

**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 May 10, 2024**

PANEL: Kevin Kelly, Chair  
Paul M. Bourassa, Member  
David Rolfe, Member  
Dr. Theresa A. Chika-James, Member

BETWEEN:	)	
	)	
Smokey’s Hospitality Inc.	)	Mr. Jaideep (JD) Gill (Owner)
	)	
(Appellant)	)	
	)	
- and -	)	
	)	
ALBERTA HEALTH SERVICES	)	Conor Fleming,
	)	Alberta Health Services,
(Respondent)	)	for the Respondent
	)	
	)	
	)	Heard: May 13 and 14, 2024
	)	
	)	
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**DECISION AND REASONS FOR DECISION**

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A notice of appeal was served on the Public Health Appeal Board (the “Board”) on March 21, 2024, by Jaideep (JD) Gill (the “Owner”) with respect to a decision of an Alberta Health Services (“AHS”) Executive Officer (“EO”) for an order dated March 14, 2024 (the “Order”) concerning the business premises identified as Smokey’s Lounge at 5019-22 Avenue SW, Edmonton, Alberta (the “Premises”).

## The Appeal

[1] The Owner is appealing the Order for the Premises, which identified concerns with operations of its lounge, and alterations to its premises, that were not authorized by its commercial food establishment permit. In particular, handling of food in a back storage room, changes to the menu, and an increased complexity of food handling, as well as renovations, were all allegedly undertaken without notice to the EO.

## Board Decision

[2] The hearing for this appeal began on May 13, 2024, and concluded on May 14, 2024. The Appellant and the Respondent made submissions and presented evidence. At the conclusion of the hearing, the Board informed the parties that it would provide its written decision within 60 days. For the reasons that follow, the Board is confirming the Order.

## Background

[3] The Order was issued pursuant to the *Public Health Act*, RSA 2000, c. P-37 (the “Act”), the *Food Regulation, Alta Reg 31/2006* (the “Regulation”), and the *Food Retail and Food Services Code*. The Order set out the contraventions of the Act and Regulation as they pertained to the condition of the Premises. The Premises is a commercial food establishment located in Edmonton. The EO ordered and directed the following:

- a. The Owner immediately and diligently pursue the completion of the following work in and about the Premises:
  - i. Cease and desist all handling of food outside of the approved food handling area, with the exception of the storage of food in its original container where previously approved by an Executive Officer.
  - ii. Ensure the operation of the food facility is consistent with the approved operations and permit restrictions.
  - iii. Notify the Executive Officer or Regional Health Authority and obtain approval prior to conducting any renovations or modifications to the operation, including changes to the menu.
- b. The work be completed immediately.

## Timing of Appeal

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

[5] The Board received a notice of appeal (the “Notice of Appeal”) dated March 21, 2024. The Notice of Appeal was served on the Board within 10 days, as the Order was verbally communicated

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to the Appellant on March 12, 2024, and, in writing on March 14, 2024. The Notice of Appeal was therefore served on time.

### **Grounds of the Appeal**

[6] In the Notice of Appeal, the entirety of the grounds of appeal are as follows:

*I believe I need to appeal the executive order issued by the health inspector because I have faced discrimination since first attempting to obtain the necessary license. This appeal is crucial to address the unfair treatment and barriers I've encountered, which I feel have unjustly affected the outcome of the licensing process. My experiences, supported by extensive correspondence and evidence, demonstrate a consistent pattern of bias that warrants a thorough review and reconsideration by the Alberta Public Health Appeal Board.*

[7] While the Appellant requested a stay of the Order, the Board found it difficult to discern what the grounds of appeal were. It appeared that the Appellant took issue with the licencing process, which is beyond the scope of the Board's jurisdiction, rather than the Order itself. Thus, the Board only considered the stay and asked the Appellant to articulate the grounds at the hearing. On April 12, 2024, the Board issued its stay decision to the parties via email, confirming that the stay application was dismissed, as the weight of the oral submissions was found not to support a stay of the Order, and that the appeal would proceed to a hearing on the merits.

