

PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE PUBLIC HEALTH ACT,  
CHAPTER P-37, R.S.A. 2000  
AND ITS REGULATIONS

IN THE MATTER OF STAY APPLICATION TO  
THE CHAIR OF THE PUBLIC HEALTH APPEAL BOARD  
BY RAY MORTON  
OF THE ORDER OF AN EXECUTIVE OFFICER  
ISSUED BY ALBERTA HEALTH SERVICES  
ZONE 4 EDSON  
DATED MAY 24, 2016 ("Order")  
STAY HEARING HELD JUNE 29, 2016

**Appearances**

Mr. Ray Morton, Owner/Appellant

Ms. Shirley Morton, on behalf of the Owner/Appellant

Mr. Mark Raven-Jackson, Legal Counsel, Alberta Health Services/Respondent

**Chair of Board's Decision**

The Chair has decided to grant a stay of the Order.

**Introduction**

The Order was issued to Owners, Shirley Morton and Ray Morton on May 24, 2016. Since that time, Shirley Morton has been removed as an Owner, by agreement with Alberta Health Services, prior to the stay hearing application which she attended on behalf of Ray Morton.

The Order was pursuant to the *Public Health Act*, the *Housing Regulation*, Alberta Regulation 173/99 and the *Minimum Housing and Health Standards*. The Order set out the contraventions of the *Act* and *Regulations* as they pertained to the condition of a property located 14516 Township Road 542 in Yellowhead County. The premises were not found to be unfit for human habitation. The work and repairs required in the Order to address the contraventions were to be completed by June 30, 2016. The Appellant received the written Order on June 6, 2016 and the Board received the Notice of Appeal on June 16, 2016.

An appeal hearing date had not been set at the time of the stay hearing but has now been set for August 31, 2016.

The stay hearing was held on June 29, 2016 by way of a telephone conference.

### **Issue**

Whether a stay of the Executive Officer's Order dated May 24, 2016 ought to be granted.

### **Appellant's Submissions**

The Appellant submitted that the people residing in the Premises were not tenants, they were squatters and had paid no rent. He has initiated legal proceedings to have them removed from the property and there is a hearing on July 18, 2016 to address that matter. He does not want to undertake the work set out in the Order because the Premises will be demolished once the tenants leave the Premises. At one point the Premises had been condemned by Alberta Health Services but that previous Order had been rescinded. The Premises are not worth fixing and some items cannot be repaired like the windows and the walls. The tenants changed the locks to the Premises and the Appellant no longer has access to the Premises.

The Appellant submitted that the Order ought to have designated the Premises as being unfit for human habitation rather than requiring remediation.

Finally, it made no economic sense to do the costly repairs to the Premises when the plan was for the building to be demolished.

### **Alberta Health Services' Submissions**

Alberta Health Services submitted that the economic feasibility of the work to be completed is not relevant to Public Health. The walls and window repairs are not in the Order as those are building code issues.

*The Residential Tenancy Act* requires that a rental property meets the requirements of the *Public Health Act* and its' *Regulations*. The 11 violations require material and labour and business decisions are not to be considered. The Appellant was given a generous period of time to complete the repairs and these contraventions ought to have been fixed before the Premises were offered for rent. The Premises were occupied for many months and would be rented for the foreseeable future.

The previous Order that included an unfit for human habitation designation was the result of a critical contravention as there was no power being provided to the Premises.

The test for a stay is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The first part of the test is whether there is there a serious question to be tried. Counsel for Alberta Health Services submitted this part of the test has a low threshold and the Appellant has met that part of the test. However, Alberta Health Services submitted that the second and third parts of the test have not been met and a stay should not be granted.

The second part of the test is whether the Appellant would suffer irreparable harm if the stay was not granted. Alberta Health Services submitted that pure economic loss or expense is not irreparable harm. And lastly, the third part of the test is an assessment of the balance of inconvenience to the Appellant if the stay is not granted and the inconvenience to the Respondent if the stay is granted. In these circumstances Alberta Health Services submitted the inconvenience of making the repairs was minimal and should be assessed against tenants having to reside in unsafe Premises.

### **Reasons**

The Chair or Vice-Chair of the Board is empowered to grant a stay pursuant to section 6 of the *Public Health Act*. This section states:

An appeal taken pursuant to section 5 does not operate as a stay of the decision appealed from except so far as the chair or vice-chair of the Board so directs.

A stay postpones the enforcement of the Order until the appeal is heard and decided by the Public Health Appeal Board. The test for whether a stay should be granted is set out by the Supreme Court of Canada in *RJR- MacDonald*. It is a three part test:

1. Is there a serious question to be tried?
2. Would the Appellant suffer irreparable harm if the stay was not granted?
3. Assess the balance of inconvenience to the Appellant if the stay is not granted and the inconvenience to the Respondent if the stay is granted. In this part of the test the inconvenience of other parties may be considered as well as the public's interest.

### Application of the test

Is there a serious question to be tried? This part of the test has a low threshold and can be met if the appeal is not frivolous or vexatious. The Appellant showed the appeal is not frivolous or vexatious.

The second part of the test is whether the Appellant would suffer irreparable harm if the stay was not granted.

The Public Health Appeal Board is required to hear the appeal within 30 days of receiving the appeal unless the Board considers it appropriate to extend the time.

Typically, the Board is able to hear an appeal within 30 days of receiving an appeal. However, due to the Board's limited availability during July and August, the hearing has been scheduled for August 31, 2016. If a stay is not granted, the result for the Appellant would be, in essence, to decide his appeal in favour of Alberta Health Services. He would be compelled to complete the work set out in the Order by June 30, 2016, two months prior to the appeal hearing. This can be considered irreparable harm to the Appellant.

In addition, the Supreme Court of Canada in *RJR- MacDonald* made a distinction between disputes involving the *Charter* and private parties. This distinction pertains to economic loss as irreparable harm. The Court sets out the considerations regarding compensation for the party that is not granted a stay of an Order and is successful on appeal. The considerations in *Charter* cases are analogous to *Public Health Act* appeals. There are no provisions in the *Public Health Act* for the Board to compensate the Appellant for financial losses in the event he is successful in appealing the Order. The Supreme Court of Canada in *RJR- MacDonald* states:

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

In this appeal, the costs required to repair the Premises can be considered irreparable harm.

The third part of the test requires an assessment of the inconvenience to the Appellant if the stay is not granted and the inconvenience to the Respondent if the stay is granted. In this part of the test the inconvenience of other parties may be considered as well as the public's interest.

The inconvenience to the Appellant includes the expense of the repairs, including labour and materials, the inconvenience of obtaining access to the Premises and dealing with tenants that are not cooperative. There is also the inconvenience of, for all intents and purposes, having his appeal decided against him without the benefit of an appeal hearing if the stay is not granted.

The inconvenience to Alberta Health Services includes the important consideration of public health and the safety of the tenants. In this situation, there were no critical contraventions that resulted in the Premises being designated unfit for human habitation or requiring the tenants to vacate the Premises. In addition, the Appellant was given approximately 5 weeks from the time the Order was issued to complete the repairs, which indicates the contraventions were not serious and the repairs were not urgent.

Waiting for the appeal to be heard and decided before the repairs are completed, if the Appellant's appeal is not successful, will be a minimal inconvenience to the tenants and a minimal risk to public health.

On balance, the inconveniences for the Appellant outweigh the inconveniences for the Respondent.

**For the above reasons, the Chair of the Public Health Appeal Board has granted a stay of the Order.**

*Rebecca Hawkes*  
On behalf of:

Per: \_\_\_\_\_  
Julia Jones, Chair

Date: July 19, 2016