
DECISION AND REASONS FOR DECISION

The Public Health Appeal Board (the “Board”) received a notice of appeal on October 22, 2021. This matter came before a panel of the Board (the “Panel”) on November 19, 2021, January 13, 2022 and February 9, 2022 via video conference.

The Appeal

[1] This is an appeal (the “Appeal”) to reverse a Food Handling Permit Notice of Suspension and an Order of an Executive Officer Notice of Defined Closure (collectively, the “Orders”), both dated October 14, 2021 and issued to 2248870 Alberta Ltd., Stacey Pacholek and Collin Pacholek.

Board Decision

[2] The Panel rendered its decision to confirm the Orders on March 18, 2022 following the Panel’s review of written submissions and closing arguments of the Appellant and the Respondent.

Background

[3] Stacey Pacholek and her husband, Collin Pacholek own and operate a bookstore that serves coffee and other beverages at the subject property named Stacey’s Happy Place (the “Appellant business”), located in Eckville, Alberta (the “Premises”).

[4] The Appellant appealed two orders issued by an Alberta Health Services (“AHS”) Executive Officer pursuant to the *Public Health Act* (“Act”): a Food Handling Permit Notice of Suspension and an Order of an Executive Officer Notice of Defined Closure, both dated October 14, 2021. The Appellant’s grounds of appeal are as follows: that the Orders contain errors of law and errors of fact, and a breach of duty of administrative fairness; the sole reason for the closure is obstruction, which the Appellant argues must be proven in an application to the Court of Queen’s Bench; and there is no evidence that the Appellant contravened orders issued by the Chief Medical Officer of Health in the Inspection Reports.¹

Timing of Appeal

[5] Section 5(3) of the Act requires the Appellant to serve the notice of an appeal within 10 days after receiving notice of the decision being appealed. The Board Secretariat received the Notice of Appeal dated October 22, 2021 on October 25, 2021. The Notice of Appeal does not provide a date that the verbal or written Orders were received by the Appellant. However, counsel for AHS indicated that the Notice of Defined Closure was personally served on October 15, 2021. The Panel will assume that the Appellant received the Orders on October 15, 2021.

¹ Notice of Appeal dated October 22, 2021.

[6] Based on the Panel's assumption that the Appellant received the Orders on October 14, 2021, the Board Secretariat received the Notice of Appeal 10 days after the Appellant received the Orders. The Board Secretariat received the Notice of Appeal on October 25, 2021. Therefore, the Notice of Appeal was filed on time.

Preliminary Application

[7] Early in the hearing, counsel for AHS made an application for Mr. Dave Brown ("Dave"), and Mr. Garth Gosselin ("Garth"), corporate officer for AHS, to provide oral testimony in the hearing as fact witnesses. Counsel for the Appellant and counsel for AHS made submissions regarding AHS' application.

[8] Counsel for AHS submitted that the primary question for the Board is whether AHS had reasonable and probable grounds to believe that a nuisance existed on the Premises to warrant issuing a closure order. AHS further submitted that the evidence of Mr. Brown and Mr. Gosselin is relevant because it confirms the reasonable concerns AHS had when the obstruction occurred, being that the Appellant created an environment where suppression of a disease was being disregarded. Counsel for the Appellant objected to Mr. Brown giving evidence on the grounds his evidence is irrelevant and submitted that the closure of the Appellant business was based on unverified complaints and the past conduct of the Appellant business. The Appellant did not see how Mr. Brown's testimony is relevant if he inspected the Premises two weeks after AHS issued the Orders.

[9] After considering the submissions made by counsel, the Board allowed AHS' application for Mr. Brown and Mr. Gosselin to provide oral testimony in the hearing. In reaching its decision on this application, the Board noted that it is not bound by the rules of evidence that are applicable to common law courts. Rule 4.7.2 of Public Health Appeal Board Rules of Procedure states that as a general principle the Board shall admit any relevant oral or documentary evidence that is not privileged. Relevant evidence is defined in Rule 4.7.2 as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the appeal more or less probable than it would have been without the evidence. Based on the submissions of counsel, the Board is of the view it needed to hear the evidence of Mr. Brown and Mr. Gosselin, and then it would determine the appropriate relevance or weight to attach to their evidence.

Recusal of Board Member

[10] Before counsel for the Appellant had begun presenting the Appellant's case, the Chair directed the parties to focus solely on the subject of this appeal, being the Orders issued on October 14, 2021, and not previous decisions relating to the Appellant. Counsel for the Appellant then announced that she would like to make an application, while the Chair was giving the Board's direction. Board member Mr. Bourassa and counsel for the Appellant had a verbal exchange arising from Mr. Bourassa's request that counsel for the Appellant refrain from speaking until the Chair had finished giving the Board's direction. After a brief recess, due to his desire that the Appellant Stacey Pacholek feels that she has a fair hearing, Mr. Bourassa recused himself from the panel. The hearing continued with three panel members, which constituted a quorum pursuant to the Act.

Legal Issues

[11] The legal issue on this Appeal for consideration by the Panel is as follows:

- (a) Should the Food Handling Permit Notice of Suspension and the Order of an Executive Officer Notice of Defined Closure both dated October 14, 2021, be confirmed, reversed or varied?

Jurisdiction

[12] There are no objections to the Panel's jurisdiction to hear the Appeal.

Documents/Evidence

[13] In making its decision, the Panel reviewed and considered the documents and evidence put before it, including:

- (a) written submissions of the Appellant;
- (b) written submissions of the Respondent;
- (c) written closing submissions of the Appellant;
- (d) written closing submissions of the Respondent;
- (e) oral testimony given by witnesses Stacey Pacholek, Garth Gosselin and Dave Brown at the hearing;
- (f) arguments from counsel for the Appellant and counsel for the Respondent at the merits hearing.

Submissions of the Appellant

[14] The submissions by counsel for the Appellant submitted with respect to this Appeal are summarized as follows.

