

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE FIRE SAFETY ACT



- and -

IN THE MATTER OF AN APPEAL by **JOHN DOULL** operating as **DOULL BOOKS**, from an Order to Take Action dated November 4, 2016, issued by a Fire Prevention Officer, in relation to a property located at 122 Main Street, Dartmouth, Halifax Regional Municipality, Nova Scotia

BEFORE: Richard J. Melanson, LL.B., Member

APPELLANT: **JOHN DOULL o/a DOULL BOOKS**
Fergus Ford, LL.B.

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
Joshua Judah, LL.B.

HEARING DATE: February 7, 2017

DECISION DATE: March 6, 2017

DECISION: The Appeal is allowed in part. The Order to Take Action is varied and the Appellant is allowed more time to comply with s.3.2.2.3(2) of the Fire Code.

I INTRODUCTION

[1] This is an appeal by John Doull, operating as Doull Books (“Appellant”), the tenant of premises located at 122 Main Street, Dartmouth, Halifax Regional Municipality, Nova Scotia, from an Order to Take Action (“OTA”) issued by Darrell Hartling, Fire Prevention Officer, Halifax Regional Fire and Emergency Service (“Fire Service”), dated November 4, 2016.

[2] The OTA was issued pursuant to s.25(1)(b) of the *Fire Safety Act*, S.N.S. 2002, c.6, as amended (“Act”). The appeal to the Board is pursuant to s.41 of the *Act*.

[3] The OTA alleges eight violations of the National Fire Code of Canada (2010) (“Fire Code”), which is adopted as the Fire Code pursuant to s.15(2) of the *Act* and s.2(1)(d) of the *Fire Safety Regulations*, N.S. Reg. 48/2003, as amended.

[4] The eight alleged contraventions of the *Act* and associated Fire Code, together with the corrective measures ordered by the Fire Prevention Officer, are outlined in Schedule “A” of the OTA.

[5] A preliminary hearing was held by telephone conference on Friday, December 9, 2016, to resolve any preliminary issues relating to the appeal and to set a date for the hearing on the merits. The Appellant was represented by Fergus Ford, LL.B., while Joshua Judah, LL.B., acted as solicitor for the Respondent.

[6] Pursuant to s.41(5) of the *Act*, the filing of an appeal acts as a stay of the OTA until the disposition of the appeal by the Board. The Board may be asked to lift the stay pursuant to s.41(6) of the *Act*. The Respondent made no such request.

[7] At the initial preliminary hearing, the parties asked that the matter be adjourned without setting a date for the hearing on the merits, to provide them with an opportunity for further discussions concerning the OTA.

[8] A second preliminary hearing was held on Wednesday, December 21, 2016, at which the parties advised an agreement had been reached whereby the date for the completion of Items 1 through 7 in the OTA had been extended from January 10, 2017, to February 1, 2017. The Appellant was no longer pursuing the appeal of those items. The parties indicated only Item 8 in the OTA would proceed to a formal hearing. Item 8 of the OTA states:

8) National Fire Code of Canada 2010-3.2.2.3.2) Clearances

In unsprinklered buildings, a clearance of not less than 1 m between the top of storage and the underside of the floor or roof deck shall be maintained. (See Appendix Note A-3.2J2.3. (2).)

Remove excess books and materials throughout the building to allow for a clearance of not less than 1 m between the top of storage and ceiling. This also includes the garage.

This does not apply to shelving that is placed against a wall.

[9] The hearing on the merits of the appeal was held on February 7, 2017. The Appellant and Respondent confirmed the subject of the hearing was Item 8 of the OTA. The Appellant asked the Board to extend the time for compliance in relation to this item to July 4, 2017.

II ISSUES

[10] The principal issue in this proceeding is whether the Appellant has established that the time for compliance set out in the OTA with respect to Item 8 should be extended to July 4, 2017, so the work, which the Appellant says is required to comply, can be completed.

III FACTS

[11] Mr. Ford called the Appellant, Matthew Covey, Darrell Hartling, and Peter Bustin as witnesses. At the completion of the Appellant's case, the Respondent called no additional evidence.

[12] Matthew Covey has been a Division Chief/Fire Prevention with the Fire Service since April, 2016. Prior to that, he was the Manager of Building Standards with HRM.

[13] Darrell Hartling is a fire prevention officer. He has been employed by Halifax Fire for 29 years. As previously indicated, he issued the OTA which is the subject matter of this proceeding.

[14] Peter Bustin described himself as an artist and a builder. He has worked with the Appellant for many years. He described carpentry experience related to small jobs, and indicated he built many of the site-specific shelves currently in the Appellant's premises.

