COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANT: SH, Registrant

(operating Happy Day Care)

(represented by S. K. Patro, counsel)

RESPONDENT: Barbara Hoffman, Manager, Community Licensing

(represented by G. McDannold, counsel)

PANEL: Susan E. Ross, Chair
Deborah Harden, Member

Decision – Adjournment and Interim Stay Order

Introduction

[1] On October 29, 2009, the Board issued its decision, with reasons to follow, on the Appellant's applications to adjourn the October 30, 2009, hearing date for this appeal and extend the interim order staying the decision under appeal (cancellation of the Appellant's licence to operate). The hearing was adjourned generally, but the Board refused to extend the interim stay order beyond November 30, 2009.

[2] Later on October 29, 2009, the Respondent made an application for the interim stay order to be lifted before November 30, 2009, on the basis of the results of an inspection conducted earlier in the day.

[3] This decision comprises the Board's reasons for decision on October 29, 2009, and its disposition of the further application by the Respondent, which the Board has decided to refuse.

[4] The consequence of this decision is that the hearing of this appeal remains adjourned generally, and on November 30, 2009, the Board's interim stay order will lapse and the Respondent's licence cancellation decision will be in force.

Background

[5] 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 *Child Care Licensing Regulations* (the "Regulations"). She appeals from a June 22, 2009, reconsideration decision made by the Respondent to cancel the license of the Facility effective June 30, 2009.

[6] The Respondent initially agreed to a voluntary interim stay of the license 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.
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> (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.

[7] In due course, the Appellant applied to the Board for an interim order staying the licence cancellation pending a decision on the merits of her appeal. On the basis of written submissions from the parties, on July 24, 2009, the Board 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.
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> (b) The Appellant will receive no new or additional enrollments of children into the Facility.
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> (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.

[8] The Respondent, while proposing no specific time period, had asked for the interim stay order to be of short duration due to the need for frequent monitoring of the Facility by licensing staff. The conditions imposed by the Board were intended to ensure that the appeal would be heard at the earliest opportunity.

[9] The Board intended to hear the appeal on September 22, 2009, because this date 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. However, on receiving the Respondent's statement of points, the Appellant requested more time to file her statement in reply, which was granted. She then also requested a later hearing date, so she could seek legal advice on her situation, and the removal of the condition of the interim stay order preventing her from taking new enrollments.

[10] The Respondent was opposed to a later hearing date, submitting that the Appellant had already had sufficient time to consult a lawyer and the Respondent would be unable to continue monitoring the Facility beyond September 22. It also opposed removal of the condition of the interim stay order preventing the Appellant from taking new enrollments.

[11] In its decision issued on September 14, 2009, the Board noted the following facts from the Licensing Record and materials filed by the parties:

- 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 now 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 her 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, the Board would expect the Respondent to have informed the Board.
- The parties were available for the hearing of the appeal on October 30, 2009.

[12] In that decision, the Board extended the interim stay order and rescheduled the hearing of the appeal for October 30, 2009, but it declined to lift the condition preventing the Appellant from taking new enrollments. A further condition was added requiring the Appellant to notify families with children in care at the Facility of the Respondent's licence cancellation decision and the Board's interim stay order pending the appeal. The Board's decision also stated that the Appellant should expect no extension from the new October 30 hearing date.

[13] The Board was moved to accommodate the Appellant's desire to obtain legal advice, though it had probably been possible for her to do so earlier, because of the seriousness of the licence cancellation decision to her, her evident lack of legal sophistication, the relatively short time frame for the adjournment sought and the low hazard rating assigned to the Facility since the complaint that resulted in the cancellation of the licence.

Appellant's further applications

[14] On October 26, 2009, the Board learned that the Appellant had secured legal representation, when her counsel applied for an adjournment of the October 30 hearing date and a further extension of the interim stay order. The justification given for these applications was that the Ministry of Children and Family Development (the "Ministry") investigated a child protection report about whether the Appellant used the "magic spoon" to discipline her own nine-year old son, who is also a child in care at the Facility. It is common ground that the Ministry concluded that the Appellant's son was not in need of protection within the meaning of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, and Respondent was aware of this when investigating the complaint that resulted in the licence cancellation decision.

