

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 AUGUST 9, 2023**

**AND IN THE MATTER OF AN APPLICATION FOR RECUSAL
OF THE PUBLIC HEALTH APPEAL BOARD CONSTITUTED
SEPTEMBER 12, 2023**

PANEL: Kevin Kelly, Chair
Vicki Wearmouth, Member
David Rolfe, Member

BETWEEN:)	
)	
)	
ADDOOR V. VENKATARAMANAN)	Adoor V. Venkataramanan,
(Appellant))	Self-represented
)	
- and -)	
)	
ALBERTA HEALTH SERVICES)	Kyle Fowler,
(Respondent))	Alberta Health Services, for the Respondent

Heard: October 5, 2023

**DECISION AND REASONS FOR DECISION ON APPLICATION FOR
RECUSAL OF THE PUBLIC HEALTH APPEAL BOARD PANEL ON
APPEAL 08-2023**

Overview

[1] This matter came before a panel (the “Panel”) of the Public Health Appeal Board (the “Board”) on September 12, 2023. The appeal hearing did not conclude on that date, and on September 18, 2023 the Board received an application wherein the Appellant seeks the Panel’s recusal from hearing the appeal. The Panel met on October 5, 2023 to consider the Appellant’s application. The application for recusal is dismissed.

Background

[2] The Appellant is the owner of housing premises located at 228 Canter Place SW, Calgary, Alberta (the “Premises”). An Alberta Health Services (“AHS”) Executive Officer (“EO”) inspected the Premises in response to a complaint. The inspection disclosed various breaches of the Public Health Act (“Act”), and the EO issued a written order of an Executive Officer dated August 9, 2023 (the “Order”). The Appellant has appealed to the Board to reverse the Order (the “Appeal”).

[3] The Appeal hearing commenced on September 12, 2023 in front of the Panel via video conference. The Appeal hearing did not conclude on that date.

[4] On September 18, 2023 the Board received an application wherein the Appellant seeks to have the Panel recuse itself from hearing the Appeal (the “Recusal Application”).

[5] The Panel received written submissions from the Appellant dated September 16, 2023, written submissions from AHS dated September 27, 2023, and written rebuttal submissions from the Appellant dated October 2 2023. The Panel met on October 5, 2023 to consider the Recusal Application.

Board Decision

[6] The Panel considered the written submissions of the Appellant and AHS, and for the reasons that follow, the Recusal Application is dismissed.

Legal Issues

[7] The Panel must consider the following issue in this application:

Should the Panel recuse itself from hearing the Appeal hearing?

Documents/Exhibits

[8] In addition to the written submissions received from the Appellant and AHS, the following documents were entered as exhibits by agreement of the parties:

Documents received from the Appellant (collectively marked Exhibit A):

Attachment 01 Exhibit

Attachment 02_ Exhibit_ Written *[sic]* Submission attached to my email shown in attachment 01 - Copy (2)

Attachment 03 Exhibit

Attachment 05 Exhibit

Attachment 06 Exhibit

Attachment 07 Exhibit

Attachment 08 Exhibit

Attachment 09 Exhibit

Attachment 10 Exhibit

Attachment 11 Exhibit

Documents received from AHS (collectively marked Exhibit B):

EXHIBIT 1 - AHS Resp to Application

EXHIBIT 2 - AHS Resp to Application

EXHIBIT 3 - AHS Resp to Application

EXHIBIT 4 - AHS Resp to Application

EXHIBIT 5 - AHS Resp to Application

EXHIBIT 6 - AHS Resp to Application

Submissions

[9] The Appellant and AHS both provided written submissions to the Board in connection with the Recusal Application, and the Panel has summarized their submissions below.

Submissions of the Appellant

[10] The Appellant's submissions are summarized as follows:

a) He was advised during a conversation with the Board Secretariat on September 7, 2023 that, as he would be unable to complete his written submissions before the date due, that the Board may accept them later and may even accept them on the date of the hearing if received prior to the start.

b) The Board Secretariat informed him that he could read from his written submission document without submitting it to the Board, and that it would be audio recorded. He

submitted that he was advised that he could not record the Appeal hearing proceedings. The Appellant submitted that the Board Secretariat informed him that the Board would be lenient to him and show flexibility regarding the rules.

c) The Appellant provided his written submission via email to the Board on September 12, 2023 at 7:40 am MST. He further submitted that he received confirmation of receipt of his written submission by the Board Secretariat on September 12, 2023 at 8:23 am MST.

d) He requested permission from the Board Secretariat to access documents in his laptop for presentation during the Appeal hearing and was advised that the Secretariat would be able to bring up the documents during the hearing or could give him presenter status but would need to know which exhibit to present.

e) He requested to have one additional document (Attachment: Exhibit 46 – My email dated 19 July 2023 Anil email and my reply.pdf) added to his written submission in an email he sent at 8:51 am MST on September 12, 2023.

f) He opened the Team Meeting Application at 8:45 am MST and, while waiting to be let into the meeting, he noticed that AHS counsel had joined the hearing. He submitted that he was not admitted until past 9:23 am MST and only after submitting an email to the Board Secretariat. Upon admission to the meeting, he noticed all the other participants were already present in the meeting.

g) The Board Chair stated that his written submission containing 43 pages was only received by the Board that morning and was submitted after the deadline. The Chair asked AHS counsel if the written submission should be accepted to which, after a quick review, AHS counsel objected to its acceptance as it was received after the deadline, adding that he has no time to take his client's instruction in this regard and won't allow its acceptance by the Board. The Appellant submitted he was advised he would be allowed to read his written submission document during the Appeal hearing, but that it should not form part of the exhibits or records of the Appeal hearing. The Chair accepted this objection.

h) In response to the Chair's asking what outcome he wanted from the Appeal hearing, he replied that he wanted the EO's Order dated August 9, 2023 rescinded and reversed in its entirety.

i) He requested to give his opening statement first and informed the Chair that he was new to such hearing process and requested advice on what an opening statement was.

j) The Chair told him that the opening statement was a brief summary of his case, so he proceeded to present his opening statement with the following seven legal issues arising in his Appeal.

