ELECTRICAL SAFETY AUTHORITY REVIEW PANEL

B E T W E E N:

JASON BOWYER, PURAYR LLC

(the "Applicants")

- and -

DIRECTOR OF ONTARIO ELECTRICAL SAFETY CODE

(the "Director")

DECISION

Review Panel:	Klaas Degroot, Mel Fruitman, and Gary Rygus
Hearing Dates:	May 11, 18, 2018 and June 26, 2018
File Number:	P0007101
Appeal Number:	NOAC-17-04

APPEARANCES

Director of Ontario Electrical Safety Code	) Emily Larose, Counsel) Patience Cathcart, Director))
Jason Bowyer, PurAyr LLC	) Bryan Embree, Counsel) Jason Bowyer) Scott Wright)

I. BACKGROUND

1. Three hearing dates were held between May and June 2018 before the Review Panel comprised of Klaas Degroot, Mel Fruitman, and Gary Rygus.

2. A pre-hearing in this matter was held on November 1, 2017, in which a differently constituted Review Panel determined that it had the authority and jurisdiction to inquire into whether the Electrical Safety Authority (the "ESA") had improperly interfered with the certification process, and to consider the Applicant's allegations against the ESA with respect to the change in the certification of the Product.[1]

3. Oral evidence was submitted and both parties provided supporting documents during the hearing on the merits.

4. The issue before the Review Panel was the propriety of the Director's decision to confirm the Order that the Applicant had contravened subsection 5(1) of Ontario Regulation 438/07 ("Regulation 438/07") by advertising and offering for sale an unapproved electrical product, given all of the circumstances.

II. FACTS

5. The Applicant, PurAyr LLC ("PurAyr") is an American company that manufactures, distributes, advertises, and sells the Product. The "Product" is a piece of odour removal technology. Jason Bowyer is a partner of PurAyr.[2]

6. On January 7, 2016, the Product was certified by QAI Laboratories ("QAI") to the Canadian Standards Association ("CSA") standard CSA C22.2 No. 113, "Fans and Ventilators".[3]

7. On or about February 2, 2016, the ESA received a complaint regarding the Product alleging that the Product was purchased without a user's manual or other documentation, as well as, that no training was provided or required for the purchase of the Product when there should be a requirement to do so.[4] The complaint also included a field evaluation report prepared by Canadian NRTL QPS Evaluation Services, Inc. ("QPS") dated December 22, 2015 that stated that the Product did not bear any certification or field evaluation markings and indicated that alterations to the Product were required to comply with all applicable

[1] Pre-Hearing Decision – Jurisdiction Issue at paras 20-22 and 26.
[2] Transcript Vol 1, p 27.
[3] Exhibit 1, Evidence Brief of Jason Bowyer/PurAyr, Tab 2, p 4.
[4] Exhibit 2, Director's Book of Documents, Tab 1B, p 21-22 and Decision of the Director, dated February 21, 2017, para 2.

standards.[5]

8. On or about February 2, 2016, the ESA opened an investigation under File No. P0007101 with respect to the Applicant's alleged sale of an unapproved electrical product.[6]

9. On July 14, 2016, the ESA issued a warning letter to PurAyr regarding the allegation that PurAyr was selling electrical equipment that was not approved in accordance with Regulation 438/07.[7] In the letter, the ESA requested that PurAyr comply with Regulation 438/07 and stop selling the Product and any other unapproved electrical products, and to confirm its compliance in writing.[8] The ESA also requested that PurAyr implement corrective actions for all customers who purchased the unapproved products.[9] The letter was sent to an incorrect address, and the letter was subsequently returned to the ESA unclaimed and unopened.[10]

10. On October 6, 2016, Alexey Shipkov, the Product Safety Engineer, Regulatory and Safety Programs of the ESA, emailed a Product Incident Report (a "PIR"), File No. PIRp16028 (the "Report") to Simon Hodson of QAI, and to Jason Bowyer at jbowyer@revitalyze.com.[11] The Report stated that the Product was certified to an inapplicable standard, as standard CSA C22.2 No. 113, "Fans and Ventilators" does not apply to air cleaners that generate ozone and cannot be used for the testing and certification of air cleaners that generate ozone, because the health risks related to the emission of ozone are not covered by that standard.[12] Pursuant to subsection 8(5) of Regulation 438/07, the ESA requested that QAI and PurAyr complete a preliminary PIR response report by November 6, 2016, and a final report by January 6, 2017.[13]

11. On November 8, 2016, QAI submitted its final PIR response report to the ESA and advised it of QAI's perspective that while there is currently no standard that specifically addresses the safety hazards of air purifiers that produce ozone, they believed that they had certified the Product to an appropriate standard.[14]

12. On November 9, 2016, the ESA advised QAI that it disagreed with their statement that there is no applicable Canadian standard for this type of product.[15] The ESA

