COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANT: S.H. (Licensee)
(operating Happy Day Care)

RESPONDENT: Barbara Hoffman, Manager, Community Care Facilities Licensing, Fraser Health Authority

PANEL: Susan E. Ross, Panel Chair
Deborah J. Harden, Member
Mary-Ann Pfeifer, Member

APPEARANCES: Sanjeev K. Patro, counsel for the Appellant
Troy DeSouza, counsel for the Respondent

DECISION

A. Introduction

[1] The Appellant, S.H., appeals a June 22, 2009, decision of the Respondent Barbara Hoffman, Manager, Community Care Facilities Licensing, at the Fraser Health Authority ("Licensing"), that cancelled her Family Child Care licence to operate Happy Day Care in Surrey, British Columbia (the "Facility"). The appeal was heard by written submissions from the parties, followed by a lengthy one-day hearing on June 16, 2010, at which the Appellant, one parent and three Licensing officials gave evidence, much of it focused on whether the Appellant had used or threatened to use a "magic spoon" to hit children in care at the Facility.

[2] This is our decision and reasons for dismissing the appeal.

B. Statutory Provisions

[3] Parts of sections 7, 13, 17 and 29 of the *Community Care and Assisted Living Act*, SBC 2002, c. 75, ("Act") and sections 51 and 52 and Schedule H of the *Child Care Licensing Regulation,* BC Reg. 332/2007 ("Regulation"), are relevant for this appeal. They read as follows:

ACT

Standards to be maintained

7(1) A licensee must do all of the following:

(b) operate the community care facility in a manner that will promote

(i) the health, safety and dignity of persons in care, and

Suspension or cancellation of licence

13(1) A medical health officer may suspend or cancel a license, attach terms or conditions to a licence or vary the existing terms and conditions of a licence if, in the opinion of the medical health officer, the licensee

(a) no longer complies with this Act or the regulations,

(b) has contravened a relevant enactment of British Columbia or of Canada, or

(c) has contravened a term or condition of the licence.

Reconsideration

17(1) In this section:

“action”, in relation to a licence, means

(c) a suspension or cancellation, an attachment of terms or conditions, or a variation of terms or conditions under section 13(1), or

(2) Thirty days before taking an action or as soon as practicable after taking a summary action, a medical health officer must give the licensee or applicant for the licence

(a) written reasons for the action or summary action, and

(b) written notice that the licensee or applicant for the licence may give a written response to the medical health officer setting out reasons why the medical health officer should act under subsection (3)(a) or (b) respecting the action or summary action.

(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,

(b) confirm, rescind, vary, or substitute for the action or summary action.

(5) A medical health officer must give written reasons to the licensee or applicant for the licence on acting or declining to act under subsection (3).

Appeals to the board

29(11) The board must receive evidence and argument as if a proceeding before the board were a decision of first instance but the applicant bears the burden of proving that the decision under appeal was not justified.

(12) The board may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person whose decision is under appeal.

REGULATION

Behavioural guidance

51(1) A licensee must

(a) ensure that behavioural guidance is appropriate to the age and development of the child who is receiving the guidance, and

Harmful actions not permitted

52(1) A licensee must ensure that a child, while under the care or supervision of the licensee, is not subjected to any of the following:

(a) shoving, hitting or shaking by an employee or another child, or confinement or physical restraint by another child;

(c) harsh, belittling or degrading treatment by an employee or another child, whether verbal, emotional or physical, that could humiliate the child or undermine the child's self respect;

(d) spanking or any other form of corporal punishment;

(2) A licensee must ensure that a child is not, while under the care or supervision of the licensee, subjected to emotional abuse, physical abuse, sexual abuse or neglect as those terms are defined in Schedule H.

SCHEDULE H

Reportable incidents

1 For the purpose of this regulation, any of the following is a reportable incident:

"emotional abuse", which means any act, or lack of action, which may diminish the sense of well-being of a child, such as verbal harassment, yelling or confinement, perpetrated by a person not in care;

"physical abuse", which means any physical force that is excessive for, or is inappropriate to, a situation involving a child and perpetrated by a person not in care;

C. Background

[4] The Appellant opened Happy Day Care as a licensed facility on July 13, 2007. As a Family Child Care, it operated out of her home with a maximum capacity of seven children and the Appellant was required to be qualified as a "responsible adult" under s. 29 of the Regulation. Her son, Child 1, was included as a child in care when at home during the operating hours of the Facility, as provided by s. 1(3) of Schedule E of the Regulation. There were five Licensing inspections between the opening of the Facility and November 7, 2008, all of which yielded low hazard ratings.

[5] On February 11, 2009, K.E. (also known as K.S.), a parent of three year-old twin sons in care at the Facility (Child 2 and Child 3), reported to Licensing that the Appellant may have hit Child 3 and possibly another child in care (Child 4) with a magic spoon kept on top of the refrigerator. Licensing conducted an investigation that included interviewing Child 3, K.E., Child 4 and his mother L.S., the Appellant and her adult sister K.H. who assisted at the Facility at times. Child 4 was in care at the Facility from August to December 2008. He turned age five shortly after being interviewed by Licensing in March 2009. In its investigation, Licensing also received information from two support workers of Child 2 and Child 4 at another facility and conducted an inspection that found a wooden spoon on top of the refrigerator at the Facility. Instead of interviewing Child 1, Licensing made a child protection report about him to the Ministry of Children and Family Development ("MCFD") under s. 14 of the *Child, Family and Community Service Act*, RSBC 1996, 46 ("CFCSA"). The report was in response to a statement to Licensing by the Appellant's sister, K.H., that the Appellant hit her son with the magic spoon upstairs in the home. Licensing also investigated whether the Appellant used inappropriate and excessive time-outs relative to the age of children in care at the Facility.

[6] While Licensing conducted its investigation, the Appellant agreed to a health and safety plan that required a second unrelated adult to be present with her during

operating hours at the Facility. After meeting with the Appellant about the allegations in early March, Licensing Officer Karen Berger told the Appellant her preliminary conclusion was that they were well founded. Licensing Officer Shelly Christie then completed a March 30, 2009, investigation report, which concluded that the Appellant's licence to operate the Facility should be cancelled because she had hit children in care on their palms with a magic spoon and had administered developmentally and age inappropriate time-outs. The Appellant was given two weeks to respond to the investigation report, which she did in writing on April 14.

[7] On April 30, Ms. Christie decided to cancel the licence effective June 30, 2009, with the health and safety plan to remain in place until the cancellation date. She confirmed that decision in a seven-page "Decision Report" dated May 15, 2009. The Appellant asked for reconsideration and the Licensing Manager Barbara Hoffman reached the same conclusion in her reconsideration decision dated June 22, 2009.

[8] When the Appellant appealed Ms. Hoffman's reconsideration decision to this Board on June 28, 2009, Licensing agreed to an interim stay of the licence cancellation, on conditions, to July 31, 2009. On July 24, 2009, the Board ordered an interim stay, with conditions, pending a decision on the merits of the appeal. The conditions included continuation of the health and safety plan requiring the presence of an unrelated adult with the Appellant during operating hours at the Facility, no new enrollments and an early hearing date for the appeal.

