

Indexed as: BCSSAB 18 (1) 2019

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 Building Company/ Owner

Appellants

AND:

**British Columbia Housing Management Commission
Licensing and Consumer Services
("BC Housing")**

Respondent

Board Member:

Jeffrey Hand

Counsel for the Appellants:

Michael B. Morgan

Counsel for the Respondent:

Kevin L. Boonstra

REASONS FOR DECISION

[1] The Appellant brings this appeal seeking to set aside a Decision of the Registrar dated August 20, 2019 (the "Decision") which confirmed Compliance Order 19-001, dated March 12, 2019. (the "Compliance Order")

[2] The Compliance Order required the Appellant to register and enroll a home located at on Bowen Island, BC (the "New Home") for coverage with home warranty insurance.

[3] The Appellant says that the Compliance Order, and in turn the Decision which upheld it, was incorrect because the Appellant did not perform or otherwise manage all or substantially all

of the construction at the New Home. In addition, the Appellant says that the investigation that led to the Compliance Order was procedurally unfair and that the investigation was tainted by bias.

[4] The Respondent submits that the Compliance Order and in turn the Decision, reasonably found that the Appellant was responsible for substantially all of the construction of the New Home. The Respondent says there is no evidence of bias in the investigation that led to the Compliance Order or any procedural unfairness. Alternatively, any unfairness was cured by reason of this appeal which was conducted as a de novo hearing.

[5] This appeal proceeded by way of written submissions.

Issues

- 1) Was the Decision and /or the Compliance Order tainted by bias?
- 2) Was any part of the enforcement investigation giving rise to the Compliance Order procedurally unfair?
- 3) Did the Appellant manage all or substantially all of the construction at the New Home?

Facts

[6] The Appellant company has been a licensed residential builder in British Columbia since 2014. The principal of the company has worked in the construction industry for more than 20 years.

[7] On June 13, 2017 the Appellant entered into a written contract with the owner of the property to provide labour and materials for the construction of the New Home.

[8] The Appellant enrolled the New Home in a policy of home warranty insurance provided by Pacific Home Warranty Insurance Services Inc. ("Pacific Warranty") on or about May 12, 2017.

[9] The Municipality of Bowen Island issued a building permit for construction of the New Home on May 25, 2017.

[10] Construction of the New Home commenced in or about June 2017 and continued until August 28, 2018 at which time a dispute arose between the Appellant and the owner concerning the cost of construction. The project was over budget and there were unpaid invoices outstanding which the owner was disputing. The Appellant says that there had been numerous changes in the scope of the work.

[11] The relationship between the Appellant and the owner deteriorated. It is fair to say there was generally a lack of trust on the part of both parties.

[12] The Appellant says that he did not perform any additional work on the New Home after August 28, 2018. He describes the state of completion of the New Home at that date as follows:

- exterior siding near complete although there were small portions still to be installed
- exterior caulking incomplete
- window and door flashings partially installed
- fireplace and chimney flashings not complete
- at least one set of exterior doors still to be installed
- Interior insulation and drywall completed
- no flooring or tiling installed
- no baseboards or interior trim installed
- no painting beyond a primer coat in the basement
- mechanical and electrical systems roughed in but not functional
- no plumbing or electrical fixtures installed
- no millwork installed
- no interior doors installed
- septic field incomplete
- no functioning propane service

[13] On September 11, 2018 Pacific Warranty performed a building envelope inspection at the New Home as part of their normal warranty process. They identified the state of construction in very similar terms to those described by the Appellant, but differing in these respects:

-the building envelope was noted as completed including all caulking, flashings, and exterior doors

-their assessment of the work yet to be on the interior was consistent with the Appellant, with the possible exception of interior paint which they indicated had one coat completed

[14] The Appellant attended at the property on September 28, 2018 for the purpose of removing his tools. At that time he learned that certain portions of the building envelope were leaking due to the incomplete elements of the envelope. It seems the owner had retained another contractor to look into this and rectify it.

[15] In the following weeks the relationship between the Appellant and the owner continued to deteriorate. The owner was indicating he might terminate the contract with the Appellant and the Appellant advised the owner that he was considering de-enrolling the New Home from the warranty coverage. The Appellant requested the opportunity to inspect the home for the purpose of documenting the state of construction for warranty purposes. The owner denied this request.

