Appeal No.: 03/2016

PUBLIC HEALTH APPEAL BOARD

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

IN THE MATTER OF AN APPEAL
TO THE PUBLIC HEALTH APPEAL BOARD
BY HAROLD HICKIE
OF THE ORDER OF AN EXECUTIVE OFFICER
UNFIT FOR HUMAN HABITATION
ORDER TO VACATE
ISSUED BY ALBERTA HEALTH SERVICES
AT ONOWAY, ALBERTA, NORTH ZONE
DATED MAY 6, 2016
HEARING HELD SEPTEMBER 8, 2016

Appearances
Harold Hickie, Appellant
Sarah Eadie, Legal Counsel, Appellant

Mark Raven-Jackson, Legal Counsel, Alberta Health Services/Respondent
Jennifer Fearnehough, Executive Officer, Alberta Health Services/Respondent

Board Decision
The Board decided as follows regarding the Appellant's three grounds of appeal:
1) Ground One:
The *Public Health Act,* the *Nuisance and General Sanitation Regulation,* the *Minimum Housing and Health Standards* and the *Housing Regulation* apply to the property that is the subject of this appeal and Order of an Executive Officer dated May 6, 2016.
2) Ground Two:
The Board does not have jurisdiction to determine questions of constitutional law.
3) Ground Three:
The Order of an Executive Officer Unfit for Human Habitation - Order to Vacate dated May 6, 2016 is confirmed.

I. INTRODUCTION

An Order of an Executive Officer Unfit for Human Habitation - Order to Vacate dated May 6, 2016 (the "Order") was issued pursuant to the *Public Health Act* (the "Act") and its Regulations regarding housing premises at 208 Lakeview Place, 54425 Ste. Anne Trail, Lot 5, Plan 9023655 located in Lac Ste. Anne County, Alberta (the "Premises").

The Order was directed to Gilbert Lizee, the registered owner of the Premises (the "Owner") and all occupants. When the Order was issued Harold Hickie, the Appellant,

was the sole occupant residing at the Premises with his seven-year-old son visiting regularly. At the time of the appeal hearing the Appellant's son was living with him full-time.

The Order declared the Premises unfit for human habitation, directed the occupants to vacate the Premises by May 20, 2016 and directed the owner to immediately undertake and diligently complete work set out in the Order. The Premises were to remain vacant and secure from unauthorized entry until the work was completed to the satisfaction of an Executive Officer of Alberta Health Services. The Order was entered as Exhibit 1 at the hearing and is attached to this decision as Appendix 1.

The Order cited breaches of the *Act,* the *Housing Regulation*, Alberta Regulation 173/99 and the *Minimum Housing and Health Standards.*

Pursuant to the Order dated May 17, 2016 of Justice J.M. Ross of the Court of Queen's Bench, the Appellant could file an appeal of the Order to the Board prior to May 24, 2016. If the Appellant filed the appeal by May 24, 2016 the Order would be stayed until disposition of the appeal by the Board.

The Appellant filed a Notice of Appeal dated May 24, 2016 entered as Exhibit 2 at the hearing and attached to this decision as Appendix 2.

The Appellant raised three grounds of appeal. As the first two grounds primarily raised questions of law, the Board advised the Appellant and Alberta Health Services that these two grounds would be decided by considering written submissions. The Board advised that it would provide a decision regarding the first two grounds and if it was necessary to decide the third ground of appeal, a hearing date would be set to hear the third ground in person.

Written submissions were received from the Appellant and Alberta Health Services and after fully considering them the parties were notified of the Board's decision on grounds one and two by letter dated August 11, 2016. The parties were informed that the Board would provide written reasons for its decision regarding grounds one and two at the same time as it provided its decision and reasons on the third ground of appeal.

The appeal hearing on the third ground was heard on September 8, 2016 at Edmonton, Alberta. The parties were notified of the Board's decision on ground three by letter dated September 12, 2016 and that written reasons would follow regarding the three grounds of appeal.

At the hearing the Respondent's written submissions on appeal grounds one and two were entered as Exhibit 3, and the Appellant's written submissions on those two grounds were entered as Exhibit 4.

II. TIMING OF THE APPEAL

Section 5(3) of the *Public Health Act* requires the Appellant to serve a notice of appeal within 10 days after receiving notice of the Order. The Order was verbally issued to the Appellant on May 6, 2016 and the written Order provided to him at the same time.

The Appellant served the notice on the Board on May 24, 2016. Although this was outside the 10-day period provided for by the *Public Health Act*, the notice was served within the time frame granted to the Appellant pursuant to the Order of Justice Ross referred to above. There was no objection raised by Alberta Health Services to the Board hearing the appeal. In the circumstances, the Board extends the time to serve the notice of appeal.

III. JURISDICTION

There was no objection raised by either party to the Board's jurisdiction to hear this appeal.