(1) Whether the property was in compliance with the Minimum Housing and Health Standards and the Public Health Act at the time of inspection by the Executive Officer on July 14, 2023.

- (2) Whether the considerations and findings of the EO were within the parameters of the Act.
- (3) Whether the findings of the Executive Officer were in error and based on false or inaccurate findings,
 - i. The grounds upon which the Order is based are false or inaccurate, such that the Order is without proper basis.
 - ii. The EO's act and statements made by her suggest a reasonable apprehension of bias, such that the Orders may be based upon considerations other than those mandated by the Act and the Regulations;
- (4) Whether the EO has exceeded her limit in exercising or abused her authority and power under the Act.
- (5) Whether the EO failed to make sufficient inquiries and satisfy if Power Property Ltd. was in fact responsible to discharge the property owner's obligations under the MHHS and Act, as the owner's agent acting for and on behalf of the property owner or whether the EO intentionally disregarded the fact that Power Properties Ltd. was in fact responsible to discharge the property owner's obligations under the MHHS and the Act, despite availability or nonavailability of legal documentation.
- (6) Whether the property management agent's and tenant's behaviour and actions, including complaining to AHS on July 14, 2023, were self-serving and constitute abuse of the MHHS and the Act.
- (7) Whether there were reasonable grounds to believe that the EO was abetting the tenant and agent in their coercive act of obtaining the Appellant's approval for the tenant's unjustified use of an amenity (hot tub) which was not included in the list of amenities in the tenancy lease agreement by abusing the MHHS as a tool, and thereby force the Appellant to:
 - i. either risk incurring unreasonable expenditures resulting from the tenant's abuse of that amenity and eventually agree for a rent reduction at a later date when that amenity is rendered unusable by its abuse by the tenant, or
 - ii. agree now for a \$500 per month rent reduction if the tenant is not allowed to use the hot tub, and
 - iii. assume management of the Appellant's property himself remotely from India thereby continuing to take undue advantage of his absence from the country.
- k) After AHS counsel presented his opening statement, he was asked to present his case which consisted of him reading his written submission document. The Appellant

submitted that AHS counsel soon objected to his reading his document, to which the Chair ruled valid, stating that only the evidence was to be read.

l) He was shocked and confused but was afraid to question the Chair. After several objections from AHS counsel the Appellant contended that he became paranoid and sought the Chair's advice on whether reading certain paragraphs from his written submission would be permissible. He submitted he felt pressured to cut his presentation short after being asked several times when he would finish his presentation.

m) He felt the questions posed to him by AHS counsel did not seem relevant to the Appeal, such as how long the property was vacant before the current tenancy, why it was vacant, and whether the Appellant had visited the property after the current tenant occupied it.

n) Video exhibit 7.3 in AHS' disclosure was not shared with him prior to the submission deadline of September 5, 2023 and he felt that, because his own late submission was not allowed, the late submission rule was not being equally applied to both parties.

o) He had difficulty hearing the questions AHS counsel asked the tenant as well as the tenant's replies.

p) His questioning of the tenant, who was AHS' witness, was continually objected to by AHS counsel.

q) His following genuine concerns are:

- 1) He was not admitted into the hearing until much later than AHS counsel and AHS witnesses.
- 2) The AHS witnesses should not have been admitted into the hearing until such time as they were to give their evidence.
- 3) The Chair and Panel members had a private closed-door meeting with AHS counsel and both witnesses, showing unfair practice and bias and partiality of the Board in favour of AHS.
- 4) His written submission has been shared and discussed with AHS even though it is not part of the exhibits and hearing records and will not be considered by the Panel in making its decision. He submitted there is a very clear unfair conduct of the hearing and injustice to himself and feels beyond doubt that the Chair and Panel members are openly favouring AHS counsel.
- 5) AHS counsel has had preferential treatment and status during these proceedings.
- 6) The Chair did not inquire whether the Appellant had any objection to the constitution of the Panel as is required by the Board's Rules of Procedure.

- 7) The acceptance of his late written submission should have been determined by the Chair and Panel members and not shared with AHS counsel.
- 8) AHS counsel should have declined receipt of the late written submission. The Appellant submitted that the Board's sharing of his privileged legal document with AHS counsel signals to him "that this is not going to be a fair trial from the start".
- 9) The Appellant submitted that he did not know why he was not allowed to present his arguments during the hearing or to counter AHS counsel's objections which were readily accepted by the Chair. He submitted that this made it clear that the Appeal was going to be decided without his legal arguments recorded and in favour of AHS.
- 10) The Appellant submitted to feeling discriminated against during the hearing by both the Board and AHS counsel and feels that the outcome of the Appeal hearing has been predetermined in favour of AHS.
- 11) The Appellant submitted that the Board has denied him the principle of natural justice.¹

Submissions of the Respondent

[11] The Respondent AHS' submissions are summarized as follows:

