

Board.

Issues

[5] 1. Does the Board have jurisdiction to hear the Appellant's Appeal?

Position of the Parties

Summary of the Respondent's Position

[6] The Respondent's position is that the Board does not have jurisdiction to deal with this Appeal. In support of its position the Respondent relies on the following facts:

- a) The Cancellation Decision was dated and mailed to the Appellant on November 4, 2011;
- b) The Appellant was entitled pursuant to the *Homeowner Protection Act* (the "Act") to request that the Registrar of the HPO review the Cancellation Decision within 30 days after receiving notice of or reasons for the decision.
- c) Pursuant to section 31.1(2)(c) of the Act the Cancellation Decision was deemed to have been received 14 days after the mail was deposited with Canada Post, namely November 18, 2011 for the purposes of this Appeal.
- d) The Appellant sent a letter to the HPO dated January 3, 2012, which letter was received on January 6, 2012, requesting that the Registrar review the Cancellation Decision.
- e) On March 1, 2012 the Registrar of the HPO provided the Decision under appeal, which indicated that the Appellant's request for review of the Cancellation Decision was made outside of the time specified in the Act and is not reviewable.
- f) The appellant wrote to the HPO on May 30, 2012 requesting an appeal by the Board.
- g) The Appellant's formal Notice of Appeal of the Decision was filed with the Board on June 20, 2012.

[7] These facts are not in dispute.

[8] The Respondent states that pursuant to sections 29.1, 29.2 and 29.3 of the Act

that there are two levels of review for decisions such as the Cancellation Decision:

- a) a review by the Registrar under s.29.2 of the Act, if such review is properly requested under s. 29.1 of the Act; and
- b) an appeal to the Board of any decision made by the Registrar of the HPO under s. 29.2 of the Act, if such appeal is properly requested under s. 29.3 of the Act.

[9] The Respondent states that pursuant to section 31.1(2)(c) of the Act that the Cancellation Decision was deemed to have been received on November 18, 2011 by the Appellant and that the Appellant did not properly request a review of the Cancellation Decision pursuant to s. 29.2 given that the request for review was not made within 30 days of November 18, 2011.

[10] The Respondent's position is that the Decision of the Registrar is not reviewable as the Registrar declined her own jurisdiction to review the Cancellation Decision due to the Appellant's delay in requesting a review.

[11] With respect to the Registrar's inclusion of reference to the right to appeal pursuant to s. 29.2 of the Act in the Decision, the Respondent takes the position that while the reference may be misleading and arguably ought not to have been included in the Decision that the HPO cannot confer jurisdiction on the Board via such inclusion and states instead that the Board, being a creature of statute, only has the jurisdiction delegated to it by legislation.

Summary of the Appellant's Position

[12] The Appellant states that that Board does have jurisdiction to hear the Appeal.

[13] The Appellant does not take issue with the facts set out by the Respondent. However, the Appellant adds to those facts the following:

- a) A Compliance Order was issued by the HPO on May 4, 2012 (the "Compliance Order"). A copy of the Compliance Order is the sole document attached to the Appellant's Notice of Appeal.
- b) The Appellant was on a pilgrimage to visit holy sites and temples in Indian and Pakistan from late October 2011 until December 2011 and did not receive the Cancellation Decision until her return to Canada in December

2011 when the legislated period for a request for review had already passed;
and

- c) In the Appellant's request for review of the Cancellation Decision the Appellant advised the Registrar of the HPO that she had been away from the country when the Cancellation Decision was sent to her.

[14] The Appellant submits that in considering her Request for Review of the Cancellation Decision that the Registrar failed to consider the criteria set out in s.29.1(2) of the Act, which allows for a review outside of the 30 day review period if the Registrar is satisfied that special circumstances existed that precluded the Appellant from filing within the 30 day period and an injustice would otherwise result. While the merits of the Appeal are not at issue in these reasons for decision, the Appellant further submits that the Decision not to consider those factors was made pursuant to s. 29.2 of the Act and is therefore appealable to the Board.

[15] With respect to the dates for filing its appeal with the Board, the Appellant states that it was unable to determine how to file an appeal with the Board in a timely manner and did so as soon as possible.

The Law

[16] The Respondent is correct that section 29.3 of the Act provides the Board with jurisdiction to hear appeals of certain decisions of the Registrar. Specifically, this section of the Act states:

29.3 A person who has received a decision made by the registrar under section 29.2 may, within 30 days after receiving the notice, appeal the decision to the appeal board.

[17] Based on this legislation the Board may hear appeals of decisions provided they are decisions made by the registrar under section 29.2 and the appeal to the Board is made within 30 days after receiving the notice.

[18] Accordingly, to consider whether the Board has jurisdiction to hear the appeal, the Board must first determine whether the decision under appeal was a decision made under section 29.2 of the Act. Section 29.1 and 29.2 of the Act state:

29.1 (1) A person may request that the registrar review a decision made under any of the following:

- (a) section 14 (2) or (7) [*licensing of residential builders*];
- (b) section 14.1 [*licence renewal*];
- (c) section 15 [*suspension or cancellation of licence*];
- (d) section 20 (1) [*authorizations for owner builders*];
- (e) section 20.1 (2) or (3) [*prohibition on sales and offers to sell*];
- (f) section 20.2 [*suspension or cancellation of authorization*];
- (g) section 22 (1.2) [*mandatory home warranty insurance*];
- (h) section 28.1 (1) or (4) [*compliance orders*];
- (i) section 28.3 (1) [*monetary penalty*].

