

**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 DATED APRIL 2, 2019**

**PANEL:** Denis Lefebvre, Chair, Presiding  
Wendy Lickacz, Vice-Chair  
Ike Zacharopoulos, Panel Member  
David Rolfe, Panel Member  
Barb Rocchio, Panel Member

BETWEEN:	)	
	)	
<b>1443028 ALBERTA LTD., RALPH</b>	)	Erika Norheim, and
<b>HOFFMAN and TASNEEM GOHAR</b>	)	Paul Moreau for the Appellants
(Appellants)	)	
	)	
- and -	)	
	)	
<b>ALBERTA HEALTH SERVICES</b>	)	Linda A. Svob,
(Respondent)	)	Alberta Health Services
	)	for the Respondent
	)	
	)	
	)	
	)	Stuart Chambers,
<b>Heard: May 30 and July 18, 2019</b>	)	McLennan Ross LLP,
	)	Independent Counsel for the Board

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**REASONS FOR DECISION**

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A notice of appeal was received on April 15, 2019. The matter was set down for a hearing on May 30, 2019, and continued on July 18, 2019.

## **The Appeal**

[1] This is an appeal (the “Appeal”) to vary an order of an Executive Officer (“EO”) dated April 2, 2019 (the “Order”).

## **Board Decision**

[2] The Panel provided its written decision on October 30, 2019 and varied the Order.

[3] The Panel’s reasons for its decision are provided herein.

## **Background**

[4] The subject-matter property is a duplex in the City of Edmonton, municipally described as 11841-83 Street (the “Premises”).

[5] At all material times, the registered owners of the Premises were 1443028 Alberta Ltd. (“144”) Ralph Hoffman (“Hoffman”) and Tasneem Gohar (“Gohar”). Hoffman and Gohar are both directors of 144 and in the actual or apparent control of the Premises. Collectively, Hoffman, Gohar and 144 are the owners of the Premises (the “Owners”).

[6] The same Owners also own the adjoining duplex municipally described as 11843-83 Street (the “Adjoining Premises”).

[7] On March 22, 2019, the tenants then residing at the Premises (the “Tenants”) contacted EPCOR to report that there was no water service. EPCOR had turned off the water supply to the Adjoining Premises and did not realize at the time that both the Premises and the Adjoining Premises shared the same water shut-off valve. In light of this unintended loss of water service to the Premises, EPCOR delivered bottled water to the Premises.

[8] On March 26, 2019, EPCOR re-established water service to the Premises and the Adjoining Premises for a period of 60 days to allow the tenants of the Premises time to discuss the issue with the Owners.

[9] On March 28, 2019, an EO received a complaint from EPCOR advising that water had been turned off at the Premises, and that the complainant believed that vulnerable tenants were residing at the Premises.

[10] That same day, an EO attended at the Premises but no one answered the door. The Adjoining Premises, however, was accessible and was inspected.

[11] The following morning, Friday March 29, 2019, two EOs attended the Premises and again could not gain access. The Adjoining Premises could be accessed and were inspected.

[12] The EO contacted Gohar that same morning to advise her that an inspection would be conducted at both the Premises and the Adjoining Premises on Monday April 1, 2019.

[13] A tenant living in the Premises contacted the EO in the afternoon of March 29, 2019, and arranged an inspection for later that day.

[14] An EO inspected the Premises on March 29, 2019 (the “Inspection”).

[15] On April 2, 2019, the EO issued the Order with respect to the Premises.

### **Grounds of the Appeal**

[16] The grounds as presented in Schedule “A” of the Notice of Appeal can be grouped into two categories.

- (a) That in making the Order, the EO exceeded her authority, did not undertake a reasonable investigation and erred in finding that the Premises violated a number of the Minimum Housing and Health Standards (the “MHHS”); and
- (b) The EO erred in providing advice to the tenants to not pay their rent.

### **Legal Issues**

[17] Based on the grounds, the legal issues of this Appeal for consideration by the Panel are as follows:

- (a) Whether the EO undertook a reasonable investigation.<sup>1</sup> Stated another way, whether the EO’s investigative process complied with the Act.
- (b) Whether the EO erred in finding that the Premises violated the MHHS related to:
  - i. The disruption in water supply;
  - ii. Pest control;
  - iii. Operational smoke alarms;
  - iv. Window screens;
  - v. Electrical outlet covers;
  - vi. The condition of a shelf and the floor tiles in the main floor bathroom;
  - vii. The condition/functionality of the thermostat;
  - viii. The condition of the stair nosing;
  - ix. The condition of the door frame; and
  - x. The power bar in close proximity to the kitchen sink.

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<sup>1</sup> The Panel erroneously did not address this issue in the Decision dated October 30, 2019.

- (c) Whether the EO exceeded her jurisdiction by informing the tenants that they did not have to pay rent for the premises.