IV. APPEAL GROUNDS

1. **Ground One:**
   The *Public Health Act* was not applicable because the Appellant was functioning as agent of the owner of the Premises.

2. **Ground Two:**
   The Order unjustifiably infringed the Appellant's right to liberty and security of the person guaranteed by s. 7 of the Canadian *Charter of Rights and Freedoms.* The Order unjustifiably infringed the Appellant's right to liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of the law guaranteed by s. 1(c) of the *Alberta Bill of Rights.* Any further investigation would unjustifiably infringe the Appellant's right to privacy guaranteed by s. 8 of the Canadian *Charter of Rights and Freedoms*.

3. **Ground Three:**
   If the *Public Health Act* applies, there was insufficient evidence that the State's interests would be advanced by all identified deficiencies of the Order. The Executive Officer had the authority to issue an order only if it was necessary to prevent a condition that is or might become injurious or dangerous to the public health, or that might hinder in any manner the prevention or suppression of disease. In some instances, it had not been demonstrated that such conditions existed or that the Order was likely to assist in preventing such conditions.

V. APPEAL GROUND ONE

A. Issue

Does the *Public Health Act* and its Regulations apply to the property that is the subject of this appeal and Order dated May 6, 2016?

B. Appellant's Submissions

By way of background, the Appellant had possession of the Premises for approximately one year before the investigation. The Premises were not advertised for rent and it was not the Appellant's intention to be a renter. The Owner's principal motivation for making the Premises available to the Appellant was to ensure the Premises were occupied and free from vandalism. It was specifically agreed that the Appellant would cover any costs to maintain the Premises and surrounding land. The Appellant kept the poplar trees trimmed and his presence prevented dumping and vandalism on the property. He knew the condition of the house upon moving in and was willing to live there because it was close to his mother and his son.

It was argued that because the Appellant falls under the definition of "owner", the Premises are beyond the scope and authority of the *Housing Regulation* and the *Minimum Housing and Health Standards* issued pursuant to the *Act*.

> Section 1(ff) of the *Public Health Act* defines "owner" as:
> ... the registered owner, and any person in the actual or apparent possession or control of land or a premises.
>
> Section 1(c) of the *Housing Regulation* similarly defines "owner" as:
> ... the registered owner and any agent of the owner in actual or apparent possession or control of land or premises.
>
> Section 2 of the *Housing Regulation* further states:
> This Regulation does not apply to housing premises or to that part of the housing premises that is occupied solely by the owner and the owner's dependents.

The Appellant submitted that he falls under the definition of "owner" because he was a person, namely an agent, in actual or apparent possession or control of the premises. As such pursuant to Section 2 of the *Housing Regulation*, the Regulation does not apply to him.

The Appellant submitted caselaw in support of his position that he was an owner of the Premises. The courts have recognized that the definition of "owner" in the *Act* is broad. In *R v Kraus*, ABQB, 1997, Justice Johnstone stated that "the use of the conjunctive word 'and' in s. 1(s) [what is currently section 1 (ff)] clearly intends the definition of 'owner' to encompass more than one person or group of persons" (para 26) and included as owners those who have beneficial but not legal ownership (para 27). In this case, the owner did not have to be both a registered owner and be in apparent or actual control of the premises, but merely an owner with title to the land. Similarly, the Appellant does not need to be the registered owner to be considered an "owner" in the *Act*, but can fall into the second part of the definition - a person in actual or apparent control of the Premises.

This definition of owner was affirmed in *R v Adamowicz,* ABQB in 2004, where a non-registered owner was found to be an "owner" as defined by the *Act* Section 1(ff) because he was in actual or apparent control of the subject property. The court found

the non-registered owner was in full control of the property, management of the property was left him as were any transactions conducted concerning the property.

The definition of "owner" in the *Act* was also expanded upon in *R v Princeton Capital Credit Inc*, 2012 ABPC 234, to include a property manager or caretaker.

In *R v Cholach*, 2006, ABPC 304, an individual who was neither a registered owner of the premises, nor a shareholder, director or officer of the corporation was considered an "owner" under the *Act*. The evidence was that this individual was an active manager of the premises, the person who dealt with the public health officers and was in care and control of the premises. Accordingly, the court found that individual to be an owner pursuant to the *Act.*

In *R v Strauss*, ABPC, 2004, the court dismissed charges against an owner that had been laid for failing to meet the requirements of the *Act*. However, the charges were dismissed because the owner had taken reasonable steps to remove the property from the rental market. This case illustrated that an owner is not required to meet the minimum housing standards if the property is not a rental property.

It was argued that these cases illustrate that an "owner" as defined in the *Act* is not only the legal registered owner to the property, but can include someone, like an agent, who demonstrates control and care of the property. If an owner is occupying the Premises, like the Appellant, the *Housing Regulation* and the *Minimum Housing and Health Standards* do not apply.