(2) A request under subsection (1) must be made

(a) within 30 days after receiving notice of or reasons for the decision, or

(b) within the period specified by the registrar, if the registrar is satisfied that

(i) special circumstances existed which precluded the filing of a request for review within the period required by paragraph (a) of this subsection, and

(ii) an injustice would otherwise result.

(3) The registrar may allow any other person affected by a decision made under section 28.1 to request a review of that decision under subsection (1) of this section.

(4) A decision of the registrar under subsection (3) refusing a request for a review is not appealable to the appeal board.

(5) A request under subsection (1) must be in writing, must identify the error the person believes was made or the other grounds on which the review is requested and must be accompanied by the prescribed fee.

(6) The registrar may refer a request for a review directly to the appeal board.

(7) Within 30 days after the service of a compliance officer's decision under section 28.1, the registrar, on his or her own initiative, may initiate a review of that decision by serving notice of the intention to do so on the person on whom the decision was served, and section 29.2 applies.

29.2 (1) Unless the registrar refers a request for a review under section 29.1 to the appeal board under section 29.1 (6), the registrar, as soon as practicable after receiving a request under section 29.1 (1) or initiating a review under section 29.1 (7), must review the decision and

(a) confirm, vary or cancel the decision or, in the case of a decision made by a compliance officer under section 28.1, refer the matter back to the compliance officer with or without directions,

(b) notify the person in writing of the following:

(i) the registrar's decision;

(ii) the reasons for the decision;

(iii) the person's right to appeal the decision to the appeal board, and

(c) in the case of a decision made by a compliance officer under section 28.1, provide a copy of the notice referred to in paragraph (b) of this subsection to the compliance officer who made the decision.

(2) The registrar

(a) must consider the submissions of the person who requests a review of a decision, and

(b) may review the matter on the basis of documents only, or may make any investigation of the matter that the registrar considers necessary.

[19] I note that pursuant to section 29.1 a request to for review made to the registrar must be made within 30 days of receipt of the decision under review or within the time frame specified by the registrar if the registrar is satisfied that special circumstances exist and an injustice would otherwise result.

[20] I also note that pursuant to section 29.1(2)(4) that requests for review to the registrar brought pursuant to section 29.1(2)(3) of the Act are specifically not appealable to the Board. Applying the rules of statutory interpretation I take this to imply that other requests for review brought pursuant to section 29.1 are appealable to the Board.

Decision

[21] It is clear to me based upon a reading of the applicable legislation that pursuant to section 29.1 the Appellant had the right to request a review, even a review brought outside of the 30 day timeline for filing an appeal. Otherwise, the legislation would not give the registrar permission to grant an extension of such timeline in special circumstances.

[22] The Respondent submits that Registrar's response stating that the request for appeal was brought outside of the 30 day time for making such a request is not a decision of the Registrar rendered pursuant to section 29.2 of the Act. I disagree. Given that section 29.1 clearly contemplates situations in which there may be special circumstances when the registrar may grant an extension to the time for filing, the Appellant's request for review is a request made pursuant to section 29.1 and is therefore a request that triggers the obligations of the registrar set out in section 29.2, namely that the registrar must review the decision and must consider the submissions of the party requesting such a review.

[23] Accordingly, I find that the Board would have jurisdiction to deal with the appeal of the Decision had the within Appeal been filed with the Board within the statutory 30 day timeframe for bringing an Appeal. The Decision was sent to the Appellant on March 1, 2012. Pursuant to the applicable legislation it was deemed to be delivered 14 days later, which date is March 15th. The Appellants did not file their appeal with the Board until June 20, 2012 – well after the 30 day deadline for filing an appeal. That being said, the Rules of Practice and Procedure of the Board permit Appellants to bring applications for late filing where they can show that special circumstances exist. While the Appellant's actual Notice of Appeal does not make such application, I note the Appellant's position in submissions that the Appellant and her son did make several attempts to contact the HPO to determine how to make an appeal and on May 30th did write to the HPO advising that they wished to appeal the Decision to the Board. I find

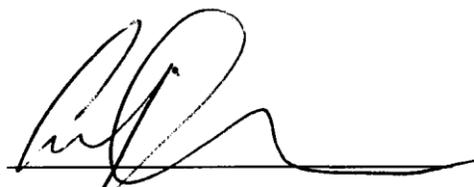
that these submissions, while not worded in the form of a formal application amount to the same thing. Accordingly, I direct the HPO to respond to the Appellant's application for late filing before the Board within 7 days of receipt of these reasons for decision. Upon receipt of those submissions, the Board will determine whether the Board does in fact have jurisdiction to hear the Appellant's appeal of the Decision.

[24] The above being said, I find that there is confusion with respect to which decisions of the HPO are properly before the Board as both the Decision and the Compliance Order appear from a review of the Appellant's materials to be before the Board. Given the date of the Compliance Order and the date of the filing of the Appeal, the Appellants are within time to appeal the Compliance Order.

Conclusion

[25] The Decision of the Registrar, is appealable to the Board. The Appellant is found to have applied to the Board for late filing of the Appeal and the HPO shall provide their response to that application within 7 days of receipt of these reasons for decision. Upon receipt of the HPO's response, the Board will render a further decision regarding its jurisdiction to hear this appeal.

[26] With respect to the Compliance Order, the Board has jurisdiction and accordingly, I direct that the parties attend a second Appeal Management Conference to clarify whether the Appellant wishes to proceed with an appeal of the Compliance Order and if so to determine how the appeal will proceed through the tribunal process. This second Appeal Management Conference will be scheduled after the Board's decision is rendered with respect to the Appellant's application for late filing on the matter of the Appeal of the Decision.



Emily C. Drown, Vice-Chair