

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 A PRELIMINARY APPLICATION TO
THE PUBLIC HEALTH APPEAL BOARD BY KEITH GALL
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 2 CALGARY
DATED SEPTEMBER 29, 2015
ADJOURNMENT AND OTHER PRELIMINARY MATTERS
HEARING HELD OCTOBER 28, 2015

Appearances

John Fletcher, Legal Counsel, Appellant

Ivan Bernardo, Legal Counsel, Alberta Health Services/Respondent

Decision

1. The appeal hearing will be adjourned to November 23, 2015. The hearing shall not be adjourned until after the *Allard* appeal (*Neil Allard, Tanya Beemish, David Hebert, Shawn Davey v. Her Majesty the Queen in Right of Canada, 2014 FC 280*) or until after the possible changes to federal laws regarding growing and possessing marijuana.
2. The Board does not have jurisdiction to decide constitutional questions.
3. The Board declines to compel any witnesses to attend the appeal hearing at this time.
4. All written evidence, submissions, case law, photographs, or documents of any kind, which will be referenced or relied upon by a party at the appeal hearing, as well as a list of potential witnesses that will give evidence at the hearing, shall be submitted to the Board, and to the other parties to the appeal in electronic format, prior to noon on November 16, 2015. The parties are required to bring to the hearing, sufficient hard copies of the items referred to above for use by the Board and the other parties at the appeal.

Introduction

The Order of an Executive Officer dated September 29, 2015 was issued pursuant to the *Public Health Act* and its *Regulations* regarding an owner occupied residential property located at 103 Citadel Peak Circle N.W., Calgary, Alberta.

The Order directed the Appellant to discontinue plant production when the least mature crop has been harvested or by December 29, 2015 and to complete certain work in and about the premises by March 29, 2016, June 29, 2016 and September 29, 2016.

An appeal hearing date had been set for November 2, 2015.

The Appellant applied for a stay on October 15, 2015 and the Chair of the Board did not grant the stay but did give the Appellant leave to re-apply for a stay in the event the Board did not hear and decide the appeal prior to December 29, 2015.

Issues

1. Whether an adjournment of the appeal hearing ought to be granted and if so, whether it should be adjourned until after the *Allard* appeal or until after the Federal Government has changed the law regarding growing and possessing marijuana.
2. Whether the Board can decide *Charter of Rights and Freedoms* issues raised at the appeal hearing.
3. Whether the Board ought to compel certain witnesses to attend the appeal hearing as requested by the Appellant.
4. Whether the parties ought to disclose their evidence prior to the appeal hearing.

Appellant's Submissions

The Appellant provided an Affidavit that outlined some of the circumstances prior to the Order being issued.

The Appellant's counsel submitted that the appeal ought to be adjourned until after the *Allard* appeal has been heard. That case is with respect to licenses that were issued by Health Canada to individuals to grow and be in possession of marijuana. The Appellant has two licenses to grow marijuana and one to possess.

In addition, the new Federal Government may change the law regarding growing and possessing marijuana in the near future and an adjournment would allow the new laws to come into effect before the appeal.

Lastly, with respect to an adjournment, more time is required to prepare for the hearing and this would be procedurally fair.

The Appellant's counsel advised that he will be advancing the argument that the Order is a violation of the Appellant's section 7 *Charter* right, the right to life, liberty and security of the person. The Appellant is 61 years old, suffers from multiple sclerosis and the marijuana is medication to treat the pain and symptoms caused by the disease. To deprive him of being able to grow this medication or force him to purchase it from a dispensary, which is beyond his means financially, is a violation of his section 7 *Charter* rights.

The Appellant's counsel also provided a list of witnesses that he wants produced at the hearing so that he may cross examine them at the appeal hearing. The list includes persons who attended at the inspection of the property; three City of Calgary employees, two City of Calgary Police Officers and the Alberta Health Services Executive Officer that issued the Order. He also wants to cross examine the unnamed person who complained to Alberta Health Services which resulted in the inspection of the property, and the Executive Officer's superior who allegedly advised the Executive Officer to shut down the growing operation.