[15] The Appellant has been in the book business for 39 years. Five years ago, he relocated his business from Barrington Street in Halifax to 122 Main Street, Dartmouth.

[16] The new Dartmouth location formerly housed an electronics store. Extensive renovations were required before it could be used as a bookstore. Mr. Bustin was primarily responsible for the work, which included removing the shelves in the new premises, disassembling existing shelves at the old Barrington Street location, reassembling them at the Dartmouth location, and creating site-specific shelves for the new book store. The renovations also included some structural beamwork.

[17] During the course of these renovations, a fire prevention officer attended the premises. While he did not conduct a formal inspection, he expressed dissatisfaction with some of the work surrounding the structural renovation. He indicated he would return in one month. While the Appellant made the changes recommended by the fire prevention officer, there was no return visit.

[18] Two years later, another fire official visited the premises. He indicated he would return in approximately one month, but, to the knowledge of the Appellant, there was no return visit.

[19] In December, 2015, after receiving a call expressing concern from another fire official, Mr Hartling visited the premises and met with the Appellant. He scheduled an inspection, which was carried out on January 8, 2016. During this inspection, Mr. Hartling, who was accompanied by another fire inspector, observed several areas of concern. However, Mr. Hartling had not yet been appointed as a municipal fire inspector and did not have authority to issue an OTA.

[20] There were some administrative delays, due to retirements in key positions. The process to appoint Mr. Hartling as a municipal fire inspector only started in April, 2016, after Mr. Covey was appointed as Divisional Chief.

[21] In the interim, because of the safety issues observed by Mr. Hartling, the property was "flagged", which meant if there was a fire at this location, fire suppression crews would not enter the building. The emergency fire response would be limited to a defensive attack outside the building.

[22] The Appellant was made aware of the situation relating to the fire response limitations. It appears he thought this would resolve the issues raised by Mr. Hartling.

[23] On October 12, 2016, having now been appointed a municipal fire inspector, Mr. Hartling attended the Appellant's premises to arrange an inspection.

[24] He indicated to the Appellant the flagging of the property was only a temporary measure and Fire Code compliance was required. The record indicates the Appellant was not satisfied with this response and his displeasure was communicated to the Fire Service.

[25] A fire inspection was conducted on October 28, 2016, resulting in the OTA, which sets out eight Fire Code violations. Corrective measures were ordered as set out in the "Actions Required" portion of the OTA.

[26] If a fire official "determines that there is a significant risk that a fire will occur, or a likelihood that a person will be killed or injured if a fire does occur", s.25(2) of the *Act* authorizes the fire official to order that the premises be closed. This provision was not invoked, as Mr. Hartling did not think there was an imminent hazard.

[27] Where there is no imminent hazard, the standard practice of the Fire Service is to allow a reasonable time for corrective measures to be completed to achieve compliance with the Fire Code. There is no written policy addressing what constitutes a reasonable time. This is determined by the responsible fire prevention officer (in this case Mr. Hartling), based on the individual circumstances of the case. The nature and extent of the work to be completed is a key factor. It is not dependent on whether a business is large or small. The standard practice is to allow 60 days to complete the corrective measures.

[28] The OTA was issued on November 4, 2016, and delivered to the Appellant on the same date. The Appellant was ordered to undertake the Actions Required by

January 10, 2017, which allowed for 67 days to comply, keeping in mind the holiday season.

[29] As set out earlier in this decision, the specific Actions Required ordered by Mr. Hartling in relation to Item 8, which is the only item in the OTA in dispute, were:

Remove excess books and materials throughout the building to allow for a clearance of not less than 1 m between the top of storage and ceiling. This also includes the garage. This does not apply to shelving that is placed against a wall.

[30] Mr. Hartling advised that the 1 metre clearance, from the top of storage to the ceiling, was required for firefighting purposes. Such a clearance would allow firefighters to spray water over the top of the storage to the other side of a shelf in certain circumstances. This explains why the requirement does not apply when shelves are against a wall, since there would be no way to spray water over the shelves in any event, where the wall itself would act as a barrier.

[31] According to the Appellant, removal of the books from the top of the shelves in question would represent one-third of his stock, which stock could no longer be displayed in the store.

[32] When asked how he determined the OTA provided sufficient time to complete the corrective measures, Mr. Hartling stated that "it doesn't take forever to remove books."

[33] As a result of discussions between the parties following the filing of this appeal, the time for completion of all eight corrective measures set out in the OTA was extended to February 1, 2017.