[15] The Appellant's counsel formed the view that the Ministry's investigation material would be relevant to her appeal. He therefore made a request for access to those materials under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. The Appellant's counsel advised that the results of that access request are not expected before some time in December and he submitted that, since the most recent inspections of the Facility had yielded "low risk" assessments, there was no reason not to continue the interim stay order pending the hearing of the appeal.

[16] The Respondent opposed the Appellant's applications on the basis that her counsel should be prepared to proceed with his brief on the appointed hearing date of October 30 and, more importantly, the information requested from the Ministry was unnecessary to either the licence cancellation decision or the appeal.

[17] The Appellant's reply stressed the potential importance of the information sought from the Ministry, her lack of sophistication and consequent inability to seek out this information before she retained counsel, and the hardships that closure of the Facility would impose upon the families of the children in care there. The reply also candidly acknowledged that without new evidence the Appellant's likelihood of success on her appeal was low.

[18] By a letter dated October 29, 2009, the Board granted an adjournment of the appeal, with a direction to the Appellant's counsel to contact the Board

Director about a re-scheduled date in the New Year, but it decided not to extend the interim stay order beyond November 30, 2009.

[19] The decision to allow the adjournment was made because it was not obvious to the Board that the investigation material the Appellant's counsel had requested from the Ministry would be conclusive of anything on this appeal, but neither could the Board conclude that this material would be of no assistance to the Appellant. Giving special regard to the fact that she was without legal counsel until recently, the Board decided to grant her request for a further adjournment to permit her counsel to pursue, in the relatively short term at least, information that he believes will be relevant and help his client put her best foot forward on the appeal.

[20] The decision not to extend the interim stay order past November 30, 2009, turned on other considerations. Section 25 of the *Administrative Tribunals Act*, S.B.C. 204, c. 45 (the "ATA") provides that the commencement of an appeal "does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal order otherwise." Standing alone, this provision might suggest that the Board should look to the three part common law test for an interim stay pending appeal that is stated in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; namely, (1) whether there is a serious issue to be tried, (2) whether there will be irreparable harm to the applicant if a stay is not granted, and (3) whether the balance of convenience favours a stay. Section 29(6) of the Act, however, prescribes a specific test for when the Board may not stay or suspend a decision. It provides that the Board "may not stay or suspend a decision unless it is satisfied, on summary application, that a stay or suspension would not risk the health or safety of a person in care." Section 25 of the ATA and s. 29(6) of the Act must be read together, harmoniously.

[21] In previous Board decisions, it was sufficient to focus on the statutory test for when the Board cannot stay or suspend a decision, but when the threshold in s. 29(6) of the Act is met the Board is not required to order a stay pending appeal, it has discretion to do so. The statutory context of appeals to the Board suggests that this discretion may be informed by the test in *RJR MacDonald*, but it is not necessarily restricted to that test.

[22] For example, the accessibility of the appeal process is promoted by granting an interim stay pending appeal to a small operator who would struggle to have the resources to participate in the appeal process without a stay order, but would not meet the irreparable harm part of the *RJR MacDonald* test. This assumes, of course, that the health and safety threshold in s. 29(6) of the Act has been satisfied.

[23] Timely progress of the appeal is always significant for cases before the Board and is important to its discretion to order an interim stay. Hence, the condition that is regularly attached to interim stay orders requiring the appellant to accommodate the scheduling of an early hearing date and co-

operate with all case management and scheduling requirements of the Board. Appeals to this Board are intended to be expeditious. In a case of the kind here, a decision to cancel the Appellant's licence will be preceded by an investigation by the Respondent, followed by extensive disclosure to the Appellant in conjunction with an opportunity to heard about whether the licence should be cancelled, then a further right for the Appellant to request and to make submissions on a reconsideration decision that results in the cancellation decision appealed to this Board.

[24] With an expeditious appeal process, the licensing decision in issue and its underlying facts are more likely to remain relevant when the appeal is heard. Appellants and respondents can more manageably engage an expeditious appeal process. It is also more likely to offer meaningful relief to appellants.