[5] Exhibit 2, Director's Book of Documents, Tab 1B, p 21-22 and Decision of the Director, dated February 21, 2017, para 12.
[6] Decision of the Director, dated February 21, 2017, para 3.
[7] Exhibit 2, Director's Book of Documents, Tab 3, p 29.
[8] Exhibit 2, Director's Book of Documents, Tab 3, p 29.
[9] Exhibit 2, Director's Book of Documents, Tab 3, p 29.
[10] Transcript Vol 3, p 25.
[11] Exhibit 2, Director's Book of Documents, Tab 4, p 38.
[12] Exhibit 2, Director's Book of Documents, Tab 4, p 38.
[13] Exhibit 2, Director's Book of Documents, Tab 4, p 38.
[14] Exhibit 2, Director's Book of Documents, Tab 7A, p 62.
[15] Exhibit 2, Director's Book of Documents, Tab 7, p 57.

informed QAI of standard CSA C22.2 No. 187-15, "Electrostatic Air Cleaner", which covers equipment for commercial use that intentionally produces ozone in temporarily unoccupied spaces.[16] The ESA stated that QAI's final report could not be accepted and that the report required QAI's second review.[17]

13. On November 17, 2016, QAI issued a letter to PurAyr informing it that QAI had been 'forced to suspend' the certification of the Product due to concern that the requirements for protection against hazards are not sufficiently addressed as outlined in standard CSA C22.2 No. 113, "Fans and Ventilators".[18]

14. On November 22, 2016, PurAyr became aware of the Report and contacted the ESA, stating that it had not received any documents from the ESA regarding its investigation into the Product. Mr. Bowyer stated that while jbowyer@revitalyze.com is a valid email address, he had never received the PIR or any other correspondence from the ESA.[19]

15. In another email dated later that day, PurAyr requested the originating documents that triggered the PIR.[20] The ESA refused to provide these documents on the grounds that it does not share any materials or documents used during its investigations.[21]

16. On December 1, 2016, the ESA issued a warning letter to PurAyr regarding the allegation that PurAyr was selling electrical equipment that was not approved in accordance with Regulation 438/07.[22] In the letter, the ESA requested that PurAyr comply with Regulation 438/07 and stop selling the Product and any other unapproved electrical products, and to confirm its compliance in writing.[23] The ESA also requested that PurAyr implement corrective actions for all customers who purchased the unapproved products.[24] The ESA initially gave PurAyr until December 15, 2016 to respond to the warning letter, but it extended that deadline until December 23, 2016.[25]

17. On December 21, 2016, QAI advised the ESA that it had suspended the certification for the Product.[26] QAI did not send a copy of the suspension of certification letter that had been issued to PurAyr on November 17, 2016 to the ESA until December

[16] Exhibit 2, Director's Book of Documents, Tab 7, p 57.
[17] Exhibit 2, Director's Book of Documents, Tab 7, p 57.
[18] Exhibit 2, Director's Book of Documents, Tab 8, p 63.
[19] Exhibit 2, Director's Book of Documents, Tab 9, page 72-73.
[20] Exhibit 2, Director's Book of Documents, Tab 9, p 72.
[21] Exhibit 2, Director's Book of Documents, Tab 9, p 72.
[22] Exhibit 2, Director's Book of Documents, Tab 9A, p 75.
[23] Exhibit 2, Director's Book of Documents, Tab 9A, p 76.
[24] Exhibit 2, Director's Book of Documents, Tab 9A, p 76.
[25] Exhibit 2, Director's Book of Documents, Tab 10, p 88.
[26] Transcript Vol 2, p 79 and Transcript Vol 3, p 6 and 10.

21, 2016 and which was received on January 5, 2017.[27]

18. On December 23, 2016, PurAyr, the ESA, and the Ministry of Government and Consumer Services participated in a teleconference.[28] Following the teleconference, Mr. Bowyer emailed the parties who had been on the conference call a summary of PurAyr's action plan.[29] The ESA replied to PurAyr's email, changing some of what PurAyr had written.[30] PurAyr advised that it did not accept the ESA's changes to the text of the action plan, and that it wanted to start an appeal.[31]

19. On January 17, 2017, the ESA issued an Order to the Applicant pursuant to subsection 113(11) of the *Electricity Act*, *1998* (the "*Electricity Act*").[32] The Order provided that PurAyr had failed to provide the ESA with written confirmation that the unapproved Product was no longer sold or offered for sale and had failed to provide corrective actions with all customers who purchased the unapproved products.[33] The Applicant was ordered to comply with subsection 5(1) of Regulation 438/07 by ceasing to advertise, display, sell, or offer for sale or other disposal any unapproved electrical products, including but not limited to the Product.[34] The Applicant was also ordered to provide evidence of compliance with the Order by way of written correspondence indicating corrective actions taken with respect to the unapproved Product distributed and sold in Ontario within fifteen calendar days of receipt of the Order.[35]