- (a) The Notice of Suspension of Food Handling Permit and Notice of Defined Closure were issued by AHS based on errors of law, in that AHS grossly exceeded and abused the authority conferred by the Public Health Act. AHS breached the principles of procedural fairness and acted unreasonable in their issuance of the Orders subject to this Appeal. AHS abused their authority to inspect by basing the need for inspection upon complaints received but not verified or that were from a provincially funded organization created when Covid-19 rules were imposed.
- (b) AHS abused their jurisdiction and authority by closing the Appellant business solely due to alleged obstruction that was not proven in the Court of Queen's Bench. AHS breached their authority by undertaking an unlawful search and seizure to obtain confidential tax records of the Appellant business to use as evidence to support closure of the Appellant business.

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- (c) AHS has repeatedly breached the principles of procedural fairness by deliberately ignoring the right to legal representation in that they authorized the same inspectors, who are the primary decision-makers, evidence gatherers and witnesses in the ongoing proceedings, to continuously attend at the Appellant business and to attempt to arrange meetings without notice or attendance of their counsel.
- (d) In spite of being served twice with formal Notices to Cease and Desist from attending at the Appellant business, AHS inspectors Garth and Catherine committed trespass and refused to leave.
- (c) AHS breached the Reasonableness Standard by unreasonably utilizing its authority to Inspect pursuant to s. 59 of the Act for the purpose of upholding the AHS mandate by:
- carrying out inspections based on unverified complaints;
 - having an Informant carry out an unimpeded inspection where no contraventions were observed;
 - while trespassing, Garth and Catherine attempted to carry out a third inspection in one day even though the unverified complaints and lack of contraventions did not reasonably support this;
 - while denying access to Garth and Catherine meets the definitions of “obstruction” in the Act, the lack of contraventions that threaten public health, and the closure of the Appellant business shifts the focus of compliance from public safety to the power and authority of the AHS Health Inspectors, thus ignoring the objectives of the Act.
- (e) AHS has indicated that the Appellant was not complying with REP, however, REP does not apply to this business. It is not the job of business owners to ask customers about their mask exemptions and vaccine status when attending the Appellant business and this is a breach of Privacy Legislation.
- (f) In the absence of an inspection and without any facts supporting the presence of any contraventions, Garth and Catherine did not have “reasonable and probable grounds to believe that a nuisance exists”. In the absence of health contraventions, the decision to issue the Orders on Appeal was unreasonable and not permitted by the provisions of the PHA.

Submissions of the Respondent

[15] The submissions of the Respondent, Alberta Health Services (AHS) with respect to this Appeal are summarized as follows.

- (a) AHS submits that its closure order and suspension of the food-handling permit was justified under the circumstances given that: (i) AHS had reasonable and probable grounds to believe that a nuisance existed on the property such that a closure order was required to limit the transmission of a nuisance, in this instance, COVID-19;

and (ii) the Appellant's obstruction constituted a contravention of the *Public Health Act* warranting further action by way of an Executive Officer order.

- (b) CMOH restrictions were in place at the relevant times of the inspections, including:
- Masks must be worn in public spaces;
 - Any medical exception to masking must be proven with an exemption letter completed by a health professional; and
 - Indoor dining is prohibited unless a business verifies its patrons' vaccination status or negative COVID test result prior to serving them.
- (c) On October 6, 2021, AHS received a complaint from the public through its online complaints portal indicating that the Appellant was not verifying its patrons' vaccination status and followed up with an inspection on the business on October 8, 2021. Initially, a public health inspector student attended the premises, but no patrons were present. Garth and Catherine then followed up to complete a full inspection, however, the Pacholeks locked the front door, denying AHS entry.
- (d) Later that day, on October 8, 2021, AHS tried to re-inspect the premises again. The Pacholeks refused to allow AHS to complete its inspection and verbally confronted AHS in an aggressive manner stating that they were "trespassing" on the property. The Pacholeks forcibly removed AHS from the property.
- (e) On October 15, 2021, along with RCMP, Garth attended the premises and provided a partial closure order and food handling permit suspension to the operator. The operator was advised that: (a) their food handling permit was suspended and that they could not serve beverages until an administrative hearing was held to re-instate the food handling permit, and (b) the Closure Order required that the business close its indoor dining.
- (f) On October 21, 2021, Garth wrote to the operator and indicated that AHS was prepared to meet to discuss lifting the Closure Order and Food-Handling Permit Suspension. This invitation was rebuffed and met with correspondence from the Appellant's counsel alleging breach of the *Petty Trespass Act* and attending the premises without her being present.
- (g) On October 25, 2021, counsel for AHS responded to counsel for the Appellant indicating that it was AHS' understanding that the *Act* granted AHS the right to inspect and that the Appellant's interference with that inspection constituted a breach of s. 71 of the *Act* which prohibits anyone from obstructing with an executive officer's ability to execute their duties under the *Act*. An invitation was provided to the Appellant's counsel for her and her clients to meet with AHS' counsel and the public health team to discuss lifting the Food-Handling Permit Suspension and Closure Order. No reply was received to this invitation.

- (h) On October 26, 2021, AHS received a further complaint from the public about the business which noted that indoor dining was taking place and that the operators were not checking their patrons' vaccination status.
- (i) On October 28, 2021, AHS inspector Dave Brown conducted an inspection along with RCMP and they were not physically obstructed from inspecting. This inspection was recorded by video. During this inspection, Dave noted the following:
- AHS' placard advertising the closing of in-person dining was missing;
 - None of the staff present were masked. When a request was made to Collin Pacholek for proof of an exemption note from a physician, Mr. Pacholek declined to provide any;
 - Dave issued an oral request to Mr. Pacholek to produce receipts from the cash register to ascertain whether beverages were continuing to be sold. This request for receipts was declined by Mr. Pacholek;
 - When inquiries were made if the business would be implementing the REP, Mr. Pacholek indicated that they would not be complying with CMOH order requirements and asserted the following:
- “We respect peoples' rights, their freedoms to make their own decisions, to live their lives and not live in fear. In no way shape or form are we going to be affiliated with this propaganda and fear-mongering that's prevalent in today's society, and that includes your public health orders...”
- (j) Following the October 28, 2021 inspection, counsel for AHS wrote to Appellant's counsel and noted the following:
- That under s. 59(2)(b) of the Act, AHS can request the production of any books, records, or any other documents relevant to an inspection, and that under the circumstances, the operator's refusal to provide such records constituted a breach of the Act;
 - the operator continued to serve beverages in breach of AHS' Closure Order and Food-Handling Permit Suspension; and
 - the operator had expressly and directly stated to AHS that it had no intention of complying with CMOH restrictions.
- (k) AHS objects to the numerous instances in the Appellant's written submissions in which the Appellant refers to, and attempts to re-argue, issues and evidence that was raised before the PHAB in prior appeals, in particular appeal number 07-2021.
- (l) AHS denies that its inspections constituted an abuse of authority, but instead asserts that its inspections were warranted in light of: (a) the initial complaints AHS had received from the public regarding breaches of CMOH Orders; and (b) the powers of inspection conferred upon AHS pursuant to s. 59 of the Act. Section 59(1) reads as follows:

