

**Date Issued: February 1, 2019  
Appeal No. SSAB 17-2018**

Indexed as: BCSSAB 17 (1) 2018

**IN THE MATTER OF THE SAFETY STANDARDS ACT,  
S.B.C. 2003, Chapter 39**

**AND IN THE MATTER OF an appeal to the  
BRITISH COLUMBIA SAFETY STANDARD APPEAL BOARD**

**BETWEEN:**

**A Home Services (B.C.) Inc.**

**APPELLANT**

**AND:**

**British Columbia Safety Authority**

**RESPONDENT**

**REASONS FOR DECISION**

**Safety Standards Appeal Board:**

**Jeffrey Hand**

**Representing the Appellant:**

**Appellant's Counsel**

**Technical Safety BC:**

**Lisa Picotte-Li**

**INTRODUCTION**

[1] This appeal concerns a Monetary Penalty MP2008-0008 issued on July 6, 2018 ("2018 Monetary Penalty") in the amount of \$45,000.

[2] The 2018 Monetary Penalty was issued for alleged breaches of two Compliance Orders, CO-2016-0020 dated March 11, 2016 ("March Compliance Order") and CO-2016-0059 dated July 8, 2016 ("July Compliance Order").

[3] The Appellant submits that the Monetary Penalty is unnecessary because they were in the process of complying with the orders or alternatively, the Penalty is excessive in amount and should be reduced. The Respondent submits the Monetary Penalty was appropriate in the circumstances and that it should not be set aside or varied.

## **FACTS**

[4] The Appellant is an Ontario based company offering British Columbia homeowners the opportunity to purchase new furnaces, hot water tanks, heat pumps and air conditioners on financing terms. These customers are typically found through a door-to-door sales campaign where new clients are signed up and then in most instances the Home Service hires local contractors to install the new equipment supplied by the Home Service. In some instances the Home Service performs the work with its own forces.

[5] In 2016 concerns were first raised by a City of Kelowna Gas Inspector regarding possible instances of work being performed in the City of Kelowna either by Home Service, or by contractors they had retained, without the necessary gas permit. Safety Officers from the Respondent made contact with one of the principals of the Home Service to advise of their concerns that there may be a number of installations in the Province of British Columbia where work was done either without an electrical permit or a gas permit or both depending on the nature of the installation. Thereafter, a lengthy process commenced to identify potential projects, the contractors that may have worked on a given project, and to determine if the requisite permits were in place.

[6] On March 11, 2016 Compliance Order CO-2016-0019 was issued to the Home Service ordering them to:

1. Stop performing regulated gas work unless it is performed by qualified individuals.
2. Stop performing regulated gas work unless it is being performed pursuant to a permit.

3. Conduct a review of all regulated gas work performed by the Home Service or work they had authorized others to perform, during the period between March 11, 2014 and March 11, 2016 and provide a list of this work to the Safety Authority.

[7] An identical Order was issued in respect of electrical work, CO-2016-0020.

[8] On May 5, 2016 a Safety Officer requested that the Home Service supply a list of all gas and electrical jobs that their company had undertaken in BC.

[9] The appeal record contains evidence of various lists and spreadsheets exchanged between the Respondent and the Appellant and on May 9, 2016 the Safety Officer acknowledged by email that the Home Service had submitted a list of regulated gas and electrical jobs performed by the Home Service in British Columbia. This in turn led to a request that the Home Service obtain the necessary permits in relation to all of the properties that had been identified where no permit had previously been obtained.

[10] On July 8, 2016 the Respondent issued the July Compliance Order which required the Home Service to:

1. Obtain the services of a BCSA licensed electrical contractor and instruct the contractor to perform an inspection of (and make safe) all regulated electrical work performed or authorized by your firm within the Province of British Columbia and for which a permit has not been obtained and to do within 30 days.
2. Provide a list of permits obtained by the Home Service subcontractors.

