COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANTS: Twenty-four residents of Cowichan Lodge

RESPONDENTS: Dr. Richard S. Stanwick, Chief Medical Health Officer, Vancouver Island Health Authority (the "MHO")

and

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

PANEL: Susan E. Ross, Chair

COUNSEL:

For the Appellants:	J.M. Gislason
For the Respondent Chief Medical Health Officer:	G. McDannold
For the Respondent Licensee Representative operating Cowichan Lodge:	N.C. Carfra

Decision of the Board

[1] Cowichan Lodge is a licensed adult residential care facility under the *Community Care and Assisted Living Act*, SBC 2002, c. 75 (the "CCALA"). Beginning on July 18, 2008, appeals were filed by or on behalf of twenty-four residents of Cowichan Lodge from the MHO's July 2, 2008, exemption decision under s. 16(1) of the CCALA that abbreviated the required notice period in s. 14(1) of the *Adult Care Regulations*, BC Reg 536/80 (the "Regulations") from 12 months to 60 days (the "Exemption").

[2] On July 25, 2008, the Board granted a stay of the Exemption pending an expedited hearing of the appeals, which was subsequently scheduled for August 26 and 27, 2008, in Duncan, BC, where Cowichan Lodge is located.

[3] On August 19, 2008, the MHO, at the request of the Licensee and without notice to the appellants or the Board, rescinded the Exemption and the Licensee announced that Cowichan Lodge would abide by the 12-month notice period in s. 14(1) of the Regulations.

[4] On August 20, 2008, the Licensee and the MHO requested the Board to cancel the scheduled hearing and dismiss the appeals because the rescission of the Exemption made the appeals moot. The appellants oppose this as they say that there are still outstanding issues to be heard and decided by the Board.

[5] The Licensee requests the Board to summarily dismiss the appeals under s. 31(1)(g) of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the "ATA")[1] because, "the substance of the application [these appeals] has been appropriately dealt with in another proceeding." The Board declines to do this, not the least because the proposition is dubious that the MHO's rescission of the Exemption was "another proceeding" and the circumstances in which it was done are not conducive to assessing whether the substance of the appeals were "appropriately dealt with."

[6] Under s. 29(12) of the CCALA, the Board may confirm, reverse or vary a decision under appeal, or may send it back for reconsideration, with or without directions. Section 50(2) of the ATA empowers the Board to attach terms and conditions to a decision. The Board also has the ability to control its own process by declining to hear matters that are academic or an abuse of its process.

[7] There may be an issue as to whether the MHO had continuing or residual authority to rescind the Exemption while it was both under appeal and the subject of stay order by the Board. That is to say, whether the MHO was, in law, *functus officio*, and, rather than confronting the appellants with a *fait accompli* rescission of the Exemption engineered by the Licensee and MHO, the Licensee was required to apply to the Board for an order allowing the appeals.

[8] Be that as it may, the Board is of the view that the Licensee's surrender to the setting aside of the Exemption in favour of the required 12-month notice period ends the necessity and appropriateness of hearing the merits of the numerous grounds of appeal. It also has the effect of discharging, or making academic, what would otherwise be the appellants' burden under s. 29(11) of the CCALA to prove that the Exemption was not justified.

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[1] The substance of this power is incorporated as well into Board Rule 15(1)(g).

[9] To the extent that the MHO may have lacked authority to rescind the Exemption on August 19, 2008, the Board orders that the appeals are allowed and the Exemption is set aside, on the condition that the 12-month notice period in s. 14(1) of the Regulations applies from August 22, 2008, and the Licensee will not resume seeking an exemption from that requirement.

[10] Alternatively, if the MHO did have authority to rescind the Exemption, the Board dismisses the appeals as moot because there is no exemption decision left to be confirmed, reversed or varied, again on condition that the 12-month notice period in s. 14(1) of the Regulations applies from August 22, 2008, and the Licensee will not resume seeking an exemption from that requirement.

[11] As the Board indicated in its stay decision of July 25, 2008, during the notice period it will be the ongoing obligation of the Licensee to comply with the CCALA and the Regulations, including with respect to staffing levels to maintain required standards of care for however many residents are at Cowichan Lodge.

[12] Nothing in this decision should be taken as the Board's concurrence in or approval of the reasons that the Licensee announced for asking the MHO to rescind the Exemption. The type and circumstances of the exemption in the case of *Ganton v. Valleyhaven Guest Home*, 2008 BCCCALAB 5, were quite different than here and the decision-maker's process in that case suffered because there was simply no consideration of any information from the affected residents (*i.e.*, failure to take into account a relevant consideration) and not because of a novel duty to consult, as glossed by the Licensee in its August 19, 2008, request to the MHO to rescind the Exemption.

[13] This decision should also not be taken as in any way diminishing the gravity of the appellants' grounds of appeal. It must nonetheless be said that the Board does not have jurisdiction to grant declaratory relief, which was one of the appellants' objectives in having the appeals continue to hearing despite the developments of August 19, 2008.

August 22, 2008

Susan E. Ross, Chair