

Indexed: BCSSAB 4 (1) 2014

**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: **HOMEOWNERS** Appellants

AND: **BRITISH COLUMBIA SAFETY AUTHORITY** Respondent

REASONS FOR DECISION

Introduction

[1] This is an unusual appeal. Normally, Appellants come to the Board after they have been served with decisions from the British Columbia Safety Authority (the “Respondent”) putting them on notice that they must comply with provincial safety legislation or issuing a monetary penalty for failing to comply. In this appeal however it is the Appellants that say that regulated equipment installed in their home does not comply with provincial safety legislation. Formally, this is an appeal of the decision of the Provincial Safety Manager dated March 21, 2014 (the “Decision”) that reviewed a safety officer’s certificate of inspection for permit EL-011134-2013. However, the Decision only came about due to the persistence of the Appellants who feel most strongly that certain regulated work in their home does not comply with provincial safety legislation.

[2] Throughout the Appeal the Appellants have requested the Board become involved in the contractual dispute they have with the electrical contractor that built their new home. The Board does not have jurisdiction to deal with such contractual matters

and such disputes are properly dealt with via civil action between the parties, if an out of court resolution cannot be reached. However, the Board will say that it is clear that the matters leading up to this Appeal could have been dealt with better by all parties involved – the builder and contractor, the Appellants and the Respondent. In particular, the Appellants appear to have been argumentative (perhaps rightly so) with the builder and electrical contractor as well as the Respondent and the Respondent has made a number of small errors (such as issuing a new permit when they could have reopened one that had been closed upon receipt of inaccurate information from the electrical contractor) that had they not been made could have prevented the conflict between the parties getting to the point raised in this appeal.

The Decision Being Appealed

[3] The Decision dealt with two issues. The first was whether the location of an electrical panel in the Appellants' "spice kitchen" complied with the requirements of rule 26-402(2) of the *BC Electrical Code* (the "Electrical Code"). The second was whether the installation of a service disconnecting means (the "Switch"), located on the exterior of the building violated BC Building Code Article 9.34.1.3 (the "Building Code"). With respect to the first issue, the Provincial Safety Manager held in the Decision that the electrical panel located in the spice kitchen needed to be relocated. With respect to the second issue, the Provincial Safety Manger held in the Decision that the issue of compliance with the Building Code was outside of the Respondent's jurisdiction and that since the installation of the Switch complied with the Electrical Code that the installation was acceptable as installed. That being said, the Provincial Safety Manager indicated that a potential conflict between the Electrical Code and Building Code may exist and questioned a representative of the Building and Safety Standards Branch of the Office of Housing and Construction Standards, with the Province of British Columbia as to whether there was a conflict. Upon being advised that the walkway where the Switch is located is not considered public, the Provincial Safety Manager decided not to further pursue the matter.

History of Appeal

[4] The Appellants filed their Notice of Appeal on April 1, 2014. The Notice of Appeal sought a review of the second issue set out in the Decision, namely the

installation of the Switch. Simultaneously with the filing of this Appeal, the Appellants' electrical contractor filed appeal number SSAB 6-2014 regarding the first issue set out in the Decision, namely the location of the electrical panel in the spice kitchen.

[5] An initial Appeal Management Conference was held on April 23, 2014. Given that both this Appeal and appeal number SSAB 6-2014 both involved the same residence and parties the initial Appeal Management Conference dealt with both appeals. At the Appeal Management Conference the Board ordered that the two appeals be heard together and that the parties attend a Settlement Conference. Prior to attending the Settlement Conference, the parties notified the Board that the issues set out in appeal number SSAB 6-2014 had been settled to the satisfaction of all parties.

[6] A second Appeal Management Conference was held on May 21, 2014. At that time the Board confirmed that a settlement had been reached in Appeal No. 6-2014 and ordered that appeal dismissed with the appellants in that matter having no further involvement in this Appeal. Accordingly, the only issue to proceed to hearing in the Appeal is the issue regarding the Switch. The parties agreed that the Appeal would proceed via written submissions and agreed to the following timetable:

- a) The Appellants would file their evidence and written submissions by Wednesday, June 11, 2014;
- b) The Respondent would file its evidence and written submissions by June 27, 2014; and
- c) The Appellants would file their reply, if any, by July 11, 2014.