[11] Over the course of the Summer of 2016 it appears as though efforts were made by the Home Service to obtain the necessary permits for installations they had performed, or had other contractors perform for them. During this investigation it was determined that the Home Service continued to perform work without first obtaining the necessary permits in at least two instances.

[12] By November, 2016, 47 properties had been identified as requiring permits and as of that date Home Service had obtained 27 permits leaving 20 permits outstanding. On November 24, 2016 a Monetary Penalty in the amount of \$10,800.00 was levied for

the Home Service's failure to achieve full compliance with the July Compliance Order and for it having continued to perform work after the issuance of the March Order without the necessary permits.

[13] The Home Service appealed the 2016 Monetary Penalty and this Board dismissed the appeal and upheld the amount of the Monetary Penalty.

[14] The appeal record contains little in the way of evidence to explain what occurred post-issuance of the 2016 Monetary Penalty. It seems fair to assume that the Home Service was continuing to obtain permits for the remaining 20 properties that were still in need of permits.

[15] On June 1, 2017 a Certificate of Inspection was issued by the Respondent with respect to a property located in Hope, British Columbia, where a heat pump installation was found to have been performed without the necessary electrical permit ("Hope Incident"). The homeowner identified this installation as being a Home Service project and accordingly, a Safety Officer made an enquiry of the Home Service on June 5, 2017 to ask whether the Home Service's forces had actually performed the work at this property. The Home Service advised that they had not performed the work and it had been subcontracted.

[16] A few days later on June 8, 2017 an electrical trade obtained a permit for this property but they say they never actually performed any work because of apparent issues between the homeowner and the Home Service whereby they understood that the equipment was going to be removed.

[17] In early 2018 the Respondent began speaking with local contractors to determine what work any of them may have done for the Home Service. It appears these enquires were being made based on a list of projects submitted by the Home Service to the Respondent.

[18] On April 9, 2018 the Safety Manager provided notice to the Home Service that he was considering issuance of a Monetary Penalty in the amount of \$50,000 due to the following concerns:

1. Full compliance with the July Compliance Order had not been achieved. There were, according to the Safety Manager, 11 properties remaining without the necessary permit and without confirmation that they had been made safe.
2. The list of permits obtained by the Home Service was still outstanding.
3. The Home Service had performed work at the Hope Incident property and had done so in breach of the March Compliance Order which required the Home Service to stop performing work unless they were properly licensed and qualified and stop performing work without a permit.

[19] In response to the notice of Potential Monetary Penalty Home Service submitted that the list of 11 properties relied upon by the Respondent was in error because:

1. No permit was required for a property in Prince George.
2. Eight of the ten properties had permits obtained, leaving only two outstanding.
3. The Home Service said their forces did not perform the work at the Hope Incident property.

[20] The Safety Manager agreed that the Prince George installation did not require a permit and he agreed there were only two properties remaining without permits. On July 6, 2018 the Safety Manager issued a Monetary Penalty in the amount of \$45,000.

[21] On August 3, 2018 the Appellant filed a Notice of Appeal from the 2018 Monetary Penalty.

## ANALYSIS

[22] As a preliminary issue the Respondent argues that the standard of review this Board should apply to this appeal is one of reasonableness. They submit that the decision of the Safety Manager is entitled to deference.

[23] The Respondent relies on *International Brotherhood of Electrical Workers v. Applied Science Technologist and Technicians of British Columbia*, 2017 BCCA, 313 as setting out the standard of review that this Board should apply.

[24] This Board has previously held that it does not consider *International Brotherhood* to be applicable. That case considered the standard of review to be utilized by a Court while conducting a judicial review. It has no application to appeals brought before this Board which is not, firstly a Court, or secondly engaged in a judicial review.

[25] The *Safety Standards Act* grants authority to the Safety Standards Appeal Board to hear appeals from decisions of the Safety Manager as a new hearing and grants the Board exclusive jurisdiction to determine all matters of fact, law and discretion. The Board also has the protection of a privative clause under the *Act*, all of which leads to the conclusion that the Board should, subject only to the type of issue under appeal, normally apply a correctness standard to appeals from decisions of the Safety Manager.

