

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 CHRISTOPHER KERR AND ROCKING MR LTD.
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 5 HINTON
DATED SEPTEMBER 15, 2016 ("Order")
STAY HEARING HELD OCTOBER 6, 2016

Appearances

Paula Hale, Legal Counsel for Rocking MR Ltd/Appellant/Applicant

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

Chair of Board's Decision

The Chair decided not to grant a stay of the Order dated September 15, 2016.

Introduction

The Order was issued pursuant to the *Public Health Act* and the *Food Regulation* for a business located in Rock Lake Provincial Park and known as Rocking MR Ltd (Rocky Mountain Escape) (the "Business"). The Business provided meals and accommodations in a mountain park setting. The Order directed the owners to close the food preparation and service portion of the Business until it obtained a food handling permit as it was a commercial food establishment.

Alberta Health Services also issued a written Boil Water Advisory order for the Business in September, 2016. A Notice of Appeal regarding this order was not received by the Board.

The Appellant received the Order on September 15, 2016 and the Notice of Appeal was received by the Board on September 23, 2016. The Board received correspondence dated September 30, 2016 from the Appellant's Counsel objecting to the appeal being heard more than 30 days after the filing of the Notice of Appeal. The appeal hearing date was not set at the time of the stay hearing but has since been set for November 3, 2016.

The stay hearing was held on October 6, 2016 by way of a telephone conference. On October 17, 2016 the Chair advised the parties, in writing, that a stay of the Order was not granted.

Issue

Whether a stay of the Executive Officer's Order dated September 15, 2016 ought to be granted.

Appellant's Submissions

Counsel for the Appellant provided written submissions, the Order, case law, letter from L. Rutter, PHAB stay decision 02/2015, Government of Alberta 2014 Small Business Report, Alberta Environment and Parks Business Plan 2016-2019, Government of Alberta Plan for Parks 2009-2019 and CBC News Article September 30, 2016.

Counsel submitted that food preparation was integral to the Business. As a result of the location and nature of the Business, it was not possible for guests to order a pizza or go out for a meal.

Counsel submitted there was a serious question to be tried as the Appellant contested that the Business was a food establishment and therefore no food handling permit was required. It was the Appellant's position that Alberta Health Services had determined the Business was not a food establishment 20 years ago when the Appellant started the Business. In addition, the underlying appeal would determine the viability of the Business and that was not frivolous or vexatious.

Regarding irreparable harm, Counsel submitted the Order required the Business to cease operations which had resulted in the Appellant losing his livelihood and revenue. The Order also resulted in reservation cancellations and a loss of reputation for the Appellant.

On the balance of convenience assessment, Counsel submitted there were inconveniences to both the Appellant and the public. The inconveniences to the Appellant were loss of revenue due to the closure of the Business and loss of reputation. The inconveniences to the public were:

- Loss of economic benefits for the Hinton area;
- Loss of sustainable economic development in Alberta; and
- Loss of access to wilderness areas by both customers and the public.

Counsel also submitted there was no public interest in keeping the business closed. There was no evidence that allowing a stay of the Order would threaten the integrity of the public health inspection system. There are numerous exemptions to the requirement of a food handling permit which allow the public to consume food not prepared by operations with food handling permits. Those included food sold at a farmer's market, a community organization function or a temporary food establishment

at a special event. Counsel submitted there were no incidents of the public being harmed in the last 20 years and no undue risk to the public if the stay was granted.

In response to Alberta Health Services position that the stay would only be in effect for a short period of time because Counsel had objected to the appeal being heard past the 30 days set out in the legislation, Counsel submitted that was not a procedurally fair argument. The stay hearing was not held until 13 days after the Notice of Appeal was filed which resulted in a shorter period of time until the appeal hearing.

Alberta Health Services' Submissions

Counsel for Alberta Health Services provided written submissions and materials that included the Appellant's lease, marketing materials from the Appellant's website, photographs taken by the Executive Officer, a Demand for Entry letter from Alberta Health Services to the Appellant and PHAB stay decisions 06 +07/2015 and 08/2016.

Counsel submitted that a stay of the Order would endorse the non-compliant practice of operating a commercial food operation without a food handling permit. This would put the health and safety of individuals at risk of harm. Counsel submitted the marketing material for the Business showed the focus is on food preparation. He stated the Appellant prepared and served high risk food to clients in a cook house. The Appellant used reusable kitchen items and cold running well water was supplied to the cookhouse by a garden hose. The *Food Regulation* clearly required the Appellant to obtain a food handling permit. The Appellant had refused to bring the Business into compliance with the established regulatory scheme.

Alberta Health Services issued a boil water Order to the Appellant verbally on September 10, 2016 and in writing on September 12, 2016.