The Appellant submitted he was an agent of the Owner in actual possession or control of the Premises. Although no written contract existed between the Owner and the Appellant, the Owner expressly allowed the Appellant to reside on the Premises. The Owner may not have expressly referred to the Appellant as an "agent" of his Premises, but his conduct, by allowing the Appellant to live there and deal with the Premises, was sufficient for a reasonable person to conclude the Appellant was an agent of the Owner.

The agency relationship was supported by the following:

- The Appellant managed the property as he saw fit
- The Owner did not regularly visit or check in on the Premises
- The Appellant was free to deal with neighbours and Lac Ste. Anne Enforcement Services as he wished for the Premises (Lac Ste. Anne Enforcement Services regarding earth-dug outhouse, and complied with requests to ensure safe sewage and sanitation)
- The Appellant dealt with Public Health Officers and concerns personally, without the direction of the Owner.

The Appellant submitted he was not a tenant of the Premises. This was supported by the following:

- There was no residential tenancy agreement, written or implied

- No rent was paid or other form of exchange to live on the Premises
- No security deposit was paid
- The Appellant kept the Premises free from public dumping and hazards
- The Appellant protected the Premises from vandalism and robberies
- The Appellant maintained the Premises as required and incurred all costs associated with maintenance
- Maintenance of the Premises was not a condition of residing there
- Preventing dumping and vandalism was not a condition of residing there or in lieu of paying rent.

C. Alberta Health Services' Submissions

Alberta Health Services submitted the appeal should proceed on the merits and the issue of whether the Appellant was functioning as an "agent" had no bearing on the statutory ability of Alberta Health Services to inspect the Premises or issue the Order.

The Alberta Court of Appeal decision in *Alberta Health Services v Kneehill Animal Control and Rehabilitation Centre Ltd.*, 2015 ABCA 67 at paragraph 9 was cited as confirming the preconditions necessary to empower an Executive Officer to inspect a private place:

> Section 60 of the *Public Health Act* empowers an Executive Officer, with the consent of the owner or pursuant to a court order, to enter and inspect a private dwelling or privately owned land if the Executive Officer has reasonable and probable grounds to believe that a nuisance exists or that the owner is in contravention of the Act or regulations. Such grounds are not needed to enter and inspect a public place as defined by the Act. The only preconditions to entering public places is a need to determine the presence of a nuisance or whether the Act or its regulations are being complied with.

It was submitted that Alberta Health Services was hindered from accessing the Premises to conduct an inspection and therefore a Queen's Bench Court Order was sought and issued to permit access pursuant to Sections 59 and 60 of the *Act*. The application was structured to permit access to an Executive Officer whether the Premises were determined to be a private dwelling or a public place. The application was unopposed by either the Owner or the Appellant. Mr. Justice Hillier granted an Access Order on April 26, 2016.

Alberta Health Services inspected the Premises on April 28, 2016. The Executive Officer exercised her discretion pursuant to Section 62 of the *Act* and issued the Order on May 6, 2016 declaring the Premises Unfit for Human Habitation and ordering the Premises be vacated.

The Executive Officer had the statutory authority to issue the Order pursuant to Section 62 of the *Act* regardless of whether the Premises were a "public place" or "private place". Section 62 reads as follows:

> Where, after an inspection under section 59 or 60, the executive officer has reasonable and probable grounds to believe that a nuisance exists in or on the public place or private place that was the subject of the inspection or that the place or the owner of it or any other person

> is in contravention of this Act or the regulations, the executive officer may issue a written order in accordance with this section.

It was submitted that the issue of whether the Appellant resided at the Premises as a tenant or an agent and thus owner of the premises was, in the circumstances, irrelevant to whether the Order could be issued for the following reasons:

1. Alberta Health Services had the legislative authority to request access to a private place or public place pursuant to Sections 59 and 60 of the *Act;*

2. Alberta Health Services had the legislative authority to apply to the Court to obtain the order to access and inspect a private or public place pursuant to Section 61 of the *Act;* and

3. Alberta Health Services had the legislative authority to issue the Order pursuant to Section 62, including an order to vacate and an order deeming the Premises (private or public) unfit for human habitation.

Alberta Health Services submitted if determining whether the Appellant was an agent of the Owner was relevant, the Appellant was not an agent but a tenant at will.

Regarding the agency issue and Alberta Health Services' position that the Appellant was not an agent of the owner, Alberta Health Services relied on the Alberta Court of Appeal decision in *Swift v Tomecek Roney Little & Associates Ltd.*, 2014 ABCA 49 (CanLii) at paragraph 22 which described an agency relationship as follows:

> An agency relationship arises when one person gives another the power to affect his or her legal relationships: *Rockland Industries v Amerada Minerals Corp of Canada Ltd*, 1980 CanLii 188 (SCC), [1980] 2 SCR 2. Most agency relationships arise from an express contract between the agent and principal. Actual authority may be implied, but the implied authority is actual authority to perform "all subordinate acts which are necessary or ordinarily incidental to the exercise of ... express authority": see *Auer v Lionstone Holdings Inc*, 2005 ABCA 78 (CanLii), 363 AR 84 at para 14, citing *McDonald v Lawlor* (1908), 7 WLR 639 at 642 (Sask KB) ...