[18] The Panel will only be dealing with the first two legal issues. The third issue, whether the EO exceeded her jurisdiction by informing the tenants that they did not have to pay rent, will not be considered, as this issue is not related to the Order and lies outside the jurisdiction of the Public Health Appeal Board (the “PHAB”).

### **Timing of Appeal**

[19] Section 5(3) of the *Public Health Act* (the “Act”) requires the Appellant to serve notice of an appeal on the Board or AHS within 10 days after receiving notice of the decision being appealed.

[20] The Order was issued April 2, 2019. The PHAB Secretariat received the Notice of Appeal on April 15, 2019. The Notice of Appeal was filed 3 days late. However, AHS did object to the late filing. The Board has accordingly exercised its discretion to allow the Appeal to proceed pursuant to s. 5(9) of the Act.

### **Jurisdiction**

[21] There are no objections to the Panel’s jurisdiction to hear the Appeal.

### **Documents/Exhibits**

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

- (a) **Exhibit 1** – Binder of documents of the Appellants
- (b) **Exhibit 2** – Binder of document of AHS
- (c) **Exhibit 3** – Email from EPCOR to Gohar dated April 18, 2019
- (d) **Exhibit 4** – EPCOR notes
- (e) **Exhibit 5** – Three (3) AHS colour photos

### **Submissions of the Appellants**

[23] The Appellants claim that the EO did not take reasonable steps when inspecting the Premises. The Appellants submit that there were insufficient steps taken by the EO to determine who owned the Premises and Adjoining Premises and whether the Adjoining Premises was vacant at the time of the inspection. The Appellants referred to the Land Titles Search for the Premises and the Adjoining Premises in the AHS Binder dated May 21, 2019. The evidence indicates the Land Title Searches was not done until after the Order was issued.

[24] The Appellants submit that the EO entered the Premises without the Owners’ knowledge or permission after EPCOR informed AHS of the lack of water services on March 28, 2019.

Further, the Appellants submit that based on the information provided by EPCOR, the EO assumed that the Adjoining Premises was a rental property and went ahead and carried out an inspection on March 28 and 29, 2019.

[25] The Appellants submit the EO immediately issued the Order after the unauthorized entry to the Premises instead of identifying the owners and using a less formal approach with the Owners (i.e., repair direction to inform them of the concerns or using other compliance options rather than an Order) to provide the Owners with an opportunity to address the concerns identified during the EO's inspection of the Premises.

#### *Disruption in Water Supply*

[26] The Appellants argue that the service provider, EPCOR, had mistakenly shut off the water to the Premises, when it had intended to shut off the water to the Adjoining Premises, because both units share the same water shut-off valve. The interruptions in water service were not due to the actions of the Appellants, nor within their control. The Appellants submit that EPCOR restored the water on March 26, 2019 before the EO's inspection and before the Order was issued.

[27] The Order indicates that the lack of water services contravenes Section IV(6) of the MHHS, which state, "Every housing premises shall be connected to the public sewage system, or an approved private system". The Appellants submit AHS did not prove that the Premises are not connected to a sewage system.

[28] The Appellants submit that AHS did not allege the Owners had contravened Section VIII (d) of the MHHS, which states that each owner must ensure a continuous supply of electricity, water and heat unless the rental agreement stipulates that such utility services are the sole responsibility of the occupant. The Owners' agent, Jennifer Vuong ("Vuong"), testified there were three people living in the Premises and they had been renting the suite for three years. During that time the tenants paid for their own utilities as per their lease agreement. The Appellants argue that the terms of tenancy in effect at the time made the utility services the sole responsibility of the tenant, falling within the exception of Section VIII(d) of the MHHS.

[29] The Appellants argue that the EO knew that water was in the process of being restored at the time the Order was issued. The Appellants also argue that the water services to the Premises were accidentally terminated by EPCOR and the Owners did not have the power to secure a commitment that the water supply be "permanently" restored as requested in the Order. Therefore, it was unreasonable for the EO to include the word "permanently" in the Order and this word should be deleted from the Order.

#### *Pest Control*

[30] Vuong testified that she had received no complaints from the Tenants in the Premises about mice or cockroaches and there was no evidence of mice or cockroaches in the Premises. The Appellants were ordered to hire a certified pest control operator to treat for mice and cockroaches in the Premises. The Order also indicated that the work must commence within seven days. The Appellants attempted to comply with the Order by hiring a pest control company. The Appellants submit that it was suggested by the EO via email on April 9, 2019,

(Exhibit 2 p.159) to delay initiation of the pest control services, telling them it would be best to hold off on pest control treatment until the following week as not to cause undue hardship to the Tenants. However, the EO did not formally vary or amend the Order to indicate her recommendation. The Appellants submit that this underscores the unreasonableness of the time frame set out in the Order.