Counsel submitted the Appellant had not met the first part of the test for a stay as set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. He submitted the only argument the Appellant submitted in the appeal was an alleged representation made 20 years ago by a local public health inspector that the Business was either in compliance with the regulatory scheme or there were no requirements at the time. He stated the applicable sections of the regulatory scheme are non-discretionary. Neither Alberta Health Services nor its employees were statutorily enabled to make a representation that a commercial food establishment did not have to comply with the regulatory scheme. A public body cannot be estopped from enforcing a non-discretionary regulatory scheme when it has a positive statutory duty to protect public health and safety.

Regarding whether the Appellant would suffer irreparable harm if the stay was not granted, Counsel submitted the Order required the Appellant to cease food services to its customers but other aspects of the eco-tourism operation could continue.

Counsel submitted the loss of revenue related to the issuance of the Order is not an appropriate consideration when assessing irreparable harm. The proper consideration

is the financial loss if the stay is denied. This is a brief period of time as the appeal hearing will be set within the 30 days as required in the legislation. The financial loss from any reservation cancellations that have already occurred cannot be remediated with a stay. In addition, when considering financial losses, the Business was unable to operate because of the boil water order and therefore the losses were not the result of the Order being appealed.

Counsel submitted that a loss of reputation would not be irreparable harm resulting from a stay not being granted, it would be caused by the Order being issued. They could not be remediated by a stay which only suspends the enforcement of the Order. Any stigma suffered by the Appellant as a result of the Order would be unaffected by a stay.

Regarding the balance of convenience, Counsel submitted the Appellant would not be inconvenienced if the stay was not granted. It would maintain the status quo as the Business has ceased operations. He stated potential customers of the Business should not be subjected to the risk of harm inherent in an unregulated and unpermitted commercial food establishment preparing, serving and storing high risk food. He stated food illnesses are often not reported and it is potential risk of harm that ought to be considered.

When considering the balance of inconveniences, Counsel submitted that by referencing all loss and potential loss that could be suffered by the Appellant, the Community of Hinton, the Province of Alberta and all visitors to wilderness areas around Hinton, the analysis was broader than what the test requires. The inconveniences to the parties if the stay was not granted is the test and not the inconveniences should the Appellant completely cease to operate its eco-tourism business.

If a stay is not granted the status quo of the Appellant would be maintained for a short period of time. The inconvenience to the Appellant and the public would be minimal and solely related to the inability to re-commence the commercial food establishment and the inability to generate the associated revenue until the appeal is heard and decided. The balance of convenience weighs heavily in favour of denying 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 disputes whether the Business is a food operation that requires a food handling permit and whether there was a previous exemption from the regulatory scheme that ought to be considered in determining whether a food handling permit is required at this time. The Appellant showed the appeal was 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 Appellant to be compensated for financial losses in the event the appeal is successful. Unlike private litigation between parties, there is no obvious route by which a business or person subject to an order may seek compensation from Alberta Health Services in the event an order is overturned on appeal. Absent bad faith or maliciousness, it is likely that no compensation would be recoverable.

For this reason, financial loss can, in appropriate circumstances, constitute irreparable harm. The period for calculating the financial loss is from when the stay application is heard until the Board hears and decides the appeal. In this situation, the loss of revenue would be for a short period of time as the appeal hearing is scheduled for November 3, 2016. Had the stay hearing been earlier, the period of time would have been a week to 10 days longer but would remain a short period of time. In addition, this period of time was reduced because the Appellant would not operate the Business while the boil water order was in effect. At the time of the stay hearing that order had not been rescinded. The Appellant would suffer from financial loss if the stay was not granted but, given that the period of time is unknown and may not exist due to the boil water order, this financial loss is not sufficient to meet the test for irreparable harm to the Appellant.

The other irreparable harm the Appellant would suffer if the stay were not granted is to its reputation. That potential harm would be caused by the Order and not by denying a stay. There is an exception; when reservations are turned down or cancelled as a result of the Order. Customers who may not be aware of the Order would learn about it when

the reservations were cancelled or turned down. This would not occur if the Order was stayed. Whether this harm would be irreparable is uncertain.

The Appellant did not show certain irreparable harm would result if the stay was not granted, however, if this is not correct and the harm could be considered irreparable harm sufficient to meet the test, the third part of the test is not tipped in favour of the Appellant.

The third part of the test requires an assessment of the inconveniences 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 for the Appellant would be loss of revenue until the Board hears and decides the appeal and loss of reputation. Other parties would also be inconvenienced as follows:

- Loss of economic benefits for the Hinton area;
- Loss of sustainable economic development in Alberta; and
- Loss of access to wilderness areas by both customers and the public.

However, the inconveniences for the Appellant and these other parties are measured and analyzed for the period of time the stay would be in effect and not for the period of time the Order is in effect. In this situation the inconveniences are for a short period of time and are minimal.

On balance, the inconveniences are tipped in favour of the Alberta Health Services because the risk to customers of the Business could potentially be significant. A food handling permit ensures that certain knowledge and procedures are in place which increases the probability that the food being served is safe for the public.

For the above reasons, the Chair of the Public Health Appeal Board has decided not to grant a stay of the Order dated September 15, 2016.

Per: 
Julia Jones, Chair

Date: October 20, 2016