

COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANT: SH, Registrant

(operating Happy Day Care)

RESPONDENT: Barbara Hoffman, Manager, Community Licensing

PANEL: Susan E. Ross, Chair

Interim Decision – Stay Order and Hearing Date

The Appellant operates the Happy Day Care Family Child Care facility (the "Facility") in Surrey, British Columbia, a licensed community care facility pursuant to the *Community Care and Assisted Living Act* (the "Act") and the *Child Care Licensing Regulations* (the "Regulations") thereto. She appeals from a June 22, 2009, reconsideration decision made by the Respondent to cancel the licence of the Facility effective June 30, 2009. The Respondent agreed to a voluntary interim stay of the licence cancellation until July 31, 2009, at 7:00 p.m., on the following conditions:

- (a) As per the agreed upon Investigation Health and Safety Plan, dated March 15, 2009, the Appellant Licensee, was required at all times to have another adult, who is not a family member, with her, when she is with the children in her care. It was a condition that the Plan remain in effect and not be modified or lifted without prior consultation with the Licensing Officer.
- (b) Licensing staff would conduct regular visits to the Facility to ensure the Health and Safety Plan was being adhered to, and the Licensee would cooperate with all continued monitoring by licensing officers.

The Appellant applied to the Board for a further stay of the licence cancellation pending her appeal. On the basis of written submissions from the parties, on July 24, 2009, the Board Vice-Chair ordered an interim stay

until the hearing and disposition of the appeal or further order of the Board, whichever comes sooner, with the following conditions:

- (a) The Appellant will at all times comply with the Investigation Health and Safety Plan dated March 15, 2009, including the requirement that she have another adult, who is not a family member, present with her, when she is with the day care children. The Plan must remain in effect and will not be modified or lifted without the prior agreement of the responsible licensing officer.
- (b) The Appellant will receive no new or additional enrollments of children into the Facility.
- (c) During the period of the stay, the Appellant will ensure that she is in full compliance with the Act and the Regulations.
- (d) If the Appellant is absent from the Facility, she will have in place a fully qualified substitute in accordance with the Regulations.
- (e) The Appellant and any substitute caregivers will fully cooperate with all continued monitoring by licensing staff.
- (f) The Appellant will accommodate the scheduling of an early hearing date of the appeal, and will co-operate with all case management and scheduling requirements of the Board.
- (g) The Appellant will comply strictly with this order and any existing conditions of the Facility's registrations or requirements of the Act.
- (h) The Respondent may request the Board to vary or lift this interim stay order if she has reason to believe that its conditions are not being complied with in a material respect or that, on any new information, the continued operation of the Facility pending the disposition of the appeal puts at risk the health or safety of the children under the Appellant's care.

It should be noted that the Respondent, while proposing no specific time period for the interim stay order, had asked for it to be of short duration due to the need for frequent monitoring of the Facility by licensing staff. The conditions imposed by the Vice-Chair were intended to ensure that the appeal would be heard at the earliest opportunity.

The Board Director set a schedule for the following materials from the parties:

Licensing Record (from the Respondent): August 7, 2009

Appellant's Statement of Points:	August 21, 2009
Respondent's Statement of Points:	September 4, 2009
Appellant's Reply:	September 11, 2009

The Board intended to hear the appeal on September 22, 2009, because this followed shortly on the parties' statement of points and also accommodated the Respondent's principal witness, who would be on annual vacation for one month from September 24.

On receiving the Respondent's statement of points, however, the Appellant requested more time to file her reply in order to seek legal advice. She was allowed an extension to September 18, 2009. She then also requested a later hearing date and in support of this she has provided particulars of steps she has taken to find and consult a lawyer.

The Respondent wants the September 22, 2009, hearing date to be maintained, or, if a later date is set, for the interim stay order to be lifted in the meantime. The Respondent's reasons for its position are that the Appellant has already had sufficient time to consult a lawyer and the Respondent "will not be able to continue with the monitoring of the Appellant's facility beyond the proposed September 22 hearing date".

The Appellant is opposed to the lifting of the interim stay order if there is a hearing date beyond September 22. She has also asked, for financial reasons, for the removal of the condition of the interim stay order that prevents her from taking new enrollments. She emphasizes that she has cooperated with the Respondent and that the hazard rating on inspection reports on the Facility have not been "high".

From the Licensing Record and the materials filed by the parties on the appeal and in respect of a stay order, I note the following:

- In early February, 2009, the Respondent received a complaint about the Appellant applying and threatening to apply corporal punishment ("the magic spoon") to children in care at the Facility.
- The allegations were investigated, while the Facility continued to operate, from the time of the complaint to the end of April 2009.
- On April 30, 2009, Licensing Officer, Shelly Christie, gave notice of a decision to cancel the licence and on May 15, 2009, she issued a 'decision report' cancelling the licence effective June 30, 2009.
- The Appellant requested a reconsideration.
- The Respondent's reconsideration decision (the decision under appeal) was issued on June 22, 2009, confirming cancellation of the licence effective June 30, 2009.
- The Appellant filed her notice of appeal on June 29, 2009, within the allowed time under the Act, and requested a stay of the cancellation pending the appeal.