[7] Upon receiving and reviewing the evidence and submissions filed by the parties, the Board advised the parties that they wished to hear further from the parties and some witnesses. Accordingly, a teleconference was held on October 23, 2014 with the parties and certain witnesses in attendance.

Issue

[8] The sole issue before the Board is that of the Switch. In this appeal the Board must determine whether the Switch installation complies with the applicable legislation, namely the BC Electrical Code and whether any potential conflicts between those

provisions and the Building Code are within the scope of the Respondent's jurisdiction and if so, whether a conflict exists.

The Appellants' Position

[9] The Respondents seek to have the Decision overturned as it applies to approval of the Switch. They also state that they would like the scope of this Appeal to be broadened from that set out in the Decision as they submit that they have raised a number of other concerns with the Respondent and state that these concerns were not addressed in the Decision. The extra issues regarding the Switch are the manner in which the Switch came to be allowed as a correction option and the specific conduct of the electrical safety officer inspecting the regulated work in question.

[10] In support of their position, the Appellants have filed numerous documents and videos with the Board, all of which have been reviewed in detail by the Board. The Appellants have also provided the Board with written submissions in which they clearly set out their specific objections with the installation of the Switch.

[11] First, the Appellants state that the correction to the service disconnecting means should have been made under the original permit #EL - 5103448 taken out on May 9, 2012 (the "Original Permit") and not either of the new electrical permits taken out in 2013 (the "Subsequent Permits"), as the issue around the service disconnecting means was first raised in July 2012 under the Original Permit and was not corrected by the electrical contractor at that time. The Appellants state that had the Switch been corrected under the Original Permit that the 2009 Electrical Code would have been in force as the Switch, as installed, did not become code compliant until the 2012 Electrical Code was adopted.

[12] Second, the Appellants state that the Switch violates both the prescriptive elements and intent statements of the Building Code, particularly Article 9.34.1.3. Article 9.34.1.3 states as follows:

Location of Equipment in Public Areas

- (1) Entrance switches, meters, panel boxes, splitter boxes, time clocks and other similar equipment shall not be located in any public area unless adequate precautions are taken to prevent interference with the equipment.

[13] The Appellants submit that since the walkway where the Switch is located is the only entrance path to their secondary suite and is directly parallel to the only entrance to their neighbour's backyard and secondary suite that the walkway should be considered publicly accessible. The Appellants submit that the walkway is easily accessible to anybody that comes to either their home and suite or their neighbour's home and suite and is not behind a fenced area of the property. By way of example, the Appellants submit that if a neighbour felt that the Appellants' tenants were playing music too loudly that the neighbour could arguably flip the Switch and turn off power to the suite.

[14] In support of this position, the Appellants rely on an email from a Codes Administrator with the Office of Housing and Construction Standards, Building and Safety Standards Branch. In this email, he responds to an online question submitted by the Appellants outlining the installation of the Switch and states "the situation you have described certainly sounds like an oversight and a risk to occupant safety" and refers the Appellants to the Safety Authority for further follow up.

[15] Third, the Appellants state that the Switch, violates Rules 2-316, 2-324 and 6-206 (all parties referred to this rule, but it was clarified at the oral hearing component of the appeal that it was Rule 6-206 that was actually being referred to) of the Electrical Code for the following reasons:

- a) the Switch is in a stairway;
- b) the Switch is less than 2m from ground level and not protected from mechanical injury;
- c) the Switch is very close to the gas meter and vent; and
- d) the Switch is in a dangerous, hazardous or similar undesirable position.

[16] Fourth, the Appellants state that there were numerous options for correcting the deficiency with the service disconnecting means and that the Respondent should not have advocated for one specific correction. In support of this, the Appellants submitted a long list of complaints regarding their treatment by the safety officer that they were

dealing with regarding the issue of the Switch; however, they are not enumerated in these Reasons for Decision as it is the Decision that is at the centre of this appeal and not the earlier safety officer's conduct.

The Respondent's Position

[17] The Respondent states that the Decision was correct or in the alternative, reasonable.

