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 KEITH GALL
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 2 CALGARY
DATED SEPTEMBER 29, 2015
HEARING HELD DECEMBER 3, 2015

Counsel
John Fletcher, Appellant
Ivan Bernardo Q.C., Alberta Health Services/Respondent

Witnesses
Keith Gall, Appellant
Nik Binder, Electrical Foreman, for Appellant
Tim Moen, Fire Officer Public Safety Inspector, for Appellant
Daryl Hagg, for Appellant
Ryan Lau, Executive Officer, Alberta Health Services/Respondent
Vicky Wearmouth, Executive Officer, Alberta Health Services/Respondent

A. Introduction

The Order of an Executive Officer dated September 29, 2015 was issued pursuant to the *Public Health Act* and its *Regulations* regarding an owner occupied residential property located at 103 Citadel Peak Circle N.W. Calgary, Alberta (the Premises).

The Order directed the Appellant to discontinue plant production when the least mature crop had been harvested or by December 29, 2015 and to have environmental consultants complete extensive testing and repairs on the Premises.

The Appellant had licenses issued by Health Canada to grow marihuana in the Premises. There was no issue or dispute about the legality of the grow operation.

The Notice of Appeal was received by the Board on October 5, 2015. The Order was entered as Exhibit 1 and the Notice of Appeal as Exhibit 2. Both documents are attached to this Decision as Appendix A and B respectively.

The Appellant applied for a stay on October 15, 2015 and the Chair of the Board did not grant the stay but gave the Appellant leave to re-apply for a stay in the event the Board did not hear and decide the appeal prior to December 29, 2015.

There was a Preliminary Hearing on October 28, 2015. This hearing addressed the issues of an adjournment, whether the Board could decide *Charter of Rights and Freedoms* matters at the appeal hearing, whether the Board ought to compel certain witnesses to attend the appeal hearing and disclosure of evidence prior to the hearing.

The Decision of the Board in the Preliminary Hearing addressed the issues set out above and advised the parties that the issues at the appeal hearing would be whether the Order was properly issued pursuant to the *Public Health Act* and its *Regulations* and whether it was a proper exercise of the Executive Officer's authority pursuant to the *Act.*

The appeal was heard December 3, 2015 in Calgary, Alberta. The Board issued a decision dated December 16, 2015 as follows:

> After hearing all the evidence of the Appellant and Alberta Health Services, the Board is satisfied that Alberta Health Services has not made a reasonable effort to resolve the matters in dispute between them and therefore refers the matter to Alberta Health Services for further consideration and redetermination.

And:

> The Chair grants a stay of the Order dated September 29, 2015 until such time as the matters in dispute are resolved between the parties or the Board issues a decision.

Counsel for both parties confirmed to the Board that they were unable to resolve the matter and they summarized their positions in emails to the Board. The Appellant took the position that he was in compliance with the *Act* and *Regulations* and Alberta Health Services took the position the Premises were not in compliance.

No new information was received from the parties. Neither party advised the Board that he considered there to be further information the Board ought to receive before rendering a decision. The Board decided that a decision would be made based on the evidence from the December 3, 2015 hearing and a continuation of the hearing was not required.

An exception to the statement that no new information was received by the Board after the hearing, is that the Board received information from Alberta Health Services on December 15, 2015 that included case law identified below in section J. Counsel for Alberta Health Services referred to the Sault Ste. Marie case at the hearing and stated he would provide copies to the Board after the hearing. He provided this case, along with other cases, on December 15, 2015 and Counsel for the Appellant also received a copy of the information and the case law.

B. Timing of the Appeal

Section 5(3) of the *Public Health Act* requires the Appellant to serve notice of the appeal within 10 days after receiving notice of the Order. The Appellant served notice on October 5, 2015, which was within the 10 day period.

C. Jurisdiction

There were no objections to the Board's jurisdiction to hear this appeal.

D. The Appellant's Documentary Evidence and Case law

The Appellant provided bound materials that included the *Public Health Act* and *Regulations*, an Affidavit of the Appellant that included his licences to grow marijuana and case law as follows:

- *BPCL Holdings Inc. v. Alberta*, 2006 ABQB 757;
- *BPCL Holdings Inc. v. Alberta*, 2008 ABCA 153;
- *Kaushik and Sask-Al Holdings Inc. v. Town of Kamsack*, 2013 SKQB81;
- *Kaushik and Sask-Al Holdings Inc. v. Town of Kamsack*, 2014 SKCA 25;
- *Alberta (Public Works, Supply and Services) v. Nilsson*, 1999 ABQB 440; and
- *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283.

These were accepted as Exhibit 3.

The Appellant also provided photos of the Premises that were accepted as Exhibit 4 and the Curriculum Vitae of two witnesses were accepted as Exhibits 7 and 8.

E. Submissions of Counsel for the Appellant

Counsel submitted that the witnesses for Alberta Health Services ought to leave the hearing room and not hear the testimony of other witnesses until after he or she had provided testimony. He submitted this was important because one of the Appellant's submissions would be regarding the Executive Officer's failure to do his duty.

Counsel for the Appellant submitted the theme of the appeal was the rights of the state versus the rights of an individual.

The Appellant was engaged in lawful activity as he had two licenses to grow the plants. The issue was whether the Order was properly issued pursuant to the *Public Health Act* and whether the Executive Officer properly exercised his professional discretion in issuing the Order.

Counsel pointed out that the *Public Health Act* and its *Regulations* treat public and private places differently and this was an important distinction. He submitted the Premises were a private place as defined in the *Public Health Act* as the Appellant was the registered owner of the property and resided there by himself.

Counsel submitted that because the Premises were a private place the Executive Officer was required to obtain the consent of the Appellant to enter the Premises. He argued that the Appellant did not give consent for the Executive Officer to enter the Premises and therefore the Order was unlawfully made and ought to be reversed. The legislation constrained the Executive Officer from entering the Premises and he must follow those requirements set out in the *Act.*

Regarding distinctions between private and public places in the *Act,* it was not only the requirements to enter the premises that set them apart. Regulations and the ability to make regulations are different.