Inspection of place other than private dwelling

59(1) An executive officer may inspect any public place for the purpose of determine the presence of a nuisance or determining whether this Act and the regulations are being complied with.

- (m) The criteria for issuing an Order pursuant to s. 62 of the Act were met as they had reasonable and probable grounds to believe a nuisance did exist.
- (n) The Instant Inspections were not in breach of the *Petty Trespass Act* as the *Petty Trespass Act* contains in s. 2(3) an exception for any entry unto a property that arises through a right conferred by law. This right is conferred in s. 59 of the *Public Health Act*, such that the *Petty Trespass Act* is of no application to AHS' inspections under the Act.
- (o) AHS denies that Appellant's counsel has been inappropriately prevented from administrative meetings between the Operator and AHS.
- (p) AHS further denies any knowledge of a provision in the applicable legislation or case law commentary supporting a right that Appellant's counsel be present at all AHS inspections. Such an obligation would be unduly onerous and would defeat the purpose of an inspection in those scenarios where advanced notice of inspection would undermine the function of certain types of compliance inspections, such as verifying adherence to CMOH Orders which depend on the observation of specific point of time conduct.

Witness Evidence

[16] Three witnesses gave oral testimony over the course of this three-day hearing, the majority of which was used by Appellant's counsel to cross-examine the two witnesses called by AHS. Key evidence from all witnesses is summarized below.

Appellant's Evidence

[17] Counsel for the Appellant called Stacey Pacholek to testify. Her testimony is summarized as follows.

- (a) The Appellant did not have to rectify anything to receive the Food Handling Permit of July 27, 2021. Ms. Pacholek was required to attend a meeting with AHS inspectors Zaheen and Catherine regarding compliance issues to obtain the permit. The main breaches the inspectors were concerned about was that they could not inspect the Premises, due to the Appellant not allowing them to do so. There were no issues with the Appellant Business. Ms. Pacholek didn't want Catherine or Garth at the Premises. She has not obstructed other inspectors other than Garth and Catherine from entering the Premises. She described there being a hostile environment, with Garth and Catherine bullying and harassing the Appellant and being completely unreasonable whenever Garth and Catherine enter the Premises. The Appellant gave them a cease and desist notice and they don't want them

trespassing. The Appellant's daughters have had panic and anxiety attacks resulting from the inspections. They are scared and feel they have been followed.

- (b) The Appellant does not have a mask exemption, because her doctor told her that doctors will lose their license if they provide one. No AHS inspector has asked her if she has a masking exemption. The Appellant business has not received any warnings, tickets or notifications from any other administrative government body that do not relate to the CMOH Orders. The appellant business and Premises have not been suspected of any Covid cases. The Appellant business sells coffee and books. The majority of the business' revenue comes from book sales.
- (c) On October 8, 2021 someone came into the Premises and the Appellant and her family were suspicious of him. He said something like "thank you" and left the building. The Appellant's daughter believed this man took pictures of her, so Collin Pacholek followed him, and saw him talking to Garth and Catherine. Later that day, Catherine and another man, then Garth, came into the Premises. The Appellant's daughters were yelling a lot, telling the inspectors to leave and that they were trespassing. Catherine said they get to be there. The Appellant then came out to the front portion of the Premises and she saw that Garth was taking steps her daughter, so the Appellant grabbed her daughter and told the inspectors to get out. Her husband then appeared and calmly told the inspectors they were trespassing and needed to leave or he would call the police. "And it was so fast that he opened the door. And out Catherine went." Collin told Garth he had to leave and Garth said he would not, but finally he left the Premises. The other man then left the Premises.
- (d) Whenever the police or the AHS inspectors attend the Premises, people don't want to come in. This has financially affected the Appellant business.

Respondent's Evidence

[18] AHS called two witnesses: Dave Brown and Garth Gosselin. Their testimony is summarized as follows.

[19] Garth Gosselin gave the following testimony.

- (a) He has been a manager with Environmental and Public Health, Alberta Health Services in Central Zone for approximately 12 years. He supervises the staff in the southern part of Central Zone and also oversees the communicable disease program. He has been a public health inspector for approximately 25 years. On October 8, 2021 he attended the Premises in response to a complaint. AHS had attempted to not visit the Premises in an effort to prevent further aggravation, however, they are required by policy to follow up on and verify complaints. Complaints from small towns are generally anonymous, and most of those complaints prove to be valid.
- (b) On October 8, 2021 the CMOH Orders had been rescinded. At that time, operators could choose to follow CMOH Order 44 or Order 45. Order 44 restricted indoor dining completely and indoor masking remained a requirement, but it would allow

a food-serving business to operate for takeout without the production of a vaccine passport. If they chose to follow Order 45, indoor dining would be allowed, a vaccine passport and some identification would have to be produced, and masking was still required. Seating could be allowed. The complaint alleged that people were dining inside the Premises, no Restrictions Exemption Program (“REP”) was being utilized, and there was no signage encouraging masking. It appeared that both Orders were potentially being violated.

