

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 THE ORDER OF AN
EXECUTIVE OFFICER ISSUED BY
ALBERTA HEALTH SERVICES ZONE 2, DATED OCTOBER 21, 2021

PANEL: Kevin Kelly, Chair
Miles Weatherall, Member
Paul M. Bourassa, Member

BETWEEN:)	
)	
1872174 Alberta Ltd.,)	Self-represented
Darlene Banfield, and)	
Brian Banfield)	
)	
(Appellants))	
)	
- and -)	
)	
ALBERTA HEALTH SERVICES)	Kyle Fowler,
)	Alberta Health Services,
(Respondent))	for the Respondent
)	
)	
)	
)	
)	Heard: November 29, 2021
)	

DECISION AND REASONS FOR DECISION

A notice of appeal was received on October 25, 2021. This matter came before the Public Health Appeal Board (the “Board”) on November 29, 2021 via videoconference.

The Appeal

[1] This is an appeal (the “Appeal”) to reverse an order of an Alberta Health Services (“AHS”) Executive Officer (“EO”) dated October 21, 2021 (the “Order”).

[2] The panel of the Board hearing the Appeal initially consisted of four members. The Appellants objected to one of the panel members hearing the Appeal, after the member disclosed having previously worked with the EO that issued the Order in this Appeal. The member recused themselves and the Appeal proceeded with a panel of three members (the “Panel”) of the Board.

Board Decision

[3] The Respondent provided written submissions dated November 29, 2021. The Appellants did not provide written submissions.

[4] The Panel heard and considered evidence and oral submissions from the Appellants and the Respondent during the November 29, 2021 hearing.

[5] Following the hearing, the Panel considered the parties' submissions and evidence. After careful consideration of those submissions and evidence, the Order is confirmed.

Background

[6] The subject business is 1872174 Alberta Ltd., owned and operated as a food establishment by Darlene Banfield and Brian Banfield, carrying on business under the name Olifunt Espresso & Wine Bistro (the "Business"). The Business is located at 1112 Osler Street, Carstairs, Alberta (the "Premises").

[7] On October 6, 2021, AHS received a complaint that the Business was operating dine-in services and the owner was:

- (a) not requesting proof of vaccination from patrons;
- (b) allowing unvaccinated patrons to enter and dine in the Premises;
- (c) serving customers without wearing masks; and
- (d) not requesting patrons to wear a mask when entering or leaving the Premises.¹

[8] AHS inspector visits to the Premises on October 13, 14, and 16, 2021 revealed that the Appellants were not following the Government of Alberta's mandatory Restrictions Exemption Program ("REP").

[9] The EO issued a verbal order to the Appellants on October 19, 2021.² On the same day, the EO issued the Order in writing, which ordered and directed that the Appellants to:

- (a) close immediately the indoor dining area of the Premises to the public and restrict the indoor dining area to takeout, drive through, delivery or patio service until the EO rescinded the Order;
- (b) implement restrictions outlined in Order 44-2021 issued by the Alberta Chief Medical Officer of Health ("CMOH"), including only providing takeout food and beverage services;
- (c) ensure two meter physical distancing between members of the public; and
- (d) ensure Business owners' Darlene Banfield and Brian Banfield, and patrons are masking when inside the Premises.³

Timing of Appeal

[10] Section 5(3) of the *Public Health Act* (the "Act") requires an Appellant to serve a notice of appeal on the Board and the regional health authority within 10 days after receiving notice of the decision being complained of.

[11] On October 25, 2021, the Board received a notice of appeal dated October 25, 2021 (the "Notice of Appeal"). The Notice of Appeal was therefore filed on time.

¹ AHS Disclosure, Tab 5 at page 010.

² AHS Disclosure, Tab 3 at page 007.

³ AHS Disclosure, Tab 3 at page 007.

Grounds of the Appeal

[12] The Notice of Appeal appeared to contain three grounds:

- (a) AHS used improper processes and procedures when it inspected the Premises;
- (b) The Appellants complied with the CMOH Order and therefore the Order; and
- (c) The terms of the CMOH Order required the Appellant Darlene Banfield to break her oath given to Canada Revenue Agency and other legislation.⁴

[13] During the hearing, the Appellants stated that they would only proceed to appeal the Order on the first ground of appeal.

Legal Issues

[14] The legal issues considered by the Panel in the Appeal are as follows:

- (a) Whether AHS used improper processes and procedures when it inspected the Premises; and
- (b) Whether to confirm, reverse or vary the Order.

Jurisdiction

[15] The Panel determined that while it had jurisdiction to hear the first two grounds of appeal, it did not have jurisdiction to consider the third ground of appeal regarding the Appellant Darlene Banfield's concerns about breaking her oath given to Canada Revenue Agency.

[16] The CMOH issues orders under section 29(2.1) of the Act. The EO, who acts to enforce the orders of the CMOH, then issues orders under section 62(1) of the Act to remedy a "nuisance". The Panel interprets these statutory provisions to mean that what constitutes a "nuisance" under section 62 of the Act is expanded to include scenarios that would not have constituted a "nuisance" prior to the COVID-19 pandemic.

