Date Issued: June 12, 2006

Indexed as: BCSSAB 3 (3) 2005

IN THE MATTER OF THE *SAFETY STANDARDS ACT*
SBS 2003, Chapter 39

AND IN THE MATTER OF an appeal to the
British Columbia Safety Standard Appeal Board

BETWEEN:

A Gas Contractor

Appellant

AND:

BC Safety Authority

Respondent

REASONS FOR PRELIMINARY DECISION
Amendment of Notice of Appeal and Consolidation of Two Appeals

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Board Member: Pinder K. Cheema, Q.C., Vice-Chair

Introduction

[1] This decision deals with two preliminary matters before the Board that were canvassed at the appeal management conference with the parties on May 5, 2006. They are as follows:

i.) should leave be granted to the Appellant to amend his Notice of Appeal filed on November 28, 2006 in file BCSSAB 3 - 2005, and

ii.) should the two claims currently being considered by the Board, namely BCSSAB 3 - 2005 (filed on Nov. 28, 2005) and BCSSAB 3 - 2006 (filed

on April 11, 2006) be consolidated pursuant to Rule 18 of the Board's Rules of Practice and Procedure.

[2] The Board sought submissions from the parties on both issues. The Board gave its decision by way of letter on June 12, 2006 with written reasons to be issued at a later date.

APPLICATION TO FILE AMENDED NOTICE OF APPEAL IN CLAIM BCSSAB 3-2005

Background

[3] The Appellant filed his Notice of Appeal on November 28, 2005. He was acting on his own behalf. The document reflects this. It is a general, imprecise document and unclear as to the specific grounds of appeal.

[4] The Respondent filed his Response on December 16, 2005. The Appellant subsequently retained counsel on February 24, 2006 and now seeks leave to file an amended Notice of Appeal received on May 4, 2006. The Respondent is opposed to this application.

Position of the Appellant

[5] The Appellant filed his original Notice of Appeal on November 28, 2005 without the benefit of counsel. Counsel for the Appellant argues that the amended Notice would assist all parties by narrowing the arguments, clarifying the grounds of appeal and facilitating disclosure.

[6] The Appellant disagrees with the Respondent's position, that he would suffer prejudice in the event of such amendment. Although the Respondent has already had an expert report prepared, the Appellant argues that no fresh cause of action is being raised by the amendment and, in any event, any expert report prepared to date would not be relevant to the issues of jurisdiction now being explicitly raised in the amended Notice. In the event that there is a fresh cause of action, the Appellant argues that the Board must make a specific determination of the existence of actual rather than presumed prejudice.

[7] The Appellant further submits that if the Respondent is prejudiced then this issue can be addressed by way of an application for costs.

[8] The Appellant also argues that Rule 12 of the Board's Rules of Practice and Procedure explicitly permits the Board to request such further information from the Appellant as it may require. Rule 21 permits the Board to give directions as to the content of a statement of issues. Hence, the Board's own procedures include an informal process of amendment.

[9] The Appellant further submits that the appropriate test to be applied in determining if an amendment is to be permitted is laid out in the case of *Stone Venepal (Celgar) Pulp Inc. (c.o.b. Celgar Pulp Co.) v. IMO Industries (Canada) Inc.(2002) B.C.J. No. 2203*. In this case, the Plaintff sought to amend the pleadings to include an earlier abandoned cause of action as this would be the only prospect of recovery. The Court agreed that there was inconvenience to the defendant but that no essential element of evidence had been lost and that the defendant was in essentially the same position as he had been at the date of the filing of the Notice of Appeal.

[10] The Appellant argues that the courts in interpreting Section 4 (4) of the *Limitation Act* apply the same test as Stone Venepal in permitting amendments after the expiration of a limitation period.

Position of the Respondent

[11] The Respondent submits that the proposed amendment attempts to raise new and unrelated issues, namely:

- that the manager who issued the revocation acted outside his jurisdiction,
- that the revocation is a form of discipline pursuant to s. 42 of the *Safety Standards Act*, and
- that the penalty was "unreasonable and unjustified" in light of the Appellant's response to previous compliance orders.

[12] The Respondent also submits that the amended Notice or particulars relating to it should have been raised prior to or at the first Appeal Management Conference of March 24, 2006.

