

Indexed as: BCSSAB 2 (1) 2016

IN THE MATTER OF THE *HOMEOWNER PROTECTION ACT*, S.B.C. 1998 c. 31

AND IN THE MATTER OF

an Appeal to the British Columbia Safety Standard Appeal Board

BETWEEN: **AN INDIVIDUAL** **APPELLANT**

AND: **HOMEOWNER PROTECTION OFFICE** **RESPONDENT**

Chair: **Emily Drown**

Vice Chair: **Jeffrey Hand**

Member: **Terry Bergen**

Counsel for the Appellant: **Hans J.R. Doehring**

Counsel for the Respondent: **Kevin L. Boonstra**

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal of a decision of the Registrar of the Homeowner Protection Office (the "HPO") dated December 18, 2015 (the "Decision"). The Decision was made under subsection 39.2(1)(a) of the *Homeowner Protection Act* (the "Act") and confirmed the issuance of a Monetary Penalty. The Monetary Penalty, in the amount of \$9,600.00, was issued an Individual (the "Appellant") and 0856131 B.C. Ltd. on July 27, 2015 (the "Monetary Penalty") and was imposed pursuant to section 28.3(1)(a) of the Act for operating as licensed residential builders without being licensed as required by the Act.

ISSUES

[2] The issue to be determined in this Appeal is whether the Decision ought to be upheld, set aside or varied. In order to address the Appellant's arguments with respect to his position that the Monetary Penalty ought to be set aside or varied, the Board must determine the following:

- a) Whether the Appellant was involved in the construction of new homes as an agent or employee of 0914603 BC Ltd., and if so, whether the Monetary Penalty is still appropriately issued to the Appellant;
- b) Whether the Registrar of the HPO displayed bias against the Appellant, and if so, whether the Monetary Penalty is still appropriately issued to the Appellant; and
- c) If the Monetary Penalty was correctly issued to the Appellant whether the amount of the Monetary Penalty ought to be reduced to \$2,500.00.

FACTS

[3] The parties do not dispute the facts of the matter on appeal, only the treatment given those facts. Accordingly, the Board accepts that:

- a) The Appellant was the principal and sole shareholder of a Construction Company, which was a previously licensed residential builder from June, 2001 through June of 2012.
- b) On June 8, 2012 the HPO cancelled the Construction Company's license as a result of its failure to provide evidence of acceptance for home warranty insurance.
- c) The Appellant is the sole director of 0856131 B.C. Ltd and on January 26, 2013 made an application to the HPO for a residential builder license on behalf of 0856131 B.C. Ltd.
- d) 0856131 B.C. Ltd. was unable to obtain a residential builder license as it was not accepted for home warranty insurance.
- e) 0856131 B.C. Ltd. was the registered owner of six residential building lots located in Langford, B.C. (the "Lots").
- f) 0914603 B.C. Ltd. obtained a policy of home warranty insurance for homes it was to construct on the Lots in Langford, B.C. in summer 2013 and was granted building permits for the construction of the same from the City of Langford.
- g) In June 2014, the National Home Warranty cancelled its commitment to provide home warranty insurance for the new homes as 0914603 B.C. Ltd had failed to meet the requirements of National Home Warranty.

- h) Subsequently, the properties in question were foreclosed on by mortgage holders. As part of the foreclosure process the mortgage holders re-established home warranty coverage.

POSITION OF THE PARTIES

The Appellant

[4] The Appellant states that, at all material times, he was the owner of the subject property through 0856131 B.C. Ltd., a company in which he was the sole director. The Appellant states that he subdivided the land located in Langford, British Columbia (the Appellant states that the land was in Colwood, but a review of the evidence indicates that it was in fact located in Langford) and that it was his intention to construct homes on this subdivision. He states further that as he was unable to become a licensed residential builder through the Homeowner Protection office that he hired 0914603 BC Ltd. to be the licensed registered builder for the subdivision and entered into a construction contract with 0914603 B.C. Ltd. for this purpose.

[5] The Appellant admits that he was involved in supervision of the construction but states that it was not as a residential builder. Instead, he states that any involvement he had in the construction process was as an agent or employee for 0914603 BC Ltd. The Appellant submits, that at all times, the subject properties were enrolled with the Homeowner Protection Office and that he had complied with the requisite provincial legislation.