The *Housing Regulation* and the *Minimum Housing and Health Standards* do not apply to private dwellings and s.66 (2) of the *Act* distinguishes between public places and private dwellings regarding the regulations the Minister may make as follows:

> (h) respecting the location, operation, maintenance, equipping, cleansing, disinfection and disinfestation of public places;
>
> (i) respecting the cleansing, disinfection and disinfestation of private dwellings.

Counsel relied on the Alberta Court of Queen's Bench decision in *BPCL Holdings Inc. v. Alberta* for the proposition that there must be a connection between the regulations and public health. The Court in that case stated:

> Public health officers have no authority to issue orders that have nothing to do with public health. If they do issue such orders, the Public Health Appeal Board has a duty to set them aside. Should the Public Health Appeal Board fail to do so, the owner would be entitled to seek judicial review in the Court of Queen's Bench, based on the appropriate standard of review. However, if the regulation or standard has a real and meaningful connection to public health, the fact that unauthorized orders might be issued by public health officers with an erroneous opinion about the extent of their jurisdiction does not render the regulation itself invalid.

Counsel also relied on the Saskatchewan Court of Appeal decision in *Town of Kamsack v. Daya Chand Kaushik* and *Sask-Al Holdings Inc*, as support for the proposition that the Order ought to have included details about the deficiencies that constituted a public risk. In that case, the Court did not set aside the Chamber Judge's determination that the orders to remedy were without jurisdiction because not all the deficiencies constituted a "nuisance" and they had not been sufficiently connected to the purpose of the Bylaw and the definition of "nuisance".

Counsel submitted that in this instance, the contraventions set out in the Order were vague, inaccurate and did not demonstrate a connection to public health. There was merely a suspicion of mould and the venting was inaccurately described as going into the attic.

Counsel submitted that for the Executive Officer to issue the Order he must find reasonable and probable grounds to believe that a "nuisance" exists. He argued the Premises were not a "nuisance" as defined in the *Act* as follows:

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

It was his position that the conditions of the Premises were not and would not become injurious or dangerous to the public health and the Order did not disclose any conditions to support the finding of a "nuisance".

Counsel submitted that the conduct of the Executive Officer constituted an abuse of public office tort. He argued that the factual elements of the tort were as follows:

- the Order was illegal for lack of consent to enter the Premises;
- the Executive Officer knew the Appellant had licenses to grow the plants;
- the Executive Officer saw the Appellant was confined to a wheelchair;
- the Executive Officer turned a blind eye to the foreseeable consequences of issuing the Order and informing the Appellant's mortgage lender of the Order; and
- the foreseeable consequences were stress and stress induced medical problems for the Appellant.

Finally, Counsel submitted the Board ought to reverse the Order as it was not properly issued pursuant to the *Act* and because issuance of the Order was an abuse of public office.

F. Evidence of the Appellant

The Appellant was issued two Health Canada licenses permitting him to grow marijuana plants for medical purposes. The first permitted him to grow 59 indoor plants for himself and the second permitted him to grow 73 plants indoors for another person.

The Appellant explained he was licenced to grow 132 plants but typically grows 90, and of those, 40 are small (seedlings) at any given time. He does not grow more because he requires sufficient space to move around the plants in his wheelchair. At the time of the inspection he had 85 plants growing, which included seedlings.

His Affidavit stated he had previously incurred expenses of approximately $25,000.00 for a contractor to properly outfit his basement to grow the plants in such a way that there would be no damage to his house or a health threat to himself or visitors.

Regarding mould growth in the Premises, he stated there was not a hint of mould in the Premises. He explained the precautions he implemented to ensure no mould would grow. Those precautions included monitoring the humidity with a gauge to ensure it remained less than 50%. He had a dehumidifier for when the humidity increased over 50%. He also kept the temperature below 28-29 degrees Celsius and used a sulfur burner. He kept the number of lights to a minimum and used 600 watt bulbs and not 1000 watt bulbs like most other growers.

The Appellant also vented the warm air and excess moisture out of the house. There were two large charcoal filters at the base of the venting system to remove odours before the air was vented through the attic to the roof where it was vented through a chimney.

He explained that mould grows in drywall, carpet and wood and therefore he had no carpet or drywall in the basement. The wood was wrapped carefully with a poly material so that no moisture could enter and this poly material also reflected light which improved the light for the plants. He explained there was no mould or dampness around that area. The Appellant stated the water stain near the attic vent was there before he purchased the property and was most likely the result of a leak from the roof or from the chimney.

Regarding the chemicals used to grow his plants, he had a poly wrapped plywood counter to pour and mix the fertilizer and he replaced the poly regularly. He used only insecticidal soap on his plants for insects. He grew the plants in dirt rather than hydroponically.

He washed the floor between each growing and painted between every second growing. When the Executive Officer inspected the Premises, he had recently harvested and had not cleaned the dirt from the floor.

Regarding the holes cut through the floor between the main level and basement for the vents, the Appellant advised these were necessary for the venting to take the excess moisture and heat from the grow area out through a chimney in the roof. The venting was sealed and there was no smell from the grow area in the house. There were no structural issues created from the venting holes. The Appellant stated the Executive Officer did not look in the attic to confirm whether the venting went into the attic, or out through the roof, as it was too much trouble with the venting pipes obstructing his access.

Regarding the electrical set up to grow the plants, he had previously obtained a permit and had an electrician install 220 amp service to grow the plants. During the inspection, the City Safety Codes Officer who was present with the Executive Officer, advised him that each light required a separate breaker. He also learned that one of the lights did not have a CSA sticker.

The Appellant worked for many years in the construction industry. He lives alone in the Premises. He has multiple sclerosis and is confined to a wheelchair. Health care providers attend at his home two times per day to assist him. No children visit his home and he occasionally has overnight guests.

The Appellant stated he did not sell the plants but sometimes the person who he grows for, paid part of the costs and she assisted with some tasks as he is in a wheelchair and cannot do everything himself.