[9] On May 15, July 9, 15 and 29, and August 12, 2009, Licensing made unannounced inspections of the Facility, which were without incident and yielded low hazard ratings. A September hearing date was adjourned to October 30, 2009, against the wishes of Licensing, to enable the Appellant to consult a lawyer. When she retained counsel, he sought a further adjournment and extension of the interim stay order to enable the Appellant to obtain the results of an access to information request to MCFD about its investigation of Licensing's child protection report concerning her son Child 1. On October 29, 2009, this Panel granted the further adjournment to the New Year, but declined to extend the interim stay order past November 30, 2009. In the meantime on October 29, Licensing made an unannounced inspection of the Facility and found the Appellant alone with three children in care, contrary to the health and safety plan and conditions of the interim order staying the licence cancellation. The Appellant told Licensing that the unrelated adult who was supposed to be at the Facility with her had left to see a doctor about a cough. She said she called Licensing about the situation, but got no answer and did not leave a message. This incident caused Licensing to seek revocation of the interim stay order. The Panel decided to maintain November 30 for orderly winding down of the Facility and on November 16 the Appellant's counsel reported that she was operating as an unlicensed day care (enrollment limited to two unrelated children). The Appellant delayed pursuing her access to information request to MCFD somewhat, but she eventually received an information package that was tendered on the appeal.

[10] The Appellant and Licensing were both ably represented by counsel at the hearing of the appeal on June 16, 2010. It was a lengthy hearing day in which the Panel heard argument from counsel and the testimony of the Appellant, parent K.E., Licensing Officer Shelly Christie, Investigation Coordinator Lyn Kinney and Licensing Manager Barbara Hoffman.

D. Issues on Appeal and the Parties' Positions

[11] The Appellant appealed on grounds of lack of fair process and insufficient evidence to support a finding on a balance of probabilities that she had contravened either the Act or the Regulation. Her counsel submitted that whether she used or threatened to use the magic spoon is the critical issue and other concerns relied on by Licensing, while not conceded, could be resolved through education or less drastic action than licence cancellation. He said that Licensing had not afforded the Appellant adequate disclosure of the allegations or evidence against her. He also described the Licensing investigation as fatally flawed by improper evaluation of the evidence and heavy reliance on evidence about the magic spoon that was gathered in interviews of very young children, without adequate consideration of the inherent frailty and unreliability of such information or thoughtful analysis and reconciliation of evidence that was contradictory or unsupportive of the allegations against the Appellant.

[12] Examples given were that:

- Child 4 reported being given a time-out in a locked nap room, which Licensing found unsubstantiated because the nap area at the Facility is open and viewable from the play area; yet Licensing failed to take this indication of suspect credibility into account in weighing the reliability of Child 4's information about the magic spoon.
- Child 4 was inconsistent about whether or not he had been hit with the magic spoon, telling a support worker and Licensing that he had been hit but his mother that he had not.
- Child 4 had a history of wild statements, such as threatening to harm the Appellant and burn down her day care.
- Child 3 was also inconsistent about whether or not he had been hit with the magic spoon, telling his mother that he had been hit then that he had not, then telling Licensing that he had been hit.
- Child 4 said the magic spoon cracked. The magic spoon upstairs was cracked, but the wooden spoon that Licensing found on top of the fridge in the day care was not cracked.
- Licensing failed to consider MCFD's investigation and conclusion that Child 1 was not in need of protection, which was strong evidence that she did not harm children in her care.
- Licensing also failed to consider the Appellant's explanations that Child 3 and Child 4 heard about the magic spoon from Child 1 when he was playing in the

day care, the only magic spoon was on the fridge upstairs, and the wooden spoon on the fridge in the day care was only there for retrieving objects that fell behind it.

[13] Licensing maintained that it followed a fair process that included providing the Appellant with an opportunity to be heard before deciding to cancel the licence and to confirm that decision on reconsideration. The Appellant did not meet minimum standards under the Act and Regulation because there was overwhelming and corroborated evidence that two children in care were physically abused with a wooden spoon and the Appellant had conceded that she threatened her son with a wooden spoon and made excessive use of time outs. Licensing was therefore not confident that children would be safe in the Appellant's care. Counsel summarized Licensing's view of the relevant facts, as follows:

- Two children in care (Child 3 and Child 4) made separate yet similar disclosures of physical abuse at the Facility.
- Both used the unusual term "magic spoon".
- Both described the spoon as wooden
- Both said it was kept on top of the fridge in the day care.
- Both said they were hit with the magic spoon.
- Both demonstrated being hit with the spoon on the palm of the hand (Child 4's statement that the magic spoon cracked was made in the context of the sound it made, not its physical appearance).
- Both said others were also hit with the magic spoon, among them Child 2 (twin brother of Child 3).
- Child 4 acted out hitting a doll hard with a wooden spoon, saying my day care lady does this to me.
- The Appellant denied there was a magic spoon at the Facility.
- Licensing found a wooden spoon on top of the fridge in the day care kitchen.
- The Appellant admitted there was a wooden spoon called the magic spoon.
- The Appellant admitted to threatening her son Child 1 with the magic spoon.
- The Appellant's adult sister K.H. told Licensing that the Appellant hit Child 1 with the magic spoon then she recanted to MCFD.
- The Appellant admitted to excessive use of time outs.

E. Investigation by Licensing

[14] Because of the seriousness of the allegation of hitting and threatening children in care with a wooden spoon, the seriousness of license cancellation and the Appellant's particular grounds of appeal, Licensing's investigation and process for action against the licence will be described in some detail.

[15] The essence of K.E.'s report to Licensing in early February 2009 was that two weeks earlier her twin sons, Child 2 and Child 3, had become unwilling to go to day care with the Appellant. K.E. then learned from a support worker for Child 2 at

another facility that the parent of Child 4, who also received support at that facility, had withdrawn her son from the Facility after he reported being spanked with a magic spoon. Later that day, Child 3 again told K.E. that he did not want to go the Facility. K.E. reported that when she asked why, he replied that another child took his toys. When she then asked whether the Appellant hurts him, he replied that yes she did "with a magic spoon". When K.E. and the support worker at the other facility attempted to get more information from Child 3, he said that the magic spoon "lives on top of the fridge" and the Appellant hits her own hand with it, but she does not hit Child 3. Licensing noted that K.E. also remarked that she had no previous concerns about the Appellant or her discipline techniques and that day care was hard to find so she did not want to "mess up" hers with the Appellant if the allegation was unfounded.

[16] The next day, two Licensing officers made an unscheduled inspection of the Facility. The Appellant, her sister K.H. and her father were on site at the time. Both the inspection report (signed by both Licensing officers) and further notes to file record the allegation as whether a child was hurt by the Appellant with a magic spoon that is kept (or "lives") on the refrigerator. The inspection report records that "Licensing reviewed the complaint allegation with [the Appellant] and explained the investigation process." Additional notes record that they explained their role to the Appellant. The inspection report and notes give similar accounts of the Appellant's response to the allegation and the Licensing officers' observation of a wooden spoon on top of the refrigerator. The following passage is from the inspection report:

> [The Appellant] denied the allegation and stated that she sometimes threatens her son (9 years old) with the spoon, but that she never hits him. She states that the magic spoon is kept upstairs in the family home and that the daycare children do not have access to the upstairs. [The Appellant] states that she never threatens her son with the spoon in the presence of the day care children. She stated there is no magic spoon kept in the daycare, only spoons for cooking that she showed Licensing in a kitchen drawer. Licensing observed a long handled wooden spoon on the top of the fridge in the day care kitchen. When Licensing asked [the Appellant] about this spoon she explained that she keeps it on the fridge to obtain articles that have fallen behind the fridge.
>
> Licensing spoke briefly with [the Appellant's] sister [K.H.] who came downstairs during the inspection at [the Appellant's] request to assist with the children. [K.H.] informed Licensing that she never hits the children and only cooks with the spoons.

[17] On February 17, 2009, Licensing Officer Angela Uy spoke by telephone with a support worker at the other facility attended by Child 2 and Child 4, who had witnessed disturbing behaviour by Child 4 regarding the Appellant. Ms. Uy's note to file records the following information from the support worker:

> [Child 4] was playing in the housekeeping area with a baby in a highchair. He started hitting the baby's hand with a play wooden spoon quite forcefully saying bad girl. Bad Boy. When worker stated to [Child 4], oh, that must hurt the baby – he replied "my daycare lady does that to me" and he named a couple of other children whose names the worker does not remember. Worker discussed this with her supervisor and co-workers. Worker stated as well that when [Child 4] was taken back to the facility by school bus, he tried to hide and he didn't want to get off the bus. There was a male and a female adult at the facility when [Child 4] was dropped off.