[26] As this Board has previously stated, where the governing legislation gives discretion to the Safety Manager to make a decision on which he has specialized expertise, this Board would be inclined to defer to his judgement. For example, determinations of whether a given installation of a regulated product is safe, or whether the manner of installation constitutes an acceptable equivalency, or whether individuals have the requisite training to receive certifications under the Regulations, would all be matters on which the Safety Manager is technically qualified to comment. However, on matters such as determining issues of law, weighing evidence on which to make findings of fact, or adhering to rules of natural justice would be examples of matters on which the Safety Manager does not have technical expertise and it would fall to this Board to make those determinations on a correctness standard.

[27] Decisions to impose monetary penalties requires the Safety Manager to correctly apply the requirements of the *Safety Standards Act* and the Monetary Penalties Regulation. Thereafter, the discretion to determine the amount of the penalty must be reasonable having regard to the facts and legislation.

### **The Monetary Penalty**

[28] Section 40(1)(b) of the *Safety Standards Act* (the "Act") allows the Safety Manager to issue a Monetary Penalty if there has been non-compliance with a Compliance Order. Accordingly, I must determine whether the Appellant's circumstances in 2018 constitute a failure to comply with either the March Compliance Order or the July Compliance Order.

[29] If a Monetary Penalty is warranted, Section 3 of the Monetary Penalties Regulation sets out the factors the Safety Manager must consider before imposing a Monetary Penalty.

[30] A relevant consideration in this appeal is the fact that the Appellant was already subject to a Monetary Penalty in 2016 for the same breaches of the July and March Compliance Orders. A party cannot be sanctioned twice for the same activity and so it is only the Appellant's actions in relation to outstanding compliance matters, after issuance of the 2016 Monetary Penalty, or new instances of non-compliance that can form the basis of an additional Monetary Penalty.

[31] The 2016 Monetary Penalty was issued ostensibly because after receiving the July Compliance Order the Appellant had still not obtained the requisite electrical permits for 20 properties. In addition, there was evidence that the appellant had continued to perform work with its own forces and without permits within weeks of having received the March Compliance Order.

[32] By the time the 2018 Monetary Penalty was under consideration this list of 20 properties had been reduced to two properties that still did not have permits. More specifically the 2018 Monetary Penalty was issued because:

- (a) two properties remain without electrical permits;

- (b) a list of all permits obtained by the Home Service had not been submitted;
- (c) documentation "in all cases" evidencing that these installations had been made safe had not been delivered; and
- (d) the Hope Incident constituted a further breach of the Home Service performing work when they were not licensed do so and without an electrical permit.

[33] No explanation was offered by the Home Service as to why it took 17 months, from December, 2016 to April, 2018, to reduce the list of 20 properties without permits down to two properties, beyond the general statement that it took time to identify which subcontractors worked on what properties and which of them obtained permits. The Appellant also states that obtaining authorization from the homeowners to gain access was not always forthcoming or at least not in a timely way. While the Board accepts that these may have been time consuming challenges, it is noteworthy that this situation was entirely of the Appellant's own making. The sheer volume of work they secured in the Province through a vigorous door-to-door sales program coupled with their own apparent ignorance of the regulatory scheme, created the need for a sizeable effort to address the lack of permits and in some cases, installation errors.

[34] While the Home Service's efforts to obtain the necessary permits may be a consideration to take into account in determining the amount of penalty, I am satisfied that the failure to obtain these remaining permits in a more timely fashion constitutes an ongoing breach of the Compliance Order and one warranting of a Monetary Penalty.

