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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 STANDARDS APPEAL BOARD**

BETWEEN:	**BUILDERS**	**APPELLANTS**
AND:	**HOMEOWNER PROTECTION OFFICE**	**RESPONDENT**

Reasons for an Appeal of a Monetary Penalty

REASONS FOR DECISION

[1] This is an appeal under the *Homeowner Protection Act*, S.B.C. 1998, c. 31 (the "Act"), concerning a decision of the Registrar of the Homeowner Protection Office (the "HPO") dated July 30, 2012 (the "Decision"). The Decision was made pursuant to subsection 29.2(1)(a) of the Act and confirmed a monetary penalty issued to the Builders (the "Appellants"), on March 22, 2012. (the "Monetary Penalty"). The Monetary Penalty amounts to $192.50 per day for each property for a total of $385.00 per day up to 40 days of non-compliance. After 40 days of non-compliance the total payable is capped at $15,400.00.

[2] In the Decision the Registrar of the HPO states that the Monetary Penalty was correctly assessed and issued under s. 29.3 of the Act as a result of the Appellants contraventions of subsections 14(1) and 22(1) of the Act. These sections of the Act read as follows:

s.14(1) A person must not carry on the business of a residential builder unless licensed under this Part.

s.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.

[3] The Appellants submit that the structures constructed were not "new homes" as defined in the Act and that therefore the Act does not apply. In the alternative, the Appellants submit that even if the sites are found to be new homes that both are exempt from the Act pursuant to section 2(1)(a) of the *Homeowner Protection Regulation* (the "Regulation"). In the further alternative, the Appellants submit that if the Act does apply that the monetary penalty levied by the HPO ought not to have been assessed or alternatively, the penalty ought to be significantly reduced from the penalty assessed by the HPO. The HPO takes the position that the Act applies and that the monetary penalty was appropriately assessed against the Appellants.

Issues

[4] The issues that must be determined in this Appeal are as follows:

1. Does the Act apply? Are the structures built by the Appellants "new homes" as defined by the Act?
2. If so, are the "new homes" exempt pursuant to section 2(1)(a) of the Regulation?
3. If not, was the monetary penalty reasonably assessed against the Appellants?

History of the Appeal

[5] Earlier in the appeal process, the Appellants brought an application that I recuse myself on the ground that there may be a reasonable apprehension of bias should I continue to hear this appeal. I dismissed that application in a separate written decision dealing solely with that matter.

[6] Shortly thereafter, at an Appeal Management Conference it was ordered that this appeal would proceed via written submissions. Accordingly, the Board has received evidence and written submissions from all parties. In particular, the Board has received and has reviewed the following affidavit evidence:

a) Affidavit of one Appellant, sworn April 24, 2013
b) Affidavit of another Appellant, sworn April 24, 2013
c) Affidavit of the Registrar, sworn May, 2013
d) Affidavit of a Compliance Officer, sworn May 10, 2013

Position of the Parties

Summary of the Appellants' Position

[7] The Appellants have submitted a detailed argument. First, they submit that the structures constructed were not "new homes" as defined in the Act and that therefore the Act does not apply. The Appellants basis for this submission is that the zoning of the sites expressly prohibits residential occupancy and therefore it is not possible that the sites were "intended for residential occupancy" as is required by the definition of "new home" under the Act.

[8] In the alternative, the Appellants submit that even if the sites are found to be new homes that both are exempt from the Act pursuant to section 2(1)(a) of the *Homeowner Protection Regulation* (the "Regulation"). In support of this argument, the Appellants submit that because neither home is strata titled that the structures constructed on the sites are caught under section 2(1)(a) of the Regulation, which exempts hotels and motels from the definition of "new home" under the Act. The Appellants submit that the decision of the BC Supreme Court in *Tin Amera Resorts et al. v. HMTQ,* 2001 BCSC 66 ("*Tin Amera*") applies to the facts at hand and they specifically refer to paragraph 19 of the decision where Mr. Justice Edwards acknowledges that if the units were not strata titled, they would be exempt from the Act by virtue of the hotel and motel exemption under the Regulation.

[9] In the further alternative, the Appellants submit that if the Act does apply that the monetary penalty levied by the HPO ought not to have been assessed or alternatively,

the penalty ought to be significantly reduced from the penalty assessed by the HPO.

