

Community Care and Assisted Living Appeal Board
Community Care and Assisted Living Act,
SBC 2002, c. 75

Appellant: WM, Licensee (operating AM, an adult care facility)

Respondent: Beverley Bateman, Senior Licensing Officer,
Community Care Facilities Licensing Program,
Interior Health Authority

Panel: Susan E. Ross, Chair
Pinder K. Cheema Q.C., Member
Ron McNaughton, Member

Decision

Introduction

[1] The issue for determination is whether this appeal respecting the licence to operate an adult care facility concerns a matter that is subject to appeal. If there is no right of appeal, then the appeal cannot proceed. If there is a right of appeal, then the Board can hear and decide the appeal on its merits at a later date.

[2] The appeal was initiated with the former board, the Community Care Facility Appeal Board, under the Community Care Facility Act, RSBC 1996, c. 60 (CCF Act). The former board became this Board, the Community Care and Assisted Living Appeal Board, when the CCF Act was repealed and replaced by the Community Care and Assisted Living Act (CCAL Act) on May 14, 2004.

Parties' positions

[3] The appellant, WM, is the manager of a licensed adult care facility, AM. WM also controls the company that operates the facility, FE Ltd. The appellant says that in late 2003, and re-confirmed in early 2004, the Interior Health Authority (IHA) withdrew approval of the appellant as manager of AM and required a new manager to be put in place. The appellant claims this action attached a term or condition on the licence to operate the facility and was therefore subject to appeal under s. 15(2)(b)(ii) of the CCF Act.

[4] The IHA says the licence to operate AM was not suspended, cancelled or made subject to a term or condition. WM was already the approved manager of the facility when FE Ltd. became operator in 2002, but the IHA says s. 4 of the CCF Act nonetheless required the appointment of an approved manager and there is no right of appeal from the recent refusal to approve WM in that position.

Facts

[5] The licensing record provided by the IHA indicates that the appellant acquired AM in 1999 as an existing five bed specialized adult residential care home for people with dementia related illness.

[6] WM was assessed for suitability as manager and was approved for interim permits issued for April 6 to July 31, 1999 and August 1, 1999 to April 5, 2000, and for “full” licenses issued on April 5, 2000 and October 10, 2001. Each interim permit and licence was issued to WM, by name, to operate AM and listed WM as its manager. No expiry dates were stipulated on either of the full licenses. The second full licence appears to have been issued only to reflect a change of WM’s residential address. Each cover letter concerning the interim permits and full licenses, included this paragraph:

Please be aware it is required that this office be notified of any planned changes such as facility name change, new address, or a new Manager (Person-in-Charge) whose qualifications would then need to be assessed. In the event of such changes, an amended application form must be submitted. Please contact your licensing office for the necessary forms.

[7] In June 2002, the appellant began operating AM through FE Ltd., a company of which the appellant was director, president and secretary. A June 24, 2002 letter to WM’s clients and associates reads:

I am happy to inform you that [AM] is now operating as a division of [FE Ltd.]

Please update your information to include this change.

[8] WM provided the above letter to the IHA, or its predecessor, on July 10, 2002, with this note:

For your information, I have started a Home Support Business in the District of Lake Country – [FHS], which also operates as a division of [FE Ltd.]

[9] On October 21, 2003, two IHA licensing officers, Beverley Bateman and Bettina Garry, issued an investigation report respecting AM, which described WM as both the licensee and manager of the facility. The investigation report was framed around 10 action points. For Action 10, it quoted s. 4(1)(a) of the CCF Act, then noted that the appellant “has been the manager of this facility since 1999” and “[i]n that time [WM] has been twice reassessed due to three investigations”. It listed issues relating to the appellant’s management of AM, then concluded:

This office does not have the confidence that this manager will remain in compliance with the Community Care Facilities Act and Adult Care Regulations and are of the opinion [WM] will not

continue to operate the home in a manner that will maintain the spirit, dignity and individuality of the residents. We are therefore withdrawing our approval of [WM] as manager of this licensed residential care home.

Action 10: The licensee must have a new manager in place within 21 days of receipt of this letter.

[10] On November 10, 2003, WB provided a 10-page response to the investigation report. For Action 10, WM requested reconsideration of “your decision to withdraw your approval of me, [WM], as manager of [AM]”.

