

HEALTH SERVICES APPEAL AND REVIEW BOARD

PRESENT:

James Beamish, Designated Vice-Chair, Presiding
Marla Burstyn, Board Member
Samia Makhamra, Board Member

Heard February 10, 11, 12, 13 and 18, 2014 at Toronto, Ontario

IN THE MATTER OF a Request for Hearing under section 164 of the *Long-Term Care Homes Act, 2007*, Statutes of Ontario, 2007, c. 8, as amended

B E T W E E N:

SENIORSCARE OPERATIONS

Applicant

and

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

Respondent

Appearances:

For the Applicant: Gordon R. Baker, Q.C. and Scott Lemke
For the Respondent: Judith Parker and Sandra Nishikawa

DECISION AND REASONS

I. DECISION

1. For the reasons explained below, it is the decision of the Health_Services Appeal and Review Board (the Appeal Board) to confirm the order of the Respondent dated May 29, 2102 revoking the Applicant's licence under Part VII of the *Long-Term Care*

Homes Act, 2007, Statutes of Ontario, 2007 c. 8, as amended (the *Act*) to operate Picton Manor Nursing Home (Picton Manor).

II. BACKGROUND

2. Picton Manor is a 78-bed long-term care home located in Picton, Ontario. The premises of Picton Manor consist of a building constructed in the 1900s and an addition constructed more recently.
3. The Applicant first received a licence to operate Picton Manor in 2003. A new licence was issued to the Applicant on July 1, 2010 when the *Act* came into force. The principal of the Applicant is Stephen Bordo.
4. Picton Manor is a home with Class D beds that has not been upgraded in accordance with the applicable guidelines. Pursuant to section 187 (3) 6 of the *Act*, licences issued to such homes are for a term of 4 years expiring June 30, 2014.
5. Section 187 (9) of the *Act* provides that if the licensee of a home with class D beds does not agree during the first year of the term of the licence, to redevelop the home to the current standards and to the satisfaction of the Director, the Director shall be deemed to have given notice to the licensee that no new licence will be issued following the expiry of the existing licence on June 30, 2014. The parties agreed that no such redevelopment agreement had been reached and that the Applicant's licence was to expire on June 30, 2014 with no prospect of renewal.

The Fire and Electrical Concerns

6. The Prince Edward County Fire Department (PECFD) conducted annual fire safety inspections of Picton Manor. Prior to January 2012, those inspections did not identify any significant issues.

7. On January 12, 2012, the PECFD conducted a fire safety inspection in which 10 contraventions of the Ontario Fire Code were identified including a lack of compliance with fire resistance ratings for the construction of the building, improper use of temporary wiring and non-compliant fire alarm and detection systems. The Applicant was ordered to correct the contraventions by March 19, 2012.
8. At the request of the PECFD, the Electrical Safety Authority (ESA) conducted an inspection of Picton Manor on February 8, 2012. The ESA identified 20 contraventions of the Electrical Safety Code and ordered that a licensed electrical contractor correct the deficiencies no later than February 20, 2012.
9. On February 10, 2012, the PECFD issued a notice under section 15 of the *Fire Protection and Prevention Act, 1997* that the risk of fire at Picton Manor posed an immediate threat to life. The PECFD ordered that a minimum of 12 supervisory staff be present at all times to facilitate emergency evacuation of residents in the event of a fire.
10. The Applicant retained an electrical contractor to correct the deficiencies identified by the ESA and hired additional staff to comply with the order of the PECFD that a minimum of 12 staff be present at all times.
11. On February 20, 2012, the ESA sent a notice to the Applicant that the Applicant had not confirmed that the deficiencies identified in the ESA report of February 8, 2012 had been remedied. The ESA advised the Applicant that unless the deficiencies were corrected immediately, the ESA would issue an order to disconnect the power supply to Picton Manor.
12. The Ministry of Labour conducted inspections of Picton Manor on February 14 and 22, 2012. Those inspections revealed that the electrical work being done would involve the disturbance of asbestos.

13. On February 22, 2012, the Ministry of Labour issued two orders requiring that a designated substance report and a work plan under section 30 of the *Occupational Health and Safety Act* and prohibiting the electrical contractor from undertaking any work in an area where asbestos might be disturbed.
14. The foregoing orders delayed the remedial electrical work and caused the Applicant to incur additional expenses.
15. On February 22, 2012, the PECFD issued an Inspection Order under the *Fire Protection and Prevention Act, 1997*. That order identified 16 deficiencies which posed a fire and life safety risk to occupants and the steps that the Applicant was required to take to remedy those deficiencies.
16. On February 22, 2012, the South East Community Care Access Centre (CCAC) asked the Respondent to cease admissions to Picton Manor citing concerns about fire safety and asbestos hazards. The CCAC stated that the Applicant had contacted it to discuss the possible relocation of residents and that it did not want to admit frail elderly residents only to move them again. In late February 2012, the Respondent directed the CCAC to cease admitting new residents to Picton Manor pursuant to section 50 of the *Act*.
17. On February 24, 2012 a ministry inspector conducted an inspection of Picton Manor and determined that the work needed to comply with the orders of the PECFD, the ESA and the Ministry of Labour was in progress. As a result, no findings of non-compliance with the *Act* were made.
18. The ESA issued a further order on March 7, 2012, in which it noted the original 20 defects plus an additional 4 defects that had been identified by the electrical contractor. Those additional defects were considered to be serious and included shock and fire hazards. The ESA ordered that all defects be corrected by March 8, 2012. A