Regarding the inspection of the Premises and whether the Executive Officer had consent to enter the Premises, the Appellant stated a Safety Codes Officer from the City of Calgary telephoned and scheduled the inspection for September 28, 2015. He was not advised there would be others in attendance.

On the day of the inspection, six officials arrived: two police officers, the Executive Officer from Alberta Health Services, the Safety Codes Officer who scheduled the inspection and two additional Safety Codes Officers from the City of Calgary.

The Safety Codes Officer who scheduled the inspection handed him a letter as the six officials entered the Premises. The letter was dated September 28, 2015 and was on City of Calgary Development and Building Approvals letterhead. It stated:

> The City of Calgary – Building Regulations Division has received information regarding the Medicinal Marihuana Grow Operation located at 103 Citadel Peak Circle NW and require entry to perform a safety inspection of the premises. Inspectors will be available and ready to proceed with this inspection on Monday September 28, 2015 unless other arrangements are made through myself. If you have any questions, or need to arrange another time for the inspection contact me at 403-554-0743.
>
> The Alberta Safety Codes Act authorizes Safety Codes Inspectors of the City of Calgary to inspect this residence under Section 34 by consent or warrant. For your ease of reference copies of ss.31-37 of the Safety Codes Act are attached to this Notice.
>
> Please be advised that Safety Codes Officers in the electrical, mechanical, building, and plumbing and gas disciplines as well as an Officer of Alberta Health Services will be attending the residence. Officers from the Calgary Police Service will be also attending to ensure the safety of the inspectors.

None of the officials verbally asked for permission to enter the home when they arrived at the Premises. The police officers remained with the Appellant and his friend on the main floor when the others went into the basement to inspect the plant area. The Appellant never asked anyone to leave during the inspection.

The Executive Officer forwarded a letter to the Appellant's mortgage lender advising as follows:

> Please be advised that clean-up orders have been issued against this property. Damages caused by the presence of a Health Canada approved marihuana grow operation have created potentially hazardous conditions inside. A closure order has also been issued requiring that the plant growing activity cease by December 28, 2015 and remain so.

The Executive Officer saw he was in a wheelchair when he entered the Premises. As a result of the Order issued and the letter sent to his mortgage lender, the Appellant stated he suffered from stress, shingles, bowel troubles and disrupted sleep. He feared the mortgage lender would commence foreclosure proceedings.

The Appellant estimated the work required in the Order would cost $30,000.00.

G. Evidence of the Appellant's friend – Daryl Hagg

This friend was present during the inspection of the Premises. He has known the Appellant since 1984 when they worked together. He lives in Winnipeg but visits the Appellant regularly.

He photographed the Premises and the photos were accepted as Exhibit 4. The photos were reviewed and he explained there was no evidence of moisture or mould in the attic or other locations in the Premises. The photos showed the vents went through the attic and out through a stack on the roof. The fertilizer mixing area was three to four feet wide and the fertilizer was the same as that used for tomatoes and other indoor or outdoor plants. The only other chemicals present were for cleaning, like bleach.

He confirmed no one else lived in the Premises and there were no children at the Premises.

H. Evidence of the Safety Codes Officer –Tim Moen

This witness was accepted as an expert in fire prevention. He has a Master of Arts in Leadership and Paramedic and Ambulance training. He has been a Captain and Acting Battalion Chief for Regional Emergency Services in Fort McMurray in addition to holding other positions in his field. He was not paid to attend the appeal hearing and was found by the Appellant on Facebook. He was a witness at the Allard trial, a case which considered whether cancelling individual licenses to grow marijuana was a *Charter* infringement. He testified about some of the risks of residential grow operations. He swore an Affidavit for those proceedings that Alberta Health Services submitted and was accepted as Exhibit 9.

He inspected the Premises shortly before the appeal hearing and found them to be clean, tidy and less than 10 years old. When shown the photo of the plants on page 26 of Alberta Health Services' Binder of evidence, he confirmed the plants shown in the photo were present at his inspection and he characterized the grow operation as tiny, stating the space was barren.

He found no fire hazards. The electrical wiring was meticulous as was the venting. Both were done in a safe manner. He found no flammable materials or chemical hazards. There were fertilizers but no hazards.

Regarding mould in the Premises, there was evidence the Appellant was controlling for mould. He found the temperature and humidity were low and stated optimal growing conditions for mould are higher heat and humidity.

He inspected the attic and found the vents went through the attic and exited through the roof. He inspected the insulation in the attic, pulled it up, and found no moisture or mould.

The Safety Codes Officer checked the wood behind the poly and found it to be completely dry and there was no sign of mould.

When asked about water stains in general, he stated that if he saw water stains he would want to investigate further. He confirmed that a water stain can be evidence of possible mould. He stated there were no water stains in the basement and a little stain near the attic hatch in the Premises.

He did not test for mould spores or inspect any filters at the Premises. The witness noted there were no controls at the sink to prevent back-siphonage.

The witness characterized the grow operation as the gold standard compared to others he had seen. He stated he would have no problem moving his family next door.

I. Evidence of the Electrician- Nik Binder

This witness has been a journeyman electrician since 2007. He was also certified in safety training. He inspected the Premises a few days prior to the appeal hearing.

He found no tampering with the electrical system as was stated in Alberta Health Services' Chronology in their binder of evidence on page ii. He stated all the electrical work was completed to the Code and there was nothing out of place. He found no risk of fire.

He reviewed the Report from the City of Calgary Planning, Development and Assessment Electrical, dated September 29, 2016. This report had been prepared by one of the Safety Codes Officers who attended with the Executive Officer for the inspection of the Premises. The report set out four items but only the third and fourth items were actual deficiencies.

The two deficiencies were minor matters. One was a current protection breaker with 15 amp branch circuits rather than 40 amps and the other was a light missing a CSA sticker. He stated that an electrician cannot install a light fixture without this sticker but it is not unusual for someone to purchase a light fixture that does not have a CSA sticker.