[34] Upon filing the appeal, Mr. Ford, on behalf of the Appellant, requested until July 4, 2017, to comply with Item 8 in the OTA. The purpose of the requested extension

was to enable the Appellant to secure a building permit, so new walls could be constructed, thus allowing the offending shelving to be placed against the new walls.

[35] The Fire Service does not have a definition of what constitutes a “wall”. Mr. Hartling advised the Appellant the erection of walls would be governed by the National Building Code (2010). The Fire Service addresses Fire Code compliance.

[36] It is clear that the specifics of the proposed renovations were not provided to Mr. Hartling, nor did he request further specifics. He did not consider the renovations when considering the extension request. In Mr. Hartling’s opinion, what was required was a 1 metre clearance from the top of the shelf to the ceiling, which he thought could be achieved by removing books and materials. He had not ordered renovations and, in his view, these renovations could be completed later, but were not required to comply with the OTA.

[37] Another factor Mr. Hartling took into consideration, when assessing the extension request, was the fact Fire Service personnel were not authorized to enter the premises in the event of a fire. If such an emergency did occur, if employees and patrons of the business found themselves trapped in the smoke-filled building, firefighters would not be allowed inside to effect a rescue.

[38] As well, if a fire were to break out within the building, which might be extinguishable when small, the Fire Service has to respond with an exterior defensive attack. This could result in the fire spreading, thus putting the entire building, and surrounding buildings, at risk.

[39] Therefore, Mr. Hartling wanted all items in the OTA addressed as soon as possible, and refused the extension request.

[40] It became evident during the course of the hearing that the Appellant disagreed with Mr. Hartling as to what was required to comply with s.3.2.2.3(2) of the Fire Code.

[41] Mr. Bustin's evidence established there are a number of what were described as "island shelves" which are not against walls. While many are back to back, and otherwise structurally attached to the building, persons can walk all the way around them. These are the shelves which the Appellant admits do not comply with the Fire Code requirements.

[42] The Appellant acknowledged removal of books from the top of the shelves could be done in a relatively short time. However, both he and Mr. Bustin indicated the removal of such books from the top of these shelves will not create a 1 metre gap from the top of the shelf to the ceiling. Mr. Bustin testified the clearance, if the books were removed, would be between 10 inches and 1 foot. Therefore, while the removal of books would allow for some clearance, it would not create the 1 metre space set out in the Fire Code.

[43] While there was some confusion in the Appellant's evidence as to whether or not the island shelves had wooden backing going all the way to the ceiling, this was clarified by Mr. Bustin. The problem which he identified is not that the shelves have backs which extend to the ceiling. The issue is that the gap created by removing the books from the top of the shelves is not 1 metre, because the top of the shelf itself is closer to the ceiling than 1 metre.

[44] The proposed resolution, which was presented in detail by Mr. Bustin, with the aid of schematic floor plans, is to disassemble the existing island shelves, create walls

where these shelves are presently located, and reassemble the shelves against the newly constructed walls. Mr. Bustin estimated it would take between 13 to 16 weeks to complete the renovations.

[45] A building permit application was submitted to HRM on January 16, 2017, without plans. A building inspector attended the premises approximately one week before the hearing date. According to Mr. Bustin, the drawings he prepared, and which the Appellant filed with the Board as part of Exhibit D-4, were based on discussions with the building inspector who attended the premises.

[46] The proposed work involves erecting walls studded by 2x2's, top and bottom plated, with mudded, fire resistant, drywall. The plan is to make the walls as thin as the building inspector will allow, so as to avoid the loss of aisle space.

[47] Mr. Bustin also testified that in relation to one upstairs room, the nature of the work is undetermined, as a window location may make the placement of a wall impossible.

[48] No building permit has yet been obtained. It is apparent the details of what is proposed have not been reviewed by Mr. Hartling, in relation to Fire Code compliance.

IV ANALYSIS AND FINDINGS

[49] The Appellant has admitted non-compliance with s.3.2.2.3(2) of the Fire Code.

[50] The Appellant is requesting that the OTA be modified by extending the time for compliance with the Actions Required set out in Item 8 thereof.

[51] The burden of proof is on the Appellant to show, on a balance of probabilities, that the requested extension should be granted.

[52] Mr. Hartling's authority to issue the OTA arises, in this case, from s.25(1)(b) of the *Act*, which states, in part:

25 (1) Where the Fire Marshal, a deputy fire marshal, a local assistant or a municipal fire inspector believes that there is a contravention on land or premises of this *Act*, the regulations, the Fire Code or an order made pursuant to this *Act*, the regulations or the Fire Code, the fire official may issue to an owner of the land or premises an order that

(a) is substantially in the form set out in subsections 26(1) and (2);

(b) may direct the owner to do one or more of the following within the time limit set out in the order:

(i) remedy the contravention, including do anything in relation to the land or premises that the fire official considers necessary to remedy the non-compliance,

(ii) carry out repairs or alterations,

(iii) remove or demolish buildings or things on the land or premises, or parts of the land or premises,

(iv) replace materials used in the construction of buildings or things,

(v) remove any combustible or explosive material or anything that poses a fire hazard or compromises fire safety,

...