- (c) Garth and Catherine sent a student public health inspector (“Kevin”) to look around the Premises in the hopes of not causing conflict, and he confirmed that the Premises contained unmasked patrons. AHS was not able to verify the complaint, so they decided to do a follow-up visit. Collin Pacholek followed Kevin back to the Manor parking lot, where Garth and Catherine were, and asked if they got what they needed from Kevin’s visit to the Premises. Garth suggested that they did not, and they told Mr. Pacholek that they could discuss it at that time if he wanted to, but Mr. Pacholek chose not to. Garth had asked Kevin if he had taken any photos, and Kevin confirmed he had not. A few minutes later Garth, Catherine and Kevin attended the Premises because they had not yet verified the complaint. The sign to the Premises indicated it was open, however, it was clear when they arrived and knocked on the door that the Appellant had no interest in letting them inside, so they left.
- (d) They tried to enter the Premises again, approximately one hour later. The sign indicated the Premises was open and the door was unlocked, so they entered. Immediately upon entering, two or three of the Appellant’s daughters were screaming at them to get out and that they were trespassing. Garth gave them some time to voice their concerns in the hope it would de-escalate the situation, and he tried to explain that AHS had the right to inspect the Premises. He put a copy of the Act on a table, as Stacey Pacholek was not interested in accepting it. He noticed that Ms. Pacholek was carrying a baseball bat. Shortly after that Garth heard Catherine say something like “get your hands off me”. Mr. Pacholek grabbed Catherine and pulled and pushed her out the door fairly aggressively. He then did the same to Garth and pushed him out the door. Although the AHS inspectors could not verify the complaint due to above described interaction, they did notice that the Pacholek family was not masking, as was shown in a video played in the hearing.
- (e) After they left the Premises, the AHS inspectors decided they had to issue the Food Handling Permit Suspension and the Notice of Defined Closure Order, which was fairly standard practice across Alberta during situations of non-compliance with the CMOH Orders. The Closure Order was issued on the basis of ongoing non-compliance with the CMOH Orders and obstructing an executive officer, and only applied to closing the Premises to food and beverage services, and not to close the bookstore. The Food Handling Permit Suspension contained three criteria to be met for the suspension to be lifted: 1) compliance with the Executive Officer’s Order dated October 14, 2021 to the Executive Officer’s satisfaction; 2) compliance with all relevant CMOH Orders; and 3) to allow unobstructed access to an Executive Officer to conduct an inspection. The bottom of the suspension also referred to an

invitation for the operator to attend an administrative meeting at a neutral site, to give the operator the opportunity to get back the permit.

- (f) On October 15, 2021 Garth attended the Premises once again, to post a placard closure template on the Appellant business as required by the Act, to effect personal service of the Order, and to take back the suspended permit, which remains AHS property. The Appellant did not allow AHS to enter the Premises on that day, however, they allowed the RCMP officer, who accompanied AHS, to enter and take the permit. Garth's primary dealings that day were with Mr. Pacholek, to make it clear that the food permit was suspended and therefore the Appellant business could not serve any food until they obtained a permit, and to reaffirm the path to getting back the permit required the operator to meet with AHS and to show compliance. Mr. Pacholek clearly stated to Garth at that time that he had no intention of complying, they had never complied with the CMOH Orders to date, and he would not comply in the future. The operators were all unmasked within two metres of the AHS inspectors and the RCMP, and they did not provide documents to confirm they had obtained masking exemptions. CMOH Orders 44 and 45 required masking, even if the operators had implemented the REP. AHS inspectors did not see any signage requesting masking or any indication the operators were participating in the REP.
- (g) Garth believes he sent the operators two emails after the October 15, 2021 interaction. He may have sent another email, possibly on October 20, 2021 asking Ms. Pacholek if she intended to participate in the meeting. Ms. Pacholek indicated she did not intend to attend the meeting.
- (h) Grant found the Premises to be "technically out of scope for the Restrictions Exemption Program", which means the Premises needed to create a separation from the bookstore and the dining area. This had not been done, as people had to walk through the bookstore to get to the coffee area. For the operators to be in scope, they could have done something like push their dining area off to one side so that they could check REP compliance before patrons sat down.
- (i) On cross-examination, Garth testified that inspectors can demand an inspection at all reasonable times. AHS inspectors might be able to seize the financial records from book sales if they were linked to a premise that AHS had an interest in. The Act allows inspectors to enter a property if someone tells them they are not welcome. Garth would only feel obligated to leave a property if his work was concluded. The Act gives inspectors right of entry to a public place. AHS' position during the Covid pandemic has been that vaccination status or the contents of a vaccine passport are not considered personal information. Garth believes he was obstructed from inspecting the Premises on October 8, 2021 because they're angry, they don't like CMOH Orders, they don't believe in Covid and they don't like following rules.
- (j) AHS has inspected or had interactions with the Appellant business since it opened, with the first interaction occurring on January 14, 2021. Garth was present for

approximately eight of those inspections. Enforcements are based on whether an operator meets the requirements of the order and the response of the operator. The operators in this appeal needed to either cease indoor dining or follow CMOH Order 45. Garth did not witness any indoor dining at the Premises, but AHS received three complaints of indoor dining there. The operators pose blatant safety concerns due to a lack of masking, a lack of checking vaccine passports, indoor dining and not following the CMOH Orders. Enforcement is based on a number of factors, including the situation, how the operators respond to AHS' requests, and the seriousness or continuance of the offence. If they comply, AHS stops enforcement, and if they don't comply, enforcement continues. Due to the operator's ongoing infractions, AHS continued to inspect the Premises pursuant to their right of entry under the Act.

