

- b) an order that the BC Safety Authority deliver the Report to the Appellant, under revised terms of confidentiality, such that it can pursue the appeal;
- c) an order that the appeal proceed under terms of confidentiality, pursuant to its powers under Sections 41 and 42 of the *Administrative Tribunals Act*;
- d) an order reversing the findings of the Letter;
- e) in the alternative, an order varying the findings of the Letter; and
- f) an order staying the findings of the Letter, and staying the final decision to release the Report until such time as the jurisdiction and powers of the Provincial Safety Manager to complete, and to issue the report to the public, and the appeal board to hear this appeal, is determined.

[3] As the British Columbia Safety Authority (the “Respondent”) maintains that the Board lacks jurisdiction to hear this matter, it is first necessary to consider whether the Board has the jurisdiction to proceed with the appeal.

History of the Appeal

[4] An Appeal Management Conference was held on October 23, 2013. At that time, the issues of jurisdiction, interim board orders, and disclosure of the Report were discussed. A second Appeal Management Conference was held on October 29, 2013 to hear final submissions regarding the disclosure of the Report and to set a schedule for hearing submissions regarding the preliminary issue of the Board’s jurisdiction to hear the Appeal. At the second Appeal Management Conference, the Board also ordered limited disclosure of the Report pursuant to section 42 of the *Administrative Tribunals Act*, SBC 2004, c. 45.

[5] As the Respondent raised the jurisdictional question, the parties agreed that the Respondent would file the initial submission and the Appellant would then file a response.

Issue

[6] The only issue for consideration at this stage is whether the Board has jurisdiction to hear the Appeal brought by the Appellant.

Position of the Parties

The Respondent

[7] As stated above, the Respondent submits that the Board does not have jurisdiction over the issues raised in the Notice of Appeal. The Respondent states 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 issuance of an investigative report.

[8] Since the Board was created by statute, the Respondent submits that it has only that jurisdiction provided to it by the legislation. 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 *expression 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 the grammatical wording of the Act supports a finding that the jurisdiction of the Board is limited only to those instances where the legislature has expressly set out a right to appeal and preliminary matters that arise in the hearing of an appeal such as jurisdiction to consider an appeal and procedural issues such as disclosure.

[9] The Respondent cites the 2007 decision of the Board, *A Power Engineer v. BCSCA*, 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 manager 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 further 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:

- a) investigate “incidents” as defined in section 1 of the Act using the powers set out in ss.18 and 37 of the Act;
- b) document the investigation findings in a report; and
- c) disclose reports publically in accordance with the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[11] According to the Respondent, none of these powers fall within the categories over which the Board is granted appellate jurisdiction by the Legislature. While the Respondent acknowledges that findings of the Safety Authority in the Report may legitimately come before the Board, the Board only has jurisdiction to deal with them to the extent they are incidental to or relate to an exercise of authority that carries a right of appeal, such as an appeal of a compliance order or monetary penalty issued as a result of the findings in the Report.

[12] Finally, the Respondent relies on Hansard to support its view of the legislative intention regarding the scope of the Board’s jurisdiction. The relevant Hansard extract from the 2003 Legislative Session dated May 8, 2003 contains the following exchange:

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?

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. In theory they can move up to the ADM, they can move on to the appeal board, they can move on

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

Position of the Appellant

[13] The Appellant takes the position that the Board has jurisdiction to hear the Appeal. It urges the Board to review the issue of its jurisdiction from a practical perspective, noting that the Letter confirmed that the Safety Manager had made a “decision” and had “decided to finalize the Investigation Report” despite having been requested by counsel for the Appellant to first review and revise it. The Respondent submits that it is logical that a “review” took place within the meaning of ss. 49 and 50 of the Act since counsel requested a review and the Safety Authority responded that it had made a “final decision”.

[14] The Appellant further submits that the Board has the jurisdiction to deal with what it alleges to be an overstepping of the Safety Authority’s own jurisdiction in the drafting of the Report.

[15] The Appellant submits that its request for “review” and the issue of jurisdiction are both matters “arising from” the Act and the Provincial Safety Manager’s exercise of authority under the Act; it further submits that section 60(1) of the Act establishes the authority of the Board to adjudicate issues where the substantive jurisdiction of a safety manager under the Act is at issue.

[16] The Appellant relies on Hansard to support the argument that there is a right of appeal concerning disputes in the exercise of the authority under the Act, to the Deputy Minister, to the Board, and to the courts, depending on the character and nature of the complaint.

[17] The Appellant distinguishes *Power Engineer* on the basis that the remedy contemplated in that case clearly did not flow from the exercise of a power that was appealable under the Act and that a necessary inference must be drawn, that when a final decision is made by a provincial safety manager concerning powers that are asserted to be components of the overall authority of the provincial safety manager, the right of appeal must exist in respect of them.