[53] Section 42 of the *Act* confers the following jurisdiction on the Board:

42 The Board has exclusive jurisdiction to determine all questions of

(a) law respecting this *Act*, the regulations and the Fire Code;

(b) fact; and

(c) mixed law and fact,

that arise in any matter before it, and an order or decision of the Board is final and binding and not open to review except for an error of law or jurisdiction. 2002, c. 6, s. 42.

[54] Section 41(8) provides the Board with broad remedial powers. It states:

(8) On an appeal made pursuant to subsection (2), the Board may

(a) confirm, vary or revoke the order or decision appealed;

(b) allow additional time for the person to whom the order is directed, or who is the subject of the decision, to comply with the order or decision, and may attach conditions to such compliance; or

(c) make any order or decision that the fire official making the original order or decision could have made.

[55] In considering an appeal, it is important to keep in mind the purpose of the *Act*, which is set out in Section 2:

2 The purpose of this Act is to educate and encourage persons and communities to apply the principles of fire safety so as to prevent fires, preserve human life and avoid unwarranted property loss due to the destructive forces of fire. 2002, c. 6, s. 2.

[56] In Nova Scotia, every property owner, which includes a person in control of land or premises, is required, by virtue of s.17 of the *Act*, to take every reasonable precaution to carry out the requirements of the *Act* and Fire Code and achieve fire safety.

[57] On behalf of the Appellant, Mr. Ford took the position the OTA provided insufficient time to complete what is required to comply with the Fire Code. This argument is based on the premise that Mr. Hartling did not appreciate the amount of work required.

[58] Mr. Ford argued that the deadline imposed was an arbitrary application of the law and not based on evidence. He submitted it was not possible for Mr. Hartling to make a reasonable determination on the extension application without knowing the extent of the substantial renovations which the Appellant is proposing to undertake.

[59] Mr. Ford indicated the concerns expressed by Mr. Hartling, regarding the fact fire personnel were limited in their emergency response, existed when the original time to comply was set at January 10, 2017, and when the extension was granted to February 1, 2017. Therefore, this was not a reason to deny a further extension.

[60] Mr. Ford submitted the extension request was reasonable, and in accordance with the Fire Services' stated policy of providing reasonable time to business owners. It should therefore be granted.

[61] Responding on behalf of HRM, Mr. Judah acknowledged that the extensive work proposed by the Appellant would require significant time to complete.

[62] However, Mr. Judah submitted that removing the books from the top shelves would not require a lengthy period of time. While acknowledging the removal of books and materials might not bring the premises entirely into compliance, he said it would be a good first step.

[63] Mr. Judah suggested another potential remedial action could be removing a second shelf of books, and then removing the top shelves themselves, the shelving to be supported by brackets. While Mr. Bustin and the Appellant had indicated removing the top shelf would compromise the integrity of the shelves, Mr. Judah suggested their analysis was not reasonable.

[64] Mr. Judah submitted it was open to the Board to either confirm the order as issued by Mr. Hartling, or modify it to allow for the partial compliance discussed above within a relatively short time frame, with further time to complete the full renovations contemplated by the Appellant.

[65] As a first step in its analysis, based on the available evidence, the Board will not order the removal of the top shelves, or any shelves, of the offending "island shelves". There is no evidence before the Board to establish that, from a structural integrity perspective, this can be done safely.

[66] In considering fire safety and risk, the evidence indicates that non-compliance with s.3.2.2.3(2) of the Fire Code, in and of itself, does not increase the risk of a fire being initiated. It could hinder the ability of firefighters to fight a fire, if one were to occur. However, this assumes firefighters will enter the building to fight the fire in the first place.

[67] In this case, if the Appellant were to proceed with removing the books and materials from the top shelves, it is not clear the premises would no longer be “flagged”, such that firefighters would be allowed to enter the premises. When the Board inquired about this of Mr. Judah, he indicated it was not so simple, and there might be other issues to consider.

[68] If firefighters are not allowed to enter the premises, removal of the books from the top shelves will serve no purpose, as there will be no firefighters inside the building to spray water over the shelves.

