

Indexed as: BCSSAB 3 (4) 2005

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

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

BETWEEN:

A Gas Contractor

Appellant

AND:

BC Safety Authority

Respondent

REASONS FOR PRELIMINARY DECISION

**Jurisdiction of the: Provincial Safety Manager Pursuant to Sections 15 (1) and 42
and
the Safety Officer Pursuant to Section 18 of the *Safety Standards Act***

Board Members:

Pinder K. Cheema, Q.C., Vice-Chair
Brian Morgan
Ted Simmons

Introduction

[1] The Appellant is a registered contractor under section 23 of the *Safety Standards Act*, SBC 2003, c.39 (the Act) holding a Class B Gas “Contractor Licence with a Class A endorsement thereon”. Class A and B certificates are defined in sections 6 and 7 respectively of the Gas Safety Regulation, BC Reg. 103/2004.

[2] He appeals the decision of the BC Safety Authority (the Respondent) dated November 18, 2005 wherein the provincial safety manager revoked the Appellant's Class A Certificate of Qualification. The Appellant acting on his own behalf filed a Notice of Appeal (the Appeal) with the Safety Standards Appeal Board (the Board) on November 22, 2005 pursuant to section 51 (2) of the Act which provides:

“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 a review under section 49 has instead a right to appeal the decision to the appeal board.”

[3] In addition, pursuant to section 54 (2) of the Act the Appellant requested a stay of the Respondent's decision and that his Class A status remain in effect until a final determination was made by the Board. The Board subsequently determined that a stay would not be granted.

[4] On January 16, 2006, a safety officer suspended the Appellant's permit pulling privileges pursuant to section 18 (1) (a) of the Act due to non-compliance with three certificates of inspection. On April 11, 2006, the Appellant filed a second appeal to the Board disputing this suspension.

[5] The Appellant then retained counsel who filed an Amended Notice of Appeal and agreed that the Appellant's two outstanding claims should be consolidated.

[6] The hearing of the consolidated claims was set for October 12, 2006 via videolink with the Appellant in Prince George and the Board and the Respondent in Victoria, British Columbia.

[7] On October 6, 2006, the Appellant filed a Notice and supporting material disputing the jurisdiction of the provincial safety manager and the safety officer as follows:

1. The extent of the provincial safety manager's jurisdiction to revoke a certificate of qualification under section 15 (a) of the Act,
2. The extent of the safety officer's jurisdiction to suspend the permit pulling privileges of a qualified gas fitter under section 18 of the Act, and
3. The extent of the provincial safety manager's jurisdiction to revoke a certificate of qualification without issuing a discipline order under section 42 of the Act.

[8] The Respondent filed submissions and the Appellant filed rebuttal submissions.

[9] On October 12, 2006 the parties addressed their filed written materials and answered the Board's queries.

[10] The Board gave a brief response to the 3 issues with written reasons to follow. These are the reasons.

1. Does the provincial safety manager have jurisdiction to revoke a certificate of qualification under section 15 (a) of the Act?

Background

[11] The BC Safety Authority (the Respondent) was created pursuant to the *Safety Authority Act*, SBC 2003, Chapter 38 for the following purposes according to Part 2, Section 5 of that Act:

“(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”.

[12] The provincial safety manager and the safety officer are designated positions within the Respondent's organization. On November 18, 2005, the provincial safety manager, Ron Herrington revoked the Appellant's Class A Certificate.

[13] Section 15 of the Act sets out the powers of a provincial safety manager:

“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;”

[14] The Safety Standards Act seeks to ensure a balance between the rights of the individual performing regulated work to earn a living and the rights of the public to have safety maintained and enhanced. In hearing appeals, the Board must ensure, pursuant to section 52, that it

“consider the maintenance and enhancement of public safety”.

Position of the Appellant

[15] The Appellant argues that the provincial safety manager's power to revoke a Certificate of Qualification is not unlimited but must be within the ambit of and exercised according to the purposes of the statute. He argues that the Board must consider how the exercise of his discretion may affect the rights of the individual and that such exercise cannot take away the rights of the individual unless it was, expressly or by implication, the intent of the Legislature to do so. The Appellant further submits that the Board must in its analysis examine the purposes underpinning the relevant legislation and must interpret the jurisdiction as being "limited to such an extent so as not to interfere with individual rights...including the practice of a profession, unless the Act itself contains clear language clearly permitting greater intrusions."