#### *Smoke Alarms*

[31] The Order indicated that the smoke alarms located throughout the main floor were not operational and there was no smoke alarm in the basement. The definition of what is operational is not clear as the EO testified she did not check all of the smoke alarms in the Premises to determine if they were working or if they had a battery. Vuong testified the Tenants repeatedly removed the batteries to purposely disable the smoke alarms. The Appellants indicated that it is unreasonable for the EO to issue an Order to the owner rather than to the tenant who, by removing the batteries, disabled the smoke alarms. The Appellants submitted that the EO has broad jurisdiction under the Act to issue orders to tenants as well as owners.

#### *Window Screens*

[32] The Order directed the Appellants to immediately install window screens on all windows. The MHHS states that “during the portion of the year when there is need for protection against flies and other flying insects, every window or device intended for ventilation shall be supplied with effective screens”. The Appellants argue that this standard does not require that screens be installed, only that they be provided. Vuong testified that screens were provided for the windows but the Tenants removed the screens during the winter. The Appellants requested that the Order be varied to require that screens be supplied rather than installed. The Appellants argued the EO exceeded her jurisdiction when she ordered that the screens be installed immediately during a time of the year when there was not a need for protection against flies and other flying insects and that the missing screens were not in violation of section 11 (b) (3) of the MHHS.

#### *Electrical Outlet Covers*

[33] The Appellants argue that the absence of cover plates does not establish a breach of the MHHS. The Appellants rely on *R. v. George*<sup>2</sup> where the Court found that the absence of electrical cover plates was not proof that an outlet is not in safe working order. The Appellants submit there is no evidence to indicate that the outlets were not properly installed or not in good and safe working conditions.

#### *Condition of sink shelf and floor tiles in the main bathroom*

[34] The Appellants argue that the photographs AHS provided at Exhibit 5 and page 44 of Exhibit 2 showed that the shelf was not damaged and did not show signs of rot, but simply required cleaning. As such, it was unreasonable to order that the shelf be repaired or replaced.

[35] The Appellants further submit that only one floor tile was cracked as shown at page 47 of Exhibit 2. During cross-examination, the EO testified that she did not check closely to see if any

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<sup>2</sup> 2018 ABPC 20 at para.24

sealant had been applied to the tile. As such, the EO's finding that the floor tile needed repair or replacement is incorrect and not a violation of the MHHS.

*The condition/functionality of the thermostat*

[36] The Appellants submit that the photograph at p. 55 of Exhibit 2 demonstrates that the thermostat was not removed from the wall, as stated in the Order; only the thermostat cover had been removed. During cross-examination, the EO stated she did not test the thermostat to see if it was working. The Appellants submit that there was no evidence that the thermostat was not working properly. Vuong testified she was told by one of the tenants that the tenant had removed the cover, not the thermostat itself. The Appellants argued the evidence established the thermostat had not been removed from the wall, and that the Tenants had simply removed the cover.

*The condition of the stair nosing*

[37] The Appellants submit that the stair nosing was not painted but otherwise was in good repair and therefore not a contravention of the MHHS.

*The condition of the bathroom doorframe*

[38] The Appellants submit that page 23 of Exhibit 2 and the Inspection Report (at page 59) indicate that the door frame in question was in the bathroom, not the kitchen, and the direction in the Order to "repair or refinish the door frame in the kitchen" was unreasonable and should be removed. During cross-examination the EO agreed that the doorframe was in the bathroom and the Order was in error. No action was taken by the EO to amend or vary the Order.

*The power bar in close proximity to the kitchen sink*

[39] The Appellants argued that the fact that the tenants made use of a power bar to supply electrical services to their small appliances is not evidence of lack of electrical service. There was no evidence presented by AHS that there were deficiencies in the outlets, switches or fixtures therefore the Order applies only to the power bar not to whether or not the electrical services were in place.

[40] The Order directs the Appellants, not the Tenants, to remove the power bar and the cords near the kitchen sink. The Appellants submitted that if the EO's inspection revealed that the Tenants' use of electrical services amounted to a violation of the Act or Regulations, the appropriate remedy is for the EO to issue an Order to the Tenants to remove the power bar and cords from near the kitchen sink.

**Submissions of the Respondent**

[41] The Respondent submits that the EO's investigation of the Premises was reasonable and done in accordance with the relevant provisions of the Act, the Regulations and the MHHS.

### *Disruption of water supply*

[42] With respect to the water supply, the Respondent confirmed with EPCOR that the reason for the water supply being turned off was due to the non-payment of services for the Adjoining Premises. This caused the Premises' water to also be shut off, since the Premises and the Adjoining Premises share the same shut-off valve. The Respondents argue that since Owners of the Premises and the Adjoining Premises are one and the same, this puts the water supply issue squarely in the Appellants' control.

