Date: July 15, 2014
File No: SSAB 23 – 2013

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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 Standards Appeal Board

BETWEEN:	INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	**Appellant**
AND:	BRITISH COLUMBIA SAFETY AUTHORITY	**Respondent**

REASONS FOR DECISION
RE: JURISDICTION OF THE BOARD AND STANDING

Introduction

[1] This appeal is brought under the *Safety Standards Act*, SBC 2003, c.39 (the "Act") by the Appellant, the International Brotherhood of Electrical Workers (the "Appellant") and concerns the October 28, 2013 decision (the "Decision") of the Provincial Safety Manager, to recognize two new certificates created by the Applied Science Technologists and Technicians of B.C. (the "ASTTBC") as approved training programs. The two certificates in question are offered under the ASTTBC's Electrical Work Practitioner Certification Program (the "EWP Certification Program").

[2] The Appellant's position is that the Provincial Safety Manger of the British Columbia Safety Authority does not have jurisdiction to recognize the ASTTBC's new certificates and that the ASTTBC does not have the statutory authority to create or issue new certificates. Further, the Appellant submits that the Decision violates the duty of procedural fairness by not including sufficient written reasons. The Appellant submits that it has standing to appear in front of the Safety Standards Appeal Board (the "Board") with respect to the arguments raised in the Appeal.

[3] The British Columbia Safety Authority (the "Respondent") submits that the Board does not have jurisdiction to address the issues raised in the Appellant's Notice of Appeal and alternatively, if the Board does have jurisdiction to hear the Appeal, the Appellant lacks standing to raise these issues.

History of the Appeal

[4] At an Appeal Management Conference held on January 14, 2014, the parties agreed that the first issues to be determined are those of jurisdiction and standing. As the Respondent raised the jurisdictional question, it was agreed that the Respondent would file the initial submission on these preliminary issues and the Appellant would then file a response with a final right of reply by the Respondent.

Issues

[5] The preliminary issues for consideration at this stage are as follows:

1) Does the Board have jurisdiction to hear the issues raised in the Appeal?
2) If so, does the Appellant have standing to appear before the Board?

The Board intends to deal with the issue of jurisdiction first. Should the Board find that it does in fact have jurisdiction to hear this appeal, the Board will then consider the issue of standing.

Position of the Parties Re: Jurisdiction

<u>The Respondent</u>

[6] The Respondent relies on *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 ("ATCO") for the proposition that the Board's jurisdiction is determined by, and confined to, those matters bestowed on it by the Act. The Respondent takes the position that the Act does not contemplate an appeal with respect to the recognition of training programs under section 15(k) of the Act. In the alternative, the Respondent submits that, if the Board does have jurisdiction to hear this appeal, the Appellant lacks standing to appeal because it was not the subject of the decision.

[7] The Respondent points out that the legislation expressly sets out the specific Safety Authority decisions that give rise to a right of appeal and states that those are the only decisions that may be appealed to the Board. The Respondent relies on the doctrine of *expressio unis est exclusion alterius* to argue that the reference to specific enumerated areas of appeal to the

Board in the Act leads to the presumption that there is no appeal to the Board in areas where it has not been expressly stated in the legislation. The Respondent also submits that while Part 9, Division 2 of the Act contains references to the Appeal Board's jurisdiction, that this part alone is of limited use in determining the scope of that jurisdiction. In particular, the Respondent states that the obligation to "consider the maintenance and enhancement of public safety" set out in section 52(1) of the Act must be limited "in respect of the Appeal Board's jurisdiction" and that the intent is clearly not to authorize the Board to rule on all unsafe products or activities which are not specifically subject to the Act. Similarly, the Respondent states that the Board's "exclusive jurisdiction" as set out in section 60(1) of the Act is limited to those matters required to be determined in an appeal or ancillary matters arising in such a properly constituted appeal such as preliminary decisions on jurisdiction or procedure.

[8] The Respondent submits that the following Hansard extract from the 2003 Legislative Session dated May 8, 2003 provides support that the legislature did not intend the Board to have jurisdiction over all safety manager decisions:

> **J. Kwan:** Is there an appeal mechanism through which to question, I guess, the decisions of the safety manager? The minister mentioned that it goes to the managerial level. Who would that be? Is that the assistant deputy within the ministry?
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> **Hon. G. Abbott:** I'll just put a little bit more flesh around the previous answer I made. When complaints are launched in respect of the decision or the action of an employee or a manager, the first effort, obviously, is to seek an informal resolution of that rather than engaging other processes.
>
> In some cases – again depending on the nature and complexity of the complaint that's tendered – it may find its way up, for example, to the assistant deputy minister, who would give consideration to the issue. I should also note that the *Ombudsman Act* applies currently to decisions of the safety engineering services branch employees and managers. The *Ombudsman Act* will continue to apply when the new authority is in place as well. That's an alternative source of a remedy for an aggrieved party if they choose to proceed with it.
>
> Again, the emphasis is always on early and formal resolution of these things. <u>In theory they can move up to the ADM, they can move on to the appeal board, they can move on</u>

to the Ombudsman or they can move on to the courts, depending on the character and nature of the concern. (Emphasis added.)