Notice of Appeal to the Director

20. On January 30, 2017, the Applicant filed a Notice of Appeal, Request for Review of ESA Order.[36] The Applicant appealed on the grounds that PurAyr had provided written confirmation that the unapproved Product was no longer sold or offered for sale as well as a corrective action plan on December 23, 2016, that the ESA had failed to notify PurAyr of the investigation or provide them with any details about it, and that the ESA had forcefully removed the certification of the Product.[37]

21. On February 21, 2017, the Director confirmed the Order and found that the Applicant had contravened subsection 5(1) of Regulation 438/07 by advertising and offering for sale an unapproved electrical product.[38] The Director was satisfied that

[27] Exhibit 2, Director's Book of Documents, p 117.
[28] Transcript Vol 1, p 93.
[29] Exhibit 2, Director's Book of Documents, Tab 16, p 116.
[30] Exhibit 2, Director's Book of Documents, Tab 16, p 116.
[31] Exhibit 2, Director's Book of Documents, Tab 16, p 115.
[32] Exhibit 2, Director's Book of Documents, Tab 18A, p 127.
[33] Exhibit 2, Director's Book of Documents, Tab 18A, p 127.
[34] Exhibit 2, Director's Book of Documents, Tab 18A, p 127.
[35] Exhibit 2, Tab 18A.
[36] Exhibit 2, Director's Book of Documents, Tab 20, p 133.
[37] Exhibit 2, Director's Book of Documents, Tab 20, p 133.
[38] Exhibit 2, Director's Book of Documents, Tab 22, p 196.

the Product was an unapproved electrical device, as the Director had received no information or materials indicating that the Product had been re-certified or re-evaluated, or that the Applicant had initiated corrective action for the unapproved products that were sold.[39] The ESA was also aware of at least one occasion where the Product was offered for sale prior to approval: an invoice from Abatement Technologies dated November 30, 2015, prior to the Product's initial certification by QAI on January 7, 2016.[40] The Director had not been provided with any material or submissions from the Applicants that indicated that the Product was no longer offered for sale, nor had the Director been provided with any material or submissions indicating that the Applicants had taken corrective action with respect to all of the customers who had purchased the Product in Ontario.[41]

III. SUBMISSIONS

The Applicants

22. The Applicants claimed that at no time was the Product sold in Ontario without certification.[42] While the Applicants did sell some units of the Products to distributors for trade shows, these units had been field certified or certified under standard UL 507.[43]

23. The Applicant alleged that after the ESA received the complaint that PurAyr had sold uncertified and hazardous electrical products, the ESA intervened inappropriately and forced QAI to withdraw the certification of the Product.[44] The complaint that formed the basis of the initial investigation into PurAyr was made by a competitor of PurAyr, and the Applicants submitted that the entire investigation was founded on unsubstantiated and bad faith allegations.[45]

24. The Applicants alleged that despite the lack of evidence that the Product was dangerous, [46] the ESA actively pursued the de-certification of the Product and circumvented its usual processes and procedures for investigating complaints in order to get the Product decertified.[47] The Applicants further alleged that the ESA conducted this process surreptitiously, as the ESA sent the first warning letter in July 2016 to an incorrect address and was negligent in failing to do due diligence in

[39] Exhibit 2, Director's Book of Documents, Tab 22, p 199.
[40] Exhibit 2, Director's Book of Documents, Tab 22, p 196.
[41] Exhibit 2, Director's Book of Documents, Tab 22, p 196.
[42] Transcript Vol 1, p 4.
[43] Transcript Vol 1, p 32-34.
[44] Exhibit 1, Material Statement of Facts p 1.
[45] Exhibit 1, Material Statement of Facts p 1.
[46] Transcript Vol 3, p 109 and 118.
[47] Transcript Vol 3, 106-109.

locating the correct address of the Applicants.[48] Because Mr. Bowyer did not receive the Report to his correct email address, the Applicants did not receive notice of the investigation until after QAI had already revoked the certification of the Product.[49]

25. The Applicants submitted that there is no basis for the revocation of the certification of the Product, and that the ESA acted maliciously towards them and irresponsibly attacked their business interests.[50]

The Director

26. The Director submitted that they properly upheld the Order because the Product was not approved at the applicable time and that the Applicant is actually objecting to the fact that the certifying body suspended its certification, a process, which the ESA claims, it does not control.[51]

27. The Director submitted that the ESA acted within its regulatory authority when it questioned whether the Product was approved and whether it complied with the applicable standards.[52] It is immaterial to the review that the Product first came to the ESA's attention due to a competitor's complaint.[53] The ESA did not act harshly or maliciously when it asked QAI to conduct a second review,[54] and it did not direct QAI to certify the Product to a particular standard.[55] The Director claimed that the ESA never threatened or forced QAI to revoke the Product's certification, and that QAI suspended the Product's certification without consulting the ESA and without advising the ESA that it had done so.[56]

28. The Director submitted that in light of the ESA's product safety mandate and the suspension of the certification of the Product, the Order was reasonable and consistent with the Regulation 438/07.[57] The Order only required PurAyr to comply with the law and to provide evidence that it had a corrective action plan for recalling the unapproved products that were sold.[58] The ESA's request that the Applicants submit a corrective action plan was therefore not malicious, draconian, or extraordinary.[59] The ESA did not even request a specific kind of action plan.[60]

