

COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANTS: SKB and CB (for NKB) and SG (for LCG) and JN (for GB, JM, EG, EN , JB, MH, ES and DL)

RESPONDENTS: Dr. Richard S. Stanwick, Chief Medical Health Officer,
Vancouver Island Health Authority

and

Howard Waldner, President and Chief Executive Officer of
the Vancouver Island Health Authority (Licensee
Representative operating Cowichan Lodge, an Adult
Residential Care Facility)

PANEL: Susan E. Ross, Chair

Stay Pending Appeals

[1] The appellants are family or friends of persons in care at Cowichan Lodge, a 27 year-old community care facility in Duncan, B.C. Cowichan Lodge is operated by the Vancouver Island Health Authority ("VIHA") as a licensed 94-bed adult residential care facility under the *Community Care and Assisted Living Act*, SBC 2002, c. 75 ("CCALA").

[2] The respondent Howard Waldner, President and Chief Executive Officer of VIHA, is the licensee representative of Cowichan Lodge (the "Licensee").

[3] In a decision dated July 2, 2008, the respondent Dr. Richard S. Stanwick, Chief Medical Health Officer at VIHA (the "MHO"), granted the Licensee an exemption under s. 16 of the CCALA (the "Exemption") that reduces the written notice period in s. 14(1) of the *Adult Care Regulations*, BC Reg 536/80 (the "Regulations") to suspend the operation of Cowichan Lodge from 12 months to 60 days. The Licensee sought the Exemption in conjunction with its announcement around June 20, 2008, that Cowichan Lodge would be closing permanently and a new, nearby privately operated

facility, known as Sunridge Place/The Arbours ("Sunridge"), that was opening as of June 25, 2008, would offer a "one-time opportunity" until mid-September 2008 for the transfer of residents from Cowichan Lodge.

[4] The appellants appeal the Exemption under s. 29(3) of the CCALA, which entitles a person in care, or the agent, personal representative, spouse, relative or friend of a person in care, to appeal a decision to grant an exemption under s. 16 of the CCALA to the Board within 30 days after the decision is made. The Board received the first notice of appeal on July 18, 2008. It was followed on July 21, 2008, by other notices of appeal and by requests for a stay pending the outcome of the appeals.

[5] The MHO takes no position on the granting of a stay pending the appeals, except to inform the Board that the availability of potential witnesses (the MHO and a member of his staff) would be problematic if the appeals were scheduled for an expedited hearing earlier than the week of August 25, 2008.

[6] The appellants disagree with the Licensee's decision to close Cowichan Lodge at all, on any time frame, which is in itself not a decision from which there is a right of appeal to the Board under s. 29 of the CCALA. They appeal the Exemption on the basis that the extent of the abbreviation of the 12-month notice period in s. 14(1) of the Regulations puts at risk the health and safety of a highly vulnerable population of persons in care. Although the appellants' evidence on the appeals is not fully known at this stage, they have been able to file a letter from two physicians from Duncan Mental Health and Addictions who are familiar with residents at Cowichan Lodge that states:

Providing care for the frail and mentally impaired elderly is very challenging and requires a cohesive team of dedicated, empathic and experienced caregivers. It often takes months to prepare an individual for the move into such a facility, then several months for the person to acclimatize and for staff to learn to adjust to that particular individual's unique personality and needs.

We, and a team of nurse clinicians, work with Cowichan Lodge staff to help patients with particularly challenging behaviours or mental symptoms. Jointly, a care plan is created, then modified, and re-modified over time. Thankfully – and through the hard work of family and the caregivers – we have had excellent results with the vast majority of individuals. We fear that the wholesale transfer of patients out of their home in Cowichan Lodge in a short period of time unacceptably risks the health and well-being of many individuals.

We do not wish to disparage the staff of the newly opened facility, Sunridge, but as with all such ventures it will take time to form the community of caring that Cowichan Lodge had provided.

