

APPEAL NUMBER: NOAC 23-01

IN THE MATTER OF APPEALS UNDER PARTS II & III OF O. REG 187/09 MADE UNDER
THE *SAFETY AND CONSUMER STATUTES ADMINISTRATION ACT, 1996*

BETWEEN:

1277897 ONTARIO LTD.

Appellant

- and -

GENERAL MANAGER, ELECTRICAL SAFETY AUTHORITY

Respondent

Decision of the Review Panel — Application to Lift Stay Pending Appeal

Review Panel: Richard E. Austin (Presiding Member), Geroqe Matai, Andrew Bloomfield

Hearing Dates: September 5, 2022 (in writing)

Appeal Number: NOAC 23-01

For the Appellant

Bob Nikolic

For the General Manager

Jonathan Hurter

Independent Legal Counsel

Justin Safayeni

I. DECISION

1. This decision addresses the outcome of an application by the Respondent to lift a stay that would otherwise be in place pending the determination of appeal NOAC 23-01 (the “Appeal”).
2. For the reasons set out in this decision, this Review Panel orders that the stay be lifted.
3. For further clarity, this decision does not address the merits of the Appeal, which is the subject of an upcoming hearing before the Panel scheduled for late October of this year.

II. BACKGROUND

4. The Appellant operates an apartment building located at 634 Lasalle Blvd., Sudbury, ON, with 47 residential units (the “**Building**”).
5. Over the course of June and July 2022, the Electrical Safety Authority (“**ESA**”) inspected the Building during a number of visits, after initially being asked by the City of Sudbury’s By-Law team to participate in a site visit. According to the ESA, those inspections disclosed a number of serious defects in various areas of the Building.
6. On July 14, 2022, the Electrical Safety Authority (“**ESA**”) issued a Hazardous Investigation Defect Notice requiring the Appellant to remedy a list of 12 defects within the Building (“**Defect Notice**”). The defects included two “hazards” to “life and/or property”, which are described as follows:

[Defect #9] – June 23, 2022

OESC 2021 Rule 02-032 3) – Electrical equipment has been exposed to ingress of water; it shall be evaluated to ascertain whether or not the equipment may be placed back into service.

Life and/or Property

*****There is water coming in the building and water dripping out of some of the electrical fixtures, inspect and test the fixtures and the wiring in every unit on the property following the ESA Guideline-for-electrical-installations-exposed-to-water found on the ESA website.*****

[Defect #10] – June 23, 2022

OESC 2021 Rule 02-004 6) – The building has an infestation e.g. fleas, bedbugs. In order to provide safe access have the insect infestation professionally removed and provide acceptable documentation confirming remediation activities.

Life and/or Property

*****There was Mice droppings in the units that we visited and there is reports from the tenants that they can hear mice in the walls and lights flickering, test all the wiring in each unit to confirm the integrity of the wires.*****

7. Subsequent testing disclosed an additional 29 defects within the Building, according to the ESA.
8. The Appellant brought an application before the ESA's Director of Reviews and Appeals ("**Director**") to have the Defect Notice set aside. During the course of that application — and for all steps taken since then — the Appellant has been represented by Mr. Nikolic, who we believe to be the Appellant's principal and directing mind.
9. Pursuant to the statutory scheme, the Appellant's application resulted in an automatic stay of the Defect Notice, but the ESA could apply to have the stay lifted pursuant to s. 9(7) of O. Reg 187/09 under the *Safety and Consumer Statutes Administration Act, 1996* ("**Regulation**"). The stay can be lifted "if the Director is of the opinion that the action is necessary in the interest of public safety."
10. The ESA sought to have the stay lifted and, on September 23, 2022, the Director ordered that the stay be lifted ("**Director's Stay Decision**"). In his reasons, the Director explained:

[34] The Director reviewed the Applicant's submission where he indicated he would engage an exterminator regarding the rodent droppings identified by the inspector in defect #10. However, after going through all the invoices submitted by the Applicant, there was no indication that the exterminator was tasked with inspecting for rodents. Rather, the invoices and description of work was targeting cockroaches and similar insects. This defect appears to be outstanding as a result. Furthermore, the expert stated, the use of an exterminator will not have an impact on damage that may have previously occurred. He added, this can only be detected through testing the wiring.