- (k) AHS has sent six different inspectors to the Premises. AHS' standard practice is to have a manager support the inspector. Catherine was the only inspector in Sylvan Lake, which is close to the location of the Appellant business. AHS' general practice is for the area inspector to handle matters in their area. A lot of inspectors were hours away from the location of the Appellant business, and AHS did not have any concerns about Catherine's past performance. Garth supports AHS staff when they need it, and as a manager he has an obligation to protect his staff. He decided to not immediately leave the Premises when asked. His intention was to accomplish the business of the day, that he and his inspectors felt could be done within a few minutes, which was to verify the complaint. The first engagement Garth had with the Appellant business was good. Things quickly deteriorated as soon as AHS requested compliance. AHS generally does not change the inspector unless their safety is at risk or if they did something inappropriate, which did not happen in this case. No other inspectors have been obstructed from inspecting the Appellant business. However, inspectors Brown and Nanji were also involved in altercations with the Appellant business.
- (l) AHS did not have concerns about the Pacholek family not socially distancing from one another. Their concern was that the Pacholek family not distancing from the inspectors and people who are not in their family. This constituted non-compliance with the CMOH Orders. Garth said instances of obstruction is rare, and this was his first case of obstruction. AHS normally tries to find the quickest and easiest path to compliance, and they normally do not get anywhere near where they have gone with the Pacholeks. The obstruction in this case by the Appellant includes AHS inspectors being locked out and not being allowed to inspect the Premises, and being forcibly removed from the Premises. Also, regardless of whether Collin Pacholek or the other operators had a masking exemption, which they did not produce, they would be in violation of the Order for being unmasked indoors. AHS did not apply to the Court of Queen's Bench for a remedy, because it is an escalation tool that AHS did not feel was the right tool at the time. AHS had hoped that orders and permit restrictions would rectify the Appellant' non-compliance. During the interactions at the Premises, Garth wore a mask and was not within two metres of anyone. It is the operators' responsibility to avoid contravening the Orders.

- (m) When asked numerous times by Appellant’s counsel why he and Catherine continued to inspect the Premises rather than any of the approximately 29 AHS inspectors, Garth reiterated that AHS did not feel that they were physically at risk, and AHS had no concerns about the actions of AHS or Catherine, which he stated were logical actions. AHS decided to maintain routine protocol, which was to let the inspector handle things unless there was reason to believe they were at risk or had previously acted inappropriately, but he stated that neither of those factors existed. Operators do not get to choose their inspector just because they don’t like them. AHS tries to repair communication by engaging with the operators. He believes RCMP accompanied AHS to the Premises during inspections on October 15 and 29, 2021 to get the job done. As part of the path to enable the operators to get back their permit, AHS had offered the operators the opportunity to meet on October 22, 2021, but the operators did not agree to meet. Most operators figure out what they need to do to get their permit back by making the appropriate changes.
- (n) When Garth entered the Premises on October 8, 2021, Stacey Pacholek appeared and held a baseball bat in her hand. Garth was intimidated by this, but he was not threatened with it. This prompted AHS to return to the Premises on October 15, 2021 with the RCMP. He remembered a lot of screaming, which he believes was from a couple of the operators’ daughters. Collin Pacholek was upset but was interacting reasonably with the inspectors. Garth tried to listen and “wait it out” to allow the Pacholeks to calm down, but that was unsuccessful. When asked if he was harmed by the interaction with the Pacholeks on October 8, 2021, Garth said he was emotionally harmed and had to go outside the Premises and catch his breath around the corner, something he had never had to do previously in his career. Garth served the Order on the Premises because he conducted the inspection, had the knowledge about circumstances, and wrote the Orders based on his inspection. He served the Order by email, and he posted it at the Premise as required by the Act, with the RCMP present to ensure there was no physical risk.
- (o) The October 15, 2021 inspection report stated that the operators were advised that continued non-compliance with the Closure Order and permit suspension would necessitate further legal action, which could include prosecution or a Court of Queen’s Bench action. Garth disagreed with Appellant counsel’s question that he had obtained a remedy without bringing court proceedings by virtue of closing the Appellant business, because AHS had not achieved compliance. Prosecution and court action are tools available to AHS. The standard practice of AHS is to look at each situation for its merits and history and try to apply the best tool to the situation. Usually, they try to apply a tool that has the least negative impact on the operator but still gets to the end point of compliance. Sometimes it involves an inspection report, and other times a letter, but usually it is an order.
- (p) The Appellant business must comply with the REP if they choose to offer in-person dining. They would not be subject to the REP if they chose to only offer takeout. AHS could not determine if the Appellant business was offering in-person dining in the Premises because they were obstructed from conducting the inspection. The

way the operators could remedy the contraventions was to wear a mask, restrict their food and beverage sales to takeout only, or to check vaccine passports.

- (q) Closing the Appellant business was reasonable, because of ongoing non-compliance of the CMOH Orders and ongoing complaints.
- (r) On re-examination, Garth testified that the operators could have become compliant by operating only as a takeout service, which would have only required them to wear masks or keep a two metre distance and not allow people to sit down and drink coffee inside the Premises. If they chose to have in-person dining, they would have to check for vaccination passports of people that chose to sit down. Because the Appellant business could be considered a quick-serve restaurant, they could ask patrons at the counter whether they are dining in or taking out, and if they are dining in, then and only then would have to ask for proof of vaccination. The other acceptable remedies would be a recent negative Covid test or a doctor's note saying they are exempt from the REP or are unable to be vaccinated. These are the same requirements that are placed on thousands of similar operators across the province.
- (s) AHS had decided to stay away from the Premises unless they really had to go back, and they would wait to receive a complaint before they went back. AHS assumed that there would be non-compliance as soon as the new orders were issued. However, based on the history with the Appellant business, AHS wanted to leave that alone as long as they could. When AHS received the first complaint on October 6, 2021, and from a visit they had on October 2, they decided they had no choice but to respond to the complaint, which they did.

[20] Dave Brown gave the following testimony.

- (a) He has been a Director of Environmental Public Health for Central Zone for approximately 12 to 13 years. He first inspected the Premises on October 28, 2021 with an RCMP officer to determine if the operators were in compliance with the CMOH Orders in effect at the time, and to verify himself to bring timely observations to any changes since the previous inspection. He reviewed three further complaints with Catherine that AHS had received just before the October 28 inspection. The three complaints were similar in nature, in that nobody was masking indoors, they were not compliant with the order to close the Premises or cease selling food, and when food service was being provided, people were sitting in the Premises without proof of vaccination being determined. The orders issued by the executive officer were to cease selling food until the operators complied with the CMOH Orders that were in place at the time to control Covid.
- (b) The Closure Order required that the public were to be limited from entering the Premises, and the Appellant business was to cease all food service in the facility. People were entering the Premises without being masked appropriately. AHS

wanted to see that all provisions within the CMOH Orders were complied with by the people working at the Premises and all visitors or patrons.