- a) AHS opposes the Appellant's Recusal Application, and submitted that the Recusal Application is without merit, is based on factual inaccuracies, and shows a lack of understanding and appreciation by the Appellant for rules of procedure and evidence.
- b) The parties completed the exchange of disclosure on September 5, 2023, however, by way of email dated September 5, 2023, delivered at 8:45 PM, and further emails received by AHS counsel on September 6, 2023 at 12:22 AM and 12:50 AM, the Appellant informed AHS that he could not access the files uploaded to GlobalScape.
- c) Following receipt of the Appellant's emails, AHS attempted to send the video files by email directly to the Appellant. The Board Secretariat confirmed that they had spoken to the Appellant and that he had confirmed receipt of the email with the videos.
- d) Written submissions were provided to the Board and the Appellant by way of email on September 8, 2023 but no submissions from the Appellant were provided to AHS by the deadline.
- e) Upon signing into the Merits Hearing on September 12, 2023, AHS counsel, the EO and Corporate Representative, and the AHS witness were all placed into a virtual wait room prior to commencement of the proceedings. At no time did anyone on behalf of AHS speak with the Panel prior to the Secretariat admitting all parties to the hearing and the Chair

¹ Appellant's written submissions.

commencing the proceedings. AHS submitted that any allegation otherwise is false and based on pure speculation by the Appellant.

f) The Appellant has failed to recognize the distinction between signing into a meeting and being placed into a waiting room from a party being admitted to the Merits Hearing.

g) There was no deviation from the rules governing the attendance of witnesses in legal proceedings as the AHS witness (the tenant) was present only for preliminary procedural discussions and was not present for the submission of evidence by the Appellant.

h) The Appellant had submitted to the Board a 43-page document comprising his proposed written submissions on the morning of the Merits Hearing but failed to provide a copy to AHS despite the Board's earlier direction of August 28, 2023. AHS had not been given the ability to provide a position on any late submission in advance of the Merits Hearing so accordingly AHS counsel objected to the inclusion of the Appellant's late written submissions.

i) Privilege cannot exist between an appellant and the Board in situations where a party provides submissions intended to form the basis of legal argument upon which a future decision will be made. Procedural fairness applies to all parties, and AHS is entitled to know the case to be met and be given the opportunity to meet it.

j) No objection was made by the Appellant at the time, nor any other material time, prior to the Recusal Application, to the request by AHS counsel to the Board Secretariat to be provided with a copy of the late submissions for a brief review. Following this brief review, AHS counsel maintained the objection that the submissions should be excluded from the record, but agreed that the Appellant, as a self-represented litigant, could read from the submissions for the purpose of submitting his case. At no material time prior to the submission of the Recusal Application did the Appellant make any objection to AHS' continued possession of the proposed submissions.

k) AHS counsel made various objections during the Appellant's submission of evidence, including, but not limited to: (1) that the Appellant was submitting argument instead of evidence, and (2) that the Appellant was submitting evidence that was not relevant or material to the Order under appeal. The objections were upheld by the Chair after the Appellant had the opportunity to respond.

l) During the Appellant's cross examination of the AHS witness (the tenant), AHS counsel made objections to certain questions, including, but not limited to: (1) that the Appellant was asking questions irrelevant to the proceedings, (2) that the Appellant was asking the tenant to create documentary evidence during the proceedings, (3) that the Appellant was asking the tenant to authenticate and comment on photographs she had not taken, and (4) that the Appellant had asked and received answers to his questions, but was repeating questions notwithstanding. AHS submitted that when the Appellant intruded into improper areas of examination, it was appropriate for the Chair to correct the Appellant and define the limits of cross examination.

- m) The Merits Hearing extended well into the late afternoon to a point where he would need to be excused. When asked if his cross examination could conclude by this time, the Appellant said no. At no time did AHS or the Chair demand that the Appellant conclude his cross examination in set timeline.
- n) When applying the facts to factors laid out by the Supreme Court relevant to the determination of the level of procedural fairness, there is no basis upon which to find this has been denied to the Appellant.
- o) There is no reasonable apprehension of bias on the part of the Board. Mere suspicion of bias is insufficient and does not meet the required legal test.
- p) The Appellant has not established that he has been denied procedural fairness or that the Board has a reasonable apprehension of bias. Accordingly, the application seeking recusal of the Panel constituted September 12, 2023 should be denied with prejudice.²

Rebuttal Submissions of the Appellant

[12] The Appellant made the following rebuttal submissions:

- a) The allegation that the Application is without merit, is based on factual inaccuracies, and shows a lack of understanding and appreciation for rules of procedure and evidence is untrue and he denies the same.
- b) His Recusal Application states facts of specific conduct of AHS counsel and the Board that occurred during the first day of the Merit Hearing on September 12, 2023.
- c) The three video files said to have been uploaded via GlobalScape on September 5, 2023 could not be accessed as he received no instructions on how to access and open the video files. The Appellant submitted that the three videos attached to an email were delivered to him only on September 6, 2023 at 8:45 AM MST after the deadline of 4:00 PM MST on September 5, 2023 as directed by the Board. The Appellant submitted that the genuineness of the videos he received is questionable and may not be the same videos which were said to be uploaded by AHS on GlobalScape.
- d) AHS counsel submitted his written submission at 4:14 PM MST, missing the 4:00 PM deadline. The failure of the Board to not inform him of this late submission and not giving him any opportunity to convey his position on its acceptance as part of the AHS Exhibit on record, clearly establishes the open bias the Board has for AHS counsel and the lack of impartiality of their part in this Merit Hearing.
- e) AHS counsel's failure to mention his presence at the start of the Merit Hearing on the Teams video is proof that he was absent for an unknown period of time after the admission of AHS counsel, the two witnesses and the Panel at the start of the Merit Hearing.