[43] The Respondent further argues that the Premises must be connected to the public sewage system with sufficient water volume and pressure to ensure proper operation and flushing of all plumbing fixtures as set out in section 6 of the MHHS.

### *Pest Control*

[44] The Respondent argues that the EO suggested to the Owners that pest control be delayed by one week in order to secure accommodations for the vulnerable and immune compromised tenants. It is submitted that this was a case-specific suggestion following a conversation between the EO and the Owners. The Respondent explained that the Owners had commenced the proper pest control protocol by contacting a pest control expert and made all necessary arrangements to have the process started. However it was suggested that the relocation of vulnerable tenants be completed before pest control measures were commenced.

### *Operational Smoke Alarms*

[45] The Respondent submits that, on inspection, the EO noted that smoke alarms were not operational. The Owners are responsible to ensure that the Premises have operational smoke alarms and that appropriate measures can be taken to mitigate against tenants tampering with smoke alarms (i.e., smoke detector wire guard). The EO noted that no such devices were utilized at the Premises.

### *Window Screens*

[46] The Respondent submits that it is reasonable for the Order to include the requirements for window screens, as this was a deficiency noted during the inspection.

[47] At the time of the inspection, it was 9 degrees Celsius and the tenants had the windows open. Further, it is important that the Premises have window screens in good working order to prevent pests of all kinds from entering the Premises. The Premises were found to have an active mouse and cockroach infestation. There was a concern that the pest control measures would be ineffective without window screen installation.

### *Electrical outlet covers*

[48] According to section IV(11) of the MHHS, “[e]very housing premises shall be supplied with electrical service. Outlets, switches and fixtures shall be properly installed and shall be maintained in a good and safe working condition”.



[49] The Respondent also submits that having outlet covers without adequate covers poses a public health risk in that it is a condition which might become injurious or dangerous to the public. That is, a lack of plate covers can expose wires and lead to personal injury.

[50] The Respondent argues that missing outlet covers are required for outlets to be in good and safe working conditions.

*Condition of the shelf and floor times in the main bathroom*

[51] Upon inspection, the EO found the bathroom shelf to be water damaged, peeling and cracking. This makes it difficult to keep the surface of the shelf clean and free of harmful agents or bacteria.

*Condition/functionality of the thermostat*

[52] The Tenants had complained of a lack of heat during the winter and questioned how a thermostat could function without a cover plate. It was indicated that the tenants would have difficulties turning the thermostat on and off without a cover and the function of the thermostat would be rendered “null” without a cover.

[53] The Respondent argues that without the cover on the thermostat, it is difficult (if not impossible) for the tenants to regulate the thermostat to the desired temperature and therefore it was reasonable to conclude that the thermostat was not functional.

*Condition of stair nosing*

[54] The stair finishing is not in good repair as stair nosing was missing, making cleaning difficult in contravention of part III, section 5 of the MHHS, which states all floor coverings shall be maintained in good repair, free of crack, holes, loose or lifting coverings and in a condition that renders it easy to clean.

*Condition of the doorframe*

[55] While the Order stipulates that a section of the doorframe in the kitchen was not properly finished in that particleboard was exposed, the frame is in fact the one in the bathroom. This, according to the Respondent, is in violation of the section III(5)(b) of the MHHS, which states that rooms and section of rooms that are used for food preparation and cooking shall have walls and floors constructed of materials which do not provide harbourage to dirt, grease, vermin, and bacteria and that are easily kept clean.

*Power bar in close proximity to the kitchen sink*

[56] The power bar on the sink was not a permanent installation likely placed there by the Tenants. The Respondent submitted that no direction on this was given to the Tenants as it is the Owners' responsibility.

[57] The Respondent submits that the power bar installed close to the kitchen sink is in violation of section IV(11) of the MHHS, which states that every housing premises shall be

supplied with electrical services. Outlets, switches and fixtures shall be properly installed and shall be maintained in a good and safe working condition.

### **Analysis and Reasons**

#### Legal Issue No.1: Whether the EO's investigative process complied with the Act

[58] The Panel will first deal with the reasonableness of the EO's investigation.

[59] An EO's authorization to inspect premises (whether public or private) and issue orders respecting health violations is found under Part 4 of the Act. Section 59 of the Act allows an EO to enter any public place for the purposes of determining the presence of a nuisance or determining whether the Act and the Regulations are being complied with. Permission of the Owner to enter rental accommodations is not required, though an EO will seek the cooperation and/or consent of the tenant. However, in order to enter a private place, the EO requires consent of an owner (s. 60) or an order of the court (s. 61).

[60] Once an EO has lawfully entered upon a premises and conducted an inspection (s.59), he/she has broad powers when enforcing the Act and the Regulations. For example, the presence of a nuisance or a violation under the Act and the Regulations might simply result in a warning, or, in more serious cases, require rental accommodations to be closed for tenant accommodation or even deemed unsafe for human habitation. In making his/her findings (of either a nuisance or violation), an EO is expected to show reasonable and probable grounds for said finding.