The Appellant also submitted that he has not been provided with any evidence from Alberta Health Services pertaining to the Order and he wants to review the evidence prior to the hearing.

The Appellant's counsel distinguished the cases provided by Alberta Health Services because in this instance no stay has been granted and there is no risk to the public.

Alberta Health Services' Submissions

Alberta Health Services' counsel submitted that the outcome of the *Allard* appeal or any upcoming changes by the Federal Government to the laws regarding growing or decriminalizing marijuana will not affect the appeal of the Executive Officer's Order. The issue is not whether this activity is permitted or legal but whether the activity meets the standards as set out in the *Public Health Act* and its *Regulations*. The public health regulations are the same whether the Appellant is growing marijuana or some other crop in his home. Whether the activity is criminal is not the issue; two police officers attended at the house and no charges were laid.

In addition, the *Allard* appeal is in the preliminary motion phase which means a stay or an adjournment would be for an indefinite period and it could be years before it is decided.

Alberta Health Services presented the *Union Tractor Ltd. V. Horseshoe Contracting Ltd*, 2002 ABCA 119, *S.E. v. Law Society of Alberta*, [1992] A.J. No. 718 and *Frost v. Alberta Assn. of Architects*, [1995] A.J. No.251, for the proposition that there is a duty of prompt prosecution and that leisurely litigation and a stay of execution cannot co-exist, particularly where the interests of the public are at stake.

Although a stay has not been granted in this instance, leave was granted for the Appellant to re-apply for a stay if the appeal is not heard and decided by December 29, 2015 and to get a stay with no intention to prosecute the appeal was an abuse of process. This is aggravated by the fact that the purpose of the Order was to protect the public.

Alberta Health Services likened the adjournment application to a stay application where the public's health ought to be considered as was done in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

Regarding the Appellant's position that his Charter rights were being violated by the Order, Alberta Health Services submitted that s.11 of the *Administrative Procedures and Jurisdiction Act* does not give the Public Health Appeal Board jurisdiction to hear *Charter* matters.

With respect to compelling witnesses, the Board has the powers to compel witnesses to attend the appeal hearing pursuant to section 5(10) of the *Public Health Act* and sections 4 and 5 of the *Public Inquiries Act*.

Alberta Health Services submitted that, for many years, the Board's procedure has been for Alberta Health Services to call witnesses they consider necessary to meet the burden of defending the Order. If the evidence is not sufficient the Order may be reversed or varied. The Appellant may cross examine Alberta Health Services' witnesses produced at the hearing. Alberta Health Services is not obligated to produce the list of witnesses provided by the Appellant but the Appellant can call any witness he wishes to attend the hearing. The Board may compel witnesses as set out in the *Public Inquires Act* but that would be because the Board finds that they need to hear from the particular witness in order to make a decision in the appeal.

A complaint is not required for Alberta Health Services to inspect a property as was submitted by the Appellant but if they receive a complaint they must inspect. Alberta Health Services would not typically call a complainant as a witness at the appeal hearing.

Reasons

Adjournment

The Board will not adjourn the appeal hearing until after the *Allard* appeal or until after the Federal Government makes changes to the laws regarding the possession or growing of marijuana. Whether the activity of growing marijuana is legal will not be in question at the appeal hearing. The issue at the appeal hearing will be whether the Order was issued pursuant to the *Public Health Act* and its *Regulations* and whether it was a proper exercise of the Executive Officer's authority pursuant to the *Act*. There is nothing to be gained by waiting to see if the laws change as submitted by the Appellant.

The *Public Health Act* requires hearings to be conducted within 30 days of receiving an appeal but the Board may extend the time if it considers it appropriate to do so. In this instance, the Board finds it appropriate to extend the appeal hearing past the 30 days so that the parties may properly prepare for the appeal. The appeal hearing will be heard November 23, 2015.