[18] The note to file also records the following information from a telephone conversation Ms. Uy had with L.S., mother of Child 4:

> [Child 4] started at Happy Day Care Sept 2008 and left Dec 2008. He is 4 years old.
> In the beginning son was happy. One day he started talking about a magic spoon and how it can make people disappear. He seemed excited about it.
> – maybe a month later he didn't want to go anymore and he said he didn't like the magic spoon anymore because she hits people – she hits her son (Licensee's son)
> – mom asked him if he was hit and he said no but she hit [Child 3] and [Child 2]. He told support worker at the school she did hit him but tells mom no.
> – mom confronted caregiver regarding hitting with the magic spoon and she said she only uses it to scare her son. Licensee stated to mom that she doesn't hit anyone with it.
> – child still states occasionally that Licensee is mean. Mother didn't report as she had no real evidence and son never appeared to have any evidence of being hit.
> …
> – when mother confronted Licensee about hitting her son, she didn't ask if she hit [Child 3] and [Child 2].

[19] On February 20, 2009, Ms. Christie and Ms. Uy again interviewed the Appellant. Notes to file record that when asked why she thought the day care children would be referring to a magic spoon, the Appellant said that her son, Child 1, played with Child 4 when he was in care at the Facility. She said that Child 4's mother asked her about the magic spoon and "[m]aybe my son told [Child 4] about the magic spoon." The Appellant's explanation of her son's relationship with the magic spoon was recorded as follows:

> …magic spoon is upstairs for my son. He wants to play in daycare but I want him to have a snack and do homework….Rules apply to [Child 1] in the downstairs. He wants 15 minutes to play and I tell him its time to go upstairs. Then he goes. If you don't listen to me then the kids won't listen. I don't hit him with it. It's upstairs. If I'm down here you know what's coming. I had the

> magic spoon before I had the daycare. I keep it upstairs. It was on the daycare fridge. Sometimes snacks fall and I use it to grab them.

Asked what words she used when talking about the magic spoon to her son, the Appellant said: "You go upstairs, if not I will grab the magic spoon."

[20] On March 6, 2009, Ms. Christie and Ms. Kinney conducted separate interviews of Child 3 and Child 4. Ms. Kinney was brought in because of her skills in interviewing young children about possible abuse. The interviews were not audio or video recorded. The only contemporaneous records of what happened are handwritten notes taken by Ms. Christie, which are obviously incomplete and somewhat challenging to decipher. They indicate that each child referred to a magic spoon kept on the refrigerator that was used to hit that child and other children at the Facility across the palms of their hands. The interview notes for Child 4 indicate he said the Appellant hit him, Child 2 and Child 3 on the palms with a wooden magic spoon; he also suggested that the Appellant's sister K.H. hit with the spoon; and he said "when hits hard magic spoon cracks." The interview notes for Child 3 indicate he said the Appellant hit Child 2 and Child 3 on the palms and fingers with a wooden magic spoon. From the notes themselves it is difficult to be sure how questions to the children were framed to elicit information and answers from them. There are certainly indications within the notes themselves that these young children, not surprisingly, had limited attention spans and drifted off to other subjects of interest to them.

[21] That same day, Ms. Christie, in company with Licensing officer Karen Berger, also interviewed the Appellant's sister K.H. Ms. Christie's notes of that interview record that K.H. said the Appellant hits Child 1, the information that triggered Licensing to make the child protection report to MCFD:

> Never use magic spoon – uses time-out only – make them peace/quiet – don't share toys – she make time out – child sit in corner 10-15 min on chair at table. When he screams (son) upstairs so loud – he came downstairs to scream – she hits her son upstairs with magic spoon – never down stairs – [day care] children never seen this. Never use magic spoon downstairs.

[22] By March 11, 2009, Licensing officers met with the Appellant to communicate their preliminary findings and give her an opportunity to respond. Their findings were expressed in a preliminary report by Ms. Berger dated March 9, 2009, as follows:

> …on a balance of probability, I have determined that although you state you never used the magic spoon in the daycare, and have only threatened your own son with it, the spoon was used to hit two children on the palms of their hands who attend(ed) the daycare.

> …Although the allegation that a child was in time-out in a room with the door closed is unsubstantiated, it is confirmed that time-out was used with more than one child, and at least one of those children is under the age of 2 years old and that time out can occur for 10 to 15 minutes or until the child is happy. Using time out for 10 to 15 minutes with children who are under the age of two is not a developmentally or age appropriate technique.

[23] On March 15, 2009, the Appellant agreed to a health and safety plan requiring her to have an unrelated responsible adult present with her at the Facility at all times.

[24] In her investigation report dated March 30, 2009, Ms. Christie concluded that the Appellant had hit more than one child with the magic spoon and had threatened her own son with it. She concluded the allegation of physical abuse with a magic spoon was well founded in terms of hitting and threatening and this conduct breached s. 7(1)(b) of the Act and s. 52(1)(a), (c) and (d) and s. 52(2) of the Regulation. She found that one child's disclosure that he was put in a locked time-out "nap room" was unsubstantiated as the nap area at the Facility was an open space viewable from the play area. However, the Appellant had acknowledged administering 10 to 15 minute time-outs to children at the Facility, at least one of whom was under age two. Ms. Christie found this was developmentally and age inappropriate guidance in contravention of s. 51(1)(a) of the Regulation.

[25] The March 30, 2010, investigation report and a cover letter of the same date were both addressed to the Appellant and gave her an opportunity to respond. Text at page 7 of the report notified her that Licensing would then determine whether to take action against the licence:

> Please submit a written response to Shelly Christie by **April 14, 2009,** outlining what action you will take to address the contraventions and concerns identified in this report. Upon receipt of your response, CCFL will determine whether any further action is needed. Action may include supervision, attaching terms and conditions or cancellation of your license.

[26] The only attachment to the March 30, 2010, investigation report was a one-page flow chart describing Licensing's process for addressing non-compliance with the Act or Regulation. The facility inspection report for the complaint inspection on February 12, 2009, and the follow-up on March 6, 2009, would have been left with the Appellant at the time of each inspection. At this point, the Appellant did not have access to the Licensing notes to file or interview notes that are now available on this appeal, including records of the interviews of Child 3 and Child 4, their mothers K.E. and L.S., the Appellant's sister K.H., or the two support workers at the other facility. Pages 3 and 4 of the March 30, 2009, investigation report describe the investigation analysis and findings on the allegation about children being hurt by a magic spoon kept on the refrigerator, however the synopsis on page 3 of the information from K.E., L.S., Child 3 and Child 4 was excised out of the copy of the

investigation report provided to the Appellant. As a result, the Appellant was given the text summarizing her own response to the allegation and the information provided by her sister K.H. and a support worker at the other facility, but the information about Licensing's interviews of Child 3, Child 4, and their mothers, was limited to the following passage on page 4:

> Although there are some inconsistencies in the disclosures made by both children, there are also significant common elements. Both children described the magic spoon as a wooden spoon that was kept on top of the fridge. Both children indicated that they had been hit on the palm of the hand. Both children stated that other children in the daycare had been hit with a magic spoon. [Child 4] stated that [Child 3] had been hit with the "magic spoon" and both children interviewed stated that the same third child had been hit with the "magic spoon".