[6] With respect to his argument that he was not a licensed registered builder, the Appellant states that he was an agent for the licensed registered builder 0914603 BC Ltd and is not responsible in any way for the construction of the homes and that the only responsible party for the homes is 0914603 BC Ltd. In support of this argument, the Appellant submits that the object and purpose of the *Home Warranty Protection Act* (which, the Board takes to be a reference to the *Homeowner Protection Act*) is to protect owners against defective workmanship and that the definition of a residential builder under the Act must be understood and interpreted with reference to the intention and goal of the Act. In this regard, the Appellant submits that since the homes were always enrolled in policies of new home warranty with 0914603 BC Ltd.'s insurers that there was never any risk to a home owner. The Appellant cites Section 8 of the *Interpretation Act*, RSBC 1996, c. 238, to argue that the Act must be given large and liberal construction and interpretation in this regard. Further, the Appellant states that it is common practice to complete contracts through the use of agents and that any other interpretation, other

than the one he seeks the Board to affirm, will risk future construction development as anyone other than a licensed residential builder will risk having a monetary penalty levied against them for acting as a residential builder without the appropriate license being obtained. With respect to the definition of “developer” under the Act, the Appellant states that it should be interpreted only to apply to instances where the developer and/or general contractor are the same party and states that to hold otherwise may well result in liability of anyone associated with a project, whether or not they are in fact physically involved in construction.

[7] In addition to his submissions regarding the merits of the Decision under appeal, the Appellant also submits that the actions of officers and officials at the HPO were biased and that the Decision ought to be set aside because of such bias. In this regard, the Appellant correctly submits that the test for bias is whether there is a reasonable apprehension of bias with respect to the decision and/or decision maker in question. The Appellant relies on the well-known test set out by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, as articulated in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350, paragraph 7:

- (i) a judge’s impartiality is presumed;
- (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
- (iii) the criterion for disqualification is the reasonable apprehension of bias;
- (iv) the question is what would an informed, reasonable and right minded person, reviewing the matter realistically and practically, and having thought the matter through, conclude;
- (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right minded person would think that it is *more likely than not that the judge*, whether consciously or unconsciously, *would not decide fairly*;
- (vi) the test requires demonstration of serious grounds on which to base the apprehension;
- (vii) each case must be examined contextually and the inquiry is fact specific.

[8] The Appellant submits that a reasonable apprehension of bias arises from the actions of the Respondent in its reliance upon the historical activities of the Appellant, namely his previous licensing as a residential builder and the fact that he was unsuccessful in his attempt to obtain further registration under the Act. Further, the Appellant states that the Respondent ought not to have considered information such as accusations levied against him in a news story and a prior complaint, which complaint instigated said news story. In particular, the Appellant takes exception with certain considerations set out in the Respondent’s Monetary Penalty Assessment Checklist, which was considered by the Respondent in finalizing the amount of the Monetary

Penalty, and states that in this appeal there was not only a reasonable apprehension of bias but a very real bias on the part of the Respondent against the Appellant.

[9] For these reasons the Appellant requests that the Decision be overturned or in the alternative, be reduced to \$2,500.00.

The Respondent

[10] The Respondent disagrees with the Appellant and states that the standard of review on appeal is one of deference. The Respondent also states that the Board must consider the purposes of the Act pursuant to section 29.4(1) of the Act, including strengthening consumer protection and improving the quality of residential construction in British Columbia when making its decision in this appeal. The Respondent submits that accordingly, the Decision should only be interfered with by the Board if the Decision is found to be unreasonable in all of its circumstances.

[11] With respect to the Monetary Penalty the Respondent states that it has legislative authority under the Act to levy the Monetary Penalty. More particularly, the Respondent states that the Monetary Penalty was levied because the Appellant breached section 14(1) of the Act by carrying on the business of a residential builder without being licensed as required by the Act. In support of this position, the Respondent notes that the term “residential builder” is defined by the Act to include a developer and a general contractor. Further, the Respondent notes that the *Homeowner Protection Act Regulation* B.C. Reg 29/99 (the “Regulation”) defines the terms “developer” and “general contractor” in the Act and Regulation as follows:

“developer” means “a residential builder that sells the residential builder’s ownership in a new home, and includes a vendor that contracts with a general contractor for the construction of a new home”; and

“general contractor” means “a residential builder that is engaged under contract by an owner, developer or vendor to perform or cause to be performed all or substantially all of the construction of a new home, and including a construction manager and project manager.”