[10] With respect to the levying of the monetary penalty, the Appellants submit that the situation in question is not one deserving of a penalty. The Appellants submit that they acted reasonably in all of their dealings and that the penalty levied against them is unjust in the circumstances. In support of this position the Appellants deposed that:

a) prior to construction that they specifically sought out the Chief Building Inspector of the Cowichan Valley Regional District (the "CVRD") and asked the necessary questions about whether the planned construction of the two structures required home warranty insurance;

b) they were advised by the Chief Building Official of the municipality that no such home warranty insurance was required and consequently relied on that information and did not obtain home warrant insurance for either structure;

c) they were issued building permits for both sites without the need for home warranty insurance in violation of Section 30 of the Act;

d) the buildings were fully constructed by the time they were notified that they were required to obtain policies of home warranty insurance; and

e) they could not obtain warranty insurance from Pacific Home Warranty as the warranty provider was unable to see the sites during construction.

[11] In the further alternative, if a monetary penalty ought to have been assessed, the Appellants submit that such penalty was wrongly calculated and ought to be greatly reduced. In this regard, the Appellants take issue with the fact that the Monetary Penalty Assessment Checklist (the "Checklist") was not provided to them by the HPO until after this appeal was commenced and that upon provision of the Checklist it is clear that the Checklist contains numerous errors and wrongfully characterizes the actions of the Appellants in several places resulting in a skewed and erroneous number of points being assessed against the Appellants and inflating the amount of the monetary penalty beyond what is reasonable in the circumstances. In this regard, the Appellants submit the following regarding the application of the Checklist:

a) *Was the Contravention Deliberate?* The Appellants state that the contravention was not deliberate and was not deliberately continued. They point

out that the HPO itself agrees that the contravention was not initially deliberate and that the issue is whether the continued contravention was deliberate. The Appellants submit that they reasonably relied on the CVRD and were unable to obtain warranty coverage once they learned that the same was required. They submit that they should have been awarded 0 points under this category of the Checklist.

b) *Was there any economic benefit of significance derived from the contravention?* The Appellants admit that some costs were avoided as a result of their failure to obtain home warranty insurance, but they submit that such amount is negligible and pales in comparison with what economic benefit could have been derived in a deliberate attempt to undermine the Act. The Appellants submit that they should have been awarded 1 point under this category rather than the maximum allowable.

c) *Length of time during which the contravention continued*. The Appellants submit that is unreasonable for them to be penalized from the date for which building permits were issued to them on November 5, 2007 given that they reasonably relied on the Chief Building Officer for the CVRD and were not aware of the transgression until such time as the HPO made contact with them. They further submit that since upon learning of the transgression that they made inquires and tried to obtain home warranty insurance that they ought to be assessed a single instance on on-compliance, specifically 50 points and should not be penalized for the CVRD's breach of the Act.

d) *Likelihood of occurrence of harm to consumers or others*. The Appellants submit that such occurrence should be classified as "impossible or rare" rather than "possible: may occur occasionally" and accordingly should be assessed 0 points under this category of the Checklist. The Appellants submit that because the owners have applied for an received a New Home Disclosure Notice from the HPO that future owners are protected and that there is little risk of other harm as the owners were complicit win the violations of the Act and cannot be classified as consumers who might likely be harmed by the alleged violations.

e) *Severity of harm to consumers or others.* The Appellants state that this category ought to be assessed as "negligible with little or no loss or damage to any consumer" rather than "moderate localized effect, significant effect on one person or more than one person affected" as assessed by the HPO given that

the owners of both properties entered into this arrangement knowingly and are not innocent consumers.

f) *Severity and likelihood of harm to regulatory scheme.* The Appellants state that the HPO has admitted that the appellants were misled by the CVRD and argue that they should be assess 100 points under the Checklist rather than 300 points as the Appellants were not profit-driven builders that intentionally shirked their responsibilities under the Act to increase their bottom line.