² Respondent's written submissions.

- f) AHS counsel is hiding the truth and falsely stating what actually occurred during the hearing on September 12, 2023 before he was admitted.
- g) As AHS counsel was in constant contact with the Board Secretariat, he would have been fully aware that the Appellant's submissions would be late so would have had the ability to provide a position on the late submission in advance of the Merit Hearing.
- h) The statement by AHS counsel that he objected to the inclusion of the Appellant's written submissions because they were late, that AHS had not seen the document, and that Legal Counsel would be unable to obtain instructions in relation to the same due to inadequate opportunity to review the submissions is false.
- i) AHS counsel's statement that he requested and was provided with a copy of the written submissions by the Board Secretariat for a brief review is false and further submits that, if true, would render the integrity and professional ethics of AHS counsel questionable. The Appellant also submitted that this would suggest that the Board Secretariat favoured AHS counsel.
- j) The provision of the written submissions to AHS for review while in the virtual hearing, and the concession made that the Appellant, as a self-represented litigant, could read from the submissions as may be required, is not true and he denies the same.
- k) If many of the statements made by AHS counsel in his written submission were considered true, it would clearly show that the Board and the Secretariat have erred in their duty and intentionally flouted the Rules of Procedure to conduct a fair, expeditious and impartial hearing, thus proving the Board's bias and partiality towards AHS.
- l) He was not given an opportunity to make objections as he was overpowered by AHS counsel and was not allowed to complete statements. He further submitted that he was not provided with any opportunity to respond to AHS's objections.
- m) AHS Counsel not being able to detail the nature of each objection is unbelievable and unacceptable.
- n) He did not ask AHS counsel why he was asking certain questions during his cross examination, and AHS' submission to the contrary is not true.
- o) AHS counsel objected to almost all his questions put to the AHS witness (the tenant) and his submission is not true. His statement was vague and evasive, and he could not provide any justification to the objections he raised. The Appellant further submitted that the Board upheld the objections presented by AHS counsel and did not provide the Appellant with an opportunity to contest those objections.
- p) Because the cross examination of the AHS witness began late in the day and because his cross examination was frequently interfered with by AHS counsel, he was unable to complete in a timely manner and had felt pressured to do so.

- q) The “Allegations of the Appellant” summarized by AHS are AHS counsel’s own interpretation.
- r) He has made statements of fact in his Recusal Application and AHS counsel’s comments stating they are without merit is false.
- s) AHS counsel has admitted in his written submission that the Appellant was denied natural justice and fairness in the conduct of the Appeal hearing process and has made statements attempting to justify the same. The Appellant further submitted that the Board has not followed the Rules of Procedure in this Appeal, thereby denying natural justice to the Appellant, and unduly favouring AHS counsel at the cost of the Appellant.
- t) AHS counsel has not proven that the Board had not permitted AHS attendees into the Merits Hearing in advance of the Appellant.
- u) The presence of the AHS witness, EO Hoshino, throughout the proceedings is grossly unfair and has caused irreparable damage to him as she will have become biased and have gained knowledge of the case presentation by the Appellant.
- v) The presence of the AHS witness (the tenant) at the start of the hearing for the alleged purpose of providing a voice print was unjustified as she was asked later during testimony if a voice on a video was hers. The Appellant further submits that the fact that the AHS witness was present in the Appeal hearing shows lack of impartiality on the part of the Board and is unduly favouring AHS.
- w) The fact that AHS counsel received and reviewed his written submissions prior to raising his objections to it has caused irreparable damage, and there is no justification for AHS to access, review and possess his written submission that do not form part of the records or exhibits.
- x) The Board has acted in favour of AHS by sharing his written submissions with AHS counsel before ascertaining his position on its acceptance.
- y) Because the Chair did not inquire whether the Appellant had any objection to the constitution of the Panel before the start of the Merit Hearing, he had no opportunity to ascertain existence of any conflicts of interest and could not respond accordingly.
- z) AHS’ video exhibits were sent to him after the deadline and no notification and no instructions on how to retrieve the video records followed. He further submitted that he was denied access to the same videos by the Board as he was not provided with access to the GlobalScape file share website.
- aa) AHS’ use of the word “argument” should be replaced with “submission and presentation of his case”. He further submitted that he did not make any submission that was irrelevant and presented only facts which he tried to explain with evidence from his exhibits.

bb) His cross-examination questions were relevant and proper, and well within legal procedure. He further submitted that the Panel's acceptance of AHS counsel's objections shows bias and partiality towards AHS.

cc) There is cogent evidence of the Board's lack of impartiality and a strong bias towards AHS and further submitted that the Board, consciously or unconsciously, will not decide the appeal fairly.³

Analysis and Reasons

Should the Panel recuse itself from hearing the Appeal hearing?

[13] The Panel carefully considered the written submissions of the Appellant and AHS, and for the reasons that follow, the Panel finds that the Appellant has not satisfied the test required for the Panel to recuse itself from hearing the Appeal.