[9] At the outset of the hearing on May 13, 2024, the Appellant indicated that his grounds for requesting a stay of the Order were found in his submissions, consisting of eight documents and four shortened videos, which the Board received on May 10, 2024, and which was not provided to the Respondent.

[10] In order to permit the Respondent the opportunity to review the Appellant's submissions and be in a position to respond adequately, the hearing was adjourned to May 14, 2024.

[11] When the hearing continued on May 14, 2024, the Owner stated his grounds in support of reversing the Order, which the Board understood as:

- a. The EO issued the Order based upon incorrectly applying the Act, the Regulation, and the *Food Retail and Food Services Code* during the inspections with regard to the actual setup and work done in the Premises; and
- b. The Appellant faced discrimination regarding securing a license / food handling permit, encountered unfair treatment and barriers, and encountered a consistent pattern of bias.

### **Legal Issues**

[12] The legal issues on this Appeal for consideration by the Panel are:

- a. Whether the Board should confirm, reverse or vary the Order dated March 14, 2024.

## **Jurisdiction**

[13] There re no objections to the Panel's jurisdiction to hear the Appeal.

## **Documents/Exhibits**

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

- b. Exhibit 1 – Appellant's Disclosure Document (8 documents and 4 Videos);
- c. Exhibit 2 –AHS Disclosure (78 pages);
- d. Exhibit 3- Appellant's Submissions Inspection Dissection Document (7 pages);
- e. Exhibit 4-Appellant's Submissions- Disclosure Dissection Document (2 pages); and
- f. Exhibit 5- AHS submissions (9 pages).

## **Submissions of the Appellant**

[15] The submissions of the Appellant with respect to the Appeal are summarized as follows:

- a. At all times prior to the Order, the Appellant:
  - i. followed the restrictions of the license granted related to food preparation;
  - ii. acknowledged that the menu had changed for the Premises but that regardless, he continued to follow the restrictions of his license; and
  - iii. would suffer financial loss if he could not continue to operate.
- b. At any time when the EOs inspected the Premises, the Appellant tried to discuss the issues that led to the Order but was interrupted and dismissed.
- c. Concerning all of the food preparation at the Premises, the Appellant provided invoices to prove that the food was pre-cooked and that the only preparation was the process of reheating, which were well within the activities allowed by his permit.
- d. The Appellant asserted that all of the issues raised that led to the Order were based on the September 2023 inspection and that no credence was given to his completed installations and processes.

[16] The Appellant submitted two written statements, a number of videos, and an email stream.

## **Submissions of the Respondent**

[17] The submissions of the Respondent with respect to the Appeal are summarized as follows:

- a. The EOs who inspected the Premises and issued the Order, did so pursuant to the provisions of the Act, the Regulation, and the *Food Retail and Food Services Code*, which exist to protect the health of Albertans.
- b. The EO discovered violations of the Act and the Regulation, most notably that the Appellant was operating outside of the scope of its food handling permit, failed to notify the Executive Officers of alterations to the commercial food premises, failed to notify the Executive Officer of a change in the information that was provided in the permit application, and failed to insure a safe and clean area for food preparation.
- c. The Appellant's allegations that the Order is the product of a biased licensing and inspection process are not accurate.
- d. AHS denies that the licensing or inspection process were biased, and submits that the Order is reasonable and necessary.
- e. The Order should be confirmed, without variation.

## **Analysis and Reasons**

### Standard of Review

[18] The applicable sections of the Act regarding appeals that the Board must consider are the following:

- 5(3) A person who
  - (a) is directly affected by a decision of a regional health authority, and
  - (b) feels himself or herself aggrieved by the decision
 may appeal the decision 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.
- 9 A regional health authority shall appoint one or more persons as medical officers of health and one or more persons as executive officers for the regional health authority for the purpose of carrying out this Act and the regulations.

62(1) An executive officer may issue a written order in accordance with this section if the executive officer has reasonable and probable grounds to believe, based on

- (a) an inspection of a public place under section 59 or a private place under section 60, or
- (b) a report or test, regardless of whether the report or test is required to be produced or performed under this Act, if a public place or private place was not inspected under section 59 or 60,

that a nuisance exists in or on the public place or private place, or that the place or owner of the place or any other person is in contravention of this Act or the regulations.

