COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANT: SBR (Operator of a Licensed Child-Care Facility)

RESPONDENT: Deborah Bockner, Senior Licensing Officer,
Interior Health Authority

PANEL: Susan E. Ross, Chair
Joan Gignac, Member
Amy Collum, Member

Preliminary Decision

I. Introduction

[1] This appeal concerns the licence for a child-care facility. This preliminary decision concerns two issues:

1. whether the appeal was brought outside the 30-day time limit to appeal in section 29(2) of the *Community Care and Assisted Living Act* (the Act); and

2. whether the grounds of appeal in the notice of appeal dated January 3, 2006, are matters that are subject to appeal to the Community Care and Assisted Living Appeal Board (the Board) under section 29(2) of the Act.

[2] If the appeal was not brought in time, we can decide to rectify the situation by allowing an extension of time.

[3] If none of the grounds of appeal are appealable matters, then the appeal cannot proceed. If there is a right of appeal on any of the grounds of appeal raised, then the Board can hear and decide its merits at a later date.

[4] This decision is made on the basis of the appellant's notice and grounds of appeal documentation and the written submissions, including documents where included, of both parties on the issues identified above.

II. Facts

[5] Following is the factual chronology that is relevant for this decision:

- In February 2005, the respondent ("Licensing") received complaints regarding the appellant's licensed child-care facility and commenced an investigation, during which additional alleged contraventions were identified.

- Between June 27, 2005, and the fall of 2005, the appellant appears to have made a number of applications for a new facility licence or for a change in address, capacity or manager. Licensing viewed the application process and the suitability of the manager to be tied to the outcome of the investigation started in February 2005 and for this reason determined that no direction could be given or action taken on these applications until a decision had been made on the investigation.

- In September 2005, a preliminary investigation report was forwarded to the appellant, who provided written responses to it.

- In September 2005, a final investigation report was completed (the "Investigation Report") and sent to the appellant under cover of a letter dated September 23. This letter said that the Investigation Report had been submitted to the medical health officer and contained "recommendations put forward for his determination". It also told the appellant that she would be notified "of an opportunity for reconsideration prior to a final decision" and that information regarding the appeal process would also be made available to her.

- The Investigation Report concluded that the appellant had demonstrated an inability to remain in compliance with the Act and the *Child Care Licensing Regulation* and that, "[a]t this time, Licensing lacks the confidence in [the appellant] to comply with the legislation and has serious doubts about her suitability as licensee/manager". The Investigation Report also noted that the appellant intended to close her then existing facility in October and had made an application to relocate the child-care programs.

- The Investigation Report determined that there had been a number of contraventions to the legislation. It also "recognized that the rights of [the appellant] to timely completion of this investigation have not been fulfilled" and stated that the impact of this delay had been considered in weighing the following recommendations:

    - Given the [appellant's] intention to close this facility within the month, it is recommended that the Medical Health Officer take no action on the status of the licence.

- In the event that the [appellant] does not cease her current facility operation by October 31, 2005, it is recommended that a condition be placed on the licence establishing an expiry date of December 1, 2005, and that the Licensing Authority conduct a full review of the facility operations.

- It is recommended that future application from [the appellant] to operate a community care facility be reviewed with full consideration of the conclusions reached in this investigation.

- It is recommended that by copy of this report, the Early Childhood Educator Registry be advised of the Licensing Authority's concerns regarding [the appellant's] ability to operate a community care facility in compliance with the *Community Care and Assisted Living Act* and the *Child Care Licensing Regulation*.

- On September 26, 2005, the appellant sent a detailed email to Don Corrigal, Kootenay Manager, Office of the Director of Health Protection, documenting a number of complaints against Licensing and requesting a full review of her concerns regarding the licensing program in regard to her facility. Her concerns included the following:

    - the investigation process and outcome,
    - the re-application process for the relocated facility and the outcome, and
    - the professional deportment of the licensing officers.