- The Respondent agreed to itself stay the licence cancellation, with conditions, until July 31, 2009.
- On July 24, 2009, the Board made the interim stay order, on conditions.
- The schedule for delivery of the Licensing Record and the parties' statements of points was timely.
- It is apparent from the Appellant's communications in the Licensing Record and with regard to her appeal that she is not a legally sophisticated person and may well benefit from legal advice concerning her position in this matter.
- Prior to the complaint in 2009, the Facility had low hazard ratings from inspection reports from June 2007 to November 2008. The next inspection was triggered in February 2009 by the complaint that ultimately resulted in the decision to cancel the licence. During the period of the investigation (February to April 2009), high hazard ratings were assigned. After that, low hazard ratings were assigned, including in the most recent inspection reports in the materials up to August 2009. If there were incident reports or a higher hazard rating was assigned since, I would expect the Respondent to have informed the Board.
- The parties are available for the hearing of the appeal on October 30, 2009.

On what date should the appeal be heard?

In my view, the Board should have reasonable regard to value to the Appellant of pursuing her right of appeal with the benefit of legal advice. It was probably possible (and wiser) for her to seek legal advice earlier in this process, but I am not persuaded there is evidence that she delayed or neglected to seek legal advice as a ploy for more time to keep the Facility operating under conditions of the interim stay order, which are by no means ideal for her. She is not legally sophisticated. The implications of the decision under appeal are clearly very serious for her. September 22 to October 30 is not a long period of time.

On the other hand, the Respondent was only amenable to staying the licence cancellation decision on conditions that included an early hearing date. It should not be put to an undue burden, but that has to be determined in the context of a difference of five weeks between the two hearing dates, the fact that fair process in licensing decision-making and appeals does involve time and costs associated with time, and the Respondent's own pace at the earlier stages of this matter. For example, it may have been possible (and this is not said in any criticism of the Respondent at all) for the investigation to have been completed sooner than it was, thus lessening the period of the Facility's operation under the cloud of the complaint and then the strictures of the conditions for staying the decision to cancel the licence. Then again, quicker investigating and decision-making by the Respondent might have been at the expense of thoroughness or of fairness to the Appellant. It is

only fair to observe as well, again not as a criticism, that the unavailability of the Respondent's primary witness is the reason why the hearing date cannot be shifted into early October, instead of late October.

In all of these circumstances, I have decided to deny the Respondent's request for the hearing to proceed on September 22, 2009, and to instead schedule it for hearing on October 30, 2009. The Appellant should expect no extension from the October 30 date.

Should the interim stay order be continued?

The Facility cannot be allowed to continue to operate while the appeal is pending unless the Board is satisfied that this would not risk the health or safety of a person in care (see s. 29(6) of the Act).

The low hazard ratings given to the Facility prior to the complaint and after the decision to cancel the Facility licence, and the Appellant's compliance first with the Respondent's stay conditions and then with the conditions of the Board's interim stay order, indicate that a continuation of the interim stay order will not risk the health or safety of children at the Facility.

Having regard to the Board's authority pursuant to sections 15, 26(9) and 50(2) of the *Administrative Tribunals Act* and section 29(6) of the Act, the interim stay order of July 24, 2009, will remain in place on the conditions that were imposed by the Vice-Chair, plus the following additional condition which I consider prudent:

- (i) The Appellant will deliver a copy of this decision and the Respondent's reconsideration decision dated June 22, 2009 (without attachments) to a parent or guardian of each child in care at the Facility, within two days of the date of this decision. Within four days of the date of this decision, the Appellant will confirm in writing to the Board (copy to the Respondent) that she has complied with this condition.

Should condition (b) of the interim stay order be removed?

The Appellant's request to vary the conditions of the interim stay order to enable her to take new enrollments is denied. The licence for the Facility has been cancelled and its very existence will be determined by the appeal. New enrollments are not appropriate during this brief period. They would be an added potential complication to the administration of the interim stay order. I am also concerned that it would be misguided for the Appellant to expend energy in eliciting and establishing new business, that she needs to devote to seeking and taking legal advice on her appeal from the Respondent's licence cancellation decision. It is not reasonable, considering the licence cancellation decision and the basis for that decision, for the Appellant to

expect the interim stay order to enable her to operate the Facility 'business as usual'.

Dated this 14th day of September, 2009.

A handwritten signature in black ink, appearing to read "Susan Ross". The signature is written in a cursive style with a long horizontal stroke extending to the left.

Susan E. Ross
Chair