[9] The Respondent cites the 2007 decision of the Board, *A Power Engineer v. BCSA*, Appeal No. BCSSAB 5(1) 2007 ("Power Engineer") where it was observed:

> [19] The jurisdiction of the Board as outlined in the Act is clearly not unfettered. The Board has the jurisdiction to hear appeals from certain decisions of local government or provincial safety officers, acting under delegated authority, and local government or provincial safety managers under the Act. For example, a right of appeal is specifically given in respect to a refusal to issue a license, permit or a certificate of qualification. Additionally there are instances outlined in the Act where it is clearly stated that there is no right of appeal to the Board. For example, s. 32 of the Act states that a decision of a safety manger on a review of a decision to not issue a variance is not appealable to the Board. If the intention of the Legislature was to provide a broad right of appeal on all decisions made by provincial safety managers they would not have specified when a right of appeal was available and when it was not.

[10] The Respondent states that the Board should look to the power asserted by the Safety Authority and determine whether the Act extends its jurisdiction to that power, as it did in *Power Engineer*. In the present case, the Safety Authority claims that it has the power to recognize a training program for the purpose of qualifying for a certificate under section 15(k) of the Act and this power does not fall within the categories of decisions over which the Board is granted appellate jurisdiction. The Respondent submits that the only circumstance in which the recognition of a training program under section 15(k) could arguably be subject to a right of appeal under the Act is if recognition of a training program constitutes the issuance of a "permission" within the meaning of section 27(5) of the Act, but even then such a right to appeal would be limited in this case only to the ASTTBC as it would be "the applicant" granted the right to appeal by sections 27(2) and (5) of the Act.

[11] The Respondent relies on *A Lumber Mill v. BCSA,* Appeal No. SSAB 18(1) 2013, which it claims is directly applicable to the facts on this appeal.

[12] To summarize, the Respondent states that the Board lacks jurisdiction because:

a) the Act expressly lists which Safety Authority decisions can be appealed, to the exclusion of all other decisions;

b) the *expression unis doctrine* supports that the Legislature intended to exclude other decisions from the Appeal Board's jurisdiction;

c) the Legislature expressly indicated that the Appeal Board's jurisdiction does not extend to all Safety Authority decisions; and

d) the subject matter of this appeal does not fall within the range of decisions over which the Act grants a right of appeal.

Position of the Appellant

[13] The Appellant agrees with the Respondent that the Board's powers cannot exceed what have been granted to it under the Act and that determining the Board's jurisdiction involves a question of statutory interpretation.

[14] The Appellant states that the proper approach to statutory interpretation is the "modern approach" as set out by the Supreme Court of Canada in a number of decisions, including *Rizzo & Rizzo Shoes Ltd.* [1998] SCJ 2 ("Rizzo"); *Bell ExpressVu Limited Partnership* v. *Rex*, 2002 SCC 42 ("Bell ExppressVu"); and *ATCO*.

[15] The Appellant states that the proper approach to statutory interpretation is set out in Rizzo as follows:

> …Elmer Dridger in *Construction of Statutes*(2nd ed.1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> …
>
> I also rely on s.10 of the *Interpretation Act*, R.S.O. 1980, c.219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."
>
> Although the Court of Appeal looked to the plain meaning of the specific provisions in questions in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized…. (at paras. 21-23)

[16] The Appellant notes that section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 (the "Interpretation Act") is substantively identical to that considered by the Supreme Court of Canada in Rizzo where it held that more than just the wording of legislation must be considered in determining the correct interpretation of a statute.