[16] The owner began communicating with a Senior Registration Consumer Complaints Officer employed by the Respondent. In an October 18, 2018 email the owner inquired about when warranty coverage could be cancelled. The SRCCO referred the owner to a Regulatory Bulletin issued by the Respondent dated May 2012. ("Regulatory Bulletin 10")

[17] Regulatory Bulletin Number 10, entitled, De-enrolling Homes from Home Warranty Insurance and the Homeowner Protection Act, includes the following relevant provisions:

"A de-enrolment occurs when the commitment for home warranty insurance on a home or multiunit project is cancelled. BC housing does not initiate de-enrolments. De-enrolments occur at either the builder's or developer's request to the warranty provider or on the warranty provider's initiative.

The consequences of the de-enrolment and options to remedy are different depending on the reason for the de-enrolment and at what stage of construction it takes place. In each case, de-enrolment puts the owner and builder in the position of no longer satisfying the requirements of section 22 of the Act. This situation must be remedied before continuing with construction, offering for sale, and/or selling of the new home.

If the general contractor changes prior to the new home or project being substantially complete (definition below) the developer may wish to have the new general contractor enroll the project. However, the warranty provider must agree to this arrangement prior to re-enrollment. In most cases the warranty provider will prefer the developer to enroll the project.

If the general contractor changes after the new home or project is substantially complete, the developer may enroll the project themselves. Note: general contractor cannot enroll a residential construction project under a policy of home warranty insurance if they did not substantially complete the construction of the residential project.

If the home is not yet substantially complete, the owner has two options:

- hire a new general contractor who must register the new home and ensure it is enrolled in home warranty insurance or
- successfully apply for owner builder authorization from licensing and consumer services branch of BC housing and complete the home acting as his or her own general contractor.

What does “substantially complete” mean?

A builder’s responsibility for a substantially complete home derives from the definition of residential builder in section 1 of the *Act*:

“residential builder” means a person who engages in, arranges for or manages all or substantially all of the construction of a new home or agrees to do any of those things, and includes a developer and a general contractor.

Please note that the term “lockup” does not equate to substantial completion. In most cases, a substantially complete home is one for which a policy of home warranty insurance could be issued for all of the structural and building envelope components of the home at a minimum. The test is one of reasonableness – whether a reasonable person would consider that the builder had managed all or substantially all of the construction of a new home. For example, a home could also be substantially complete if a few items were incomplete from the building envelope component, but a significant

amount of the interior finishing was complete in lieu. The licensing and consumer services branch can be contacted for guidance on what reasonably constitutes a substantially complete home for the purposes of the *Act*.

If the home is substantially complete when the contract ceases:

‘general contractors are still legally obligated to stand behind their work as a residential builder. If they de-enroll the home at this stage, they would be contravening section 22 of the *Act* and would then be required to re-enroll the home.’”

[18] The Regulatory Bulletin also contains the following disclaimer:

This bulletin and the website are for convenience only, they do not constitute legal advice. For complete details consult the *Act* and its regulations.

[19] On October 15, 2018 the owner spoke with Pacific Warranty to inquire about the circumstances under which the home warranty might be cancelled and they referred the owner to the aforementioned Regulatory Bulletin 10.

[20] October 16, 2018 the SRCCO sent an email to the owner after he described his situation with the Appellant and she stated, “I am sorry to hear that the builder is attempting to hold you to ransom with the threat of de-enrolment.”

[21] The SRCCO went on to say that she could not determine if there was a sufficient amount of construction completed for de-enrolment to occur. She told the owner that this was a matter for the warranty provider to determine.

[22] October 19, 2018 the owner elected to terminate his contract with the Appellant. He advised the SRCCO on November 7, 2018 that he had taken this step.

[23] On November 13, 2018 the Appellant began making inquiries with Pacific Warranty about the procedure to be followed to remove the New Home from warranty coverage. He was told to check with the Respondent before proceeding further.

[24] The Appellant says he telephoned the SRCCO on or about November 15, 2018 concerning his intention to de-enroll the New Home from warranty coverage and he says that

she informed him that this would be an appropriate step. The SRCCO denies having such a conversation with the Appellant.

[25] The Appellant says he contacted Pacific Warranty again, presumably on some date after November 15, 2018, to further discuss the possible de-enrolment of the New Home. He says he was again cautioned by Pacific home warranty to make further inquiries with the Respondent before taking that step.

