

CANADA / JUDGMENT

Technical Safety BC v. Simply Green Home Services (BC) Inc.

2020 BCSC 2157

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2157 Technical Safety BC v. Simply Green Home Services (BC) Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Technical Safety BC v. Simply Green Home Services (BC) Inc.,

2020 BCSC 2157

Date: 20200915

Docket: S193689

Registry: Vancouver

Between:

Technical Safety BC

Petitioner

And

Simply Green Home Services (BC) Inc.

Respondents

Before: The Honourable Madam Justice Fleming

On judicial review from: A decision of the British Columbia Safety Standards Appeal Board, dated February 1, 2019

(Simply Green Home Services (B.C.) Inc. v. British Columbia Safety Authority, BCSSAB 17 (1) 2018)

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:

J.A. Morris

Counsel for the Respondent,

Simply Green Home Services (BC) Inc.:

M.E. Young

Counsel for the Attendee,

The Safety Standards Appeal Board (appearing via teleconference):

R.J.B. Gage

Place and Date of Hearing:

Vancouver, BC

September 10 and 11, 2020

Place and Date of Judgment:

Vancouver, BC

September 15, 2020

- [1] THE COURT: The petitioner, Technical Safety BC ("Technical Safety"), applies for judicial review of a decision of the British Columbia Safety Standards Appeal Board (the "Appeal Board") varying a monetary penalty imposed on the respondent Simply Green Home Services (BC) Inc. ("Simply Green") from \$45,000 to \$8,000. Technical Safety argues the Appeal Board breached its duty of procedural fairness by deciding the appeal based on issues not raised by the parties, without notice or opportunity to address them.
- [2] Technical Safety asks that the decision be set aside and an order made remitting the matter to the Appeal Board for a rehearing.
- [3] The application is opposed by Simply Green, who denies the appeal was decided based on new issues and argues the decision was made fairly. The Appeal Board, also a respondent, takes no position.

Background

- [4] Simply Green is a company that leases or sells home energy products such as furnaces, air conditioners, hot water tanks, and heat pumps to homeowners throughout BC on financing terms. Customers have typically been found through a door-to-door sales campaign. In most instances, Simply Green hires local contractors to install its products, although in some instances it performs the work itself.

- [5] Technical Safety is a non-profit entity established under the Safety Authority Act, S.B.C. 2003, c. 38 [SAA]. Its purposes include carrying on activities that "foster safety in the design, manufacture, disposal, construction, installation, operation, maintenance and use of technical products, equipment, systems and railways" (s. 5(2)).

Statutory Framework

- [6] The Safety Standards Act, S.B.C. 2003, c. 39 [SSA], sets standards for regulated products and work performed on those products. Regulations made pursuant to s. 8 of the SSA establish standards respecting electrical equipment and gas systems and equipment, both of which are regulated products: s. 2(1)(b)(iv) and (vi).
- [7] Technical Safety employs safety officers and safety managers appointed pursuant to the SSA. The powers and duties of safety managers and officers are set out in Part 4 of the SSA. Under s. 18, safety officers may exercise a range of powers to enforce the regulations, including the power to issue a compliance order and the power to recommend that a safety manager impose a monetary penalty. Under ss. 15 to 17, safety managers have all the powers of a safety officer and additional powers, which include imposing monetary penalties.
- [8] Section 40(1)(b) of the SSA allows a safety manager to issue a monetary penalty for a failure to comply with a compliance order. The maximum amount of the penalty for a contravention is \$100,000: s. 40(4).
- [9] Section 3 of the Monetary Penalties Regulation, B.C. Reg. 129/2005 [MPR], requires a safety manager to consider a number of factors before imposing a monetary penalty. It reads:
- 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 of the degree of risk of harm, to others as a result of the contravention;
 - (c) whether the contravention was deliberate;
 - (d) whether the contravention was repeated or continuous;
 - (e) the length of time during which the contravention continued;
 - (f) any economic benefit derived by the person from the contravention.
- [10] Technical Safety also relies on an internal calculator to determine the amount of a monetary penalty.