- An October 12, 2005, letter from Licensing to the appellant communicated that the Medical Health Officer had accepted the findings and recommendations in the Investigation Report. This letter also stated that: "[a]lthough no action has been taken on the status of the licence to operate a community care facility, contact information for the Community Care and Assisted Living Appeal Board is enclosed in response to your October 11, 2005 request".

- On October 13, 2005, Don Corrigal emailed to the appellant his report on her complaints against Licensing. Although by no means agreeing with all of the appellant's concerns, his letter did observe that there had been a breakdown of communications between the appellant and the licensing officers leading to an "egregious interpersonal relationship" between the participants, for which all bore some responsibility, including the licensing officers who would be working on improvements to their professional deportment.

- Also on October 13, 2005, Licensing sent to the appellant by courier the decision dated the day before regarding the outcome of the investigation and a brochure about appealing to the Board. It appears, from the

information before us, that the appellant did not receive this package until October 18, 2005.

- On October 14, 2005, the appellant replied by email to Don Corrigal, stating that: "[a]lthough Processing a License for the new facility is my priority right now – I do request a Reconsideration/Appeal or Hearing – whatever you'd like to identify it as. Please instruct me or send me the information to do this". Don Corrigal forwarded this email on the same day, by email, to Licensing, with a request that the necessary appeal information to be provided to the appellant.

- On October 27, 2005, a meeting was held between the appellant and Licensing. The minutes of the meeting state its purpose as: "[t]o follow up on recent investigation recommendation that the investigation conclusions should be fully considered in reviewing any future application by the [appellant] to operate a community care facility".

- Out of this meeting, the appellant signed a document dated October 27, 2005, that delegated full authority for the new facility to a proposed manager.

- At the end of October the appellant closed her then existing facility and resumed licensed operations in her new location in early November 2005, with a delegated manager.

- On November 16, 2005, the appellant faxed a package of information to the Board. The Board received the appellant's enclosures (a copy of the October 12, 2005, decision letter from Licensing and her September 26, 2005, email to Don Corrigal), but no letter requesting an appeal.

- On November 17, 2005, the Board wrote to the appellant acknowledging receipt of the documents it had received by fax and providing further information on how to appeal.

- It seems that the appellant was not aware that her cover letter requesting a 'Reconsideration or Appeal' did not transmit through, nor was the Board aware that the appellant's intended transmission of materials had been incomplete.

- On January 3, 2006, the Board received a further fax from the appellant that included a cover letter and an "Appeal Notice Document" and identified the following six specific grounds of appeal:

    - the ECE Registrar's Office being advised of the Licensing Authorities concerns regarding [the appellant's] ability to Operate a Community Care Facility

- Future Applications from this Licensee to Operate a Community Care Facility being reviewed with full consideration of the Investigation Findings

- A Contract between [the appellant] and Interior Health had to be signed which released any decision making authority to a designated Manager

- The Old Facility License had a Condition of an "Expiry Date" applied to it

- The New Facility License has a Condition of an "Expiry Date" applied to it, and

- 4 different Facility Licensing Applications were turned into I.H.A. resulting in I.H.A.'s Refusal to issue a New License or give advice – only the MLA's involvement produced cooperation from the Local Health Authority.

- On January 9, 2006, the Board wrote to the parties asking them to provide written submissions on the two preliminary issues of timeliness of the appeal and whether the grounds of appeal were matters that could be appealed to the Board under the Act.

III. Position of Licensing

[6] Licensing says that the recommendations in the Investigation Report proposed that no action be taken on the status of the facility licence as the appellant's intention to voluntarily close it within the month was taken into account. Licensing also suggests that the appellant did not come forward to request reconsideration under section 17 of the Act of the recommendations in the Investigation Report and therefore, the grounds of appeal do not fit within the matters that can be appealed to the Board under in section 29(2) of the Act.

[7] In addition, Licensing says that because its October 12, 2005, decision letter was sent to the appellant by courier on October 13, 2005, the appeal was not brought within 30 days as required by section 29(2) of the Act, presumably if the time of bringing the appeal is calculated from November 16, 2005, when the first package was faxed to the Board or from January 3, 2006, when the Board received the appellant's second package.

