



(the “Compliance Order”). The Compliance Order required the Appellants to perform all excavation work in compliance with the British Columbia *Gas Safety Regulations* and to prepare and submit a Safety Management Plan to the Provincial Safety Manager outlining how the Appellants planned to ensure compliance in the future.

[2] Upon receipt of the Monetary Penalty notice, the Excavating Service appealed the imposition of the Monetary Penalty to the Safety Standards Appeal Board as it was entitled to do. At an Appeal Management Conference held in this matter it was confirmed that the Appeal was in fact filed on behalf of all of the Appellants and that all references to the Excavating Service in the Notice of Appeal would be deemed to include all Appellants.

[3] These reasons for decision deal with the appropriateness of the Monetary Penalty.

### **Issue**

[4] 1. Should the Monetary Penalty levied by the Safety Manager be set aside or varied?

### **History of Appeal**

[5] The parties are largely in agreement with respect to the facts that led up to the issuance of the Monetary Penalty and notably, the Appellants do not deny the conduct that led to the imposition of the Monetary Penalty.

[6] The Appellants have supplied the Board with a statement filed February 14, 2012, which I take to be both the written evidence of the Appellants as well as their final submissions in this Appeal. The BCSA has filed two affidavits: the affidavit of a Provincial Safety Manager for gas technology with the BC Safety Authority and the affidavit of a Provincial Safety Officer for gas technology, both of which were sworn February 24, 2012. The BCSA has also provided written submissions outlining their position with respect to the Appeal.

[7] The Appellants' position is that it was someone else's responsibility, namely the builder of the house where the construction was taking place, to comply with the terms of the *Gas Safety Regulation* as opposed to their responsibility. The BCSA's position is that it was at all material times the responsibility of the Appellants to comply with the terms of the *Gas Safety Regulation* and more particularly that the Appellants had to comply with the Compliance Order, which dealt with the Appellants' previous infractions regarding non-compliance with the terms of the *Gas Safety Regulation*. The BCSA submits that the issuance of the Monetary Penalty was reasonable due to the Appellants' multiple infractions of the Compliance Order. Further, the BCSA submits that the issuance of the Monetary Penalty was done in compliance with the terms of the *Monetary Penalties Regulation*.

[8] Notably, the Appellants have not denied the previous acts of non-compliance relied upon by the BCSA, despite having being provided with the opportunity by the Board to provide reply evidence and submissions, which I note the Appellants chose not to make use of. Nor have the Appellants provided any opposition to the evidence of the Provincial Safety Manager that the infractions complained of by the BCSA with respect to the Appellants can have serious or fatal consequences.

[9] The Appellants own evidence admits that they did not comply with section 39 of the *Gas Safety Regulation*, albeit because they thought that doing so was another individual's responsibility. It is noted by the Board that while the Appellants have provided evidence of other occasions when they have complied with the terms of the *Gas Safety Regulation* by calling BC One Call that they have not denied the existence of previous infractions of the *Gas Safety Regulation* nor do they state that they have created a Safety Management Plan as required by the terms of the Compliance Order.

### **Position of the Parties**

#### **Summary of Appellants' Position**

[10] As stated above, the Appellants do not dispute the fact that section 39 of the *Gas Safety Regulation* was not complied with. They instead state that it was someone else's responsibility to do so, not their responsibility. The Appellants submit that the builder should be held responsible instead of the Appellants.

### Summary of Respondent's Position

[11] The BCSA submits that the Appellants, as excavators, had a duty to comply with the terms of the *Gas Safety Regulation*, in particular section 39 and failed to do so. Accordingly, the BCSA submits that the Monetary Penalty complies in all respects with the Act and the *Monetary Penalties Regulation*.

[12] The BCSA states that the standard for review of the Monetary Penalty is reasonableness and that consequently the Safety Manager's decision to impose the Monetary Penalty is entitled to deference, was reasonable and ought not to be varied or reversed on appeal.

[13] The BCSA submits that the repetitive nature of the Appellants' non-compliance with the *Gas Safety Regulations* and the significant hazard posed by the Appellants' actions supports the Monetary Penalty imposed by the Safety Manager.

### Analysis

[14] As submitted by the Respondent, the standard for review of this appeal is reasonableness, which means that the Board must give deference to the discretion the legislation grants to the Safety Manager to enforce the Act and impose monetary penalties.

[15] In addition, pursuant to section 52 of the Act, when considering an appeal, the Board must also consider the maintenance and enhancement of public safety.

[16] Pursuant to section 40 of the Act, a safety manager may, in accordance with the regulations, impose a monetary penalty on an individual if they contravene a compliance order.

[17] The Compliance Order required the Appellants to comply with the *Gas Safety Regulation* and to submit a Safety Management Plan. The evidence before the Board indicates that they did neither. The Appellants submit that it was the builder's responsibility to ensure compliance with the *Gas Safety Regulation*. However, I find that the *Gas Safety Regulation* is clear that responsibility for such compliance, particularly

with respect to section 39, lies with the party doing the excavation work.

[18] The criteria for the imposition of such a monetary penalty are set out in section 3 of the *Monetary Penalties Regulation* as follows:

- 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; and
- f) any economic benefit derived by the person from the contravention.

[19] Applying these criteria to the Appellants' actions, it is clear that the Safety Manager's decision to impose a monetary penalty was a reasonable decision. The evidence before the Board indicated that there had been previous enforcement actions under the Act for contraventions of a similar nature by the Appellants, including three known line hits (two of which occurred after the issuance of the Compliance Order) and a recommendation to issue an earlier Monetary Penalty. The potential harm to others as a result of the contravention was large. The Appellants are fortunate that nobody was injured as a result of the contravention. Similar contraventions have proven fatal. While I will not say that the Appellants' contravention was deliberate as the Appellants genuinely felt that the builder had complied with the *Gas Safety Regulations*, the Appellants had previously been educated by the BCSA about the need to comply with the legislation and they took no steps to comply with the legislation themselves or to verify that the builder had in fact complied.

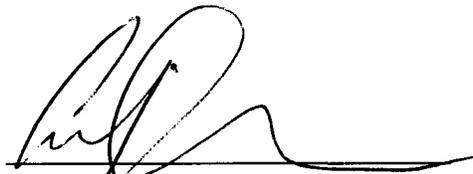
[20] The maximum Monetary Penalty permitted under the Act is \$100,000.00 and as deposed in the Safety Manager's Affidavit, the Monetary Penalty issued was in line with the BCSA's Monetary Penalty Assessment Checklist.

[21] On the evidence before the Board, the \$10,000.00 penalty issued by the Provincial Safety Manager appears reasonable.

## **Conclusion**

[22] The Monetary Penalty levied by the Safety Manager in the amount of \$10,000.00 should not be set aside or varied. Accordingly, the appeal is dismissed and pursuant to section 40(13) of the *Safety Standards Act*, S.B.C. 2003, c. 39 the Appellants must pay the Monetary Penalty within 30 days.

Signed:



**Emily C. Drown, Vice-Chair**