- [11] There is a right to an appeal from a decision of a safety manager to the Appeal Board, an independent adjudicative tribunal established under Part 8 of the SSA. Pursuant to s. 11 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA], and s. 44 of the SSA, the Appeal Board has the power to control its own process and make rules respecting practice and procedures to facilitate the just and timely resolution of the matters before it. The Appeal Board has published rules of practice and procedure, as well as guidelines and practice directions. The rules require a notice of appeal to, among other things:
- (d) state why the decision being appealed is being challenged; [and]
 - (e) state the requested outcome of the appeal;
- [12] A response to the notice of appeal must contain:
- (c) the appeal record [defined as "the decision being appealed and any reasons given for it, any documents produced in evidence before the decision-maker, any submissions filed by the parties before the decision maker and any intermediate orders made by the decision-maker" and]
 - (d) the grounds on which the decision being appealed was made, indicating specific provisions of the [SSA] associated regulation(s) and code rule(s) which support the decision under appeal.
- [13] Under the rules, the Appeal Board may require the hearing of an appeal to occur in person, by phone, in writing, electronically, or through a combination of these means. The guidelines provide, however, that hearings will generally be held by way of written submissions where practical and fair, with a view to reducing costs for the parties. The rules and guidelines require the parties to attend an initial appeal management conference.

Monetary Penalty

- [14] On July 6, 2018, a safety manager issued a monetary penalty to Simply Green of \$45,000 based on breaches of two compliance orders issued in March 2016 and July 2016. The compliance orders dealt separately with gas and electrical work on otherwise identical terms and required Simply Green:
- 1) to stop performing regulated gas and electrical work unless performed by qualified individuals;
 - 2) to stop performing regulated gas and electrical work until it was performed pursuant to a permit; and
 - 3) to conduct a review of all the regulated gas and electrical work it had performed or authorized between March 2014 and March 2016, and provide a list of the work to Technical Safety.
- [15] The July compliance order also required Simply Green:

- 1) to obtain the services of a licensed electrical contractor;
 - 2) to instruct the contractor to perform an inspection and make safe all regulated electrical work it had performed or authorized for which a permit had not been obtained;
 - 3) to instruct the contractor to make safe the work and ensure it complied with the SSA and regulations;
 - 4) to instruct the contractor to submit documentation within 30 days; and
 - 5) to provide a list of permits obtained within 30 days.
- [16] The safety manager had imposed a previous monetary penalty of \$10,800 on November 24, 2016. By that time, 47 properties had been identified as requiring permits and Simply Green had obtained 27. An investigation also determined Simply Green continued to perform work without obtaining the necessary permits. Consequently, the 2016 monetary penalty was issued to Simply Green for failing to fully comply with the July compliance order because permits for 20 properties remained outstanding, and for failing to comply with the March compliance order by continuing to perform work without a permit in two circumstances.

Previous Appeal Board Decision

- [17] Simply Green appealed. In August 2017, the Appeal Board upheld the 2016 monetary penalty and dismissed the appeal. In doing so, it stated at para. 14:
- [14] A review of the appeal record clearly indicates that the Appellant was not in compliance with any of the three Compliance Orders when the Monetary Penalty was issued. I find that the Appellant was given significant time to comply between the initial discovery of the non-compliances, issuance of the Compliance Orders and the ultimate issuance of the Monetary Penalty. It is also apparent that the Safety Manager considered the criteria set out in section 3 of the [Monetary Penalty] Regulation. Upon review of the Monetary Penalty Checklist completed by the provincial Safety Manager in advance of the issuance of the Monetary Penalty, I find the Safety Manager's decision to issue the Monetary Penalty correct and supported by the Act and associated Regulations.

Ongoing Investigation

- [18] Technical Safety continued to investigate. In a detailed letter dated April 8, 2018, the safety manager notified Simply Green that he was considering imposing another monetary penalty of \$50,000 for failing to comply with the March and July compliance orders. He specified his non-compliance findings as follows:
- 1) permits for 11 properties remained outstanding;
 - 2) the list of permits obtained and safety documentation was still outstanding; and

- 3) Simply Green had performed work at a property in Hope in breach of the March compliance order requiring it to stop electrical work without a permit and unless properly licensed and qualified.

[19] Regarding the Hope property, the safety manager outlined outstanding requests for information before stating:

Subject to the receipt of additional information on this matter, I am forced to conclude that Simply Green performed the original installation.

[20] He went on to particularize the breaches resulting from this conclusion before considering in some detail each of the mandatory factors under s. 3 of the MPR.