[11] On November 27, 2003, Ms. Bateman replied:

Action 10: Withdrawal of our approval of you as the manager will not be reconsidered. Please submit the information for the proposed manager of [AM] within two weeks of receipt of this letter.

[12] On December 12, 2003, WM faxed a letter and enclosures to the Community Care Facility Appeal Board in order to appeal the withdrawal of approval of WM as manager of AM. The letter concluded:

As part of Community Care programs reduction in the number of care beds, [AM's] funding contract was not going to be renewed as of March 31, 2004. Because of Licensing's position on the manager and my inability to finance such a position, my contract will be ending December 31, 2003. A loss of 3 months of income is devastating.

[13] On January 9, 2004, Ms. Bateman wrote WM to say she understood AM had no residents at the time and this meant the facility had ceased to operate, which required WM to return (surrender) the licence under s. 11(3)(b) of the CCF Act. The letter concluded by saying WM could care for two clients without a licence and had to contact the licensing office if WM wished to care for more.

[14] On January 19, 2004, WM responded:

Please be advised that [AM] continues to operate as a Specialized Adult Residential Care Home. We are at less than full capacity.

We await your decision regarding the license related to the investigation (report dated Oct. 21, 2003).

[15] On March 18, 2004, WM wrote again:

As you are aware, I still await a decision on the investigation. When we talked last, I informed you that I wouldn't be advertising [AM] as a licensed facility until I received a decision as I do not think it would be fair to potential clients to do so.

The length of time for receiving a decision is unreasonable. This is resulting in a large loss in revenue for [AM] which is unacceptable.

When I talked with L. Balson at the Licensing Appeals Board in January, 2004, she said that she'd be talking with B. Bateman. Ms. Bateman told her that a written decision would be sent within two weeks.

I await your immediate reply on this matter.

[16] On March 21, 2004, Ms. Bateman responded:

I am responding to your third fax or letter since the completion of the investigation of physical abuse at your facility. This one dated March 18th, 2004.

The abuse investigation you referred to was completed and decisions around the outcome and your facility were made at that time.

Please refer to my responses of November 27th and January 9th, 2004.

You may care for two residents without a licence. Should you choose to provide care to three or more residents at [AM], you will need a manager, approved by Licensing, in place.

Also, I have not discussed your facility with Lauri Balson at the Appeals Board, nor did I state that she would receive a written decision from me.

[17] On April 13, 2004, WM filed a notice of appeal from "the decision made by Beverley Bateman, Chief Licensing Officer of the Interior Health Authority dated March 21st, 2004". The following reason was given for the appeal:

I appeal because the Licensing Officer has attached the requirement that I hire a new manager for [AM]. I believe that I have sufficient documentation to show that I have in no way failed in my duties and responsibilities as manager and this requirement is unnecessary, unfair and financially impossible for this home.

Statutory provisions

[18] The licensing and appeal framework is found in the following provisions of the CCF Act and the *Adult Care Regulations*, B.C. Reg. 536/80:¹

CCF Act

3 A person must not

- (a) operate, advertise or otherwise hold himself or herself out as operating, a community care facility,
- (b) provide, or hold himself or herself out as providing, any of the services provided in a community care facility, or

¹ References to the "director" are to the director of licensing designated under s. 2 of the CCF Act. Under s. 2(2) of the CCF Act, the director delegated authority to suspend, cancel or attach a term or condition to a licence to the IHA medical health officer.

- (c) accommodate, or hold himself or herself out as accommodating, any person who, in the opinion of a medical health officer, requires any of the services provided in a community care facility,

unless the person holds a valid and subsisting licence or interim permit issued under this Act that authorizes the person to provide those services offered at the facility.

4(1) Subject to this Act and the regulations, a medical health officer may issue to an applicant a licence to operate a community care facility if the medical health officer is of the opinion that

- (a) the applicant,
 - (i) if a person other than a corporation, is of good character and has the training, experience and other qualifications required under the regulations, and the personality, ability and temperament necessary to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of the person being cared for, or
 - (ii) if a corporation,
 - (A) has a director permanently resident in British Columbia,
 - (B) has appointed as manager of the community care facility a person who meets the requirements under subparagraph (i), and
 - (C) has delegated to that manager full authority to operate the community care facility in accordance with the requirements of this Act and the regulations,
- (b) the building or structure to be used by the community care facility will be used
 - (i) to provide day care for no more than 8 persons, or
 - (ii) as a residence for no more than 10 persons, not more than 6 of whom are persons in care, who can either be safely removed from the building or structure by the staff or can make their way from the building or structure unaided in the event of fire, and that the building or structure
 - (iii) complies with this Act and the regulations, and
 - (iv) complies with all Provincial and municipal enactments relating to fire and health that are applicable to a dwelling house in use as a private family home, and
- (c) the building or structure to be used by the community care facility, if it is not a dwelling house under paragraph (b), complies with this Act and the regulations and all applicable Provincial and municipal enactments relating to fire and health.