[26] The Appellant says he called the SRCCO again, on an undisclosed date, and he says he again received confirmation from the SRCCO that he could proceed with de-enrollment. She denies having such a conversation with him.

[27] During this same time frame the SRCCO was also receiving regular telephone calls from the owner expressing his frustration with the Appellant concerning the cost of the construction of the home and expressing his concern that the New Home might be removed from warranty coverage.

[28] On November 23, 2018 the Appellant filed the necessary paperwork with Pacific warranty to de-enroll the New Home. Pacific Warranty says they were satisfied that the New Home had not yet reached substantial completion and they accepted the de-enrolment.

[29] The first written record in the Respondent's file of a communication with the Appellant occurred on November 28, 2018. The Appellant sent an email to the SRCCO stating:

"I was given your contact regarding the de-enrollment of #315416. I would like to remove my company as the builder named on the building permit and complete anything required.

Please call me at your convenience."

[30] I should pause here to note that the wording of this November 28, 2018 at email makes it seem unlikely that the Appellant had spoken to the SRCCO on two previous occasions as he states in his affidavit. Were that so it is difficult to reconcile that with this November 28, 2018 email which reads more like an introductory communication between two people who had never previously spoken.

[31] According to the SRCCO's affidavit, the Appellant and she first spoke by telephone on November 28, 2018. The Appellant advised her of the state of construction at the new home when he left the project. Again, this would have been unnecessary if the Appellant had already explained the situation to the SRCCO in the two previous phone calls he claims to have made to her.

[32] At this point Pacific Warranty was also receiving telephone and email inquiries from the owner. The owner was seeking clarification as to why the New Home had been de-enrolled from warranty coverage. On December 4, 2018 Pacific warranty advised the owner that they did not consider the home to have reached substantial completion and therefore they accepted the Appellant's request for de-enrolment.

[33] On December 5, 2018 the SRCCO made an inquiry of the Municipality of Bowen Island with a request that they confirm what inspections had been performed at the New home.

[34] December 5, 2018 also marks the start of the involvement of a member of the Compliance and Enforcement Department at the Respondent. On that date she made an inquiry of the Warranty Provider to advise her of the information they had obtained from any attendances that they made at the New Home.

[35] She received the September 11, 2018 envelope inspection report from Pacific Warranty on December 5, 2018.

[36] She advised the Appellant on December 7, 2018 that she was investigating the de-enrolment of the home and requested information from the Appellant as to the state of construction when he left the property.

[37] On December 10, 2018 she began communicating with counsel for the Appellant.

[38] Because the New Home had been de-enrolled from warranty coverage, the Municipality of Bowen Island placed a stop work order on the New Home on December 11, 2018.

[39] In a December 12, 2018 email to the owner she said "I am sorry are you are going through this" in reference to his dispute with the Appellant and the stop work order.

[40] On December 12, 2018 legal counsel for the Appellant responded to her providing her with a description of the state of construction as at the end of August 2018. He requested from her any information she had gathered on the issue of the completion of the home.

[41] December 18 she reached out to the building inspector advising him that she was authorizing the owner to proceed with construction as an owner builder and without placing new insurance, because the Appellant “had substantially completed” the New Home. The building inspector lifted the stop work order as of that date.

[42] Following the lifting of the stop work order she emailed the owner on December 19, 2018 stating, “I’m glad I could lift some of your pressure”.

[43] During December and January she also began collecting information in furtherance of her investigation of the de-enrolment of the home. She spoke with the owner, obtained inspection records from the Municipality Bowen Island, the inspection report performed by Pacific Warranty in September 2018, as well as speaking to four of the sub- trades that counsel for the Appellant had identified as having worked on the New Home.

[44] She spoke with the siding contractor on Jan 22, 2019 and was told that some of the siding was incomplete and an exterior door was missing.

[45] The same day the electrical trade confirmed his work was not yet finished.

[46] On January 24, 2019 she was told by the septic field contractor that his work was incomplete and that he could not comment on other aspects of the house because he did not know.

[47] The roofing contractor confirmed that the work he had performed on the roof was complete.

[48] It is readily apparent that the information obtained from these trades did not do much more than confirm the Appellant’s description of those four aspects of the New Home.

[49] On January 31, 2019 she advised counsel for the Appellant that she was of the opinion that the Appellant had substantially completed the home and as such he was required to have the New Home enrolled in a policy of home warranty insurance. She also said her investigation was ongoing.