[14] The courts have stated that the test for a decision maker to recuse itself is whether there is a reasonable apprehension of bias. The law of recusal is summarized by Justice J.T. Eamon in *Alston v. Haywood Securities Inc.*⁴ In that decision, in considering whether to recuse himself, Justice Eamon referred to the Supreme Court of Canada decision of *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*⁵, and held that:

[29] In *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 (CanLII), [2015] 2 SCR 282 the Supreme Court of Canada summarized the law of recusal:

[20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

. . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]

(*Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting)).

[21] This test — what would a reasonable, informed person think — has consistently been endorsed and

³ Appellant's written rebuttal submissions.

⁴ *Alston v. Haywood Securities Inc.*, 2022 ABKB 797 [*Alston*].

⁵ *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25.

clarified by this Court: ... [citations omitted by Eamon J].⁶

[15] In *Miller v Capital Management Ltd.*⁷, an Alberta Human Rights Commission (the “Commission”) decision, the Complainant made a recusal application and asked the Tribunal Chair to recuse herself. The Commission rejected the Complainant’s application, applying essentially the same law of recusal that was later cited in *Alston*. The Court held that:

[2] The test for a decision maker to recuse herself is whether there is a reasonable apprehension of bias. The Supreme Court of Canada described the test for reasonable apprehension of bias in *Committee for Justice and Liberty et al. v. National Energy Board et al.*

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.”

[3] In *R. v J.L.A.*, the Alberta Court of Appeal summarized the test as “what a reasonable observer would think who is fully informed and thought the matter through, not an observer with a suspicious mind or a mind too sensitive”. The Alberta Court of Appeal concluded that a decision maker does not need to recuse herself simply because a party requested her recusal.⁸

[16] In this Recusal Application, in order for the Panel to recuse itself from hearing the Appeal, the Appellant must show that a reasonable apprehension of bias exists. In order to determine if the Panel should recuse itself, the Panel will now address the allegations it identified in the Appellant’s Recusal Application.

Allegation 1: AHS and others were admitted to the Appeal hearing prior to the Appellant.

[17] The Appellant submitted that “the Appeal Board’s Chair and its members had a private closed door meeting with the AHS counsel and AHS’ both witnesses without my attendance”. AHS submitted in response that no one from AHS was admitted prematurely to the Appeal hearing, they

⁶ *Ibid* at para 20.

⁷ *Miller v Capital Management Ltd.*, 2020 AHRC 78.

⁸ *Ibid* at paras 2-3.

were placed in a virtual waiting room upon signing into the virtual Appeal hearing platform, and they were unable to speak with, see or hear the Panel prior to the Appeal hearing.

[18] The Panel finds that there is no evidentiary basis to support the Appellant's allegation that AHS and others were admitted to the Appeal hearing prior to the Appellant. The Appellant has made a bare allegation that is without merit and lacks any air of reality. The "private closed door meeting" alleged by the Appellant never occurred. Furthermore, the Appellant has chosen to make this serious allegation without any evidence to substantiate it, which is due to the fact that no such evidence exists. Prior to the commencement of the Appeal hearing, the Panel was placed in a separate virtual breakout room from the other hearing participants. At no time did the Panel engage in any interaction with AHS counsel and AHS witnesses without the Appellant being present. The Appellant also did not raise any concerns during the hearing about the alleged private meeting that in fact never took place.

Allegation 2: AHS objected to the Appellant's 43 page submission received moments before the hearing and he has continued to be in possession of it when it is not accepted as an exhibit.

[19] The Panel finds that allegation 2 is without merit. The Board had previously informed the parties that any submissions they intended to rely upon at the Appeal hearing were due on or before September 8, 2023. At the beginning of the Appeal hearing on September 12, 2023, the participants provided a voice print for the record, and then certain documents were entered as exhibits. The Panel noted that the Appellant had provided the Board with a 43 page document on the morning of the Appeal hearing and asked him if he wished to use that document in the Appeal hearing. The Appellant stated that he had just completed the document, had not provided it to AHS counsel, and that it could be provided to AHS counsel if AHS counsel wanted it.

[20] The Panel then informed the parties that it needed to decide whether the Appellant's 43 page document would form part of the Appeal hearing record, and the Panel asked AHS counsel if he would be taking a position on whether the 43 page document should form part of the record. AHS counsel objected to the document's inclusion in the record, due to the disclosure deadline and the written submission deadline which AHS counsel stated had been very clearly laid out by the Board, and because he had not been given an opportunity to receive, review or consider the Appellant's submissions prior to the Appeal hearing.

[21] The Panel asked AHS counsel if he required time to review the 43 page document, and AHS counsel was granted a brief period to review the document and confer with his client. Upon his return, AHS counsel maintained his objection to the document forming part of the record, however, he stated that he would not object to the Appellant, as a self-represented litigant, reading from his 43 page document for the purpose of submitting his case. The Appellant then confirmed that he was going to repeat each and every word contained in his 43 page document.

[22] The Panel deliberated on the objection and determined that the Appellant would be allowed to read from his 43 page document and that the document would not be entered as an exhibit.

[23] The Appellant also submitted that the Panel accepted AHS' written submissions after the submission deadline had passed but did not accept the Appellant's written submissions after the deadline. The Panel finds this argument to be without merit. The Board received AHS' written

submissions on September 8 at 4:14pm, which was 14 minutes past the 4:00pm deadline. However, the Board received the Appellant's written submissions at 7:40am on September 12, the day of the hearing, which is more than three days past the deadline. The Panel finds that the Appellant was not prejudiced by the fact that AHS submitted its written submissions 14 minutes after the deadline. The 43 page document that the Appellant provided to the Board was received on the morning of a hearing that was scheduled to start at 9:00am. The Appellant also admitted to not providing AHS with a copy of that document before the hearing. The Appellant submitted his 43 page document in excess of three days after the submission deadline of September 8. If the Panel had accepted this document to be entered as an exhibit, it would have had to respond to a 43 page document that it had only received during the hearing.

