Appeal No.: 05-2018

PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE *PUBLIC HEALTH ACT*
R.S.A. 2000 c. P-37 AND THE REGULATIONS

AND IN THE MATTER OF THE APPEAL OF ORLANDO OLIVERIO
OF AN ORDER OF AN EXECUTIVE OFFICER ISSUED BY
ALBERTA HEALTH SERVICES ZONE 3 DATED MARCH 21, 2018

AND IN THE MATTER OF THE AN APPLICATION BY THE
RESPONDENT TO HAVE THE APPEAL DISMISSED ON THE
BASIS THAT IT IS MOOT

DECISION OF THE BOARD

Written Submissions

This is an application by the Respondent, Alberta Health Services ("AHS"), to have the within appeal (the "Appeal") dismissed on the basis that the order of an AHS executive officer has been rescinded, therefore making the appeal of the said order moot.

Rather than hold a hearing of this application, the Board requested written submissions from the parties. The Board met to consider those submissions.

Submissions were provided by:

Ms. Sarah Louw, Litigation Legal Counsel for the Respondent, AHS; and

Mr. Orlando Oliverio, Appellant

Date of Board Meeting

May 16, 2018, 10:00 AM via teleconference.

Sitting for the Public Health Appeal Board (the "Board"):

Denis Lefebvre, Chair
Wendy Lickacz, Vice-chair
David Rolfe, Member, and
Barb Rocchio, Member

Short Decision of the Board

[1] The Application is allowed. The Appeal will not be heard for the reasons provided below.

Background

[2] The Appellant is the owner (the "Owner" or the "Appellant") of the property located in Mountain View County, Alberta and legally described as:

Lot 4
Block 1
Plan 1013642

(the "Premises")

[3] On March 20, 2018, AHS Executive Officer, Kelly Bauer (the "EO") inspected the Premises following a complaint from the tenant.

[4] Following the inspection, the EO issued an Order. The Order directed that:

(a) The occupants vacate the Premises on or before March 31, 2018;

(b) The Owner immediately undertake and diligently pursue the completion of the following work (the "Work") in and about the Premises, namely:

i. The wood-burning stove must be inspected by a Safety Code Officer to ensure the unit is correctly installed, is code compliant and does not present a fire hazard. A certified professional must do any work that is done to the unit.

ii. A certified electrician must complete the electrical system and inspected by a Safety Code Officer.

iii. All work to repair the sewage system must meet the requirements of the Alberta Building Code as we as the Alberta Private Sewage Systems Standards of Practice. Once completed, a Safety Code Officer must inspect the sewage system.

iv. Ensure the home has a potable water supply with sufficient volume, pressure and temperature. Any work required to repair the current system must be completed by a certified plumber. Note that water samples were submitted for microbial and routine chemical analysis on March 21, 2018 to ensure the water supply in the home is potable.

v. Ensure the furnace is in proper working condition and that all duct work, vents and covers are properly installed. All work to repair the system must be completed by a certified HVAC professional and must meet the requirements of the Alberta Building Code.

vi. Ensure all areas where there is water-damaged drywall are properly remediated and repaired. Ensure all damaged walls and ceilings are properly repaired.

vii. Ensure all surfaces in the washrooms including floors, walls and ceilings are in good repair, smooth, easy to clean and impermeable to moisture. All junctions must be properly caulked to prevent moisture damage and to allow for easy cleaning of the areas. All primed MDF trim must be painted with a product in that is designed for high moisture applications.

viii. Ensure the junction between the counter top and backsplash in the kitchen is properly caulked to prevent water damage and to ensure the area can be easily cleaned.

ix. Ensure the north side exterior door is repaired so that it can be easily opened and locked. IN addition, ensure weather stripping is installed to seal gaps around the door with it is closed.

x. Ensure all operable windows have fitted, intact screens in place.

(c) Until such time as the Work is completed to the satisfaction of an Executive Officer of Alberta Health Services, the above noted premises shall remain vacant and secure from unauthorized entry.

[5] On April 5, 2018, the Appellant submitted the Appeal.

[6] On April 26, 2018, the EO rescinded the Order, as the Appellant had complied with the Order.

[7] On May 7, 2018, the Respondent made an application to have the Appeal dismissed on the basis that it is moot.

Issues

[8] The Issues for the Board's consideration are as follows:

(a) Whether the Appeal is moot; and

(b) Whether the Board should hear the Appeal.

Submissions of the Respondent

[9] In support of its position, AHS references *Borowski v. Canada* (AG), [1989] 1 S.C.R. 342 ("*Borowski*"). In *Boroswki*, the SCC devised a two-step test to help determine whether a matter should be dismissed as a result of being moot:

(a) Is there a live controversy?

(b) If no, should the decision maker nonetheless exercise its discretion to hear the case?

[10] In determining whether to exercise the discretion to hear a case in which no live controversy exists, the court must consider the extent to which the following three factors are Present:

(a) The requirements of an adversarial context;

(b) Issues of judicial economy and the need to ration scarce resources, including consideration of:

i. Whether the court's decision will have some practical effect on the rights of the parties, despite the matter being moot;

ii. Whether the issue raised is of a recurring nature, but of brief duration, that would otherwise evade review; and

(c) That the Court should not intrude on the legislative branch.