- follow-up notice was issued on March 8, 2012 that indicated that some but not all of the defects had been corrected.
19. On March 19, 2012, the ESA issued a final notice that the power would be disconnected on April 19, 2012 unless all defects had been corrected.
 20. On April 10, 2012, the ESA advised that the immediate threats had been abated and, as a result, the PECFD lifted the immediate threat to life notice effective April 19, 2012 but maintained the requirement that 12 staff be present at all times.
 21. The ESA noted that the known shock hazards had been corrected but that there could be unknown hazards. In addition, the ESA noted that the wiring in the old portion of the building had been damaged because of over-fusing and would need to be replaced. The ESA indicated that the wiring in its current condition would not be sufficient to power the air conditioning units used to cool the premises during the summer months. The ESA agreed that it would extend the disconnect order to May 1, 2012.
 22. On April 11, 2012, the ESA learned that the electrical contractor was not on the job. The contractor returned to work by May 1, 2012 but with reduced hours. As of May 1, 2012, some but not all of the remedial work had been completed. The ESA agreed to further extend the disconnect order to May 23, 2012.
 23. As of May 14, 2012, the electrical contractor had not been on the job for approximately 1½ weeks. The contractor only returned to work after the Respondent appointed an interim manager to operate Picton Manor on May 23, 2012 and the interim manager agreed to be responsible for paying the contractor. Ultimately, the building was “made safe”, although it was not brought up to full compliance with the *Electrical Safety Code*.

Financial Concerns

24. Funding for long-term care homes in Ontario is provided through Local Health Integration Networks (LHIN) that are funded by the Ministry of Health and Long-Term Care (MOHLTC). The LHIN distributes funds to long-term care homes in accordance with a formula that is based largely on the number of residents in the home.
25. Funding is determined in advance based on the estimated number of residents for the forthcoming year. If there are fewer residents than estimated, the excess payments to the long-term care home are known as “recoveries” and are to be repaid to the LHIN no later than March 31 of the following year.
26. To the end of 2011, recoveries owing by Picton Manor were \$302,182 and a further \$92,777 accrued in 2012. The total recoveries owing to the date on which the Applicant’s licence was revoked and an interim manager appointed were \$394,959.
27. The LHIN may make cash advances to long-term care homes. Such cash advances are to be made against future revenues and must be repaid by March 31 of the year following the year in which the advance was made. A cash advance of \$170,000 was made to Picton Manor in 2011 and was recovered in two equal installments in February and March 2012.
28. In January 2012, the Applicant requested that the LHIN provide a further cash advance of \$170,000. The Applicant increased the amount of the requested cash advance to \$270,000 by April or May 2012. The LHIN considered the request but ultimately declined to make a cash advance to the Applicant.
29. The mortgage on Picton Manor had a principal balance of \$3,000,000 as at January 1, 2012 and bore an interest rate of 11.5% payable monthly. The Applicant defaulted in

making the mortgage payments beginning in January 2012 and did not resume making mortgage payments.

30. On May 2, 2012, a lawyer representing the secured creditors and mortgagees of Picton Manor gave notice of their intention to enforce their security. That notice was withdrawn on May 10, 2012.

31. On May 22, 2012, Stephen Bordo met with the Respondent's representatives Karen Simpson and Wiesia Kubicka to discuss the financial situation of the Applicant. At that meeting, Mr. Bordo presented the Respondent with a document entitled "Six Month Close Down Nursing Home Statement". That document indicated that the Applicant required \$1,416,465 to fund the operations of Picton Manor pending a close down effective October 31, 2012. At that meeting Mr. Bordo told the Respondent that the Applicant could not make the forthcoming payroll for Picton Manor and had to issue an emergency cheque to pay food suppliers.

The Licence Revocation

32. On May 29, 2012, the Respondent made orders under section 157 of the *Act* revoking the Applicant's licence to operate Picton Manor and appointing an Interim Manager to operate Picton Manor. The order revoking the Applicant's licence stated that the conduct of the licensee afforded reasonable grounds to be believe that,
 1. The home is being operated or will be operated in a manner that is prejudicial to the health, safety or welfare of its residents.
 2. The conduct of the Applicant and/or Stephen Bordo, President and Director of the Applicant, persons with a controlling interest in the Applicant affords reasonable grounds to believe that the home is being operated in a manner that is prejudicial to the health, safety or welfare of its residents.

3. The conduct of the licensee affords reasonable grounds to believe that the home is not being operated in accordance with the law and with honesty and integrity.
 4. The conduct of the Applicant and/or Stephen Bordo, President and Director of the Applicant, persons with a controlling interest in the Applicant, affords reasonable grounds to believe that the home is not being or will not be operated in accordance with the law and with honesty and integrity.
 5. The conduct of the Applicant affords reasonable grounds to believe that it is not in a position to furnish or provide the required services.
 6. The conduct of the Applicant and/or Stephen Bordo, President and Director of the Applicant, persons with a controlling interest in the Applicant, affords reasonable grounds to believe that it/they are not in a position to furnish the required services.
33. The bases for grounds 1 and 2 were the Applicant's failure to complete the necessary renovations to correct fire hazard and electrical safety hazards, the Applicant's failure to fulfill its financial obligations to contractors engaged in performing the work necessary to make the home safe, the Applicant's failure to comply with the *Electrical Safety Code* and the *Fire Code* and the Applicant's failure to pay the costs for goods and services as they come due including payroll and those relating to suppliers.
34. The basis for grounds 3 and 4 was the Applicant's failure to comply with the *Electrical Safety Code* and the *Fire Code*.
35. The basis for grounds 5 and 6 was the Applicant's indication that it had insufficient funds to pay employees and suppliers.
36. The Respondent has acknowledged that there were no concerns about the hands-on care of the residents of Picton Manor and the same staff continued to care for the residents after the appointment of the Interim Manager.