[16] The Appellant further argues that the provincial safety manager's power may only be

1. used for those purposes clearly contemplated by the Act, i.e. to ensure and maintain public safety or enforce compliance, and
2. limited and strictly construed so as to limit the potential impact on individual rights, and only be exercised where there is a clear and pressing safety concern.

[17] The Appellant further characterizes the revocation as a form of enforcement which ought to be limited to those occasions when a discipline order becomes necessary.

[18] The Appellant's view that the provincial safety manager's jurisdiction to impose the "revocation" only as a disciplinary measure is, he argues, supported by a comparison of section 42 to the other enforcement provisions of the Act. A discipline order under section 42 of the Act is issued only on those occasions when an individual is non-compliant, commits an offence or commits serious breaches. The Appellant argues that a revocation issues only when all other forms of enforcement have proven ineffective.

[19] Revocation pursuant to section 15, argues the Appellant, should be limited to situations where no other form of compliance is effective, or where this penalty alone will ensure public safety, or in the most compelling situations.

[20] Section 42 deals with the imposition of discipline orders and comprises the power to revoke certificates in certain specified circumstances.

[21] The Appellant argues that this section 42 limitation on the provincial safety manager's power to revoke ought to be incorporated into section 15 as well. The Appellant further argues that section 15 revocations are, in any event, limited or circumscribed by the section 42 parameters.

[22] Finally, the Appellant argues that the revocation order cannot stand as none of the prerequisites of a discipline order have been met as per section 42 and this is not such a clear and compelling case which requires the imposition of such an extreme penalty such that it can be imposed under section 15. As such, in the matter before the Board, the provincial safety manager lacked jurisdiction to issue such revocation or exceeded his jurisdiction to do so.

Position of the Respondent

[23] The Respondent argues that the Act, pursuant to section 2, applies to all persons doing regulated work, including the Appellant. It states:

“This Act and the regulations apply to all of the following:

- (a) persons doing regulated work,
- (b) all of the following regulated products:
 - (vi) gas systems and products.

[24] The Respondent states that section 15 of the Act sets out the powers of the provincial safety manager including the powers to revoke a Certificate (which permits individuals to perform regulated work) and to issue a discipline order against such persons who hold Certificates.

[25] The Respondent argues that the Act places no limits on the provincial safety manager's power to issue, suspend or revoke a Certificate of Qualification except that such discretion must be exercised in good faith within the context of or for the express purposes of the Act.

[26] The Respondent argues that when one looks at the combined effect of sections 5 of the Safety Authority Act and 15 of the Act, it then follows that the Legislature empowered the provincial safety manager to revoke the Certificate of Qualification if, in his view, public safety was put at risk by an individual performing regulated work.

[27] In response to the Appellant, the Respondent states that the whole Act addresses safety issues but that section 15 ascribes certain specific powers to the

provincial safety manager to ensure compliance with the Act by gas fitters such as the Appellant.

[28] Under sections 15 and 18 of the Act, the provincial safety manager is granted discretion to decide which of the particular options listed in sections 15 and 18 will be most effective to the particular circumstances.

[29] The Respondent argues that the strict approach suggested by the Appellant is not consistent with the flexibility provided by the Act to the provincial safety manager to permit him to effectively tailor his responses to the needs of particular situations as they arise.

Analysis and conclusion.

[30] It is agreed by the parties that the only relevant statutory purposes for which the section 15 (a) power to revoke a certificate of qualification can be exercised is to ensure and maintain public safety.

[31] The Board agrees with the position of the Appellant that this power can only be used for the purposes contemplated by the Act, and that the extent of the provincial safety manager's jurisdiction must be limited and strictly construed so as to limit its potential impact on the rights of the individual.

[32] In determining whether this power to revoke must be limited to cases of clear and pressing safety concern, it is helpful to look at the total scheme of the Act. It consists of 103 sections which are divided into 15 Parts. Each Part deals with a separate and distinct subject matter. Each Part is further subdivided into Divisions. Section 15 is located in Part 4, Division 1 and it deals with Safety officers and Managers, their appointments and duties. Section 15 is a listing of all the various powers to which the provincial safety manager may have recourse in administering the Act. There is no stated direction as to when these powers must be exercised. It appears that the provincial safety manager may choose when and which of these powers to exercise in any given situation. It is clear that the Legislature intended the provincial safety manager to select from a wide variety of powers so he could tailor the most effective solution to the particular situation facing him. However, the Legislature has not defined a hierarchy or an order of precedence in which these powers must be exercised. Therefore, the Board finds that the section 15 (a) power to revoke is not restricted to certain situations nor must it be exercised in any particular order. The Board further finds that the section

15 (a) power is not a form of enforcement, nor is it to be limited only to those occasions where a section 15 (f) discipline order becomes necessary, nor to cases where there is a clear and pressing safety concern.