Charter Violation Submissions at the Appeal Hearing

The *Administrative Procedures and Jurisdiction Act* sets out which administrative tribunals have jurisdiction to determine a question of constitutional law. The Public Health Appeal Board does not have the jurisdiction to determine these questions. The *Act* and *Regulation* states as follows:

“decision maker” means an individual appointed or a body established by or under an Act of Alberta to decide matters in accordance with the authority given under that Act, but does not include

- (i) the Provincial Court of Alberta or a judge of that Court,
- (ii) a justice of the peace conferred with the authority to determine a question of constitutional law under the Provincial Court Act,
- (iii) the Court of Queen’s Bench of Alberta or a judge or master in chambers of that Court, or
- (iv) the Court of Appeal of Alberta or a judge of that Court;

11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

AB REGULATION 69/2006

DESIGNATION OF CONSTITUTIONAL DECISION MAKERS

Authorization

2 The decision makers listed in column 1 of the Schedule have jurisdiction to determine the questions of constitutional law set out opposite them in column 2.

Schedule 1

Column 1	Column 2
Decision Maker	Jurisdiction
Labour Relations Board	all questions of constitutional law
Alberta Energy and Utilities Board	all questions of constitutional law
Law Society entity	all questions of constitutional law
a human rights panel appointed under the <i>Human Rights, Citizenship and Multiculturalism Act</i>	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
labour arbitrators	all questions of constitutional law
Workers' Compensation Board	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
Appeals Commission established under the <i>Workers' Compensation Act</i>	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
Law Enforcement Review Board	questions of constitutional law relating to the Charter
Alberta Securities Commission	questions of constitutional law that relate to the Charter or arising from the federal or provincial distribution of powers under the Constitution of Canada
Alberta Utilities Commission	all questions of constitutional law
Alberta Energy Regulator	all questions of constitutional law

The Board will not determine any *Charter* violation issues raised by the Appellant at the hearing as it has no jurisdiction to do so.

Compelling Witnesses

Section 5 (10) of The *Public Health Act* states:

For the purposes of conducting an appeal under this section, the Board has all of the powers, privileges and immunities of a commissioner appointed under the *Public Inquiries Act*.

The *Public Inquiries Act* states:

Evidence

4 The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.

Attendance of witnesses

5 The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.

There is no evidence that the witnesses who will attend the hearing will not be sufficient to determine the matter. At this time, the Board will not compel any witnesses to attend at the appeal hearing. If, at the appeal hearing, the Board determines that it is necessary to hear from a particular witness in order to fully investigate the appeal matter, it will make a determination whether witnesses ought to be compelled to attend the hearing or provide written evidence or documents.

For the above reasons, the Board has decided as follows:

1. The appeal hearing will be adjourned to November 23, 2015. The appeal will not be adjourned until after the *Allard* appeal or the possible change to federal laws regarding growing and possessing marijuana.
2. The Board does not have jurisdiction to decide constitutional questions at the hearing.
3. The Board declines to compel any witnesses to attend the appeal hearing at this time.
4. All written evidence, submissions, case law, photographs, or documents of any kind, which will be referenced or relied upon by a party at the appeal hearing, as well as a list of potential witnesses that will give evidence at the hearing, shall be submitted to the Board, and to the other parties to the appeal in electronic format, prior to noon on November 16, 2015. The parties

are required to bring to the hearing, sufficient hard copies of the items referred to above for use by the Board and the other parties at the appeal.

New Information affecting the Board's Decision

After the Board had heard and decided this preliminary application, it was advised that the Executive Officer that issued the Order would not be available for the hearing scheduled for November 23, 2015. The Board will set the new hearing date after canvassing the parties for available dates. In addition, the Executive Officer that issued the Order is directed to attend the hearing so that he may be cross examined at the hearing.

Per: 

Julia Jones, Chair

Date: November 6, 2015