37. The Interim Manager paid the outstanding invoices and the payroll and continued to operate Picton Manor until the residents could be relocated to other long-term care facilities. The total expenses incurred by the Interim Manager to close Picton Manor were \$1,209,454.
38. The MOHLTC has submitted a claim to the Applicant for a total of \$1,592,378.70, which includes the expenses incurred to close Picton Manor plus outstanding recoveries of \$394,959, less an occupancy allowance of \$12,034.62.

III. THE EVIDENCE

39. The Respondent called evidence from four witnesses, David McConnell, Senior Inspector for the ESA, Larry Hofmeister, Director, Health Service Provider Funding and Allocation for the LHIN, Karen Simpson, Senior Manager, Compliance and Enforcement for the Respondent and Wiesia Kubicka, Acting Senior Manager, Compliance and Enforcement during Ms. Simpson's absence.
40. The Applicant did not call any evidence.

David McConnell

41. David McConnell is a licensed electrician and has been an inspector for the ESA for 10 years. Mr. McConnell explained that all long-term care homes must comply with the provisions of the *Electrical Safety Code* and that any electrical work done at a long-term care home must be inspected and approved by the ESA. He found no record of any such inspections or approvals for Picton Manor.
42. After the PECFD issued its initial order regarding Picton Manor, Mr. McConnell and a colleague made a visual inspection of Picton Manor. Mr. McConnell stated that he

- found numerous fire and shock hazards in the old part of the building. He issued an order that 20 identified deficiencies be corrected by February 20, 2012.
43. Mr. McConnell described some of the deficiencies that he observed at Picton Manor. He stated that he was concerned for the safety of the residents.
44. Mr. McConnell testified that he was concerned that there were no permits for electrical work on file. He stated that if electrical work had been done at Picton Manor, it must have been done without the required permits.
45. Mr. McConnell testified that he made regular visits to Picton Manor to observe the work that was being done by the electrical contractor. He stated that the contractor discovered other issues that had not been observed during the initial visual inspection. Those additional issues were identified in the ESA order issued on March 7, 2012 which directed that those issues, as well as the 20 defects identified in the initial order, be corrected by March 8, 2012.
46. Mr. McConnell stated that when the defects were not corrected by the date specified, a final disconnect notice was delivered to Picton Manor on March 19, 2012 to be effective April 19, 2012. By April 19, 2012, sufficient work had been done to alleviate the immediate fire hazard. Mr. McConnell explained that the disconnect order was put on hold so long as the electrical work was progressing at an acceptable pace.
47. Mr. McConnell testified that the wiring in the old part of the building had to be replaced because it was damaged due to over-fusing. The wiring in its existing condition was not adequate to run the air conditioning units during the summer months.
48. Mr. McConnell stated that he spoke with the contractor on or before May 14, 2102 who advised that he had not been on the job for 1.5 weeks and was concerned that he

would not be paid. Mr. McConnell stated that he reported to his manager that the power might have to be disconnected.

49. Mr. McConnell spoke to Ms. Simpson to advise her that the ESA might have to disconnect the power to Picton Manor. He explained that there were unprotected wires in the building that could become hot and cause a fire. He told Ms. Simpson that he was “terrified” about the danger to the residents.

50. Mr. McConnell stated that the power was not disconnected because the Interim Manager appointed by the Respondent agreed to be responsible for the cost of the electrical work. He explained that sufficient work was done to make the building safe although it was not brought up to compliance with the *Electrical Safety Code*.

Larry Hofmeister

51. Mr. Hofmeister is the Director, Health Service Provider Funding and Allocation for the LHIN. The LHIN is responsible for allocating funding from the MOHLTC to 84 service agencies in the south-east region, including long-term care homes. Picton Manor was one of the long-term care homes to which the LHIN allocated funding.

52. Mr. Hofmeister explained that funding is allocated to long-term care homes on the basis of the projected number of residents and the acuity of each resident. If the actual number of residents is less than the projected number, there may be an overpayment to the service agency which must be repaid to the LHIN. These amounts are known as recoveries.

53. Mr. Hofmeister further explained that the LHIN may make cash advances to service agencies subject to policies and guidelines prescribed by the MOHLTC. Those policies and guidelines include the requirement that any cash advance must be repaid out of future revenues not later than March 31 of the year after the year in which the advance was made.

54. In considering requests for cash advances, Mr. Hofmeister considers the financial circumstances of the service agency including its projected revenues and expenditures. The LHIN would decline to make a cash advance if it believed that the service agency would be unable to repay the cash advance by March 31 of the following year. Mr. Hofmeister explained that cash advances are not additional funding to the service agency but an advance against future revenues.
55. Mr. Hofmeister testified that the Applicant had outstanding recoveries as at September 30, 2011 of \$170,923. In addition, the LHIN had made a cash advance to the Applicant of \$170,000 which was to be repaid by March 31, 2012. That cash advance was recovered in two equal installments in February and March 2012.
56. Mr. Hofmeister testified that in January 2012, the Applicant applied for a further cash advance of \$170,000. The amount of the requested cash advance was subsequently increased to \$270,000. Mr. Hofmeister received financial information from the Applicant and considered that information together with information from other parties including the secured creditor of Picton Manor. In April 2012, Mr. Hofmeister learned that the mortgage on Picton Manor had been in arrears since January 2012. Mr. Hofmeister also learned that, although the occupancy rate for Picton Manor was declining, the LHIN was continuing to fund the Applicant as if it were 100% occupied. For that reason, the recoveries owing by the Applicant were continuing to increase. In addition, Mr. Hofmeister was told about the electrical and fire safety concerns and the remedial work and additional staff required as a result of those issues.
57. Mr. Hofmeister stated that he considered reducing the ongoing funding to Picton Manor to reflect the reduced number of residents but that he decided not to do so because of the potential impact on the safety and well-being of the residents.