[50] On February 4, 2019, counsel for the Appellant asked her to provide him with information learned in the course of her investigation. She replied the same day advising that her investigation was confidential.

[51] On February 8, 2019 counsel for the Appellant advised her that he wanted the opportunity to make sure she had received accurate information in the course of her investigation and he again asked for disclosure the investigation file.

[52] On February 21, 2019, she again advised counsel for the Appellant that she was of the opinion that as of September 11, 2018 the home's superstructure and building envelope had been completed and therefore the home was substantially complete.

[53] On March 12, 2019 she issued the Compliance Order which ordered the Appellant to immediately register the New Home for warranty coverage.

[54] On March 18, 2019 counsel for the Appellant requested a Registrar's review of the Compliance Order.

[55] In his March 18, 2019 request for a review, counsel for the Appellant advised the Registrar that he took the position that the determination of whether the Appellant had completed a sufficient amount of construction to require the home warranty to be in place was procedurally unfair because of her failure to make more fulsome disclosure of her investigative file before reaching her final decision.

[56] On March 28, 2019 the Registrar provided counsel for the Appellant with a document entitled Summary of Rationale containing notes and summaries of conversations and emails prepared by the investigating officer. The Registrar said she would await further submissions from counsel for the Appellant before making her Decision.

[57] The Appellant continued to make requests to be given access to the New Home to obtain a record of the state of construction and the homeowner apparently continued to deny these requests.

[58] Counsel for the Respondent advised counsel for the Appellant that obtaining access to the property was an issue for the Appellant and the owner to resolve and that this was not an issue on which the Respondent could, or would, become involved.

[59] The Registrar gave some extensions to Counsel for the Appellant to file submissions, but ultimately, no further submissions were submitted to the Registrar.

[60] On August 26, 2019 the Register delivered her Decision in which she found that because the Appellant had completed the superstructure of the home and most elements of the building envelope, the property was substantially completed and that it followed that the Appellant had managed all or substantially all of the construction of the New Home such that warranty coverage was required.

[61] The Registrar said she was upholding the Compliance Order, which had ordered the Appellant to place insurance on the New Home unconditionally, but she stated in her Decision that the Appellant was required to warrant those only those portions of the New Home that he had completed. It is not clear whether the Register was intending to modify Compliance Order. She did not say that she was doing so, but her Decision is somewhat different from the terms of the Compliance Order that she was upholding.

[62] The Appellant initiated this appeal on September 17, 2019 asking the Board to reverse the Registrar's Decision and to cancel the Compliance Order.

Analysis

Standard of Review

[63] At the outset, it is that necessary to address the standard of review to be applied in this appeal. The Respondent suggests that the register's Decision need only be reasonable.

[64] Counsel for the Appellant says that this is a de novo hearing and that the Board is entitled to make its own determinations of fact on a correctness standard.

Section 53 of the *Act* states:

53. An appeal is a new hearing unless the Appeal Board otherwise recommends and the parties to the appeal agree.

[65] The Board's jurisdiction is set out at section 60(1):

Decision of the appeal board is final. 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.

[66] This Board has previously held in, *A Builder Inc. v Homeowner Protection Office*, SSAB 4-2016, that decisions of the Registrar are not entitled to deference and that the standard of review to be used by the Board is correctness. This standard of review was also recently confirmed by the British Columbia Supreme Court in *Technical Safety BC. v. B.C Frozen Foods Ltd.* 2019 BCSC 716

[67] Accordingly, correctness is the standard the Board will use.

Procedural Fairness

[68] Before turning to the question of whether the Appellant completed all or substantially all the construction of the New Home it is necessary to deal with the Appellant's submissions regarding procedural fairness and bias.

[69] The Appellant's arguments on procedural unfairness are centred on the argument that he says the investigation officer was required to make full disclosure of her investigative file to the Appellant prior to making her determination on the state of completion at the New Home.

[70] Counsel for the Appellant says that the Appellant was entitled to know the whole of the evidence that had been gathered by the investigating officer so as to understand "the case to be met".

[71] Counsel for the Respondent submits that procedural fairness in the context of an investigation taken in furtherance of enforcement proceedings does not require disclosure of the

whole of the investigators file. He says that while the investigator is required to be fair, the investigation is not akin to a quasi-judicial function and that fairness does not require disclosure of the file.