And with respect to the creation of an agency relationship, GHL Fridman in *Canadian Agency Law*, 2nd ed (Markham, Ont: LexisNexis Canada, 2012) at 40 as cited in *Mraz v Herman*, 2015 ABQC 573 at paragraph 17 stated:

> As with other contracts, the agency relationship may be impliedly created by the conduct of the parties, without anything having been expressly agreed as to terms of employment, remuneration, etc. The assent of the agent may be implied from the fact that he has acted intentionally on another's behalf. In general, however, it will be the assent of the principal which is more likely to be implied [....] Such assent may be implied where the circumstances clearly indicate that the principal has given authority to another to act on his behalf [....] There must be some course of conduct to indicate the acceptance of the agency relationship. The effect of such an implication is to put the parties in the same position as if the agency has been expressly created.

Alberta Health Services submitted that if it was restricted from issuing an order because the Appellant was functioning as an "agent and thus owner of the premises", the Appellant's evidence of agency is not supported by sworn evidence, not been subjected to cross examination and is a bare assertion.

Alberta Health Services submitted there was an implied tenancy at will relationship between the Owner and the Appellant. In *Ocean Harvesters Ltd v Quinlan Brothers Ltd*, [1975] 1 SCR 684 at 686, 687-688, Dickson J. explained that a "tenancy at will is created when one person permits another to occupy lands on the agreement, express or implied, that the tenancy is determinable at the will of either".

It was submitted that like the within appeal, in *R v Martins*, 2010 ABPC 392 (CanLii) at paragraphs 82-86 there was no rental contract between the occupants and owner of the premises. However, the owner of the premises allowed the two occupants to reside in the house for nearly a year in exchange for rent and the payment of utilities. On this basis, the court found an implied residential tenancy agreement.

Alberta Health Services took the position the Appellant and Owner had an implied tenancy at will relationship rather than an agency relationship based on the following:

1. The Certificate of Land Title did not disclose an agency relationship or that the Appellant held any registered interest in the Premises;
2. There had not been a formal agency agreement tendered by the Appellant;
3. No evidence tendered from the purported principal (the Owner) that the Appellant is, in fact, acting as his agent;
4. There was no evidence of conduct clearly indicating that the purported principal had given authority to the Appellant to act on his behalf;
5. There was no apparent fixed term in the tenancy agreement between the Appellant and the Owner of the Premises;
6. On November 25, 2015, the Appellant advised the Executive Officer he paid the Owner a "nominal fee" to reside at the Premises which was negotiated annually during tax season;
7. On November 25, 2015, the Appellant further advised the Executive Officer that the power for the Premises was in his name;
8. On December 3, 2015, the Appellant refused to disclose the name of the Owner to the Executive Officer and stated, "it was too much of a hassle for the Owner and he would probably just kick [the Appellant] out [of the Premises]";
9. On January 25, 2016, the Appellant again refused to supply the name of the Owner to the Executive Officer because the owner might demolish the Premises;
10. On January 27, 2016, the Owner told the Executive Officer the Appellant was to take care of the Premises and the Premises is what it is;

11. On January 27, 2016, the Owner provided the Executive Officer with permission to inspect the Premises. He further advised that he would not put money into the Premises, instead he would simply evict the Appellant and burn it down; and
12. On February 11, 2016, the Appellant confirmed he paid a nominal fee for rent and keeps up the property.

D. Board's Reasons re Ground One

Housing is regulated by the *Public Health Act* whether it is owner occupied or rental housing. Pursuant to the *Act,* an Executive Officer has legislative authority to inspect a public place or private place if he or she believes a nuisance exists. The Act provides different requirements for entry to inspect a public and private place but an order may be issued for either type of property.

More specifically, there is nothing in the *Act* that precludes the *Act* from applying to owner occupied premises and the Act defines "private place" and "public place" as follows:

> s. 1 (hh) "private place" means
> (i) a private dwelling, and
> (ii) privately owned land, whether or not it is used in connection with a private dwelling;
>
> s. 1 (ii) "public place" includes any place in which the public has an interest arising out of the need to safeguard the public health and includes, without limitation,
> (i) public conveyances and stations and terminals used in connection with them,
> (ii) places of business and places where business activity is carried on,
> (iii) learning institutions,
> (iv) institutions,
> (v) places of entertainment or amusement,
> (vi) places of assembly,
> (vii) dining facilities and licensed premises,
> (viii) accommodation facilities, including all rental accommodation,
> (ix) recreation facilities,
> (x) medical, health, personal and social care facilities, and
> (xi) any other building, structure or place visited by or accessible to the public;

Section 62 of the *Act* gives the Executive Officer discretion to issue an Order when a nuisance exists in a public or private place, including an order to vacate the place, declaring the place or any part to be unfit for human habitation and requiring work to be done. This section states:

> s. 62 (1) Where, after an inspection under section 59 or 60, the executive officer has reasonable and probable grounds to believe a nuisance exists in or on the public place or private place that was the subject of the inspection or that the place or the owner of it or any other person is in contravention of this Act or the regulations, the executive officer may issue a written order in accordance with this section [emphasis added].
> (2) An order shall be served on the person to whom it is directed and shall set out the reasons it was made, what the person is required to do and the time within which it must be done.