58. Mr. Hofmeister testified that the LHIN ultimately decided on or about May 16 to decline to make the cash advance. Mr. Hofmeister stated that the outstanding trade payables of Picton Manor were approximately \$370,000, which was more than the amount of the requested cash advance. The fact that the mortgage was in default meant that Picton Manor did not qualify for a cash advance. Mr. Hofmeister stated that he was concerned that Picton Manor would be closed as a result of the financial situation and the ongoing fire safety and electrical problems.
59. Mr. Hofmeister stated that he tried to find a way to make the cash advance but was unable to do so. He denied that he promised the Applicant that a cash advance would be approved, only that the request for a cash advance would be considered. He stated that the LHIN continued to consider the request until May 16, 2012 because Mr. Bordo held out the prospect of a refinancing that might alleviate the Applicant's financial problems.
60. In cross-examination, Mr. Hofmeister explained that the LHIN does not establish the funding formula for long-term care homes and cannot approve an increase to that funding. He stated that in most cases the funding allocated to long-term care homes is sufficient to cover contingencies such as those encountered by Picton Manor. He noted that long-term care homes, including Picton Manor, are private, for-profit facilities that have funding options other than funding from the MOHLTC.
61. Mr. Hofmeister stated that it was not up to the LHIN to consider whether additional funding should be provided to Picton Manor, including funding under section 154 of the *Act*, which provides that the MOHLTC may perform any necessary work at the long-term care home and recover the cost of such work from the licensee. Mr. Hofmeister further testified that funding provided by the MOHLTC to upgrade some long-term care homes is not part of the funding allocated to the LHIN and is not flowed through the LHIN.

Karen Simpson

62. Karen Simpson (Slater) was the Senior Manager, Compliance and Enforcement under the *Act* until March 26, 2012 when she became Acting Director. She is now Director, Compliance and Enforcement. Ms. Simpson oversees three service area offices that are staffed by managers and inspectors. The Compliance and Enforcement Branch is responsible for licensing and regulation of long-term care homes in Ontario.
63. Ms. Simpson explained that Picton Manor was initially licensed in 2003 under the previous legislation. A new licence was issued in July 2010 when the *Act* came into force. The licence issued to Picton Manor in 2010 was for a Class D home. That licence was for a term of four years expiring June 30, 2014 unless there was an agreed upon redevelopment agreement prior to that date.
64. Ms. Simpson testified that the Applicant did not present a viable proposal for redevelopment of Picton Manor. As a result, a final letter was sent to the Applicant on April 19, 2012 stating that the licence for Picton Manor would expire on June 30, 2014 with no prospect of renewal. Ms. Simpson explained that if Picton Manor were to be redeveloped or a new home constructed, a new licence would have to be issued.
65. Ms. Simpson testified that she first learned of the PECFD immediate threat to life notice on February 13, 2012. She obtained a copy of the order which did not require an immediate evacuation of the home but required that 12 staff be present at all times. Ms. Simpson sent an inspector to Picton Manor to review the fire safety plan and to ensure that 12 staff were present. In addition, she contacted the PECFD Fire Chief to confirm that the additional staff that had been hired were sufficiently trained. The Fire Chief told Ms. Simpson that the staff were sufficient so long as they could use a fire extinguisher and help with an evacuation.
66. Ms. Simpson also contacted Mr. Bordo to discuss the steps that were being taken to address the fire safety and electrical concerns. Ms. Simpson stated that she was

satisfied at that time that appropriate steps were being taken to correct the deficiencies.

67. Ms. Simpson stated that she understood that the issues were serious and required prompt attention but that she did not consider that it was necessary to revoke the licence at that time since appropriate steps were being taken. Nevertheless, discussions were had with the Applicant and the CCAC regarding a possible evacuation and relocation of the residents.
68. On February 23, 2012, a letter was issued to the Applicant suspending admissions to Picton Manor. The letter was issued at the request of the CCAC and under the authority of the Director. Ms. Simpson testified that she recommended that admissions be suspended in light of the fire and electrical safety concerns.
69. Ms. Simpson described a meeting held on March 2, 2012 which she attended along with representatives of the PECFD and Mr. Bordo. At that meeting, the progress of the remedial work was reviewed. Ms. Simpson stated that she was satisfied that the Applicant was continuing to take appropriate steps. A follow-up meeting was held on March 8, 2012, at which time the ESA indicated that it was not satisfied with the progress of the work. Ms. Simpson stated that she was satisfied that the ESA and the PECFD were monitoring the remedial work. She felt that her role was to understand the situation and to develop contingency plans in the event that it became necessary to evacuate the residents.
70. Ms. Simpson testified that she became aware of the Applicant's financial difficulties in early March 2012. Mr. Hofmeister advised Ms. Simpson of the Applicant's application for a cash advance. On March 30, 2012, Ms. Simpson met with a representative of the Applicant's secured creditors. At that meeting, there was discussion of what would happen if a receiver were appointed. Ms. Simpson stated that she received information from the LHIN that the mortgage on Picton Manor was

in arrears. Ms. Simpson stated that she knew that the Applicant's financial situation was precarious.