[17] The Appellant cites ATCO in support of the argument that the grammatical and ordinary sense of a section in isolation is not determinative and that it is necessary to consider the entire legislative context of a provision:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole"….
>
> As in any statutory interpretation exercise, when determining the powers of the administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell Express Vu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c.1-8, s.10 (in Appendix). "Statutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co., at* para. 102.
>
> …As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission),* [1989] 1 S.C.R. 1722, at p.1756:
>
> > The powers of any legislative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.
>
> The mandate of this Court is to determine and apply the intention of the legislature…without crossing the line between judicial interpretation and legislative drafting…That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication": the powers conferred by the enabling statute are construed to include not only those expressly granted but also, by necessary implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature…Canadian courts have in the past applied the doctrine

so as to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

(at paras.49-51)

[18] Accordingly, the Appellant submits that it is necessary when interpreting provisions of the Act to begin with a consideration of the objects and scheme of the legislation, and to place the provisions at issue into the proper legislative context; this requires reading the words of the provisions at issue harmoniously with both the scheme and object of the legislation as well as the intent of the Legislature.

[19] The Appellant points out that the broad object of the Act is the enhancement of public safety. To accomplish this object, the Act provides for its administration and enforcement through the appointment of Safety Officers and Safety Managers, and endows them with specific powers.

[20] The Appellant notes that the Respondent is created by the *Safety Authority Act,* S.B.C. 2003, c. 38 (“BCSA Act”) and notes that its mandate coincides with that of the Board as it relates to public safety:

> **Purposes of the Authority**
>
> 5. The purposes of the authority are:
>
> (a) To carry on activities throughout British Columbia that foster safety in the design, manufacture, disposal, construction, installation, operation, maintenance and use of technical products, equipment, systems and railways…

[21] The Appellant states that the Board is granted jurisdiction to hear appeals by section 52(1) of the Act, which provides:

> **Jurisdiction of the appeal board**
>
> 52(1) When hearing appeals the appeal board must consider the maintenance and enhancement of public safety.

[22] The Appellant further states that section 53 of the Act provides that appeals before the Board are new hearings, unless the Appeal Board otherwise recommends and the parties agree; this means that the Board conducts hearings *de novo* in which it hears the matter decided by a Safety Officer or Safety Manager anew.

[23] The Appellant notes that the Board is granted broad powers for the hearing of appeals by s.44 of the Act, which provides that the majority of the provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c.45. apply. The Board is provided exclusive jurisdiction to hear appeals further to section 60 of the Act and its decisions are protected by a strong privative clause. The Appellant submits that these powers are consistent with an expert Board that sits in appeal of decisions with a scope of jurisdiction which coincides with the overall purposes of the Act and the mandate of the Safety Authority and that the Board has the authority to determine all matters necessary to determine an appeal, including matters of discretion.

[24] The Appellant further contends that the *de novo* nature of hearings before the Board means that it does not owe any deference to the decisions made below.

[25] On a proper interpretation of the Act, the Appellant submits that the Board has broad jurisdiction over all decisions made by Safety Officers and Safety Managers unless there is an express indication to the contrary in the Act. The Appellant contends that the narrow construction of the appeal provisions urged by the Respondent leaves certain decisions of the Safety Officers and Safety Managers immune from appeal; as such decisions are not protected by privative clauses and are subject to judicial review, where they would be reviewed on a standard of correctness. The Appellant submits that such an interpretation is inconsistent with the creation of an expert Safety Authority and an Appeal Board with broad and exclusive jurisdiction.

[26] The Appellant also refers to several sections of the Act which expressly provide that certain decisions made by the Safety Authority are not appealable to the Board. It points out that absent a presumption that all decisions are appealable to the Board, such exemptions would be unnecessary.

[27] Further, the Appellant states that the Act does not provide for discrete rights of appeal as submitted by the Respondent. Rather, the Appellant notes that the Act provides that in certain circumstances a safety manager or safety officer must notify a prospective appellant of their right to appeal a decision. The Respondent submits that accordingly the *expressio unis doctrine* relied on by the Appellant has no application. The Appellant states that any endorsement by the Board of enumerated grounds for appeal in *A Power Engineer* is a mistake that must be corrected.

[28] In support of this position, the Appellant refers to an excerpt of Hansard that shows an exchange in the Legislature as to appeals from s. 20 of the Act, which concerns the removal of contractors from the registry and for which there is no provision providing for notice of appeal:

> **J. Kwan:** Will a contractor be notified if they're removed from the registry?
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> **Hon. G. Abbott:** Yes.
>
> **J. Kwan**: Will they be able to appeal that decision, and to whom do they appeal it?
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> **Hon. G. Abbott**: The answer is yes. Typically, the aggrieved contractor would be appealing the decision of a manager, and it would embrace the process as we talked about earlier. But yes, certainly the decision would be appealable to the Safety Standards Appeal Board.
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> *Hansard*, 2003 Legislative Session: 4th Session, 37th Parl (May 8, 2003, vol 15, No.6)The Appellant submits that this demonstrates that the legislative intent of the Act was not to limit appeals to those decisions for which there is a provision providing for a notice of appeal to the Board.