[12] Based on the above, the Appellants submit that they should be assess $20.00 per day for each property to a maximum penalty of $1,600.00 after 40 days. In support of this significantly lower monetary penalty, the Appellants ask the Board to consider *R. v. Gill et al,* 2004 BCPC 513 ("Gill"), a decision of the Provincial Court of British Columbia that considered a company and its two directors that were found to offer new homes for sale without warranty insurance and were fined $500.00 against each individual and $2,250.00 against the corporate entity. The Appellants say that case law suggests that a penalty in the range of $500.00 to $2500.00 is appropriate for the infractions of the Appellants and that the Gill decision ought to be considered by the Board because it is the only decision of a court in British Columbia that considers the purposes of the Act and the amount of a fine or penalty under the Act.

Summary of the Respondent's Position

[13] The HPO takes the position that the Act applies and that the monetary penalty was appropriately assessed against the Appellants.

[14] The HPO submits that although this appeal is a new hearing under the Act that the Registrar's Decision with respect to the monetary penalties is entitled to deference on the standard of reasonableness. It is admitted that the question of jurisdiction does not attract deference as the Act either applies or it does not.

[15] With respect to the argument that the two structures are not "new homes" as defined by the Act, the HPO submits that the two structures are each self contained residences, containing kitchens, eating areas, living areas, sleeping areas and bathrooms and accordingly meet the definition of "dwelling unit" under s.1.(1) of the Regulation. Further, the HPO submits that both structures were intended for occupancy by their owners albeit on a seasonal or recreational basis and therefore qualify as "new

homes" under the Act. The HPO rebuts the Appellant's argument that transient tourist accommodation does not amount to residential occupancy and cites the *Tin Amera* case as precedent in this regard, relying on paragraphs 12 and 22 of that decision and in particular the following:

> [12]….I find the units are residential because they provide residential type accommodation. Who occupies them and for how long are considerations which do not alter that fact…..
>
> [22]…."New home", as defined by the Act, includes a building used for "residential occupancy" which may include transient occupancy such as hotel and motel use….

[16] With respect to the Appellant's submission that the structures are exempted from the Act under s.2(1) of the Regulation because the properties are zoned for tourist accommodation and therefore qualify as "hotels and motels" under the exemption provisions of the Regulation, the HPO submits that this case is distinguishable from the *Tin Amera* case upon which the Appellants rely. In this regard, the HPO submits that in *Tin Amera* there was evidence that the units were part of a "rental pool" and available to rent to tourists while here there is no evidence that the properties would be rented to tourists and used as resort, hotel or motel accommodation. Instead, the HPO states that the evidence is that the owners of the structures intend to use the homes as personal, albeit, seasonal, residences. In support of this submission, the HPO draws attention to the fact that one owner was at one point issued an owner builder authorization, which requires under s.20 of the Act that she intended to build the New Home on Site 18 for "personal use".

[17] With respect to the issuance of the monetary penalty, the HPO submits that the fact that the Appellants relied on erroneous information from the CVRD is immaterial as ignorance of the law is no excuse. They rely on *Whiskey Dock Developments Ltd. v. Ucluelet (District)*, 2011 BCSC 937 where at paragraphs 17 and 22 Mr. Justice Macaulay states that a municipal authority has no authority to exempt a builder from the requirements of the Act and that there is no agency relationship between a municipal authority and the HPO. They also cite *Accredit Mortgage Ltd. v. Ucluelet (District)*, 2013 BCSC 86 where Mr. Justice Macauley states at paragraph 29 that "It is not reasonable for [a municipal body] to rely on previous statements respecting other projects in order to meet its own statutory obligation[s]..."

[18] The HPO submits that the Appellants never contacted the HPO to determine whether the structures fell under the Act and that the first contact with the HPO regarding the two units was when a representative of the HPO contacted one of the Appellants on October 21, 2008 and advised that he was required to be a residential builder and enroll the New Homes with home warranty insurance. A Compliance Officer, deposes that the HPO communicated at least four more times with the Appellants prior to the issuance of a compliance order on June 8, 2009 and that a further amended compliance order was issued on September 24, 2009.

[19] Notably, the HPO points out that the Appellants never sought a registrar's review of the Amended Compliance Order and never appealed it in any way.

[20] The HPO also submits that it appears as though the Appellants have only attempted to arrange home warranty insurance with Pacific Home Warranty and not any of the other three companies from which home warranty insurance is available in British Columbia, despite being advised specifically by the HPO to try to contact another company.