[61] The Appellants argue that the EO failed to undertake a reasonable investigation. Stated in another way, the EO did not comply with the Act when conducting her investigation.

[62] The EO did ascertain that the Premises were rental accommodations (a public place as defined in the Act) and was provided access to the Premises by one of the Tenants. The EO then conducted an inspection, which eventually led to the issuance of the Order. Based on the EO's testimony, the photos taken of the Premises as well as the investigation reports provided (found at **Exhibit 2**) the actions of the EO falls squarely within sections 59 and 62 of the Act. As such, the investigation of the Premises was reasonable.

[63] The Appellants also raise the issue of the investigation of the Adjoining Premises. The Panel did stipulate from the outset of the hearing that it was only interested in dealing with the Premises, which is the subject matter of the Order being appealed. This was raised by counsel for the Respondent in response to the Appellants line of questioning on the reasonableness of the EO's action regarding the inspection of the Adjoining Premises. The Panel did give the Appellant some leeway to cross-examine the EO on this issue, and as to make limited submissions so as to permit the Appellant to provide context for its reasonableness argument.

[64] The Appellants further argue that the EO was unreasonable and exceeded her jurisdiction in relation to some of the EO's findings of violations under the Act and the Regulations. The legal question, which frames this ground, is whether the EO erred in finding that the Premises violated the Act and the Regulations, including the MHHS.

[65] While the submissions on reasonableness was considered when the Panel reviewed the EO's compliance with the Act, the broader issue of reasonableness will also be discussed below under a separate heading, as this pertains to the Panel's broader concerns related to the Order and the underlying investigation as well as the investigation of the Adjoining Premises.

Legal Issue no 2: Whether the EO erred in finding that the Premises violated the MHHS

[66] The Panel now turns to the items listed in the Order that the Appellants maintain are not violations under the Act and the regulations

*Disruption of water supply*

[67] It is trite law that an owner of rental accommodations is responsible for compliance with the Act and the Regulations. However, there are some exceptions. For example, the MHHS stipulates at Part IV, Section 6(d) that every owner must ensure a continuous supply of water unless the lease agreement specifies that such a utility service is the sole responsibility of the occupant.

[68] It is incumbent upon an EO to be familiar with such exemptions and to make the necessary inquiries to ascertain whether the owner or the tenant is responsible for utility services. In this case, this enquiry was never made and the EO assumed that the Owners were responsible for water services. The Appellant submitted that the Premises' lease agreement stipulated that the Tenants were solely responsible for water service. While a lease agreement was never produced in these proceedings to substantiate the Appellant's assertion, the Panel is satisfied that the Tenants are responsible for water services pursuant to their lease agreement based on the testimony of the representative of EPCOR that the water services account of the Tenants was kept sufficiently current to maintain water services.

[69] This issue has been complicated by the fact that that both the Premises and the Adjacent Premises share the same water shut-off valve. By shutting off the water supply to the Adjacent Premises, the water to the Premises was also cut off. The representative for EPCOR testified that the water to the Premises was in fact accidentally shut off because it was EPCOR's intent to cut the water supply to the Adjacent Premises only for overdue accounts. Since the owner of the Adjacent Premises also happens to be the Owners, the EO surmised that the Owners were responsible for having caused Premises' water to be cut off and ordered the Owners to ensure water service is "permanently restored to the premises".

[70] There are two problems with the Respondent's argument: Firstly, EPCOR never intended to shut the water supply to the Premises; this was a mistake. Secondly, the Tenants are responsible for their water service account and any issue regarding that account is between the Tenants and EPCOR. The fact that the Owners also happen to own the Adjacent Premises is completely irrelevant. Since the Tenants are in good standing with EPCOR regarding their account, EPCOR should not have shut off their water service. In any event, it was explained by EPCOR that this was done in error. EPCOR may have to find another way to deal with the fact that both the Premises and the Adjacent Premises share the same water shut-off valve. It is not reasonable that the Tenants' water service would be impacted by outstanding bills related to the

Adjacent Premises. Since the cut in water services to the Premises was not the responsibility of the Owners, the EO erred in finding that the Owners violated the MHHS in this regard.

### *Pest Control*

[71] The Appellants do not dispute the fact that there was a rodent and cockroach problem at the Premises. However, in light of the suggestion from the EO discussed above, they dispute the reasonableness of having to complete item 1(c) at page 3 of 4 of the Order within seven (7) days.

[72] The evidence shows that Appellants did engage the services of a pest control company to deal with the mouse and cockroach infestation in accordance with the Order. A decision was made, based on the suggestion of the EO, that the pest control work be delayed for one week as to allow a vulnerable tenant sufficient time to find alternate accommodations. The fact that this agreement was not recorded in a revised order is of no consequence.