[29] With respect to the Respondent's submission that the broad jurisdiction submitted by the appellant would provide no limits to the Board's jurisdiction and create an absurdity, the Appellant states that clearly such jurisdiction is limited by the Act to include only those public safety issues that stem from decisions of Safety Officers and Safety Managers under the Act.

[30] The Appellant submits that the decision in *A Lumber Mill* is distinguishable as it dealt with the issue of jurisdiction over an investigative report rather than an adjudicative decision.

[31] Finally, the Appellant notes that the impugned decision in this appeal states that a right of appeal to the Board exists; accordingly, such a right must exist.

Analysis

[32] The Board agrees with both parties that the proper approach to statutory interpretation requires consideration of the grammatical and ordinary meaning of a provision in the context of the legislative objective and scheme of the Act as a whole. The fundamental question in this preliminary ruling is whether a right of appeal exists from a decision to recognize certificates created by ASTTBC as approved training programs.

[33] The Board recognizes that it only has those powers conferred expressly and by necessary implication from the Act. The Board's primary jurisdiction comes from section 52(2) of the Act, which states:

s.52 (2) If a safety manager makes a decision that could otherwise have been made by a safety officer, a person who would have a right to review under section 49 has instead a right to appeal the decision to the appeal board.

[34] The Board therefore has jurisdiction over those decisions that are within the power of a safety officer to make and that are subject to a right of review. The legislation also expressly identifies certain decisions that do not give rise to an appeal. For example, s. 32 of the Act states that a decision of a safety manger on a review of a decision to not issue a variance is not appealable to the Board. Accordingly, the Board has the jurisdiction over decisions that can be made by a safety officer that are not otherwise exempted by the legislation. Further, the legislation sets out some instances where an appeal arises from the exercise of a safety manager's powers. For example, section 23 of the Act states that notice of the right to appeal must be given if a safety manager refuses to issue a license to an individual.

[35] The Appellant places emphasis on the fact that the legislation only provides for "notice" of an appeal rather than a right of appeal; however, the reference to a "notice" of appeal necessarily gives rise to a substantive right of appeal as any other interpretation would lead to an absurd result.

[36] The legislation lists powers for both safety officers and safety managers. The powers of provincial safety officers are set out in section 18 of the Act:

Powers of safety officers

18 (1) For the purposes of this Act and in the course of performing their duties, safety officers may exercise any or all of the following powers and any other powers assigned to them under the regulations:

(a) issue, suspend or revoke a permit under this Act;

(b) when issuing a permit, include terms and conditions;

(c) if satisfied that there are reasonable grounds to do so, enter any premises at any reasonable time for the purpose of

(i) inspecting regulated work, regulated products and records respecting regulated work or regulated products, or

(ii) investigating any incident;

(d) inspect all regulated products and regulated work found on any premises by a safety officer;

(e) require any regulated product that is being inspected to be started, turned on, put in motion, tested, used, operated, stopped or turned off for the purpose of its inspection by a safety officer;

(f) require the production to a safety officer of all plans and specifications a safety officer considers necessary for the inspection

of any regulated work or regulated product that a safety officer is inspecting;

(g) after giving reasonable notice of the intention to do so, remove or take samples of or direct the removal of a regulated product or a part of a regulated product, or require any of them to be provided or delivered to a safety officer;

(h) require that the names and addresses of licensed contractors or other persons engaged to do regulated work be provided, together with a statement setting out their qualifications, the nature of the work they do and when and where it is done;

(i) require that a person provide evidence that this Act and the regulations, and any safety order, compliance order, discipline order or decision of a provincial safety manager, a local safety manager or the appeal board is being, or has been, complied with;

(j) if the presence of a person is necessary in respect of a regulated product or regulated work about which the person has particular knowledge, on reasonable notice, require that a person come to a location at a specified time to answer oral or written questions;

(k) require that a person produce any record for inspection;

(l) require a person to produce for inspection any licence, permit, other permission, certificate or any other document issued under this Act to the person by the minister or a local government;

(m) temporarily remove a record to copy it;

(n) during or after completion of regulated work, require a certificate or affidavit, given by a person recognized by the regulations as having the authority to provide a certificate or affidavit, that the specified regulated work meets the requirements of this Act and the regulations;

(o) issue a compliance order;

(p) issue a variance;

(q) recommend that the appropriate safety manager impose a monetary penalty.

(2) A safety officer may require that a person provide information orally, in writing or by an affidavit.

(3) Despite any other provision under this Act, a safety officer may refuse to issue or may cancel or suspend any certificate, licence, permit or other permission under this Act if a person is delinquent in the payment of any fee, penalty or other money owed under this Act.