(3) Where the order is directed to a person who is not the registered owner, a copy of it shall also be served forthwith on the registered owner.

(4) An order may include, but is not limited to, provisions for the following:

(a) requiring the vacating of the place or any part of it;
(b) declaring the place or any part of it to be unfit for human habitation;
(c) requiring the close of the place or any part of it;
(d) requiring the doing of work specified in the order in, on or about the place;
(e) requiring the removal from the place or the vicinity of the place of anything that the order states causes a nuisance;
(f) prohibiting or regulating the selling, offering for sale, supplying, distributing, displaying, manufacturing, preparing, preserving, processing, packaging, serving, storing, transporting or handling of any food or thing in, on, to or from the place.

Therefore, the Premises are subject to the Act whether the Appellant was an agent of the owner, an owner or a tenant.

The Board also finds that the N*uisance and General Sanitation Regulation* applies to the Premises as that *Regulation* does not preclude owner occupied premises and contains a blanket prohibition against creating a nuisance as follows:

s. 2 (1) No person shall create, commit or maintain a nuisance.

The next question the Board asked was whether the *Housing Regulation* and the *Minimum Housing and Health Standards* apply to the Premises.

The *Housing Regulation* specifically states it does not apply to owner occupied premises:

s. 2: This Regulation does not apply to housing premises or to that part of the housing premises that is occupied solely by the owner and the owner's dependants.

And owner is defined as:

s. 1(c) "owner" means the registered owner and any agent of the owner in actual or apparent possession or control of land or premises.

For the *Housing Regulation* not to apply to the Premises, the Appellant must show he was either a registered owner, which he was not, or an agent of the owner in actual or apparent possession or control of the Premises. The actual or apparent possession or control of the Premises must be different from the possession or control that a tenant would have of rented premises as the *Housing Regulation* applies to rental accommodations and is intended to protect tenants.

The Board reviewed the characteristics of the relationship between the Owner and the Appellant to determine whether it was agency or tenancy. There was no written agreement setting out the terms of their relationship, making the tenancy or agency relationship "implied".

As submitted by Alberta Health Services, an agency relationship arises when one person gives another the power to affect his or her legal relationships. Assent by the agent or principal may be implied. The assent of the principal may be implied where the circumstances clearly indicate the principal has given authority to another to act on his behalf. The evidence submitted by the Appellant does not show the Owner gave authority to the Appellant to affect his legal relationships relating to the Premises.

If the Appellant was an agent of the Owner, he would have the authority to act on behalf of the Owner. This might include the authority to lease the property, evict tenants, sell the property, destroy and rebuild the property or anything an owner can do legally. There was no evidence the Appellant had authority to act on behalf of the Owner in this regard. The Appellant provided no evidence from the Owner confirming the authority he had delegated to the Appellant to act on his behalf.

The caselaw provided by the Appellant also shows that a caretaker or active manager may be an owner pursuant to the *Act* and *Regulation.* This relates to the possession or control of the property as set out in the definition of owner. The case law relates to whether managers or caretakers of property could be fined as owners pursuant to the *Act* or whether the legislation could be enforced against these managers or caretakers. The caselaw was not directly on point as it did not relate to whether a person residing on the property could claim he was not a tenant but rather an owner in the care and control of the property and therefore the Premises were not subject to the Regulations intended to protect tenants.

There was evidence that the Appellant cared for the Premises but it cannot be characterized as active management or caretaking. It was more akin to the care a tenant would engage in to maintain his property. He did care for the Premises as he saw fit but that was not because he was an active manager or caretaker but because the Owner did not want to be involved with the Premises or invest any funds into the Premises. The Appellant did not seek the Owner's direction but that was not because he had full authority to act on behalf of the Owner.

The evidence showed the relationship between the Owner and the Appellant was more akin to an implied tenancy at will. This relationship is created when one person permits another to occupy lands on the agreement, express or implied, that the tenancy is determinable at the will of either. This characterization is supported by the Owner threatening to evict the Appellant if work was required on the Premises and by the Appellant stating to the Executive Officer that if it was too much of a hassle for the Owner, he would probably just kick the Appellant out of the Premises. The Owner could evict the Appellant or sell the Premises at any time.

The tenancy at will arrangement is further supported by the Appellant paying the Owner, or intending to pay the Owner, a nominal fee to reside at the Premises. In addition, the Owner, not the Appellant gave permission for the Executive Officer to inspect the Premises.