[72] Counsel for the Respondent refers me to the Supreme Court of Canada Decision in *Baker v. Canada (Minister of Citizenship and Immigration)* [1990] 1 S.C.R. 653, for the proposition that procedural fairness is a flexible process when it arises in the context of administrative agencies. Some key concepts from the Baker Decision are:

- how much the decision-making process of an enforcement investigation resembles a judicial decision-making process will have an impact on the degree to which procedural fairness is expected or required

- greater procedural fairness protection may be required if there is no appeal procedure from the investigative process

- greater procedural fairness may be expected where there is a reasonable expectation that certain procedures will be followed based on past practice which have not been followed in the enforcement exercise under review

- reasons for administrative decisions are preferred but their absence and/or sufficiency is not necessarily indicative of a lack of procedural fairness

[73] Utilizing the criteria from the *Baker*, I am of the view that the investigation undertaken by the enforcement officer is not akin to a judicial decision-making process. This Compliance and Enforcement Officer's investigation was made for the purposes of enforcement and not as part of an adversarial process intended to make a final determination of legal rights.

[74] It's also noteworthy that the enforcement exercise she performed was subject to two reviews, firstly by right of review to the Registrar, and secondly by way of appeal to this Board.

[75] There is also no evidence that the Respondent's typical procedure in undertaking an enforcement investigation was not followed in this instance or that there was any reasonable expectation that some other process would be followed.

[76] Moreover, it is noteworthy in my view that despite the Appellant's assertion that he did not know the case that he was required to meet, it is apparent that as early as December 7, 2018 the Appellant was aware that the investigation officer would be reviewing the de-enrollment of the New Home and determining whether the Appellant had completed all or substantially all of the construction.

[77] In my view that the Appellant was given full opportunity to present his evidence to the enforcement officer on the very issue under consideration, that is what was the extent of construction at the New Home performed by the Appellant. He was, after all, perhaps in the best position to give first-hand evidence since he could speak to precisely what work was completed at the New Home by him or his trade contractors.

[78] The real thrust of counsel for the Appellant's argument is that he ought to have been given the opportunity to challenge the evidence that the investigative officer may have gathered from other sources. This, in my view, more akin to a discovery process and/or cross-examination to test evidence which might be appropriate in a quasi judicial setting, but is not, in my view, expected in an investigative setting. All the more so when the investigative findings are subject to two levels of review.

[79] It cannot be said that the Appellant was not given an opportunity to present his evidence and a have it considered by the investigative officer.

[80] There is one other aspect of the Appellant's procedural fairness argument. It seems to be based of the Appellant's inability to gain access to the New Home, either in the fall of 2018, or even as late as the summer 2019. But this is not a matter of procedural fairness within the control of the Respondent. The circumstances the Appellant found himself in result from the failure to gain the owner's agreement to allow access, or to otherwise seek to exercise whatever legal remedies he might have had available to him to obtain a Court order allowing him access to the property. That was not within the purview of the Respondent to facilitate. Accordingly, it cannot be the basis for alleging that the Respondent has somehow denied the Appellant access to the property.

[81] Considering all of the foregoing I cannot conclude that the Appellant was denied procedural fairness as it relates to the determinations that gave rise to the Compliance Order.

[82] Perhaps more importantly however, it is significant to note that both the Registrar's review, and this appeal have provided the Appellant the opportunity to make full argument before this Board on the merits of the whether the Appellant was or was not responsible for all or substantially all of the construction of the New Home. He was provided with the Summary of Rationale document which included much, if not all of the information obtained by the investigator.

[83] Even if the lack of disclosure was procedurally unfair, and I do not find that to be the case, any such irregularities were fully cured through this appeal process.

[84] Finally, it should also be noted that it is the Registrar's Decision that is under review and while I accept that that Decision cannot be wholly separated from the Compliance Order that formed the basis of the Decision, there is no evidence before me that the process undertaken by the Registrar was in any way procedurally unfair. To the contrary the Registrar appears to have made every effort to provide the Appellant with a full opportunity to understand the reasons for the Compliance Order and to submit whatever information or evidence he intended to rely upon before she made her Decision.

Reasonable apprehension of bias

[85] The Appellant submits that correspondence sent by the SRCCO and the Compliance and Enforcement Officer, to the owner prior to the Compliance Order is suggestive of undue sympathy for the owner's circumstances, which in turn raises a bias concern.