[21] In response, Simply Green informed the safety manager it took issue with the facts he alleged, whether a monetary penalty should be issued at all, and alternatively the amount of the penalty. Simply Green advised him that permits for eight of the 11 properties had been obtained, no permit was required for a Prince George property, leaving two permits outstanding and denied performing the work at the Hope property. Simply Green also addressed what it regarded as the relevant factors under s. 3 of the MPR, including the extent of harm, whether the contravention was deliberate, and the economic benefit derived.

Safety Manager's Decision

[22] The safety manager provided notice of the July 2018 monetary penalty with a letter dated July 6, 2018 that stated it was based on continued non-compliance with the July compliance order and a further breach of the March 2016 electrical compliance order. In the letter, the safety manager acknowledged there were only two properties without permits. He informed Simply Green that he had reduced the amount of the penalty from the original amount contemplated to \$45,000 for this reason.

[23] The safety manager also specified that the penalty was based on Simply Green's failure to provide a list of all permits obtained, documentation indicating the installations had made safe not having been received in all cases and its performance of the work on the Hope property in breach of the March compliance order. On this last point, the safety manager again wrote he was forced to conclude Simply Green had performed the original installation, based on its failure to respond to specific requests for information.

[24] He also wrote that, apart from the reduction in the number of outstanding permits, his assessment of the MPR s. 3 factors remained unchanged from his April 2018 letter, setting out there had been a previous monetary penalty issued for the same or similar contraventions. There had been a moderate risk of harm associated with the unverified electrical installations. The failure to prioritize compliance, after significant efforts had been made by Technical Safety to assist, suggested that these instances of non-compliance were deliberate. These instances of non-compliance had been outstanding for a significant

period of time and, in the case of the unlicensed work, amounted to a repeated violation. Economic benefit was obtained whenever work was done without a permit or by an unlicensed individual.

2018 Appeal

[25] On August 3, 2018, Simply Green filed a notice of appeal from the July 2018 monetary penalty.

[26] Simply Green explained why it was appealing in a letter to the Appeal Board from its vice president of operations, David Singh:

Simply Green wishes to appeal [the] penalty assessment of \$45,000, as it unduly penalizes [Simply Green] for activities that have been resolved or are continuing to be resolved due to factors outside of [its] control.

[27] The letter also addressed outstanding documentation and permits as well as the safety manager's request for further information regarding the Hope property, before challenging his assessment of the MPR s. 3 factors and providing additional information about the changes to its operational practices, its business model, and its decision not to continue with sales to new clients until these matters were clarified.

[28] The response of Technical Safety began with a blanket denial of the allegations in the notice of appeal. It asserted the monetary penalty was authorized by s. 41(1)(b) of the SSA, reasonable and correct, and that there was no basis to vary or set it aside. In addition to setting out facts related to the compliance orders and Simply Green's position, namely not denying it continued to fail to comply, the response simply stated the safety manager considered the factors set out in s. 3 of the MPR and that it complied with s. 40.

[29] The appeal record consists of 326 pages, most of it, as Simply Green points out, related to the compliance orders and the 2016 monetary penalty.

[30] An appeal management conference was held on September 13, 2019. By consent, the Appeal Board ordered the appeal to proceed by way of written submissions "with the parties providing the Appeal Board, as well as each other, their written argument and any evidence, affidavits, documents, or anything that they will be relying on in such argument," and set deadlines.

[31] After the case management conference, Simply Green chose not to produce any written submissions. Those of Technical Safety address the compliance orders, the previous appeal, the standard of review, and the safety manager's consideration of s. 40 of the SSA, as well as the factors in s. 3 of the MPR. In addition, Technical Safety expressly relied on the safety manager's April 2018 letter notifying Simply Green of the potential enforcement action and his letter of July 6, 2018.

- [32] Identifying Simply Green's primary objection to the monetary penalty as based on its attempts to comply and being in the process of complying, Technical Safety also made a number of factual and legal submissions directed at Simply Green's opportunities for compliance, its history of and ongoing non-compliance, the safety manager's reduction of the proposed monetary penalty, Simply Green's submissions about subsequent and current efforts, the risk of harm, the requirement for the Appeal Board to consider the purpose of the Act, and other issues with reference to several documents contained in the appeal record, the notice of appeal, and the SSA.
- [33] At the appeal management conference, the Appeal Board determined that, if any questions arose from the written submissions filed, it would notify the parties and a further appeal management conference would be scheduled to address those questions, neither of which occurred