[35] In terms of the requirement in the July Compliance Order that a list of all permits be supplied, it is not clear on the appeal record that the Respondent did not receive this information. The appeal record contains numerous references to various lists being exchanged between the Appellant and the Respondent and there are lengthy lists of properties with permit numbers in the appeal record. Indeed there appears to be no disagreement between the parties that by the time the 2018 Monetary Penalty was issued there remained only two properties without permits. By definition the very list



that allowed the Safety Manager to agree that only two properties remained to be permitted, is a list showing the permits that had been obtained. It is not clear what list was missing at the time the 2018 Monetary Penalty was issued and it is difficult on this evidence to conclude that a Monetary Penalty was warranted in this regard.

[36] The other aspect of the July Compliance Order that the Safety Manager relies upon is the need to submit documentation confirming that those properties where work had been done without a permit had been made safe by a licensed contractor. The Safety Manager says that this documentation has not been submitted "in all cases" but no explanation is submitted to explain how many properties are affected. It is not clear whether this is only a reference to the last two remaining properties without permits. If licensed contractors obtained permits and performed the remedial work then declarations and requests for inspection would have followed in the normal course. The Safety Manager has not explained whether and to what extent this has or has not occurred or how this issue factored into his decision.

[37] The Board is mindful of the need to consider the maintenance and enhancement of public safety in the disposition of appeals. That said, if there were indeed important safety issues relating to this aspect of the 2018 Monetary Penalty, that is the lack of documentation in all cases that properties had been made safe, the Board would have expected to have seen some mention of this in correspondence between the Respondent and the Appellant as and when the various permits were obtained and the work completed or some more fulsome reference to this issue in the submissions filed by the Respondent. Without specific evidence the Board can only determine that it is reasonable to conclude there is some potential for a risk to public safety, albeit a risk that is unquantified.

[38] Turning then to the matter of the Hope Incident property and the Safety Manager's reliance on it for supporting at least in part, the 2018 Monetary Penalty, the Board finds that there are no grounds for finding this was a breach of the March Compliance Order.

[39] The March Compliance Order required the Home Service to stop performing work unless they were properly licensed and qualified and to stop performing work if the requisite permit had not been obtained. The order speaks to what the Home Service must do. Recognizing this, the Safety Manager made enquiries of the Home Service to determine whether they had actually performed this work rather than having a subcontractor do so. The Home Service, from the outset advised the Respondent that they had not performed this work, albeit their response was initially incomplete and confusing. They subsequently advised the Respondent that the Electrical Trade had obtained a permit to perform remedial work, which was true, however, the Electrical Trade did not perform the original work. It was not until their Notice of Appeal was filed that they clarified that the original installation had been performed by A Heating & Air Conditioning Company in May of 2017.

[40] The Safety Manager stated both in his letter advising that he was considering a Monetary Penalty, and in the July 6, 2018 Monetary Penalty letter, that the Home Service was in breach of the March Compliance Order because he was assuming that they had performed this work.

[41] In the Board's view the Safety Manager could not make such a finding on the evidence available to him. If a party is to be found to have been in breach of a Compliance Order, there must be evidence on which to conclude that there has actually been a breach of the Compliance Order. It is not open to the Safety Manager to assume that the Appellant performed this work. There was no evidence demonstrating that the Home Service performed this work with their own forces. In the absence of that there is no basis on which the Safety Manager could correctly, or even reasonably, conclude that there had been an actual breach of the Compliance Order. If the Home Service subcontracted this work then it was the responsibility of that subcontractor to be properly qualified, licensed and to take steps to obtain a permit. Under the provisions in the Act, as they existed at the time the Monetary Penalty was imposed, there was no requirement on the Home Service to ensure that its subcontractors were qualified or that those subcontractors obtained the necessary permit.

[42] With the foregoing comments in mind I am satisfied that the Appellant's failure to obtain permits for the remaining two properties arising from the 2016 Monetary Penalty is sufficient grounds for a Monetary Penalty. The Appellant was afforded more than adequate time to bring itself into compliance once it came to learn in early 2016 that it was offering services in the Province that constituted regulated work and required compliance with the regulatory regime. As noted above in these reasons, the predicament that the Appellant found themselves in was purely of their own making and I accept that with greater diligence they could have brought themselves in conformance with these requirements at an earlier point in time. That said, the Appellant was taking steps to achieve full compliance.