(2) If a medical health officer is of the opinion that an applicant has complied with all of the requirements of subsection (1) that may significantly affect health or safety and is in the process of complying with the other requirements of subsection (1), the medical health officer may issue to the applicant, on terms and conditions the medical health officer considers necessary or appropriate, one or more interim permits to operate a community care facility for a period not exceeding a total of one year.

(3) A medical health officer may specify on a licence or interim permit the type of service that the person may provide in the community care facility.

6 If the director determines following a hearing that a licensee or permit holder has contravened an enactment of British Columbia or of Canada or a term or condition of the licence or interim

permit, the director may attach terms or conditions to, suspend or cancel the licence or interim permit.

7(1) The director may, without notice or a hearing, attach terms or conditions to or suspend a licence or interim permit until the commencement or completion of a hearing under section 6 if the director has reasonable grounds to believe that the health or safety of persons cared for at the community care facility is at risk if the terms or conditions are not attached or the suspension is not imposed.

(2) If the director has acted under subsection (1), the director must commence a hearing as soon as practicable if a hearing is not already in progress.

8 A licensee or interim permit holder must do all of the following:

- (a) only employ at a community care facility persons of good character who meet the standards for employees specified in the regulations;
- (b) operate the community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for;
- (c) operate the community care facility in a manner that will promote the health and safety of persons in care.

11(1) A person who has been issued a licence or an interim permit under this Act must display the licence or interim permit in a conspicuous place in the community care facility.

(2) Subsection (1) does not apply if the community care facility is a dwelling house under section 4(1)(b).

(3) If a person who has been issued a licence or interim permit under this Act ceases to operate the community care facility for which it is issued

- (a) the licence or interim permit expires, and
- (b) the person must surrender the licence or interim permit to the director.

15(1) The Community Care Facility Appeal Board is continued consisting of the members the Lieutenant Governor in Council appoints.

(2) An applicant for a licence, interim permit or certificate or a licensee, a permittee or a certificate holder may appeal to the board under this section if

- (a) the minister has appointed an administrator under section 10,
- (b) the director has
 - (i) refused to issue a certificate under section 9(1), or
 - (ii) attached terms or conditions to, suspended or cancelled a licence or an interim permit under section 6 or 7 or a certificate under section 9(2),
- (c) a medical health officer has refused to issue a licence or interim permit under section 4, or
- (d) a panel has refused to grant an exemption under section 5.

Adult Care Regulations

3(1) An application for a licence to operate a community care facility under this regulation must be submitted in the form specified by the director.

(2) A licensee must notify the medical health officer within 30 days of any change in the information recorded on the form referred to in subsection (1).

6(1) Every community care facility must have a manager, by whatever title known, who,

- (a) if the licensee is a corporation, is an individual designated by the licensee to be responsible for the day to day operations of the facility, or
- (b) if the licensee is not a corporation, is
 - (i) the licensee, or
 - (ii) an individual designated by the licensee to be responsible for the day to day operations of the facility.

14(1) No licensee shall suspend operation of a facility whether temporarily or permanently unless he has given 12 months written notice to the medical health officer.

(2) No licensee shall sell, lease or otherwise transfer control of a facility unless he has

- (a) given 120 days written notice to the medical health officer, and
- (b) satisfied the medical health officer that the intended purchaser, lessee or transferee
 - (i) will continue the operation of the facility for at least 12 months from the date of sale, lease or transfer, and
 - (ii) has applied to be and is qualified to be a licensee for the facility.

(3) Where the medical health officer is satisfied under subsection (2)(b) it may waive the notice required under subsection (2)(a).

Analysis

[19] WM was assessed and approved as manager of AM and was issued interim permits and licenses to operate it as an adult care facility. The latest full licence was issued on October 10, 2001 and had no expiry date. It was issued to WM as licensee and also listed WM as manager.