[48] Transcript Vol 1, p 7 and Transcript Vol 3, p 112.
[49] Transcript Vol 3, p 110 and
[50] Transcript Vol 1, p 7.
[51] Transcript Vol 1, p 13.
[52] Transcript Vol 3, p 130.
[53] Transcript Vol 1, p 19 and Transcript Vol 3, p 153.
[54] Transcript Vol 1, 17.
[55] Transcript Vol 3, p 155.
[56] Transcript Vol 3, p 142 and Transcript Vol 1, p 13 and 17.
[57] Transcript Vol 1, p 20.
[58] Transcript Vol 1, p 20.
[59] Transcript Vol 3, p 126.
[60] Transcript Vol 3, p 126.

29. The Director also claimed that the ESA's warning letter of July 2016 was delivered to the wrong address purely due to an administrative error,[61] and that it had tried to send the Report to the Applicants using the email address provided by QAI,[62] as it had been the ESA's intent to apprise the Applicants of the Report.[63]

IV. ISSUES TO BE DECIDED

30. The Review Panel must decide the following issues:

    1. Did the Applicants contravene subsection 5(1) of Regulation 438/07 by advertising and offering for sale an unapproved electrical product?

    2. Did the ESA interfere with the certification process improperly by forcing QAI to revoke the certification for the Product?

    3. Did the ESA act negligently, maliciously, or in bad faith with respect to the Applicants?

V. THE LAW

Legislation

31. In order to assess the Director's decision to confirm the Order, the Review Panel must examine the relevant regulations and certification standards.

32. Regulation 438/07 Product Safety Regulation reads:

> **Definitions and application**
>
> **1.** (1) In this Regulation,
>
> "certification body" means a body accredited in accordance with the *Standards Council of Canada Act* (Canada) to certify electrical products and devices and recognized by the Authority;
>
> …
>
> **Deemed approvals**
>
> **2**. (1) An electrical product or device that falls into one of the following categories is deemed to be approved:

[61] Transcript Vol 1, p 16.
[62] Transcript Vol 3, p 138.
[63] Transcript Vol 1, p 20.

1. An electrical product or device for which a certification body has issued a report certifying that the electrical product or device conforms to the applicable standards for the electrical product or device and,

i. the report is available to the Authority from the certification body,

ii. the electrical product or device complies with all standards of design and construction and all terms and conditions set out in the report, and

iii. the electrical product or device bears the certification body's mark, which identifies the electrical product or device as certified for use in Canada.

2. An electrical product or device, if a field evaluation agency has examined the electrical product or device or a sample and issued a report confirming that product or device conforms to the applicable standards for the electrical product or device and presents no undue hazard to persons or property and,

i. the electrical product or device is within the scope of Section 3 of the Electrical Safety Code adopted under Ontario Regulation 164/99 (Electrical Safety Code) made under the Act and within the field evaluation agency's accreditation under the Standards Council of Canada Act (Canada),

ii. the electrical product or device bears a label approved for use in either Ontario or Canada affixed by the field evaluation agency, and

iii. where the field evaluation agency has examined only a sample, the electrical product or device is of the same design and construction as the sample.

3. An electrical product or device, if the Authority has examined or tested the electrical product or device or a sample and determines that it presents no undue hazard to persons or property and,

i. the electrical product or device bears a label affixed by the Authority,

ii. all applicable fees have been paid, and

iii. where the examination or testing was of only a sample, the electrical product or device is of the same design and construction as the sample. O. Reg. 438/07, s. 2 (1).

(2) Where testing is required for the purposes of paragraph 3 of subsection (1), the Authority may accept reports or other evidence of testing from a certification body, field evaluation agency, professional engineer or other competent person. O. Reg. 438/07, s. 2 (2).

…

Prohibition, selling etc. non-approved product or device

5. (1) No person shall use, advertise, display, sell, offer for sale or other disposal any electrical product or device unless it has been approved in accordance with this Regulation. O. Reg. 438/07, s. 5 (1).

(2) No person shall use an electrical product or device for any purpose or in any manner other than the purpose or manner for which it is intended. O. Reg. 438/07, s. 5 (2).

(3) If a certification report or a field evaluation report in respect of any approved electrical product or device requires that a notice indicating the proper and safe manner of use of the electrical product or device be affixed to the electrical product or device or be provided with it, no person shall use, advertise, display, sell, offer for sale or other disposal of the electrical product or device without affixing or providing the notice in the manner required by the report. O. Reg. 438/07, s. 5 (3).

(4) Despite subsection (1), an electrical product or device does not require approval under this Regulation if,

(a) it is displayed at a trade show or is activated in a demonstration of its use; and

(b) permission to display or activate it is given by the Authority. O. Reg. 438/07, s. 5 (4).