[21] Based on the above, the HPO submits that the amount of the monetary penalty was in line with the Checklist. Further, the HPO submits that provided each element of the Checklist was considered and applied that the Board should not engage in a "line-item" review and should instead determine whether the Checklist was reasonably applied. In this regard, the HPO submits that in keeping with *Dunsmuir v. New Brunswick,* 2009 SCC 9 ("Dunsmuir") that the Board is only to determine whether there was "justification, transparency and intelligibility within the decision making process."

[22] In the alternative, if a "line-item" review is undertaken, the HPO submits as follows:

a) *Was the contravention deliberate?* The HPO submits that it is clear that the involvement of the CVRD was considered but that ignorance of the law is no excuse.

b) *Economic Benefit*. The HPO submits that the appellants have acknowledged that they did avoid costs by breaching the Act and submit that the

assessment of 5 units instead of the 3 that the Appellants suggest is more appropriate is a judgment call for which the HPO is entitled to deference.

c) *Length of time of the contravention*. The HPO submits that it assessed the number of points related to contraventions that last 2 months or longer and that given the many years of the contravention that such assessment is reasonable.

d) *Likelihood of harm to consumers.* The HPO submits that it assessed the mid-range due the fact that harm is possible.

e) *Severity of harm to consumers*. The HPO submits that a mid-range assessment is reasonable and states that the owners are the very people that Act is supposed to protect rather than accomplices in the breach.

f) *Harm to regulatory scheme.* The HPO submits that the Appellants were slow to react and failed to seek warranty coverage from most potential providers, including the one to which the HPO directed them.

[23] The HPO submits that the Monetary Penalty was significantly less than the maximum permissible penalty of $25,000 (per new home) permitted under the Act and as such was reasonable. They further submit that reliance on the *Gill* case is not required as it dealt with a quasi-criminal offence and was made under a legislative regime that did not include monetary penalties. They submit that section 28.3 of the Act was enacted in 2007 because of the need for additional enforcement tools to ensure that builders complied with their statutory obligations.

Issues Under Appeal

The Facts

[24] After reviewing the affidavit evidence and written submissions of the parties, I find the following as fact:

- Both structures at issue in this appeal were built by the Appellants with the intent of being the owners personal seasonal or recreational cabins and each is a self-contained residence with kitchen, eating areas, living areas, bedrooms and bathrooms;
- Both properties are within the CVRD and are zoned C-4;
- Before undertaking work on either property, the Appellants spoke with the

CVRD's chief building inspector and were advised that the property did not require home warranty insurance;

- Building permits were issued for both properties in November of 2007 without proof of home warranty insurance being obtained by the owners or builders;
- In or around October 2008, the Appellants were contacted by a Compliance Officer of the HPO and advised that both properties were subject to the Act and home warranty insurance was required;
- In January 2009, the Appellants were contacted a second time by the Compliance Officer who reiterated that the requirements of the Act needed to be met;
- On January 28, 2009 the HPO issued a demand letter to the Appellants requiring them to be licensed and arrange for home warranty insurance by February 27, 2009;
- On June 8, 2009 the HPO issued a Compliance Order;
- On September 24, 2009 the HPO issued an Amended Compliance Order;
- The Appellants never sought a review of the Amended Compliance Order.
- In March 2010, one of the Appellants applied for a residential builder's license from the HPO;
- In May 2010, the Appellant received a conditional residential builder's license from the HPO, the license was conditional upon obtaining home warranty insurance for the properties within 30 days;
- The Appellant paid $10,000 into a GIC at Coast Capital Savings Credit Union and was issued a letter of credit to be forwarded to the home warranty insurance provider.
- The Appellants contacted Pacific Home Warranty for home warranty insurance in the spring /summer of 2010, but were unable to obtain home warranty insurance;
- There is no evidence that the Appellants contacted any other home warranty provider after being turned down by Pacific Home Warranty;
- Both properties still do not have policies of home warranty insurance; and
- The Appellants first received the monetary penalty assessment checklist from the HPO during the course of this appeal.

The Law – Applicable Legislation and Case Law

[25] The relevant sections of the Act are sections 14(1) and 22(1). As set out above, they read as follows:

> s.14(1) A person must not carry on the business of a residential builder unless licensed under this Part.
>
> s.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.