He stated the Appellant had obtained all the proper permits for the work completed prior to the inspection in question. He stated the City had finalized and signed off on the electrical work that had been completed. There was no negligence on the part of the Appellant and the minor electrical deficiencies would be $1,500.00 to $2,000.00 to remedy.

J. Alberta Health Services Documentary Evidence and Case law

Alberta Health Services provided a binder of evidence accepted as Exhibit 6 that included the following:

Tab 1 Notice of Appeal
Order

Tab 2 Land Title Document

Tab 3 Cover Letter
Executive Officer's Order
Mortgage Holder Notice

Tab 4 AHS Documents
Photo of property
Photos from inspection
Hedgehog report
PHAB decision November 2013 – Chen MMGO

Tab 5 Other Agency documents
Green Team South – Expert Opinion (Cst. Greg Riley)
City of Calgary
Notice to Perform Inspection
Electrical Inspector's Notes
Notice of Motion & Mayor Nenshi's letter
Bylaw Number 7P2014
Letter to Health Minister from Mayor Nenshi
City of Denver – Information

Tab 6 Hazards of Residential Grow ops & Rationale for Remediation
Domestic MGO's – Understanding the Hazards
Photo - mould conditions due to excess heat and moisture
Photo – moisture resulting from improper venting
Health Effects Associated with Indoor Grows
RCMP's New National Marihuana Grow Strategy
Grow Op Free Alberta Recommendations Summary
Grow Op Free Alberta Final Recommendation Report
Health Canada MMGO information

Counsel for Alberta Health Services also submitted the following case law after the hearing:
R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299
R. v. Huttman, 2006 ABPC 15
R. v. Kraus, [1997] A.J. No. 464
R. v. Wholesale Travel Group Inc., [1991] S.C.J. No. 79
and, the *Interpretation Act*.

K. Submissions of Counsel for Alberta Health Services

Counsel for Alberta Health Services objected to the Appellant's request to have witnesses removed from the hearing until after he or she had given their evidence. He stated that both of his witnesses were expert witnesses and the Courts allow experts to hear other evidence and the Board should not set a higher standard than the Courts.

Alberta Health Services' Counsel submitted that although the Appellant had licenses to grow marijuana for personal medical use and to grow for another person, he was required to maintain minimum standards and to comply with the *Public Health Act* and its *Regulations*.

Alberta Health Services submitted the *Public Health Act* is intended to protect members of the public, especially those who are vulnerable, from activity that would result in dangerous conditions and to prevent future harm through enforcement of minimum standards of conduct and care.

In this instance, the neighbours had to be considered as well as two health care workers who attend at the Premises every day.

Alberta Health Services submitted the *Public Health Act's* general purpose is public welfare. It is not penal legislation. The Supreme Court of Canada discussed regulatory legislation in the *Sault Ste. Marie* case and found that it should be broadly and liberally interpreted. Meeting the goals of the *Public Health Act* is important and technical arguments should not defeat its purpose. The case law submitted by Alberta Health Services supported this proposition.

Counsel submitted the requirements of consent in the *Public Health Act* are not prescriptive elements and there is no prescribed method of obtaining consent. The Executive Officer was invited to join the City of Calgary Safety Codes Officer for the inspection which was permitted pursuant to the s.34 of the *Safety Codes Act*.

In addition, the Executive Officer asked for permission to enter rooms in the Premises and the Appellant gave him permission. This was consent as required in s.60 of the *Act*. There was no conflict about consent at the time of the inspection and only became an issue after the inspection when the Appellant sought legal advice.

Regarding whether consent to enter the Premises was required, Counsel argued the Premises could be a business because the Appellant was growing plants for another person who paid him for these services by contributing to the cost of growing the plants. Also, friends stay from time to time and may contribute groceries and this could arguably make the Premises rental accommodations.

These arguments not only affect whether consent to enter the Premises was required but also the *Regulations* that apply because rental accommodations are subject to the *Housing Regulation* and the *Minimum Housing and Health Standards.*

Counsel submitted the *Nuisance and General Sanitation Regulation* applies and the definition of "nuisance" is broad. The conditions at the Premises met the requirements for a nuisance in the legislation as the definition includes conditions that might become injurious or dangerous to the public health.

The Executive Officer must assess risk and a grow operation utilizes heat, power and large amounts of water which are all risks. Alberta Health Services characterized the Premises as an intensive agricultural operation and a large commercial operation and submitted this scale of operation required an assessment for mould which is what the Executive Officer requested in the Order.

Counsel submitted that Alberta Health Services did not prosecute the Appellant which was an option in the *Act* and that issuing an Order was the lowest rung of enforcement.

One of the police officers who attended at the inspection provided a "Scenario Concerning Marijuana Consumption". Based on the number of plants the Appellant was permitted to grow as per his licence and the dried product he can keep in storage, he concluded there would be excess marijuana. Counsel questioned what the Appellant was doing with the excess product.

To support the position that premises where marijuana is grown are hazardous to public health generally, the Respondent provided information about the risks of marijuana grow operations which included *Domestic Marihuana Grow Operations; Understanding the Hazards*, *Health Effects Associated with Indoor Grows*, *RCMP's New National Marihuana Grow Strategy*, and the Government of Alberta's report entitled *Grow Op Free Alberta, Final Recommendations* and *Health Canada MMGO Information*.

Counsel explained that the Federal Government issued licences for individuals to grow medical marijuana and then planned to change the program and not renew the licenses. This resulted in the *Allard* case, a *Charter* challenge to the new program that discontinued individual licenses to grow plants in residences. An injunction was granted by the Federal Court allowing licenced individuals to continue growing plants until the case was heard. Although the Federal Government had issued licences, all levels of government were concerned about public safety when growing plants is permitted in residential communities. He submitted these large grow operations were not suited or intended for residential communities.

Counsel submitted documents relating to the municipalities' efforts to regulate licensed grow premises and their support of the Federal Government's efforts to discontinue the licenses.

