

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 728106 ALBERTA LTD. AND WOLFGANG WENDRICH
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 1 SOUTH
DATED JUNE 30, 2016 ("Order")
STAY HEARING HELD JULY 25, 2016

Appearances

Mr. Wolfgang Wendrich, Owner/Appellant
Mr. George Wendrich, on behalf of the Owner/Appellant
Mr. Derek Witt, Tenant/Resident

Mr. Ivan Bernardo, Legal Counsel, Alberta Health Services/Respondent
Mr. Wade Goin, Executive Officer, Alberta Health Services/Respondent

Chair of Board's Decision

The Chair has decided to grant a stay of the Order until the Board renders its decision in the appeal

Introduction

The Order was issued pursuant to the *Public Health Act, the Nuisance and General Sanitation Regulation and the Recreation Area Regulation*. The Order set out the contraventions of the *Act and Regulations* as they pertained to the water supply for the property known as Crowsnest Mountain Resort at 100 Wolfstone Drive in Coleman Alberta.

The Order required the Owners to cease and desist the distribution of non-potable water to the recreational area immediately, including water for showers and toilets, obtain approval from Alberta Health Services before implementing a new water distribution system and to provide privies in the interim.

The Appellant received verbal confirmation of the Order on June 30, 2016 and the Notice of Appeal was received by the Board on July 10, 2016.

An appeal hearing date has been set for August 22 and 23, 2016.

The stay hearing was held on July 25, 2016 by way of a telephone conference.

Issue

Whether a stay of the Executive Officer's Order dated June 30, 2016 ought to be granted.

Appellant's Submissions

The Appellant submitted he has been delivering water to the sites and cabins from a licensed well since 1998. He tested the water regularly after being taught by Public Health about how to treat the well water. In 2012 the water rules changed and the well water was no longer considered potable. No one was ever harmed by the well water that was being provided.

A leak developed in the water line and that resulted in contamination. He has since repaired the leak and has been testing the water and found it not be contaminated. He is providing guests/tenants with drinking water in 5 liter containers and has posted signs indicating that the well water is non-potable that the water is to be boiled.

The Appellant has plans to build a different water system in the fall of 2016 but the funds to build this system need to be raised and are \$50,000 to \$60,000.

The Appellant stated that if he is unable to provide the non-potable well water to the guests/tenants for the toilets and showers, he will lose business and 70 to 75% of the business is in the summer months. Without revenue during the summer months his business will be insolvent.

One of the tenants/guests stated that the group of residents on the premises were aware and understood the water being provided is non-potable and that there is a boil water advisory. They want delivery of the non-potable water to continue being provided to the sites for showers and toilets. He stated that signs have been posted at each site and if the distribution of non-potable water was discontinued at the sites, new problems would be created. It was his position that it was a drastic measure to require the non-potable water to distribution to discontinue given that there was a plan in place for all the sites to receive potable water in the near future.

Alberta Health Services' Submissions

Counsel for Alberta Health Services submitted that the merits of the appeal are not relevant to a stay application. The test for a stay is different and is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

In this situation the guests/tenants interests mirror that of the owner's. In addition, it is not true that the Order requires the owner to shut down the business, the Order requires

the owner to cease and desist the distribution of non-potable water. There are other options available to the Appellant, such as shipping potable water to the sites. The 5 liter containers of potable water that are being provided to each of the sites, meets the requirements of the Order.

The Appellant has the burden to prove irreparable harm pursuant to the test for a stay and the Appellant has given no evidence that there is irreparable harm. Financial loss or revenue is not irreparable harm.

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. Alberta Health Services submitted that the public's interest is to be considered in balancing the inconveniences and referred to the caselaw submitted to support the proposition that the Order promotes public health. The public health considerations favours Alberta Health Services in the balance of inconveniences and there is no other competing public interest. Determination of whether the measures taken by the Appellant are effective are to be decided at the appeal and not at the stay application.

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 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 Supreme Court of Canada in *RJR- MacDonald* made a distinction between disputes involving the *Charter* and disputes involving private parties. This distinction pertains to whether economic loss can be considered 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 Appellant submitted that if he discontinues providing the non-potable well water to the guests/tenants for the showers and toilets, he would lose business and that would result in a significant loss in revenue. As the business is seasonal, and this is the busy season, the loss of revenue would result in insolvency. This can be considered irreparable harm and meets the requirements of the second part of the test.

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. In this situation, the public's interest must be carefully considered and in doing so, it is appropriate to consider the measures undertaken by the Appellant to ensure the public's safety.

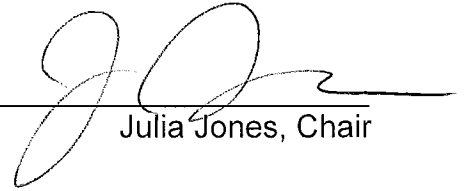
Those measures are:

- Repairing the water line;
- Testing the well water regularly;
- Posting signs at all sites clearly indicating the well water is not potable;
- Posting boil water advisory signs; and
- Providing 5 liter containers of potable water to each site.

These measures address the public safety interests in the short term which balances the inconveniences in favour of the Appellant. On balance, the inconveniences for the Appellant, which is possible insolvency, 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 until the Board renders its decision in the appeal.

Per: _____

A handwritten signature in black ink, appearing to be 'J. Jones', written over a horizontal line.

Julia Jones, Chair

Date: August 12, 2016