

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 ENCORE NIGHTCLUB & CONCERT HALL  
OF THE EXECUTIVE OFFICER'S ORDERS  
ISSUED BY ALBERTA HEALTH SERVICES  
ZONE 4 EDMONTON  
ON MARCH 2, 2015  
STAY HEARING HELD MARCH 31, 2015

**Appearances**

Mr. Dan Eddie, Appellant

Ms. Jill Wilke, Legal Counsel, Alberta Health Services/Respondent

**Chair of Board's Decision**

After careful consideration of all the evidence presented at the stay hearing, the Chair has decided to grant a partial stay of the orders. The stay will apply to the order to dismantle and remove the dishwashers on the condition they are not used while the stay is in effect. The order to discontinue the use of reusable glasses and only use disposable cups remains in effect.

**Introduction**

Alberta Health Services ordered the Appellant to dismantle and remove the dishwashers located on the Encore Nightclub and Concert Hall premises and to discontinue the use of reusable glasses in correspondence dated March 2, 2015.

Alberta Health Services stated in the orders that due to past issues with the glass washers and the inability of staff to be able to correct the problem, the facility was ordered to discontinue the use of reusable glasses. The Appellant's permit would also be changed to permanently restrict service to non-reusable glasses.

The Appellant applied for a stay of the order to dismantle and remove the dishwashers located on the Encore premises and for a stay of the order directing Encore to discontinue the use of reusable glasses.

Alberta Health Services agreed to a stay of the order to dismantle and remove the dishwashers if the Appellant did not use the dishwashers in the interim and contested the application for a stay of the order to discontinue the use of reusable glasses.

An appeal hearing date was set for April 15, 2015.

The stay hearing was held on March 31, 2015 by way of a telephone conference and the Chair's decision was provided to the parties on April 1, 2015.

### **Issue**

Whether a stay of the Executive Officer's orders dated March 2, 2015 ought to be granted.

### **Appellant's Submissions**

The Appellant was represented by the Business Manager at Encore Nightclub and Concert Hall. He submitted that their business model requires the use of washable cups because disposable cups are expensive and add the cost of \$1100 per weekend. To switch to disposable cups so quickly would have an effect on the business's bottom line and the company has been in a financial break even position for the past 2 years.

In addition, there are instruments that need to be cleaned for the business other than the drinking cups.

The Appellant submitted that the use of disposable cups adds to waste and garbage which negatively impacts the environment.

The Appellant submitted that he understood why the Executive Officer issued the orders but they have taken steps to address the contraventions. They changed the manager who was in charge of the dish washing and noted that when the inspection occurred a new person had been in charge and he had replaced the chemicals in the dish washers in the wrong order. They have now set up new procedures and have a bullet proof system in place. The situation that resulted in the orders being issued was embarrassing given that they had spent money on the dishwashers and then had them fail the inspection test.

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

Alberta Health Services submitted that the test for granting a stay was set out in the Gas Plus Inc. decision by the Alberta Environmental Appeals Board [2011] A.E.A.B.D. No. 12. In that case the Board relied on the three part test set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 but added a fourth part to the test where the public interest is considered.

With respect to the first part of the test: is there is a serious question to be tried, Alberta Health Services submitted that the Appellant did not meet the criteria. Because the Appellant understood why the Executive Officer issued the orders and because Alberta Health Services had good reason to make the orders that it did, there was no serious question to be tried at the appeal.

With respect to the second part of the test: would the Appellant suffer irreparable harm if the stay is not granted, Alberta Health Services submitted that there was no irreparable harm, only financial hardship which does not constitute irreparable harm.

The third part of the test is the balance of inconvenience. Alberta Health Services submitted that the harm to the public is a separate test as set out in *Gas Plus Inc.* and the public's interest was the crux of the test. The *Public Health Act* is legislation wherein there is a duty to protect the public and the Act is paramount legislation. The public interest balances the inconveniences in favour of Alberta Health Services and not granting a stay of the order to use disposable cups only.

### **Reasons**

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.

The test for a stay is set out in the Supreme Court of Canada decision in *RJR MacDonald*. It is a 3 part test that can be summarized as follows:

1. Is there is a serious question to be tried.
2. Would the Appellant suffer irreparable harm if the stay is not granted.
3. Assess the balance of inconvenience to the Appellant and Respondent – the inconvenience to the Respondent if the stay is granted and the inconvenience to the appellant if the stay is not 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 is a low threshold and can be met if the appeal is not frivolous or vexatious. Although the Appellant stated that he understood why the orders were issued, the appeal is not frivolous or vexatious. The appellant has met the criteria for the first part of the test.

The second part of the test is whether the Appellant will suffer irreparable harm if the stay is not granted. The Appellant submitted that the harm suffered if the stay is not granted would be an additional cost of approximately \$1100 per weekend. This may add up to a significant cost in a year but the stay would be in effect for only a brief period of time: until the Board's decision is issued after the appeal hearing set for April 15, 2015.

A financial loss is not generally considered to be irreparable harm if the loss can be addressed by damages at the conclusion of an appeal/claim. That is not possible in an appeal before the Public Health Appeal Board as there is no statutory provision for awarding damages for financial loss in the event an appeal is successful.

As the nature of the harm is to be considered rather than the quantum in this part of the test, the third part of the test will be considered in this stay application.

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

The public interest is of the utmost importance in assessing the Respondent's inconveniences as the Order was issued pursuant to the *Public Health Act* which protects the public interest. But the balance of inconveniences assessment is not tipped permanently in favour of the Respondent merely because the order being appealed was issued pursuant to the *Public Health Act*. If that was the case, the *Public Health Act* would not empower the Chair or Vice Chair of the Board to stay an Order or Decision of an Executive Officer pending the appeal.

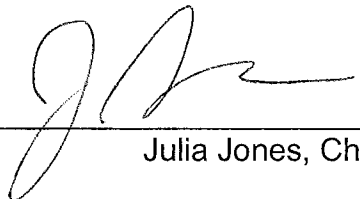
In this instance the inconvenience of not granting the stay for the Appellant is the financial loss in the sum of \$1100 per week. There is also the public's interest to consider because of the additional waste and garbage that the use of disposable cups would cause. Both of these inconveniences are minimal.

The inconvenience for the Respondent is the public's interest as the *Public Health Act* protects public interests and the order to use disposable cups was issued to ensure the public's safety.

The balance of inconvenience weighs in favour of not granting the stay with respect to the order to use only disposable cups because the public's interest is paramount in these circumstances.

The order to dismantle and remove the dishwashers is stayed on the condition they are not used while the stay is in effect as this was agreed to by the Respondent.

For the above reasons, the Chair of the Public Health Appeal Board has granted a partial stay of the Orders. The stay will apply to the order to dismantle and remove the dishwashers on the condition they are not used while the stay is in effect. The order to discontinue the use of reusable glasses remains in effect.

Per:   
Julia Jones, Chair

Date: April 8, 2015