### *Operational Smoke Alarms*

[73] All rental housing must have smoke alarms pursuant to the MHHS; there is no dispute of this by either party. The EO could recall that the basement smoke detector was without batteries, but could not recall if the upstairs smoke detector was either non-operational or not present, nor did the inspection report (Exhibit 1, page 25) make any note of this. It is also peculiar that that the EO stated that she considers the absence of a smoke detector the same as a smoke detector being non-operational. The said report also only refers to one smoke alarm. However, from a practical perspective, this does not matter. Ensuring that smoke alarms on each level of the Premises are installed, operational and properly maintained is required under the MHHS and very easy to do. The fact that the Tenants may have removed the batteries from the smoke detectors does not relieve the Owners of their obligation under the Act and the regulations. As such, the EO did not err in finding a violation with respect to the smoke detectors.

[74] Having said the foregoing, noting whether a smoke detector is present or non-functional is a basic fact that could and should be easily noted in the EO's investigation report and accurately stated in the Order.

### *Window Screens*

[75] The Appellant has not established the presence of flying insects during the EO's inspection. The fact that window screens are not installed during the time of year when flying insects are not present is not a violation pursuant to Part III, Section 2(b)(iii) of the MHHS. The Public Health Appeal Board has made a similar finding in Appeal 15-2018. In that appeal, the Hearing Panel stated as follows:

[58] Part III, section 2(b)(iii) of the MHHS states as follows:

During the portion of the year when there is a need for protection against flies and other flying insects, every window or other device intended for ventilation shall be supplied with effective screens.

[59] The Inspection and Second Inspection occurred on November 21 and November 22, 2018, respectively. It would be highly unusual for flies and other flying insects to be out

during that time of year. In any event, the Respondent provided no evidence of the presence of any flying insects.

[60] The Panel is unable to accept the Respondent's arguments that it wanted to make sure that the owner was aware that screens would be necessary come summer time. An order is meant to communicate a violation that exists at the time of the inspection, not one that may exist sometime in the future. Consequently, missing screens in November, when there are no flying insects present, is not a violation under the MHHS.

[76] In the case at bar, the EO erred in finding that the absence of window screens in the Premises is a violation under the MHHS.

#### *Electrical outlet covers*

[77] Missing electrical covers do not, by themselves, constitute a violation under the Act and the Regulations. The follow-up question is whether a missing cover may cause a safety hazard. In *R. v George*<sup>3</sup> Judge L.E. Malin considered whether a missing cover plate on an electrical outlet in a basement bedroom establishes a contravention of Part IV, Section 11 of the MHHS:

[...] The matter then comes down to the question of whether the absence of the cover plate is proof that it has not been "maintained in good a safe working condition." The photograph of the outlet clearly shows that the covers plate is missing. The mere absence of a cover plate does not, by itself and in this instance, prove that the outlet was not in a good working condition or in safe working condition or that it compromised the safety of the housing premises. The charge under count 35 is dismissed.

[78] In support of its position that missing plate covers is a violation under the MHHS, AHS provides the case of *R. v. Princeton Capital Credit Inc.*<sup>4</sup> Therein, Judge F.E. LeReverend found that the defendant did contravene the section 11 of the MHHS by "failing to ensure switches are properly maintained in a good and safe working condition." In that case, however, the missing covers exposed wires, which constitute a safety concern. The Court went on to state, "[l]ack of cover plates could allow someone to experience a shock if any part of their body came into contact with the exposed electrical wire."

[79] The photo at page 54 of the Exhibit 2 shows a light switch with a missing cover plate. The photo clearly shows that the wires are securely housed within the switch box and there are no exposed wires. The fact that the switch is missing its cover does not cause a health or safety concern and therefore does not constitute a violation under the MHHS.

[80] The photo at page 54 of Exhibit 2, on the other hand, shows an electrical outlet with exposed wires. Without the cover plate, this outlet may cause a safety hazard, as it could allow someone to experience an electric shock. Accordingly, the missing cover in this circumstance constitutes a violation of Part IV, Section 11 of the MHHS.

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<sup>3</sup> 2018 ABPC 20 at para. 124

<sup>4</sup> 2012 ABPC 234 at para. 105

*Condition of the shelf in the main bathroom*

[81] Photos of the shelf are found at pages 41-55 of Exhibit 2. Additional photos were produced during the hearing and entered as Exhibit 3. The Appellants argue that the surface of the shelf is simply stained and its surface still allows for easy cleaning. The EO testified that the surface is in fact peeling and difficult to clean, thus creating a health hazard. The Panel accepts the EO's direct observation and confirmation as to the state of the surface of the shelf. The Panel finds that the EO did not err in finding a violation under the MHHS.

