Appeal No. SSAB 14-2016
April 11, 2017

Indexed as: BCSSAB 14 (1) 2016

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:	**A Gas Company**	**APPELLANT**
AND:	**British Columbia Safety Authority**	**RESPONDENT**

Chair of Board:	**Emily C. Drown**
Counsel for Appellant:	**Imraj S. Gill**
Counsel for Respondent:	**Kimberly Fenwick** **Lisa Picotte-Li**

Reasons For Decision

Introduction

[1] This is an appeal of Monetary Penalty No. MP-2016-0009 (the "Monetary Penalty") in the amount of $10,000.00 issued on May 2, 2016 by the British Columbia Safety Authority (the "Respondent") against the Appellant for failing to comply with Compliance Order No. CO-2014-0058 (the "Compliance Order"). The Compliance Order required the Appellant to undertake work to correct non-compliances as noted on certificates of inspection issued under permit numbers 4519123, 4519130, 4519132, 4519135 (collectively the "Townhouse Non-Compliances"), UW-257038-2015 ("the Crumpit Non-Compliance") and GA-293549-2015 (the "Glaciers Non-Compliance"), and

to submit declarations to this affect within the time period specified in each circumstance.

Issues

[2] The issue before the Board is whether the Monetary Penalty should be upheld, dismissed or varied.

Facts

[3] The Townhouse Non-Compliances result from the Appellant's failure to install stainless steel backsplashes in a townhouse complex located on 32nd Avenue, Surrey, British Columbia. The Appellant installed gas range tops in the townhomes and was required to also install stainless steel backsplashes behind the gas range tops. The back splashes were never installed despite the fact that the Compliance Order was issued in December 2014 and the Appellant was provided with an extension of time to February 20, 2016 to complete the installation. The Appellant did undertake third party company lab tests for the specific purpose of determining whether the stainless steel backsplashes requested to be installed behind the gas ranges would meet the standards set out in the requisite legislation. The Appellant states that it would have installed the backsplashes but could not as it was denied access to the worksite. The Respondent disagrees with this characterization of events.

[4] The Crumpit Non-Compliance results from the Appellant's improper installation of copper tubing and PVC venting at a residential home located in Squamish, British Columbia. The Appellant admits the error and states that it remedied these defects as of July 22, 2016.

[5] The Glacier Non-Compliance results from the Appellant improperly installing a furnace, insulated plastic duct and copper tubing at a residential home located in Squamish, British Columbia. The Appellant admits the error and states that it remedied these defects as of July 22, 2016.

Position of the Parties

The Appellant's Position

[6] Counsel for the Appellant submits that the Monetary Penalty ought to be dismissed or in the alternative, be reduced, and states that the Provincial Safety Manager's decision to levy the Monetary Penalty was unreasonable. In support of this position, counsel for the Appellant submits that the Provincial Safety Manager failed to adequately consider section 3 of the *Monetary Penalty Regulation*, BC Reg. 129/2005 (the "Regulation") when deciding to levy the Monetary Penalty. Section 3 of the Regulation states:

> 3. Before a safety manager imposes a monetary penalty on a person, the safety manager must consider the following:
>
> 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. the length of time during which contravention continued;
>
> e. any economic benefit derived by the person from the contravention.

[7] In support of its position the Appellant filed with the Board the Affidavit of the Director, sworn October 18, 2016 (the "Director's Affidavit"). In the Director's Affidavit, the Director, deposes that the Townhouse Non-Compliances stem from the denial of access to the worksite to install the required stainless steel backsplashes. The Director states that prior to installing the backsplashes, the Appellant obtained third party lab tests regarding the backsplashes and that when he went to install the backsplashes he was denied access to the worksite. The Director states that he subsequently attempted to obtain access on May 15, 2013, July 11, 2013, December 19, 2014 and February 12, 2015. The Director states that with those attempts unsuccessful the Appellant's legal counsel inquired as to why access was denied and was advised that it was certain tenants in the townhomes that were denying access. The Director deposed that to date he has not been able to obtain access to the work sites in question, but remains ready, willing and able to do the work should he be permitted access.

[8] With respect to the Crumpit and Glaciers Non-Compliances the Director deposes that both instances of non-compliance were due to an administrative oversight and were corrected as of July 22, 2016.