[35] The Director's expert is of the opinion that the ingress of water listed as defect #9 in the Hazardous Investigation Defect Notice has the potential to cause damage that may be an imminent threat to persons and/or property and would merit lifting the stay and the disconnection of power.

[36] The Director reviewed correspondence between the inspector and Applicant and noted the Applicant did not agree with defect #9 [ingress of water]. However, photos submitted by The Authority indicated water damage on the drywall.

[37] Furthermore, The Director inquired on the past complaints received by The Authority on the property and noted multiple hazard investigations over many years. In a majority of the hazard

investigations the common finding was severe flooding or water damage and complaints about rodents.

[38] The evidence of a history of water damage, along with photos of water ingress/damage on the walls raises questions as to the integrity and therefore safety of the electrical system. Testing of the wiring in all units appears reasonable.

[39] Furthermore, although the Director's expert qualified his opinion on the issue of rodents, the Director believes the presence of rodents and exposed wires/contacts in the electrical panel heightened his concerns.

[40] OESC 2-032 states that "electrical equipment that has been exposed to ingress of water shall be subjected to evaluation to ascertain whether or not the equipment may be placed back into service."

[41] The evidence suggests the electrical wiring may have been exposed to water which could increase the chances of an electrical failure and/or fire and therefore testing the wiring in each unit is not unreasonable and would satisfy the OESC 2-032 but more importantly would be in the interest of public safety and the safety of the residents at 634 Lasalle Blvd, Sudbury ON.

11. On December 21, 2022, the Director dismissed the application on its merits and confirmed the Defect Notice ("**Director's Merits Decision**").
12. The Appellant then commenced an appeal of the Director's Merits Decision, to be heard by this Review Panel.
13. Section 10(5) of the Regulation provides that the appeal of the decision of the Director "operates as a stay of the decision pending the outcome of the appeal". However, s. 10(6) of the Regulation provides that "upon application of the Director, which may be made without notice, the Review Panel may order that the stay of the decision be lifted if, in its opinion, the action is necessary in the interest of public safety" (emphasis added). This is the same standard that is applied when seeking to have a stay lifted at the Director level.
14. The Panel has received an application to lift the stay, in accordance with s. 10(6) of the Regulation. The application proceeded in writing, without any objection.
15. Despite the fact that the Regulation allows for such proceedings to be determined "without notice", the Appellant was given full notice of the application and an opportunity to respond. The parties exchanged multiple rounds of written material in respect of this application. Most recently, the Appellant submitted a further round of material, despite a procedural direction (made at a pre-hearing conference) that no further material should be filed unless this Panel directs otherwise.

16. The material filed on this application is voluminous and will not be referenced or summarized in detail here, except to the extent needed to explain the Panel's reasons for its decision. (A more detailed chronology can be found in the Director's Stay Decision and the Director's Merits Decision.) Still, the Panel confirms that it has reviewed and considered all of the material submitted by the parties in respect of this application, including the latest set of material submitted by the Appellant.

III. ISSUE TO BE DECIDED

17. There is only one issue before the Panel on this application: should the stay of the Director's Decision be lifted because, in the Panel's opinion, that action is necessary in the interest of public safety?
18. Below, we set out a brief summary of the thrust of each party's position (which is not intended to be exhaustive), followed by our analysis.

IV. ANALYSIS

A. The ESA's Position

19. The ESA relies on the contents of the Defect Notice (and, in particular, Items #9 and #10), as well as the findings in the Director's Stay Decision. While the ESA acknowledges that the Appellant subsequently retained a company, Madden Electric Inc. ("**Madden**"), to conduct the necessary testing of the integrity of the power wiring, the ESA argues that the necessary repairs were not completed following that test, that the testing results reveal a litany of defects, and that the Appellant has now contested the results of Madden's testing. The ESA is particularly concerned that the Appellant has reconnected wires that failed testing, based on the Appellant's own subsequent testing (which he conducted himself) and his conclusion that no repairs are needed. Ultimately, the ESA argues that the concerns to life and/or property identified in Items #9 and #10 of the Defect Notice remain outstanding and require that the stay be lifted.