Suspending or revoking an approval

6. (1) The Authority may suspend or revoke the approval of an electrical product or device if,

(a) the electrical product or device is not manufactured or produced in accordance with all standards of design and construction and all terms and conditions set out in the certification report or field

evaluation report;

(b) the Authority finds the electrical product or device to be unduly hazardous to persons or property; or

(c) an examination by the Authority of the electrical product or device or of the certification report or field evaluation report for the electrical product or device shows that the electrical product or device does not comply with all applicable standards. O. Reg. 438/07, s. 6 (1).

(2) If an approval is suspended or revoked, the electrical product or device is deemed not to be approved. O. Reg. 438/07, s. 6 (2).

(3) The Authority may establish rules with respect to a process for the suspension, revocation or reinstatement of deemed approvals. O. Reg. 438/07, s. 6 (3).

33. The Product was originally certified to standard C22.2 No. 113-10, "Fans and Ventilators", which has now been withdrawn. The standard reads:

C22.2 No. 113-10 Fans and ventilators

Scope

1.1
This Standard applies to cord-connected and permanently connected fans and ventilators intended to be
(a) connected to supply circuits of 600 V and less;
(b) used in non-hazardous locations;
(c) used indoors or outdoors; and
(d) used in accordance with the Rules of the Canadian Electrical Code, Part I.

1.2
This Standard applies to fans and ventilators used for ventilating or exhaust and filter units consisting of an air-circulating fan and a mechanical filter.

1.3
This Standard applies to air-circulating-type fans and ventilators, such as desk, pedestal, hassock, utility, suitcase, and pendant ceiling fans.

1.4
This Standard applies to ventilating-type fans and ventilators, such as wall insert, ceiling insert, attic, household hood or canopy, and window fans. It also applies to fan-type air-to-air heat exchangers and to electronically commutated (brushless) dc component fans.

1.5
This Standard does not apply to the following:
(a) air conditioning equipment;
(b) electric air heaters;
(c) fan coil units;
(d) humidifiers;
(e) evaporative coolers; and
(f) electrostatic air cleaners.

1.6
Throughout this Standard, the term "fan" also includes ventilators.

1.7
In CSA Standards, "shall" is used to express a requirement, i.e., a provision that the user is obliged to satisfy in order to comply with the standard; "should" is used to express a recommendation or that which is advised but not required; and "may" is used to express an option or that which is permissible within the limits of the standard.
Notes accompanying clauses do not include requirements or alternative requirements; the purpose of a note accompanying a clause is to separate from the text explanatory or informative material.
Notes to tables and figures are considered part of the table or figure and may be written as requirements.
Annexes are designated normative (mandatory) or informative (nonmandatory) to define their application.

1.8
The values given in SI units are the units of record for the purposes of this Standard. The values given in parentheses are for information and comparison only.

34. The ESA suggested standard CSA C22.2 No. 187-15 UP, “Electrostatic Air Cleaners”

CSA C22.2 No. 187-15 UP Electrostatic air cleaners

1.1 This Standard applies to
a) electrostatic air cleaners intended to remove dust and dirt from the air and intended for general indoor residential and commercial use;
b) air ionizer type air cleaners; and
c) other similar ionizing equipment.

1.2 This Standard applies to equipment for commercial use that intentionally produces ozone in temporarily unoccupied space incorporating an integral ozone detector.

1.3 This Standard applies to cord-connected and permanently connected equipment operating at nominal supply voltages up to 600 V, single-phase or polyphase, in accordance with the Rules of the Canadian Electrical Code, Part I.

1.4 This Standard applies to portable air cleaning devices that incorporate a UV lamp that emits UV radiation between 100 and 280 nm (UVC).

1.5 This Standard does not apply to electrostatic air cleaners for use in hazardous locations or in atmospheres defined as hazardous by the Canadian Electrical Code, Part I.

1.6 This Standard does not apply to air cleaners designed to remove particles other than dust and dirt normally found in heating and ventilating systems.

1.7 This Standard does not specify requirements for the effectiveness of air cleaners with respect to the removal of airborne particles.

1.8 This Standard does not apply to electrostatic air cleaners intended for industrial use.

1.9 This Standard does not apply to air cleaners for residential use that are designed to generate ozone intentionally.

1.10 This Standard does not apply to ozone generators, and/or devices intentionally using ozone to treat or
condition air, designed exclusively to be connected to air duct systems.

1.11 In this Standard, "shall" is used to express a requirement, i.e., a provision that the user is obliged to satisfy in order to comply with the standard; "should" is used to express a recommendation or that which is advised but not required; and "may" is used to express an option or that which is permissible within the limits of the Standard. Notes accompanying clauses do not include requirements or alternative requirements; the purpose of a note accompanying a clause is to separate from the text explanatory or informative material. Notes to tables and figures are considered part of the table or figure and may be written as requirements. Annexes are designated normative (mandatory) or informative (non-mandatory) to define their application.