[12] With respect to the Appellant’s submission that the Appellant was merely an agent or employee of 0914603 B.C. Ltd., the Respondent states that the Appellant has not provided sufficient evidence that such a relationship existed. The Respondent states that throughout his submissions the Appellant sometimes refers to himself as an employee and at other times an

agent of 0914603 B.C. Ltd. Further, the Respondent states that while the Appellant has referred to an agreement between him and 0914603 B.C. Ltd. regarding these arrangements, whether they be agency or employment, that a copy of such agreement, or even the details of such agreement, has not been provided by the Appellant as evidence in this appeal.

[13] Accordingly, the Respondent states that it is reasonable to conclude that the Appellant acted as a project manager or construction manager. Further, the Respondent states that, in any event, 0856131 B.C. Ltd. was a developer of the new homes and was as such required to be licensed under the Act. The Respondent relies on the facts that 0856131 B.C. Ltd. entered into a contract with 0914603 B.C. Ltd. to construct the new homes and was the intended vendor of the new homes until such time as foreclosure proceedings were commenced against 0856131 B.C. Ltd. to support this assertion. The Respondent submits that while it is 0856131 B.C. Ltd. that is subject to the Monetary Penalty that the Appellant was correctly named in the Decision as he is liable for the monetary penalty pursuant to section 28.3(9) of the Act, which states that a director of a corporation is liable for a monetary penalty issued under the Act.

[14] With respect to the Appellant's submission that the amount of the Monetary Penalty ought to be reduced, the Respondent states that no reduction in the amount is warranted and that the factors set out in the Respondent's Monetary Penalty Assessment Checklist were all considered and that the penalty is significantly lower than the \$25,000.00 maximum penalty permitted by the legislation and is in keeping with other upheld monetary penalties issued by the Respondent.

[15] With respect to the Appellant's submissions regarding bias on the part of the Respondent, the Respondent states that there is no reasonable apprehension of bias in this case and that the Appellant's arguments alleging bias ignore the statutory context in which the Monetary Penalty was issued and the Decision made and are wrong on the facts and law. Further, the Respondent states that the Appellant's allegation of bias makes the Appellant liable for an award of costs against him.

[16] The Respondent also relies on the definition of bias set out by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2003 SCC 259 and notes paragraph 58 where it was held that:

The essence of impartiality lies in the requirement of the judge to approach the

case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as:

a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[17] The Respondent relies upon *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, where the court drew a distinction between administrative decision makers that are strictly adjudicative in their functions and those that are administering policy when it comes to standards of neutrality in the decision making process. In this regard, the Respondent states that the Monetary Penalty was not issued in an adjudicative legal proceeding and that the Respondent's Registrar was not required to have a "judicial mind" in making the Decision. Rather, the Respondent's Registrar was acting pursuant to her legislated authority to enforce the requirements of the Act and Regulations. Further, the Respondent relies on *Ocean Port Hotel v. British Columbia*, [1981] 1 S.C.R. 301, where the court held that the "overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role." The Respondent submits that the Registrar was acting more like a "protagonist" or "righteous official" in enforcing a regulatory scheme (*Crown Packaging v. Ghinis*, 2002 BCCA 172) that the Act and Regulation require the Respondent to pursue and prosecute contraventions of the Act and Regulations and that the role of "impartial decision-maker" under the legislation is given to this Board.

[18] In the alternative, the Respondent states that if the Registrar did owe the Appellant a duty of impartiality that the issues and facts of this appeal do not give rise to an apprehension of bias. The Respondent cites *CK Auto Service v. British Columbia (Attorney General)*, 2014 BCSC 2359, for the proposition that allegations of bias cannot be based upon suspicion alone and that actual evidence of bias is required. The Respondent states that the evidence the Appellant suggests supports a finding of bias, does no such thing as the factors that the Appellant relies upon to support a finding of bias are all relevant to matters that the Registrar was required to address in issuing the Monetary Penalty under section 20.1(1) of the Regulation. The Respondent states that because the Registrar was required by legislation to consider these factors that she cannot be found biased for having fulfilled her statutory duty.

[19] Further, the Respondent notes that the Registrar did not consider the CBC video evidence in coming to her decision and expressly stated that it was not relevant. Accordingly, the Respondent states that the Registrar considered what was reasonable and necessary and did not consider inappropriate evidence that could lead to a finding of bias.

[20] In light of its position that there are no grounds for a finding of bias against the Respondent, the Respondent submits that this is an appropriate case for an award of costs against the Appellant. The Respondent states that allegations of bias when there is no evidence to support them, are improper and must be discouraged and notes that costs awards are one such avenue for doing so.