[7] The Licensee opposes an interim stay of the Exemption and in any case requests an expedited hearing of the appeals. The Licensee says that the appellants appear to be operating under the erroneous impression that the Board can hear an appeal from the Licensee's decision to close Cowichan Lodge, as distinct from the MHO's decision to grant the Exemption with respect to the time frame for the closure. Also, the Licensee contends that the appellants have not provided tangible evidence of risk to the health or safety of the person or persons in care at Cowichan Lodge that they represent if the Exemption is not stayed. The Licensee also says that a stay pending appeal likely would risk the health or safety of persons in care at Cowichan Lodge because:

- Sunridge is a new, superior facility; the presently available space there will fill up by mid-September 2008, and an agreement between VIHA and Sunridge ensures that all residents of Cowichan Lodge can be accommodated at Sunridge if they move before mid-September 2008;
- Cowichan Lodge is an older, grandfathered facility to which the requirements in s. 5 to 5.23 of the Regulations do not apply by operation of s. 12(1) of the Regulations; a stay would pose safety risks to residents associated with living in a "non-compliant" facility;
- the departure of staff at Cowichan Lodge is already happening and is the inevitable result of the Licensee's decision to close the facility, whether in 60 days or 12 months; a stay would put residents at risk of experiencing reduction in services;
- a stay will delay planning for the orderly, compassionate and professional transition of residents from Cowichan Lodge; and
- already frail residents will become more so during the period of a stay.

[8] In the Board's view, the circumstances at work here signal the desirability of a prompt hearing of these appeals, whether or not a stay pending appeal is granted. Further, because the Exemption decision under appeal abbreviates the notice period for closure of the facility to 60 days, this is one of those cases where the issues respecting whether to grant a stay pending appeal tend to run close up against the merits of the appeals themselves. Yet the merits of the appeals should not be decided at this stage and the Board will not do so.

[9] The Board's authority to stay a decision and to attach terms or conditions to its order comes from sections 15, 26(9) and 50(2) of the *Administrative Tribunals Act* ("ATA") and section 29(6) of the CCALA. Sections 15, 26(9) and 50(2) of the ATA empower the Board (or the Board Chair or her delegate) to make interim orders and to attach terms or conditions on orders. Section 29(6) of the CCALA provides that the Board may not stay or suspend a decision unless it is satisfied, on summary

application, that doing so would not risk the health or safety of a person in care.

[10] The appellants have provided enough evidence, most particularly in the form of the extract from the physicians' letter quoted above, to establish that their appeals raise serious issues and have some reasonable prospect of success. If there is not an impediment under s. 29(6) – risk the health or safety of a person in care – then the subject matter of the appeals should be preserved to the extent that it can be by a stay of the Exemption under appeal and an expedited hearing of the merits of the appeals should be scheduled.

[11] The Board finds that a stay of the Exemption on terms that will permit the hearing of the appeals to be scheduled in the week of August 25, 2008, can and should be granted within the parameters of s. 29(6) because:

- a stay of the Exemption would not prevent persons in care from transferring voluntarily, whether in anticipation of the result of these appeals or for individual reasons that are unrelated to the Exemption, the Licensee's decision to close Cowichan Lodge or these appeals; nor would a stay prohibit planning and plans of care from being addressed that all parties, and health care providers, agree are necessary for the ultimate transfer of residents on the closure of Cowichan Lodge;
- Cowichan Lodge is not a non-compliant facility by virtue of s. 12(1) of the Regulations, despite its grandfathered status; a stay of the Exemption is a stay of the 60-day notice period for closure in favour of the *status quo* 12-month notice period in the Regulations;
- if conditions at Cowichan Lodge threaten the health or safety of its residents, the MHO may take action against the licence and the Licensee under the CCALA and, in the case of an emergency, the Licensee may transfer a person in care involuntarily under s. 4(5)(c)(ii) of the Regulations; a stay of the Exemption would not stand in the way of these actions;
- if a stay of the Exemption is granted pending an expedited hearing of the appeals, it is the obligation of the Licensee to comply with the CCALA and the Regulations, including with respect to staffing levels to maintain required standards of care;
- the duration of the stay contemplated here to accommodate an expedited hearing of the appeals is short and it is within both the abbreviated notice period permitted by the Exemption and the self-imposed (by VIHA and Sunridge) window for filling spaces at Sunridge.

[12] The Board concludes that a stay of the Exemption pending appeal would not risk the health or safety of a person in care. Under sections 15, 26(9) and 50(2) of the ATA and section 29(6) of the CCALA, the Board orders that the Exemption is stayed until August 31, 2008, or further order of the

Board. This stay is ordered with a view to scheduling the hearing of the appeals on an expedited basis in Duncan, BC, during the week of August 25, 2008. The Board Director will contact the parties concerning a schedule for the prior exchange of documentary evidence, any expert opinions and the parties' statements of points on the issues under appeal. It will obviously be necessary for all concerned to apply themselves diligently to case management requirements for the expedited hearing.

July 25, 2008

Susan E. Ross, Chair