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

AND IN THE MATTER OF

an Appeal to the British Columbia Safety Standard Appeal Board

BETWEEN:	**Property Owners and a Holding Company**	**APPELLANTS**
AND:	**British Columbia Safety Authority**	**RESPONDENT**

REASONS FOR DECISION

Vice Chair:	**Jeffrey Hand**
On Behalf of the Appellants:	**Property Owners and a Holding Company**
Counsel for BC Safety Authority:	**Kimberley Fenwick**

INTRODUCTION

[1] This is an appeal of a Monetary Penalty Number 2016-0006 (the "Monetary Penalty") issued by the Respondent as a result of the Appellants failure to comply with Safety Order SO-L110120141 (the "Safety Order").

[2] The Safety Order required the Appellants to upgrade an elevator in an apartment building they own. The Monetary Penalty imposed is in the amount of $7,500.00.

[3] The Appellants say that they made reasonable efforts to comply with the Safety Order and they ask that the Monetary Penalty be varied or rescinded.

ISSUE

1. Should a Monetary Penalty have been imposed in the circumstance of this case?
2. If so, should that Monetary Penalty be varied or upheld?

FACTS

[4] The Appellants own an apartment building located on East Third Avenue, Vancouver, British Columbia (the "Property"). The Property is serviced by a single cylinder elevator.

[5] Beginning in 2010, the British Columbia Safety Authority ("Safety Authority") determined that single cylinder elevators potentially posed a safety risk because similar single cylinder elevator systems had experienced catastrophic failure at various sites across North America. A decision was made to require all property owners with single cylinder elevators to either upgrade them to double cylinder or to take the elevators out of service.

[6] The Safety Order was issued on December 14, 2010 stipulating that the required upgrade to double cylinder mechanism would need to be completed by October 8, 2015. Owners of buildings with single cylinder mechanisms were also required to file a Safety Order Compliance Plan with the Safety Authority by October 8, 2011 indicating:

1. the method of achieving compliance;
2. identifying a licenced contractor to perform the required work; and
   an expected date for completion of the required work.

[7] On March 31, 2014 the Safety Authority sent a reminder notice to various property owners, including the Appellants, asking that they submit their Compliance Plan if they had not already done so.

[8] The Appellants contacted Otis United Technologies ("Otis") in or about October 24, 2014. Otis submitted a written proposal to the Appellants at that time detailing the work that they proposed to do to remove and replace the existing hydraulic cylinder at an anticipated cost of $43,117.74. The contract required a 50% deposit in the amount of $21,558.87. The contract did not contain a completion date.

[9] The Appellants submitted their Compliance Plan to upgrade their elevator on November 25, 2014. That Plan indicated that they anticipated completion of the upgrade by June 1, 2015.

[10] The Appellants paid the 50% deposit on May 22, 2015. At this point, there was five months remaining before the October 8th deadline for completing the work.

[11] In July 2015 Otis performed other maintenance work on the elevator for the Appellants.

[12] On August 20, 2015 the Appellants asked Otis to provide them with an update on the progress of the work. Otis advised the Appellants that parts had not yet been sourced and that their vendor was back-logged due to the high number cylinder replacements being performed.

[13] The October 8, 2015 deadline passed without Otis having started the work.

[14] On December 15, 2015 the Safety Authority delivered a Notice of Non-Compliance to the Appellants noting that the October 8, 2015 deadline for the elevator upgrade had passed and that the Safety Authority now considered the Appellants to be in non-compliance with the Safety Order. This notice indicated that a time extension to complete the work could be obtained if the Appellant's contractor sought a variance by January 28, 2016.

[15] On January 21, 2016 the Appellants contacted Otis via email and requested they apply for a variance before January 28, 2016. Otis replied the same day assuring the Appellants that they would submit an application for a variance to allow more time for the elevator work to be completed.

[16] On January 28, 2016 the Appellants again followed up by email to Otis indicating that they had not heard further from Otis and seeking confirmation that the variance had been submitted. Otis did not reply.

[17] On January 27, 2016 the Safety Authority notified all owners of properties with elevators, including the Appellants, that the Safety Authority would shortly be beginning the process of notifying occupants of properties with elevators that had not yet been upgraded of potential shut downs. However, this letter also indicated that elevators that had not been

upgraded could still remain in service provided their contractor sought a variance from the Safety Authority.

[18] On January 28, 2016 the Safety Authority contacted Otis directly concerning the Appellants' elevator and was apparently told by Otis that they had decided not to seek an extension by way of variance due to what Otis described as "structural issues" that needed to be addressed. There is no evidence that Otis ever advised the Appellants that they were not proceeding with the upgrade work or not seeking a variance.

[19] On February 16, 2016 the Safety Authority performed an inspection at the Appellants' elevator and identified a number of issues that had to be addressed prior to the elevator upgrade proceeding. The Safety Authority shut down the elevator at that time.

[20] On February 18, 2016 the Appellants hired a new elevator contractor, to advise them going forward and the Appellants terminated their relationship with Otis.

[21] On March 2, 2016 the Safety Authority imposed a penalty of $7,500.00 (the "Penalty").

[22] On March 8, 2016 the Appellants commenced an appeal of the Penalty. On March 29, 2016 the Appellants paid the Penalty.

ANALYSIS

[23] Counsel for the Respondent submits that the standard of review on this appeal is reasonableness and that the Board is prohibited from considering the merits of the decision reached by the Respondent in imposing the Monetary Penalty. It is submitted that the Respondent's decision to impose the Penalty is entitled to deference and should not be overturned unless it is unreasonable.