71. Ms. Simpson testified that she received a copy of a Notice of Intention to Enforce Security from the Applicant's secured creditors. She stated that she was relieved because a receiver would have to appoint a manager who would assume responsibility for the Applicant's financial obligations. Ms. Simpson received a communication on March 10, 2012 advising that the secured creditors would not be enforcing their security.
72. Ms. Simpson testified that she sent a letter to the Applicant on April 19, 2012 requesting that the Applicant provide a closure plan for Picton Manor. In that letter, Ms. Simpson stated that she was prepared to discuss a closure earlier than June 30, 2014 and invited the Applicant to provide a plan for early closure and to meet with her to discuss the same.
73. Ms. Simpson stated that she learned from Mr. McConnell, on or about May 17, 2012, that the ESA had given notice to the Applicant that it would disconnect the power on May 23, 2013. Mr. McConnell also advised Ms. Simpson during that conversation that he was "terrified" about the risk to the residents of Picton Manor.
74. Ms. Simpson testified that Mr. Bordo asked for a meeting on May 22, 2012. Ms. Simpson and Ms. Kubicka attended the meeting on behalf of the Respondent and Mr. Bordo and Robert Berg attended on behalf of the Applicant. Ms. Simpson testified that Mr. Bordo and Mr. Berg presented an income statement that outlined the cost of closing Picton Manor over the ensuing six months including outstanding invoices to contractors and suppliers, payroll and other ongoing expenses, less revenues from the LHIN. The net cost of closing Picton Manor was estimated to be \$1,414,375.
75. Ms. Simpson testified that Mr. Bordo did not request funding for the cost of the remedial work other than in the context of the proposed closure of Picton Manor.

76. Ms. Simpson testified that she was convinced, following the meeting of May 22, 2012, that she had no alternative but to recommend that the Applicant's licence be revoked and an interim receiver appointed. She believed that the Applicant's financial situation was such that it could not meet its financial obligations. She also believed that the electrical concerns that had been identified by the ESA presented a danger to the safety of the residents and that if the ESA disconnected the power the residents would have to be evacuated in any event.
77. Ms. Simpson testified that she felt that the electrical and fire safety issues provided sufficient grounds for the revocation of the licence but that the Applicant's failure to comply with the *Fire Code* and the *Electrical Safety Code* as well as its inability to meet its financial obligations afforded additional grounds. Ms. Simpson stated that she had no information that would call into question the honesty and integrity of Mr. Bordo; the concern was the failure of the Applicant to comply with the law.
78. Ms. Simpson testified that the Respondent did not act sooner to revoke the Applicant's licence because she felt that the Applicant was taking appropriate steps to remedy the fire and electrical issues. It was only when it became apparent that the Applicant did not have the financial resources to complete the work that she felt that there was no alternative but to revoke the licence.
79. Ms. Simpson testified that she did not consider invoking section 154 of the *Act* that would have permitted the Respondent to perform the work and recover the cost from the Applicant. She noted that at no time did Mr. Bordo ask the Respondent to do the work nor did he request any financial assistance other than the \$1,414,375 for the estimated cost of closing Picton Manor. Ms. Simpson stated that she was not prepared to recommend that the Ministry turn over such a large sum of money to a licensee with financial difficulties such as those facing the Applicant.

80. Finally, Ms. Simpson noted that, since no plan of redevelopment had been approved, Picton Manor was going to close by June 30, 2014 in any event. There was no prospect of an ongoing operation.
81. In cross-examination, Ms. Simpson was asked whether the Respondent had responsibility for the health and safety of residents of long-term care homes. She stated that the licensee has that responsibility and it is the responsibility of the Respondent to ensure that the licensee fulfills its obligations.
82. Ms. Simpson was asked why the Respondent did not act sooner in light of the immediate threat to life notice issued by the PECFD. She stated that she was satisfied that the Applicant had complied with the requirement that 12 staff be present at all times and was taking appropriate steps to correct the deficiencies identified by the PECFD and the ESA. It was not until mid-May that she learned that the Applicant was unable to meet its financial obligations including its obligations to the electrical contractor.
83. Ms. Simpson was asked why Mr. Bordo was not told at the meeting of May 22, 2012 that the Respondent was considering revoking the Applicant's licence. Ms. Simpson stated that the purpose of the meeting was to discuss the closure of Picton Manor and that Mr. Bordo should have known that revocation and closure of the home was a possibility.
84. Ms. Simpson was asked about the reference in the order that the home was not being operated "in accordance with the law and with honesty and integrity." Ms. Simpson stated that the Respondent had no evidence of any lack of "honesty and integrity" and that the only concern to support that ground for revocation was the Applicant's failure to comply with the *Electrical Safety Code* and the *Fire Code*.

85. Ms. Simpson acknowledged that, as a result of the Applicant's appeal, the Applicant's licence to operate Picton Manor remained in effect, subject to the outcome of the appeal.

Wiesia Kubicka

86. Wiesia Kubicka was acting Director, Compliance and Enforcement during Ms. Simpson's absence from May 25 to June 4, 2012. For that reason, it was Ms. Kubicka who signed the orders revoking the Applicant's licence and appointing an Interim Manager.

87. Ms. Kubicka testified that she reviewed the orders with Ms. Simpson and that she agreed with Ms. Simpson that the orders should be issued and with the grounds for the orders.

88. Ms. Kubicka testified that she attended the meeting of May 22, 2012 with Ms. Simpson and Messrs. Bordo and Berg. She stated that she felt that continued operation of Picton Manor was not a viable option. Section 154 would have allowed the Respondent to do the electrical work but would not have helped with the payroll.

89. Ms. Kubicka stated that Mr. Bordo was not told that revocation was a possibility during the meeting of May 22, 2012. She explained that there was no statutory requirement that notice be given and noted that, in any event, the discussion at the meeting concerned the closure of the home. She further noted that from February to May 2012, the Applicant had been unable to present a viable plan to keep the home open. In cross-examination, Ms. Kubicka stated that she was concerned that the Applicant might have taken some action that could have affected the health or safety of the residents had notice of the revocation order been given. Ms. Kubicka acknowledged that this concern was speculative and not based on any concrete information.