Standard of Review

35. In *Orangeville Hydro Limited and Director, Licensing and Certification*, dated February 11, 2011 ("*Orangeville Hydro*"), the ESA Review Panel for Licensing

decided that the appropriate standard of review on appeals from decisions of the Director is correctness.[64] In making its decision, the Review Panel in *Orangeville Hydro* relied on section 14(11) of Regulation 187/09:

> The Review Panel may, by order, confirm, amend, rescind or impose terms and conditions to the decision of the Director or make whatever other decision that the Review Panel deems appropriate.

36. In applying section 14(11) of Regulation 187/09, the Review Panel stated the following at paragraphs 19 and 20:

> The legislature has seen fit to give to the Review Panel wide authority to insert itself into the decision making process. While it may be that the Review Panel may choose to give deference to the Director in the exercise of certain decision making exercises that are conferred her under the EA in any individual case, the Review Panel clearly has great latitude to impose its perspective and to make the decision that it deems appropriate.
>
> Although not determinative, the Review Panel is also supported in its view on this matter in that a hearing before a Review Panel is a hearing *de novo*.

37. In *Maybburry Inc. and Director of Ontario Electrical Safety Code* ("*Mayburry*"),[65] a decision upheld on appeal by the Divisional Court,[66] the Review Panel explicitly adopted the reasoning in *Orangeville Hydro* that the applicable standard of review on appeals from decisions of the Director is correctness. [67]

38. This Review Panel adopts the reasoning in *Orangeville Hydro* that the standard of review is one of correctness.

39. The standard of proof in this review is a balance of probabilities.

VI. ANALYSIS

1. Did the Applicants contravene subsection 5(1) of Regulation 438/07 by advertising and offering for sale an unapproved electrical product?

40. Prior to the Product receiving certification from QAI on January 7, 2016, the Applicant sold at least one unit to one of its previous distributors, Abatement

[64] ESA Review Panel, NOAL 10-02, February 11, 2011 at paras 15-18[*Orangeville Hydro*].
[65] ESA Review Panel, NOAC 13-10, September 13, 2013 [*Mayburry*].
[66] *Mayburry Inc v Iafano, Statutory Director, Ontario Electrical Safety Code*, 2014 ONSC 6074.
[67] *Mayburry Inc v Iafano, Statutory Director, Ontario Electrical Safety Code*, 2014 ONSC 6074 at paras 11-13.

Technologies, on November 30, 2015.[68] PurAyr claimed that it did not sell unapproved products, and that prior to receiving certification from QAI, PurAyr only sold the Product to distributors for trade show and display purposes while the Product had field certification and certification under UL 507.[69]

41. The Product purchased by Abatement Technologies was sold to Rivard Brothers Building Contractors, a licensee of BioSweep, one of PurAyr's competitors.[70] The parent company of BioSweep, Phocatox Technologies, submitted the Product to QPS for a field evaluation.[71] This field evaluation formed the basis of the complaint regarding the Product that Phocatox submitted to the ESA on or about February 8, 2016.

42. Although PurAyr claimed that all products sold prior to receiving QAI certification were field certified, QPS's 'Field Evaluation Report' noted that there were no certification or field evaluation markings on the Product.[72] As QPS is an independent third party, the fact that the Applicants' competitors provided QPS with the Product is immaterial to the accuracy and validity of QPS's findings. The Applicants could have provided evidence that the Product was in fact field certified by providing the Review Panel with copies of its invoices for purchasing field evaluations or other documentation. The Applicants did not do so.

43. The Review Panel therefore finds on a balance of probabilities that the Applicant sold an unapproved Product to Abatement Technologies.

44. Independent of any sales of unapproved products that may have taken place prior to January 7, 2016, the Review Panel also finds that the Applicant advertised and offered for sale an unapproved electrical product after QAI suspended the certification of the Product on November 17, 2016. The Applicant provided no material or submissions to indicate that the Product was neither advertised nor offered for sale subsequent to the suspension of its certification or that the Applicant took corrective action with respect to all of the customers who had purchased the unapproved Product in Ontario. The Review Panel therefore finds that the Applicant advertised and offered for sale unapproved products.

45. The Review Panel is satisfied that the Applicant advertised and offered for sale unapproved products both prior to the Product receiving QAI certification and subsequent to that certification being suspended. Accordingly, the Review Panel finds that the Applicant contravened subsection 5(1) of Regulation 438/07.

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[68] Transcript Vol 1, p 36, and Exhibit 1, Evidence Brief of Jason Bowyer/PurAyr LLC, Tab 14, p 46, and Exhibit 2, Director's Book of Documents, Tab 1C, p 23-24.
[69] Transcript Vol 1, p 34.
[70] Transcript Vol 1, p 35.
[71] Transcript Vol 1, p 35.
[72] Exhibit 2, Director's Book of Documents, Tab 1B, p 22.

2. Did the ESA interfere with the certification process improperly by forcing QAI to revoke the certification for the Product?