[86] The second element of the Appellant's bias argument is that the compliance and enforcement officer concluded at an early point of her investigation that she was of the opinion that the Appellant had substantially completed the home notwithstanding her contemporaneous assertions that her investigation was ongoing.

[87] Counsel for the Respondent says that the exchanges between the SRCCO and the Compliance and Enforcement Officer and the owner reveal nothing more than politeness. I cannot agree that these exchanges were as benign as the Respondent suggests. I think their unfortunate choice of wording not surprisingly raised concerns in the eyes of the Appellant.

[88] That said, an allegation of bias is a serious allegation and I must consider whether the Decision that is under appeal has in fact been tainted.

[89] I firstly observe that the SRCCO's exchanges with the owner do not appear to have formed any part of the investigative review performed by the Compliance and Enforcement Officer. The SRCCO was in no way a decision-maker and her role in this matter ended around the end of November 2018.

[90] The Compliance and Enforcement Officer made the determination as to the state of construction at the time Appellant left the project site. Her investigation seems entirely based on gathering factual evidence from as many sources as were available, including from the Appellant, the Municipal building inspector, some tradespeople who worked on site, and the warranty provider. Utilizing these facts and her understanding of Regulatory Bulletin 10 seem to have informed her decision.

[91] In terms of whether she reached the conclusion that the Appellant had substantially completed the new Home at the very outset of her investigation, her comments to that effect in early December are somewhat concerning.

[92] However, based on the totality of that evidence I find that she concluded that the home was substantially completed by the Appellant based on her review of the factual record and reliance on Bulletin 10. I cannot say that her Decision was tainted by bias, and I find that her early comments were nothing more than poorly chosen words.

[93] Furthermore, and as noted above, the issue on appeal is the determination made by the Registrar not that of the Compliance Enforcement Officer. I find nothing in the Registrar's decision that indicates bias on her part.

Was the Appellant responsible for all or substantially all of the construction of the New Home?

[94] The following legislation is applicable to this appeal:

Homeowner Protection Act Regulation BC Reg 29/99

Definitions

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 includes the construction manager and project manager

Homeowner Protection Act [SBC 1998] Chapter 31

residential builder means a person who engages in, arranges for or manages all or substantially all of the construction of a New Home or agrees to do any of those things, and includes a developer and a general contractor

Section 22 (1)

a person must not build a New Home unless the New Home is registered for coverage by home warranty insurance provided by a warranty provider

(4) subsection (1) ... does not apply to an owner builder

(my emphasis added)

[95] These provisions set out the entirety of the *Act's* requirements for insurance. Owner builders are not required to have warranty insurance. General contractors, developers, and construction managers, who perform substantially all of the construction are required to place insurance.

[96] The owner retained the Appellant, a licensed residential builder, to construct the New Home. At the time the Appellant was retained, it is beyond controversy, that the expectation was that he was to complete the entirety of construction of the New Home and to that end he secured warranty coverage in compliance with the *Act*.

[97] The issue that arises in this appeal is what does the *Act* require of the Appellant when his contract for construction of the New Home was terminated before it was finished?

[98] There is no disagreement between the parties that the Appellant would be required to maintain insurance on the property provided he completed all or substantially all of the

construction of the New Home. Where the parties disagree is on the issue of what the evidence says about the state of construction at the New Home when the Appellant last performed work in August of 2018.

[99] This is a factual inquiry based on the evidence of what work was performed by the Appellant. While the policy of home insurance was not cancelled by the Appellant until November 21, 2018, the date of importance for determining what work was performed by the Appellant must be the date when the Appellant last performed work. In this case that is August 28, 2018.

[100] Based on the evidence submitted by the parties, it is apparent that there is not serious disagreement between them as to the state of the New Home when the Appellant left the site, with some minor exceptions. The parties may disagree about the proper interpretation of the applicable legislation, but the state of construction is largely agreed.

[101] I find that the building envelope was largely complete, with some details still to be finished. The structure was complete and a roof installed along with the windows and almost all of the doors. There was some flashing and caulking to be done as evidenced by the water leaks that were occurring in September 2018. Some of the cladding was incomplete, as noted by the cladding contractor.