[25] Since this Board "must receive evidence and argument as if a proceeding before the board were a decision of first instance" (see s. 29(11) of the Act), it certainly can entertain new evidence that was not before the Respondent. The appeal process is not an investigative process, however. It is an appellate venue where the appellant has already had quite complete disclosure around the decision under appeal and "bears the burden of proving that the decision under appeal was not justified" (again see s. 29(11) of the Act).

[26] Turning to the *RJR MacDonald* test as a point of reference only, the appeal in this case does not appear to be a strong one, based on the material filed on the appeal. Appellant's counsel has sought information from the Ministry that the Appellant could have pursued much earlier. That information may or may not be relevant, much less conclusive, to the appeal. There is no certainty when this information of unknown value to the appeal will be forthcoming from the Ministry. There is a current enrollment of four children in care at the Facility, one of whom is apparently the Appellant's son. Without a licence to operate the Facility, the Act will still permit the Appellant to provide care for up to two children who are not related by blood or marriage to her; that is, two children in addition to her own son. It is difficult to see how the Appellant's ability to resume a licensed day care operation, if her appeal succeeds, would be irreparably harmed by requiring her to give up one child in care, or even two, pending her appeal. Having regard to the balance of convenience, the risk hazard assigned to the Facility was low in recent months (disregarding the October 29, 2009, inspection that the Board learned about later that day), but a continuing stay of the licence cancellation decision would still present a draw on the Respondent's compliance–monitoring resources. The Appellant's interest in continuing her licensed operations while she investigates her pending appeal carries little weight against the public interest in an expeditious appeal process and the rational dedication of the Respondent's compliance resources across many licensed facilities.

[27] The Board was satisfied that continuing the interim stay order would not risk the health and safety of children in care at the Facility, if the Appellant complied with the conditions of that order and the Respondent maintained a periodic level of compliance monitoring. It nonetheless decided not to continue the interim stay order to permit the Appellant to investigate evidence of unknown value that could have been sought earlier. The Board's decision to adjourn the appeal preserved the Appellant's ability to exonerate herself respecting the decision to cancel her licence. Its decision to lift the interim stay order effective November 30, 2009, respected the importance of an expeditious appeal process and put a cap on the Respondent's responsibility to monitor the Appellant's compliance with special terms of operation for the Facility.

Respondent's further application

[28] Later on October 29, 2009, the Respondent applied to the Board for the interim stay order to be lifted by November 13, 2009, on account of an inspection that morning that disclosed violation of condition (a), the requirement for the Appellant comply with the Investigation Health and Safety Plan by having another adult who is not a family member present when she is in the Facility with children in care. The inspection report indicated that when a licensing officer made an unannounced inspection of the Facility at around 11:00 am, she observed the Appellant was alone with three children in care because her assistant had gone to a medical clinic, an absence of over two hours. A similar infraction was also reported in an inspection report in April 2009.

[29] The Respondent maintains that the Appellant was well aware of the requirement for her to call the Respondent's office for prior approval to deviate from the Health and Safety Plan. The Appellant claims that she tried to get through to that office, but hung up without leaving a message, and that her assistant's absence to see a doctor was necessary to ensure the health and safety of the children in care. The Respondent replies that the assistant's return to her duties at the Facility after she was unwell and had seen the doctor is a further concern because, if she required medication for influenza, then she should not have been returning to work with children in care.

[30] The assistant's precise illness, whether or not it presented a risk to the health of safety of children in care, and conflicting claims by the Appellant and Respondent about her attempt to communicate with the Respondent's office, cannot be resolved on the written submissions that have been provided. It is nonetheless apparent enough that there was a problem on October 29, 2009, with compliance with condition (a) of the interim stay order, which, in the Board's view, reinforces the appropriateness of its previous decision to extend the interim stay order only to November 30, 2009.

[31] The Respondent was proper to inspect the Facility on October 29, 2009, and provide the Board with the results. The orderly winding-down of the Facility on November 30, 2009, is near enough at hand, however, that the Board has decided not to abridge that date to November 13, 2009, as requested by the Respondent.

Dated this 6th day of November, 2009.

"Susan Ross"
Susan E. Ross, Chair

"Deborah Harden"
Deborah Harden, Member