[13] The Respondent also submits that as the Rules of Practice and Procedure are silent as to the issue of amendment of the Notice of Appeal, the amendment should not be permitted. In the alternative, it is submitted that it ought to be permitted only in the event of extraordinary circumstances. As well, prejudice should be presumed where the proposed amendment is sought to be filed outside the 30 day period set out in Rule

10(1). In support, the Respondent puts forward the cases of *Whitechapel Estates Ltd. V. B.C. (1998) 63 LCR 121* and *Med Finance C. S.A.v. Bank of Montreal (1993) BCLR (2D) 222 (BCCA)*. The Respondent submits that the Appellant has failed to rebut the presumption of prejudice and hence the amendment should be rejected.

[14] The Respondent further states that he commenced his preparation based on the original Notice of Appeal and, accordingly hired an expert who has completed his report. The Respondent argues he has suffered actual prejudice in that he has obtained and paid for a report that will be of no use if the appeal proceeds based on the amended Notice. He asks that the amended Notice be rejected and that such issues be declared statute barred as per Rule 10 (1)..

Analysis and conclusion

[15] The jurisdiction of the Board to consider the issue of amendments is found in Rule 12 of the Board's Rules and Section 11(l) of the *Administrative Tribunals Act*. (ATA) Section 44 of the *Safety Standards Act* states that Section 11 of the ATA applies to the Board. In addition, section 14 of the ATA stipulates that in facilitating "the just and timely resolution of an application, the tribunal may make any order for which a rule is made by the tribunal under section 11.".

[15] Hence, I find the Board has jurisdiction to determine the initial issue of whether an amendment may be considered.

[16] I now turn to the issue of whether leave should be granted to file the Amended Notice of Appeal. Just over 6 months have elapsed between the filing of the orginal Notice and the request to file the amendment. In that time period, the Respondent has filed his Reply, disclosure is almost complete and 3 Appeal Management conferences have been held. However, no lists of witnesses have been exchanged nor have any other documents been exchanged or filed. Pretrial matters are still being resolved. The issue of a hearing date is still being canvassed with the parties..

[17] Granting leave to file the proposed amendment would, in my view, permit the "just and timely" resolution envisaged by section 14 of the ATA. This proposed amendment clarifies and defines the scope of the hearing for all parties including the Board. It will mean a hearing based on 3 specific claims rather than on an multipage document which combines elements of fact, theory and opinion such that it is unwieldy and unhelpful to all parties and possibly prejudicial to the Appellant. Ultimately, a hearing

based on the amended Notice will be more efficient and fair for the Appellant. This approach is consistent with the words and spirit of both section 14 of the ATA and section 44 of the *Safety Standards Act*.

[18] I also wish to address the Respondent's position that such an amendment raises new issues and thus should be rejected. I find that it does not raise new issues but rather refines the lay language utilized by the Appellant. If I am incorrect in this view, I find that the amendment should still be filed; otherwise it will penalize the Appellant for his lack of legal training and his failure to consult counsel at the outset. It could also lead to unforseeable delays as the Parties and the Board attempt to discern the substance of the Notice.

[19] However, while filing such an amendment may be permitted by the relevant legislation be consistent with the overall goal of the legislation, and be in the best interest of the Appellant, I now consider the issue of prejudice to the Respondent.

[20] The Respondent argues that prejudice is to be presumed in cases where the amendment is proposed after the limitation period has expired. The Appellant disagrees and states that actual prejudice must be shown.

[21] The Webster dictionary defines prejudice as follows: "injury or harm as from some judgment or of another or others". Prejudice cannot be presumed in a vacuum. It must be assessed in the context of the relevant circumstances. The Respondent has relied on the original Notice in preparing his materials to date. He has expended time and money in a mode of preparation which he says will now be rendered irrelevant. I find that in these circumstances, prejudice is to be presumed.

[22] However, one must consider whether the presumed prejudice is such that the proposed amendment should be disallowed. I note the Respondent does not argue that the amended Notice will preclude him from continuing his preparation or that evidence essential to his defence has now been irretrievably lost due to his detrimental reliance on the original Notice. Accordingly, the issue of prejudice will not preclude the filing of the amended Notice.

[23] To redress the issue of prejudice, the Respondent is granted leave to raise the matter of costs at the conclusion of the hearing.

[24] Accordingly, given the length of the delay, the pretrial stage of proceedings and the absence of any lost evidence preventing the Respondent from being able to adequately present a defence, leave is granted to the Appellant to file the amended Notice of Appeal. The Respondent is granted leave to file an amended Reply within 15 days of receipt of these written reasons and, further, to raise the issue of costs at the conclusion of the hearing.