At the hearing and in an email submitted on December 15, 2015, Counsel for Alberta Health Services set out the consequences for the Appellant in the event the Board reversed the Order because the Executive Officer did not obtain consent to enter the Premises. He stated:

> If the existing Order is reversed (based on the issue of consent, or lack thereof, of the owner) then AHS would have no means to enforce the Act in this case and would have to take other steps to gain a means to enforce. The most appropriate means would be to go to the Court of Queen's Bench and get an order allowing an inspection. A new inspection could then take place and a new order of an executive officer could then be issued. We would thus then be back to the same position we are in now; except that AHS would be forced to take enforcement steps and would seek indemnity costs from the Appellant at the Court of Queen's Bench.
>
> As I mentioned at the Hearing, payment of full indemnity costs to AHS has been described by the Alberta Court of Appeal as a natural consequence of requiring AHS to get an order; and if the Appellant refused to allow an inspection (and the Board reversed the current order) AHS would be required to get an order. This is based on the assumption that if AHS asked the Appellant for permission (in the form that Mr. Fletcher suggests is required, which is not agreed to by AHS) that permission would be denied. If it is suggested that the Appellant would consent to a new inspection, thereby not requiring a QB order, then there would be no point in reversing the executive officer's order as we would end up in the same place.

(Appellant's name was removed and "Appellant" substituted)

Regarding the Appellant's abuse of public office tort submissions, Counsel submitted that Alberta Health Services is not the Crown and therefore even if they were wrong in issuing the Order, the tort does not apply.

Finally, costs that may be incurred by the Appellant to complete the work required in the Order and address contraventions of the *Act,* are a natural consequence of not complying with the *Act.*

Counsel asked the Board to confirm the Order.

L. Evidence of Alberta Health Services' Executive Officer- Vicky Wearmouth

This witness had not attended at the Premises. She gave evidence about the hazards of marijuana grow operations. She has been an Executive Officer for 15 years in the housing area and 12 years in grow operations. She has attended at more than 1000 grow operations. She also co-authored the document entitled "Domestic Marihuana Grow Operations; Understanding the Hazards" which was included in Alberta Health Services' submissions.

The witness stated it is possible to comply with the *Public Health Act* and grow plants. It would require proper insulation, electrical modifications and venting. It would also depend on the number of plants grown. There were more hazards created in large operations. In Colorado they allow marijuana to be grown in homes but no more than six plants: two at each stage of the growing process.

Mould is a risk in grow operations and it can be hidden. Heat, above 80 degrees Fahrenheit, and humidity creates mould and so does stagnant air. Other risks are structural, electrical wiring, heating and venting, CO2 leaks, back-siphonage from sink hoses to public water systems, odours and they can be targets of crime. The risks are the same for legal and illegal grow operations.

M. Evidence of Executive Officer- Ryan Lau

This Executive Officer inspected the Premises and issued the Order. He has been an Executive Officer for five years in housing and grow operations. He completes about six inspections per day.

The Executive Officer had ordered 40 to 50 grow operation closures and of those, 10 were medical marijuana grow operations. He had never inspected a grow operation and not issued an order.

He received a request from a Safety Codes Officer with the City of Calgary, to attend at the Premises for an inspection. He arrived with five other people, including two police officers. He had no contact with the Appellant prior to arriving at the Premises to conduct the inspection and he knew it was a legal grow operation before the inspection commenced. Upon arriving at the Premises he saw the Appellant was in a wheelchair.

He introduced himself when he arrived with the other officials and went to the basement where the plants were grown. He did not ask the Appellant for consent to enter the Premises but did ask for permission to enter certain areas on the main floor where doors were closed. He stated the Appellant did not appear surprised when he arrived and did not ask him to leave.

The inspection was completed in 30 to 45 minutes. He found about 48 small plants in a tent and larger plants in the basement. He did not know how many large plants were there but guessed there were 50 to 70.

The Executive Officer's evidence regarding what he found at the Premises and the inspection process was:

- zip ties hanging from the ceiling with no lights attached;
- found no mould but was concerned because grow operations have high heat and humidity;
- did not test the humidity or temperature at the Premises;
- water stain on main floor ceiling around venting to the attic;
- the house was close to the neighbours which would be a concern if there was a fire;
- two bottles on a table with unknown contents;
- connection for the water hose/tap at the sink could lead to back-syphonage – this was disconnected by a Safety Codes Officer; and
- could not get into the attic but did see the vents went into the attic

He told the Appellant he would require an assessment by an environmental consultant and then prepared the Order. He decided to issue a closure order as there were several dangers present and due to the scale of the operation. He did not intend to prevent the Appellant from growing plants but wanted the number of plants reduced. He gave the Appellant a long time to close the operation as he had small plants started.

The Executive Officer sent a letter to the Appellant's mortgage lender advising of the Order and damages caused by the presence of a Health Canada approved marihuana grow operation. His evidence included many explanations of why sending the letter was positive for the Appellant but later explained the letter was sent in error. It was not Alberta Health Services' policy to send a mortgage lender a letter in these situations.

The Executive Officer could not estimate the cost of the required repairs and testing required in the Order as this was outside of his scope

The Executive Officer was not aware of any stress he caused the Appellant.

N. Issues

1. Did the Executive Officer require the consent of the Appellant to enter the Premises?

2. If the Executive Officer required the consent of the Appellant to enter the Premises, did the Appellant consent?

3. If the Executive Officer did not obtain consent from the Appellant to enter the Premises, how does that affect the Order?

4. Did the condition of the Premises support the Order that was issued?

5. Was the Executive Officer's conduct an abuse of public office tort?

O. Decision

Having considered all of the evidence and submissions of the parties, the Board finds the Premises were a private place and not a public place or both, as defined in the *Public Health Act.* The Executive Officer required the consent of the Appellant to enter the Premises and the Appellant did not give his consent.

The Board has reversed the Order dated September 29, 2015 as there was no consent to enter the Premises and because the condition of the Premises did not support the Order that was issued.

The Board does not have jurisdiction to make a finding regarding the abuse of public office tort.