90. In cross-examination, Ms. Kubicka confirmed that Mr. Bordo was not told during the meeting of May 22, 2012 that the financial information that he provided might be used to support the decision to revoke the licence.
91. In addition, Ms. Kubicka was cross-examined about the reference in the order that the home is not or will not be operated ... “with honesty and integrity.” She stated that Mr. Bordo’s lack of timely financial disclosure might afford grounds for a concern about his honesty and integrity but that was not a basis for making the order.
92. In re-examination, Ms. Kubicka stated that there were no issues about the quality of care provided to the residents and noted that the Interim Manager retained the same staff care for the residents until they were relocated and the home closed.

IV. THE LAW

93. Section 154 of the *Act* provides as follows:

Work and Activity Orders

154. (1) An inspector or the Director may order a licensee.

(a) to allow employees of the Ministry, or agents or contractors acting under the authority of the Ministry, to perform any work or activity at the long-term care home that is necessary, in the opinion of the person making the order, to achieve compliance with a requirement under this Act, and

(b) to pay the reasonable costs of the work or activity.

Grounds

(2) An order may be made under this section if,

(a) the licensee has not complied with a requirement under this Act; and

(b) there are reasonable grounds to believe that the licensee will not or cannot perform the work or activity necessary to achieve compliance.

Licensee must co-operate

(3) If an order is made under this section respecting work or an activity to be performed at a long-term care home, the licensee shall co-operate with and give reasonable assistance to the persons performing the work or activity.

Recovery of costs

(4) The Minister may,

(a) recover the reasonable costs of any work or activity to be performed under this section by withholding an amount from the funding that would otherwise be provided to the licensee under this Act; or

(b) direct the local health integration that provides funding under the *Local Health System Integration Act, 2006* to the licensee to withhold from such funding an amount equal to the reasonable costs of any work or activity performed under this section.

Compliance by LHIN

(5) A local health integration network shall comply with a direction of the Minister under clause (4) (b).

94. Section 157 of the *Act* provides, in part, as follows:

Revocation

157. (1) The Director may make an order revoking a licence.

Grounds

(2) A licence may be revoked under this section if,

(a) the licensee has not complied with a requirement under this Act;

(b) any person has made a false statement in the application for the licence, or the licensee or any person acting on behalf of the licensee has made a false statement in any report, document or other information required to be furnished under this Act or any other legislation in relation to the long-term care home;

(c) the conduct of the licensee, a person with a controlling interest in the licensee or, where the licensee is a corporation, the conduct of the officers or directors, affords reasonable grounds to believe,

- (i) that the home is not being operated or will not be operated in accordance with the law and with honesty and integrity,
- (ii) that the licensee, officers, directors or persons are not competent to operate a home in a responsible manner and in accordance with this Act and the regulations or are not in a position to furnish or provide the required services, or
- (iii) that the home is being operated or will be operated in a manner that is prejudicial to the health, safety or welfare of its residents;

When order effective

(3) An order revoking a licence takes effect upon the expiry of the period for appealing the order under section 165, subject to section 25 of the *Statutory Powers Procedure Act* if the order is appealed.

Interim management

(4) If the Director has made an order revoking a licence, the Director may also make an order providing for the long-term home to be occupied and operated by an interim manager until the revocation of the licence becomes effective and the residents of the home are relocated.

Provisions re interim management

(6) The following apply when an order has been made under subsection (4):

1. The interim manager has all of the powers of the licensee to occupy, manage, operate and administer the home.
2. The interim manager may have any repairs made to the home that the interim manager considers necessary to prevent, eliminate or reduce harm to or an adverse effect upon the health of any person or impairment of the safety of any person.
3. The cost of the repairs under paragraph 2 are a debt owed by the licensee to the Crown and may be set off against the compensation mentioned in paragraph 4 and against any other funding that would otherwise be provided to the licensee under this Act or the *Local Health System Integration Act, 2006*.
4. The licensee is not entitled to funding under this Act or the *Local Health Systems Integration Act, 2006* or payment for any service provided at the home, including a payment by a resident for accommodation, while the home is under

the control of the interim manager, other than reasonable compensation for use of the licensee's property.

5. Any other amount owed by the licensee to the Crown may be set off against the compensation mentioned in paragraph 4.

6. The Crown and the interim manager shall not, by reason of the appointment of the interim manager, the occupation or operation of the home by the interim manager or the continuation of an employee's employment under subsection 158 (2), be responsible for a liability incurred or attributable to a period before the interim manager began occupying and operating the home.

7. If the Crown or the interim manager pays any amount, a portion of which is attributable to anything that arose or occurred before the interim manager began occupying and operating the home, the licensee shall owe the Crown a debt equal to that portion.

95. Section 162 of the *Act* provides as follows:

Form and service of orders

162. An order under sections 153 to 157,

- (a) must be in writing;
- (b) must set out the grounds on which it is made;
- (c) must set out, if there is a right under section 163 to have the order reviewed, a statement of that right and an explanation of how to exercise that right, including the deadline for requesting a review;
- (d) must set out, if there is a right under section 164 to appeal the order, a statement of that right and an explanation of how to exercise that right, including the deadline for appealing the order; and
- (e) must be served on the licensee against whom it has been made.

96. Section 164 of the Act provides as follows:

Appeal from Director's order, decision

164. A licensee may appeal any of the following to the Appeal Board:

1. An order by the Director under sections 153 to 157.
2. A decision of the Director under section 163.

97. Section 166 of the Act provides, in part, as follows:

No automatic stay of order or decision

166. (1) Despite section 25 of the *Statutory Powers Procedure Act*, an appeal to the Appeal board does not stay an order or decision unless the Appeal board orders otherwise in writing upon being satisfied that a stay will not cause harm or a risk of harm to a resident.

(2) Subsection (1) does not apply with respect to an order to revoke a licence under subsection 157 (1) but does apply with respect to an order under subsection 157 (4).

98. Section 169 of the Act provides as follows:

Decision of Appeal Board

169. After a hearing, the Appeal board may rescind, confirm or alter the order or decision of the director, and may substitute its own opinion 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.