[9] Counsel for the Appellant submits that the Provincial Safety Manager failed to adequately consider the criteria set out in section 3 of the Regulation as they apply to the Townhouse Non-Compliances and the Crumpit and Glacier Non-Compliances. With respect to the Townhouse Non-Compliances counsel for the Appellant states as follows:

a) There have been no previous enforcement actions against the Appellant;
b) There is a low risk of degree of harm in the failure to install stainless steel back splashes on the gas ranges in question;
c) The contravention was not deliberate due to the fact that the Director has been trying to gain access to complete the work for four years and remains ready, willing and able to complete the work;
d) The length of time that the non-compliance has continued is no fault of the Appellant's as it has been denied access to the work site;
e) The Appellant has not received any economic benefit from its failure to install the stainless steel back splashes as it undertook to get independent lab testing done on the gas range stove tops prior to commencing work.

[10] With respect to the Crumpit and Glaciers Non-Compliances counsel for the Appellant states as follows:

a) There have been no previous enforcement actions under the Act against the Appellant;
b) The Crumpit and Glaciers Non-Compliances posed a low risk of degree of harm;
c) The contravention was not deliberate as the failures to comply were due to administrative oversights and have since been rectified;
d) The length of time that the non-compliances continued was due to administrative oversights that were rectified as soon as they were recognized by the Appellant;
e) The Appellant did not receive any economic benefit as it has rectified the Crumpit and Glaciers Non-Compliances.

[11] For these reasons, the Appellant asks the Board to set aside the Monetary Penalty, or alternatively vary it. In the event that the Monetary Penalty is not set aside, the Appellant also seeks an order of the Board granting the Appellant access to the worksites so that the Townhome Non-Compliances can be rectified.

The Respondent's Position

[12] The Respondent disagrees with the Appellant and submits that the Monetary Penalty is reasonable and states that there is no basis in law to vary or set it aside. The Respondent's submissions include a lengthy argument regarding the applicable standard of review.

[13] With respect to the standard of review, counsel for the Respondent submits that the applicable standard of review is reasonableness. Counsel for the Respondent states that the Board does not have jurisdiction to cancel or vary the Monetary Penalty and the Board cannot substitute its own discretion for that of the Provincial Safety Manager unless the Safety Manager's decision is unreasonable having regard to the legislation. In support of this position, counsel for the Respondent states that until recently the Board has consistently applied the standard of reasonableness to its review of decisions of the British Columbia Safety Authority and ought to continue to do so despite the Board's recent decision in *Property Owners and a Holding Company v. British Columbia Safety Authority*, SSAB 6(1) 2016 stating that the appropriate standard of review for the Board to use in most instances is correctness.

[14] In support of this position counsel for the Respondent submits that there are two lines of case law that address administrative review of administrative decisions: the statutory interpretation approach and the functional approach. Counsel for the Respondent summarizes the statutory interpretation approach with a quote from *Halifax (Regional Muncipality) v. Anglican Dioceasan Centre Corporation,* 20120 NSCA 38, at para 23 stating: "The Board, itself an administrative tribunal under a statutory regime, does not immerse itself in *Dunsmuir's* standard of review analysis that governs a court's judicial review. The Board should do what the statute tells it to do." Counsel for the Respondent further states that this line of cases has received little attention in British Columbia and states that the more appropriate line of case law is the functional

approach, which requires a consideration of the factors set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[15] Counsel for the Respondent cites *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 as the leading case of the functional approach and submits that the factors enumerated in *Newton*, ought to be considered by the Board when determining the appropriate standard of review:

a) the respective roles of the tribunal of first instance and the appellant tribunal, as determined by interpreting the enabling legislation;
b) the nature of the question in issue;
c) the interpretation of the statute as a whole;
d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
e) the need to limit the number, length and cost of appeals;
f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
g) other factors that are relevant in the particular context.

Applying these factors, counsel for the Respondent states that the appropriate standard of review for the Board on this appeal is that of reasonableness.

[16] The Respondent addresses the issue of appeals to the Board being "new hearings" pursuant to section 53 of the Act and states that this legislative requirement does not require a standard of correctness. In support of this submission, counsel for the Respondent cites *Lamb v. Canadian Reserve Oil & Gas (1976),* [1977] 1 S.C.R. 517 among other decisions also relied upon. In *Lamb* Justice Martland held that deference was owed to a Board's conclusions even though legislation provided for an appeal to take the form of a new hearing as the legislative purpose was to put the "expert nature and competence and specialized experience of the board's members to work".

[17] Counsel for the Respondent states that the Respondent has sector-specific knowledge that is integral to the maintenance and enhancement of public safety and its employees are experts in the technical safety of regulated equipment and are highly knowledgeable regarding industry practices and that deference ought to be given to its

decisions on appeal. In this regard, counsel states that a reasonableness standard promotes the integrity of the proceedings of the Respondent and gives effect to the legislature's intent to create an effective and efficient regulatory body. Counsel states the Board risks undermining the integrity of the process if the Board routinely rehears matters on the basis of new evidence.

