PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE PUBLIC HEALTH ACT,
CHAPTER P-37, R.S.A. 2000
AND ITS REGULATIONS
IN THE MATTER OF AN APPEAL TO
THE PUBLIC HEALTH APPEAL BOARD
BY ABDI FARAH
OF THE ORDER OF AN EXECUTIVE OFFICER
NOTICE OF CLOSURE
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 4 EDMONTON
DATED MARCH 4, 2016
HEARING HELD APRIL 7, 2016

Appearance:
Mark Raven-Jackson, Legal Counsel, Alberta Health Services/Respondent

Board Decision:
The appeal is moot. The Board decided not to exercise its discretion to hear the appeal and therefore the appeal is dismissed.

A. Introduction

An Order of an Executive Officer Notice of Closure was issued March 4, 2016 for Xhale, a food establishment located at 8120 101 Street Edmonton, Alberta. The Order required the owner to obtain a valid food handling permit and to address several contraventions found on the Premises. The Order was entered as Exhibit 1.

The Board received the Notice of Appeal from an owner, Abdifatah Farah, on March 7, 2016. It was entered as Exhibit 2. The Notice of Appeal questioned the accuracy of what the Executive Officer found on the Premises and asked for a re-inspection.

The Order was rescinded by Alberta Health Services on March 10, 2016. The hearing was scheduled for April 7, 2016 in Edmonton, Alberta and the Appellant, or a representative, did not attend the hearing.

The Board decided at the hearing that the appeal was moot and dismissed the appeal. The Board is now providing the reasons for its decision.

B. Timing of the Appeal

Section 5(3) of the *Public Health Act* requires the Appellant to serve notice of the appeal within 10 days after receiving notice of the Order. The Appellant served notice within this time period.

C. Notice of Hearing

As the Appellant did not attend the appeal hearing, the Board reviewed the notice provided to the Appellant with respect to the hearing dates and times to ensure sufficient and proper notice was given and that it was administratively fair to proceed with the hearing in his absence.

Contact with the Appellant relating to the date, time and place of the appeal hearing was as follows:

- March 18, 2016 - Board Secretariat telephoned the Appellant regarding his availability for hearing dates and was advised he was available any day between April 4 and 14, 2016.

- March 21, 2016 - Board Secretariat telephoned the Appellant to advise him the hearing date was scheduled for April 7, 2016 and the details would be in an information package for him to pick up (he did not provide an address to send the information).

- March 24, 2016 - Board Secretariat left three messages in an attempt to confirm receipt of hearing information package and to confirm his plan to attend at the hearing date.

- Week of March 29 to April 1, 2016 – Board Secretariat left another message and no response was received.

- April 4, 2016 - Board Secretariat left a voicemail asking the Appellant to return the call.

- April 4, 2016 - Board Secretariat called again and spoke with the Appellant who confirmed he had received the voicemails left by the Secretariat and he would be attending the hearing on April 7, 2016. He was provided with the details regarding the location and time and advised the package was available for him to pick up with those details.

- Alberta Health Services' Counsel contacted the Appellant on April 4, 2016 and he confirmed he would be attending the hearing on Thursday, April 7, 2016 as he wanted his position on the public record.

The day before the hearing, Alberta Health Services provided written submissions regarding its position that the appeal was moot. The submissions were couriered to the Appellant's place of business by the Board's Secretariat that same day. The Appellant did not return telephone messages left by the Secretariat that day.

The Board found the Appellant received sufficient and proper notice of the hearing's date, time and location. Therefore, the Board decided to proceed with Alberta Health Services' application regarding the appeal being moot.

D. Issue

Whether the appeal of the Order of an Executive Officer dated March 4, 2016 is moot and if so, whether the Board ought to exercise its discretion and hear the appeal.

E. Alberta Health Services' Submissions

Counsel submitted the Order was rescinded and the live controversy had been resolved, rendering the Appeal moot.

The Appellant sought a specific remedy, the opportunity to have another inspection of the premises, in the Notice of Appeal. Subsequent to filing the Notice of Appeal there were two re-inspections by another Executive Officer, on March 9 and 10, 2016. The Order was rescinded and a permit granted on March 10, 2016. The specific remedy sought by the Appellant was already granted to him by Alberta Health Services.

Counsel for Alberta Health Services submitted the two part test set out in the Supreme Court of Canada decision in *Borowski v Attorney General for Canada*, [1989] 1 SCR 342, ought to be applied:

1. Determine if there is a live controversy; and
2. If the answer is 'no', determine whether discretion should be exercised to hear the case.