The Board finds there was an implied tenancy at will relationship between the Owner and the Appellant and therefore the *Minimum Housing and Health Standards* also apply to the Premises. The introduction of these Standards states its purpose is the protection of occupants of rental housing:

> Purpose: The primary objective of this Minimum Housing and Health Standard is to protect and promote the health and well being of occupants of rental housing premises and of those who may reside in the immediate vicinity of such premises.

In summary, the *Public Health Act* and *Nuisance and General Sanitation Regulation* apply to both owner occupied and rental housing. The Appellant is not an agent of the Owner or an owner as defined in the *Housing Regulation.* He is a tenant therefore, the *Housing Regulation* and the *Minimum Housing and Health Standards* apply to the Premises.

VI. APPEAL GROUND TWO

A. Issues

1. Does the Order issued under the *Public Health Act* unjustifiably infringe on the Appellant's right to liberty and security of the person guaranteed by s. 7 of the *Charter of Rights and Freedoms* (The Constitution Act, 1982, c 11)?

2. Does the Order unjustifiably infringe on the Appellant's right to liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of the law guaranteed by s. 1(c) of the *Alberta Bill of Rights*?

3. Would further investigation unjustifiably infringe on the Appellant's right to privacy guaranteed by s. 8 of the *Charter of Rights and Freedoms*?

B. Appellant's Submissions

The Appellant submitted a *Charter* analysis argument for the Board to consider if it was found that the Board could hear *Charter* arguments. It is summarized as follows:

The Order unjustifiably infringed the Appellant's right to liberty and security of the person guaranteed by s. 7 of the Canadian *Charter of Rights and Freedoms.* The Order unjustifiably infringed the Appellant's right to liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of the law guaranteed by s. 1(c) of the *Alberta Bill of Rights.* Any further investigation would unjustifiably infringe the Appellant's right to privacy guaranteed by s. 8 of the Canadian *Charter of Rights and Freedoms.*

The Appellant sought a declaration that the Order was of no force or effect as it infringed his rights protected in the *Charter* and did not reflect the values set out in *Charter.*

The Appellant also submitted that if the Board has no jurisdiction to determine a question of constitutional law, both the Executive Officer's decision to issue the Order

and the Board's decision in this appeal ought to be interpreted considering constitutional principles. The *Charter* is supreme in Canada and any decision made by a delegated statutory decision maker must be consistent with its principles and values.

More specifically, the Appellant submitted the Order interfered with his ability to make decisions of fundamental importance including housing, namely, where and how he chooses to live. The Order would seriously interfere with the Appellant's autonomy and protection from physical or psychological harm which are recognized *Charter* values that ought to be considered in making a decision. The Executive Officer did not exercise proper professional discretion by failing to consider *Charter* principles when issuing the Order.

Similarly, the Appellant submitted the Board must also consider the *Charter* in making its decision.

The Appellant reserved the right to advance specific arguments regarding a violation of his *Charter* rights under section 7, including both that the Order and the *Act* unjustifiably infringed his rights to life, liberty and security of the person if this matter was reviewed or appealed to a court of competent jurisdiction.

C. Alberta Health Services' Submissions

Alberta Health Services submitted the Board does not have jurisdiction to hear a question of constitutional law. In support of this position, it was submitted that Part 2 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 governs a tribunal's jurisdiction to determine questions of constitutional law. The Board is a "decision maker" within the meaning of the *Administrative Procedures and Jurisdiction Act* as it is a body established by an Act of Alberta, namely the *Public Health Act*, to decide matters within the authority given under that Act.

The *Administrative Procedures and Jurisdiction Act* defines a "question of constitutional law" as "any challenge, by virtue of the *Constitution of Canada* or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or a determination of any right under the *Constitution of Canada* or the *Alberta Bill of Rights*."

It was submitted the Appellant's challenge that the Order infringed on his rights guaranteed by Section 7 of the *Charter* and Section 1(a) of the *Alberta Bill of Rights* fit squarely within the definition of a question of constitutional law as set out in the *Administrative Procedures and Jurisdiction Act*.

Section 11 of the *Administrative Procedures and Jurisdiction Act* states that a decision maker does not have jurisdiction to determine a question of constitutional law unless it is conferred such jurisdiction by a regulation made under that Act. The *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, s. 2 and Schedule 1 does not designate the Public Health Appeal Board as an administrative tribunal with

jurisdiction to determine a question of constitutional law. Therefore, the Board is precluded from adjudicating on the constitutional issue raised by the Appellant.