(4) If a safety officer considers that it is necessary to take immediate action in order to prevent, avoid or reduce a risk of personal injury or damage to property and there is no person who could carry out the action, a safety officer may take the necessary action and issue any safety order that could be made by a safety manager under section 31 (4).

[37] The powers of safety managers are set out in sections 15, 16 and 17 of the Act:

Powers of provincial safety manager

15 A provincial safety manager may exercise any or all of the powers of a safety officer and may do one or more of the following:

(a) issue, suspend or revoke a certificate of qualification;

(b) issue, suspend or revoke a licence;

(c) when issuing a licence, include in the licence a term or condition;

(d) issue a safety order;

(e) review a decision of a safety officer appointed by the minister;

(f) issue a directive or discipline order;

(g) delegate any of the powers under paragraphs (a) to (f) of this section to a safety officer appointed by the minister;

(h) delegate to a safety officer or class of safety officers the power to issue a licence for a licensed contractor or certificate of qualifications to an individual;

(i) require a person who holds a licence, certificate, permit or other permission under this Act to be re-examined as to their qualifications to maintain or renew the licence, certificate, permit or other permission;

(j) if the regulations require further training for persons who hold a certificate, permit or other permission of a particular class, require a person who holds a certificate, permit or other permission to undertake further training or examination in order to maintain their status and for that purpose may devise and administer tests;

(k) recognize programs of training for the purpose of qualifying for a licence, certificate, permit or other permission under this Act;
(l) evaluate the qualifications of a person who applies for a licence, certificate, permit or other permission under this Act.

Powers of local safety manager

16 A local safety manager may exercise any or all of the powers of a safety officer and may do the following:

(a) recommend to a provincial safety manager the revocation or suspension of a licence under this Act;

(b) review a decision of a safety officer appointed by the local government.

Powers of safety managers

17 (1) A safety manager may do any of the following:

(a) subject to the regulations,

(i) accept, with or without terms and conditions, an alternative safety approach,

(ii) vary the terms and conditions of, or impose new terms and conditions on, an alternative safety approach, and

(iii) suspend or cancel an alternative safety approach;

(b) impose a monetary penalty.

(2) In addition to the powers under subsection (1), a safety manager has the powers assigned by the regulations.

[38] It is manifest from a review of these sections that the powers given to safety officers are largely those needed to enforce the public safety aspect of the Act. While many of the powers conferred on safety managers are similar to those given to safety officers, safety managers are also granted additional administrative powers to oversee the safety scheme implemented by the legislation, such as reviewing qualifications, requiring examinations, and recognizing courses of training.

[39] On a plain reading of the Act, there is no language that supports, either expressly or by necessary implication, a right of appeal from the recognition of a program of training or from recognition of new certificates created from such approved training programs. The power to recognize a program of training, or to recognize a certificate from a program of training, is not a power exercisable by a safety officer and, as such, does not engage the statutory appeal under s. 51 of the Act. Although there is no right of appeal directly from the recognition of a training program, the Board recognizes that there may be instances where an appeal could arise indirectly. For example, if a safety officer refused to issue a license or an individual applied for certification and was turned down, then the individual adversely affected by that decision would have a statutory right to appeal pursuant to s. 27 of the Act. However, even in such circumstances, the subject of the appeal would not extend to the decision to recognize the training program as a whole.

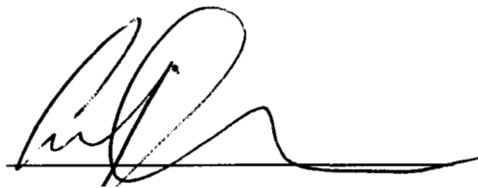
[40] The Board does not accept that the *de novo* nature of appeals provides any support for the argument that it has jurisdiction over this matter. The fact that the Board conducts hearings *de novo* simply means that it is not limited to the appeal record and may consider new evidence. The Board agrees with the Respondent that it must provide some deference to the decisions under appeal but the issue of deference has no bearing on the jurisdictional question of whether a right of appeal exists.

[41] The Board does not accept the Appellant's assertion that there must be an appeal because the Safety Manager included notice of such right in its letter to the ASTTBC. A right of appeal can only be created by statute. The Board has concluded that no such right has been created here.

Conclusion

[42] For the reasons set out above, the Board finds that it does not have jurisdiction to hear the Appellant's appeal. In view of that finding, it is not necessary to address the issue of standing.

Signed by Panel:



Emily C.Drown, Chair

Angela Westmacott, Vice-Chair

Keith Saddlemyer, Board Member