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File No. SSAB 4-2016

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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:	**A Builder Inc.**	**APPELLANT**
AND:	**Homeowner Protection Office**	**RESPONDENT**

REASONS FOR DECISION

Vice Chair:	**Jeffrey Hand**
On Behalf of the Appellant:	**A Builder Inc.**
Counsel for Homeowner Protection Office:	**Kevin Boonstra**

INTRODUCTION

[1] This is an appeal of the decision of the Registrar of the Homeowner Protection Office ("HPO") dated January 29, 2016 which confirmed a monetary penalty levied against the Appellant on October 22, 2015 (the "Monetary Penalty") for failure to comply with a Compliance Order dated September 2, 2014. The Compliance Order required the Appellant to place home warranty insurance on a home located in Blind Bay, British Columbia (the "Home"). The Monetary Penalty was in the amount of $7,200.

[2] The circumstances giving rise to the Compliance Order have already been the subject of a previous appeal decided by the Board on June 22, 2015. In that previous decision, the Board found that the Appellant had managed substantially all of the construction of the Home and

accordingly was responsible for placing home warranty insurance on the home. However, the Board stayed the Compliance Order because by the time the appeal was heard, the Appellant's lender had secured home warranty coverage on the Home and it was no longer possible for the Appellant to take steps to comply with the Compliance Order.

[3] This appeal concerns the imposition of the Monetary Penalty for the Appellant's failure to comply with the Compliance Order from the date it was imposed in September 2014 to April, 2015 when the Appellants lender secured its own warranty coverage.

ISSUES

1. What is the standard of review in this appeal?
2. Should a Monetary Penalty be issued in respect of non-compliance with an Order that has subsequently been stayed?
3. Should the Appellant be relieved of paying the Monetary Penalty owing due to financial hardship?

FACTS

[4] Most of the facts underlying this appeal are set out in a previous Board Decision *A Builder Inc. v. Homeowner Protection Office*, BCSSAB 17(2) 2014 and will not be repeated in detail beyond the following brief summary.

[5] The Appellant has been a licensed residential builder since 2007.

[6] The Appellant commenced construction of the Home in 2009 and obtained warranty coverage from a home warranty insurance provider as per the provisions of the *Act*.

[7] The Appellant ran into financial difficulty in 2012 and did not finish constructing the Home. Their lender, A Credit Union ("A Credit Union") commenced foreclosure proceedings and was granted conduct of sale by the Supreme Court of British Columbia in March 2013.

[8] Thereafter The Credit Union hired another contractor to complete the construction of the Home and this was accomplished in or about July 2014.

[9] On August 14, 2014 The Appellant de-enrolled the Home from warranty coverage but this was soon followed by a Compliance Order issued on September 2, 2014 requiring The Appellant to enroll the Home with a warranty provider. The Appellant did not do so and, in the earlier appeal, took the position that they were not required to obtain warranty insurance on the home because they had not managed substantially all of its construction. The Board determined that in fact the Appellant had managed substantially all of the construction and found that the Appellant was required to maintain warranty coverage on the home.

[10] However, by the time that appeal was heard, The Credit Union had secured its own warranty coverage on the Home in April 2015 and the Appellant could no longer comply with the Order.

[11] The Board stayed the Order requiring the Appellant to secure coverage on the Home.

[12] On October 22, 2015 the HPO levied a Monetary Penalty against the Appellant, and its principal for failing to comply with the Compliance Order.

[13] The Appellant sought a review of the Monetary Penalty. The Registrar of the HPO upheld the Monetary Penalty in written Reasons dated January 22, 2016.

[14] This appeal is taken from the Registrar's decision.

DECISION

What is the standard of review on this appeal?

[15] The Respondent submits that the standard of review on this appeal is one of reasonableness, requiring this Board to give deference to the decision of the Registrar and not interfere with it unless the Board finds the Registrar's decision was unreasonable. The Respondent submits that the Board should be guided by the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008, SCC 9.

[16] Upon careful review, the Board has determined that the decision in *Dunsmuir* has no application to this Board. The facts in *Dunsmuir* concern the standard of review to be utilized by a court in undertaking a judicial review of a decision of an Administrative Tribunal. The court in *Dunsmuir* was not concerned with the situation the Board has before it in this case, that is, the

standard of review to be utilized by an administrative tribunal reviewing a decision of a statutorily appointed decision maker, in this case the Registrar of the HPO.

[17] To the extent that any previous decisions of this Board have either relied upon *Dunsmuir*, or otherwise accepted that reasonableness as opposed to correctness, is the standard of review to be implemented by this Board, then those decisions no longer apply.

[18] The Board also notes that the enabling legislation for the Board makes no mention of deference nor does it limit the scope of review of the Board in deciding appeals. To the contrary, sections 53 and 60 of *The Safety Standards Act*, which govern this appeal by reason of s. 29.4(7) of the *Homeowner Protection Act* provide:

> Nature of Appeal
>
> 53 An appeal is a new hearing unless the Appeal Board otherwise recommends and the parties to the appeal agree. (emphasis added)

[19] The term "new hearing" as used in s. 53 of the *Act*, contemplates that appeals to this Board are by way of *trial de novo* for the purpose of considering any evidence, both new and that which was before the decision maker, on the merits and not simply as a review of the reasonableness of that decision.