Decision of the Appeal Board

- [34] On February 1, 2019, the Appeal Board issued its decision to reduce the 2018 monetary penalty from \$45,000 to \$8,000.
- [35] The reasons indicate the Appeal Board first considered whether Simply Green had failed to comply with the March or July compliance orders in 2018, identifying the safety manager's power to issue a monetary penalty for non-compliance with a compliance order under s. 40(1)(b).
- [36] Writing a party cannot be sanctioned twice for the same activity, the Appeal Board also stated it was only Simply Green's actions in relation to outstanding compliance matters after the 2016 monetary penalty was issued, or new instances of non-compliance, that can form the basis of an additional penalty.
- [37] The Appeal Board determined that, of the four breaches of the compliance order found by the safety manager, only the failure to obtain two permits was established by the evidence. Addressing the lack of evidence regarding the breaches based on the permit list and documentation required by the July compliance order, the Appeal Board commented on the confusing state of the record, i.e., the numerous references to various permit lists exchanged, the lack of clarity regarding how many properties were affected by the failure to submit documentation in all cases, and the lack of explanation from the safety manager. Acknowledging its obligation to consider the maintenance and enhancement of public safety in deciding appeals, the Appeal Board also reasoned:

That said, if there were indeed important safety issues relating to this aspect of the 2018 Monetary Penalty, that is the lack of documentation in all cases that properties had been made safe, the Board would have expected to have seen some mention of this in correspondence between the Respondent and the Appellant as and when the various permits were obtained and the work completed or some more fulsome reference to this issue in the submissions filed by the Respondent.

- [38] Regarding the Hope property, the Appeal Board found the safety manager could not make the finding he did based on the evidence available to him. There being no evidence that proved Simply Green performed the work itself, the Appeal Board opined the safety manager could not correctly or even reasonably conclude there was an actual breach of the July compliance order.
- [39] Returning to Simply Green's failure to obtain permits for two properties, the Appeal Board also found this breach sufficient for a monetary penalty, in addition to setting out findings regarding the nature of the breach.
- [40] Turning to consider the amount of the monetary penalty "in light of the foregoing facts", the Appeal Board set out the factors under s. 3 of the MPR, in addition to noting the monetary penalty calculator. The Appeal Board then observed Technical Safety had not explained what use, if any, the safety manager had made of the calculator in this case. The Appeal Board further noted the record contained four drafts of the monetary penalty, none of which totalled \$45,000.
- [41] After again noting that a party cannot be made to pay twice for the same contravention, the Appeal Board went on to consider and apply each of the s. 3 factors with reference to the evidence and lack of evidence. Following this analysis, the Appeal Board expressly agreed with Simply Green's assertion that a monetary penalty of \$45,000 was excessive:
- [60] We firstly observe that it does not reflect any proportionality in light of the 2016 Monetary Penalty bearing in mind that both Penalties concern the same set of facts and the 2018 Penalty only relates to the ongoing efforts of Simply Green to comply with the July Compliance Order.
- [61] If the 2016 Monetary Penalty in the amount of \$10,800 was appropriate for reducing a list of 47 properties to 20 it seems disproportionate that a penalty some four and a half times that amount is justified for reducing a list of 20 properties to two. It is also noteworthy that the 2016 Monetary Penalty was intended to sanction the Appellant for continuing to perform work without permits in the weeks after the March Compliance Order. No such contravention was present in 2018.
- [62] A penalty of this size is also not consistent with any previous decisions of the Safety Manager that have come before this Board for similar contraventions. Monetary Penalties are a means of encouraging compliance with the regulatory scheme and a way of discouraging future infractions but the decision to impose a penalty must be proportionate.
- [63] The circumstances giving rise to the 2018 Monetary Penalty, on any reasonable consideration, are far less egregious than those that existed in 2016 when a \$10,800 penalty was imposed, and which this Board upheld on appeal.
- [64] Using the criteria in the Regulation, and importantly, the amount of the 2016 penalty as a guide, I find that a monetary penalty in the amount of \$8000 properly takes in account:

1. The remaining two permits that were outstanding.
2. The delay after 2016 while the Appellant secured permits and rectified installation errors.
3. The potential for safety concerns after 2016 in any of the affected properties.
4. Any economic benefit the Appellant may have received.
5. The fact that the Appellant has already been sanctioned for the circumstances that first gave rise to the contraventions.

