

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 STAY APPLICATION TO
THE CHAIR OF 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
STAY HEARING HELD OCTOBER 15, 2015

Appearances

John Fletcher, Legal Counsel, Appellant

Ivan Bernardo, Legal Counsel, Alberta Health Services/Respondent

Decision

The Chair has decided not to grant a stay of the Order but has granted leave for the Appellant to re-apply for a stay of the Order in the event the appeal is not heard and decided prior to December 29, 2015.

Introduction

The Order of an Executive Officer dated September 29, 2015 was issued pursuant to the *Public Health Act* and its *Regulations* regarding a 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 has not been set but the parties have advised they are available on October 26, 2015.

Issue

Whether a stay of the Order of an Executive Officer dated September 29, 2015 ought to be granted.

Appellant's Submissions

The Appellant's counsel submitted that he plans to obtain a stay of the Order and then apply for an adjournment of the appeal hearing until after the *Allard* (2014 FC 280) 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 2 of these licenses and as a result of the *Allard* case, they remain in force.

The Federal government allows the Appellant to grow marijuana in his house and the Provincial government is prohibiting it with the Order. The Order is a violation of the Appellant's section 7 *Charter* right, the right to life, liberty and security of the person because it deprives the Appellant of medication. This was the decision in the *Allard* case and it applies to this appeal and application for a stay of the Order.

Counsel advised that the Appellant is 61 years old, suffers from multiple sclerosis and is in a wheel chair. The marijuana is medication to treat the pain and symptoms caused by the disease and the Order would, in effect, deprive him of his medication. It is not a public health issue as he is smoking marijuana for his own health in his own house.

The Appellant questioned whether the *Housing Regulation* applied as the premises are occupied solely by the Appellant who is the owner of the property and that *Regulation* does not apply to these properties. In addition, the mould concern set out in the Order was only suspected and the chemical fertilizer is not a nuisance as defined by the *Act*.

The Appellant submitted that the cost of the work that the Order requires is estimated to be \$30,000.00.

The copy of the Order that Counsel had received was unsigned but the Appellant acknowledged receiving a signed copy in the mail.

The *Gas Plus* case relied on by Alberta Health Services to oppose the stay of the Order is distinguished because it dealt with a gas leak that went into neighbouring properties and in this situation it is a guy smoking in his own house.

The Appellant's counsel stated he wants the person who complained about the marijuana being grown in the house to be cross examined at the appeal hearing.

Alberta Health Services' Submissions

Alberta Health Services submitted that the Appellants did not meet the test for granting a stay set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and the Alberta Environmental Appeals Board in *Gas Plus Inc. (Re)*, [2011] A.E.A.B.D. No. 12.

Alberta Health Services submitted that the Appellant meets the first part of the test for granting a stay but that most of the Appellant's submissions did not address the

requirements for a stay application. The Respondent submitted that the issue of whether the activity was creating a nuisance is a matter for the appeal hearing and not relevant for the stay application.

The *Allard* case relates to medical marijuana and the issue was clearly distinct from and not relevant to the proceedings for a stay application of the Public Health Order. In that case the issue was very different, it was the right to possess marijuana. This Order is pursuant to the *Public Health Act* and its *Regulations* wherein regulated activities must meet public health standards. The public health regulations are the same whether the Appellant is growing marijuana or tomatoes. Growing and using marijuana by the Appellant is not affected by the Order, it just requires that he produce the marijuana in a safe manner and not cause a nuisance.

Alberta Health Services submitted there is no evidence of irreparable harm to the Appellant from now to the appeal hearing date which is the time frame that must be considered in the test.

Alberta Health Services advised that a request for an adjournment of the appeal hearing until after the *Allard* appeal is heard, will be opposed.

Reasons

The Chair or Vice-Chair 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 potential harms the Appellant may suffer, not being able to

grow marijuana, the cost of repairs and being deprived of medicine for pain and symptoms would not potentially begin until December 29, 2015. This is the earliest date that the Order requires action to be taken, the discontinuation of growing marijuana.

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.

Sections 5(4) and (9) of the *Public Health Act* state:

(4) Subject to subsections (5) and (6), the Board shall, if it is satisfied that the requirements of subsection (2) have been met, hear the appeal within 30 days after receiving the notice of appeal.

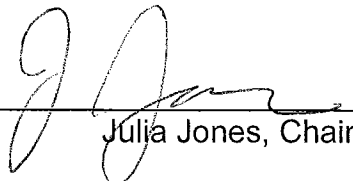
(9) Notwithstanding subsections (3) and (4), the Board may, if it considers it appropriate to do so, extend the time within which an appeal may be taken under subsection (3) or within which the Board must act under subsection (4).

At this time the Board has not set the hearing date and it is not certain whether there will be an application for an adjournment and if so, whether the Board will extend the time to hear the appeal beyond December 29, 2015. The Appellant has not shown that he will suffer irreparable harm if the appeal is heard and decided prior to December 29, 2015. The harm must occur from the time of the stay application to when the appeal hearing is completed and decided by the Board.

As the Appellant has not shown he will suffer irreparable harm if the stay is not granted at this time, a stay will not be granted but the Appellant will have leave to re-apply for a stay of the Order in the event the hearing date and decision of the Board will occur after December 29, 2015.

A stay suspends the enforcement of an order and many of the Appellant's submissions were with respect to the accuracy, jurisdiction, validity and fairness of the Order which ought to be presented at the appeal hearing where the Board may confirm, vary or reverse the Order.

For the above reasons, the Chair of the Public Health Appeal Board has not granted a stay of the Order but has granted leave for the Appellant to re-apply for a stay of the Order in the event the appeal is not heard and decided prior to December 29, 2015.

Per: 
Julia Jones, Chair

Date: October 21, 2015