Counsel submitted the Alberta Court of Appeal applied the two part test in *Wiebe v Alberta (Labour Relations Board)*, 2001 ABCA 192, an administrative matter, wherein the Court stated:

> The appellants "have got what they wanted (decertification), and the substantive dispute is over. Their rights are no longer in issue ... our judgment could not lead to the union local's decertification or recertification for these employees. Nor could it open any road (previously closed) for the Board to do either thing".

The Court in that case also cautioned that discretion should not often be exercised to hear a case for a number of reasons and listed six dangers in doing so:

- A proceeding could go by default, even collusion, because a respondent would have little motive to fight it;
- The relevant arguments will not be before the court (e.g. counsels thinking in abstract without a specific factual problem will not imagine practical difficulties);

- The court may be led to enunciate a rule of law which hangs together in theory but is impractical;
- The court will enunciate too wide a rule of law;
- The court will proceed with an inadequate evidentiary record; and
- The respondent is forced to act as a devil's advocate and must spend time and money on a question in which there is no present interest at risk.

Counsel submitted that in *Nashco Enterprises Ltd. v Edmonton (City)*, 2014 ABQB 569, a developer and the City of Edmonton disagreed about whether the Plaintiff's newly constructed apartment building needed to comply with the Alberta Building Code requirements for barrier free access. The City refused to issue a variance to the Plaintiff. However, the Alberta Government subsequently issued a relaxation. The practical effect of the relaxation was to make the building compliant with the Building Code requirements for barrier-free access.

Nashco applied for judicial review of the City's refusal to issue a variance. The City argued that the application for judicial review was moot. The Court stated that while a variance and relaxation under the Building Code are different mechanisms, they nevertheless achieve the same practical result:

> The consequence of the Relaxation is to place Nashco in the same position it would be in if (presuming success on judicial review) the Variance Decision was overturned and the Court ordered the City to grant the variance sought. There is no point in ordering the City to issue a variation now."

The Court found the issue was moot and the appeal was dismissed.

Further, Alberta Health Services submitted the Board was statutorily restricted to the remedies contemplated in s. 5(11) of the *Public Health Act* to confirm, reverse or vary the Closure Order. Since the Closure Order had already been rescinded, the Board was unable to provide the Appellant with any further remedy.

Finally, as of March 10, 2016, the Appellant has lost his legislative status to advance an appeal pursuant to s. 5(2) of the *Public Health Act,* as he was no longer a person that was directly affected and aggrieved by a decision of Alberta Health Services, as that decision was no longer in existence: *Pension Fund Properties Limited v. Calgary (Development Appeal Board)*, 1981 ABCA 195.

F. Reasons

The Supreme Court of Canada's decision in *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 sets out the test to determine whether a matter is moot and if so, whether the Court should exercise its' discretion and hear the matter, notwithstanding that it is moot.

The first part of the test is to determine whether a live controversy exists between the Appellant and Alberta Health Services. The Board finds there was a controversy when the appeal was submitted to the Board but at the time of the appeal hearing, the

controversy no longer existed because the Order had been rescinded. In addition, the only remedy the Appellant had asked for in the Notice of Appeal was a re-inspection and a re-inspection had been completed.

The second stage of the analysis is to determine whether the Board ought to hear the appeal notwithstanding that the matter is moot. This analysis considers the three rationales for the mootness doctrine. The absence of one factor may weigh heavier than the presence of other factors. The three rationales for hearing a moot appeal are as follows:

(a) An adversarial context still exists; the parties have an interest in the outcome and will fully argue the issue before them.

(b) Judicial economy is preserved; and

(i) The concern for preserving judicial resources can be partially alleviated if the Court's decision will have some practical effect on the rights of the parties.

(ii) The expenditure of judicial resources can also be warranted in cases where the issue, although moot, occurs frequently and is of a brief duration (e.g. labor strikes) so as to preclude an appeal hearing. This does not necessarily indicate that a decision-maker should not wait until a genuine adversarial context exists.

(ii) Finally, when considering the preservation of judicial economy, a Court also has the discretion to hear a moot appeal where the issue is of national importance, like a constitutional issue. There must be an added societal cost if the matter were left unresolved.

(c) The Court can maintain its role as an adjudicator. It cannot usurp the legislature's role as a law maker.

In this instance, there was no longer an adversarial context between the parties. The parties no longer had an interest in the outcome of the appeal, so much so that the Appellant did not attend the hearing to argue the appeal before the Board.

There would be no practical effect on the rights of the parties for the Board to hear the appeal. The Appellant had obtained the remedy he requested and he would not be in a better position, legally or practically, if the Board reversed the Order than he is with the rescission of the Order.

For the above reasons, the Board has decided the appeal is moot and it will not exercise its discretion to hear the appeal. The appeal is dismissed.

Per: _____
Julia Jones, Chair
Also Sitting:
Ron Everard, Vice Chair
Linda Cloutier, Member

Date: April 14, 2016