[11] The Respondent argues that in considering part one of the *Borowski* test, the PHAB has previously found that where the Executive Officer's order has been rescinded, there is no longer a live controversy between the parties (See PHAB Appeal 02-2016). In this case, as it was in Appeal 02-2016, the Order has been rescinded. As such, a live controversy between the parties no longer exists and the first part of the *Borowski* test is satisfied.

[12] As there is no longer a live controversy between the parties, it is necessary to consider the second part of the test. AHS submits that the factors in this case indicate that the PHAB ought not to exercise discretion to hear this mood appeal on the following basis:

(a) There is no adversarial context between the parties, in that the issue with the appeals centers on whether there was sewage (black water) exiting the premises, which required the premises to be vacated. However, there is no referencing the order to black water; it merely references the presence of gray water;

(b) It is not in the interest of judicial economy because:

i. There is no practical effect of the appeal, as the board can neither confirm, reverse, or a very a rescinded order;

ii. The Appellant is unlikely to have any further dealings with AHS in relations to the premises, as the appellate has indicated an intention to sell the premises and has further indicated that the premises will remain vacant until sold;

iii. The issue on appeal is one that is fact specific to the premises;

iv. AHS had indicated to the Appellant that it was flexible in terms of timeline for complying with the order such that compliance interview sending of the Order could have occurred after the appeal hearing. It is argued, therefore, that the appellant chose to comply with the Order prior to the Appeal Hearing.

Submissions of the Appellant

[13] The essence of the Appellant's appeal is based on alleged unsubstantiated claims made by the EO during her inspection of the Premises, which then formed the basis for the Order. That is to say, the Order is not supported by any evidence.

[14] The Appellant argues that he faced serious legal consequences and damages as a result of the EO ordering the tenant to vacate the Premises based on assumptions rather than facts. The Appellant further submits that this should never have happened and it should not be allowed to happen again.

[15] With respect to the Appellant's compliance with the Order, the Appellant submits that he made the decision to allow the EO and her supervisor back into his property, in good faith, after the repairs were made to show them the evidence of the EO's mistakes.

[16] The Appellant feels that the only recourse he has is to present his case to the Board so he can show the errors made by the EO in issuing the Order and to ensure that this will not happen to others.

Law

[17] *Borowski* remains the most prominent authority on mootness. In *Borowski*, Canada's Supreme Court held that a court (or administrative body) may decline to hear a matter where any decision rendered by said court (or administrative body) is to be of no practical effect on the rights of involved parties:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice (at para 15).

[18] When assessing whether an appeal ought to be heard, a court (or administrative body) ought to determine whether an issue remains to be tried and, thereafter, absent an issue, whether it ought to exercise its discretion to hear said appeal:

> The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case (at para 16).

[19] Ultimately, a matter is said to be moot where no "live controversy" remains to be tried. Notwithstanding the mootness of an appeal, a court (or administrative body) may exercise its discretion to hear a matter where the parties involved remain adversaries, expenditure of scarce judicial resources is warranted, and/or exercising its discretion does not intrude upon the legislative branch (at paras 30–41). While all three factors ought to be considered by a court (or administrative body) when determining whether it ought to exercise its discretion, said factors need not all be established:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationales for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa (at para 42).

Previous Board Decisions

[20] Prior Board decisions do not have true precedential value; the Board is not bound by its previous decisions. However, consideration of prior decisions is relevant to ensure that the Board strives for and maintains consistency in its written decisions.

[21] In Appeal 02-2016, the Board held an appeal of a rescinded Executive Order was moot and, as such, ought not be heard. In rendering its decision, the Board held rescission of the Executive Order resolved the controversy at issue; that is, the relief sought by the Appellant in its Notice of Appeal (*i.e.*, re-inspection) had been achieved prior to the matter being heard by the Board. Moreover, the Board held the parties were no longer engaged as adversaries and a decision would be of no practical effect. Accordingly, the Board exercised its discretion to decline to hear the appeal.

[22] Conversely, in Appeals 10-2015 and 06-2016, the Board opted to hear appeals notwithstanding the subject Executive Orders had been rescinded and, as such, any decision rendered was deemed to be moot. Briefly, in Appeals 10-2015 and 06-2016 alike, the Board found the impugned Executive Orders had been rescinded by reason of compliance (rather than agreement) and, accordingly, the parties remained adversaries engaged in disagreements as to whether said Executive Orders were accurate and/or were made with proper authority. Ultimately, the Board held the parties to Appeals 10-2015 and 06-2016 remained adversaries and any decision rendered would be of practical effect (again, notwithstanding rescission of the subject Executive Orders):

> In the circumstances here, the Order might evade review if the appeal is not heard because the Appellants were compelled to comply with the Order prior to the hearing of the appeal. There exists an ongoing adversarial relationship between the Appellants and Alberta Health Services. Due to business reasons and the very terms of the Order, the Appellants completed the work required by the Order and should not now be denied the opportunity to challenge the accuracy and reasonableness of the Order (Appeal 06-2016).

