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 A PRELIMINARY APPLICATION
BY ALBERTA HEALTH SERVICES
IN THE APPEAL TO THE PUBLIC HEALTH APPEAL BOARD
BY PERSONNEL & GENERAL SERVICES INC.
AND ROBERTO MAGLALANG
OF THE ORDER OF AN EXECUTIVE OFFICER
NOTICE OF CLOSURE
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 4 EDMONTON
DATED JULY 13, 2016
HEARING HELD AUGUST 18, 2016

Appearances:
Roberto Maglalang, Appellant (Respondent in the Preliminary Application)

Mark Raven-Jackson, Legal Counsel, Alberta Health Services, Respondent
(Applicant in the Preliminary Application)

Board Decision:
The Board will hear and decide the appeal of the Order dated July 13, 2016 notwithstanding that the Order was rescinded by Alberta Health Services on August 4, 2016.

A. Introduction

An Order of an Executive Officer - Notice of Closure was issued July 13, 2016 pursuant to the *Public Health Act* and the *Food Regulation, Alberta Regulation 31/2006* and the *Food Retail and Foodservices Code* relating to Little Asia Noodle House and Dylan's House of Minis, a food establishment located in Millbourne Market Mall, Edmonton, Alberta.

The Order directed that the owner immediately close the premises and required the owner to immediately undertake and diligently address several contraventions found on the premises.

On July 19, 2016 the Board received the Notice of Appeal. An appeal hearing date was set for August 18, 2016.

The Order was rescinded by Alberta Health Services on August 4, 2016. Alberta Health Services took the position that the appeal was moot because the Order being appealed had been rescinded. The Appellants advised the Board that they did not intend to withdraw their appeal.

The Board informed the parties that it would hear the preliminary application of Alberta Health Services as to whether the appeal is moot on August 18, 2016 by way of telephone conference. Further, the appeal hearing would not proceed until the Board hears this application on the issue of mootness. A different hearing date would be scheduled for the appeal if the Board decided that the appeal should proceed.

B. Issue

The issue is whether the Board ought to hear the Appellants' appeal of the Order of an Executive Officer dated July 13, 2016 notwithstanding that the Order was rescinded by Alberta Health Services on August 4, 2016.

C. Alberta Health Services' Submissions (Applicant in the Preliminary Application)

There were two stages to the argument advanced by Alberta Health Services:

I. Is the Appeal Moot?; and
II. Should the Public Health Appeal Board hear a Moot Appeal?

I. Is the Appeal Moot?

Counsel for Alberta Health Services asserted that the Appellants did not specify in their Notice of Appeal the specific remedy being sought. Section 5(11) of the *Public Health Act* states that the Board may confirm, reverse or vary the decision of the regional health authority. It was submitted that based on the Appellants' written submissions opposing this application, they are seeking to have the Order reversed.

Counsel cited the two part test for mootness in the Supreme Court of Canada decision in *Borowski v Canada (Attorney General),* [1989] 1 SCR 342:

1) Determine if there is a live controversy; and
2) If the answer is "no", determine whether discretion should be exercised to hear the case.

It was submitted that the Order has been rescinded and the live controversy resolved, thereby rendering the appeal moot.

Alberta Health Services referred to a previous decision of the Public Health Appeal Board dated April 14, 2016 [Appeal 02/2016] in which *Borowski, supra* was applied. In appeal decision 02/2016 the Board found that the appeal was moot. The Board decided not to exercise its discretion to hear the appeal and dismissed the appeal. In that case the Appellant sought a specific remedy in the Notice of Appeal, the opportunity to have another inspection of the premises. After the filing of the Notice of Appeal there were two re-inspections by another Executive Officer on March 9 and 10, 2016. The Order was

rescinded and a permit was granted on March 10, 2016. The specific remedy sought by the Appellant was already granted to him by Alberta Health Services.

Counsel for Alberta Health Services submitted that the Alberta Court of Appeal has applied the two part test for mootness from *Borowski* in an administrative matter in *Wiebe v Alberta (Labour Relations Board),* 2001 ABCA 192, at paragraph 9:

> The Court stated that the appellants "have got what they wanted (decertification), and the substantive dispute is over. Their rights are no longer in issue . . . our judgment could not lead to the union local's decertification or recertification for these employees. Nor could it open any road (previously closed) for the Board to do either thing."

Counsel submitted in the more recent decision, *Nashco Enterprises Ltd. v Edmonton (City),* 2014 ABQB 569 at paragraphs 24, 28-29, Topolniski J. applied the two part test for mootness from *Borowski.* Topolniski J. quoted both *Borowski* and *Wiebe* to say that courts will not adjudicate cases without a live controversy affecting or that might affect the parties' rights. She stated that:

> While a variance and relaxation under the Building Code are different mechanisms, they nevertheless achieve the same practical result . . . The consequence of the Relaxation is to place Nashco in the same position it would be in if (presuming success on judicial review) the Variance Decision was overturned and the Court ordered the City to grant the variance sought. There is no point in ordering the City to issue a variance now.