[27] The March 30, 2009, cover letter to the Appellant also included the following passage, presumably to explain the excision of passages from the enclosed investigation report and the non-inclusion of records such as witness interview notes:

> CCFL provides copies of Investigation Reports to the Licensee/Facility Manager and, if applicable, to any collaborating agencies. This Investigation Report and the CCFL program's records for this facility are subject to the Freedom of Information and Protection of Privacy Act and upon request may be subject to release.

[28] The Appellant provided a one-page hand-written response dated April 13, 2009, with several one-page letters of support including ones from K.E. (mother of the twins, Child 2 and Child 3) and two other mothers with children in care with the Appellant. She denied hitting children in care and posited that Child 3 and Child 4 must have learned about the "magic spoon" through her son Child 1 when he spent time in the day care:

> In response to the allegations stated by CCLR to this matter I am stating that the events and occurrences stated is false. I have never hit a child with a wooden magic spoon. The spoon that they are reffering to is on top of the fridge for picking things up fallen behind fridge example, cheese, crackers, jelly snacks etc. In regards to hitting a child has never happened in my care and it has never been used to threaten them. I have used wooden magic spoon on my son [Child 1] to scare him from doing wrong things but, I have never used it on him. By saying that my son [Child 1] understands that if he does naughty things he will be punished as in time out for 9 min. He must have told the children in my care that if you don't listen to [the Appellant] she will use the magic spoon on them to scare them. To my understanding children must have got that from [Child 1] that I will use it on them and that they are scared of it.

[29] On April 22, 2009, Ms. Christie spoke with K.E. by telephone. Her note to file records that K.E. was not concerned about the care her twins received with the Appellant, they were always happy when picked up and had no physical marks like bruising. K.E. thought Child 3 said the Appellant hit him because "he heard someone say that she hits." She believed that it was the support worker at the other facility, and not K.E., who ought to have reported to Licensing about what Child 3 had said to the support worker about the Appellant and the magic spoon.

[30] A very brief one-page letter from MCFD to the Appellant dated April 22, 2010, told her that MCFD social worker Stacey Jonas had completed the steps of her assessment of the child protection report respecting the Appellant's son and concluded that he was not in need of protection.

[31] An unannounced inspection by Licensing on April 30, 2009, found the Appellant alone at the Facility caring for three children under age 2, with a fourth child just under age 3 years arriving during the inspection. The Appellant explained that her staff person had left to go to the doctor and was to return. The Licensing officers told the Appellant that she should have contacted Licensing about departing from the health and safety plan. They approved the presence of an adult family member with the Appellant for that day. They also informed the Appellant that the Regulation limited a Family Day Care to four children under age 4, of whom only two could be under age 2; reviewing the Appellant's attendance logs, they noted overages on repeat days of five or six children in care under age 4 in care, including three children under age 2.

[32] On April 30, 2009, Ms. Christie decided to cancel the licence effective June 30, 2009. She followed up with her "Decision Report" dated May 15, 2009, which explained that suspending or imposing terms or conditions on the licence were not considered adequate to ensure the health and safety of children in care because of the serious nature of the magic spoon contravention; hence, the decision to cancel the licence effective June 30, 2009. The decision report had 24 attachments consisting of the March 30, 2009, investigation report (with the passages still excised on page 3), the facility inspection reports from June 2007 to April 30, 2009, the health and safety plans from time to time, the Appellant's written response and attachments to the March 30, 2009, investigation report, Licensing's April 30, 2009, letter to the Appellant. and extracts from the Act. A brochure about appeal rights was also enclosed. Ms. Christie found that the Appellant's April 13, 2009, response had not provided any additional or new information. The Appellant was still not provided with Licensing's notes of the interviews of Child 3 and Child 4, their mothers, or the support worker who had witnessed Child 4 act out hitting a doll's hand with a wooden spoon. However, the decision report did provide the following description of the evidence in support of Licensing's conclusion that the Appellant had threatened and hit children with a wooden spoon:

> This finding is evidenced by the similar disclosure made by two children that they were hit on the palm of the hand with the "magic spoon" and the "magic spoon" is made of wood. One child also disclosed to another adult that they had been hit with the "magic spoon". One child acted out the incident by hitting a baby doll's hand quite forcefully with a play wooden spoon and telling the adult that "my daycare lady does this to me…" In addition, Licensing Officers observed a wooden spoon on top of the fridge which is where the children said the "magic spoon" was kept. You have also stated that you used the wooden "magic spoon" as a form of discipline to scare or threaten your own child.
> …
>
> Based on the corroborated disclosure by two children who stated that they have been hit with the "magic spoon", the excessive use of time out and your admittance that you threaten your own child it has been determined that Section 51(1)(a) and 52(1)(a)(c)(d), 52(2) of the Child Care Regulation have been contravened.

[33] The following passage summarized Ms. Christie's conclusion that the Appellant was not suitable for licensing, again highlighting that in Licensing's eyes her responses to the allegations had not provided new information:

> Licensing continues to have concerns regarding your ability to manage a community care facility in a manner which maintains the spirit, dignity and individuality of the children in care as evidenced in the Investigation Report page 6 (attachment #1). You have stated that you have not hit any child with the "magic spoon" even though two children have disclosed that you hit them on the palm of the hand. A wooden spoon matching the description of the "magic spoon" was found by Licensing on top of the fridge after you denied that there was a "magic spoon" in the daycare. You have admitted to threatening your own child with the magic spoon which is an inappropriate form of guidance. In addition, one adult stated that you have hit your own child with the "magic spoon". I am not convinced that if this form of guidance is used with your own child, that a similar form of inappropriate guidance would not be used with children in your care. Your own child is part of the licensed capacity and it is expected that your child would receive the same standard of care which you are required to provide to all children in the daycare.
>
> I have reviewed your verbal and written responses to Licensing and no new information has been provided to refute the evidence. The complimentary letters of support from parents have also been reviewed, however due to the seriousness of the allegation I find that the letters do not provide any new evidence. In addition, during the inspection on April 30, 2009, you were found in contravention of the agreed Health and Safety plan and the ages of children in care were not in compliance with the [Regulation].

[34] For her reconsideration decision dated June 22, 2009, Ms. Hoffman considered the investigation report of March 30, 2009, (including interview notes and consultation with the Licensing officers), the decision report of May 15, 2009, and further representations received from the Appellant on June 8, 2009. She also did a site visit where she spoke with the Appellant, she spoke with K.E. (mother of Child 3 and Child 4) and she contacted MCFD about the child protection report under the *CFCSA* concerning the Appellant's son, Child 1.

[35] The Appellant's June 8, 2009, written representations to Ms. Hoffman addressed the allegations about the magic spoon and the improper use of time-out. Again she denied physical abuse with a wooden spoon and explained, in somewhat more detail, that Child 3 and Child 4 must have learned about the magic spoon through her son, Child 1, when he spent time in the day care:

> 1-2 As far as hitting with the "MAGIC SPOON" this did not occur in my day care. There was an incident where my father was teaching the special needs child [Child 4] bike riding and my son mentioned about the magic spoon which I was later questioned by the special needs child, which I reassured there was no magic spoon.
> …
> 4-1 As far as hitting my child this does not occur in our home. We were never spanked by our parents or grandparents and I follow the same principles and values.
> 5-1 Hitting children is not part of the policy of my day care and I disagree with anyone that uses this practice. If I have hit as forcefull as it has been aligated then there should be visible physical signs or a cracked spoon as claimed and there is neither. My fault again is for having a spoon on top of the fridge to retrieve fallen supplies. Yes I did say there is no "MAGIC SPOON" in my day care which is the truth, there is a wooden spoon on top of my fridge and I have explained why.
> …
> In this case I feel I was so shocked and numbed by the accusations that I failed to respond in detail for you to make your decision. I have made mistakes which I have admitted to, but not hitting a child. I would never have gone into this profession if I felt I could not provide a safe, clean, healthy and happy environment.