5(11) The 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.

In this regard, the Board is guided by the public health context in which it renders its decisions, and by the Alberta Court of Appeal's jurisprudence regarding determination of the applicable standard of review in these circumstances. In particular, after a thorough consideration of the factors outlined by that Court in its *Newton*<sup>1</sup> decision and its additional guidance in the decisions in *Moffat*<sup>2</sup> and *Yee*<sup>3</sup>, and reading the relevant sections of the Act harmoniously with the intention of the legislature, the Board is satisfied that the appropriate standard of review to be applied in this Appeal has been articulated in section 62(1) of the Act.

This standard is:

***Whether there are reasonable and probable grounds to believe that a nuisance exists on the property, or that there is a contravention of the Act or the regulations based on an inspection or a report or test such that the order under appeal is warranted.***

[19] In *Canada (Minister of Citizenship and Immigration) v Vavilov*<sup>4</sup>, the Supreme Court of Canada provided instruction on the application of the reasonableness standard of review in the judicial review of a tribunal's decision. The focus of such a reasonableness review is on the reasons. A decision will be reasonable if it is both internally consistent and justified in light of the legal and

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<sup>1</sup> *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 [*Newton*].

<sup>2</sup> *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 [*Moffat*].

<sup>3</sup> *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98.

<sup>4</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

factual constraints that bear on the decision.<sup>5</sup> Unlike the judicial review approach established in *Vavilov*, the standard of review adopted by the Board represents a hybrid procedure that takes into account not only AHS's reasons but other evidence deemed relevant by the Board. This approach involves reviewing all the relevant records supplemented with *viva voce* evidence, while also allowing portions of the hearing to be conducted on the record. As the Board is not a court, it is not bound by the strict rules of evidence applicable to courts. However, the Board's authority is limited to confirming, reversing, or varying an AHS order, without extending beyond these options as provided in the Act.

[20] In conclusion, by adopting this hybrid standard of review, the Board can effectively balance the need for procedural flexibility and thoroughness with respect for the specialized expertise and initial findings of the AHS executive officers. This approach ensures that the appeal process remains efficient and cost-effective, while preserving the integrity of the original proceedings and allowing the Board to make well-informed decisions that uphold public health standards consistently with the objectives of the Act.

#### Background to Reasons

[21] The Order for the Premises required the Owner to cease and desist all handling of food outside of the approved food handling area, with the exception of the storage of food in its original container, ensure the operation of the food facility is consistent with the approved operations and permit restrictions, and notify AHS of any modifications to the operation, including changes to the menu. The Order was the result of a number of issues that the EO identified previously.

[22] On September 14, 2023, the Owner submitted a service request for an inspection of the Premises. The EO called the Owner, who indicated that he was already constructing the space and was planning to use single-use disposable wares only.

[23] The EO scheduled an onsite inspection on Monday, September 18, 2023, to discuss the space within the Premises. The Owner was present at the time of the inspection with construction underway.

[24] During the September 18, 2023 inspection, the EO observed that the small kitchen included a single basin sink, counters, an undercounter domestic fridge, pod-style coffee machines, frozen beverage machines and a panini press. There was also a small storage room that was being used to store Vapes, and a small domestic fridge. There were no commercial canopy, dishwashing facilities or preparation sinks.

[25] The Owner presented a proposed menu that included extensive food handling, which the EO determined was not appropriate due to the lack of space. The EO advised the Owner that the kitchen space would be appropriate for the sale of prepackaged foods.

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<sup>5</sup> *Vavilov*, at paras 99-101.

[26] Following the September 18, 2023 inspection, there was a series of conversations between the EO and the Owner via mobile texts, phone, and email messages until October 11, 2023, regarding the submission of a new menu, setting up a supply closet as a food preparation area to meet the requirements for a commercial food establishment, including plumbing and applicable ventilation, and that the food preparation area must not have public access. The Owner provided a new floor plan to the EO. However, the plan did not include any food equipment other than food storage in the storage room.