[20] On July 19, 2002, WM informed the IHA that AM was now being operated by FE Ltd., a company controlled by WM. The *Adult Care Regulations* required WM to give notice of any change to information in the licence application and any transfer of control of the licensed facility. The IHA's stated practice was to require both notification of changes such as facility name or address, or a new manager whose qualifications would have to be assessed, and the submission of an amended licence application form. In this instance, WM notified the IHA of the involvement of FE Ltd. and continued as manager of the facility. However, the IHA, through administrative inadvertence, did not issue a physically amended licence, and an amended licence application form does not appear to have been submitted.

[21] On October 21, 2003, following an investigation, the licensing officers withdrew approval of WM as manager of AM and gave 21 days for a new manager to be put in place. On November 27, 2003, Ms. Bateman declined to reconsider the withdrawal of approval and, on March 21, 2004, she reiterated the withdrawal of approval and the refusal to reconsider that decision.

[22] A facility with less than three residents in care does not require a licence under the CCF Act because it is not a “community care facility” as defined in s. 1 of the CCF Act. Ms. Bateman informed WM that two residents could be cared for at AM, which does not require a licence under the CCF Act, but that if WM wished to care for three or more residents, then a new approved manager would have to be put in place.

[23] WM was alive to the implications of the withdrawal of approval of WM as manager. AM could only continue to be operated as a licensed adult care facility if:

- a new manager who was acceptable to the IHA was put in place,
- the IHA reconsidered and reversed the withdrawal of approval of WM as manager, or
- the withdrawal of approval of WM as manager was successfully appealed.

[24] WM did not regard getting a new manager to be an economically viable option and also contested the finding that WM was not a capable manager. The appellant asked the IHA to reconsider the withdrawal of approval then, on December 12, 2003 (and again on April 13, 2004), sought to appeal the matter.

[25] On January 9, 2004, Ms. Bateman informed WM that AM had ceased to operate because the IHA understood it had no residents at the time and s. 11(3)(b) of the CCF Act therefore required the surrender of the licence. WM’s December 12, 2003 appeal request had pre-dated any suggestion that AM ceased to operate in 2004, and, in any event, the IHA’s April 26, 2004 submission to this Board maintained that the licence to operate AM continues to exist:

At this time the licence has not been cancelled. There is no refusal to issue a licence. There is an existing licence in place. No terms and conditions have been attached to this licence. A recommendation to the Medical Health Officer to cancel the licence has not been made and there has not been a hearing regarding the status of this licence to attach terms and conditions, suspend or cancel.

Therefore, this is a preliminary application and I am asking that the Appeal Board either summarily dismiss the appeal, or alternatively, advise [WM] that the appeal will not be proceeding because the Appeal Board lacks jurisdiction and authority to hear this appeal.

[26] The IHA’s May 4, 2004 letter enclosing the licensing record described the withdrawal of approval of WM as manager as an “investigation decision”. Its May 5, 2004 reply submission then introduced and attached significance to the 2002 change from AM being operated by WM to being operated by WM’s company, FE Ltd.:

Community Care Facility Act Section 4(1)(a)(ii)(B) requires a manager be appointed whenever a Community Care Facility is being operated by a corporation. This is a statutory requirement. It is not a term or condition.

...

It is only through administrative advertence that the physical licence for [AM] has not been amended to reflect the operation of [AM] by [FE Ltd.] as the licensee when the change was received in June 2002.

Accordingly, Licensing submits that there has been no attachment of a term or condition to the licence. Rather the appointment of an approved manager is a requirement of Section 4 of the *Community Care Facility Act*.

As set out in my letter of April 26, 2004, the preliminary application by Licensing to have the Appeal dismissed ought to be granted as the Board does not have jurisdiction under Section 15(2)(b)(ii) or (c) to hear an Appeal on the issue of the refusal to approve a manager required to be appointed under Section 4 of the Act.

[27] The issue is whether the withdrawal of approval of WM as the manager of AM was appealable under s. 15(2)(c) of the Act. WM, or FE Ltd., is a licensee but did withdrawal of approval of WM as manager attach a term or condition to, or suspend or cancel, the licence to operate AM?

[28] The scheme of the CCF Act and the *Adult Care Regulations* prohibits the operation of a community care facility, as defined in s. 1 of the CCF Act, without an interim permit or licence. One statutory criterion for granting or refusing to issue an interim permit or licence is the individual suitability of the applicant or, the intended manager of the facility if the applicant is a corporation. The refusal to issue an interim permit or licence because of the individual unsuitability of the applicant or the intended manager under s. 4 of the CCF Act is appealable under s. 15(2)(c).