46. On November 17, 2016, QAI issued a letter to the Applicant stating that QAI was 'forced' to suspend the certification of the Product due to concern that the requirements for protection against hazards are not sufficiently addressed in standard CSA C22.2 No. 113.[73]

47. PurAyr alleged that QAI's word choice was purposeful, and that the ESA had forced QAI to suspend the certification of the Product.[74] During cross-examination, Mr. Bowyer claimed that he had had personal conversations with QAI representatives, who had told him that they were forced to remove the certification on account of the ESA demanding that they certify the Product to standard CSA C22.2 No. 187-15, "Electrostatic Air Cleaner", which they could not do.[75]

48. The Review Panel finds that the ESA did not improperly interfere with the certification process and force QAI to suspend the certification of the Product. While researching the Product in response to the complaint filed against it, Mr. Shipkov discovered on the PurAyr website that the Product emits a large amount of ozone, which is a toxic substance.[76] Mr. Shipkov eventually came to the conclusion that the standard that the certification agency had used was inappropriate because the health hazards associated with the use of this product and its ozone emission were not covered by standard C22.2 No. 113-10, "Fans and Ventilators". On October 17, 2016, Aaron Wilson, a biologist with the Indoor Air Contaminants Section at Health Canada, informed Mr. Shipkov that the Product should be certified to standard CSA C22.2 No. 187-15, "Electrostatic Air Cleaner".[77]

49. Whether Mr. Shipkov was correct or not in his assessment is not material for this panel to determine. What was clear throughout the evidence is that the ESA and Mr. Shipkov acted in good faith with respect to its concerns surrounding the Product and did not act out of a desire to undermine the Applicants with respect to their business. The fact that the Applicants may legitimately disagree with Mr. Shipkov with to these issues does not substantiate that the ESA or Mr. Shipkov acted in bad faith.

50. There is little evidence to suggest that the ESA forced or unduly influenced QAI into suspending the certification for the Product. The ESA does not direct a certification body to using a particular standard.[78] Usually, upon receipt of a PIR, the certification body will engage in discussions with the ESA about the product, and if there is an

[73] Exhibit 2, Director's Book of Documents, Tab 17A, p 123.
[74] Transcript Vol 1, p 70-71 and 76.
[75] Transcript Vol 1, p 198-199.
[76] Transcript Vol 2, p 59.
[77] Exhibit 2, Director's Book of Documents, Tab 6A, p 55.
[78] Transcript Vol 2, p 22.

issue the certification body will work with the manufacturer to address the issue.[79] The certification body and manufacturer will then develop a corrective action plan and submit it to the ESA, which may involve fixing products that were already sold if there was a defect. Usually, the certification body will explain their rationale for using a certain standard, and if the ESA is satisfied with the explanation, the file is closed.[80] It is very rare for certification of a product to be revoked or suspended by a certification body early on in the discussion process with the ESA.[81]

51. In this matter, the ESA suggested that standard CSA C22.2 No. 187-15, "Electrostatic Air Cleaner", which covers equipment for commercial use that intentionally produces ozone in temporarily unoccupied spaces, would be a more appropriate standard for the Product.[82] The ESA did not force QAI to suspend the certification, and the ESA only learned that QAI had suspended the certification of the Product on December 21, 2016.[83]

52. It is regrettable that QAI elected to suspend the certification of the Product so early into its discussion with the ESA and without advance notice to PurAyr. However, the Review Panel finds that the ESA did not interfere, influence, or force QAI to suspend the certification. The Applicants may have issues with how QAI conducted itself but that issue is not for the Review Panel in the context of this case.

3. Did the ESA act negligently, maliciously, or in bad faith with respect to the investigation into the Product?

53. The Applicants allege that the ESA acted negligently, maliciously, and in bad faith with respect to how it handled the investigation into the Applicant's allegedly unapproved products and the PIR. One of the Applicants' biggest concerns was the failure in communication between them and the ESA. The first warning letter that the ESA tried to send to the Applicants in July 2016 was sent to the wrong address.[84] The ESA explained that it used an incorrect Canadian address that it had for PurAyr at first instead of contacting PurAyr's American address because the ESA is a provincial regulator, and so it looks for companies and distributors who deal with the product in question in the province of Ontario.[85] Regardless, the July 2016 letter was not followed up on and no prejudice came to the Applicants.[86]

54. After the ESA had ascertained the Applicants' correct address, it issued a warning letter to PurAyr on December 1, 2016.[87] Although the ESA initially gave PurAyr until

[79] Transcript Vol 2, p 20.
[80] Transcript Vol 2, p 21.
[81] Transcript Vol 2, p 22.
[82] Exhibit 2, Director's Book of Documents, Tab 7, p 57.
[83] Transcript Vol 3, p 85-86.
[84] Transcript Vol 3, p 25.
[85] Transcript Vol 3, p 28.
[86] Transcript Vol 3, p 154.
[87] Exhibit 2, Director's Book of Documents, Tab 9A, p 75.