[20] The Board's jurisdiction is further defined in s. 60(1) of the *Act* which provides:

> Decision of appeal board is final
>
> 60(1) The Appeal Board has exclusive jurisdiction to enquire into, hear and determine all of 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.

[21] The foregoing provisions give the Board full jurisdiction to determine questions of fact and law and to do so unfettered by any requirement to give deference to the decision under appeal.

[22] The Board is also guided by a decision of the British Columbia Court of Appeal in *Investment Industry Regulatory Organization of Canada v. Rahmani*, 2010 BCCA 93. In this

decision Madam Justice Rowles considered an application for leave to appeal a decision of the British Columbia Securities Commission which had overturned a decision of a hearing panel of the Investment Dealers Association. The principle ground for appeal was that the Commission had erred in not applying a standard of review based on reasonableness rather than correctness and in failing to follow the decision in *Dunsmuir*.

[23] The Court of Appeal found that no deference to the hearing panel was required. Madam Justice Rowles' findings at para 39 are instructive:

> [39] The argument IIROC wishes to advance on appeal is that the common law standard of review as elucidated in *Dunsmuir* ought to be applied by the Commission on a review of the decision of an SRO. In my opinion, IIROC's proposed argument ignores the fact that the Commission's review of the IDA Hearing Panel's decision is not a judicial review and that nothing in the legislative scheme for the regulation of the securities industry suggests that the Commission must give significant deference to a decision of an SRO. … A Commission hearing and review of an SRO decision is not a judicial review.

[24] Accordingly, there being no common law requirement that deference be granted to the Registrar, and no restriction in the jurisdiction of the Board granted by the *Act* which requires deference or otherwise refers to a standard of review based on reasonableness, the Board finds that the standard of review to be applied is correctness.

Should a Monetary Penalty be imposed in respect of a Compliance Order that has been stayed?

[25] The Appellant argues, at least in part, that the Monetary Penalty is inappropriate because it continues to deny that it was responsible for substantially all of the construction of the Home and should not have to enroll the Home in a program of Home Warranty Insurance when another contractor completed the construction of the Home. These issues were fully considered and decided in the previous Board decision which rejected these arguments. Those issues are not before the Board in this appeal and will not be revisited again.

[26] The Appellant next argues that it is inappropriate to levy a Monetary Penalty if the penalty is associated with a compliance order that has since been stayed.

[27] The Respondent submits that there is no controversy that the Appellant failed to comply with the Compliance Order and the Appellant should not be excused for that non-compliance from the time the Order was made until the Stay was issued. The subsequent imposition on the Stay should not, in the Respondent's submission, relieve the Appellants of the consequences of their earlier non-compliance. . The Respondent relies on a Federal Court of Canada decision in *PIPSC v. Bremsak, 2013 FCA 2014*.

[28] In *PIPSC*, the Federal Court of Appeal upheld a fine for non-compliance with an order that was later set aside because it could not be implemented. The Federal Court held that the fine was appropriate for the earlier non-compliance. The facts are analogous to the issue before the Board in this appeal and the Board finds the Federal Courts reasoning to be persuasive and applicable in this instance.

[29] In addition, the Board agrees that the facts in this case display a deliberate non-compliance with the Order on the part of the Appellant in circumstances which undermine the objectives of the *Home Owner Protection Act*.

[30] As per the reasoning in *Cardaway Resources Corp., re: 2004 SCC 26*, the monetary penalty in this instance acts as a general deterrent and discourages similar wrong doing in others. The Board finds that the imposition of the monetary penalty was correct.

[31] The Board also finds that the amount of the penalty, being $7,200. is consistent with previous Board decisions imposing similar penalties where home warranty insurance had not been obtained pursuant to the *Act*.

[32] The Appellant argues that the amount of the penalty is excessive and creates undue financial hardship upon the Appellants.

[33] As noted above the Board finds that the amount of the penalty is consistent with previous Board decisions and therefore cannot be considered excessive. That leaves only the Appellants' argument that its imposition creates undue financial hardship.

[34] The Appellants have not established on the evidence submitted why the penalty creates undue hardship or why they would have difficulty in paying the amount. In any event, difficulty in paying the amount is, in of itself, not undue financial hardship.

[35] Moreover, the governing legislation does not provide for undue hardship as a potential defence other than in the circumstances of an owner/builder who seeks permission to sell a home without insurance outside of the time limits provided in the Act. The Appellants are not owners/builders and are not seeking relief from the restriction on selling a home. Those provisions have no application in this appeal.

[36] The Board finds that the Appellants have not established that they should be relieved from paying the monetary penalty on the basis of undue financial hardship.

[37] The Appeal is dismissed.

Signed;

Jeffrey A. Hand, Vice-Chair