[8] Finally, in regard to the appellant's October 27, 2005, delegation of authority to a proposed manager, Licensing characterizes this document as a "voluntarily signed confirmation that the designated facility manager proposed by [the appellant], the licensee contact, had been delegated full authority to operate the facility in compliance with licensing legislation, as required in section 11(2)(b)(iii) of the *Community Care and Assisted Living Act*" that is not subject to appeal to the Board.

IV. Position of the Appellant

[9] The appellant says that the appeal was brought on November 16, 2005, as her cover letter to the Board requested a "Reconsideration or Appeal." She also refers to her email October 14, 2005, to Don Corrigal indicating her desire for "Reconsideration or Appeal" and her request for information on how to do this. The appellant believes that she submitted an appropriate request for appeal based on the instructions in the pamphlet that was sent to her by Licensing and that at no time did she receive any information that a "Reconsideration" was a different process or how to apply for it separately from an appeal.

[10] In regard to the delay in providing further information for the appeal as the Board requested in its November 17, 2005, letter to her, the appellant explains that she was forced to give priority to the move of her child-care facility at that time and that, as a result of the stress and turmoil, particularly since February 2005 from the investigation situation, her health and communication abilities were affected.

[11] Finally, on the question of whether the matters in the notice of appeal are appealable to the Board, the appellant emphasizes the following three aspects of her appeal:

- A condition of a one month expiry date was imposed on her facility licence;
- She was required to sign a contract delegating management of her new facility before a licence for that facility would issue; and
- Licensing refused to process new facility applications from the appellant while the 2005 investigation and report were not yet complete.

V. Discussion and Analysis

[12] We will first address whether the appeal was filed in time.

[13] Section 24 of the *Administrative Tribunals Act* (the ATA), which applies to this Board, reads as follows (emphasis added):

> (1) A notice of appeal respecting a decision must be filed **within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise**.
>
> (2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

[14] The relevant parts of section 29(2) of the Act read as follows (emphasis added):

> (2) A licensee, an applicant for a licence, a holder of a certificate under section 8, a registrant or an applicant for registration may appeal to

> the board in the prescribed manner **within 30 days of receiving notification** that
> ...
>
> (b) a medical health officer has acted or declined to act under section 17(3)(b),

[15] Licensing says that because its letter accepting the recommendations contained in the Investigation Report was dispatched to the appellant by courier on October 13, 2005, the 30-day time limit to appeal expired November 12, 2005, and the appellant's November 16, 2005, fax of appeal materials to the Board was too late.

[16] The appellant says she did not get the October 12, 2005, package from Licensing until October 18, 2005, in which case the appeal materials faxed to the Board on November 16 were within the 30-day time limit.

[17] The time provision in section 29(2) of the Act is contained within the tribunal's enabling Act and prevails over the time provisions in section 24(1) of the ATA. Under section 29(2), the time to appeal runs from the date the appellant received notification of the decision being appealed, not the date Licensing dispatched the decision by courier to the appellant.

[18] We are inclined to accept the appellant's information that she did not receive the October 12, 2005, package until October 18, 2005. It is certainly plausible and there is nothing in the material provided to the Board to contradict that information. The fact that Licensing put the package in the hands of the courier on October 13, which was a Thursday, does not establish that it was delivered on that day or disprove that, as the appellant says, it was delivered on October 18, the following Tuesday.

[19] In any case, section 24(2) of the ATA permits the Board to extend the time to appeal, even after the time has expired. Although is does not appear to be necessary here, the power to extend would be available and is something we would be inclined to do this kind of case, where the departure from the time limit would be small, there was a clearly demonstrated intention and desire on the part of the appellant to launch an appeal within the time limit, and there is no demonstrable prejudice to Licensing in allowing the time extension.

[20] Our finding that the appellant's delivery of appeal material to the Board on November 16, 2005, was within the 30-day time limit to appeal under section 29(2) of the Act, does not address the sufficiency of that material or whether the matters involved are subject to appeal to the Board under the Act.