D. Board's Reasons re Ground Two

The *Administrative Procedures and Jurisdiction Act,* RSA 2000, c A-3 section 10 defines both a "decision maker" and "designated decision maker" as follows:

> (b) "decision maker" means an individual appointed or a body established by or under an Act of Alberta to decide matters in accordance with the authority given under that Act, but does not include
>
> (i) The Provincial Court of Alberta or a judge of that Court,
> (ii) A justice of the peace conferred with the authority to determine a question of constitutional law under the *Provincial Court Act,*
> (iii) the Court of Queen's Bench of Alberta or a judge or master in chambers of that Court, or
> (iv) the Court of Appeal of Alberta or a judge of that Court;
>
> (c) "designated decision maker" means a decision maker designated under section 16(a) as a decision maker that has jurisdiction to determine one or more questions of constitutional law under section (b)…

And in section 10(d) of that *Act* "question of constitutional law" means:

> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
>
> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

The *Administrative Procedures and Jurisdiction Act* further sets out the following on the question of jurisdiction at section 11:

> Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

Section 2 of the *Designated Constitutional Decision Makers Regulation,* Alta Reg 69/2006 sets out that decision makers listed in column 1 of the Schedule have jurisdiction to determine the questions of constitutional law set out opposite them in column 2. The Public Health Appeal Board is not included as one of the decision makers in column 1 of the Schedule.

The Board will not consider any *Charter* or *Alberta Bill of Rights* violation issues raised by the Appellant as it is without jurisdiction to determine questions of constitutional law. This lack of jurisdiction extends to the Appellant's arguments that *Charter* principles and values ought to be applied by the Executive Officer when making the Order and the Board when deciding the appeal.

VII. APPEAL GROUND THREE

Appeal grounds one and two were considered and decided with written submissions from the parties, as noted in the introduction above. The hearing of the third ground of appeal took place in Edmonton on September 8, 2016 where the parties attended and submitted evidence and arguments on this third ground.

A. Issue

Whether the Order Unfit for Human Habitation - Order to Vacate ought to be reversed, varied or confirmed?

B. Appellant's Submissions

Counsel for the Appellant requested the Order be varied by permitting some of the violations to remain, by allowing more time to remediate other violations and by acknowledging the work completed by the Appellant. It was argued that while the Executive Officer may have the authority to issue the Order, the authority is permissive and not mandatory.

It was submitted that the rural nature of the property and the circumstances of the Appellant ought to be considered by the Board.

The Appellant described the Premises as being in a partially developed subdivision in a "summer village". There were properties of varying sizes, from half acre to 2.5-acres with an assortment of cabins, some were permanent residences but the majority were for recreational use. Power was available but there was no municipal water or sewer system. Some of the properties had wells or water cisterns but the Premises had neither.

The Appellant explained he had financial difficulties and for economic reasons he wanted to continue residing at the Premises. The Premises were a comfortable place to live and he stated there was more remediation he wanted to complete but it was difficult to do upgrades until he knew if he could remain living at the Premises. The Owner was not interested in doing any remediation to the Premises but he had authorized the Appellant to do whatever work he wished.

The Order directed that the following work be completed and the Premises remain vacant until the work was completed to the satisfaction of an Alberta Health Services Executive Officer:

2 a. Repair re replace damaged flooring throughout the premises.

2 b. Install proper fire resistant building materials around the wood stove to ensure that it does not pose a fire hazard.

2 c. Install double glaze windows or storm sashes for existing single pane windows. Repair or replace the cracked bedroom window.

2 d. Identify the source of roof water infiltration and repair. All water damaged ceiling building material is to be removed and replaced.

2 e. Install hot and cold running potable water to the premises. A water well or cistern is required and operated in conjunction with a pressure system and suitable hot water tank.

2 f. A private sewage system shall be installed in accordance with the Alberta Private Sewage Systems Standard of Practice 2015.

2 g. The premises shall be equipped with a flush toilet, hand sink and bath tub or shower, connected to the private sewage system. The kitchen sink shall also be connected to the private sewage system.

2 h. Install a lock on the west facing exterior door.

2 i. Install missing exterior base skirting and finish to ensure weatherproof condition.

2 j. Insulate the underside of the structure.

2 k. Install an insect screen for the bedroom window and other openable windows.

2 l. Re-install the electrical outlet cover on the wall behind the wood stove.

2 m. Insulate and finish the front door construction to ensure that it is weatherproof.

2 n. Install permanent heating facilities for the premises that ensure all habitable rooms are capable of being safely and adequately heated to 22° C.

2 o. Repair or replace the stove.

Photographs of the Premises were entered as Exhibit 5. The Appellant's Counsel reviewed the violations set out above with the Appellant at the hearing. He did not dispute that the violations existed at the Premises at the time of the inspection apart from 2 d, j and l. He stated that any roof water infiltration was not a leak but water/ice damming up during winter, which could be alleviated by going up on the roof periodically in the winter. Insofar as insulating the underside of the structure was concerned, he contended it was already insulated. The Appellant stated the electrical outlet referred to in 2 l had no wires connected to it.

After the Order was issued and before the hearing on September 8, 2016, the Appellant stated he had undertaken and completed the following work:

1. Installed 8-millimeter poly on some of the single pane windows for an additional barrier and agreed that he could do the remaining windows [2 c].
2. Installed a keyed lock on exterior door [2 h].