[26] The term “new home” is defined in section 1 of the Act as follows:

> “new home” means a building, or a portion of a building, that is newly constructed or being constructed and is intended for residential occupancy, and includes
>
> (a) a self-contained dwelling unit that is
> (i) detached, or
> (ii) attached to one or more other self-contained dwelling units,
> (b) a building having 2 or more self-contained dwelling units under one ownership,
> (c) common property, common facilities and other assets of a strata corporation,
> (d) any building or portion of a building of a class prescribed by the regulations as a new home to which this Act applies, and
> (e) a home that is or is bing substantially reconstructed
> but does not include a manufactured home unless otherwise prescribed.

[27] The term “dwelling unit” is defined in section 1(1) of the Regulation as follows:

> “dwelling unit” means a class of new home which is a building, or a portion of a building that
>
> (a) is newly constructed,
> (b) is intended for residential occupancy,
> (c) is a single, self contained residence usually containing cooking, eating,

living, sleeping and sanitary facilities, and

(d) may contain a secondary suite if permitted by local bylaws.

[28] The Appellants submit that the structures in question are not “new homes” as defined by the Act in part due to the municipal zoning, which permits “tourist accommodation” and does not permit residential use unless it is accessory to another permitted use.

[28] The properties in question are located in the CVRD and are zoned C-4 “Tourist Recreation Commercial”. The permitted uses in this zoning are as follows:

9.6 C-4- Zone –Tourist Recreational Commercial

(a) Permitted Uses

The following uses and no others are permitted in a C-4 Zone:

(1) restaurant drive-in restaurant;
(2) golf driving range and mini-golf facility;
(3) tourist accommodation and campground;
(4) marina operation including accessory boat sales rental and servicing but excluding boat building and the rental of personal watercraft vessels;
(5) recreation facility;
(6) accessory retail sales gift shop; and
(7) one single family residential dwelling per parcel accessory to a use permitted in section 9.6(1)to(6)

“tourist accommodation” means a building or set of buildings used for transient accommodation which contain sleeping units and may contain auxiliary assembly commerce entertainment or restaurant uses premises licensed to serve alcoholic beverages and staff accommodation and includes hotel motel resort lodge and guest cabins.”

[29] In the event that the structures are “new homes” as defined by the Act, the Appellants submit that section 2(1) of the Regulation applies in that it exempts “hotels and motels” from the definition of “new home” in section 1 of the Act.

Application of the Law to the Facts before the Board

[30] Pursuant to section 53 of the *Safety Standards Act*, this appeal is a new hearing. With respect to whether the Act applies to the structures in question, the Act either applies or it does not and deference to the Registrar's decision does not come into play. However, with respect to the issue of the assessment of the Monetary Penalty, the new hearing that is this appeal is limited to determining the reasonableness of the Registrar's decision. It is clear from the wording of section 28.3 that monetary penalties are assessed at the discretion of the Registrar. Accordingly, provided that the evidence shows that the HPO considered the factors required to be considered by section 20.1 of the Regulation and did so reasonably, the Board cannot overturn the Registrar's decision.

[31] With respect to the first two issues before the Board, both of which are questions of jurisdiction, I wish to comment on the Appellants' failure to appeal the Amended Compliance Order. The proper time for making the argument regarding jurisdiction of the Act was upon receipt of the Compliance Order and Amended Compliance Order as both had 30 day appeal periods. Neither Appellant sought to appeal the Amended Compliance Order, yet they now raise the question of whether the Act applies. Accordingly the Amended Compliance Order stands and requires compliance by the parties. The Board does not have jurisdiction to deal with the issue of jurisdiction given the failure of the Appellants to appeal the initial orders.

[32] That being said, the Appellants have raised interesting questions that I think ought to be addressed in order to a) fully understand the other issues in this appeal and b) to assist members of the public with their understanding of the Act and its associated regulations.

[33] With respect to the issue of whether the structures are "new homes" as defined by the Act, I find that despite being zoned tourist accommodation both structures are "new homes" as defined by the Act. Both structures are single residence dwelling units. As held in the *Tin Amera* case, the dwellings are residential regardless of whether they are used as vacation homes, hotels or motels, etc...as they are fully contained residences. I find that the zoning of the properties in question in no way affects the application of the Act. It is the use of the property not the zoning that matters.