[18] In support of this position, the Respondent filed the Affidavit of the Provincial Safety Manager, sworn June 26, 2014 (the "Affidavit"). In the Affidavit, the Provincial Safety Manager, whom it should be noted wrote the Decision under appeal, deposes the following:

- a) the Appellants' disputes with other parties such as builders, electricians, city officials, and Safety Authority personnel on issues which do not relate directly to the subject matter of the Decision are irrelevant and are not addressed in the affidavit;
- b) his reasons for allowing the exterior switch are clearly stated in the Decision and he has nothing to add to that analysis;
- c) that the Switch is not located "in a stairway" and accordingly Rule 6-206(1)(c)(i) of the Electrical Code does not apply;
- d) that the Switch would only require protection from mechanical injury if in a location where injury was reasonably foreseeable and that in this case there is no evidence of abnormally high pedestrian or vehicular traffic in the walkway where the Switch is located or any other factor that would make the Switch's location a high risk location;
- e) that there is no evidence that the Switch is not within the required clearance from the gas meter and vent;
- f) that Rule 6-206 does not extend to installations that are merely "undesirable" from an aesthetic or commercial perspective;
- g) that adverse weather conditions can impact electrical systems and for this reason the panel itself must be installed indoors; however, it is not necessary for the Switch to also be installed indoors and the most current version of the Electrical Code reflects this;

- h) the Safety Authority does not enforce contractual obligations; it's jurisdiction instead extends to enforcing compliance with the legislated codes and regulations;
- i) the Safety Authority identifies thousands of deficiencies in respect of regulated activity annually and its approach to requiring correction of deficiencies must be proportionate to the risk presented and represent the least onerous means of achieving safety. In this regard, the Safety Authority is not able to turn back the clock on installations that may be complete or at an advanced stage, unless a hazard is so acute as to require complete removal of the installation;
- j) detection of a deficiency does not necessarily result in an installation being completely re-done if no safety hazard is present. To do so would be unnecessarily punitive for both contractors and owners, and does not reflect the practical, risk based approach to regulation which is practiced by modern regulators;
- k) it is appropriate for Safety Officers to assist parties in identifying possible solutions to safety hazards; however, those parties remain responsible for determining which option will be implemented;
- l) there is no imminent hazard identified with respect to the installation of the Switch;
- m) the Switch would have been permitted to be installed as is regardless of whether it was installed under the original permit or the new permit as the contractor would have been permitted to apply for a variance seeking to comply with the forthcoming code instead of the existing one if the work was done under the original permit; and
- n) this case has taken valuable safety officer time away from enforcing and inspecting more significant safety hazards.

[19] By way of written argument, the Respondent submits that the legislation does not grant the Safety Authority jurisdiction to determine contractual issues between homeowners and those performing regulated work. The Respondent states that provided the regulated work is Code compliant or equivalently safe that the Safety Authority will accept it. Further, the Respondent states that diverting limited Safety Authority resources to resolve contractual disputes instead of assessing technical safety

is a waste of safety expertise, which should be used to prevent hazards, and that doing so would contravene the intention of the legislation.

[20] The Respondent also states that the Appellants' submission that the work was performed under a new permit when it could have been performed under the original permit is immaterial due to the presumption that when safety legislation is revised and a new version adopted by the legislature that the legislation has been improved somehow. In this regard, the Respondent states that there is no basis for the Safety Authority to refuse an installation that complies with the most current Code and does not present any safety concerns.

[21] The Respondent also submits that the Safety Authority's response to deficiencies in regulated work should be reasonable and proportionate to the circumstances and states that while recurrent defective work may have implications for a contractor in terms of enforcement or requirements for technical skills upgrading, that does not mean that an installation itself must be entirely replaced regardless of the circumstances. The Respondent states that the extent to which an installation must be modified depends on the extent to which a hazard is associated with the existing configuration.

[22] Accordingly, the Respondent seeks to have the Appeal dismissed.

Evidence from Witnesses and Parties at Teleconference

[23] As stated above, upon receiving the parties' evidence and written submissions, the Board wished to hear further from the parties and certain witnesses. Accordingly, on October 23, 2014 a teleconference was held for this purpose. The teleconference was attended by the Provincial Safety Manager, the author of both the Decision under appeal and the Affidavit, and the Senior Building Code official with the Office of Housing and Construction Standards whose opinion is referenced in the Affidavit.