[24] The Appellant has subsequently submitted that AHS counsel "now has access to my privileged legal document which he is not entitled to and it is not an exhibit and it is not a disclosure document. The chair and the board facilitated this and did not allow me to object to this." The Appellant further argued that "This is a very clear unfair conduct of the hearing and open injustice to me, the appellant. This also shows beyond any doubt that the Chair and the board members are openly favoring the AHS counsel and I cannot expect any legitimate hearing and justice from them." He also stated that AHS counsel has received preferential treatment and "he has been accorded all privileges of the Appeal Board in having access to all my legal documents which only the Board is entitled to and not the respondent." The Appellant further argued that the Panel "could have decided themselves whether to accept my lately received Written Submission document or not. They could have also ascertained from Mr. Kyle Fowler, without sharing my Written Submission document with him, whether he had any objection to Board's acceptance of my lately received Written Submission document instead of first sharing it with him before he conveyed his position on its acceptance."

[25] AHS submitted that "At no material time prior to the submission of the Application, did the Appellant make any objection to AHS' continued possession of the proposed submissions."

[26] The Panel finds that allegation 2 is without merit. The Appellant has again made a serious allegation that the Panel has favoured AHS and denied the Appellant the right to a fair hearing. It is quite remarkable that in making this allegation,

- a) the Appellant is attempting to claim privilege over a document that he intended to "read each and every word" of during the Appeal hearing and which he admitted had not been provided to AHS before he stated his intention to use it in the Appeal hearing;
- b) he expressly stated in the Appeal hearing that AHS counsel could be provided with the Appellant's 43 page document;
- c) he has submitted that "only the Board is entitled to [his 43 page document] and not the respondent" and
- d) the Panel "could have also ascertained from Mr. Kyle Fowler, without sharing my Written Submission document with him, whether he had any objection to Board's acceptance of my lately received Written Submission document instead of first sharing it with him before he conveyed his position on its acceptance."

[27] The Appellant is attempting to argue that he has not received a fair hearing, while also stating that the Panel should deny AHS its right to review a document that the Appellant initially

provided to the Board only, and not AHS, on the morning of the Appeal hearing which commenced at 9:00 a.m. The Appellant further submitted that AHS counsel can decide if it has any objection to the Panel admitting into the record a 43 page document that the Appellant argued AHS should not be allowed to receive. If the Panel accepted the Appellant's submission on this point, the Panel would be denying AHS the right to know the case that is before it and the opportunity to reply, as AHS would have to answer to the contents of a 43 page document that the Appellant attempted to use as the basis of his case without allowing AHS the opportunity to receive and review that document.

Allegation 3: AHS requested to give its opening statements first.

[28] The Appellant submitted that AHS counsel requested to make his opening statement before the Appellant. The Panel agrees that AHS counsel made this request, however, the Panel finds that this did not result in a lack of procedural fairness to the Appellant for the following reasons.

[29] During the Appeal hearing, AHS counsel raised as a point of process that parties to a proceeding such as this Appeal hearing are usually afforded the opportunity to make opening statements, and the respondent has the opportunity to determine whether to make that opening statement at the beginning of the hearing or at the beginning of the respondent's case. AHS counsel stated in the Appeal hearing that while the appellant traditionally would be given the first opportunity to make an opening statement, AHS counsel would like to make a very brief opening statement before the Appellant begins his case. The Chair then asked AHS counsel to confirm that he wanted to make his opening statement before the Appellant, and AHS counsel confirmed he wished to do so, subject to the Appellant being able to make an opening statement before AHS counsel if the Appellant so chooses. The Chair then informed the Appellant that he would be able to refer to his 43 page document and asked him if he wished to make an opening statement before presenting his case. The Appellant answered yes, but then he asked what an opening statement is. The Chair then indicated that if the Appellant chooses to make an opening statement, it is a brief summary of the Appellant's position that he would be advancing in the Appeal hearing. The Appellant responded that he was not really sure what is required, and he will allow AHS counsel to make his opening statement first, so that the Appellant will learn from AHS counsel. The Appellant then stated the main points he wanted the Panel to consider in his appeal.

Allegation 4: Numerous objections from AHS and affirmative rulings in their favour with no explanation from the Chair as to why the objections were upheld.

[30] The Appellant alleged that AHS objected to the Appellant's 43 page written submission being admitted into the record, and to questions the Appellant asked the tenant during cross-examination. After considering the parties submissions regarding this allegation, the Panel finds that this allegation should be dismissed.

[31] Regarding the first objection, the Panel provided an explanation why the objection was sustained. AHS counsel objected to the inclusion of the Appellant's 43 page document as an exhibit on the grounds it was received after the submission deadline, adding that he had no time to obtain his client's instruction in this regard. The Chair then asked the Appellant for his response to AHS counsel's objection, to which the Appellant replied that he was going to repeat each and every word written from the document because of his accent. AHS counsel was then sent a copy of the

document via email and he indicated he would take two minutes to review it. After briefly reviewing the document, AHS counsel repeated his objection to the document being included as an exhibit to the degree that the Appellant may rely upon it for the purposes of giving his testimony, however, he will not object to the Appellant reading from the document. The Chair gave the Appellant another opportunity to state his position, to which the Appellant said he would still appeal. Following the Panel's consideration of the parties' positions on the objection, the Chair noted AHS counsel's objection and the reasons for it, and then the Chair gave its decision that the Appellant, as a self-represented litigant, would be allowed to read from the document and that the document will not be entered as an exhibit.