P. Reasons

Counsel for Alberta Health Services requested the Board provide reasons for its decision to remove witnesses from the hearing until after he or she had provided testimony. The Board decided there ought to be a level playing field and all witness should be excluded. The witnesses were advised not to discuss their evidence with others when waiting to give evidence.

By excluding all the witnesses, the Board was able to weigh the evidence of each witness without considering that he or she had heard prior testimony. The Board found it reasonable for witnesses not to hear the testimony or arguments of the other party prior to giving evidence so the theory of the case was unknown to the individual witnesses. As Alberta Health Services' witnesses were employees of Alberta Health Services, they could not properly be referred to as expert witnesses and be exempt from the decision to exclude witnesses prior to giving evidence.

The Board finds that, although the Appellant had licenses to grow marijuana and there was no allegation the activity was illegal, the activity and Premises are subject to regulation pursuant to the *Public Health Act* and all applicable *Regulations*.

Although there was no allegation of illegal activity, Alberta Health Services provided a "Scenario Concerning Marijuana Consumption" that calculated an amount of product that could be produced with the number of plants the Appellant was licensed to grow for his own consumption. Counsel for Alberta Health Services questioned the Appellant about the amount of product he produced and whether he sold any excess product. This was denied by the Appellant. The Board finds there was no evidence to substantiate these allegations and the information was irrelevant in deciding whether the *Public Health Act* and its *Regulations* had been contravened.

The Board reviewed the evidence and the remaining issues as set out below.

1. Did the Executive Officer require the consent of the Appellant to enter the Premises?

The consent of the Appellant to enter the Premises is required if the Premises are a private place and not a public place as defined in the *Public Health Act*.

Private Place is defined in section 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.

And Public Place is defined in section 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.

There was no dispute at the hearing regarding whether the Appellant owned and resided at the Premises. However, Alberta Health Services submitted that because a guest may occasionally stay overnight and contribute to expenses, it could be argued it was rental accommodation. In addition, because the person who he had a licence to grow plants for, contributed to the utility costs, it could be argued it was a business. Both rental accommodations and places of business are included in the definition of public place in the *Act.*

The Board finds the Premises were private and not public and not both private and public. Having occasional guests who contribute to expenses or buy their host a gift does not change the Premises into rental accommodation. A guest does not become a tenant in these circumstances and the host does not become a landlord. If that were the case, most homes would be considered rental accommodation.

Regarding the argument the Premises may be a business, the Board finds it was not a business because there was no commercial activity engaged in for gain or livelihood. There were no customers or employees, it was merely an arrangement between two friends.

Section 60 of the *Public Health Act* sets out the requirements for an Executive Officer to enter a private place. It states:

> s. 60 Where an executive officer believes on reasonable and probable grounds that a nuisance exists in or on a private place or that the private place or the owner of it is in contravention of this Act or the regulations, the executive officer may, **with the consent of the owner or pursuant to an order under section 61,**
>
> (a)enter in or on the private place at a reasonable hour and inspect it;
>
> (b)make reasonable oral or written inquiries of any person who the executive officer believes on reasonable grounds may have information relevant to the subject-matter of the inspection;
>
> © take samples of any substance, food, medication or equipment being used in or on the private place;
>
> (d) perform tests, take photographs and make recordings in respect of the private place.

There was no court order obtained to enter the Premises pursuant to s. 61. The Board finds the Executive Officer required the Appellant's consent to enter the Premises as it was a private place, not a public place or both a private and public place.

2. If the Executive Officer required the consent of the Appellant to enter the Premises, did the Appellant give consent?

The evidence of both the Appellant and the Executive Officer was clear and undisputed. The Executive Officer did not ask the Appellant for consent to enter the Premises and the Appellant did not give consent for the Executive Officer to enter the Premises.

During the inspection, the Executive Officer did ask the Appellant for permission to enter rooms with closed doors on the main floor. This was not consent to enter the Premises as consent must be given prior to entering the private dwelling.

Alberta Health Services argued the Safety Codes Officer from the City of Calgary had permission to enter the Premises and the Executive Officer was permitted to join that inspection. The *Safety Codes Act* is similar to the *Public Health Act* regarding the required consent to enter a private dwelling. The *Safety Codes Act* states:

> 34(1) For the purpose of ensuring that this Act and any thing issued under this Act are complied with, a safety codes officer may, without a warrant, at any reasonable time, enter any premises or place, **except a private dwelling place** that is in use as a dwelling, in which the officer has reason to believe there is something to which this Act applies and may, using reasonable care, carry out an inspection, review designs and examine and evaluate quality management systems and manufacturing and construction processes.

(2) For the purpose of ensuring that this Act and any thing issued under this Act are complied with, a safety codes officer may, at any reasonable time and on reasonable notice, **enter a private dwelling place that is in use as a dwelling in which the officer has reason to believe there is something to which this Act applies and, using reasonable care, may carry out an inspection and review designs**

(a) with the consent of the owner or occupant, or
(b) with a warrant from a justice

The Appellant's evidence was the Safety Codes Officer telephoned him to schedule an inspection. He was not advised that others would be attending the inspection at that time. Upon arriving at the home, the Safety Codes Officer handed the Appellant a letter stating as follows:

> The City of Calgary – Building Regulations Division has received information regarding the Medicinal Marihuana Grow Operation located at 103 Citadel Peak Circle NW and require entry to perform a safety inspection of the premises. Inspectors will be available and ready to proceed with this inspection on Monday September 28, 2015 unless other arrangements are made through myself. If you have any questions, or need to arrange another time for the inspection contact me at 403-554-0743.
>
> The Alberta Safety Cods Act authorizes Safety Codes Inspectors of the City of Calgary to inspect this residence under Section 34 by consent or warrant. For your ease of reference copies of ss.31-37 of the Safety Codes Act are attached to this Notice.
>
> Please be advised that Safety codes Officers in the electrical, mechanical, building, and plumbing and gas disciplines as well as an Officer of Alberta Health Services will be attending the residence. Officer from the Calgary Policy Service will be also attending to ensure the safety of the inspectors.

