

**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 BY GARY THOMAS POPP  
OF THE ORDER OF AN EXECUTIVE OFFICER  
ISSUED BY ALBERTA HEALTH SERVICES, ZONE 3  
DATED JUNE 28, 2018

**DECISION OF THE BOARD  
ON THE RESPONDENT'S MOOTNESS APPLICATION**

**Date of Hearing:** September 14, 2018

**Appearances**

For the Appellant:

Gary Popp, Owner/Appellant  
Don Schilling, Witness for Appellant  
Christopher Popp, Appellant's son/consultant

For AHS (the "Respondent")

Jennifer Jackson, Legal Counsel  
Jennifer Guth, AHS PHI/EO  
Gordon Watt, AHS PHI/EO  
Kevin McLeod, AHS Environment Public Health

Sitting for the Board

Ike Zacharopoulos, Alternate Vice Chair, Chairing this Hearing  
Wendy Lickacz, Vice Chair  
Barbara Rocchio, Member  
David Rolfe, Member

**Introduction**

[1] Gary Popp (the "Owner/Appellant") is an owner of the property legally described as SW-25-45-06-W5M, located in the County of Wetaskiwin, Alberta and identified as Kramer Pond Lodge/Kramer Pond & Spa (the "Premises").

[2] Following inspections of the Premises on June 14, 2018, Alberta Health Services (“AHS”) Executive Officer (“EO”) Jennifer Guth issued an Executive Order (the “Work Order”) on June 28, 2018, directing that the Owner undertake and diligently pursue the completion of work in and about the Premises.

[3] On July 4, 2018, the Public Health Appeal Board (the “PHAB”) received a Notice of Appeal (the “Appeal”) from the Owner.

[4] The hearing of the Appeal was originally set for August 10, 2018. Upon agreement between the parties on July 27, 2018 and again on July 31, 2018, the hearing was rescheduled for September 14, 2018, starting at 12:30 pm.

[5] By email dated September 4, 2018, AHS requested that the PHAB adjourn the hearing of the Appeal.

[6] By email dated September 4, 2018, the Appellant did not agree with AHS’s request for an adjournment of the Appeal.

[7] By email dated September 5, 2018, the PHAB advised both parties that AHS’s request for an adjournment was declined. The parties were advised that any concerns on this matter would be addressed at the outset of the scheduled hearing.

[8] By email dated September 9, 2018, AHS made an application to the PHAB to have the Appeal dismissed on the basis that it was moot.

[9] By email dated September 10, 2018, the Appellant objected to a delay in the hearing of the Appeal.

[10] On September 13, 2018, the PHAB advised the parties that the hearing scheduled for September 14, 2018, would proceed. Further, that the Board would first consider and adjudicate any adjournment application. In the event that an adjournment application was not made or was denied, the Board would consider and adjudicate any application from AHS regarding mootness.

### **Preliminary Matters**

[11] The parties had no objections to the Board as constituted or with the Board’s jurisdiction.

[12] The Respondent confirmed to the Board that it was not pursuing an adjournment of the hearing.

[13] The Respondent did make an application to have the Appeal dismissed on the basis that it was moot. The Board proceeded to hear from the parties on this application.

### **Issues regarding the Mootness Application**

[14] The issues for the Board’s consideration of the Respondent’s mootness application were as follows:

- (a) Is the Appeal moot; and

- (b) If so, should the Board hear the Appeal?

### **Board Decision on the Mootness Application**

[15] The Board decided that the Appeal was not moot. The Appeal would be heard by the Board.

### **Submission of the Respondent regarding the Mootness Application**

[16] The Respondent submitted Exhibit 1, a binder with 11 tabs in support of its application. It referenced *Borowski v. Canada* (AG), [1989] 1 S.C.R. 342 (“Borowski”) as the leading case on mootness. It referenced the two-step process articulated by the Supreme Court of Canada (“SCC”) on a determination of mootness:

- (a) Has the dispute disappeared, rendering the issues academic?
- (b) If so, should the Board exercise its discretion to hear the Appeal?