[29] A licensee cannot transfer control of a licensed facility unless the transferee applies and is qualified to be a licensee for the facility. The refusal of an application by an intended transferee because of individual unsuitability of the intended transferee, or the intended manager if the intended transferee is a corporation, is also appealable under s. 15(2)(c).

[30] The imposition of a term or condition on, or the suspension or cancellation of, an interim permit or licence on the ground that the licensee, or the manager if the licensee is a corporation, is not a suitable individual is appealable under s. 15(2)(b) of the CCF Act.

[31] In this case, WM transferred control of AM to FE Ltd. in 2002. WM notified the IHA of the change but no amended or new licence application was submitted. The licence remained in the name of WM and continued to list WM as manager. The IHA acknowledges that it was only through administrative inadvertence that a physical licence was not issued changing the name of the licensee from WM to FE Ltd.

[32] Following an investigation in 2003, the IHA licensing officers decided that WM was not, or more accurately was no longer, a suitable manager of AM. Ms. Bateman informed WM that a new approved manager had to be in place at the facility within 21 days. Ms. Bateman also said that WM could continue to care for up to two residents (the level of operation that does not require licensing under the CCF Act), but a new approved manager was necessary to operate AM as a licensed community care facility.

[33] We cannot accept the IHA's attribution of the recent withdrawal of approval of WM as the manager of AM back to the 2002 operator changeover from WM to FE Ltd.

[34] Firstly, the 2003 investigation report makes plain that the withdrawal of approval of WM as manager was rooted in the findings of that investigation, not in the changeover to FE Ltd. back in 2002.

[35] Secondly, when the IHA was notified in 2002 of the operator changeover from WM to FE Ltd., it acquiesced in that change and WM's suitability as manager did not go into suspense because of the IHA's administrative oversight of not issuing a physical licence reflecting the change.

[36] Thirdly, if an amended licence application had been submitted, at the instance of WM or at the insistence of the IHA, and a licence refused on the ground that WM was not a suitable manager, this would have been appealable under s. 15(2)(c) of the CCF Act as the refusal to issue a licence under s. 4 of the CCF Act because of the individual unsuitability of the intended manager.

[37] In our view it matters little whether the actions of the IHA that give substance to this appeal are conceptualized as a term or condition of the licence (the facility can operate as a licensed community care facility if WM is replaced by a new approved manager), as a licence suspension (the facility cannot operate as a licensed community care facility because its manager is no longer suitable), or as a licence suspension on terms (the facility cannot operate as a licensed community care facility until WM is replaced by a new approved manager).

[38] What does matter is that the IHA decided WM was not suitable under s. 4 of the CCF Act and informed WM that, until a suitable manager was installed, AM could no longer be operated as a licensed community care facility. The decision, whether or not it is called an "investigation decision" and whether or not it was reached after a hearing under s. 6, withdrew authority to operate AM as a community care facility with WM as manager – the existing licence – and imposed a requirement for a new approved manager.

[39] The refusal of a licence, the attachment of a term or condition to a licence, or the temporary or permanent removal of a licence can be appealed under s. 15(2) of the CCF Act. It puts form over substance to say that IHA action respecting a licence is not appealable because it simply withdraws approval that is statutorily required to qualify for or keep the licence. Carrying that reasoning to its logical conclusion, most if not every decision against a licence (attachment of a term or condition, suspension or cancellation) could be styled as withdrawal of approval respecting a licensing requirement. The rights and privileges conferred by the licence would be

removed, without a right to be heard under s. 6 or a right of appeal under s. 15. In our view, that is not the intention of this statutory scheme.

Conclusion

[40] We conclude that this appeal respecting the licence to operate AM concerns a matter that is subject to appeal under s. 15(2) of the CCF Act, now s. 29(2) of the CCAL Act. The Board Registrar will contact the parties to schedule submissions and a hearing of the merits of the appeal.

[41] We thank the parties for their submissions to date and remind them that this decision is limited to whether this appeal concerns an appealable matter. It is not a determination or reflection on the merits of the appeal.

June 18, 2004

Susan E. Ross, Chair

Pinder K. Cheema Q.C., Member

Ron McNaughton, Member