[24] With respect to counsel for the Respondent, the Board is of the view that a broad application of the reasonableness standard of review is at odds with Section 53 of the *Safety Standards Act* which provides that an appeal to this Board is a new hearing. In addition, Section 60(1) gives the Board exclusive jurisdiction to "inquire into, hear and determine" all matters of "fact and law". These appeals are in the nature of a *trial de novo* where the Board is entitled to consider not only the merits of the evidence considered in the decision under appeal,

but also to consider additional evidence that was not considered by the Safety Authority. While there may be limited circumstances where deference to the Safety Authority is warranted, those circumstances would only arise where there is more than one reasonable interpretation of the facts or law under appeal. The Board could, in appropriate circumstances, defer to a decision that the Board considers reasonable. Those cases will be rare and generally where the Board is considering new evidence, the standard of review is correctness. Such an approach is consistent with previous Board decisions.

[25] In this appeal, the Board has the benefit of two key pieces of evidence that were not considered by the Respondent when the Monetary Penalty was imposed on the Appellants.

[26] The first concerns the efforts made by the Appellants to comply with the Safety Order after it retained Otis in May 2015. The covering letter imposing the Monetary Penalty states that the Appellants had made no efforts to contact Otis to ensure that the upgrade work was proceeding in a timely fashion until after the time for compliance had passed. The Respondent considered the Appellants' deleterious in this regard.

[27] However, the evidence before the Board is that after retaining Otis in May of 2015, the Appellants contacted Otis on August 21, 2015 requesting an update on the status of the required upgrade. They were told that Otis was doing their best to obtain the necessary parts but they had been unable to proceed without the work due to serious backlogs in obtaining the required parts.

[28] The second piece of evidence concerns the continued operation of the elevator. At the time the Monetary Penalty was imposed, the Respondent stated that to their knowledge the elevator was still in service and that this represented a safety risk to the public. However, in the uncontested evidence placed before the Board reveals the elevator had actually been taken out of service on February 16, 2016 and thus by the time the decision was made to impose a Monetary Penalty, the elevator did not pose a risk to public safety.

[29] We cite the foregoing additional evidence only to reinforce why the standard of review based on reasonableness does not necessarily apply when there is additional evidence before the Board that was not before the decision maker. Looked at another way, it is hard to imagine

how a decision could be considered reasonable when it did not have all of the available evidence taken into account.

[30] With these comments in mind, the Board will consider this appeal on the basis of whether the decision to impose a Monetary Penalty was correct.

[31] Considering the whole of the evidence before the Board, it is apparent that the Appellants took reasonable efforts to bring themselves in compliance with the Safety Order by retaining a qualified and experienced elevator contractor, paying the requisite deposit, requesting advice on Otis's efforts to complete the work prior to the deadline set out in the Safety Order, and lastly requesting that Otis make the necessary application for variance when they were unable to complete the work in a timely manner. It is difficult to imagine what else the Appellants could have done in order to force a contractor to whom they had already paid a substantial deposit, to proceed with the work.

[32] There is also no evidence before the Board that explains why Otis provided a detailed quote to the Appellants in October 2014 setting out the work required to comply with the Safety Order and then waited some 16 months without doing the work. On the last possible day to obtain a variance Otis made a determination that other "structural work" was required at the Appellants' property. It is unclear why this would not have been apparent to Otis when they provided their quote in October 2014. Otis' entire approach to this work left the Appellants in an untenable position.

[33] That said, the governing legislation does require the Appellants to comply with the Safety Order and provides that the consequences of non-compliance is the imposition of a Monetary Penalty. There is no provision in the legislation for taking reasonable efforts to comply, save and except where a party receives a daily Penalty for non-compliance.

[34] While it is apparent that the Appellants intended to comply with the Safety Order, and that their chosen contractor Otis failed to take steps to perform the elevator upgrade in a timely manner, it is ultimately the Appellants' responsibility to comply with the Safety Order.

[35] The Appellants did not do so. The Safety Authority was correct in it levying a Monetary Penalty.

SHOULD THE MONETARY PENALTY BE VARIED OR UPHELD?

[36] There is no evidence before the Board that explains the Safety Authority's calculation of the $7,500.00 Penalty in numerical terms. The general principles that underlie the levying of an administrative penalty are set out in the Safety Authority's March 2, 2016 letter but there is no explanation of how the amount of the penalty was chosen. The March 2, 2016 letter is all the Board has to consider.

[37] The Safety Authority correctly observed that the Appellants have no previous record of non-compliance and they correctly observed that the non-compliance in this instance was not deliberate. However, the Safety Authority placed considerable weight on the fact that the Appellants had not taken any step to speak with Otis until shortly before the Monetary Penalty was to be imposed and they placed significant weight on the fact that the elevator was still in service and this raised a serious safety concern.

[38] However, as noted above, both of these criteria are answered, if not in whole, at least in part, by the additional evidence that the Board has before it that the Safety Authority did not consider. That is, we now know that the Appellants did take steps before the October 15th deadline to enquire as to Otis' efforts in completing the required work and we know that the elevator was taken out of service in February 2016.

[39] There is no way of knowing to what extent these two factors were used by the Safety Authority to calculate the Monetary Penalty since that evidence is not before us. The Board knows only that these two factors appear to have figured strongly in the decision to impose the Penalty and its amount. Had this information been available to the Safety Authority, it is fair to assume that the Monetary Penalty might have been adjusted downwards. The fact that the Safety Authority was considering a penalty of $15,000 does not, in of itself, mean that the $7,500 penalty imposed was reasonable. Again, the Board has no evidence before it of how the $15,000 penalty that was contemplated was calculated.

[40] Doing the best with the evidence before the Board, the Monetary Penalty will be varied and reduced to $4,000.00.

CONCLUSION

[41] The appeal of the Monetary Penalty is dismissed. However, the amount of the Penalty will be reduced to $4,000.00.

Signed:

Jeffrey A. Hand, Vice-Chair