[36] At this stage, the Appellant still did not have Licensing's interview notes (though these were reviewed by Ms. Hoffman) or an unexpurgated copy of the March 30, 2009, investigation report, but she did have the description of the evidence in the May 15, 2009, decision report. In her reconsideration decision, Ms. Hoffman summarized the state of the evidence around the "magic spoon", as follows:

> During the investigation you denied hitting any child with a wooden spoon, and in your written response, you indicate that the child who stated that you hit him, did so as a result of not wishing to come to the day care as he was unable to play with his toys. During the investigation, as well as in your points to reconsider you state that the child who alleged being hit by the "magic spoon", must have heard that term from your son, as you use the spoon to scare him. You stated you never hit children. During my conversation with you at your facility, I informed you that there were two children who stated that they had been hit on the palm of the hand by you, and their disclosures were very similar in nature. An adult also confirmed that you hit your own son with the "magic spoon", and Licensing Officers found a wooden spoon on top of your fridge in the day care area.
>
> You also mentioned in your submission that any allegations of abuse that may have taken place at your child care centre are unfounded, yet you admitted to "scaring" your son, who is considered to be in care at the facility, with a wooden spoon.

[37] Her reconciliation of the evidence was brief:

> I have reviewed your points to consider, the Investigation Report dated March 30, 2009, the interview notes of both children who stated you hit them, as well as the adult who confirmed that you hit your son with the wooden spoon, and I agree with Ms. Christie's Decision Report of May 15, 2009, that Section 51(1)(a), 52(1)(a)(c)(d) and 52(2) of the Child Care Regulation have been contravened.

[38] With respect to the Appellant's request to retain her licence with improved practices and training, Ms. Hoffman concluded that the physical abuse found and the Appellant's admission that she used the magic spoon to scare her own son indicated that she did not possess the ability to manage a licensed day care in a manner which would ensure the health and safety of children.

[39] With respect to the results of the MCFD investigation conveyed to the Appellant in the April 22, 2009, letter from social worker Stacey Jonas, Ms. Hoffman said:

> Ms. Jonas' letter states that she did not find that your child was in need of protection. I had a telephone conversation with Ms. Jonas, and she stated that she had interviewed your parents, your sister, and your son, and they all stated that you did not hit your son with the wooden spoon, or any of the children in the child care centre. Ms. Jonas did state that you use the wooden spoon as a threat to get him to do things, and that he is afraid of it.

[40] Notes to file for June 10 and 12, 2009, provide more detail of the information gained in Ms. Hoffman's telephone conversations with social worker Stacey Jonas:

> (June 10, 2009) S. Worker Ms. Jonas stated that she had visited the day care and interviewed [the Appellant], her son, sister and parents. Ms. Jonas stated that [the Appellant] was using the wooden spoon ("magic spoon", which the son called it) as a threat to get her son to do things (e.g. "Don't make Mom use the wooden spoon" – Used it to put her son in time out). Her son stated he was not hit and did not see any other kids hit. He also stated the "Magic Spoon" wasn't brought in to the day care.
>
> (June 12, 2009) Spoke with Stacey Jonas – sw – MCFD – son stated to her – mother puts it on his hand like a "high 5". – never brought it in day care. His mother sometimes makes him "scared" with it. Son states "magic spoon" not brought into care and day care children not hit.
>
> S. Jonas interviewed [the Appellant's] sister who stated that [the Appellant] does not hit him, he is a good boy, but scared of the spoon, threatens.

[41] We will now discuss the grounds of appeal and related issues under the following headings: fairness of the investigation, fairness of the process to cancel the licence, adequacy of Licensing's reasons, the MCFD investigation, and sufficiency of the evidence.

F. Fairness of the Investigation

[42] In the Panel's view, the Licensing investigation itself was fair to the Appellant inasmuch as the Licensing officers told her the allegations, interviewed her on several occasions (February 12 and 20, 2009) and invited her to provide information before they reached even preliminary conclusions. At that stage, it was not necessary to provide the Appellant with records of the interviews they had already undertaken. Disclosure at that level would have been premature and, indeed, could have been prejudicial to the effectiveness of the investigation process.

[43] We would add that our assessment of the Appellant from her testimony before us, Licensing's notes of speaking with her, and her written communications to Licensing and to this Board before she retained counsel, is that she is an unsophisticated but intelligent person who speaks her mind, knows that corporal punishment of any kind is strictly prohibited in child care facilities and from the outset of Licensing's investigation understood the nature of the allegations concerning the "magic spoon" and their potential gravity for her as a licensee. When she testified on appeal we learned that she grew up in Fiji, where she spoke Hindi and Fijian and obtained grade 10 education. Her exposure to English began on her arrival in Canada as a teenager. While we have no doubt that the Appellant would be more likely to misunderstand a question or misspeak an answer than a native born English speaker, she was consistent in her cooperation with Licensing, denial of any hitting with the "magic spoon", understanding of the potential seriousness of the situation and aspiration to resolve the allegations in a way that

would enable her to continue to operate the Facility. Her level of understanding and capability around what was at stake is illustrated in the following excerpt from her June 8, 2009, written response to Licensing:

> 1–To summarize the whole problem, I fully understand the seriousness of the allegations that has been made against me and your job to protect the safety and welfare of the children in my care.
> 2–Allegations for any degree of abuse that suposadly took place at happy day care is unfounded for it did not take place.
> 3 I again retiriate that I have never hit or threaten a child in my care.
> 4 All facility inspection occurred prior to Feb 09 were within guidelines with some changes. The children were always observed as comfortable, adjusted and appear happy with me and the environment. There was no report stating the children appear unhappy or withdrawn which are all signs of abuse.
> 5 Since the investigation started in Feb of 2009 I have been forthright and accommodating in every aspect. I am within my rights to seek legal assistance for the seriouse alligation, but so far I choosen to work with you and your office to prove my innocence.

G. Fairness of the Process to Cancel the Licence

[44] We have concluded that the investigation was fair to the Appellant. The same cannot be said when the process progressed to action against her licence. Before making its decision report cancelling her licence under s. 13(1)(a) of the Act, it was proper of Licensing to extend an opportunity to be heard to the Appellant in conjunction with informing her of the investigation findings to which she had to respond. This was done by providing the March 30, 2009, investigation report, from which core information about the allegations and witness interviews was excised out. Licensing apparently believed that the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ("FIPPA") prevented it from providing that information to the Appellant and required her to request it through an access to information request to Licensing under FIPPA. This was a misguided understanding of FIPPA that resulted in information being withheld from the Appellant that could and should have been provided to enable her to respond to the investigation findings.

[45] Section 3(2) of FIPPA provides that that legislation does not limit information available by law to a party to a proceeding. To the extent that the law of procedural fairness in a proceeding to take action against the Appellant's licence obliged Licensing to make meaningful disclosure of the allegations and evidence, FIPPA was not an impediment. Furthermore, insofar as personal information was involved, s. 33.2(a) of FIPPA permitted Licensing to disclose such information "for the purpose for which it was obtained or compiled or for a use consistent with that purpose (section 34)". Disclosure of the full investigation report complete with relevant notes to file and interview notes to enable the Appellant to answer the allegations and evidence against her in connection with impending action against

her licence, was consistent with the purpose for which it was obtained or compiled by Licensing. The information was obtained and compiled for the purpose of investigating and taking any necessary action on allegations about the safety of children in care at the Facility. That process entailed giving the Appellant a meaningful right to be heard about the allegations and supporting evidence if there was to be action against her licence. The Appellant should not have had to appeal to this Board before she could obtain that information to defend her licence and suitability as a licensee. We are supported in this by the Court of Appeal's interpretation of ss. 33.2(a) and 34 of FIPPA in *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Co.* (2005), 262 D.L.R. (4th) 313.