[34] Accordingly, we must next determine whether the structures are exempted from the application of section 2(1) of the Regulation because they are “hotels or motels.” In this case, the fact that the properties were intended for personal use is an important factor. This case is not like that found in *Tin Amera* where the structures were going to be largely occupied by tourists that accessed them through a rental pool. Here, the structures were built for the owners of the property and were intended to be the owners personal seasonal or recreational property and were never intended for transient accommodation. Accordingly, the properties are not exempted from the application of the Act by the Regulations.

[35] I have found as fact that the Appellants sought the advice of the CVRD’s chief building inspector and were advised that the requirements of the Act did not apply to the structures in question. However, case law is clear that municipalities do not have an agency relationship with the HPO and cannot exempt individuals from the Act by their representations or conduct. Accordingly, while it is indeed unfortunate that the Appellants were provided inaccurate advice from the CVRD, it does not affect their obligation to comply with the terms of the Act and the Regulations.

[36] Accordingly, we must turn to the issue of the monetary penalty. As mentioned above, the standard of review for such an appeal is reasonableness. It is not enough that the Board may have applied the required criteria differently and come to a different conclusion than the HPO. Rather, the Board must look to determine whether the HPO was reasonable in their assessment of the monetary penalty based on the evidence before the Board.

[37] While I am aware that the HPO did not provide the Appellants with a copy of the Monetary Penalty Checklist prior to the commencement of this Appeal, it is clear on the evidence before the Board that they considered each factor on the Checklist prior to assessing and upholding the Monetary Penalty and accordingly, complied with section 20.1 of the Regulation. While one could reach a slightly different assessment based on the evidence before the board, there is sufficient evidence before the board to support the reasonableness of the Registrar’s decision, taken either holistically or by a line item review.

[38] While the amount of the monetary penalty is high, it is almost $10,000.00 under the maximum monetary penalty permitted and could have been much less if the Appellants had complied with the Compliance Order prior to the maximum ordered penalty accruing. I also note that the amount of the monetary penalty at issue is for two separate properties and is accordingly even less than the maximum permitted by the legislation.

[39] The Appellants may have gotten themselves into the situation of non-compliance through reliance on erroneous advice from the CVRD; however, since learning of the error they have done little to try to comply in a timely fashion. Years have passed since they first learned that the Act complied. In fact, years have passed since the Amended Compliance Order was issued. The Appellants have taken their time in applying to become Licensed Residential Builders and have failed to fully canvass their options for obtaining home warranty insurance. On the evidence before the Board it appears as though they even failed to contact the home warranty provider the HPO recommended may be able to assist them.

[40] The Appellants have submitted that if the structures are “new homes” and are governed by the Act that the Board ought to reduce the monetary penalties in line with those assessed in *R. V. Gill et all*, 2004 BCPC 513 (“Gill”) as it is a reported case that considers monetary penalties under the Act, albeit under a different section of the Act. I have reviewed this case. While it could be helpful with respect to assessing the amount of monetary penalties leveled by the HPO, I am mindful that since the case was decided that the legislature has amended the legislation so that monetary penalty guidelines now exist in the guise of section 20.1 of the Regulation and the HPO has developed internal guidelines with a mathematical formula for applying the legislated criteria. Accordingly, I am disinclined to vary the monetary penalty and hold instead that the monetary penalty was reasonably assessed against the Appellants.

Conclusion

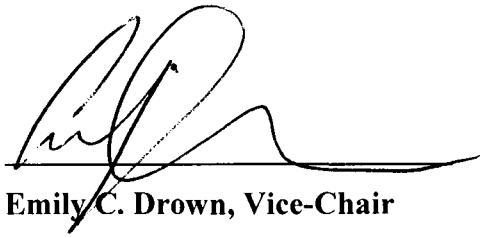
Issue One: The Act applies. The structures built by the Appellants are “new homes” as defined by the Act.

Issue Two: The structures are not exempt pursuant to section 2(1)(a) of the Regulation.

Issue Three: The Monetary Penalty before the Board was reasonably assessed against the Appellants.

[41] Accordingly, the Registrar's decision under appeal is upheld. For the reasons set out above, the appeal is dismissed.

Signed:



Emily C. Drown, Vice-Chair