3. Insulated front door with spray foam and added door trim around the inside [2 m].

In terms of the requirement for permanent heating facilities, the Appellant submitted he used a wood stove which worked well. He also had a small space heater but had not used it and there was a ceiling fan for air and heat distribution.

The Appellant used the wood stove for cooking, as well as a George Foreman grill and toaster oven. The inoperable electric range was used as a counter top.

There was no cold or hot running potable water supplied to the Premises, no flush toilet, bathtub or shower. There was a double sink in the kitchen area with a bucket under one of the sinks to catch wastewater.

The Appellant advised that he hauled five-gallon water jugs from his friends and neighbours for drinking water, cooking and cleaning. He used friends and neighbours' showers and rented an outdoor portable commode for toilet facilities.

The Appellant indicated he was prepared to install the insect screens, flooring and exterior skirting if it was required and replace the damaged ceiling tiles. He recognized the need to install proper fire resistant building materials around the wood stove and hoped this could be completed before winter. He estimated the cost would be about $500 excluding labour. The Appellant advised this work would be done immediately once there was a decision as to whether he could remain at the Premises.

The Appellant stated that much of the work he was prepared to complete on the Premises would involve expenses such that the work could not be completed immediately. He requested time to investigate the issue of the sewage system and running water and, if need be, additional time before the Appellant and son would be required to vacate the Premises.

C. Alberta Health Services' Submissions

Alberta Health Services provided a binder of materials, including a chronology of events, inspection reports, photographs, copy of Land Title Certificate for the Premises, and copies of relevant legislation and regulations. The binder was Exhibit 6.

Alberta Health Services submitted that the Premises were in substantial violation of the Act and the irony was the *Act* and *Regulations* were intended to protect people like the Appellant. Tenants should not be placed in the position of having to do substantial remediation to premises.

It was submitted there were ongoing safety issues with respect to the Premises that posed risks, especially going into winter. These included the lack of hot and cold running potable water, the fire hazard presented by the wood stove, the lack of a sewage system, flush toilet, hand sink and shower or bathtub.

The Executive Officer explained how the lack of running hot and cold water created risk of disease, illness and injury. She also explained that having the Appellant's young son now living at the Premises created additional concerns because children are more susceptible to disease and illness when premises have no plumbing.

Further, it was submitted the Appellant could not ask to live in an unfit property with no planned steps for remediation or proposed time lines. There were options open to the Appellant for accommodation elsewhere, but he had chosen not to entertain them. This was a clear case where the Order should be confirmed.

D. Board's Reasons re Ground Three

There was very little disagreement between the parties as to whether the conditions outlined in the Order existed when the Order was issued.

While some of the contraventions were less critical in nature, there were several critical violations that the Board found would pose an imminent risk to the occupants and neighbours of the Premises. These included the wood stove and lack of fire resistant materials surrounding it as well as the inability to control the temperature. In addition, the lack of indoor sewage system, flush toilet, hand sink, bathing facilities and hot and cold running potable water pose a serious risk of injury or may hinder the prevention of disease or illness.

Although the Board considered the Appellant's personal circumstances and the rural nature of the property, these considerations cannot not supersede the potential risks the critical violations posed to the occupants of the Premises, visitors and neighbours. The Premises cannot remain occupied pending remediation efforts. The Board finds the issuance of the Order, including declaring the premises Unfit for Human Habitation, was a reasonable exercise of the Executive Officer's professional discretion.

The Board also found that the critical violations constituted a "nuisance" as defined in the *Act* [s. 1(ee)] and in the *Nuisance and General Sanitation Regulation* [s. 1(f)]:

> "nuisance" means a condition that is or might become injurious or dangerous to the public health, or that might hinder in any manner the prevention or suppression of disease.

This finding means the Board would have confirmed the Order even if the Appellant was an agent of the owner or an owner as defined in *Act* and the *Housing Regulation* and the *Housing Regulation* and *Minimum Housing and Health Standards* did not apply.

The Executive Officer Order dated May 6, 2016 is confirmed.

VIII. SUMMARY

After considering all the submissions and evidence of the parties and for the reasons outlined above, the Board decided as follows:

1. **Appeal Ground One:**
   The *Public Health Act,* the *Nuisance and General Sanitation Regulation,* the *Minimum Housing and Health Standards* and the *Housing Regulation* apply to the property that is the subject of this appeal and Order of an Executive Officer dated May 6, 2016.

2. **Appeal Ground Two:**
   The Board does not have jurisdiction to determine questions of constitutional law.

3. **Appeal Ground Three:**
   The Board confirms the Executive Officer's Order dated May 6, 2016.

Per: _____

Julia Jones, Chair
Written by Sandra Sheppard
Also sitting:
Sandra Sheppard, Vice-Chair
Linda Klein, Member

Date: November 3, 2016