[46] In summary, FIPPA did not impede Licensing from providing the Appellant with the complete investigation reports and related material that are before the Panel and the parties on this appeal. Nor was there a need to require the Appellant to pursue such information through an access request to Licensing under FIPPA.

[47] Section 29(11) of the Act requires the Panel to receive evidence and argument as if this appeal was a decision of first instance, with the Appellant bearing the burden of proving that the reconsideration decision cancelling her licence is not justified. We heard this appeal on the evidence of the Appellant, her witnesses, Licensing's witnesses, the full record of proceeding for the decision under appeal and further documents provided by the Appellant. The Appellant had the complete record of proceeding before Licensing, including an unexpurgated copy of the March 30, 2009, investigation report and complete copies of Licensing's notes to file and witness interviews. She was given an unfettered opportunity to answer Licensing's investigation reports and findings for the purpose of enabling us to consider the decision under appeal afresh. This included tendering documents she received from MCFD in response to her access request, made under FIPPA after this appeal was filed, about its investigation of Licensing's child protection report under the CFCSA concerning her son Child 1.

[48] In the appeal hearing, we raised the question of why Licensing's interviews of Child 3 and Child 4 were recorded only by notes of the Licensing officers. Ms. Kinney informed us that she had looked into recording such interviews at the request of her superiors at the Fraser Health Authority. She had learned that taping was not a common practice because of the time and cost of transcription, but the matter was still under consideration. She agreed that video recording was something that could warrant further attention.

[49] In our view, Licensing should give serious consideration to video recording forensic interviews of young children. The two interviews in this case were each just 10-15 minutes long. Video technology is widely and inexpensively available and need not be intrusive, especially for young children who would probably not even be aware of it. Yet video recording has the potential to capture the demeanour, gestures, reactions and answers of a young child that cannot otherwise be

accurately recorded, easily or at all. And it is truly the best means of recording the way the child's responses were elicited by investigators to reliably establish that they were not the product of leading, coercive or other contaminating influences in the interview.

[50] Specialized training is important when interviewing young children and Licensing took care to assign Ms. Kinney to interview Child 3 and Child 4 because she had specific training, skill and experience for that task. From her testimony, we learned that she has been a Licensing officer for 17 years and Investigating Coordinator for the last five of those years. She has a teacher's certificate from Simon Fraser University, as well as Early Childhood and Infant/Toddler Education certifications. She has social worker training for interviewing children as well as specific training and experience in the widely recognized Stepwise Interview technique for forensic interviewing of young children, developed by University of British Columbia psychologist, Dr. John Yuille. It is simply unrealistic to expect even the most skilled and experienced interviewer of children to be able to compile verbatim or even near verbatim notes of the interview. In our view, video recording of the children's interviews would have been a manageable way to both enhance the rigour and credibility of that part of the investigation and create a much more complete and reliable basis for Licensing, the Appellant, and this Panel on appeal to verify, understand and evaluate the children's evidence. We strongly encourage Licensing to make video recording a routine practice for future forensic interviews of children.

H. Adequacy of Licensing's Reasons

[51] The Appellant argued that the reconsideration decision cancelling her licence is insupportable because it is conclusory, lacking analysis of contradictory evidence and any explanation of why Licensing did not accept the Appellant's denial of hitting with the magic spoon.

[52] Licensing maintained that its findings were reached on the totality of the evidence, which is overwhelmingly conclusive against the Appellant.

[53] It is true that the Appellant admitted she threatened her son Child 1 with the magic spoon upstairs in the home and had misused time out discipline in the day care. We would not, however, describe this as a case of overwhelming evidence that the Appellant hit children in care with the magic spoon or that she threatened them with it (other than her son upstairs). Nor was it just a matter of deciding whether to believe Child 3 and Child 4 or the Appellant and explaining why. There was contradictory, non-supportive and, to say the least, complicating evidence to consider. Child 3 told his mother he had been hit with the magic spoon and then he said that he had not; then he told the Licensing officers that he had been hit. Child 4 told the Licensing officers, his support worker at the other facility, and his mother that the Appellant hit him with the magic spoon; he also told his mother that he was not hit and he stated to the Licensing officers that K.H. hit with the spoon. The

Appellant denied that she hit the children and there was no physical evidence of blows to their bodies (such as bruising or like marks). The fact that key disclosures about hitting came from two very young children was a significant obstacle because eliciting and testing the reliability of evidence of abuse from a three and a four year-old is not a simple or easy exercise.

[54] In our view, however, the clear implication in Ms. Hoffman's decision is that she did not accept the Appellant's denial of hitting with the magic spoon or her innocent explanation that Child 3 and Child 4 must have learned about the magic spoon through her son Child 1 because of the uncanny similarity of central elements of the disclosures by Child 3 and Child 4, reinforced by the discovery of a wooden spoon on top of the refrigerator in the day care where the children said it was kept and by K.H.'s statement to Licensing that the Appellant did hit Child 1 with the magic spoon upstairs in the home. Ms. Hoffman did not merely accept the veracity and reliability of Child 3 and Child 4. She was influenced, as she was entitled to be, by surrounding features of the evidence such as verification of the presence of the spoon on the refrigerator in the day care after the Appellant said there was no magic spoon in the Facility, the independence, spontaneity and similarity of the disclosures by Child 3 and Child 4, and the Appellant's admission of using the magic spoon to threaten her son upstairs.

[55] We agree that the reconsideration decision does not articulate why Licensing discounted that K.H., the Appellant's parents and Child 1 apparently all told the MCFD social worker that there was no hitting with the magic spoon and will discuss the implications of that below.

I. The MCFD Investigation

[56] The Appellant relied heavily on MCFD's investigation, which accepted that she threatened her son but found she did not hit him with the magic spoon and concluded that he was not in need of protection under the CFCSA.

[57] In our view, MCFD's findings and conclusion under the CFCSA were not controlling on Licensing and they are not controlling on this appeal. The CFCSA is a different regime concerned with grounds for the government to remove children from the care and custody of their parents or other lawful guardians, whereas the Act and Licensing's responsibilities under it concern the health and safety of unrelated children in the paid care of the Appellant. Furthermore, the MCFD social worker, focusing on the welfare of Child 1 in the care of his mother, interviewed the Appellant, Child 1, K.H. and the Appellant's parents. The MCFD social worker did not interview Child 3, Child 4, or any of their collaterals, and there is no indication that MCFD was mindful of the investigation and interviews being conducted by Licensing. In response to questioning from the Panel, Ms. Hoffman testified that in weighing the implications of MCFD's assessment of the child protection report, she had considered it significant that MCFD did not interview Child 3 or Child 4 and that

Child1's knowledge of what went on in the Facility would have been limited his time spent there.

[58] Child 1 spent time at the Facility after school, he was considered a child in care under the Regulation and he was a central figure in the allegations concerning the magic spoon and the Appellant's answer to those allegations; yet Ms. Hoffman informed us that Licensing deferred to MCFD because Licensing's questions of Child 1 would have concerned the conduct of his mother. MCFD was not involved in a joint investigation with Licensing. It conducted its own very separate assessment for child protection purposes under the CFCSA. Licensing should only have deferred to MCFD's interview of Child 1 if Licensing was going to share in that process in a meaningful way, for its own statutory purposes. But that was never the case and Licensing's failure to interview Child 1 became an incomplete aspect of its investigation under the Act in the circumstances.