B. The Appellant's Position

20. The crux of the Appellant's position is that he takes issue with the concerns of the ESA's inspector and argues that there is no threat to life and/or property at the Building. The Appellant also takes issue with the validity and scope of Madden's testing, argues that Madden's testing was done with a "faulty tester", and admits that he re-did the testing himself, which led him to conclude that Madden's concerns were not founded. With respect to water damage, the Appellant argues that the "very minor water damage... did not penetrate into walls and did not compromise electrical installation", and that "the water leak in the spring of 2022 impacted only 3 units with damage to surface drywall only". The Appellant also denies there has been a rodent infestation and argues that since no complaints have been received by tenants, this means that the professional extermination company he has retained "is performing his obligations as per agreement".

C. Discussion

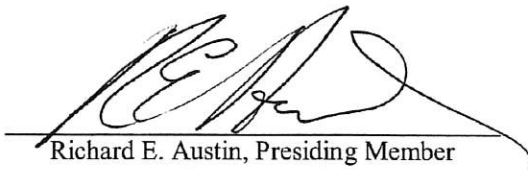
21. As a preliminary matter, the Review Panel notes that this decision reflects only an interim order. The Review Panel is not finally or conclusively determining the underlying merits of the Appellant's case. That will only happen a full hearing on the merits, which is presently scheduled for late in October. The question to be answered now is not whether the appeal ultimately has merit, but rather whether — based on the record before the Panel as it stands — the Panel is of the opinion that lifting the stay is necessary in the interest of public safety.
22. As noted above, the Director of the ESA may, pursuant to the Regulation, request that a stay established pursuant to subsection 10 (5) be lifted “if the action is necessary in the interest of public safety”.
23. The Review Panel in considering all the materials filed and submissions made by the Appellant and the ESA have kept public safety as its sole focus in its deliberations. While the submissions of the parties conflict as to whether the defects noted in the ESA's submissions exist in many cases — and whether the defects that both sides agree existed at the time they were raised by the ESA are of a nature that poses a threat to the safety of the public, specifically to the many residents of the Building — the Review Panel believes that public safety necessitates a cautious and prudent approach.
24. We noted that in many instances, the Appellant initially took positions that certain defects did not exist, only to subsequently admit that these same defects did in fact exist. For example, the Appellant's submissions states that there are “no deficiencies were present on the project” (at p 7), but then later states “All defective items listed in June 23, 2022 reports are satisfied by the owner” (at p 24).
25. While the Appellant has made a number of submissions as to steps it has taken to address the defects, in many instances there is no documentary or other evidence supporting these submissions other than the statements of the Appellant's representative, Mr. Nikolic, and hearsay evidence.
26. With regard to submissions by the Appellant with regard to defects that are said to have been addressed and where documentation is provided in support thereof, the documentation did not support the submissions made. For example, the Appellant submitted that a pest control service had been hired to take care of the mice in the Building on a “full time basis”. But the documents do not support this assertion: one document submitted by the Appellant only referenced cockroaches, while another speaks of addressing the common areas and only two of the 47 units in the Building a month.
27. The most troubling allegation relates to the ESA's submission that a large number of circuits were reconnected to the power supply in the Building after failing certain testing in direct contravention of Rule 2-004 of the Ontario Electrical Safety Code. The Appellant has not specifically denied that this has occurred in its submissions and in fact would appear to have admitted same on page 26 of its submissions.
28. Taken together, the material before the Review Panel — including the concerns relating to Items #9 and #10 of the Defect Notice and the points outlined above — are sufficient for the Panel to reach the opinion that lifting the stay is necessary in the interest of public safety.

29. As the stay will now be lifted, the Review Panel leaves it to the ESA to take appropriate steps in the interest of public safety.

V. ORDER

30. The Review Panel orders that the application be granted and the stay of the Director's Merits Decision be lifted, such that the Defect Notice is in full force.
31. The Review Panel makes no orders as to costs at this juncture and leaves the question of costs to be determined as part of the merits hearing, if so required.

Dated this 6th day of September, 2023



Richard E. Austin, Presiding Member
George Matai
Andrew Bloomfield