[33] Further, if the Legislature had intended the section 15 (a) power to revoke to be subject to the prerequisites of section 42, it would have so stated. There is no such reference. Clearly, what is contemplated in the section 15 (a) power to revoke is something less than a discipline order; it is a revocation which carries neither the prerequisites nor the stigma attached to a formal discipline order as contemplated by section 42.

[34] The Board finds that section 15 (a) authorizes the provincial safety manager to issue a revocation which is separate and distinct from a discipline order as contemplated in section 42.

[35] Hence, the first question is answered in the affirmative.

2. Does a safety officer have jurisdiction to suspend permit pulling privileges of a qualified gas fitter under section 18 of the Act?

Background

[36] The Appellant's permit pulling privileges were suspended on January 16, 2006 by the safety officer pursuant to section 18 (1) (a) of the Act due to non-compliance with three certificates of inspection.

Position of the Appellant

[37] The Appellant argues that section 18 (1) (a) specifically permits a safety officer to "issue, suspend or revoke a permit".

[38] The only instance where a safety officer may refuse to issue a permit is pursuant to section 18 (3) which reads as follows:

"Despite any other provision under this Act, a safety officer may refuse to issue ... a permit... under this Act if a person is delinquent in the payment of any fee, penalty or other money owed under this Act."

[39] The Act does not provide the safety officer with a general power to refuse to issue permits irrespective of the basis for such refusal.

[40] The Appellant also argues that sound policy reasons exist for the safety officer's jurisdiction to be able to only "issue, suspend or revoke a permit". If work is done according to issued permits, the Authority can then monitor quality and safety of installations. Where permits are refused to contractors, the Authority runs the risk of having installers working without permits thereby creating a situation where the Authority is prevented from overseeing installations.

Position of the Respondent

[41] The Respondent argues that when one looks at the combined effect of sections 18 (1) (a) and 18 (1) (b) of the Act, it permits the safety officer to "issue, suspend or revoke a permit or to include terms and conditions when issuing same". The Respondent argues that the combined effect of these two subsections empowers the safety officer to control the issuance of permits and to curtail those issued. While section 18 (1) does not oblige the safety officer to issue a permit to the Appellant, it is within his sole discretion as to whether a permit or a group of permits are issued.

[42] Section 18 (3) deals with the power to refuse issuance in cases of non payment of fees but, argues the Respondent, it should not be interpreted as restricting the powers set out in section 18 (1). The Respondent argues that the safety officer may make decisions about the issuance of a single or a group of permits.

Analysis and conclusion

[43] Section 18 (1) (a) and (b) deals with the consideration of the permit application and then permit issuance with as many terms and conditions as necessary. In the view of the Board, this process achieves the necessary balance between individual rights and the protection of the public. The section provides no authority to refuse to consider the application for a permit and no authority then to refuse to issue the permit in the first instance. The Board finds that an application must be considered and then a permit must issue, subject to as many conditions and terms as are required to ensure public safety. To refuse to issue a permit at the outset completely frustrates the rights of the individual since all work must be done pursuant to an issued permit. This is contrary to the objective of the Act as a whole.

[44] The Board finds that the only basis for refusal to issue a permit is for non payment of fees under section 18 (3), which states

“... a safety officer may refuse to issue or may cancel or suspend any certificate.. under this Act if a person is delinquent in the payment of any fee, penalty or other money owed under this Act.”

[45] There are policy reasons for this provision as the Safety Authority is self funded by payment of permit fees.

[46] The Respondent argued that the combined effect of sections 18 (1) (a) and 18 (1) (b) empowers the safety officer to control the issuance of groups of permits. With respect, the Board disagrees. Section 18 does not include any stated power given to the safety officer to make decisions about groups of permits, nor does the section refer to groups of permits. In the view of the Board, the Legislature specifically empowered the safety officer to consider each permit individually and to make a decision about how best to issue each individual permit. To consider otherwise would mean that a safety officer could effectively prohibit a licensed individual from practicing his profession.