[17] The Respondent referenced the background facts of the Appeal, including the following:

- (a) Further to inspections of the Premises, the Appellant was advised by AHS on June 28, 2018, that the EO had observed breaches of the *Alberta Public Health Act*, R.S.A.2000 c. P-37 (the “Act”), the *Public Swimming Pools Regulation*, Alberta Regulation 204/2014 (the “Pools Regulation”) and the Pool Standards. The violations included, amongst other things, the operation, testing and treatment of eight hot tubs at the Premises.
- (b) An Executive Order was issued by the EO on June 28, 2018, ordering work to be completed by the Owner in and about the Premises, by July 12, 2018 (the “Work Order”).
- (c) This Work Order was the object of the Appeal before the Board.
- (d) Upon re-inspection of the Premises on July 20, 2018, the EO issued further Executive Orders that day, ordering the closure of eight hot tubs at the Premises and directing work to be completed by the Owner in and about the Premises to the satisfaction of the EO (the “Closure Orders”).
- (e) These Closure Orders were not appealed by the owner and were not before the Board.
- (f) The Closure Orders did not refer to the Work Order and were in fact stand-alone Orders that would remain in effect and would not be impacted by an adjudication of the Appeal of the Work Order.

[18] In summary, the Respondent maintained that “... as a result of the Closure Orders, the appeal is moot ...”, the Work Order under appeal had been “effectively rescinded” by the Closure Orders, and was “... no longer the primary order in effect for the Premises...”. It argued that

since there was no appeal of the Closure Orders, the Appellant was “left without a remedy” and thus, there was no longer a live controversy between the parties.

[19] Further, the Respondent submitted that the Board should not exercise its discretion to hear what it argued was a moot Appeal because:

- (a) There was no adversarial context between the parties, and
- (b) Hearing the Appeal was not in the interest of judicial economy.

### **Submission of the Appellant regarding the Mootness Application**

[20] The Appellant maintained that the work to be completed by the Owner in and about the Premises ordered under the Work Order was identical to that directed under the Closure Orders.

[21] It argued that although the Closure Orders had not been appealed, its dispute with the ordered work to be completed by the Owner in and about the Premises (and thus the adversarial relationship between the parties) remained as the work was unchanged from that ordered under the Work Order.

[22] The Appellant indicated that AHS officials had advised him that if he disagreed with the Work Order he could file an appeal with the Board, which he did.

[23] Further, the Appellant specified that a hearing of the Appeal was its preferred means of addressing its concerns with the work ordered on the hot tubs and an adjudication of the Appeal was the means for a remedy to its concerns.

### **Board Discussion and Finding regarding the Mootness Application**

[24] The SCC decision in *Borowski* sets out the test to determine whether a matter is moot. First, the Board is to determine whether the dispute between the parties has disappeared. If so, the Board is to decide whether it should exercise its discretion to hear the Appeal.

[25] The Board understood the evidence to indicate and the parties to have agreed on the following:

- (a) The Appellant and AHS officials had various discussions over time, dating back to 2011, regarding the requirements imposed on the Premises by the Pool Regulations and Pool Standards.
- (b) The Work Order was the result of a site inspection by the EO on June 14, 2018.
- (c) The Respondent had not rescinded the Work Order.

[26] The Respondent submitted that the Work Order had not been rescinded due to “procedural oversight”, but argued that the Work Order had been “effectively rescinded” by the Closure Orders.

[27] The Board found as fact, that AHS had not rescinded the Work Order. Therefore, the dispute between the parties remained.

[28] The Board was mindful of the considerable similarities between the work ordered through the Work Order and the work ordered through the subsequent Closure Orders. The Board also acknowledged that the Closure Orders were not under appeal. However, the Board was not persuaded that the status and viability of the Appellant's appeal of the live Work Order was diminished by the Closure Orders.

[29] Further, the Board found as fact that the Closure Orders continued in effect as they were not subject to the Appeal. The Board was also mindful of the Appellant's position that the adjudication of the Appeal was its opportunity to find a remedy to its grievances. All this was interpreted by the Board to indicate that a live controversy existed between the parties.

[30] Considering the evidence, the Board found that the dispute between the parties remained live and the issues had not been rendered academic. Thus, the first test on a determination of mootness, as articulated in *Borowski*, had not been met.

#### **Board Conclusion on the Mootness Application**

[31] Upon finding that a live dispute existed between the parties, the Board concluded the Appeal was not moot and that a hearing of the Appeal would proceed.

[32] The Board's decision on the Mootness Application was verbally delivered to the parties on September 14, 2018.

[33] The parties agreed, and the Board concurred, that the hearing of September 14, 2018, would be adjourned and the merit hearing of the Appeal would be held on September 21, 2018. The discussion included the likelihood that the constitution of the Board would change due to availability. This was not considered problematic as the parties had not entered into the merit portion of their submissions.



Ike Zacharopoulos, Hearing Chair  
On behalf of the Public Health  
Appeal Board

**Date:** March 1, 2019

**APPENDIX "A"****EXHIBITS CONSIDERED BY THE BOARD:**

<b>NO.</b>	<b>ITEM</b>
Exhibit 1	Respondent's Disclosure regarding Mootness