99. Section 171 of the *Act* provides as follows:

Funding not to be considered

171. The sufficiency of the funding provided to a licensee from any source shall not be considered in any review or appeal under this Part.

V. THE POSITIONS OF THE PARTIES

The position of the Applicant

100. The Applicant submitted that it was denied procedural fairness in the course of events leading up to the revocation of its licence. The Applicant pointed to three grounds of alleged procedural unfairness.
101. The Applicant submitted that the Respondent should have given notice to the Applicant that its licence was in jeopardy and was about to be revoked.
102. The Applicant submitted that the Respondent gave incomplete and confusing reasons for the decision to revoke the Applicant's licence. In particular, the Respondent failed to provide reasons for the allegation that the home was not being operated or would not be operated with "honesty and integrity".
103. The Applicant submitted that the Respondent demonstrated bias toward the Applicant when groundless allegations concerning the Applicant's honesty and integrity were made.
104. The Applicant submitted that the Respondent breached the Applicant's confidence when it enticed the Applicant into providing financial disclosure only to use that disclosure as a ground for revoking the licence.

105. The Applicant submitted that it had a legitimate expectation that the Respondent would consider making a work and activity order under section 154 of the *Act* before revoking the licence.
106. The Applicant submitted that the Respondent acted unlawfully in instructing the interim manager to close Picton Manor and relocate the residents when the appeal from the revocation order was pending.
107. The Applicant submitted that the Appeal Board should find that the order revoking the Applicant's licence was unlawfully and improperly issued and is null and void.

The position of the Respondent

108. The Respondent submitted that the main issue is whether there were reasonable and probable grounds for the revocation of the Applicant's licence. The Respondent submitted that the sufficiency of the funding provided to the Applicant is not an issue and noted the provisions of section 171 of the *Act* that provides that the sufficiency of funding shall not be considered in any review or appeal.
109. The Respondent submitted that there was uncontested evidence that there were serious electrical and fire safety issues at Picton Manor and that the Applicant's finances were in sufficient disarray that the Applicant was unable to pay for the work required to remedy the fire and electrical safety issues and to meet the payroll. Those issues were sufficient to provide reasonable and probable grounds to believe that the home was being operated or would be operated in manner that is prejudicial to the health, safety or welfare of the residents.
110. The Respondent submitted that the uncontested evidence of Ms. Simpson and Ms. Kubicka was that the meeting of May 22, 2012 was to discuss a closure plan for Picton Manor and that there was no understanding or expectation that the financial statement presented by Mr. Bordo at that meeting was confidential. There can be no

expectation of confidence regarding information which may have a bearing on the health, safety or welfare of residents.

111. The Respondent submitted that there is no statutory requirement that notice must be given of the intention to revoke a licence. Instead of a requirement that notice be given, the *Act* provides that an appeal operates to stay the decision.
112. The Respondent submitted that the reasons set forth in the order were sufficient to inform the Applicant of the grounds upon which the order was made. The order is clear that the Respondent never relied on the “honesty and integrity” prong of section 154 (1) (c) i of the *Act*. The Respondent relied solely on the “in accordance with the law” prong on the basis of the Applicant’s failure to comply with the *Fire Code* and the *Electrical Safety Code*.
113. The Respondent submitted that there was no evidence that the Applicant had a reasonable expectation that the Respondent would receive financial assistance or that a work or activity order would be made under section 154.
114. The Respondent submitted that the appeal was moot since the Applicant did not appeal the order appointing an interim manager and the licence was to expire in any event on June 30, 2014 with no prospect of renewal.

VI. ANALYSIS AND REASONS

115. The central issue to be determined by the Appeal Board is whether the Respondent had reasonable grounds to believe,
 - (i) that the home is not being or will not be operated in accordance with the law and with honesty and integrity, or
 - (ii) that the home is being operated or will be operated in a manner that is prejudicial to the health, safety and welfare of its residents.

116. In approaching our decision in this matter, the Appeal Board is mindful of the serious impact of the revocation of the licence on the Applicant.
117. Having said that, the Board is also mindful of the fundamental principle of the *Act* as set forth in section 1;
1. The fundamental principle to be applied in the interpretation of this Act and anything required or permitted under this Act is that a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.
118. Section 3 of the *Act* contains a resident's bill of rights that sets out 27 rights to which residents are entitled, including the right to live in a safe, clean environment.
119. Section 5 of the *Act* provides as follows:
5. Every licensee of a long-term care home shall ensure that the home is a safe and secure environment for its residents.
120. The Appeal Board finds that the overriding principle to be applied in the interpretation and application of the *Act* is the best interest of the residents. Although the commercial interests of the licensee must also be taken into account, those interests must take a secondary position to the interests of the residents.
121. 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.

Grounds for the order

122. The Appeal Board finds that the Respondent had reasonable grounds to believe that,

- (a) the home was not being operated in accordance with the law;
- (b) the Applicant was not in a position to furnish or provide the required services; and
- (c) the home was being operated in a manner that was prejudicial to the health, safety and welfare of the residents.

123. The evidence of Mr. McConnell demonstrated clearly that there were outstanding electrical issues that presented a serious risk of fire and a serious risk to the health, safety and welfare of the residents. Mr. McConnell stated that he was "terrified" of the risk to the frail and elderly residents of Picton Manor. Mr. McConnell's evidence was not contested and was not challenged on cross-examination.

124. The evidence of Mr. McConnell also demonstrated that Picton Manor was not being operated in accordance with the provisions of the *Fire Code* and the *Electrical Safety Code*. That evidence was also not contested.

