Appeal No.: 02/2015

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 WHITE HALL DAYCARE LTD.
OF THE EXECUTIVE OFFICER'S ORDER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 4 EDMONTON
DATED MARCH 16, 2015
STAY HEARING HELD MARCH 27, 2015

Appearances

Mr. Kumar, Owner/Appellant
Dr. Talibi, Owner/Appellant

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

Chair of Board's Decision

The Chair has decided to grant a partial stay of the Order. The sections of the Order directing the social care facility to be closed effective March 31, 2015 are subject to the stay: last full paragraph on page 2 and #2 on page 3 of the Order. All other portions of the Order shall remain in effect including closure of the gym.

Introduction

The Executive Officer's Order was verbally issued to the Appellant on March 13, 2015 and the written Order was dated March 16, 2015. The Order was pursuant to the *Public Health Act* (the "Act") and its Regulations: the Institutions Regulation, Alberta Regulation 143/1981 and the Food Regulation, Alberta Regulation 31/2006. The Order set out the contraventions of the Act and Regulations as they pertained to the condition of the While Hall Daycare Ltd. facility. There were 17 contraventions and the Order directed the Appellant to immediately cease using the gym area for all activities and to undertake the completion of specified work on the premises. In addition, the Order directed the daycare be closed by March 31, 2015.

An appeal hearing date was set for April 16, 2015.

The stay hearing was held on March 27, 2015 by way of a telephone conference and the Chair's decision was provided to the parties on March 30, 2015.

Timing of the Stay Application
There were no objections to the short notice to both parties with respect to the Stay Hearing.

Issue
Whether a stay of the Executive Officer's Order dated March 16, 2015 ought to be granted.

Appellant's Submissions
The Appellant submitted that most of the work to be undertaken by the Appellant as set out in the Order had already been completed with the exception of the bathroom ventilation and the concrete walkway. The concrete walkway required the cooperation of the land lord and better weather and the bathroom ventilation was currently being addressed. The gym had been closed. The Appellant submitted they were making their best efforts to address the contraventions set out in the Order.

The Appellant submitted that the business had provided child day care services for 35 years and the current owner had provided the services continuously for the past 20 years. The Appellant was concerned about the harm that would result from a closure on March 31, 2015 which included the loss of employment for several employees, panic in the community, emotional harm to the children and the uncertainty for the families that use the services.

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. 311but added a fourth part to the test where the public interest is considered.

Alberta Health Services submitted that the because the Order was issued pursuant to the *Public Health Act*, legislation that is paramount to other enactments that it conflicts with or is inconsistent with other than the Alberta Bill of Rights, and because the *Public Health Act* charges Alberta Health Services with the duty of protecting the public interest, the public interests must tip the balance in favour of the stay being denied. In addition, to meet the second part of the test the Appellant must show irreparable harm to himself and not harm to others and financial loss does not meet the test for irreparable harm.

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 was 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. A cursory review of the appeal materials and the evidence does not support a finding that the appeal is frivolous or vexatious. The Respondent made no submissions to support a finding that the appeal of the order was frivolous or vexatious. The Appellant has met 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 he would lose his business as the Order directed it to be closed, he would lose his business reputation as a result of the closure and he would suffer a financial loss. The Supreme Court of Canada in RJR MacDonald states:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when

a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin,* [1985] 3 W.W.R. 577 (B.C.C.A.). (emphasis added)

And the Court continues as follows:

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.

(emphasis added)

The Appellant meets the test for showing irreparable harm because the Order being appealed directs the closure of his business and this will also result in the loss of business reputation. Both of these harms have been identified by the Supreme Court of Canada as being irreparable harm. In addition, like Charter cases where there are limited provisions for awarding damages in the event the appellant is successful in their action, there are no provisions in the *Public Health Act* for the Public Health Appeal

Board to award damages to the Appellant for financial losses in the event he is successful in his appeal of the Closure Order. Thus the financial losses that would be suffered by the Appellant as a result of closing his business also constitute irreparable harm.

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 Supreme court of Canada in RJR MacDonald states:

> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit. (Emphasis added.)

And the Court continues as follows:

> The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a `special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the

relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups. (emphasis added)

And:

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

And the Decision continues to state:

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. (emphasis added)

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

And

2. The Status Quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

In the third part of the test for granting a stay there is an assessment of the inconveniences to each of the parties. This also includes inconveniences and harm to other parties including the public. Both parties may address the issue of harm to the public or an identifiable group of the public. The public interest is of utmost importance in assessing the Respondent's inconveniences as the Order was 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.

The inconveniences for the Appellant are as follows:

1. loss of business due to closure;
2. loss of business reputation due to closure; and
3. financial loss that cannot be adequately compensated with damages if the Appellant is successful in his appeal of the closure order.

The inconveniences for identifiable groups of the public, namely the users of the daycare service and the daycare employees, are as follows:

1. having to find alternate day care facilities in a short period of time;
2. emotional distress that the uncertainty of finding alternate care creates;
3. emotional distress for the children having to change care facilities; and
4. loss of employment.

The inconveniences for the Respondent are as follows:

1. The public interest as the *Public Health Act* protects public interests and the closure order was issued pursuant to the *Public Health Act*; and

2. The Appellants were not taking the contraventions of the *Public Health Act* seriously.

The Order was dated March 16, 2015 and the day care facility was directed to be closed on March 31, 2015. The contraventions of the Public Health Act did not result in an immediate closure of the facility indicating there were no imminent dangers to public health. The hearing of the appeal of the order was set for April 16, 2015 therefore the stay would be in effect for a brief period of time: 16 days plus the number days until the Public Health Board issued its decision in the appeal. This weighs in favour of maintaining the status quo until the appeal is heard. Also, the Appellant submitted that most of the work required to be undertaken in the Order had been completed and the gym closed which also weighs in favour of maintaining the status quo until the appeal is heard.

The Respondent submitted that there is a fourth part of the test as set out in the Gas Plus Inc. (Re) decision of the Alberta Environmental Appeals Board (2011) A.E.A.B.D. No.12, that addresses the public interests and that is the test that ought to be applied in a stay hearing. Whether the public interest is considered in a fourth part of the test or considered in the third part of the test as set out by the Supreme Court of Canada in RJR MacDonald, the outcome of the analysis is not changed. The fourth part of the test does not preclude the analysis from finding that the Appellant's inconveniences can, in some circumstances, outweigh the inconveniences of the Respondent even if it is charged with protecting public health. Each application for a stay must be carefully considered and the inconveniences weighed and balanced once the first two parts of the test have been met.

In this instance the work and repairs requiring completion in the Order remain in effect which will protect public health and it is the closure order that is stayed for a brief period of time until the appeal of the Order can be heard.

For the above reasons, the Chair of the Public Health Appeal Board has granted a partial stay of the Order: the stay applies to the sections of the Order that direct the social care facility to be closed effective March 31, 2015.

Per: _____
Julia Jones, Chair

Date: April 2, 2015