The letter does not request consent for the Safety Codes Officer or the Executive Officer to enter the Premises. It states that an Officer of Alberta Health Services will be attending the residence. This information was given to the Appellant after the Executive Officer arrived and entered the Premises. This does not constitute consent for the Executive Officer to enter the Premises.

It is unknown whether the Safety Codes Officer obtained consent to enter the Premises from the Appellant during interactions other than the letter presented when he entered the home, but if he did, that would not constitute consent for the Executive Officer to enter the Premises. An Executive Officer cannot ride on the coat tails of another official's consent to enter the Premises. The *Act* specifically requires the Executive Officer to obtain the consent of the owner.

Consent cannot be inferred or simply implied because the Appellant did not ask any of the inspectors, including the Executive Officer, to leave during the inspection. The Executive Officer must, at a minimum, ask for consent to enter the Premises and the Appellant must give consent before the Executive Officer enters the Premises.

Alberta Health Services submitted that the *Act* ought to be broadly and liberally interpreted as the goals of the *Act* are public safety. Counsel referred to *Sault Ste. Marie, R. v. Huttman*, *R. v. Kraus* and *R. v. Wholesale Travel Group Inc.* as support for this argument. Counsel submitted the consent requirements in the *Act* are not prescriptive elements and technical arguments should not be used to defeat the purpose of the *Act*.

The Board agrees that regulatory legislation is required to protect the public from potential health risks and the *Act* should not be interpreted narrowly to ensure the public is protected. However, the *Act* distinguishes between private and public places in several important ways indicating an intent for the private place to be considered or treated differently. For example, sections 66(2) (h) and (i) of the *Act* sets out regulations the Minister may make for private dwellings and public places. Private dwelling regulations are restricted to cleansing, disinfection and disinfestation whereas public places also include location, operation, maintenance and equipping. Also, the *Housing Regulations* and the *Minimum Housing and Health Standards* do not apply to owner occupied private places.

The distinction in the *Act* between what is required to enter private and public places is important and the requirements to enter private places cannot be interpreted so broadly and liberally that it is rendered meaningless.

In conclusion, the Board finds the Executive Officer did not obtain consent to enter the Premises as required in s.60 of the *Act*.

3. If the Executive Officer did not obtain consent from the Appellant to enter the Premises, how does that affect the Order?

The Board has determined that because the Executive Officer did not obtain consent to enter the Premises, the Order ought to be reversed. The lack of consent to enter the Premises as required in the *Act* is not merely a technicality but a prerequisite for completing an inspection and issuing an Order. The Board decided this in Appeal 14/2014 as well.

Alberta Health Services' Counsel submitted that if the Order was reversed due to the lack of consent issue, he could obtain a court order for another inspection and a new order of an executive officer could be issued. This would result in the parties being in the same position as when the Order was originally issued. Alberta Health Services described obtaining the court order to enter this private place as enforcement proceedings and stated because it was enforcement proceeding they would seek indemnity costs from the Appellant.

The Board finds this position taken by Alberta Health Services to be extreme. Albertans ought to be able to exercise their right not to consent to an Executive Officer entering their private dwellings without the threat of having to pay indemnity costs to Alberta Health Services to obtain an order to enter a private dwelling as required by the Act.

The Board also decided to consider whether the condition of the Premises supported the Order that was issued. The reason is because of the position taken by Alberta Health Services that they would obtain a court order for another inspection and potentially issue a new order if the Order was reversed for the lack of consent issue. They submitted the parties would then be in the same position as when the Order was issued and appealed, that is they would be in the same position as when the Board heard evidence about both the consent issue and the condition of the Premises.

4. Did the condition of the Premises support the Order that was issued?

a) What Regulations apply to the Premises?

The Board finds the *Housing Regulations* do not apply to these Premises because the Premises were occupied by the Appellant who is the owner. The *Housing Regulation* states:

> 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.

The preamble of the Order includes the statement that the inspection disclosed breaches of the *Housing Regulation* and/or the *Minimum Housing and Health Standards*. The *Minimum Housing and Health Standards* state:

> 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.

The Premises are not subject to the *Minimum Housing and Health Standards* as they were not rental housing.

The Premises are subject to s.2(1) of the *Nuisance and General Sanitation Regulation* which states:

> No person shall create, commit or maintain a nuisance.

And s.1(f) states:

> 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.

b) Breaches of the *Act* as stated in the Order.

The Order set out three breaches of the *Act* and *Regulations* to support the closure of the plant growing operation and the requirement for extensive air quality and mould testing, repairs and remediation.

The first breach was:

> Conditions that support mould growth are evident within the premises. Excess heat and humidity produced during the plant growing activities are suitable conditions for mould growth. Mould growth is suspect in hidden areas including behind reflective and/or mylar sheeting. This is a breach of Section 2(1) of the Nuisance and General Sanitation Regulation and of Sections 3, 4 and 5 of the Housing Regulation.

As stated earlier, the Board finds the *Housing Regulation* does not apply in this instance and therefore the contravention of the *Act* and the *Nuisance and General Sanitation Regulation* only applies.

The Board finds the evidence provided by Alberta Health Services was deficient regarding the heat and humidity in the Premises and other conditions required for mould growth. The Appellant was clear and knowledgeable about the humidity and temperatures that support mould growth. His evidence was that he tested them both regularly to ensure they are below those thresholds. He used a dehumidifier. The Appellant used light bulbs with reduced wattage to reduce the heat in the Premises. He had no drywall or carpet in the grow area as mould grows in those surfaces. He used a sulfur burn and charcoal filters to prevent mould. In addition he properly vented the excess heat and humidity with vent piping from the grow area, through the attic and out through a chimney stack.

Both witnesses for Alberta Health Services gave evidence about mould growth that was general, including the Executive Officer who completed the inspection. Their evidence was that grow operations are by their very nature, hot and humid, which is a risk for mould. The Executive Officer who completed the inspection did not provide any specific evidence regarding the risks for mould in the Premises other than there were plants growing and there was a water stain in the ceiling below the attic near the venting pipe. He did not test the temperature or the humidity at the Premises.

