of this Court's chambers' decisions: *Western Forest Products Limited v. HMTQ*, 2007 BCCA 418 at para. 14 (Chambers); *Dunn v. British Columbia (Securities Commission)*, 2021 BCCA 431 at paras. 23, 26–27 (Chambers); *Chemainus Gardens RV Resort Ltd. v. British Columbia (Attorney General)*, 2020 BCCA 298 at paras. 41–44 (Chambers) [*Chemainus*].

[32] The Province argues that the issues regarding the interpretation of s. 29 of the *Regulation*, raised by this appeal, will have limited significance to others. This is because s. 29 of the *Regulation* was recently amended in April 2023 to add a new subsection (2) as follows:

(2) The activities of timber harvesting, silviculture treatments, road construction, road maintenance and road deactivation referred to in subsection (1) (b) do not include the lighting, fuelling or use of an open fire related to those activities.

[Emphasis added.]

[33] The Province submits that after this amendment, even if Tolko is correct that its debris fire should be considered part of timber harvesting and silviculture treatments, the s. 29 exemption from cost recovery orders would not apply to wildfires arising from debris burns.

[34] I have difficulty with accepting the Province's argument that the recent amendment makes Tolko's appeal of little or no significance to others in the forestry industry. There may well be other industry players affected by the same provision, before its amendment. I am advised that there is a three-year limitation period for the province to seek cost recovery orders. The quantum of cost associated with fighting wildfires can be quite significant. Given the number of wildfires in this province, there may well be other large cost recovery claims in the works for wildfires that occurred

before the recent amendment to the *Regulation*. Indeed, I am advised by the parties of at least two other cases involving cost recovery orders where the prior version of the regulation is at issue. Another case involving a cost recovery order against another forestry industry company is essentially on hold, awaiting the outcome of this application.

[35] Furthermore, the recent amendment only affects one part of Tolko's argument on appeal, namely, the question of whether debris burning is included within the meaning of "timber harvesting" or "silviculture treatments" under the predecessor s. 29 of the *Regulation*. I have in mind the fact that the chambers judge considered it not necessary to address this argument because Tolko's activity fit within the first part of s. 29, namely, it willfully caused or contributed to the start or spread of the fire. The correct statutory interpretation of "willfully" in s. 29 of the *Regulation* could still remain a question of general significance to the forestry industry.

[36] In summary, I accept Tolko's argument that the appeal could have broader significance beyond just its own case. This weighs in favour of granting leave.

The merits of the appeal

[37] Turning to the merits question, the merits test has been described as requiring the leave applicant to raise a substantial question to be argued: *CNR* at paras. 24–26, and *Chemainus* at para. 58.

[38] Tolko submits that it has raised a substantial question to be argued that the chambers judge did not properly interpret s. 29 of the *Regulation* within the broader statutory scheme, and that the interpretation by the FAC was the correct interpretation.

[39] I will not attempt to detail all of the arguments but, in summary, Tolko submits that the way the *Regulation* and *Wildfire Act* work together should mean that the mere fact that a license holder violates the *Wildfire Act* provisions through negligence, leading to a wildfire, ought not to automatically equate to liability for cost recovery and exclusion from the benefit of the exemption under s. 29 of the

Regulation. However, Tolko says that the chambers judge's analysis of the words, "fire" and "willfully", leads to this result: mere negligence in controlling a debris burn, as an ordinary aspect of forestry harvesting, will exclude a license-holder from the benefit of the cost-recovery exemption under s. 29. Tolko says that the chambers judge in effect imported a requirement that a license-holder must show due diligence in order to rely on the cost recovery exemption.

[40] Tolko submits that the chambers judge's analysis and interpretation of "fire" and "willfully" creates an arbitrary distinction between debris pile burning and other high-risk forestry operations. It says s. 1 of the *Regulation* lists high risk activities which could trigger a wildfire, such as using explosives or spark-producing tools. It says that the judge's interpretation suggests that if a license-holder engaged in one high-risk activity, such as using explosives while engaging in road construction, which created a wildfire, the fact it willfully engaged in that activity would not preclude it from relying on the cost-recovery exemption under s. 29. However, if another license-holder willfully engaged in the same high-risk activity, but in respect of a debris burn, the judge's interpretation would always make that license holder liable for cost recovery if the fire escaped and caused a wildfire.

[41] Tolko submits that the chambers judge did not acknowledge the arbitrariness of this distinction when he decided not to engage in the key question of whether debris burning is included within the meaning of timber harvesting or silviculture activity in s. 29.

[42] The Province says that the chambers judge engaged in a very careful and thorough exercise of statutory interpretation, consistent with established principles. The judge established in his reasons that he considered the grammatical and ordinary sense of the language in s. 29 of the *Regulation*; other related provisions; and the purpose of the provisions. The judge considered the impact of the FAC Decision and found that the FAC's interpretation led to the absurd result of limiting the cost recovery scheme to only willfully caused wildfires such as in the case of arson.

[43] The Province adds that Tolko's analysis misconstrues the reasons of the chambers judge, who did not suggest that unless a license-holder could establish a due diligence defence, it would always be liable for a wildfire caused by its activities. The Province says that a fair reading of the judge's reasons is that the judge well knew that some acts and omissions could still be exempt from cost recovery: see para. 92 of the Chambers Decision.

[44] Tolko makes the simple but strong point that at least three decision makers interpreted the regulation differently. Given the experience of the FAC, and its understanding of the statutory framework, I understand Tolko's point to be that one cannot say that the FAC was so inarguably in error as to not raise an issue on appeal as to the correctness of the interpretation by the chambers judge.

[45] Despite the able arguments of the Province, in my view, Tolko has met the low merits threshold of showing there are substantial issues to argue on appeal.

Disposition

[46] Considering all of the relevant factors that I have already mentioned, that the issue on appeal is one of statutory interpretation that has significance to Tolko and others in the forest industry more broadly, the lack of appellate guidance on the issue, and that Tolko has raised arguable questions, I conclude that the balance weighs in favour of granting Tolko leave to bring an appeal from the Chambers Decision, focused on the correct statutory interpretation of s. 29 of the *Regulation*.

[47] I therefore grant Tolko's application.

"The Honourable Justice Griffin"