[17] Section 5 of the Act provides:

Appeal to the Board

5(1) In this section, "decision of a regional health authority" means

- (a) an order issued under section 62, and
- (b) a decision to issue, or to cancel, suspend or refuse to issue a licence, permit or other approval provided for in the regulations, and any other decision in respect of which an appeal to the Board is permitted under the regulations, whether any of those decisions is made by the regional health authority itself or one of its employees or agents.

[18] In our view, an EO order that references a CMOH order is an order issued pursuant to section 62 of the Act. Therefore, for the Board to have jurisdiction to hear appeals of such orders, the grounds of appeal must be narrowed so as to avoid any collateral attack on CMOH orders.

⁴ Notice of Appeal at page 2.

[19] Pursuant to section 5(11) of the Act:

[T]he Board may confirm, reverse or vary the decision of the regional health authority and shall give written notice of its decision to the appellant and the regional health authority.

[20] We interpret section 5(11) to mean that the Board can only confirm, reverse or vary the decisions of the EO, and not the CMOH order upon which the EO's order is based. The Board cannot reverse or vary an EO order if its effect would be to vary a CMOH order. Therefore, the third ground of appeal, which concerns a CMOH order and its impact on the Appellants' legislative rights, does not fall within the Board's jurisdiction. The Panel will not consider or make any findings in relation to the third ground of appeal.

Documents/Exhibits

[21] Prior to the commencement of the hearing, the following documents were entered as exhibits by agreement of the parties:

(a) **Exhibit 1** – AHS Disclosure Package (66 pages).

Evidence and Submissions of the Appellants

[22] The Appellants did not call any witnesses at the hearing.

[23] They stated that AHS did not provide them with any policy to justify AHS inspectors attending the Premises without identifying themselves. They questioned why AHS used a "secret shopper" during one or more inspections of the Premises, and why the secret shopper did not immediately disclose that the Appellants were not complying with COVID-19 public health restrictions.

Evidence and Submissions of the Respondent

[24] AHS stated that on October 6, 2021, it received a complaint from a member of the public that the Appellants were not following the REP. CMOH Order 44-2021 prohibits indoor dining, while CMOH Order 45-2021 allows indoor dining if requirements such as masking and social distancing are met.

[25] On October 13, 2021, AHS inspectors attended and inspected the Premises to conduct an initial inspection. AHS inspectors noted that the Business was not in compliance with CMOH Order 45-2021, as patrons and attendees at the Premises were not being screened by either Darlene Banfield or Brian Banfield at the point of entry or at the counter for proof of:

vaccination;

a negative COVID-19 test result within the previous 72 hours; or

an original vaccine medical exemption letter.

[26] Also during the initial inspection, the AHS inspector noted non-compliance with CMOH Order 44-2021, as Darlene Banfield and Brian Banfield were:

permitting unvaccinated patrons to enter and dine in the Premises;

serving customers without wearing a mask; and

not requesting patrons to wear a mask when entering or leaving the Premises.⁵

AHS inspectors tried to work with the Appellants, but the Appellant Darlene Banfield was not responsive to questions asked during the inspection.⁶

⁵ AHS Disclosure, Tab 5 at page 010.

⁶ AHS Disclosure, Tab 6 at page 014.

[27] On October 14, AHS sent another inspector to confirm if the Business was in compliance. The AHS inspector, who did not identify themselves during the visit, confirmed non-compliance with CMOH Order 44-2021, which meant the Business could not offer dine in service.

[28] On October 16, 2021, an AHS inspector secretly inspected the Premises to determine if the Appellants were complying with REP requirements. At that time, the AHS inspector determined that the Appellants were not complying with the REP requirements. The closure order was issued verbally on October 19, 2021 with the written order following on October 21, 2021.⁷

[29] AHS called Peer Mikkelsen, an AHS Manager, as its only witness. He testified that AHS inspectors are not required to identify themselves. For REP matters, AHS inspectors attend premises as an unidentified person to inspect the premises and to confirm if owners and staff are complying with public health requirements. AHS inspectors sometimes conduct inspections without identifying themselves to get a sense of the day-to-day operations of the premises, and as well for safety reasons.

[30] AHS Manager Peer Mikkelsen further testified that the practice of conducting unidentified inspections predates the COVID-19 pandemic and that there are no stringent guidelines on conducting inspections of premises, and AHS followed all reasonable procedures when they inspected the Premises.

Analysis and Reasons

Whether AHS used improper processes and procedures when it inspected the Premises

[31] The Panel accepts the evidence of the AHS Manager that AHS inspectors are not required to identify themselves when inspecting premises, and that there is no formal policy regarding AHS inspections. We acknowledge the Appellants' concerns regarding AHS conducting unidentified inspections of the Premises. However, we note that the Appellants did not provide any evidence to suggest that AHS used improper procedures when it inspected the Premises.

Findings and Conclusion

[32] After reviewing the evidence and submissions made by the Parties, the Panel makes the following findings:

- (a) With respect to legal issue 1, the Panel finds that AHS followed all applicable public health procedures when it inspected the Premises and issued the Order. As the Appellants did not provide any evidence to support its ground of appeal, significant weight was placed on the evidence provided by AHS.

[33] Based on the above findings, the Order is confirmed.

[34] The Order shall remain in force until such time as AHS rescinds the order in accordance with the *Public Health Act*.

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

Date: December 18, 2021

⁷ AHS Disclosure, Tab 17 at page 062.