December 15, 2016 to respond to the warning letter, it extended that deadline until December 23, 2016 in response to the Applicants' requests for accommodation.[88]

55. During cross-examination of Mr. Shipkov he was asked why he had not gone on the PurAyr website to obtain its address.[89] Mr. Shipkov explained that the ESA sends its product incident report only to people who are recorded in their database.[90] The PIR contains very privileged information about the product in question, and so the ESA requires its staff to only use communication channels obtained from the certification body to ensure that any email correspondence will go to the correct person.[91]

56. When the ESA began the PIR process, it reached out to the certification body in accordance with its ordinary processes to identify whom it should contact at the manufacturer.[92] The certification body identified Mr. Bowyer and provided the ESA with his jbowyer@revitalyze.com email address.[93] Although this is a valid email, Mr. Bowyer stated that he had never received the PIR or any other correspondence from the ESA.[94] Although it is unfortunate that this second channel of communication was unsuccessful, the ESA had no reason to believe that the email sent to that email address had not been received.[95]

57. The Applicant also raised the question of whether the ESA may have been colluding with its competitors. It is not unusual that the ESA receives complaints from individuals or companies regarding a competitor's product.[96] In all cases, the ESA investigates the complaint to determine if it is valid.[97] If the complaint is not valid, the ESA closes the file. However, if there is a concern that the complaint may be valid, the ESA will open the file and conduct an investigation.[98] In this matter, the ESA acted within its regulatory authority when it questioned whether the Product was approved and whether it complied with the applicable standards. It is irrelevant that the complaint came from a competitor if the complaint is valid or is acted on in good faith. Whatever the motivations of the competitor who made the complaint to the ESA, the ESA's own internal machinations deemed the complaint to be valid, independent of any consideration of who was making the complaint, and according to the evidence out of a concern for public safety.

58. Although the Applicant was concerned that its competitors and the ESA were

[88] Exhibit 2, Director's Book of Documents, Tab 10, p 88.
[89] Transcript Vol 3, p 39-40.
[90] Transcript Vol 3, p 39.
[91] Transcript Vol 3, p 39-40.
[92] Transcript Vol 3, p 138.
[93] Transcript Vol 3, p 138.
[94] Exhibit 2, Director's Book of Documents, Tab 9, page 72-73.
[95] Transcript Vol 3, p 138.
[96] Transcript Vol 2, p 17.
[97] Transcript Vol 2, p 18.
[98] Transcript Vol 2, p 18.

colluding and sharing information regarding the investigation, there is no evidence that this is the case. The ESA has a strict privacy policy and does not share information regarding who made the complaint, nor does it provide information to the submitter of the complaint about the ongoing investigation.[99] The ESA does not communicate this confidential information. However, if there was a recall notice or some other piece of information that is publicly available based on the investigation, that information is communicated to whoever complained.[100]While the Applicants allege that the ESA acted in bad faith with respect to its dealings with QAI no witnesses were called from QAI to substantiate these assertions.

59. The failures in communication between PurAyr and the ESA are unfortunate, but they do not indicate that the ESA intentionally or maliciously sought to harm the Applicants. In fact, the ESA's continued efforts to obtain the correct email and mailing addresses of the Applicants indicate its intention to keep the Applicants apprised of the investigation. The evidence does not establish that the ESA improperly colluded with the Applicants' competitors. While it is regrettable that the communication processes broke down and that the Applicants only learned of the warning letter and the PIR after QAI had suspended the certification of the Product, the ESA acted neither maliciously nor in bad faith.

VII. DECISION

60. The Review Panel therefore confirms the Director's Decision on this matter. The ESA has the authority to review a certification body's certification of a product.[101] Despite several failures in communication, it is clear that the ESA tried to apprise the Applicants of the warning letter and the Report.[102] The ESA acted in a manner consistent with its regulatory mandate; its actions were not malicious, negligent, or performed in bad faith.[103] QAI suspended the certification of the Product on its own accord.[104]

61. Once QAI suspended the certification of the Product on November 17, 2016, the Applicants contravened subsection 5(1) of Regulation 438/07 by advertising and offering for sale an unapproved electrical product. Although a different certification body has now approved the Product, this certification is not retroactive to products already on the market.[105]

[99] Transcript Vol 2, p 17.
[100] Transcript Vol 2, p 17.
[101] Transcript Vol 3, p 152.
[102] Transcript Vol 3, p 153.
[103] Transcript Vol 3, p 153.
[104] Transcript Vol 3, p 153.
[105] Transcript Vol 3, p 149.

62. The Review Panel accordingly orders:

1. The Applicant must comply with subsection 5(1) of Regulation 438/07 by ceasing to advertise, display, sell, or offer for sale or other disposal any unapproved electrical products, including, but not limited to, the Product.

2. The Applicant must provide evidence of compliance with the Order by way of written correspondence indicating corrective actions taken with respect to the unapproved Product distributed and sold in Ontario within 15 (fifteen) calendar days of receipt of this Order.

Dated this 7th day of September, 2018