[23] In both Appeal 10-2015 and Appeal 06-2016, the Appellant opposed AHS's application to dismiss the appeal on the basis that it was moot.

Jurisdiction of the Board

[24] Does the Act give the Board jurisdiction to hear a moot appeal, or is it limited by the wording of s. 5(11) to "confirm, reverse or vary" an extant decision of the regional health authority?

[25] The Board is a quasi-judicial tribunal and a general rule of administrative law is that an administrative body is a creature of statute and therefore has no inherent jurisdiction. Therefore, any power the Board possesses must be found in its enabling legislation.

[26] The Board was unable to find authority directly on point as it relates to consideration of s. 5(11) of the Act. However, a similar issue was considered by the Information and Privacy Commissioner, in its decision Order 99-005 (Re).[1] In that case, the Information and Privacy Commissioner sought submissions from the parties respecting the following:

> Specifically, I asked the parties to tell me (i) whether section 66(1) of the Act (decide all questions of fact or law) was sufficient authority, and (ii) whether the wording of my order-making power under section 68(3)(c) (confirm or reduce a fee or order a refund, in the appropriate circumstances) prevented me from making an Order on the moot issue, and thereby prevented me from hearing the moot issue.

[27] The Information and Privacy Commissioner determined that it did have the jurisdiction under the relevant legislation to hear a moot appeal on the following basis:

> Third, having read *Borowski v. Canada (Attorney General)*, the issue of whether I can decide a moot issue appears not to be a matter of jurisdiction, but a matter of general policy or practice of the tribunal. As long as I have the jurisdiction in the first instance (in this case, to make a fresh decision under section 87(4)(b)), then it becomes a matter of my general policy or practice as to whether I will exercise my discretion to hear a moot issue.
>
> Furthermore, I believe that my power under section 68(3)(c) to order, confirm, or reduce a fee or order a refund does not determine my jurisdiction to hear a moot issue. Instead, my order-making power goes to the issue of whether I should exercise my discretion to hear a moot issue when my decision will not have any practical effect on the rights of the parties (the Applicant in this case) because there is no remedy available (I discuss that issue later in this Order).
>
> Therefore, I find that I have the jurisdiction to hear the moot issue in this case. In the alternative, whether I can hear the moot issue is not a matter of jurisdiction, but a matter of general policy or practice, as discussed in *Borowski v. Canada (Attorney General)*.

[28] In the Board's view, a similar reasoning can be applied to the PHAB. So long as the Board has jurisdiction in the first instance (to confirm, reverse or vary the decision of the regional health authority), then it becomes a matter of the Board's general policy or practice as to whether or not it will exercise its discretion to hear a moot appeal.

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[1] Order 99-005 (Re), 1999 CanLII 19669 (AB OIPC)

Analysis/Reasons

[29] Given the rescission of the Executive Order, the basis of the Appeal effectively disappears rendering the Appeal moot. The remaining issue therefore is whether or not the Board should nevertheless exercise its discretion to hear the Appeal.

[30] AHS acknowledges that there may be a "limited" adversarial controversy between the parties due to the allegations by the Appellant as to whether there was "black water" in the Premises.

[31] In looking at the Appellant's grounds for appeal, he states in the Notice of Appeal:

> … When the inspection was done, I did not get confirmation that any sewage was exciting [*sic*] my property. There was no air quality inspection done. I feel that the order to evict my tenants was not based on any evidence that there was serious issue to the health of the tenant. I have evidence that there was no sewage exiting my property.

[32] It is noteworthy that while the Appellant denies the presence of "sewage", which AHS has termed "black water", he also disputes the Order on the basis of the lack of an air quality inspection (presumably to substantiate any effects from the strong smell of sewage). He further disputes the Order on the basis that it was "not based on any evidence that there was a serious issue to the health of the tenants".

[33] The Appellant's submissions clearly indicate a continued disagreement with the basis for the Order. In the Board's view, AHS has too narrowly limited the grounds of appeal to the presence of absence of "black water" to arrive at their assessment of whether or not an on-going adversarial relationship between the parties.

[34] The Board also notes that the Appellant complied with the Order not due to agreement with its conclusions, but to mitigate loss to his reputation and business as a landlord. Compliance due to these factors is distinguishable from compliance due to agreement with the citations in the Order. With the former, a controversy between the parties as to the legitimacy of the Order remains.

[35] With respect to whether the Board should exercise it discretion in hearing the Appeal, the first part of the test set out in *Borowski* is met, as there remains an adversarial relationship between the parties. However, it is the Board's view that this Appeal does not warrant the Board exercising its discretion to hear a moot appeal. The intended sale of the Premises would likely eliminate any frequent or repeat interactions between AHS and the Appellant. Therefore, there is little practical impact to the parties in hearing the moot Appeal. As such, this moot Appeal is not in the interest of judicial economy.

Decision of the Board

[36] For the above reasons, the Board has unanimously decided that:

(a) The Appeal is moot; and

(b) There is no practical reason to hear this moot Appeal.

[37] The Appeal will not be heard.

Denis Lefebvre, Chair
On behalf of the Public Health
Appeal Board

Date: September 14, 2018