- (c) On October 28, 2021 AHS wanted to inspect the Premises 1) to verify that the Premises was placarded as required by the Act, indicating that the Premises had to cease operations; 2) to make observations about people consuming food indoors and whether vaccination status was determined; and 3) to observe whether staff or patrons were wearing a mask while in the Premises. Patrons could remove their mask if they were consuming food or liquid. He observed that the placard had been removed. During that inspection he asked a staff member named Dana if Collin or Stacey Pacholek were at the Premises, and Collin presented himself. Dave introduced himself and provided his identification. He then began the interview by asking Collin Pacholek about mask provisions and vaccination status, and he was attempting to determine if the Appellant business was still selling food.
- (d) There was no obstruction at that time. Dave did not determine if any other staff members were present and working at the time. Once he determined who Dana was and her function within the Premises, he determined that Collin Pacholek was the legal owner of the Premises. This met Dave's legal requirement to see someone in care and control of the Premises, and he did not inquire about what other staff were in the Premises. Dave advised Dana and Collin Pacholek that he was at the Premises to determine why the placard was missing from the front door, and he noted that people were being served food. He asked Collin Pacholek why people were not masked and asked Collin for his mask exemption. He disclosed to the Appellant business owners that he was videotaping the entire inspection with his phone, and then he conducted the inspection and requested specific records, receipts or till receipts to determine if the Appellant business was providing food services. Upon entering the Premises he also noted evidence of indoor dining in breach of the Closure Order and food handling permit suspension, including two men drinking coffees in containers that appeared to be Styrofoam-type vessels that were being sold at the Premises, and some school-age children consuming their lunches and eating food at the other side of the room.
- (e) Dave took the following steps in connection with the inspection. At the RCMP detachment he informed the officer the nature of the business and visit to the Premises he would be conducting, invited the officer to attend the Premises with him, and that he hoped to find the Premises in compliance. Dave met Dana at the door, introduced himself, and asked for Collin or Stacey Pacholek. Collin came from his private office and introduced himself and they had a conversation. Dave brought legislation and a replacement placard. He interviewed Collin, discussed the legal requirements, and went through some sections of the Act, including the provisions to provide records upon demand. He discussed the provisions of the CMOH Orders, such as masking or the requirement to produce a mask exemption upon demand, and the elements around the Orders that would have prohibited food sales. He offered to help Collin orient himself with the legislation and then he asked to inspect the Premises, which he agreed to after asking the reason for the inspection,

to which Dave replied he wanted to determine if the Appellant business was selling food.

- (f) Dave then inspected the Premises, which mostly consisted of looking at the front customer service area and the back area where food storage and cleanup of specific items was being done. The back area contained some books and some refrigeration. When Dave concluded the inspection he had the RCMP officer help him with the placard. During that time he noted that customers bought some coffees from the till, and one of the customers was not asked about his vaccination status, which proved that the Appellant business was selling food. Collin mentioned that they had no intention at the time to comply with the CMOH Orders, and that he did not intend to contribute to the fear mongering he felt the CMOH Orders were intended for, and he felt that the CMOH Orders infringed the *Charter of Rights and Freedoms* and the *Bill of Rights*. Collin made it clear that he had no intention of asking for vaccination status, he would not require anyone to wear a mask inside the Premises, and he was going to continue selling food even though he was prohibited from doing so.
- (g) Collin declined Dave's request to have the till receipts and a copy of the menu, and that he would not provide them without a subpoena and that the only menu in the Premises was on the wall behind the till. He requested the till receipts 1) to determine if the Appellant business had sold food before Dave arrived; 2) because he did not know at the time if people brought the Styrofoam cups into the Premises or bought them there; and 3) the till receipts would be a physical record that would indicate that the Appellant business was operating fully and was not compliant with the executive officer Orders. The RCMP officer was only at the Premises to keep the peace and to ensure that the conduct of Dave and the owner/operator was appropriate.
- (h) Dave documented the following in his inspection report: 1) AHS had received three complaints, which concerned staff not wearing masks, no REP and non-compliance with the Closure Order; 2) the placard was missing from the front door and the owner admitted that it had been removed; 3) two customers were seated with disposable coffee cups; 4) when asked if the Appellant business sold the coffee, and what Collin would do if a person ordered coffee and sat down, Collin indicated he would not make any extemporaneous statements; 5) no staff, including the owner, wore masks in the Premises; 6) Dave informed Collin that any persons occupying a public place needed to wear a mask, and Dave asked him for his mask exemption note, which Collin declined to provide; 7) Dave observed two male patrons ordering coffees and that they did not consume it in the Premises; 8) while re-placarding the door, he observed two young people seated in the Premises and eating their lunch; 9) Dave asked Collin if he was checking people for their vaccination status, and Collin's daughter Dana suggested it was none of his business, and Collin confirmed he would not participate with the CMOH Order requirements or the fear mongering he felt AHS was promoting.