*Condition of the floor tiles in the main bathroom*

[82] The photos provided at Exhibit 2 shows that the tiles are in fact cracked which may make cleaning difficult. However, during cross-examination, the EO confirmed that she did not look closely to see whether clear tile sealant had been applied. The Panel is not satisfied that the EO conclusively determined that a clear tile sealant was not present. As such the Panel finds that the EO erred in finding a violation under the MHHS.

*Condition/functionality of the thermostat*

[83] Page 1, item (n) of the Order stipulates that the thermostat was removed from the wall. However, it is clear from the photos and from the EO's testimony that the thermostat was in place and its cover removed. A photo at page 55 of Exhibit 2 confirms the same. The EO explained that without its cover, the thermostat may or may not be functional. The Order then directs (at Page 3, item m), that the Owners install a functioning thermostat. However, the EO never tested the thermostat to see if it was functioning. During cross-examination, the EO testified that she could not determine if it was or was not functioning with the cover missing. The EO stated that she assumed that the thermostat was not functioning.

[84] Part IV, Section 14 of the MHHS states that outlets, switches and fixtures shall be maintained in a good and safe working condition. The Panel is not satisfied that the thermostat was not functioning and that it was unsafe and created a health hazard. Similar to missing outlet covers (see para. 75 to 78 above.) the fact that the thermostat cover is missing does not in and of itself create a health hazard. The Panel finds that the EO erred in finding that the missing thermostat cover is a violation under the MHHS.

*Condition of stair nosing*

[85] The Panel is satisfied with the EO's observations that the stair nosing was not finished and missing its covering, thus exposing particle board type material that would likely be difficult to keep clean. The EO did not err in finding that that missing stair nosing was a violation under the MHHS.

*Condition of the doorframe*

[86] The order incorrectly makes reference to the kitchen rather the bathroom. The EO confirmed this during her cross-examination. Notwithstanding the error, the condition of the door violates Part III, Section 5(a) of the MHHS.

*Power bar in close proximity to the kitchen sink*

[87] The Panel agrees with the EO that the power bar in close proximity to the sink creates a hazard. Outlets in close proximity to a sink (whether in the kitchen or bathroom) must comply with the electrical safety codes. Specifically, outlets installed within 1.5 meters of sinks must be GFCI protected with GFCI receptacles or GFCI electrical circuit breakers. The MHHS does not, interestingly, include reference to the Alberta Building Code respecting electrical outlets. At Part IV, Section 11, the MHHS stipulates that “[o]utlets, switches and fixtures shall be properly installed and shall be maintained in a good and safe working condition.” A broad reading of this section would capture the power bar in question under the definition of “switch”. Further, a broad reading of “safe working condition” would mean that the power bar being within 1.5 meters of the sink would not be in a “safe working condition”. In the alternative, one could consider the power bar in close proximity to the sink to be a “nuisance” under the Act, which, according to s. 1(ee) means “a condition that is or that might become injurious or dangerous to the public health.” Either way, the Panel accepts the EO’s assessment that the power bar in close proximity to the kitchen sink is a public health violation pursuant to the Act and the Regulations.

**Concerns Related to the Inspections and the Order**

[88] As stated earlier, the Panel has a number of concerns regarding the Order as well as the inspections. These include the following:

- (a) The EO was not authorized to inspect the Adjoining Premises. The evidence presented at the hearing, and in particular during cross-examination of the EO, revealed that inadequate inquiries were made to determine if the Adjoining Premises was a rental, relying instead on what EPCOR disclosed (which was simply that someone appeared to be living there; this does not confirm that someone other than the owner was living in the Adjoining Premises). The EO stated she assumed it was a rental based on what appeared to be squatters occupying the Adjoining Premises. It would be a simple matter of conducting a land titles search prior to entering the Adjoining Premises (in this case, there was no evidence a title search was conducted prior to the inspection), then contacting the Owners to make enquiries as to whether the Adjoining Premises was being rented. The Panel is not satisfied that the EO properly established that the Adjoining Premises was a public place as defined in the Act and therefore did not have authorization to enter upon the said premises without a court order or the consent of the Owners pursuant to sections 60 and 61 of the Act. While the Adjoining Premises is not the subject matter of the Order, the Panel is nonetheless sufficiently concerned to comment on the inappropriateness of the inspection of the Adjoining Premises.
- (b) The EO also made many assumptions during the investigation of the Premises. For example, based on the EOs cross-examination, the EO assumed that:
  - i. no clear sealant had been applied to the cracked floor tiles;
  - ii. the thermostat was not operational; and

- iii. that the Owners were responsible for payment of the utilities in the Premises.

An order should be based on facts, not assumptions.

- (c) Moreover, despite a previous finding by the PHAB (Appeal 15-2018), AHS nonetheless issued an Order citing a violation respecting window screens when there is clearly no violation. Specifically, when flying insects are not present owners are not required to have window screens installed.