[32] Regarding the other objections raised by AHS counsel during the Appellant's case presentation, the Appellant alleged that the Chair immediately accepted all objections without providing an explanation, which the Appellant alleged "signals to me that this is not going to be a fair trial [*sic*] from the start." AHS counsel submitted that the Appellant was given an opportunity to respond to all objections.

[33] After reviewing the parties' submissions regarding objections made by AHS counsel, the Panel finds that the Appellant has not provided any compelling evidence or reasons to support his allegation that the Panel did not provide explanations to its decisions on the objections. Throughout the Appeal hearing, the Panel allowed the objecting party to state their objection and to provide grounds for the objection. The Panel then allowed the other party to respond to the objection. The Panel then made decisions on the objections and provided explanations for sustaining the objections. The Appellant has not provided any compelling evidence that the Panel's decisions on the objections represent a reasonable apprehension of bias or lack of procedural fairness.

Allegation 5: The Chair asked the Appellant how much time he needed for completion of his case.

[34] The Appellant submitted that the Chair "interfered several times and wanted to know when I was going to finish my presentation" and that the Chair asked him if he could conclude cross-examining AHS' witness in seven minutes and then informed the participants that the hearing would be adjourned to another day. AHS counsel submitted that neither he nor the Chair demanded that Appellant conclude his submissions in seven minutes, but rather AHS counsel noted that he had to be excused from the Appeal hearing at a particular time to pick up his children at a set time.

[35] The Appellant has not provided any compelling evidence that would suggest he was denied procedural fairness because the Chair asked him how much time he needed to conclude his complete case presentation. AHS counsel had informed the Panel and the Appellant that he had to be excused from the Appeal hearing at a particular time to pick up his children. The time was also approaching 4:45pm, and when the Chair periodically asked the Appellant how much time he needed to conclude his case, the Appellant was unable to provide a clear estimate. Noting the time of day, the Chair informed the parties that the Appeal hearing would have to adjourn to another date. The Appellant had indicated he would not be able to finish his cross-examination in the next seven minutes, which would exceed the time AHS counsel indicated he could remain in the hearing before having to be excused.

[36] The Panel finds no evidence that the Chair's request for an estimate of how much time the Appellant required to complete his case presentation resulted in a reasonable apprehension of bias or lack of procedural fairness. The Panel's decision to adjourn the hearing to a second date, so that the Appellant and AHS would have sufficient time to conclude their respective case, clearly shows that the Panel was mindful of the need to extend the hearing past the first day, so that both parties would be given the opportunity to present their case.

Allegation 6: The Appellant did not receive or have access to the three AHS videos.

[37] The Appellant alleged in his written submissions that he was not treated fairly in that he did not receive the three videos that formed part of AHS' disclosure by the September 5, 2023 deadline, he received smaller video files, and AHS should not be allowed to use the videos in the Appeal hearing. The Appellant also alleged that when he started to tell the Panel that the videos were not shared with him before the deadline, "AHS counsel quickly intervened and prevented me from making my statement on the late receipt of the videos by responding to that Board member with his own version. He over powered me like he did all through the hearing earlier and Board Chair and members fully supported it and never asked him to allow me to make my statement completely". He also submitted that AHS counsel only shared the videos on the Globalscape file share program with the Board. He further submitted that he was only given access to "much smaller" video files that were sent to him via email by AHS. The Appellant acknowledged in his submissions that AHS counsel sent an email containing its disclosure to the Appellant on September 5, 2023, which stated that the video files would be delivered via Globalscape due to the size of those files. The Appellant submitted that he "did not any receive notification or instructions on how to retrieve the video files till now". The Appellant further alleged that AHS counsel only shared the video files via Globalscape with the Board, which "showed the Board's non neutrality to both the parties, and its partiality for the AHS counsel".

[38] AHS submitted that the Board acknowledged receipt of the videos at 3:35pm on September 5 and that the Appellant via email on that date at 8:45pm informed AHS that he could not access the Globalscape files but gave no explanation of his efforts to access or the issues with gaining access to Globalscape. The Appellant sent AHS further emails on September 6 at 12:22 and 12:50am. AHS attempted to email the files directly to the Appellant and did not receive any undeliverable receipt, therefore as far as AHS is aware the September 6 email was delivered to the Appellant. AHS further submitted that the Appellant has "failed, refused or neglected to confirm receipt of the video files to AHS". On September 7 the Board Secretariat confirmed to AHS that they had spoken to the Appellant and that he had received AHS' email containing the videos. AHS submitted its disclosure in two stages via electronic means, and the Board acknowledged receipt of AHS' disclosure before the deadline. AHS also submitted that "the Appellant was and remains in India. Therefore, AHS' ability to provide records to the Appellant was always subject to technical limitations". AHS immediately took alternative measures to provide the videos to the Appellant as he stated he could not access them. AHS submitted that the video at issue identified in AHS' disclosure as exhibit 7.3 is a copy of the video titled exhibit 15 in the Appellant's disclosure. Therefore, "any allegation that the Appellant was prejudiced by the method of delivery of the video, or that AHS should have been restricted in presentation of the video at the Merits Hearing is without merit, and based on factual submissions that are demonstrably false." AHS further argued that "at all material times before the deadline for disclosure, the Appellant was in possession of the relevant video".