[21] Regarding the sufficiency of the appellant's notice of appeal, the material received by Board on November 16, 2005, was not sufficient, in large part because the cover letter that the appellant thought she transmitted to the Board did not arrive and the incomplete materials the Board did receive only very obscurely expressed the nature or grounds of appeal.

[22] It took the appellant another six weeks, until January 6, 2006, to provide the Board with a further material outlining six specific grounds of appeal.

[23] Section 27(3) of the ATA enables the Board to allow a reasonable period of time for an appellant to correct any deficiencies in a notice of appeal. Rule 2(3) of the Board's Rules of Practice and Procedure allow up to 14 days to correct a deficiency in an appeal. Rule 6(3) provides that the Board may extend or reduce any time limit in the Rules, whether or not the time limit has expired, as the Board considers fair and appropriate in the circumstances.

[24] Six weeks is obviously longer than would be normally permitted to correct a deficiency in a notice of appeal. However, we accept the appellant's explanation that she was under considerable stress and needed to attend first to the set-up of the new facility. The intervening period was also over the month of December, which comprises the holiday season. More importantly, the fact that the Board did not receive the appellant's cover letter on November 16, 2005, when the appellant appears to have been laboring under the misapprehension that it had been received, further complicated what was already, for the appellant, a somewhat complicated situation.

[25] Taking all this into account, including the fact that the appellant is not represented and she did explicitly communicate to Licensing her request and desire to proceed with a reconsideration or an appeal, we are inclined to allow the time the appellant took, to January 3, 2006, to deliver material perfecting her notice of appeal.

[26] This brings us to the issue of whether any of the six grounds of appeal in the appellant's January 3, 2006, "Appeal Notice Document" are subject to appeal under section 29(2) of the Act.

[27] The first two grounds of appeal deal with Licensing notifying the ECE Registrar of the Investigation Report and with Licensing considering the findings in the Investigation Report in relation to future licence applications by the appellant. These are not appealable matters and cannot go forward as grounds of appeal. Should they result in future action with respect to the appellant's ECE certification or her child-care facility licence, then those actions may be subject to reconsideration or appeal at that time.

[28] The last ground of appeal concerning Licensing's apparent refusal to process the appellant's new facility or change applications while the 2005 investigation and report was not yet resolved is out of time. Additionally, it appears that the appellant's new facility application in September and the new licence that was issued at the end of October 2005 essentially overtook this ground of appeal, which we find cannot go forward.

[29] The remaining three grounds of appeal (grounds three, four and five in the appellant's "Appeal Notice Document") revolve around the appellant's disagreement with the conclusions of the Investigation Report about her suitability to operate a

child-care facility and how those conclusions were considered and applied by Licensing in relation to the appellant's old and new facility licenses.

[30] Section 17 of the Act deals with reconsideration of certain kinds of decisions. Section 17(1) defines "action" and "summary action" as follows:

> **"'action"**, in relation to a licence, means
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> (a) a refusal to issue a licence under section 11 (1),
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> (b) an attachment, under section 11 (3), of terms or conditions,
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> (c) a suspension or cancellation, an attachment of terms or conditions, or a variation of terms or conditions under section 13 (1), or
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> (d) a suspension or cancellation of an exemption or an attachment or variation of terms or conditions under section 16 (2);
>
> **"summary action"** means a suspension or cancellation of a licence, an attachment of terms or conditions to the licence, or a variation of those terms or conditions under section 14;

[31] Section 17(2) requires that 30 days before taking action or as soon as practicable after taking summary action, the medical health officer must give the licensee or applicant for a licence written reasons for the action or summary action and written notice that they may give a written response to the medical health officer. Section 17(3) deals with the medical health officer, on receipt of a written response, delaying or acting on an action or summary action. It reads as follows:

> (3) If a medical health officer considers that this would be appropriate to give proper effect to section 11, 13, 14 or 16 in the circumstances, the medical health officer may, on receipt of a written response,
>
> (a) delay or suspend the implementation of an action or a summary action until the medical health officer makes a decision under paragraph (b), or
>
> (b) confirm, rescind, vary, or substitute for the action or summary action.