Duty of Procedural Fairness - Legal Principles

- [42] Turning to the legal principles, the issue in this case is whether the Appeal Board breached its duty of procedural fairness. There is no dispute about the standard of review or its source. Decisions of the Appeal Board are protected by a strong privative clause and it has exclusive jurisdiction in an appeal under the SSA.
- [43] Section 58 of the ATA prescribes the standard of review. Under s. 58(2)(b), the standard of review regarding the application of common law rules of nature justice and procedural fairness is whether, in all of the circumstances, the tribunal acted fairly. Also described as the standard of fairness, and sometimes characterized as akin to correctness, no deference is paid to the decision-maker in determining whether the duty of procedural fairness has been met: *Sebastian v. Vancouver Coastal Health Authority*, 2019 BCCA 241 at para. 40.
- [44] As an administrative tribunal, the Appeal Board is obligated to uphold the principles of natural justice enshrined within the duty of procedural fairness which include the principle that a party must know the case being brought against them and be given an opportunity to address it.
- [45] The duty of procedural fairness is triggered whenever an administrative decision affects the rights, privileges, or interests of an individual. It is recognized, however, that the content of the duty is flexible, variable, and context-specific.
- [46] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 remains the leading authority on the approach to determining what procedural fairness requires in any particular circumstance. In *Baker*, the Supreme Court of Canada identified a list of factors to be considered that include:
- a) the nature of the decision being made and the process followed in making it;
 - b) the nature of the statutory scheme, including the existence of an appeal procedure;
 - c) the importance of the decision to the lives of those affected;
 - d) the legitimate expectations of the person challenging the decision; and
 - e) the choice of procedure made by the decision-maker.

[47] Emphasizing the list of factors is not exhaustive, Justice L'Heureux-Dubé explained:

[28] The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[48] In *Canada (Attorney General) v. Mavi*, 2011 SCC 30, the Supreme Court of Canada clarified the administrative and legislative context play a crucial role in determining the duty's content.

Parties' Positions

[49] Technical Safety argues the Appeal Board breached its duty of procedural fairness by deciding the appeal based on issues not raised by the parties without notifying them and providing them with an opportunity to respond. Technical Safety identifies the new issues as follows:

- 1) the interpretation and application of the MPR, including whether a party can be "sanctioned twice for the same activity under the MPR";
- 2) the potential for risk to public safety, an issue that warranted evidence and submissions from the parties given its central importance to the statutory scheme;
- 3) whether there was previous enforcement action under the SSA as that term is used in the MPR;
- 4) whether the previous monetary penalty was consistent with the previous monetary penalties for similar contraventions; and
- 5) the 2016 monetary penalty as a guide regarding the appropriate amount of the [2018] monetary penalty.

[50] Technical Safety takes the position that the Appeal Board's duty to provide notice of new issues and an opportunity to address them is essentially the same as the duty owed by an appellate court to a litigant. In addition, Technical Safety asserts that, as the appellant, Simply Green bore the onus, and the issues on appeal were limited to those expressly raised in its notice of appeal.

[51] Referring to the Baker factors, Technical Safety emphasized the formal adversarial nature of the process before the Appeal Board as reflected in its procedural rules and guidelines, and the importance of protecting not only the rights of the regulated party, but the public interest Technical Safety is mandated to protect. Technical Safety also argued the Appeal Board's rules and guidelines create a legitimate expectation that it would notify the parties of new issues, with reference to the purpose of those rules and guidelines, including setting requirements for board practice and procedure, and its power under the rules and

guidelines to require the parties to provide information, statements of issues, and to notify the parties of questions and schedule a further conference if it has questions after reviewing the parties' written submissions.

- [52] In support of its position, Technical Safety relies on the affidavit of Ruby Beryar, which it did not file with its petition. Ms. Beryar is employed as a legal and privacy assistant by Technical Safety. She deposes to being familiar with the Appeal Board's application of its rules, guidelines, and practice directions. In her experience, if the Appeal Board has questions regarding issues raised on an appeal, it may convene a further appeal management conference or ask the parties to provide additional information or submissions.
- [53] By way of example, she describes the procedure followed in an appeal subsequent to this one, attaching the Appeal Board's records from appeal management conferences, a letter notifying the parties an oral hearing was being convened to address five issues arising from the written submissions, the decision itself, and other documents related to the appeal.
- [54] In addition to submitting the procedure followed in the subsequent case cannot form the basis for a reasonable expectation, Simply Green argues the affidavit is inadmissible because it contains new evidence that is not relevant or helpful in determining whether the Appeal Board acted fairly.

