CITATION: Seniorscare Operations (HCL) LP v. Director, Performance Improvement and Compliance Branch, 2015 ONSC 1964
DIVISIONAL COURT FILE NO.: 234/14
DATE: 20150325

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

J. WILSON, SACHS AND HARVISON YOUNG JJ.

BETWEEN:	)	
	)	
SENIORSCARE OPERATIONS (HCL) LP	)	*Gordon R. Baker, Q.C.* and
	)	*Scott G. Lemke,* for the Applicant
Applicant (Appellant)	)	(Appellant)
	)	
– and –	)	
	)	
DIRECTOR, PERFORMANCE IMPROVEMENT AND COMPLIANCE BRANCH, MINISTRY OF HEALTH AND LONG-TERM CARE	)	*Sandra Y. Nishikawa* and *Judith S. Parker,* for the Respondent
	)	
Respondent (Respondent)	)	
	)	**HEARD at Toronto:** March 25, 2015

HARVISON YOUNG J. (ORALLY)

[1] Seniorscare Operations appeals from a decision of the Health Services Appeal and Review Board (the "Board") confirming the order of the respondent Director dated May 29, 2012. This order revoked its licence to operate a long-term care home called Picton Manor Nursing Home which had been issued pursuant to the *Long-Term Care Homes Act, 2007,* S.O. 2007, c. 8 (the "Act").

[2] The appellant seeks a declaration that the May 29, 2012 revocation order was unlawfully and improperly issued. The purpose of this declaration is not to regain the licence which expired in June 2014, but to ground a civil suit for damages.

[3] The factual background to the revocation is, for the most part, common ground between the parties. Starting in 2012, following a fire safety inspection and inspections conducted by the Electrical Safety Authority ("ESA"), Picton Manor was found to be in violation of various fire and electrical safety regulations. The ESA agreed it would not disconnect the electricity to Picton Manor so long as the required remedial work was continuing. It extended the disconnection date several times on this basis throughout February, March and April, 2012.

[4] Picton Manor was also having financial difficulties. In January, 2012 the appellant defaulted on the mortgage. Around the same time, Picton Manor requested a cash advance from the Local Health Integration Network ("LHIN"), the organization that distributes funds form the Ministry of Health and Long-Term Care to long- term care homes. Funds are distributed using a formula that is largely based on the number of residents to the home. In May, 2012, the LHIN declined to make a cash advance to the appellant.

[5] On May 22, 2012, Mr. Stephen Bordo, the principal of Picton Manor met with staff at the Ministry to discuss the financial situation of the appellant. At this meeting, Mr. Bordo presented financial statements setting out the distressed financial state of Picton Manor at the time. At the same meeting, Mr. Bordo presented a closure plan and a cost estimate of the execution of that closure plan. That cost was to be $1,416,465.00. Mr. Bordo also disclosed that the appellant

could not make a forthcoming payroll for Picton Manor, and recently had been required to issue an emergency cheque to pay food suppliers.

[6] On May 29, 2012, the respondent made two orders under s.157 of the *Act*. The first was an order pursuant to s.157(2)(c) revoking the appellant's licence to operate Picton Manor. The second was an order under s.157(4) appointing an interim manager. The appellant was not given any notice of either order prior to its issuance.

[7] The appellant appealed the order revoking the licence but did not appeal the interim management order. The Board heard the appeal in February 2014. By this time the interim manager had relocated all the residents and Picton Manor was effectively closed. The Board concluded that reasonable grounds existed to revoke the licence under each of the three prongs of s.157(2)(c). It held that the respondent had no obligation to give the appellant notice regarding revocation, that it was not expressly required by the statute and the appellant provided no evidence to show it suffered prejudice as a result of the failure to provide notice. Further, the Board rejected the appellant's arguments regarding failure to provide adequate reasons, allegation of bias, breach of confidence and reasonable expectation. Finally, the Board addressed the question of whether the respondent acted unlawfully in directing the interim manager to close Picton Manor while the appeal before it was pending. The Board concluded that since the appellant did not appeal the order appointing the interim manager, this issue was not before it.

[8] The appellant does not challenge the reasonableness of the substantive grounds of the Board's decision, but submits that the Board's decision fails to comply with the requirements of

procedural fairness. Questions of procedural fairness are not subject to a standard of review analysis. Rather, the "proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met". *Ontario Provincial Police v. MacDonald,* [2009] ONCA 805 at para. 34-37. In short, the simple question that we must determine is whether the requirements of procedural fairness were met or not.