The Court found that the issue was moot and dismissed the application for judicial review.

It was submitted that there is no longer any live controversy in this appeal as was the case in *Borowski, Wiebe* and *Nashco.* The Appellants have achieved the remedy sought in the Notice of Appeal, namely, the rescission of the Executive Officer Order. As the Appellants no longer have an available statutory remedy pursuant to Section 5(11) of the *Public Health Act,* there is no live controversy and the appeal is moot.

II. Should the Board Hear a Moot Appeal?

Alberta Health Services submitted that the second stage of the analysis is whether the Board should exercise its discretion to hear the appeal, despite the fact that there is no live controversy and the appeal is moot. Referring to *Borowski, supra* at pages 358-63 the following are circumstances where such discretion can be exercised:

a. Is there still an adversarial context in the within Appeal? The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome;

b. Will proceeding with the Appeal reserve judicial economy? This imports considerations of the resulting outcome of the Appeal and whether the expenditure of the time and resources are warranted; and

b. Is proceeding with the Appeal, despite it being moot, within the legislative mandate of the Public Health Appeal Board? Pronouncing judgments in the absence of a dispute may be viewed as being outside the legislative scope of the Public Health Appeal Board and an intrusion into the role of the legislative branch.

It was asserted the jurisprudence further provides a caution that there are real dangers in exercising discretion to hear a moot appeal and any discretion should be exercised sparingly for a number of reasons wherein *Wiebe supra* was cited at paragraphs 14-19:

- A proceeding could go by default, even collusion, because a respondent would have little motive to fight it;
- The relevant arguments will not be before the court;
- The court may be led to enunciate a rule of law which hangs together in theory but is impractical;
- The court will enunciate too wide a rule of law;
- The court will proceed with an inadequate evidentiary record; and
- The respondent is forced to act as a devil's advocate and must spend time and money on a question in which there is no present interest at risk.

Counsel submitted that there is no longer an adversarial context in the within appeal, as the Appellants are no longer "directly affected" and "aggrieved" by a decision of Alberta Health Services. Further, Alberta Health Services no longer has an Order that requires enforcement or confirmation from the Board. The absence of any practical remedy available under the *Public Health Act,* to either party, eliminates the adversarial context.

The proceeding currently before the Court of Queen's Bench is regarding a previous Order issued by the Court in 2013 directing the Appellants not to contravene the *Public Health Act* or Regulations and not regarding the Order being appealed. Counsel submitted this is completely separate from the appeal before the Board.

Further, the Board's resources should be preserved for appeals where there are live controversies and where the decisions rendered by the Board have a practical effect on the involved parties. Only in extraordinary circumstances should Board resources be expended to hold a hearing and render a decision in an appeal that is moot. Counsel submitted that there are no extraordinary circumstances present in the within appeal.

And finally, Alberta Health Services submitted that appeals to the Board pursuant to the *Public Health Act* and the powers afforded to the Board pursuant to the *Public Inquiries Act* are statutorily structured to permit the Board to adjudicate specific disputes and provide parties with specific remedies. The mandate of the Board is well defined and predicated on resolving controversy, which does not exist in the within appeal. The Board would be departing from this defined role by hearing matters that do not require adjudication and where there is no available remedy.

Alberta Health Services submitted, in conclusion:

a. There is no live controversy between the parties in the context of the within appeal and, accordingly, the appeal is moot;

b. The Board should decline to exercise its discretion to hear an appeal that is moot; and

c. The appeal should be dismissed.

D. Appellants' Submissions (the Respondent in the Preliminary Application)

The Appellants opposed the preliminary application and submitted that portions of the Order contain allegations that if uncontroverted or unvaried, cause significant damage to the Appellants' business and reputation. Further, the Notice of Closure Order has impacted them significantly as they have lost old and regular customers and that sales were down eighty percent.

The Appellants alleged that on re-inspections on July 27, 2016, August 2, 2016 and August 3, 2016 Alberta Health Services was "fishing" for more areas that could be considered harbouring pests in order to have reasons not to allow reopening of their business. The Appellants further alleged that they were unfairly targeted by Alberta Health Services for closure when none of the other food court outlets were subjected to closure.

It was submitted that an adversarial context exists between the parties and that the hearing of the appeal provides the Appellants with the opportunity to challenge errors contained in the Order.

Further, the current proceedings before the Court of Queen's Bench are related to the Order being appealed to the Board and demonstrate an adversarial context still exists between the parties.

E. Reasons

The leading case regarding the doctrine of mootness is the Supreme Court of Canada's 1989 decision in *Borowski v Canada (Attorney General),* [1989] 1 SCR 342. In that case the Court sets out the test to determine whether a matter is moot and, if so, whether the Court should exercise its' discretion and hear the matter, notwithstanding that it is moot.