[18] Although the Appellant maintains that the issue of jurisdiction should not be considered in a factual vacuum, it contends that the Respondent’s submissions regarding previous orders and certificates issued by the Safety Authority are immaterial to the appeal.

Analysis

[19] The Safety Authority has authority pursuant to sections 18(1)(c) and 37 of the Act to conduct investigations regarding regulated products, either after an incident caused by such product or where there is a risk of such incident occurring. The question is whether there is any right of appeal in relation to the conduct of an investigation.

[20] As a statutory body, there is no question that the Board only has those powers conferred expressly and by necessary implication from the Act. The legislation only gives the Board express jurisdiction over certain matters. For example, the Act confers a right of appeal in relation to the following decisions, orders, and penalties:

- a. appeal of a refusal to issue a license, certificate of qualification, permit or other permission (s. 23, 26 and 27);
- b. appeal of a safety order (s. 31);
- c. appeal of a compliance order if not subject to a safety manager review (s. 38);
- d. appeal of a monetary penalty (s. 40);
- e. appeal of a discipline order (s. 42); and
- f. appeal of a safety manager review decision (s. 50).

The legislation also expressly sets out certain situations where an appeal does not arise. For example, s.32 of the Act states that a decision of a safety manager on a review of a decision to not issue a variance is not appealable to the Board.

[21] 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 conduct of an investigation. Although it is the Board's view that there is no right of appeal directly from the conduct of a Safety Authority investigation, there may be instances where the investigation would be relevant. For example, if an investigation led to the revocation of a license, certificate of qualification, permit or other permission or the issuance of a safety order, compliance order or monetary penalty, then the individual affected would have a statutory right to appeal to the Board. However, in such circumstances, the appeal would arise from the revocation decision, the decision to issue an order, or the decision to issue a monetary penalty; the appeal would not arise directly from the investigation itself.

[22] The Board does not accept the Appellant's characterization of this matter as an appeal of a Safety Manager's Decision. The fact that the Safety Manager used the word "decision" in the Letter and made a decision to finalize the Report does not create a statutory right of appeal where one does not exist in the legislation. Provincial safety managers and safety officers make many decisions in the discharge of their day-to-day duties under the Act. For example, they must determine which properties to inspect in person, when to issue a monetary penalty, and when to conduct an investigation. Many of the decisions they make are more of an administrative rather than adjudicative nature. Not every decision that a provincial safety manager or safety officer makes can be appealed. The question of whether a right of appeal arises is a question of statutory interpretation.

[23] While the Letter may be a decision in the colloquial sense of the word, the Board finds that it is not an appealable decision on a plain reading of the Act. As set out above, the legislation gives the Safety Authority the power to investigate and it follows that an investigation may lead to the issuance of a report. However, the communication that a report is being finalized and may be distributed to third parties is not a decision appealable to the Board pursuant to the legislation.

[24] It is also important to recognize that the Act requires the Board to consider the maintenance and enhancement of public safety when considering an appeal. It is important to the maintenance and enhancement of public safety that the Safety Authority be permitted to investigate where the subject matter of the investigation falls within the scope of its authority. The Safety Authority's ability to communicate its investigation findings to those affected, as was done in the communications precipitating the Letter and the Letter itself, are powers that are necessarily incidental to the authority to investigate.

Decision

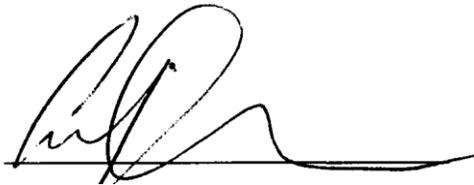
[25] As the legislation does not contemplate an appeal from the conduct of an investigation, the Board has determined that it lacks jurisdiction to hear the Appeal.

[26] The Board notes that the parties also provided submissions on the issue of disclosure of the Report. As the Board lacks jurisdiction to proceed with the appeal, it will not be addressing the issue of disclosure.

Conclusion

[27] For the reasons set out above, the Board finds that it does not have jurisdiction to hear the Appellant's appeal.

Signed by Panel:

A handwritten signature in black ink, appearing to be 'Emily Drown', with a long horizontal flourish extending to the right.

Emily Drown, Chair

A handwritten signature in blue ink, appearing to be 'Angela Westmacott', with a large, stylized initial 'A'.

Angela Westmacott, Vice-Chair

A handwritten signature in black ink, appearing to be 'Keith Saddlemyer', with a large, stylized initial 'K'.

Keith Saddlemyer, Board Member