[18] Finally, counsel for the Respondent states that it is appropriate for tribunals to be consistent and to follow their previous decisions and submits that the Board ought to follow its previous decisions where it held that the appropriate standard of review was reasonableness.

[19] With respect to the issues raised in the Appellant's submissions, counsel for the Respondent states that the Provincial Safety Manager did consider the factors set out in section 3 of the Regulation and submits that the Monetary Penalty was reasonable and requests that the Appeal be dismissed. Counsel for the Respondent states that the Appellant agrees that failure to comply with a compliance order is a legislated ground for issuing a monetary penalty and that the Townhouse Non-Compliances continue while the Crumpit and Glacier Non-Compliances were only rectified after the issuance of the Monetary Penalty. In particular response to the application of the criteria set out in section 3 of the Regulation the Respondent states as follows:

a) The Provincial Safety Manger took into account that the only previous enforcement against the Appellant was the Compliance Order.
b) The Safety Officer who assessed the sites determined that the risk of harm as a result of these contraventions was medium and the Safety Manager agreed with that assessment. Further, the Respondent states that the Appellant has not shown any evidence indicating that the risk of harm is not medium as suggested by the Safety Officer.
c) The evidence shows that the Appellant's contraventions were deliberate. With respect to the Townhouse Non-Compliances the Respondent states that the Appellant could have gained access with greater diligence. In particular, the Respondent states that the Appellant did not mention difficulty in accessing the worksites until after the Monetary Penalty was issued, only once attempted to obtain access after the backsplashes actually arrived, and did not contact the Strata Corporation for the Townhouse worksite to attempt to

obtain access. With respect to the Crumpit and Glacier Non-Compliances the Respondent states that the non-compliances were not rectified until after the Monetary Penalty was issued and therefore rectification of these non-compliances cannot be taken into account to determine whether the factor was appropriately considered by the Provincial Safety Manager at the time of issuing the Monetary Penalty.

d) The Appellant gained an economic benefit in all instances of non-compliance as it did not incur the expense of performing the necessary work to bring the non-compliances into compliance prior to the issuance of the Monetary Penalty.

Analysis

Standard of Review

[20] Counsel for the Respondent cited numerous cases in support of the Respondent's position that the appropriate standard of review is reasonableness not correctness. The majority of these cases were not from British Columbia and do not address decisions of boards with privative clauses and technical expertise. The Board relies on *Investment Industry Regulatory Organization of Canada v. Rahmani*, 2010 BCCA 93, which clearly indicates a preference at the Court of Appeal level for the statutory interpretation approach in British Columbia. Importantly, the Court of Appeal in *Rahmani* holds that *Dunsmuir* applies to whether a Court should defer to a Tribunal and that it has no application to Tribunals that are reviewing decisions of statutorily appointed decision makers. Accordingly, the Board must look to the applicable legislation to determine the appropriate standard of review.

[21] A review of the legislation indicates that the legislature created the Board to provide adjudication of appeals of certain decisions of Provincial Safety Managers. The Board has a privative clause and decisions of the Board are not appealable to the courts of British Columbia other than for the narrow application of judicial review. Further, appeals before the Board are new hearings pursuant to section 53 of the Act. While counsel for the Respondent submits that "the integrity of the process could be undermined if the Appeal Board routinely rehears all matters on the basis of new evidence", the legislature clearly wanted the Board to have the capacity to rehear matters and accept new evidence. The Board has been given the power to conduct its

hearings as new hearings with new evidence and the Board would not be fulfilling its legislated mandate if it did not do so. In fact, it would be a gross breach of procedural fairness if the Board failed to consider new evidence when the legislature clearly intended for it to do so.

[22] Counsel for the Respondent states that the Board lacks special technical knowledge to hear appeals without deferring to the knowledge of the Respondent. However, the Board is a specialized tribunal created to hear technical appeals rather than having those appeals go to the courts of British Columbia where a judge may never have dealt with an appeal under the Act before. The Board's members have varied backgrounds that cover a wide area of technical expertise, from legal to regulated technologies and construction standards. In any event, the decision under appeal is not a decision where the Provincial Safety Manager's technical expertise is strongly relied upon. It is the issuance of a monetary penalty where there has been non-compliance with a previously issued Compliance Order.