[102] Complicating the proper interpretation of the applicable legislation is the unfortunate use of the term “substantial completion” in the context of the Respondent’s consideration of whether the Appellant was responsible for all or substantially all of the construction. This Board has noted in a previous decision, *Steelewood Builders Inc. v Homeowner Protection Office* 17(2)-2014, that the term “substantial completion” is not found anywhere in the *Act* or Regulations. It is a term generally in use in the context of Builders Liens and normally refers to construction that is nearly complete and virtually ready for occupancy. However, it is a phrase that can have no place in interpreting the applicable legislation.

[103] Further complicating this analysis is Regulatory Bulletin 10, which contains a great deal of misinformation. It vaguely defines substantial completion, even though it that term is not part of the legislative scheme. The Bulletin suggests that substantial completion is based on what a reasonable person might conclude.

[104] Bulletin 10 does not have the force of law. It does not form part of the legislative scheme governing the placement of warranty insurance on residential homes. I must apply the *Act* and its Regulations in determining whether the Appellant performed a sufficient amount of work at the New Home to trigger an obligation to place warranty insurance.

[105] It seems apparent that the Registrar determined that managing all or substantially all of the construction means only that the superstructure of the home and the building envelope were complete or nearly complete. The difficulty with this approach is that the section 22 of the *Act* does not say that licensed residential builders are required to place home insurance if they complete only the superstructure and the building envelope and nothing else.

[106] The phrase that the legislature used in section 22 of the *Act* says all or substantially all the construction. In my view, this can only be read as a reference to all of the construction and adding the words “substantially all” must mean nearly all or virtually all of the construction. If it was intended to be restricted only to the superstructure and the building envelope section 22 would need to clearly say so. It does not.

[107] The Registrar’s Decision ignores the fact that there is a significant amount of work remaining to be completed at the New Home. All of the interior work remaining to be done is just as much covered by warranty insurance as is the building envelope and the structural items. On the evidence before me the Appellant has been paid roughly \$700,000 and it is said that the expected budget for completion of the home is no less than \$1.2 million. Using this metric alone, the Appellant has only performed roughly 58% of the work required to complete the home.

[108] This Board has previously held in *Steelewood, supra* that a licensed residential builder who had completed at least 80% of the construction was responsible for substantially all the construction. This case is factually distinguishable from the appeal before me. The evidence in this appeal reveals that the New *Home* is nowhere near that level of completion.

[109] The Respondent also cites *Construction Company v Homeowner Protection Office, SSAB 22(1)-2013* in support of its argument. That appeal concerned a construction manager hired by an owner-builder and the issue was which of them was actually in charge of managing substantially all of the construction. The construction manger was terminated when the project was 90% complete. Again, this case is distinguishable, firstly because construction had

progressed to 90% but secondly because the real issue was who had managed the work done prior to reaching the 90% stage.

[110] It is also worth observing, in my view, that the *Act* as presently drafted does not make specific provision for the all too common occurrence in the construction industry of contracts being terminated midway through construction. Neither is there any mention of how the insurance requirements in section 22 might be affected by termination, beyond the reference to the definition of builders being those who manage all or substantially all of the construction.

[111] I also am mindful of the purpose of the *Act* which is to:

- strengthen consumer protection for buyers of New Homes, and
- to improve the quality of residential construction

[112] I am mindful of section 29(4) of the *Act*, that requires this Board to consider that purpose when hearing appeals.

[113] Requiring the Appellant to place warranty insurance on a home he did not complete and which will require a significant amount of work by others, may well go some distance to achieving the purposes of the *Act*, but such an outcome would require me to create a definition of all or substantially all of the construction that is currently not found in the *Act*.

[114] The *Act's* purpose of strengthening consumer protection and improving the quality of residential construction were imperilled once the owner and the Appellant failed to resolve their differences and the owner elected to proceed with construction as an owner builder. With certain elements of the building envelope remaining to be completed and a significant amount of interior work to be done, the warranty status of the New Home would forever be imperfect even if the Registrar's Decision was allowed to stand. Any purchaser of the New Home would be buying a home with an uncertain and incomplete warranty status.

[115] In conclusion, I find that the wording of the *Act* does not support the conclusion that the Appellant performed substantially all of the construction of the New Home.

[116] Accordingly, the appeal is allowed in the Compliance Order is set aside.

A handwritten signature in black ink, appearing to be 'J. P. S.', written in a cursive style.