[24] When questioned, the Senior Building Code official was forthright and helpful. His initial testimony was that the location of the Switch would not be considered public by the Office of Housing and Construction Standards. However, upon questioning he

agreed that the definition of “public stairway” would include the stairway/walkway upon which the Switch is installed.

[25] When questioned, the Provincial Safety Manager was not able to provide all of the information sought by the Board regarding the various inspections of the Switch by the Respondent. However, he agreed to obtain the information and did so through the Respondent’s counsel. This additional information confirmed that the Switch complies with the requirements of the Electrical Code respecting installation and location to the adjacent gas meter.

Analysis

[26] This Board is a creature of statute and has the jurisdiction to deal with decisions of provincial safety managers as they relate to regulated work and regulated products. As set out above, it does not have the jurisdiction to deal with contractual disputes between parties, unless the parties agree to have such matters dealt with by way of an alternative dispute resolution process administered by the Board prior to or in conjunction with a formal hearing. Accordingly, in this decision the Board must look at the issues that it has jurisdiction over, namely the installation of the Switch and whether such installation complies with the applicable provincial safety legislation.

[27] The applicable legislation governing the installation of the Switch is the Electrical Code. In particular, Rule 6-206 of the Electrical Code, which states:

Consumer’s service equipment location (see Appendices B and G)

- (1) Service boxes or other consumer’s service equipment shall be
 - (a) Installed in a location that complies with the requirements of the supply authority;
 - (b) Readily accessible or have the means of operation readily accessible; and
 - (c) Except as proved by Subrule (3), placed within the building being served as close as practicable to the point where the consumer’s service conductors enter the building and not be located in
 - i. Coal bins, clothes closets, bathrooms, and stairways;
 - ii. Rooms where the ambient temperature exceeds 30C under normal conditions;
 - iii. Dangerous or hazardous locations;
 - iv. Locations where the headroom clearance is less than 2 m; or
 - v. In any similar undesirable places.

- (2) Notwithstanding Subrule (1)(b), where subject to unauthorized operation, the service disconnecting switch shall be permitted to be rendered inaccessible by
 - (a) an integral locking device;
 - (b) an external lockable cover; or
 - (c) location of the service box inside a separate building, room, or enclosure.
- (3) The service disconnecting means shall be permitted to be placed on the outside of the building or on a pole provided that it is
 - (a) installed in an enclosure approved for the location or protected against the weather; and
 - (b) protected against mechanical damage if it is located less than 2 m above ground

[28] On the surface, the installation of the Switch complies with this section of the Electrical Code. A review of the video and photographic evidence submitted to the Board by the Appellants shows that the Switch is not installed on a staircase and is appropriate for the weather expected in the location the Switch is installed. The evidence of the Provincial Safety Manager confirms that the Switch is the required distance from the gas meter and is otherwise appropriately installed. However, in addition to the legislated requirements set out in the Electrical Code, the Electrical Code directs that Appendixes B and G be consulted when applying Rule 6-206. Appendix B contains nothing relevant to this Appeal; however, Appendix G notes that section 3.6.1.2 and 9.34.1 of the Building Code should be consulted.

Section 3.6.1.2 of the Building Code states:

Electrical Wiring and Equipment

- (1) The installation of electrical wiring and electrical equipment shall conform to the requirements of
 - a. Provincial or territorial regulations or municipal bylaws, or
 - b. CSA C22.1, "Canadian Electrical Code, Part 1" in the absence of the regulations or bylaws referred to in Clause (a).

Section 9.34.1.3 of the Building Code states:

Location of Equipment in Public Areas

- 1) Entrance switches, meters, panel boxes, splitter boxes, time clocks and other similar equipment shall not be located in any public area unless adequate precautions are taken to prevent interference with the equipment.

[29] The Board notes that section 1.5.1.2 of the Building Code states:

Conflicting Requirements

- 1) In case of conflict between the provisions of this Code and those of a referenced document, the provisions of this Code shall govern.