Part one of the test is to determine whether a live controversy exists between the Appellants and Alberta Health Services. Upon considering all submissions, the Board finds that there was a controversy when the appeal was submitted but at the time of the appeal hearing, the controversy no longer existed as the Order had been rescinded.
The second part of the test is to determine whether the Board ought to hear the appeal notwithstanding that the matter is moot. At this point the three rationales for the mootness doctrine are considered. The absence of one factor may weigh heavier than the presence of other factors. The three rationales for hearing a moot appeal are as follows:

(a) An adversarial context still exists; the parties have an interest in the outcome and will fully argue the issue before them.

(b) Judicial economy is preserved; and

(i) The concern for preserving judicial resources can be partially alleviated if the Court's decision will have some practical effect on the rights of the parties.

(ii) The expenditure of judicial resources can also be warranted in cases where the issue, although moot, occurs frequently and is of a brief duration (e.g. labor strikes) so as to preclude an appeal hearing. This does not necessarily indicate that a decision-maker should not wait until a genuine adversarial context exists.

(iii) And finally, when considering the preservation of judicial economy, a Court also has the discretion to hear a moot appeal where the issue is of national importance, like a constitutional issue. There must be an added societal cost if the matter were left unresolved.

(c) The Court can maintain its role as an adjudicator. It cannot usurp the legislature's role as a law maker.

An analysis of the second part of the test demonstrates there can be several reasons for the Board to hear the appeal notwithstanding the matter is moot. These reasons are set out in *Borowski v Canada (Attorney General), supra*:

- Despite the cessation of a live controversy, the necessary adversarial relationships still prevail;

- There may be collateral consequences of the outcome that will provide the necessary adversarial context;

- The Board's decision will have a practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action;

- Although moot the matter is of a recurring nature and brief in duration; and

- The order might evade review by the Board and the Court.

While the Order was rescinded, it was not because the controversy had been arbitrated, mediated, adjudicated or settled. The Order was rescinded because the Appellants completed the work required in the Order. As the requirements were met, Alberta Health Services rescinded the order.
An adversarial relationship prevails because the parties continue to disagree about the accuracy of the Order. In addition, there is currently a proceeding before the Court of Queen's Bench relating to a 2013 Order that contributes to an ongoing adversarial relationship between the parties.

Furthermore, the nature of the Appellants' business results in ongoing dealings with Alberta Health Services. These matters are of a recurring nature and brief in duration.

The realities of the business world may contribute to these matters being of brief duration and result in the orders being rescinded prior to the Board hearing the merits of an appeal. The Appellants were compelled to comply with the Order whether they disputed it or not due to the potential impact of noncompliance on their business. Waiting for the appeal to be heard and the Board to make a decision on the merits of the appeal before meeting the demands may be impractical in the business world. This is particularly so when the Order directs the Appellants to immediately close the premises and immediately undertake and diligently pursue the completion of the work outlined in the Order or when no stay of the order was granted.

In the circumstances here, the Order might evade review if the appeal is not heard because the Appellants were compelled to comply with the Order prior to the hearing of the appeal. There exists an ongoing adversarial relationship between the Appellants and Alberta Health Services. Due to business reasons and the very terms of the Order, the Appellants completed the work required by the Order and should not now be denied the opportunity to challenge the accuracy and reasonableness of the Order.

In these circumstances, the Board finds that there should be a record of whether the Order is confirmed, varied or reversed by the Board notwithstanding that it has been rescinded by Alberta Health Services.

Pursuant to Section 62(8) of the *Act* Alberta Health Services is required to maintain a record of all orders issued and to make them available to the public. These records ought to include the Board's decision on this appeal and not just a record that the Order

was rescinded because the required work was completed. There could be a different record of the business premises if the Board varies or reverses the Order which impacts the business of the Appellants.

The Board can maintain its role as an adjudicator. By hearing this appeal the Board does not usurp the legislature's role as a law maker or role of the Court of Queen's Bench's.

Also, the Board must consider whether Section 5(2) of the *Public Health Act* precludes it from hearing this appeal. It states:

> 5(2) A person who
>
> (a) is directly affected by a decision of a regional health authority, and
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> (b) feels himself or herself aggrieved by the decision
> may appeal the decision to the Board.

It is the finding of the Board that it is sufficient to meet the legislative requirements if, when the appeal is commenced and the Notice of Appeal is served on the Board, the person is directly affected by the Order or decision. The legislation does not preclude the appeal from being heard and decided upon when the Order is rescinded due to compliance with the Order prior to the appeal being heard. The Board may confirm, reverse or vary the Order as it was issued and this would be included as part of the property's record.

The circumstances of this preliminary application are similar to a previous decision of this Board in appeal 10/2015 - January 9, 2016.

For the foregoing reasons, the Board has decided to hear and decide the appeal of the Order dated July 13, 2016. By letter dated August 24, 2016 the parties were notified of the Board's decision with reasons to follow. An appeal hearing date has been scheduled for September 15, 2016.

Per: _____
Julia Jones, Chair
Written by Sandra Sheppard

Also sitting:
Sandra Sheppard, Vice Chair
Linda Cloutier, Member
Ike Zacharopoulos, Member

Date: September 13, 2016