[43] However, as noted above, there is no basis to conclude that the Appellant committed a new breach of the March Compliance Order in relation to the Hope Incident property.

#### **Amount of the Monetary Penalty**

[44] This leaves the amount of the Monetary Penalty to be considered in light of the foregoing facts.

[45] Section 3 of the Monetary Penalties Regulations sets out the factor that the Safety Manager must consider in imposing a Monetary Penalty. Those factors are:

- (a) previous enforcement actions under the *Act* for contraventions of a similar nature by the person;
- (b) the extent of the harm, or the degree of risk of harm to others as a result of the contravention;
- (c) whether the contravention was deliberate;
- (d) whether the contravention was repeated or continuous;
- (e) the length of time during which the contravention continued; and
- (f) any economic benefit derived by the person from the contravention.

[46] In an apparent effort to apply the criteria set out in the Regulation, the Safety Manager has created an internal guideline known as the Monetary Penalty Calculator.

[47] No explanation was offered by the Respondent in its submissions to explain what use, if any, the Safety Manager made of the Monetary Penalty Calculator. Understanding how the Safety Manager arrived at the Penalty is further complicated by the fact that the appeal record contains no less than four drafts of the Monetary Penalty, none of which total \$45,000. They range in penalty amount from \$21,000 to \$42,000.

[48] It must be noted that the Monetary Penalty Calculator is nothing more than an internal guideline. It does not have the force of law and thus I am required to consider the 2018 Monetary Penalty only in the context of the criteria set out in the Regulation.

[49] As noted earlier in these reasons, care must be taken when the Safety Manager applies two Monetary Penalties arising out of the same set of facts so as to ensure that the party receiving the penalty is fairly treated and not made to pay twice for the same contravention. I consider below the criteria set out in the Monetary Penalties Regulation.

### **Previous Enforcement Actions of a Similar Nature**

[50] Having found that there is no evidence on which to conclude that the Home Service performed work related to the Hope Incident property, it follows that there is no additional contravention of a previous enforcement action. In other words the only enforcement action brought against the Home Service are the Compliance Orders issued in 2016 and which formed the basis of the previous Monetary Penalty in 2016. There is nothing that the Home Service has done subsequent to those 2016 Compliance Orders that would constitute a new contravention.

[51] Neither are the two outstanding properties that remained without permits when the 2018 Monetary Penalty was levied constitute new or additional infractions. They constitute, at most, continuing infractions, and some recognition must be given to the fact that the Appellant has already been sanctioned for the circumstances that gave rise

to these properties not having permits in the first place. What is in issue is the delay in securing those remaining permits.

### **Extent of Harm**

[52] There is little if any evidence in the appeal record, or found within the submissions of the Respondent that speaks to the degree to which any of the 18 properties that the Home Service remedied after the 2016 Monetary Penalty contained either actual safety risks or potential for safety risk.

[53] There is also a lack of information from the Safety Manager as to which properties he is awaiting confirmation that those installations have been made safe. Beyond accepting as a general proposition that there can be a risk of harm when work is performed without obtaining the requisite permit, it is not possible on the evidence submitted to draw any conclusions about the extent of risk in this instance.

### **Was the Contravention Deliberate?**

[54] The fact that the Home Service carried on a large scale sales campaign in the Province initially and did so in apparent ignorance of the regulatory regime appears to have been through inadvertence, but most importantly they have already been sanctioned for that activity by way of the 2016 Monetary Penalty. The 2018 Monetary Penalty is only for their efforts to address the remaining properties outstanding after the 2016 Monetary Penalty was issued. The appeal record contains any number of communications between the Home Service and the Respondent in furtherance of completing those tasks. The Home Service was taking steps to comply. There is no evidence that they deliberately ignored the requirements of the Compliance Orders in issue. They say they have discontinued business operations in British Columbia while they address the Safety Manager's concerns. There is no evidence, as submitted by the Respondent in its written submissions, that the Home Service has placed their own business interests ahead of achieving compliance. The contrary seems to the case.