ANALYSIS

[21] While the Board has previously held that the standard of review on appeal is one of deference, the Board reconsidered this recently and relies on the reasons articulated by Vice-Chair J. Hand in *A Builder Inc. v. Homeowner Protection Office*, SSAB No. 4-2016 to state that the standard of review on appeal is in fact correctness. Accordingly, the Board must determine whether the issuance of the Monetary Penalty was correct in all of the circumstances before the Board.

[22] In order to determine the issues in this Appeal the Board must look at the applicable legislation. Section 14(1) of the Act prohibits anyone from carrying on the business of a residential builder without being licensed as required by the Act. "Residential Builder" is defined in the Act to include a developer and a general contractor. The Regulations in turn define the terms "developer" and "general contractor":

"developer" means "a residential builder that sells the residential builder's ownership in a new home, and includes a vendor that contracts with a general contractor for the construction of a new home"; and

"general contractor" means "a residential builder that is engaged under contract by an owner, developer or vendor to perform or cause to be performed all or substantially all of the construction of a new home, and including a construction manager and project manager."

[23] The Appellant submits that he although 0856131 B.C. Ltd was the registered owner of the Lots and the vendor of the new homes constructed on the Lots that he is not a developer as

defined by the Regulation. The Appellant further submits that although he was engaged in the construction of the new home that he is not a general contractor as defined by the Regulation.

[24] The Appellant's argument for avoiding being captured by these definitions is that 0856131 B.C. Ltd. contracted the building of the homes to a 0914603 B.C. Ltd., a licensed residential builder, and that he was merely involved as their agent and/or employee (he states both at different times in his submissions). Regardless, of any such arrangement, 0856131 B.C. Ltd. remained the owner of the Lots and intended to be the vendor of the Lots and new homes built thereon – the definition of “developer” set out in the Regulation expressly includes situations where a general contractor is retained to construct the home on behalf of the owner/vendor.

[25] Accordingly, 0856131 B.C. Ltd. is a residential builder that must be licensed under the Act. 0856131 B.C. Ltd. was unable to obtain such a license and is therefore in breach of the Act. Accordingly, the Appellant is properly the subject of the Monetary Penalty as section 28.3(9) of the Act states that a director of a corporation is liable for a Monetary Penalty issued under the Act. Accordingly, it does not matter whether the Appellant was an agent or an employee of 0914603 B.C. Ltd. as his company, 0856131 B.C. Ltd. breached section 14(1) of the Act.

[26] With respect to the amount of the Monetary Penalty, the Board has applied the Monetary Penalty Assessment Checklist used by the Respondent and finds that upon its application that a higher monetary penalty amount could be supported than that which was levied by the Respondent. Accordingly, if the Monetary Penalty is varied by the Board it would be increased rather than reduced. That being said, the Board determines that the amount assessed by the Registrar is within an acceptable range of outcomes when the assessment criteria are applied. Accordingly, the Board declines to vary the amount of the Monetary Penalty.

[27] With respect to the allegation of bias, the Board agrees with the tests enunciated by the parties as set out in the case law referenced herein. The Board further agrees with the Respondent's submission that the Registrar was mandated by the legislation to enforce and prosecute contraventions of the Act and Regulations. The Board finds that the Registrar properly fulfilled this mandate and in doing so considered only those issues she was required to consider under the Act and Regulation and did not improperly consider any other evidence. In

fact, the Registrar made it clear that she did not consider improper evidence such as the CBC story as it was not relevant to the matter at hand. Accordingly, the Board does not find any bias existed nor does it find that a reasonable apprehension of bias existed. That being said, the Board declines to award an order of costs against the Appellant for raising this issue. It cannot be said that the allegation of bias was so egregious and so lacking in support that an award of costs is warranted in this instance.

CONCLUSION

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

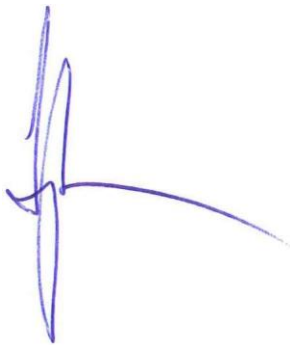
Signed:

A handwritten signature in black ink, appearing to read "Emily C. Drown".

Emily C, Drown

A handwritten signature in black ink, appearing to read "Jeffrey A. Hand".

Jeffrey A. Hand, Vice-Chair

A handwritten signature in blue ink, appearing to read "Terry Bergen".

Terry Bergen, Panel Member