- (i) When Dana repeatedly interrupted Dave during the inspection, Dave responded that the adults were talking. He acknowledged that this comment was not as polite as he would have liked and he was regretful because it obviously elevated the situation in the Premises and probably left a bad taste in everyone's mouth. He did not say "shut up, little girl" as asserted by Appellant's counsel.
- (j) On cross-examination, Dave testified that Garth's and Catherine's judgment is always reviewed and challenged by AHS legal counsel when AHS reviews enforcement files. AHS executive officers have regular and detailed conversations with their legal counsel when they are issuing orders. Due to the Appellant business' demonstrated non-compliance with the CMOH Order, AHS has been very careful with their legal counsel to ensure that their processes were as legally sound as possible. AHS inspectors are highly competent, because of their training, experience and familiarity with their ability to conduct inspections and the scope of investigations.
- (k) Section 62 of the Act allows an executive officer to issue a Closure Order. AHS can close a business based on government guidelines, which are enforceable when they are published within the Act or the regulations and referenced as such. Executive officers have a broad discretion to make judgment calls about what constitutes a nuisance and whether or not a nuisance could or might become a danger to the public health. Where an immediate risk to public health exists, the Act allows AHS to effect quick resolution, such as going to Court of Queen's Bench or issuing a warning and having an administrative hearing to discuss the non-compliant concerns. A number of mechanisms are designed to engage the public and to assess and manage risk. AHS cannot inspect a private place without express permission of the Court of Queen's Bench. However, the law gives the AHS the right to inspect a public place at any reasonable time. The Act allows AHS to seize food, water or other specific articles to determine risk, and to seize, copy and use till receipts for investigative purposes. Collin Pacholek properly identified to AHS that he declined to provide the till receipts. Requesting the till receipts was the farthest Dave was prepared to go; he would not have considered it reasonable to demand of take those records at the time. When an operator refuses to provide records, there are other mechanisms available for AHS to get their desired outcome. AHS staff are respectful most of the time, and they strive to achieve their values of compassion, accountability, respect, excellence and safety.
- (l) When AHS inspects a public place and they are asked to leave, there has to be a very good reason for them to stay. AHS tries to treat people with respect by giving them some space if they need it, and it also depends if whether this their first or second visit. AHS inspectors are not required to leave a public place when a business tells them they must leave. When asked, Dave testified that if there is a conflict between the *Trespass Act* and the Act, the Act contains a paramountcy clause. Whether an executive officer leaves a public place if demanded by an operator is determined by the outcomes AHS is trying to achieve. Dave again confirmed that the Act allows executive officers to inspect a public place at any reasonable time, and their inspection activity is governed by a judgment call of when

and how they enter the facility. He defines obstruction as when executive officers are inhibited from carrying out their duties, including gathering evidence, observing compliant and non-compliant conditions, and to gather evidence such as samples, by persons that are connected to or have an interest in the facility, or those persons are being aggressive.

- (m) After reading the October 8, 2021 that was posed to him, Dave confirmed that what occurred at the Premises on October 8, 2021 constitutes obstruction and that AHS can unilaterally close a business based on what happened that day. AHS staff were inhibited from carrying out their inspection on that date, including not being able to make observations and to collect evidence and information. Section 61 of the Act suggests that the executive officer may apply to Court of Queen's Bench for an order directing an owner to do or refrain from doing anything the court considers necessary to enable the executive officer to exercise their powers and the court may order accordingly. Section 62 allows an executive officer to make an order requiring a business to close. Dave did not send different inspectors in place of Garth and Catherine to the Premises on October 28, 2021 because they were aware of the relationships in the Premises and the history of what was previously said and done and the operators' continued lack of compliance with the Act and the regulations. Dave described the Pacholeks as "rational folks" and it was incredibly unusual for the Pacholeks to treat AHS staff so roughly on October 8, 2021. Dave was aware of the longstanding concerns AHS had about non-compliance with the CMOH Orders and executive officer orders when they were used to suspend, and subsequently cancel, the food handling permit.
- (n) It is not an offence to place a sign on the window of a business stating that people with mask exemptions are welcome, and it is not a legitimate reason to close a business. AHS requests that only their signage gets placed on business establishment windows for a number of reasons. CMOH orders are complex legal instruments that are very difficult for the public to understand and digest. AHS' messaging, by working with business owners and the public, is imperative to ensure government objectives can be achieved and that AHS messaging aligns with those objectives. AHS also wants to prevent unnecessary complaints where messaging may produce a reaction that is not required.
- (o) Dave did not ask customers if they had mask exemptions, because it is not his job. His role as an executive officer is to work with businesses. When Dave asked Collin Pacholek whether his procedures had included asking customers for a vaccination record or QR code, "his response was very clearly no". When Dave inspects businesses, he makes observations and asks the operator whether or not an REP was being followed for the unmasked people Dave noted. Dave's purpose was to have discussions with the operator and inquire whether he was illegally serving food. Collin Pacholek did not provide information in response to Dave's inquiry. Although Dave did not see the operators serving food, he did observe coffee being ordered, a coffee cup that went across the counter, the customer acknowledging coffee was received by saying thanks for the coffee as he left the Premises, and the manager, Dana confirming coffee was provided by saying you're welcome. The Act

empowers AHS to take records, including financial records, from a business to suggest they were illegally serving food, and to make copies then return them to the business. In this case, the Appellant business was selling food even though its food handling permit was suspended.

- (p) When asked if he relies on statistics and numbers in his job, Dave testified that he reviews all enforcement matters. The information he considers relevant is the legislation, compliance to that legislation, the evidence of non-compliance to that legislation, and the efforts to bring operators or owners into compliance. AHS looks at all of Alberta and it does its best to ensure a consistent environment for all businesses that are subject to specific laws such as the Act. When attempting to ensure a consistent regulatory environment provincially, businesses that do comply with the law, executive officer orders and the prohibition of sale of food, it is non-compliance that has a higher risk factor. AHS' level of risk is based on injury that could occur and compliance to provincial legislation.
- (q) When Dave asked Collin Pacholek specific questions about their activity or store policies, including whether the Appellant business was serving food illegally and if the Appellant business had a mask exemption or if the REP was being adhered to, Collin declined to answer those questions. Business owners are responsible for operating within the law. This is an example of obstruction when AHS was trying to gather information about whether the Appellant was compliant with the legislation. AHS has the authority to close a business if it obstructs AHS from carrying out an inspection. AHS has closed a business without health violations noted when the business lacks a food handling permit. The Appellant business was closed because 1) it did not comply with CMOH Orders; 2) the operators did not provide AHS with evidence that would allow it to assess the public risk; 3) the Appellant business had a suspended food handling permit; and 4) the Appellant business did not allow Garth and Catherine to inspect the Premises.

[21] On re-examination, Dave testified that he would hope that employers would look after its employees, and one element that AHS has seen is that employees who are unable to wear a mask are given jobs where they are behind a barrier and allows some protections specific to their health. Also, the other element AHS has seen is to maintain social distancing that is part of that environment so that the propensity for the virus to affect their health is minimized as much as possible. If an employee is mask-exempt and a customer enters the store, the employee would either go behind a plexiglass screen or adhere to the social distancing requirements.