[47] Interpreting section 18 as suggested by the Respondent would also confuse the sanction issuance roles of the safety officer and the provincial safety manager, upset the legislative hierarchical scheme and render any certificate revocation process by the provincial safety manager unnecessary.

[48] For the reasons above, the Board finds that this result is contrary to the overall scheme and objective of the Act, inconsistent with the stated section 18 powers of the safety officer and that it creates the very situation the Act seeks to redress: an imbalance between the rights of the individual and the enhancement and maintenance of public safety.

[49] Hence, the answer to the second question must be in the negative.

3. Does the provincial safety manager have jurisdiction to revoke a certificate of qualification without issuing a discipline order under section 42 of the Act?

Background:

[50] On November 18, 2005, the provincial safety manager, on behalf of the BC Safety Authority revoked the Appellant’s Class A Certificate of Qualification based on a review of the Appellant’s performance of his duties as a class A gasfitter. On November 22, 2005, the Appellant filed a Notice of Appeal to the Board.

Position of the Appellant

[51] The Appellant argues that this revocation constitutes a form of discipline pursuant to section 42 as it complies with all the substantial requirements of section 42 (2) and imposes a penalty as indicated in section 42 (3). However, the provincial safety manager failed to comply strictly with section 42 when revoking the certificate and this aspect, the Appellant argues, invalidates the provincial safety manager's jurisdiction to issue the revocation as a form of discipline.

[52] The Appellant argues that the November 18th letter and the Response filed on July 6, 2006 demonstrate that the provincial safety manager issued the November 18th letter because he wished to discipline the Appellant. However, argues the Appellant, none of the grounds alluded to in either document are sufficient to warrant the issuance of a discipline order. Section 42 (1) (a) clearly outlines the instances when a discipline order may issue, i.e. where there is a breach of a condition or restriction of a licence or permission, where there is unauthorized practice, failure to comply with either a compliance order, a safety order or terms of an equivalent standards agreement, or a conviction of an offence. None of these grounds, argues the Appellant, existed in the situation involving the Appellant.

Position of the Respondent

[53] The Respondent argues that section 15 of the Act provides a number of tools to be utilized by the provincial safety manager in ensuring public safety. A section 15 (a) suspension or revocation is, he argues, separate from a section 15 (f) discipline order which is governed by section 42 procedures. He argues that while a discipline order may include a revocation, it does not then mean that all revocations are discipline orders.

[54] He further argues that if the Legislature had intended to limit the provincial safety manager's revocation powers under section 15 (a) by making them subject to section 42 procedures, the necessary wording would have been included in either section 15 or section 42. This was not done and so, argues the Respondent, no section 42 requirement applies to the section 15 (a) powers of revocation.

Analysis and conclusion

[55] The Board finds that the November 18th letter which revoked the certificate was issued pursuant to section 15 (a) of the Act. In order for this letter of revocation to be

considered a discipline order under section 15 (f) and be subject to the strict requirements of section 42, it must fit within the strictures of section 42 (2) which provides as follows:

- (2) A discipline order under subsection (1) must
- (a) name the person to whom the order is addressed,
 - (b) state the sanction imposed by the order,
 - (c) state the reasons for the order,
 - (d) state that the person affected may appeal the order to the appeal board,
 - (e) be dated the day the order is made,
 - (f) be signed by the provincial safety manager, and
 - (g) be served on the person named in the order.

[56] The Board finds that the November 18th letter specifically deals with a revocation of a certificate of qualification as provided for in section 15 (a). While the provincial safety manager may have complied with the notice provisions of section 42 (2), this aspect alone does not render the November 18th revocation a discipline order. The section clearly states when a discipline order may issue:

the provincial safety manager ...may issue a discipline order to any person performing regulated work who

- (a) is in a breach of a condition of, or restriction on, any licence or permission,
- (b) practices in a discipline under this Act for which the contractor is not licensed, or undertakes regulated work that the individual or contractor is not qualified to undertake,
- (c) fails to comply with a compliance order,
- (d) fails to comply with a safety order,
- (e) fails to comply with the terms of an equivalent standards agreement, or
- (f) is convicted of an offence.

[57] These circumstances did not exist in the matter before the Board and so the revocation lacked one of the essential characteristics of a discipline order.

[58] Hence, this question must be answered in the affirmative.