[59] We are not suggesting that Licensing ought not to have made the child protection report to MCFD or that interviewing Child 1 or making the report under the CFCSA were mutually exclusive actions for Licensing. Section 14 of the CFCSA requires a person who has reason to believe a child is in need of protection to report the matter to MCFD. This duty applies to the Licensing officials and is not a matter of choice. Appellant's counsel submitted that Licensing's deferral to MCFD's child protection jurisdiction regarding Child 1 logically also required Licensing to give weight to MCFD's conclusion that Child 1 was not in need of protection. In our view, this overlooks that Licensing remains responsible for its own statutory mandate. Its licensing and oversight authority over the Facility under the Act, including Child 1's inclusion as a child in care at this family day care, could not be deferred to MCFD.

[60] By a similar measure, the Appellant's failure to provide evidence from her family who lived in the home and spent time in the Facility (Child 1, K.H. and her parents) was a gap in her answer to the evidence relied upon by Licensing to conclude that she more likely than not threatened and hit children in care. The Appellant denied to Licensing that she used the magic spoon to threaten or hit in the day care and she posited that Child 3 and Child 4 heard about the magic spoon through her son Child 1 on an occasion when her father was teaching Child 4 to ride a bicycle. Yet there were no statements from Child 1 (who was 9-10 years old at the time of the investigation), or the Appellant's parents or her sister (who had told Licensing that the Appellant did hit Child 1 with the magic spoon upstairs in the home).

[61] Instead, some months after launching this appeal the Appellant made an access request under FIPPA to MCFD for more information about its child protection investigation. This occasioned delay in the progress of the appeal. Then when a disclosure package was received and tendered on the appeal, information about Child 1, namely notes of his interview with MCFD, had been excised out by MCFD. This was apparently done because MCFD requires consent from both parents in order to release information about a child, which was not feasible because Child 1's

father is not part of their lives. The Panel is not critical of the Appellant about that. However, this state of affairs underlines that Licensing and the Appellant were both misdirected, in their own ways, in relying on other regimes and secondary sources of information rather than interviewing Child 1 directly (in the case of Licensing) and tendering Child 1's statement and testimony directly (in the case of the Appellant). We note that the MCFD material that the Appellant was able to acquire by her access to information request under FIPPA consists almost wholly of notes of the Appellant's own statements to the social worker; notes of only one collateral interview are included, that of her mother.

J. Sufficiency of the Evidence

[62] We come to the crux of the appeal—whether all of the evidence that is before the Panel justifies the cancellation of the Appellant's licence to operate the Facility. We agree with Appellant's counsel that the central question is whether there is evidence establishing that the Appellant hit and threatened to hit children in care with a magic spoon. The Appellant's inappropriate use of time out discipline is important but would not by itself warrant action as serious as licence cancellation. If hitting and threatening to hit children in care with a magic spoon is established on a balance of probabilities, that is very serious misconduct and strong grounds for cancelling the licence, particularly where the Appellant also engaged in other, albeit less serious, contraventions when the allegations were under investigation and while the licence cancellation was stayed pending this appeal.

[63] Appellant's counsel forcefully argued that the disclosures by Child 3 and Child 4, in the interviews by Licensing, to their respective mothers and support workers at the other facility, are insufficient to support adverse findings against the Appellant and that her evidence and innocent explanations ought to be accepted.

[64] K.E. (the mother of the twins, Child 2 and Child 3) testified in support of the Appellant. Her evidence was generally consistent with what she had said to Licensing. The Appellant continues to care for these children (care of up to two children unrelated to the caregiver does not require licensing). The Appellant has been helpful with her sons who are usually happy to go her home. K.E. had no concerns about the treatment and standard of care they receive with the Appellant. She explained that Child 3 is an active and verbal boy, whereas Child 2 is quiet and in receipt of special needs support at the other facility (also attended by Child 4) with a possible diagnosis of autism. She believes that Child 3 was not hit with the magic spoon and that he heard of it from someone else, probably Child 1. She has never considered herself a complainant against the Appellant and she only reported to Licensing about what Child 3 was said to have disclosed to the support worker at the other facility because she was told to do so by the staff there. K.E. believes, and we do not disagree, that support workers at the other facility ought to have made reports to Licensing themselves if they received disturbing disclosures from children about the Appellant's care at the Facility.

[65] K.E. was present when the Licensing officers interviewed Child 3, who did not know why he was there. The interviewers asked K.E. not to talk with him during the interview. Her perception was that he did not take it very seriously and was more interested in the paper airplane the interviewer made with him. She heard the interviewer ask Child 3 about telling the truth and what a lie was and observed that most of his answers to simple questions were correct. She heard him say that the spoon was on the fridge and saw him demonstrate its use by making a striking motion on his palm. K.E.'s interpretation of this was that Child 3 was perhaps showing how the Appellant used the spoon on her own hand. It was the first time that K.E. heard Child 3 say that the magic spoon was made of wood.

[66] K.E. acknowledged under cross-examination by counsel for Licensing that she may not have seen and heard all that went on the interview because Child 3 was active and moved around the room while K.E. stayed one place and apparently had a book with her. She was taken to and agreed with the general accuracy of the Licensing notes to file regarding her report about the magic spoon in early February 2009. Licensing also questioned the credibility of K.E.'s conviction that the magic spoon was not used to discipline Child 3 because early in the investigation she had told one of the Licensing officers that because day care was hard to find she did not want to mess up her day care if the allegations were unsubstantiated, and her twins are still in the Appellant's care.

[67] Our assessment is that K.E. has sincere confidence in the quality of care her sons receive with the Appellant and she would not knowingly put them in harms way. While we appreciate that she supports and believes in the Appellant, her skepticism about whether Child 3 was in fact hit with a wooden spoon does not enable us to resolve the central evidentiary question of whether the allegations about use of the magic spoon in the day care are true. Furthermore, most of K.E.'s evidence about what she saw and heard of Child 3's disclosures is in fact consistent with or confirmatory of threatening and hitting with a magic spoon in the day care, the exception being that he first told her he was hit then said he was not when asked again later.

[68] We were impressed by the qualifications, experience and professionalism of all three Licensing officials who testified at the hearing of the appeal, Ms. Kinney, Ms. Christie and Ms. Hoffman. Ms. Kinney's testimony is the main focus of our discussion here because she was the lead interviewer of Child 3 and Child 4. We have been critical of the fact that Licensing did not video record those interviews. This does not mean that the evidence gathered, such as it can be known from the interview notes and Ms. Kinney's testimony, is without compelling value.

[69] Ms. Kinney was brought in to interview the children because of her training and experience in that area including the Stepwise Interview method, which she said she applied to these interviews. In a nutshell, the Stepwise Interview involves steps that start with neutral rapport building, progress to establishing the importance of telling the truth and the child's understanding of and commitment to doing that,

move to open-ended questioning about the subject of concern and then more probing follow-up questions. Leading questions are a serious peril with suggestible and easily confused young children and the interview notes do not enable us to verify whether Ms. Kinney accomplished textbook Stepwise Interviews. However, we were impressed with Ms. Kinney as a witness and she testified that she applied the Stepwise Interview method, as she had been trained in workshops with Dr. Yuille, and described to some extent how she went through the steps and adjusted the sophistication of her questions at the truth-telling step for the fact that Child 3 is about a year younger than Child 4. The interview notes, such as they are, and K.E.'s recollection of what she saw and heard in the interview of her son Child 3, are also consistent with Ms. Kinney having conducted the interviews according to the Stepwise Interview method, which is designed to maximize the reliability of information obtained in forensic interviews of children.

[70] Ms. Kinney said both children were active and the interviews were challenging, more so with the younger Child 3. She said Child 4 (almost age 5 at the time of the interview) was very articulate and she was able to verify that he could answer questions and understand the meaning of the truth. She described his disclosures about the magic spoon as spontaneous and without elicitation by leading questions. The interview of Child 3 (age 3 years, 8 months) was more challenging. Ms. Kinney said that she was not able to do the same level of verification of his understanding of the truth as with Child 4, but was able to verify that Child 3 could respond accurately to test questions and understood the difference between activities that were permitted (singing) and not permitted (running) at day care. She also described Child 3's disclosures about the magic spoon as spontaneous responses to open-ended questioning.