New Evidence

- [55] Regarding the admissibility of new evidence, both Technical Safety and Simply Green rely on *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33, which held the power to admit new evidence on judicial review must be used sparingly, but new evidence may be admissible to show a lack of jurisdiction or a denial of natural justice. Where the grounds of review are a breach of natural justice or procedural fairness, the new evidence, however, must be both relevant and necessary before it will be admissible.
- [56] More recently, in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, the court of appeal identified the proper approach to admitting new evidence on judicial review as a principled one, also writing:
- [37] A court must also be allowed to fully consider the question of whether the proceedings of a tribunal met standards of procedural fairness. Evidence that casts light on the procedures followed by the tribunal will, therefore, generally be admissible.
- [39] Evidence that casts light on the manner in which the tribunal made its decision will be admissible within tight limits.
- [57] So too will the evidence that deals with information that was known to or acted upon by the tribunal.
- [58] The key question, said the court of appeal, is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court (at para. 39).

- [59] As they relate to the subsequent appeal to the Appeal Board, in my view, the materials attached to the affidavit of Ms. Beryar are not consistent with this jurisdiction, nor are they necessary. The evidence already included the Appeal Board's rules, guidelines, and practice directions, in addition to the appeal record. There is no dispute in this case about the Appeal Board's procedural powers in managing and conducting an appeal, nor about how they were exercised. Ms. Beryar's evidence regarding her experience with the Appeal Board, although benign, is also unnecessary.
- [60] The fact that the Appeal Board may convene a further conference or ask for additional submissions if it has questions is clear. The only issue is whether it ought to have done so in this case.
- [61] I therefore find the affidavit inadmissible.
- [62] Simply Green's position on the judicial review is that none of the issues identified by Technical Safety are new. Instead, they were squarely before the Appeal Board from the outset. Simply Green identifies the principal or overriding issue as whether the safety manager's decision to impose the 2018 monetary penalty ought to be upheld, varied, or set aside.
- [63] Similarly, based on the Baker factors, Simply Green argues the content of the duty of procedural fairness did not require the Appeal Board to request additional submissions and evidence from the parties, because Technical Safety knew or ought to have known the Appeal Board would assess:
- a) whether the 2018 monetary penalty complied with or was authorized by s. 40(1)(b);
 - b) whether the safety manager properly or correctly applied the criteria in s. 3 of the MPR in determining the amount of the 2018 penalty; and
 - c) whether the amount was appropriate in all the circumstances, based on the evidence before the Appeal Board.
- [64] Simply Green goes on to suggest that Technical Safety's written submissions before the Appeal Board in fact address those very issues.

Discussion

- [65] For the reasons that follow, I largely agree with Simply Green.
- [66] Firstly, I observe that although Technical Safety has not challenged the Appeal Board's findings of fact or law, or its exercise of discretion, its argument contains a view about the nature of the appeal that is inconsistent with the approach taken by the Appeal Board in reaching its decision, such as the appellant bearing the onus or burden.

- [67] Related to this, Technical Safety sometimes appears to conflate substantive complaints with a procedural fairness concern, casting it as a new issue. For example, Technical Safety asserts the Appeal Board ought to have raised its unwillingness to accept the safety manager's "unchallenged" expert findings regarding the extent of the risk, effectively challenging the Appeal Board's findings regarding the insufficiency of the evidence related to one of the factors under s. 3 of the MPR, under the guise of a procedural fairness concern.
- [68] I now turn to the Baker factors.
- [69] I have already discussed the nature of the statutory scheme. In discussing its features, Justice Gomery in *Technical Safety BC v. BC Frozen Foods Ltd.*, 2019 BCSC 716 also observed:
- [19] Decisions made by safety officers and safety managers may be very consequential. While the regulatory scheme mandates certain basic procedural requirements, the procedure is highly informal. Procedural flexibility is required in the interests of public safety.
- [20] The procedures for the imposition of [a] monetary penal[t]y are somewhat more involved, but still relatively informal. It is striking that a penalty of up to \$100,000 can be imposed with no more formality than a written notice provided in advance stating reasons for the safety officer's recommendation that a penalty be imposed.
- [21] The scheme is balanced by the availability of a right of appeal to the Board as an independent specialist tribunal. The Board's function is supervisory.
- [45] The safety manager is a subordinate decision-maker. The process adopted by the safety manager is inquisitorial, informal and flexible. Appeals to the Board are adversarial and more formal. This is for the protection of the appellant who is charged to pay the penalty.
- [70] Baker provides that the more closely the function of the tribunal and the process of decision-making resembles a court and judicial decision-making, the more likely it is the duty of fairness will require procedural protections closer to a trial mode.
- [71] There is no question the Appeal Board is a quasi-judicial body and appeals are subject to an adversarial process. On the other hand, under its rules, guidelines, and practice directions, the Appeal Board has broad powers to flexibly manage and conduct appeals. It may choose the hearing procedures it considers most appropriate, ranging from informal written submissions to formal oral hearings similar to a trial, or any combination of written, electronic, and oral hearing.
- [72] Where the Appeal Board decides an appeal will be heard by written submissions, the guidelines require the parties to present their entire case in writing, specifying: "all of the evidence, legal authorities and argument that a participant wants the Board to consider must be included." They also specify:

The Appellant's submissions should contain all evidence and argument in support of the grounds for appeal and explain why the decision being appealed should be changed. The Respondent's submissions should provide all evidence and argument in support of the decision being appealed and explain why the appeal should be dismissed.

- [73] In other words, a respondent is expressly notified that its submissions are required to address more than the grounds of appeal and include all arguments in support of the decision, in addition to explaining why the appeal should be dismissed.
- [74] Importantly, an appeal before the Appeal Board is a new hearing, unless it recommends otherwise and the parties agree. By s. 40 of the ATA, the Appeal Board may receive and accept information it considers relevant, necessary, and appropriate, whether or not it would be admissible under the rules of evidence. The guidelines explain the same and specify that evidence is relevant if it is helpful in answering a question the Board must consider in making a decision.
- [75] Again, once the deadlines for making submissions have expired and the Appeal Board has reviewed them, if it has questions about any of the materials or needs more information, it may hold a telephone conference or ask for follow-up written submissions before making a final decision.
- [76] The Appeal Board is required to decide an appeal by confirming, varying, or reversing the decision, or by dismissing the appeal. In doing so, the Appeal Board has a statutory obligation, as I have said, to consider the maintenance and enhancement of public safety. As an expert tribunal, its expertise extends to interpreting and applying the SSA and the MPR.
- [77] Section 60 of the SSA provides the Appeal Board with exclusive jurisdiction to "inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under this Act and to make any order permitted to be made."
- [78] At issue in every appeal from a decision of the safety manager is its correctness. In other words, the Appeal Board is not required to pay deference. The issue before the Appeal Board in this case was the same issue considered by the safety manager in imposing the 2018 monetary penalty. On an appeal of a monetary penalty, the Appeal Board is permitted to substitute its own opinion as to the appropriate penalty.
- [79] Baker also provides that greater procedural protections are required when no appeal procedure is provided for in the statute. The Appeal Board is, of course, an appeal tribunal. Appeals from the decision of a safety manager are as of right. The SSA provides for no further appeal. Instead, decisions of the Appeal Board are subject to judicial review. Because it is an expert tribunal, the ATA provides that patent unreasonableness is the standard of review from findings of fact, law, or an exercise of discretion over matters within its exclusive jurisdiction.