[39] The Panel finds the Appellant's allegation to be without merit. The three videos that the Board received on September 5 are no different than the ones the Appellant received on September 6, and they are not smaller or shorter. The Panel also finds that the Appellant has not been prejudiced by being unable to access the videos from AHS until September 6. The Board received the video files on September 5, and the Appellant submitted that he received AHS' disclosure email on September 5. While the Appellant argued that he could not access the videos from the Globalscape file share program, the Panel finds that AHS made reasonable efforts to provide the videos to the Appellant on September 5 and again took timely steps on September 6 to directly email the videos to the Appellant upon receiving his emails that he did not receive them. The Panel also finds that exhibit 15 in the Appellant's disclosure is identical to the exhibit 7.3 of AHS' disclosure, and therefore AHS provided the Appellant with the same video file that the Appellant already possessed.

Allegation 7: The Appellant was restricted to only asking questions of the AHS witness about the evidence the witness had just given when questioned by AHS.

[40] The Appellant submitted that the Chair informed him that he could only cross-examine the tenant on the same questions AHS counsel had asked her. The Appellant also alleged in his submissions that the Panel ordered him "to direct my questions in the way Mr. Kyle Fowler wanted", which "all very clearly show that the Board is openly favoring Mr. Kyle Fowler to help him get the appeal decision in his favor".

[41] AHS submitted that AHS counsel made several objections during the Appellant's cross-examination and that "the Chair gave direction, when appropriate, to the Appellant on constraining his examination. Cross-examination is not an unlimited right. There was nothing improper or procedurally unfair in the Chair's direction or rulings". AHS counsel further submitted that "All cross-examination is subject to the discretion of an adjudicator to refuse based on irrelevant or improper questions [citing *Kirst Estate (Re)*, 2023 ABCA 252 at para 8, which cited *United Nurses of Alberta v Alberta*]. As such, when the Appellant intruded into improper areas of examination, it was appropriate for the Chair to correct the Appellant and define the limits of cross examination."

[42] The Panel finds that the Appellant's allegation is without merit. Throughout the Appellant's cross-examination of the tenant that AHS called as a witness, the Chair gave direction to the Appellant when he posed improper questions to the tenant, such as when he asked the same or similar questions and when he was asking questions that bore no relevance to the Appeal. The Panel also notes that the Appellant provided no evidence that would suggest he has been denied procedural fairness with respect to his cross-examination of the tenant. The Appellant did not conclude his cross-examination on September 12, and therefore he will have the opportunity to do so when the Appeal hearing resumes and the tenant is recalled as a witness.

Allegation 8: The Chair did not ask if the appellant has objection to the constitution of the panel.

[43] The Appellant submitted that "The chair did not inquire whether I had any objection to the panel constitution, which was required by the PHAB rules". AHS submitted that the Appellant "has failed to advance any argument that he would have objected to the composition of the panel at that time. Further, there was and remains no substantive reason why the panel composition was not adequate or appropriate on the date of the Merits Hearing."

[44] The Board's standard procedure during appeal hearings includes asking the parties whether they have any objection to the composition of the panel. If the Panel did not do so in this Appeal hearing, it was an oversight that the Panel finds did not result in a reasonable apprehension of bias or unfair proceedings to the Appellant. The Panel also notes that neither the Appellant nor AHS raised any concerns about the composition of the Panel prior to or during the Appeal hearing. Furthermore, while the Appellant has only made this allegation in this Recusal Application, he has provided no argument or evidence in his submissions to suggest why the composition of the Panel was not adequate or inappropriate.

Can this appeal be heard if the Panel recuses itself?

[45] If the Panel determined that it would need to recuse itself from hearing this appeal, it appears that it would not be possible to continue and conclude this appeal. A new panel would need to be assembled, and the hearing would have to be re-heard. Also, the Board has considered whether it will be possible to hold the Appeal hearing with a new panel, and it was determined it would not be possible. Section 3 of the Act states that

3(1) There is hereby established a Public Health Appeal Board consisting of not more than 5 members who shall be appointed by the Lieutenant Governor in Council.

(8) Three members constitute a quorum at a meeting of the Board.

[46] The Act makes it clear that a minimum of three members of the Board is required to hear an appeal, and the Board cannot consist of more than five members. If any of the members of the Panel were recused from hearing this Appeal, there would be no mechanism in place to complete this Appeal. Pursuant to section 3(1) of the Act, the Board cannot consist of more than five members. Also, section 3(8) requires three members to constitute a quorum at a meeting of the Board, which the Panel determined would include holding an appeal hearing or an application.

[47] The Board also contacted the Government of Alberta regarding whether it would be possible to appoint another person to the Board for the sole purpose of being on the panel to conduct this Appeal hearing. The Government confirmed it would not be possible, due to the restrictions imposed by section 3 of the Act.

Conclusion

[48] After considering the evidence and submissions made by the Parties, the Panel finds that:

- a) the Appellant has not established that a reasonable apprehension of bias exists in this Appeal;
- b) the Appellant has not provided any evidence to support the allegations contained in his Recusal Application; and
- c) the Appellant has established no reasonable basis why the Panel should recuse itself from hearing this Appeal.

[49] For the reasons given above, the Recusal Application is dismissed. The Appeal hearing will continue and the Board Secretariat will canvass the parties' availability for a date to conclude the Appeal hearing.

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

Date: November 20, 2023

Appeal 08-2023