The evidence of the Appellant, his friend and the Safety Codes Officer called by the Appellant, was specific to the Premises. The Safety Codes Officer stated there was evidence the Appellant was controlling for mould.

The Safety Codes Officer inspected the attic and there was no mould or moisture. He felt the insulation and there was no dampness. The friend also provided photos of the attic and there was no evidence of mould or dampness.

None of the people who inspected the Premises for Alberta Health Services or the Appellant found mould.

The ceiling water stain was the only indication there had been moisture in the Premises and the Appellant explained that it was there before he purchased the property and was most likely the result of a leak from the roof or from the chimney.

The Board finds there were no specific findings at the Premises to support the concern about mould and nothing to support a contravention of the *Act* or the *Nuisance and General Sanitation Regulation*.

The second breach set out in the Order was:

> Surface throughout the growing and mixing areas located within the basement are contaminated from the use of chemical/fertilizer solutions. This is a breach of Section 2(1) of the Nuisance and General Sanitation Regulation and of Sections 3, 4, and 5 of the Housing Regulation.

Photos of this area show a small covered counter with two unlabelled bottles. Alberta Health Services provided no evidence about the contents of the bottles or of any contamination from chemical/fertilizer solutions.

The Appellant stated he used insecticidal soap rather than other chemicals. He cleaned the floor between each growing and painted after every second growing. The Safety Codes Officer found no fire hazards and no flammable materials or chemical hazards on the Premises. He did find fertilizers but they were not a hazard.

The Board finds there were no specific findings in the Premises to support this contravention of the *Act* or the *Nuisance and General Sanitation Regulation*.

The third breach set out in the Order was:

> Holes have been cut through the subfloor between the main level and basement to pass air vents and ducting in to the attic. This is a breach of Section 2(1) of the Nuisance and General Sanitation Regulation and of Sections 3, 4 and 5 of the Housing Regulation.

Alberta Health Services' evidence was the air was vented into the attic. The Executive Officer did not go into the attic to see where the vents went after entering the attic. The Appellant's friend provided photos of the attic showing the venting went out through the roof by way of a chimney stack. This was confirmed by the Safety Codes Officer and the Appellant who paid a contractor to do the work in the Premises to ensure it was completed properly.

The Board finds the Executive Officer's statement in the Order regarding the venting was inaccurate and did not constitute a contravention of the *Act* or the *Nuisance and General Sanitation Regulation*.

c) Were the Premises a "nuisance" because it was a grow operation or because of the number of plants?

Alberta Health Services provided evidence of the risks of grow operations. The documentary evidence and the Executive Officer who co-authored one of the documents, stated the risks include diversion, fire, mould, chemical contamination and theft. Only mould and chemical contamination relate to public health and the other matters relate to criminal and fire prevention regulation.

This witness stated it was possible to comply with the *Public Health Act* and grow plants. She stated it would require proper insulation, electrical modifications and venting. It would also depend on the number of plants grown as more hazards are created in large operations.

In this instance, the Executive Officer did not consider the mould prevention strategies implemented by the Appellant, the lack of chemical hazards and contamination from fertilizers and insecticides, the electrical modifications or the correct venting that had been installed.

The Premises were described by a fire prevention expert who was also a Safety Codes Officer, as the "gold standard" in operations. The Board found his evidence to be credible and that he considered all of the conditions found in the Premises rather than relying on the general premise that grow operations are a risk to public health.

The Executive Officer ought to have assessed the risk to public health given the particular circumstances found in the Premises rather than relying on the general premise that grow operations are a risk to public health. There must also be a connection between the conditions found in the Premises and a risk to public health. The definition of "nuisance" is broad but there must be evidence that a condition is, or might become, injurious or dangerous to the public health. The connection cannot be so remote that all Premises legally growing plants will be defined as a "nuisance".

Each grow operation ought to be assessed independently as there may be different conditions in each operation and as Alberta Health Services' Executive Officer stated, it is possible to grow plants and comply with the *Act*. The Executive Officer improperly exercised his professional discretion when he issued the Order and did not consider all the conditions found in the Premises.

Alberta Health Services submitted that when assessing the risks to public health, the neighbours and the two health care workers who attend at the residence should be considered. The Board agrees with this position but there was no evidence of risk to public health, including theirs. The Safety Codes Officer stated he would have no problem moving his family in next door.

The Executive Officer stated the scale of the grow operation was a factor he considered when he issued the Order. Alberta Health Services submitted the grow operation was large and characterized it as an intensive agricultural operation. The photographs provided by Alberta Health Services did not support that position. The plants were located in the basement and it was not crowded or full. The total number of plants was

unknown to the Executive Officer but the Appellant estimated he had about 80 to 85 plants, including the seedlings.

The Board found no evidence to support the submission that the grow operation was large. The number of plants was well within the allowable amount the Appellant was licensed to grow. The Safety Codes Officer described it as a small operation in comparison to most.

The Board found the evidence of Alberta Health Services, with respect to the municipality's efforts to regulate grow operations and to support the Federal Government's plan to discontinue legal residential grow operations, irrelevant. The Board did not find this information to be applicable in deciding whether the Order was properly issued pursuant to the *Act* and whether it was a proper exercise of the Executive Officer's professional discretion.

5. Was the Executive Officer's conduct an abuse of public office tort?

The Board's jurisdiction is set out in s. 4(1) of the *Act* and the Board may only confirm, reverse or vary the decision of the regional health authority as set out in section 5(11). The Board does not have the legislative authority or jurisdiction to address the Appellant's submissions regarding the abuse of public office tort.

Q. Decision Summary

After carefully considering the submissions and evidence of the parties, and for the above reasons, the Board has found that the consent of the Appellant was required prior to the Executive Officer entering the Premises. The Appellant did not provide consent to enter the Premises. In addition, the conditions found at the Premises did not support the Order that was issued. The Order is reversed.

Per: _____
Julia Jones, Chair
Also Sitting:
Ron Everard, Vice Chair
Linda Cloutier, Member

Date: April 6, 2016