[27] On October 25, 2023, an onsite inspection was conducted by the EO and a plan review specialist with the Owner present at the time. At the inspection, the EO and the review specialist observed that the kitchen had been modified. However, it was inconsistent with the plans submitted on September 29, 2023.

[28] Thus, the plan review specialist informed the Appellant that the kitchen would meet the requirements for prepackaged foods or minimal food handling, limited to simple reheating or toasting foods that could be handled with tongs. The Owner showed a new menu with all the food requiring handling other than reheating removed. The EO requested a copy of the new menu to be submitted.

[29] A further inspection was scheduled for November 1, 2023, with further email correspondence prior to this inspection.

[30] In the email correspondence, the Owner was reminded that the Premises was only permitted to do simple reheating of food from approved sources. Also, the EO reviewed the menu items to ensure clarity on the extent of food handling permitted on the premises. Furthermore, the Owner was informed that with a one compartment sink and commercial dishwasher, the operator would not be able to chop fruits and vegetables, make baked goods, reportion bulk foods, or other more complex food handling. The Appellant responded by email confirming that the menu items would be prepackaged, and that cream cheese would be prepackaged for customers to apply themselves. On November 1, 2023, the EO conducted the onsite approval inspection on and observed that the Premises had a panini press, undercounter coolers, a one compartment sink for handwashing, and a mechanical dishwasher. The bar sink was not connected to water or drainage, and the back storage room was being used for storage only. The menu was reviewed, and the Premises were approved for serving prepacked food items or simple reheating or toasting of foods prepared in an approved facility. The Owner was reminded that he must notify the EO prior to changing the menu or doing any renovations and inform AHS prior to the start of the sale of vaping products.

[31] On March 12, 2024, another onsite inspection was conducted by two EOs, with an investigator from Tobacco, Smoke, and Vaping Enforcement present during the inspection. At the inspection, it was observed that a food preparation area had been created in the back storage room. This area lacked handwashing facilities and proper finishes and was mixing incompatible activities. The space was not appropriate for handling open food and was not previously approved by AHS. It was noted that the Owner had changed the menu and complexity of food handling from what was previously approved. The menu included shrimp stir-fries with rice, cooked pasta dishes, chicken wings, and fries that required cooking, assembling, reportioning, and garnishing. The Appellant was reminded that all changes to operations, including altering the complexity of the menu or renovations, must be approved by an EO.



[32] A verbal Order of an EO was issued to the Appellant on March 12, 2024, ordering the Owner to stop all food handling in areas that were not previously approved and only to use the previously approved menu, which was limited to simple reheating of prepackaged foods only, and food that did not require any further assembly and can be handled with tongs. The EO indicated that a written order would follow and instructed the Owner to contact the EO for guidance with any questions.

[33] The EO noted that in subsequent consultation with AHS authorities, the Owner was issued some listed tasks to complete prior to obtaining a food handling permit, including the moving of a slide rail. While the slide rail is not part of the Order, the AHS officer noted that if the slide rail is used to move meats to the cooler without meats being infested or contaminated, then it would suffice. Alternatively, the EO recommended the use of carts.

### **Findings and Conclusion**

[34] After reviewing the evidence and submissions made by the Parties, the Board finds the following:

1. Although there appears to have been strained interactions at times between the EOs and the Owner, there was no evidence of the EOs being biased, and the EOs complied with their duties pursuant to the Act and Regulation. The EOs had reasonable and probable grounds to issue the Order.
2. There were violations of the Act and the Regulation as the Owner was operating outside of the scope of its food handling permit, failed to notify the EO of alterations to the commercial food premises, failed to notify the EO of a change in the information that was provided in the permit application, and failed to ensure a safe and clean area for food preparation.

[35] Based on the aforementioned findings, the Board confirms the Order, which shall remain in force until such time as AHS rescinds it in accordance with the Act.

**--Original Signed--**

Kevin Kelly, Chair

On behalf of the Hearing Panel of the  
Public Health Appeal Board

**Date: July 15, 2024**

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