[23] Counsel for the Respondent submits that the Board must be bound to follow its previous decisions where the Board held that the standard of review on appeal is one of reasonableness. Generally, it is correct that the Board ought to follow its previous decisions in order to create consistency and predictability in its decision-making. However, it is appropriate for the Board to clarify the standard of review to ensure the very consistency and predictability the Respondent submits is required. Many of the decisions cited by the Respondent do not formally mention standard of review or review submissions concerning the same and refer to what is "reasonable" in differing contexts. In light of the decision in *Rahmani*, the Board has the right and obligation to clarify the appropriate standard of review.

[24] The Board finds that the appropriate standard of review is that of correctness for the reasons cited by the Board in *Property Owners and a Holding Company v. British Columbia Safety Authority,* BCSSAB 6(1) 2016, which states at paragraph 24:

> ….the Board is of the view that a broad application of the reasonableness standard of review is at odds with Section 53 of the *Safety Standards Act* which provides that an appeal to this Board is a new hearing. In addition,

> Section 60(1) gives the Board exclusive jurisdiction to "inquire into, hear and determine" all matters of "fact and law". These appeals are in the nature of a *trial de novo* where the Board is entitled to consider not only the merits of the evidence considered in the decision under appeal, but also to consider additional evidence that was not considered by the Safety Authority. While there may be limited circumstances where deference to the Safety Authority is warranted, those circumstances would only arise where there is more than one reasonable interpretation of the facts or law under appeal. The Board could, in appropriate circumstances, defer to a decision that the Board considers reasonable. Those cases will be rare and generally where the Board is considering new evidence, the standard of review is correctness. Such an approach is consistent with previous Board decisions.

[25] While the standard of review is one of correctness, in a case such as this where the Board is tasked with determining whether the Provincial Safety Manager correctly exercised the discretion given to him to levy monetary penalties by the Act, the standards of correctness and reasonableness meld as the Provincial Safety Manger would be found to have acted “correctly” if there were appropriate grounds to levy a monetary penalty and the penalty itself was reasonable in light of the evidence before the Board.

Application of Law to the Facts

[26] Section 40 of the Act permits a Provincial Safety Manager to issue a monetary penalty in a number of circumstances, including when there has been a failure to comply with a compliance order or when license or permit conditions have not been met.

[27] The Townhouse Non-Compliances remain outstanding. While the Appellant has provided some evidence that it was denied access to the Townhouse worksites, I note that the Appellant made only one such attempt after the backsplashes were scheduled to be delivered and never contacted the strata corporation to attempt to gain access.

[28] The Appellant also failed to advise the Respondent in a timely manner that it was having difficulty obtaining access. Had it done so, the Respondent could have assisted to ensure that access was provided. Accordingly, I find that the Appellant would likely

have been able to gain access to the Townhouse worksites if it had made a greater effort to do so.

[29] While the Crumpit Non-Compliance and the Glacier Non-Compliance have since been remedied, at the time the Monetary Penalty was issued it is uncontested that the Appellant had not fixed these instances of non-compliance.

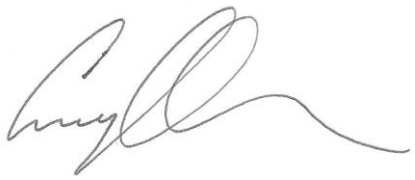
[30] There is no question that the Provincial Safety Manager had authority to issue a Monetary Penalty given that the Compliance Order had not been complied with at all when the Monetary Penalty was issued. The next question is then whether the Monetary Penalty ought to be varied or upheld.

[31] It is clear from the evidence before the Board that the Provincial Safety Manager considered the criteria set out in section 3 of the Regulation. The parties both agree that there was no previous enforcement activity concerning the Appellant. The Appellant did not provide any evidence that the risk of degree of harm is Iow as opposed to the Provincial Safety Manager's assessment of medium. With respect to whether the contravention was deliberate and the length of time the contravention was ongoing, the lack of diligence on the part of the Appellant in attempting to gain access to the Townhome site as well as the fact that the Crumpit-Non Compliance and Glacier Non-Compliance were not remedied until after the Monetary Penalty was issued bolster the position of the Provincial Safety Manager with respect to these criterion. As for whether the Appellant received an economic benefit, at the time the Monetary Penalty was issued, the Appellant had received an economic benefit as it had not performed the work required to remedy the non-compliances. Accordingly, I find that the Monetary Penalty in the amount of $10,000.00 as issued ought to be upheld.

[32] With respect to the Appellant's request that the Board make an order for it to have access to install the backsplashes, the making of such an order is outside the scope of the Board's jurisdiction. In this regard, I direct the Appellant to notify the appropriate Provincial Safety Manger if access remains an issue.

Conclusion

[33] For the reasons set out above, the appeal is dismissed.



Emily C. Drown
Chair, Safety Standards Appeal Board