[69] The Board further notes the work plan proposed by the Appellant will in no way assist firefighters in spraying water over the shelves, but will theoretically bring the premises into compliance with s.3.2.2.3(2) of the Fire Code. Whether the proposed wall configurations will be in compliance with the remainder of the Fire Code will presumably be dependent on the final plans which are approved by the building inspector, if and when a building permit is issued, keeping in mind there is still no plan in relation to one upstairs room.

[70] The Board’s main concern in relation to the preservation of human life and property in this case relates to the current limitations placed on a potential fire response. The Board does not agree that because this condition has existed for some time, absent other considerations, allowing a further five months beyond the date established by Mr. Hartling in the OTA is of no concern.

[71] While the Board understands the business difficulties occasioned by removing one third of the Appellant’s stock from display, in the interest of safety, ordering the removal of all books and materials from the top of the “island shelves” would be

appropriate, if this would result in the premises no longer being “flagged”, thus permitting firefighters to enter the building, in the event of a fire, after the work was completed.

[72] On the other hand, if full compliance with s.3.2.2.3(2) of the Fire Code is required before the premises are no longer “flagged”, an extension of time to allow for the completion of the required work would be appropriate in the circumstances.

[73] The Board further notes that without complete plans, without a final building inspection approval, and without any meaningful review of the proposed plans by Mr. Hartling, on behalf of the Fire Service, it cannot make a conclusive determination as to whether the proposed renovations will be fully compliant with the Fire Code

[74] Given the uncertainty surrounding the impact of removing the books from the top of the “island shelves”, which both parties indicate would not bring the premises in full compliance with s.3.2.2.3(2) of the Fire Code, and the uncertain status of the Appellant’s renovation plans, the Board finds that the “Actions Required” in Item 8 of the OTA should be varied as follows:

- (a) the Fire Service shall investigate and consider whether firefighters will be allowed within the premises, in the event of a fire, if all books and materials are removed from the top of the “island shelves” throughout the building, to allow for some clearance between the top of these shelves and the ceiling;
- (b) if the Fire Service determines firefighters will be allowed within the premises in the event of a fire, if all books and materials are removed from the top of the “island shelves”, notice of this determination shall be communicated in writing to the Appellant by delivery to the Appellant’s premises. A copy of such notice shall be provided to the Board;

- (c) if the Fire Service delivers a notice as contemplated by paragraph (b), the Appellant shall have 28 days to remove all books and materials from the top of the “island shelves” throughout the building, as an interim measure;
- (d) a fire inspector shall review the Appellant’s proposed renovations and advise the Appellant, on or before March 31, 2017, on a preliminary basis, whether the proposed renovations would comply with the Fire Code;
- (e) if the fire inspector indicates, on a preliminary basis, the Appellant’s proposed renovations do not comply with the Fire Code, the fire inspector shall issue a further Order to Take Action, which is subject to the Board’s appellate review, outlining what steps must be taken to bring the premises into compliance;
- (f) if the fire inspector determines, on a preliminary basis, the Appellant’s proposed renovations would comply with the Fire Code, the Appellant shall have until July 4, 2017, to complete the proposed renovations. The Fire Service will continue to have jurisdiction to consider any further extension request;
- (g) upon completion of the proposed renovations by the Appellant, a fire inspector may conduct an inspection to determine if the renovations, as completed, comply with the Fire Code. The fire inspector may issue a further Order to Take Action, which is subject to this Board’s appellate review, if compliance issues remain;
- (h) if the fire inspector determines, on a preliminary basis, the proposed renovations will comply with the Fire Code, but the Appellant cannot obtain a building permit, the Appellant shall forthwith advise the Fire Service a building permit cannot be obtained, and a fire inspector shall inspect the premises and

determine what corrective measures are required for full compliance with the Fire Code. Any such corrective measures shall be set out in an Order to Take Action, subject to the Board's appellate review.

[75] Should any issue arise with respect to the implementation of this decision, which the parties cannot resolve, the matter may be brought back before the Board to address such issue.

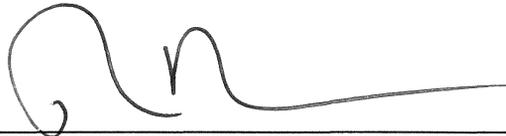
[76] The Board finds the foregoing balances the need to address the relevant fire safety considerations, while providing the Appellant a reasonable time to complete corrective measures, and providing a framework so the renovations proposed by the Appellant, or required by the Fire Service, will result in Fire Code compliance.

V SUMMARY AND CONCLUSION

[77] The Appeal is allowed in part. The Board finds Item 8 of the OTA should be varied, with conditions, as outlined in paragraph 74 of this decision.

[78] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 6 day of March, 2017.



Richard J. Melanson