- [80] Although Simply Green does not dispute the importance of the Appeal Board's decision to Technical Safety, Justice Gomery recognized the statutory scheme regarding appeals is a response to the significant consequences of Technical Safety's decision for the regulated party, be they compliance orders or mandatory penalties.
- [81] Although I accept Technical Safety's role on an appeal is to protect public safety, the Appeal Board shares this obligation. The importance of the decision to Technical Safety, therefore, is simply not the same as it is to the regulated party, in this case Simply Green.
- [82] Both Baker and Mavi discussed the factor of legitimate expectations. Several principles were enumerated in Baker, including:
- 1) legitimate expectations do not create substantive rights or an entitlement to a particular outcome, instead they affect the content of the duty of fairness; and
 - 2) if the legitimate expectation is that a certain procedure will be followed, this procedure will be required by the duty of fairness.
- [83] Simply Green made the unchallenged submission that an expectation will only be legitimate if it is based on a decision-maker's clear, unambiguous, and unqualified representation, conduct, or established practice, with reference to *Omer v. Canada (Citizenship and Immigration)*, 2015 FC 494. To the extent Technical Safety relies on this factor, none of the Appeal Board's statements as set out in the rules, guidelines, and practice directions, including its power to ask for further submissions in the event it has questions, qualify as a representation that it will do so in a particular circumstance, including the circumstances here.
- [84] Regarding the decision-maker's choice of procedure, the only challenge is to the Appeal Board's alleged failure to notify the parties of new issues along with the suggestion the Appeal Board's duty to do so is heightened because the appeal proceeded by written submissions.
- [85] An additional and important factor in this case, in my view, is the expertise of Technical Safety, as the administrative decision-maker. Both Technical Safety and the Appeal Board necessarily engage in the interpretation and application of the same statutory scheme in the exercise of their statutory powers and duties.
- [86] Assessing all of these factors, I am satisfied that the Appeal Board's duty of procedural fairness did not require it to provide notice to the parties or an opportunity to address what Technical Safety has identified as new issues before deciding the appeal. That is not to say that the Appeal Board's duty of procedural fairness would never include this obligation. In this case, however, I am firmly of the view that Technical Safety knew or ought to have known the case it had to meet as reflected in the decision of the Appeal Board. Technical Safety had ample opportunity to present its case on those issues, bearing in mind its own expertise, including its knowledge of the statutory scheme, the Appeal Board's rules, guidelines, and practice directions generally. This is particularly true with respect to the

requirements for a response and the respondent's written submission, and the broad issues on appeal from the 2018 monetary penalty. Again, those issues include the correctness of the safety manager's decision regarding breaches of the compliance order, whether a monetary penalty was authorized by s. 41(1)(b) of the SSA, whether the safety manager correctly applied the MPR s. 3 factors in determining the amount of the penalty and, if not, what amount was appropriate.

- [87] The issues Technical Safety identifies as new were not legally or factually distinct from those addressed by the parties, nor were they issues that cannot reasonably be said to stem from the issues "as framed by the parties" and required to be addressed by the statute, rules, and guidelines. Instead, all of them related to what the Appeal Board was required to consider under the SSA and MPR in reaching its decision. Again, unlike in a true appeal, the Appeal Board was required to review the safety manager's decision to impose a monetary penalty, and his assessment of the amount, considering both s. 40 of the SSA and s. 3 of the MPR. At best, most of the new issues identified by Technical Safety involve particular considerations related to the known or ought-to-have-been-known issues.
- [88] Turning to those issues, Technical Safety incorrectly identifies the Appeal Board's comment that a party cannot be sanctioned twice for the same activities involving the interpretation and application of the MPR, when in fact it formed part of the discussion of the breaches of the compliance order under s. 40(1)(b) of the SSA. In any event, the comments are irrelevant to the decision, given the only breaches at issue were those that involved conduct that occurred after the 2016 monetary penalty. I have already addressed Technical Safety's submission regarding the second issue, that the Appeal Board's assessment of potential risk warranted additional evidence and submissions from the parties. Again, Technical Safety has not challenged the Appeal Board's approach to the appeal on substantive grounds. In addition, however, the Appeal Board's findings of insufficient evidence and further discussion of this issue falls squarely within its consideration of the second factor under MPR s. 3: the extent of the harm or the degree of risk of harm to others as a result of the contravention, as well as its obligation to consider public safety in hearing appeals. The third issue, whether there was previous enforcement action under the SSA, as that term is used in the MPR, also involves the first criterion under s. 3 and is one that the safety manager addressed in his April 2018 letter, which forms part of Technical Safety's submissions and is included in the appeal record.
- [89] Regarding the fourth issue, which involves the Appeal Board "considering whether the 2018 monetary penalty was consistent with previous monetary penalties for similar contraventions", I note firstly the Appeal Board referred to the previous decision of the safety manager specifically. I agree with Simply Green, however, that this was merely a comment and the Appeal Board assessed the amount of the monetary penalty based primarily on its consideration of the s. 3 factors and the evidence. Finally, Technical Safety identifies the Appeal Board's use of the 2016 monetary penalty as a guide in determining the amount as a new issue. As Simply Green points out, two-thirds of the record involved

evidence related to the 2016 monetary penalty. In other words, it provides a logical, rational, and reasonable consideration that is well grounded in the evidence. Further, in my view, it is contemplated by the first factor under s. 3.

[90] Accordingly, Technical Safety's application is dismissed with costs to Simply Green.

"Fleming J."

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