[89] EOs have a tremendous amount of power accorded to them pursuant to the Act. As such, they must exercise that power with the utmost diligence and strictly comply with the Act, the regulations and the MHHS. To do otherwise risks eroding public confidence in AHS and the important work of EOs.

### **Findings and Conclusion**

[90] The Panel makes the following findings:

- (a) The EO did not satisfy the Panel that the Appellants violated the MHHS with respect to:
  - i. The disruption in water supply;
  - ii. The requirement for window screens;
  - iii. Electrical outlet covers where live wires are not accessible (see for example page 54 of Exhibit 2);
  - iv. The condition of the floor tiles in the main floor bathroom;
  - v. The condition/functionality of the thermostat;

With respect to item (i.) above, this is an EPCOR problem that they will have to sort out. In all of the other items, the EO assumed MHHS violations without providing the factual and evidentiary basis to support her conclusions.

- (b) The EO did not err in finding that the Appellants violated the MHHS with respect to:
  - i. Pest control;
  - ii. Operational smoke alarms. However, the EO should specify if the smoke alarm(s) on the main floor is (are) either not operational (i.e., no battery) or whether there is no smoke alarm where there should be one;
  - iii. Electrical outlet covers where live wires are exposed and may pose a risk to public health (for example, page 53, Exhibit 2).



- iv. The stair nosing;
  - v. The condition of the shelf in the main floor bathroom;
  - vi. The condition of the doorframe in the bathroom. However, the Order needs to be amended to correct the error, as the EO incorrectly made reference to the kitchen; and
  - vii. The power bar in close proximity to the kitchen sink.
- (c) The Panel is of the view that the EO could have also issued an order to the Tenants requiring the Tenants to adhere to the MHHS and prohibiting the Tenants from:
- i. Removing the batteries from the smoke detectors;
  - ii. Removing electrical outlet covers;
  - iii. Removing the thermostat cover; and
  - iv. Installing an electrical power bar too close to the sink.
- (d) However, the Public Health Appeal Board cannot direct AHS to issue an order against the Tenants, as that falls outside of the Board's jurisdiction under section 5 of the Act. The Panel would encourage AHS to issue such orders where a tenant is jointly responsible for MHHS violations. This would send a clear message that landlords/owners are not the only ones who are responsible for adhering to the Act, the regulations and the MHHS.
- (e) The Panel declines to address the issue of whether EO erred in providing advice to the tenants to not pay their rent, as this is outside the jurisdiction of the Panel under section 5 of the Act.

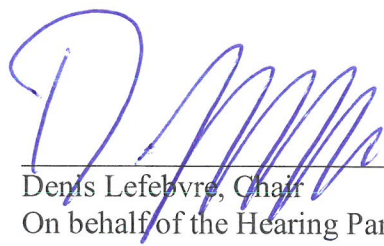
[91] In summary, the Panel varies the Order as follows:

- (a) Paragraphs a. at page 1, 2 and paragraph 1 a. at page 3 shall be removed.
- (b) Paragraph d. at page 2 and paragraph e. at page 3 shall be removed;
- (c) Item (i) shall be removed from paragraph e. at page 2.
- (d) Paragraph n. at page 1 shall be amended to state as follows: "The thermostat cover had been removed".
- (e) Paragraph 1 m. at page 3 shall be amended to state as follows: "Install a thermostat cover".
- (f) Item (n) shall be removed from paragraph h. at page 2.

- (g) Paragraph 1.b. at page 3 shall be amended as to properly identify which smoke alarm needs to be functional and where smoke alarms should be installed where there are none.
- (h) Paragraph 1.e. at page 3 shall be removed.
- (i) Paragraph 1.i. at page 3 shall be removed.
- (j) Paragraph 1.l. at page 3 shall be amended to state as follows: “Install outlet plate covers on all outlets throughout the Premises where live wires are either showing or protruding.”
- (k) Paragraph r. at page 1 should reference the main bathroom rather than the kitchen.
- (l) Paragraph k. at page 2 should reference part III, section (5)(a) rather than section (5)(b).
- (m) Paragraph 1.q. should reference the main bathroom rather than the kitchen.<sup>5</sup>

[92] AHS was given 10 days from the date of this decision to amend the Order as stated above. It is the PHAB’s understanding that this was completed.

[93] The amended Order shall remain in force until such time as AHS rescinds the Order in accordance with the Act.



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

**Dated this 12<sup>th</sup> day of March, 2020**

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<sup>5</sup> The Panel’s written decision dated October 30, 2019 did not include sub-paragraphs (k), (l) and (m) of paragraph [51]. However, it is expected that these amendments were included pursuant to the Panel’s directive at paragraph \* (b) (vi) above.