Analysis and Reasons

[22] The Board considered the following applicable legislation.

Section 5(11) of the Act gives the Board the authority to confirm, reverse or vary the decision of the regional health authority.

Section 59(1) of the Act states: An executive officer may inspect any public place for the purpose of determining the presence of a nuisance or determining whether this Act and the regulations are being complied with.

Section 59(2)(b) of the Act states: An executive officer making an inspection under subsection (1) may require the production of any books, records or other documents that are relevant to the purpose of the inspection and examine them, make copies of them or remove them temporarily for the purpose of making copies.

Section 59(2)(e) of the Act states: An executive officer making an inspection under subsection (1) may perform tests, take photographs and make recordings in respect of the public place.

Section 62(1) of the Act states: An executive officer may issue a written order in accordance with this section if the executive officer has reasonable and probable grounds to believe that a nuisance exists in or on the public place...or that the place or owner of the place or any other person is in contravention of this Act or the regulations.

Section 62(2) of the Act states: An order shall be served on the person to whom it is directed and shall set out the reasons it was made, what the person is required to do and the time within which it must be done.

Section 62(4) of the Act states: An order may include, but is not limited to, provisions for the following: (c) requiring the closure of the place or any part of it; and (g) prohibiting or regulating the selling, offering for sale, supplying, distributing, displaying, manufacturing, preparing, preserving, processing, packaging, serving, storing, transporting or handling of any food or thing in, on, to or from the place.

Section 62(7) of the Act states: Where an order is issued under subsection (4)(a), (b) or (c), the executive officer shall ensure that a copy of the order, or in the case of an oral order, a notice of the requirements of the order, is posted in a conspicuous place at, on or near the public place or private place to which the order relates.

1(1)(ee) of the Act defines “nuisance” as a condition that is or that might become injurious or dangerous to the public health, or that might hinder in any manner the prevention or suppression of disease.

[23] In order for the Board to confirm the Orders, the evidence must show that when the Orders were issued, AHS had reasonable and probable grounds to believe that a nuisance existed on the Premises, or that there was a contravention of the Act or the regulations.

[24] Although the testimony given by Ms. Pacholek conflicted at times with the testimony of Garth Gosselin and Dave Brown, all three witnesses testified that some AHS inspectors were not allowed to inspect the Premises because the Appellant would not allow them to do so. The Board notes that section 71 of the Act expressly prohibits the obstruction of AHS inspectors in carrying out their statutory right to inspect the Premises:

71 No person shall obstruct, molest, hinder or interfere with a person in the execution of any duty imposed or in the exercise of any power conferred on the person by this Act or the regulations.

[25] The Board finds that the Appellant obstructed AHS inspectors from inspecting the Premises on October 8, 2021, and that the Appellant's obstruction prevented AHS inspectors from confirming whether the Appellant operators were taking all preventative actions required by the CMOH Orders to prevent the spread of a nuisance, that being Covid-19, contrary to section 71 of the Act. The Board also finds that Garth Gosselin was a credible and reliable witness. Despite Appellant counsel's repeated questioning during cross-examination, Garth's testimony remained consistent throughout his direct examination, cross-examination and re-examination. For example: 1) he gave clear and consistent answers several times regarding why he did not send different inspectors other than himself and Catherine to inspect the Premises; 2) he provided examples of non-compliance by the Appellant operators that Garth observed, including obstructing AHS from inspecting the Premises; failing to wear masks in an indoor place as required by the CMOH Order; failing to stay two metres away from Garth and other AHS executive officers; admission of the Appellant that they have not and will not comply with CMOH Orders; 3) the Act gives an executive officer the legal authority to inspect any public place for the purpose of determining the presence of a nuisance and/or if an owner is in contravention of the Act or the regulations; AHS is legally required to verify complaints, and they must inspect public places to verify them; 4) AHS invited the operators to meet with them for the purpose of helping the operators become compliant. The Board also found Dave Brown was a credible and reliable witness. Despite Appellant counsel's repeated questioning during cross-examination, Dave's testimony remained consistent during his direct examination, cross-examination and re-examination. For example, he consistently stated that he did not ask customers about their vaccination status because it was not his job.

[26] Appellant's counsel stated numerous times during the hearing, including while cross-examining the AHS witnesses, that Stacey Pacholek is mask exempt. Stacey Pacholek also testified that she does not have a mask exemption because her doctor told her that doctors will lose their license if they provide a note indicating that a person has a mask exemption. No evidence was provided to support these statements, and accordingly the Board will not make a finding of fact that she is mask-exempt.

[27] After carefully considering the parties' submissions, arguments and evidence, the Board finds that AHS has proven on a balance of probabilities that they were legally authorized to enter and inspect the Premises, and that they properly issued the Orders because they had reasonable and probable grounds to believe that a nuisance existed, or that a public place (the Premises), and the Appellant owner of the Premises, failed to comply with the CMOH orders in effect at the time and thereby created a nuisance condition. The Board also finds that the Appellants obstructed AHS inspectors from carrying out inspections of the Premises that the Act authorizes and empowers them to do. AHS has provided examples of obstruction by the Appellants, including: 1) on at least one occasion the Appellants had no intention of allowing AHS inspectors to enter the Premises during business hours; 2) the Appellants became aggressive toward the AHS inspectors, in that Collin Pacholek physically and forcibly removed Catherine from the Premises; 3) the Appellants, and in particular Collin Pacholek, refused to provide information requested by AHS inspectors that would assist the inspectors in determining if a nuisance existed and whether the Appellants were in compliance with the CMOH Orders, the Act and regulations; 4) Collin Pacholek clearly stated

to Garth that he had no intention of complying with the CMOH Orders, the Appellants had never complied with the CMOH Orders to date, and he would not comply in the future.

[28] Based on the aforementioned findings, the Board confirms the Orders as written.

Original Signed
Kevin Kelly, Chair
On behalf of the Hearing Panel of the
Public Health Appeal Board

Date: April 10, 2023