[71] Significant factors for Ms. Kinney's confidence in the reliability of the children's disclosures about discipline with the magic spoon in the day care were that the disclosures occurred independently, they were marked by spontaneity and they had similar key elements: there was a magic spoon; it was described as wooden; it was kept on top of the refrigerator in the day care; it was used to hit the palms of hands; children in care had been hit with the spoon (Child 3 said he and his brother Child 2 had been hit, whereas Child 4 said he, Child 2 and Child 3 had been hit).

[72] Objective plausibility is a relevant consideration in assessing the credibility of disclosures of abuse by young children and the core disclosures by Child 3 and Child 4 (discipline by hitting and threat of hitting with a magic spoon in the day care) are objectively plausible. The children's description of a wooden magic spoon kept on the refrigerator was highly credible, as there was a wooden magic spoon on the refrigerator upstairs in the home that the Appellant admitted she used to scare her son when he was not doing as he was told, and Licensing did find a wooden spoon on top of the refrigerator in the day care. These facts make it quite plausible that disciplinary methods involving a wooden magic spoon, threatening to hit and hitting, were applied both upstairs in the home and downstairs in the day care.

[73] The Appellant assured Licensing that, although she had threatened her son with the magic spoon upstairs, actual hitting was not used as a disciplinary method in her home nor had her parents and grandparents disciplined her in that way. When asked by the Panel about child discipline methods where she grew up, the Appellant stated that at school students were disciplined by hitting with a stick or branch. This is not surprising. Corporal punishment of any kind is strictly prohibited in schools and care facilities in this country, but strapping was in fact used in Canadian schools well through the 1960s.

[74] Looking at the constellation of evidence, we conclude that there is a high level of objective plausibility to the core disclosures of Child 3 and Child 4 that the Appellant used a wooden magic spoon to threaten and hit children in care.

[75] At the hearing of the appeal, the Appellant testified at some length and generally consistently with what she had said to Licensing. While nervous at first, her demeanour was earnest and she did not appear evasive. She presented as a sincere and forthcoming witness. We did not disbelieve her testimony because of any feature of her appearance or outward manner. We are aware in any case that witness demeanour alone is known to be an unreliable predictor of credibility.

[76] The main area in which the Appellant provided further evidence was her testimony that Child 4, who she called the “special needs” child, was aggressive and made wild statements such as threatening to burn down the day care when he did not want to conform to the Appellant’s supervision, and that he was willing to lie about other children to resolve or make trouble in the day care. The Appellant did not know whether Child 4 had an actual diagnosis for behavioural problems or special needs, but we have evidence that he was receiving extra support at the other facility also attended by Child 2, who K.E. testified was suspected to be autistic. We also know that Ms. Kinney found him to be a very verbal and articulate child. The possibility of malicious or innocent fabrication by Child 4 is a valid consideration. However, the spontaneity of Child 4’s two similar disclosures about the magic spoon in separate incidents some four months apart, first to a support worker at the other facility and later in the interview by Licensing, run counter to a malicious intent to smear the Appellant. Such an enduring sophisticated motive also seems improbable in a four year-old and possibilities of fabrication by Child 4 do not explain why Child 3 independently made similar disclosures. This brings us to the Appellant’s theory of innocent explanation for these children’s knowledge and fear of the magic spoon.

[77] The Appellant testified that the disclosures about the magic spoon by Child 3 and Child 4 must have come out of information from her son Child 1 when her father was teaching Child 4 how to ride a bicycle. Her version of events is anchored wholly in her credibility—her denial that she hit any children with a magic spoon or used it as a threat in the day care, her explanation that it was sheer coincidence that a wooden spoon was kept on the refrigerator in the Facility to retrieve objects that

fell behind it, and her theory that the disclosures and fears of Child 3 and Child 4 were generated by Child 1. We have the Appellant's evidence alone and no direct evidence from others in the home and day care who might be expected to provide material evidence to support, confirm and establish her theory—namely, her son Child 1, her sister K.H. and her parents (or at least her father). It is not necessary to infer that their evidence would be unfavourable to the Appellant; that their evidence has not been provided is sufficiently problematic.

[78] Appellant's counsel argued that Licensing failed to evaluate the Appellant's theory of how Child 3 and Child 4 came to know and be afraid of the magic spoon. As we see it, in the absence of evidence other than the Appellant's assertion of this version of events, it is a speculative theory and not a probable alternative explanation. We conclude that the Appellant's denial of use of the magic spoon in the day care and her explanatory theory about how Child 3 and Child 4 came to know and be afraid of the magic spoon does not dispel the force of the direct and circumstantial evidence to the contrary. We do not have evidence from Child 1 or evidence from K.H. as to why she told Licensing that the Appellant did hit Child 1 with the magic spoon upstairs. The Appellant's evidence alone is not compelling against the weight of the multi-source evidence that a wooden magic spoon was used, most likely by the Appellant, to threaten or hit Child 3 and Child 4, and possibly Child 2 as well, when they were in care at the Facility.

[79] In the final analysis, we turn to the standard of proof of the balance of probabilities and the standards of conduct and relevant definitions in s. 7(1)(a)(ii) of the Act and s. 52(1)(a), (c) and (d), s. 52(2) and Schedule H of the Regulation. There is a significant, though imperfect, body of direct and circumstantial evidence that Child 3 and Child 4 were afraid of being hit by the Appellant on the palms with a magic spoon kept on top of the refrigerator at the Facility and that they and Child 2 may have in fact been hit with the spoon. That evidence consists of independent disclosures by Child 3 and Child 4 to their respective mothers, support workers at another facility and Licensing officers, fear the children exhibited to several adults about the magic spoon, the Appellant and going to the Facility, the discovery a wooden spoon on top of the refrigerator at the Facility where the children said it was kept, the Appellant's admission that there was a magic spoon on the refrigerator upstairs in the home that she used to scare her son Child 1, and K.H.'s statement to Licensing that the Appellant hit Child 1 with the magic spoon upstairs. This body of evidence is objectively plausible and compelling and we find it proven on a balance of probabilities that a wooden magic spoon was used, most likely by the Appellant, to threaten or hit Child 3 and Child 4, and possibly Child 2 as well, when they were in care at the Facility. The timing, frequency, degree of force and other details around the use of the magic spoon in the Facility cannot be determined on the available evidence.

[80] Because of the gravity of the risks of corporal punishment, physical abuse and a climate of violence and fear of violence in a facility for the care of young

children, we find that licence cancellation is warranted and confirm that action by Licensing.

[81] Under s. 13(2) of the Act, the Appellant is prohibited from applying for a new community care facility licence for one year from the date of the decision to cancel her licence. The possibility therefore does exist under the Act, and we put it no higher than that, for the Appellant to come forward to Licensing, with her son, sister and parents and complete and convincing evidence that satisfactorily explains the use of the magic spoon at the Facility, in connection with a new application for a licence.

K. Conclusion

[82] For the reasons given, the appeal is dismissed and under s. 29(12) of the Act the Board confirms the cancellation, under s. 13(1) of the Act, of the Appellant's licence to operate the Happy Day Care community care facility.

[83] Finally, the Panel acknowledges that this appeal was heard on June 16, 2010, and our decision has issued outside the 90-day post-hearing period to which the Board is able to adhere in most cases. Because this appeal was complex we considered it with the care required in the circumstances and having regard to its importance to the Appellant.

November 17, 2010

Susan E. Ross, Panel Chair

Deborah J. Harden, Member

Mary-Ann Pfeifer, Member