Application to consolidate claims

[25] The Appellant filed a Notice of Appeal in appeal number SSAB#03/06. The Board, pursuant to Rule 18, may, on its own initiative consolidate all or part of an appeal with others involving the same or similar questions of fact or law. As the potential consolidation could have significant repercussions on the progress and ultimate outcome of the appeals, the Board sought written submissions from the parties.

Position of the Appellant

[26] The Appellant opposes such an order stating that the appeals concern different facts and legal issues.

[27] The first appeal (#03/05) concerns the jurisdiction of the Provincial Safety Manager to revoke a license without having regard to section 42 of the *Safety Standards Act*. In the alternative, the Appellant states that the penalty imposed was unfair given all the circumstances.

[28] The second appeal concerns the interpretation of an agreement made in January 2006 between the BC Safety Authority and the Appellant and whether the Authority has abused its discretion in refusing to reinstate the Appellant's permit privileges and then subsequently imposing further conditions on him.

[29] The Appellant argues that combining the two appeals will unduly delay the hearing of the first as the second appeal will require extensive disclosure from the Respondent. He further states that the first appeal is based on allegations of poor performance by the Appellant leading to a license revocation whereas the second appeal alleges bad faith and breach of the January 2006 agreement by the Authority in refusing to grant permits. The Appellant has concerns that the Board, having heard evidence of alleged poor performance relating to the first appeal, may then be unduly influenced into upholding the subsequent refusal by the Authority. However, the

Appellant concedes that while the parties are the same in each appeal, the evidence and the issues in each will be different and hence requests that the hearings remain separate.

Position of the Respondent

[30] The Respondent argues that Rule 18 allows the Board to consolidate appeals "involving the same or similar questions of fact or law." He argues that consolidation would create efficiencies and would explore the complete relationship between the parties. In support, he refers to the case of *Whitechapel Estates Ltd. V. British Columbia (Ministry of Transportation & Highways, South Coastal Region) 63 L.C.R. 121* where the Board considered the following 3 factors:

- are there common claims, and relationships between the parties,
- are the claims interwoven, and
- would an order for consolidation create savings in terms of hearing dates and duplication of evidence?

[31] The Respondent argues that there are similarities between both appeals, namely, that they both involve the same parties, both challenge the Authority's decisions revoking the Appellant's license and permit privileges and both originate from the Appellant's non compliance with the Authority's directions.

Analysis and conclusion

[32] The Board has jurisdiction, pursuant to Rule 18 to consolidate appeals "involving the same or similar questions of fact or law." It is agreed by the parties that both claims involve the same parties in the same relationship. The Appellant is a licensed contractor pursuant to section 23 of the *Safety Standards Act* and the Respondent is the Authority tasked with inspections and, as in the present case, suspensions or revocations of permits issued under this Act.

[33] The claims however, are different. In BCSSAB 3 - 2005, the Appellant claims that the Authority acted outside its jurisdiction in imposing a harsher or disciplinary penalty based on incidents leading to November 22, 2005. In BCSSAB 3 - 2006, the Appellant accuses the Authority of acting in bad faith following the January 2006 agreement. The latter appeal will necessarily involve a different time period and incidents than the former.

[34] The second factor to consider is whether the claims are interwoven. The Appellant submits there is little or no evidentiary link between the 2 appeals. The Respondent submits that " a large part of the evidence would be the same in each appeal." From these positions, I conclude that the Appellant plans to lead significantly different evidence in each appeal. Not so the Respondent. Based on this factor, I conclude that the claims are not so interwoven that concurrent hearings are warranted.

[35] The third factor to consider is whether the order for consolidation would create savings in terms of hearing dates and duplication of evidence. I am not persuaded that there will be a great deal of duplication of evidence given the position of the parties above. As well, I find that the progress of the two appeals is not at an identical or similar stage. In BCSSAB 3 - 2005, the parties have filed Notices of Appeal and Response, and disclosure is almost complete. In BCSSAB 3 - 2006, a Notice of Appeal and Response have been filed. I am not persuaded that delaying the hearing of one appeal in hopes of achieving efficiencies at a later, undetermined point would have the intended result.

[36] Accordingly, the two appeals should not be consolidated and should be set for hearing separately.