[55] The Board accepts that achieving more timely compliance with orders of the Safety Manager is in the interest of public safety and the Home Service should be

sanctioned again, just as they were in 2016, but the penalty should reflect the efforts that had been made in achieving compliance.

### **Was the Contravention Repeated or Continuous?**

[56] The process of addressing the remaining 20 properties outstanding after the 2016 Monetary Penalty constitutes a continuous breach of the July Compliance Order because the failure to obtain permits and complete remedial work was allowed to persist until the issuance of the 2018 Monetary Penalty when there were only two properties remaining without permits. We note that there is evidence in the appeal record that one of the two remaining properties had a permit by May 14, 2018. So the evidence is that to varying degrees these conditions persisted over a period of 17 months but at an ever reducing rate as additional properties were brought into compliance.

[57] While there must be some recognition in the 2018 Monetary Penalty for this continuous element of contravention so too must there be recognition that during this time there were fewer and fewer affected properties and necessarily a reducing safety risk. It would be unreasonable to conclude otherwise.

### **Length of Time the Contravention Continued**

[58] There clearly is some linkage between this consideration and the previous one found in the Monetary Penalties Regulation. The comments above are applicable to this criteria.

### **Economic Benefit Obtained**

[59] No quantification of this benefit was submitted by either the Appellant or the Respondent. The Respondent submits that an economic benefit is obtained every time work was performed without paying the cost of the permit. The Appellant says that the cost of the effort they have had to undertake in going back and rectifying these contraventions has been significant. Given the sheer scale of the number of properties involved the evidence discloses at the very least that the Home Service enjoyed some temporary economic benefit albeit they have likely since incurred more costs by way of

performing remedial work than they may have saved in avoiding the permit in the first instance.

[60] With the provisions of the Regulation and the foregoing comments in mind the Board agrees with the Appellant that the size of the 2018 Monetary Penalty seems excessive. We firstly observe that it does not reflect any proportionality in light of the 2016 Monetary Penalty bearing in mind that both Penalties concern the same set of facts and the 2018 Penalty only relates to the ongoing efforts of the Home Service to comply with the July Compliance Order.

[61] If the 2016 Monetary Penalty in the amount of \$10,800 was appropriate for reducing a list of 47 properties to 20 it seems disproportionate that a penalty some four and a half times that amount is justified for reducing a list of 20 properties to two properties. It is also noteworthy that the 2016 Monetary Penalty was intended to sanction the Appellant for continuing to perform work without permits in the weeks after the March Compliance Order. No such contravention was present in 2018.

[62] A penalty of this size is also not consistent with any previous decisions of the Safety Manager that have come before this Board for similar contraventions. Monetary Penalties are a means of encouraging compliance with the regulatory scheme and a way of discouraging future infractions but the decision to impose a penalty must be proportionate to infraction committed, consistent with previous penalties, and fully transparent in terms of understanding the rationale for the penalty.

[63] The circumstances giving rise to the 2018 Monetary Penalty, on any reasonable consideration, are far less egregious than those that existed in 2016 when a \$10,800 penalty was imposed, and which this Board upheld on appeal.

[64] Using the criteria in the Regulation, and importantly, the amount of the 2016 penalty as a guide, I find that a monetary penalty in the amount of \$8000 properly takes in account:

1. The remaining two permits that were outstanding.

2. The delay after 2016 while the Appellant secured permits and rectified installation errors.
3. The potential for safety concerns after 2016 in any of the affected properties.
4. Any economic benefit the Appellant may have received.
5. The fact that the Appellant has already been sanctioned for the circumstances that first gave rise to the contraventions.

## **CONCLUSION**

[65] The 2018 Monetary Penalty is reduced to \$8,000.

Signed;

A handwritten signature in black ink, appearing to read 'J. Hand', written in a cursive style.

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Jeffrey Hand, Chair