[30] The relevant provisions of the Electrical Code are deemed to be referenced documents under the Building Code. Accordingly, if there is a conflict the provisions of the Building Code will apply.

[31] With respect to section 3.6.1.2, there is no conflict or issue. This section of the Building Code simply states that the provincial Electrical Code must be followed. However, section 9.34.1 provides additional requirements. Of particular relevance to the issue of the Switch is the requirement that such devices not be located in public areas unless adequate precautions are taken.

[32] The Appellants submit that the location of the Switch is a public area as it is accessible by their neighbours and tenants and is visible from the street. In support of his assertion, the Appellants rely on the definition of “Public Way” in the Building Code, which term is defined as “...a sidewalk, street, highway, square or other open space to which the public has access, as a right or by invitation, expressed or implied” and the statement of the Codes Administrator that the installation sounds like a risk to occupant safety. The Respondent relies on the advice given from the Senior Building Code official that the location of the Switch is not considered public. The Board considered a number of different factors when interpreting this provision; however, of most importance is the fact that when questioned by the Board, the Senior Building Code official agreed that the location of the Switch would qualify as a Public Way as defined by the Building Code.

[33] Upon review of the photographic and video evidence provided by the Appellants the secondary suite and residence are two separate residential units. Based on the definition of Public Way and the oral testimony provided by the Senior Building Code official, it is clear that this definition therefore applies to the walkway where the Switch is installed.

[34] Accordingly, the Board finds that the Switch is located in a public area. The next question must then be whether adequate precautions were taken with respect to the

location of the Switch. Upon review of the evidence before the Board, the Board finds no evidence of any precautions taken with the exterior installation of the Switch.

[35] The finding that the Switch is located in a public area without adequate precautions being taken means that such installation does not comply with the Building Code requirements and a conflict exists between the Electrical Code and the Building Code. As the relevant sections of the Electrical Code are referenced documents referred to in section 1.5.1.2 of the Building Code, such conflict means that the Building Code provisions supersede the Electrical Code provisions and must be complied with. Accordingly, as installed in its current location, the Switch is non-compliant with the legislative requirements.

[36] The Appellants raised an issue regarding the issuance of a second permit under the 2012 Building Code. They state that the deficiency in the service disconnecting means should have been addressed under the original electrical permit. The Respondent has stated that it makes no difference as a variance would likely have been given in any event. Given the fact that the Board has found that the installation of the Switch is not compliant with the Electrical Code and Building Code, the Board does not need to address this submission. However, it is clear from a review of the appeal record and documents submitted as evidence to the Board that the dispute between the parties could have been drastically minimized had proper procedure been followed by all parties involved.

[37] While the Board finds that the switch is non-compliant as installed, these reasons for decision would be remiss if they did not address the Board's jurisdiction to deal with matters of interpretation of the Building Code. The Respondent, in particular, has submitted that such interpretation is outside the jurisdiction of both the Board and the Safety Authority. The Board disagrees. There is no argument that the Board has jurisdiction over decisions made by Provincial Safety Managers concerning regulated work and products as set out in the *Safety Standards Act*, S.B.C. 2003, c. 39 (the "Act") Had this been a case where only the Building Code was at issue, the Board would lack jurisdiction. However, the Building Code provisions at issue are directly referenced in an appendix to the Electrical Code and such provisions are therefore incorporated by reference and fully within the scope of the Board's jurisdiction so far as determining


whether there is a conflict between the Electrical Code and Building Code. In fact, such interpretation ought to be dealt with by the Respondent as well.

[38] Pursuant to section 52 of the Act, the Board must always consider the maintenance and enhancement of public safety when hearing appeals. The possibility that a residential residence could have its power switched off by a passerby who happens to feel like flicking the Switch is a safety concern. The Board can reasonably foresee a number of instances when this sort of installation could be taken advantage of for nefarious purposes absent suitable precautions to avoid such tampering. For example, an intruder could turn off the power and then enter the Suite under the cover of darkness or wait for the occupants to come outside to re-set the Switch.

Decision

[39] For the reasons set out above, the Board varies the Decision and states that the Switch is not compliant with the provincial legislation as currently installed.


Signed:



Emily C. Drown, Chair



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