125. The evidence of Mr. Hofmeister and Ms. Simpson demonstrated that the Applicant faced severe financial difficulties and was unable to pay the electrical contractor and suppliers and was unable to meet the payroll due in May 2012. The financial statement provided by Mr. Bordo at the meeting of May 22, 2012 confirmed the Respondent's financial plight. There were therefore reasonable grounds to believe that the Applicant was unable to furnish or provide the required services.

Was the Applicant entitled to notice?

126. The Appeal Board finds that the Respondent had no obligation to give the Applicant notice that the Respondent was going to revoke the Applicant's licence. The revocation of the licence was an administrative act for which notice is not required in the absence of an express statutory provision.
127. In any event, there was no evidence that the Applicant suffered any prejudice because of the Respondent's failure to give notice. There was no evidence from Mr. Bordo or any other representative of the Applicant that the Applicant could have taken steps to remedy the electrical and fire safety concerns or overcome its financial problems had notice been given that the Respondent was going to revoke its licence.
128. The uncontested evidence of Ms. Simpson and Ms. Kubicka was that at the meeting of May 22, 2012 Mr. Bordo presented a proposal to close Picton Manor not a request for financial assistance so that it could continue to operate. The steps that were taken by the Respondent in revoking the Applicant's licence and appointing an interim manager were consistent with what had been proposed by the Applicant. Picton Manor was closed and the residents relocated over a period of approximately six months. This was substantially what the Applicant had proposed.

Did the Respondent provide adequate reasons for the order?

129. The Appeal Board finds that the Respondent provided adequate reasons for the order revoking the Applicant's licence. The reasons set forth in the order were sufficient for the Applicant to know the grounds upon which the Respondent decided to revoke the licence.
130. The Appeal Board finds that the submission that the Respondent failed to give reasons for the Respondent's belief that the home was not being operated in

accordance with the law and with honesty and integrity is without merit. The order was clear that the sole basis for that belief was the Applicant's failure to comply with the *Fire Code* and the *Electrical Safety Code* and not any concern about the honesty and integrity of Mr. Bordo or any other representative of the Applicant.

Did the Respondent display bias towards the Applicant?

131. There was no evidence presented at the hearing to support the allegation that the Respondent was biased in its dealings with the Applicant. The Respondent's witnesses stated that their dealings with Mr. Bordo were cordial and professional and that there were no issues with the care provided to the residents of Picton Manor.
132. The allegation of bias was based solely on the reference in the order to "honesty and integrity". As explained above, that reference must be read together with the reference to "in accordance with the law". The only basis for that reference was the uncontested evidence that the Applicant was not in compliance with the *Fire Code* and the *Electrical Safety Code*. There was no suggestion that Mr. Bordo did not conduct himself with honesty and integrity and no support for the allegation of bias.

Did the Respondent breach the Applicant's confidence?

133. The Appeal Board finds that the Respondent did not breach any confidence when it concluded, in part on the basis of the financial statement provided by Mr. Bordo at the meeting of May 22, 2012, that the Applicant's financial situation was such that it could not complete the remedial work or furnish or provide the required services.
134. There was no evidence that the financial statement was provided with any expectation of confidentiality. The only evidence before the Appeal Board was that the statement was provided to support a request that the Respondent provide approximately \$1,400,000 to fund the operations of Picton Manor over a six month

period while the home was closed and the residents relocated. The Respondent was entitled to conclude, on the basis of that statement, that Picton Manor was no longer a viable operation and that revocation of the licence and the appointment of an interim manager was the only alternative. Indeed, the Respondent was obliged, in the discharge of its obligations, to consider the information in the financial statement.

Did the Applicant have a reasonable expectation that the Respondent would offer financial assistance?

135. The Appeal board finds that there was no evidence to support the Applicant's position that it had a reasonable expectation that the Respondent would offer financial assistance or that it would make a work and activity order under section 154 of the Act.
136. The evidence was that the only requests for financial assistance made by the Applicant were the request to the LHIN for a cash advance and the request to the Respondent for financial assistance to close Picton Manor. At no time did the Applicant request any other financial assistance nor did it request that the Respondent make a work and activity order.
137. Even if the Applicant had requested that the Respondent make a work and activity order, section 154 is permissive and imposes no obligation on the Respondent to make such an order. Furthermore, section 154 provides that the Respondent is to recover the cost of the work or activity in question out of future revenues to be provided to the Applicant. In view of the Applicant's financial circumstances, there was no reasonable prospect that any future revenues would have been sufficient to cover such costs.

Did the Respondent act unlawfully in directing the interim manager to close Picton Manor while the appeal was pending?

138. Since the Applicant did not appeal the order appointing the interim manager, this is not an issue that is before the Appeal Board.
139. In any event, from a practical standpoint, the decision to close the home and relocate the residents was a reasonable and sensible course of action. Picton Manor was to close, in any event, no later than June 30, 2014. The home required extensive remedial work and the Applicant had been unable to put forth an acceptable proposal for the redevelopment of the home. On the evidence, the Appeal Board is satisfied that Picton Manor was likely to close before June 30, 2014, regardless of the status of the Applicant's licence.

VII. DECISION

140. In all, the Appeal Board finds that the Respondent dealt fairly and appropriately with the Applicant having regard for the interests of the residents of Picton Manor. For the reasons explained above, the Appeal Board confirms the decision of the Respondent to revoke the Applicant's licence to operate Picton Manor.

VIII. COSTS

141. Both parties have asked for an award of costs.

142. The Appeal Board has given careful consideration to the parties' requests for costs after considering the parties' submissions and the Appeal Board's Rules relating to costs. In the circumstances of this case, the Appeal Board declines to exercise its discretion to award costs to either party.

ISSUED April 17, 2014

"James Beamish"

James Beamish

"Marla Burstyn"

Marla Burstyn

"Samia Makhamra"

Samia Makhamra