[32] Section 17(5) requires the medical health officer to give written reasons for acting or declining to act under subsection (3).

[33] Section 29(2)(b) provides for a right of appeal to the Board within 30 days of receiving notification that "a medical health officer has acted or declined to act under section 17(3)(b)".

[34] Licensing perceives that the abridgement of the appellant's old facility licence, the limited term for the new facility licence and the appellant's commitment to a delegated manager for her new facility, were routine and consensual arrangements, not action or summary action in relation to the appellant. The

appellant perceives them to be licence conditions that were imposed because of the findings and recommendations in the Investigation Report about her suitability to be a licensee/manager, which she does not agree with and repeatedly said she wants to challenge in, as she put it in her email to Don Corrigal, “a Reconsideration/Appeal or Hearing – whatever you’d like to identify it as”.

[35] There is no identified Licensing reconsideration decision under section 17 of the Act before us. However, Licensing told the appellant (in its September 23 letter to her) that she would be notified of an opportunity for reconsideration prior to a final decision and the appellant requested reconsideration or appeal of the findings and recommendations in the Investigation Report. She did this as early as October 11 (referred to in Licensing’s October 12 letter) and again on October 14 (in her email to Don Corrigal).

[36] It is clear that the medical health officer made a decision, communicated in the October 12, 2005, letter, to accept the findings and recommendations in the Investigation Report that the existing licence was not to continue past December 1, 2005. This was to be accomplished either by the appellant voluntarily ceasing operations by October 31, due to moving to a new location, or through the attachment of a condition establishing expiry of the licence on December 1, 2005. The October 12 letter then made the following closing statement:

> Although no action has been taken on the status of the licence to operate a community care facility, contact information for the Community Care and Assisted Living Appeal Board is enclosed in response to your October 11, 2005 request.

[37] We disagree. In our view, the October 12 letter was “action” under section 17. Licensing had been correct in presenting it that way in the September 23 letter sent to the appellant telling her that she would be notified of an opportunity for reconsideration prior to a final decision. The appellant had been correct in implicitly understanding it that way when she made it known that she wished to avail herself of the opportunity for reconsideration or appeal, “whatever you’d like to identify it as”.

[38] In these circumstances, whether procedural flaws affected the medical health officer’s final decision, does not affect the appellant’s right of appeal to the Board from action taken or not taken under 17(3)(b) as a result of the Investigation Report. If the situation were otherwise, a procedural error of Licensing in providing notice or fairness respecting reconsideration could easily rob an appellant of the right to appeal action or refusal to confirm, vary or substitute for action or summary action in relation to a licence.

[39] In this case, the Board will, on the hearing of this appeal, consider the action taken by Licensing in relation to grounds three, four and five in the appellant’s “Appeal Notice Document”.

VI. Decision

[40] We have considered all the material and arguments submitted to us by the parties, whether or not they were specifically referred to by the parties or in this decision.

[41] For all the reasons set out above, we find that the appeal, as it pertains to grounds three, four and five in the appellant's "Appeal Notice Document", was brought in time, though the content of the appeal material filed was defective. We exercise our discretion to permit the perfection of the defective appeal material on January 3, 2006. We conclude that the appellant has a right to appeal to the Board under section 29(2)(b) of the Act from the decision of the medical health officer communicated by letter dated October 12, 2005, in relation to grounds three, four and five in the appellant's "Appeal Notice Document".

[42] We dismiss this appeal with respect to grounds one, two and six in the appellant's "Appeal Notice Document".

[43] The Board Director will contact the parties to schedule further written submissions and set a date for an oral hearing of the merits of the appeal.

[44] We thank the parties for their submissions to date and remind them that this preliminary decision is not a determination or reflection on the merits of the appeal.

April 19, 2006

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Susan E. Ross, Chair

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Joan Gignac, Member

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Amy Collum, Member