[9] The heart of the appellant's submission is that the Board erred in failing to find that notice with respect to the revocation was required. The respondent submits, first, that notice was not required under the statute, but that in any event, the hearing before the Board was a hearing *de novo* and that any procedural defect had thus been cured.

[10] Before us, the appellant made three submissions:

(i) that the hearing before the Board was not a hearing *de novo;*

(ii) that the appellant was entitled to notice of revocation; and,

(iii) that any breach of natural justice renders the decision void.

[11] We agree with the respondent that if the hearing before the Board was a hearing *de novo*, then the prior failure to give notice was cured: *McNamara v. Ontario (Racing Commission)* 1998 O.J. No. 3238 (C.A.).

[12] Thus, the first question that we must address is whether the hearing before the Board was *de novo.*

[13] To begin with, we note that the Board clearly treated the hearing before it as a hearing *de novo*. At para. 121 of its reasons, it stated as follows:

> The Appeal Board notes that the hearing of this appeal is a hearing *de novo* in which "the Appeal Board may rescind, confirm or alter the decision of the Director, and may substitute its decision for that of the Director, and may direct the Director to take any action that the Appeal Board considers that the Director ought to take in accordance with this Act and the regulations." The import of this provision is that the Appeal Board is not required to give deference to the decision of the Respondent but must consider all of the evidence presented at the hearing and determine whether the Respondent had reasonable grounds to revoke the Applicant's licence.

[14] In the course of the hearing before us, Mr. Lemke for the appellant denied that the appellant had agreed before the Board that the hearing was *de novo*. However, he acknowledged that the appellant's counsel had agreed before the Board that the respondent had the burden of proof and also that evidence was called at the hearing. We note that *viva voce* evidence was heard and that the hearing before the Board continued over five days. Moreover, when the Board described the hearing as *de novo*, counsel for the appellant did not make any objection or correction. In addition, the framework of the *Act* makes the *de novo* character clear. For example, the appeal to the Board had the effect of staying the revocation order.

[15] The appellant also submits that a hearing *de novo* "is one where the appeal of an initial decision resembles a new hearing and the closer the appeal is to a new hearing, the more likely it is to cure any breaches of procedural fairness or natural justice." This could not have been a *de novo* hearing, the appellant suggests, because the appellant has suffered adverse and irreversible consequences as a result of the initial decision prior to the *de novo* hearing that thus could not be cured by the hearing.

[16] The problem with this argument is that any prejudice suffered by the appellant flowed not from the lack of notice of the revocation order, but from the appointment and actions of the interim manager which the appellant chose not to challenge.

[17] The appellant did not suffer prejudice as a result of the revocation order. It had already made a six month closure plan. The evidence is clear that it was in greater financial distress as time was going on. While Mr. Lemke stated that the appellant intended to obtain the financial support to continue Picton Manor, there is nothing in the record to support the inference that such an outcome was likely or even possible. To the extent that the appellant suffered any prejudice, such prejudice arose from the second order which installed an interim manager who relocated the residents resulting in the effective closure of Picton Manor.

[18] In our view, the appellant is indirectly challenging the appointment and actions of the interim manager which is not before us. The appellant could have challenged the appointment or actions of the interim manager, it chose not to do so. The appellant could also have applied for an interim stay of that order. It did not. Having found that the hearing before the Board was *de novo*, the other submissions of the appellant that is, that there was a breach of the duty to give notice, and that the order was therefore a nullity, fail because any defects were clearly cured by the *de novo* hearing.

[19] The appeal is therefore dismissed.

JANET WILSON J.

[20] I have endorsed the Appeal Book, "For oral reasons given by Harvison Young J. this appeal is dismissed. Costs fixed payable to the respondent in the amount of $9,225 inclusive of HST and disbursements."

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HARVISON YOUNG J.

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JANET WILSON J.

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SACHS J.

Date of Reasons for Judgment: March 25, 2015
Date of Release: March 31, 2015

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Applicant
(Appellant)

– and –

DIRECTOR, PERFORMANCE IMPROVEMENT AND COMPLIANCE BRANCH, MINISTRY OF HEALTH AND LONG-TERM CARE

Respondent
(Respondent)

ORAL REASONS FOR JUDGMENT

HARVISON YOUNG J.

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