Community Care and Assisted Living Appeal Board

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DECISION NO. 2010-CCA-006(a)

In the matter of an appeal under section 29 of the *Community Care and Assisted Living Act,* S.B.C. 2002, c.75.

BETWEEN:	MC (operating Smiley Stars Daycare)	**APPELLANT**
AND:	Paul Hundal, Manager, Health Protection, Community Care Facilities Licensing, Fraser Health Authority	**RESPONDENT**
BEFORE:	Helen Ray del Val, Chair Gordon Armour, Member Richard Margetts, Q.C., Member	
DATE:	January 25-28, 2011	
PLACE:	Langley, British Columbia	
APPEARING:	For the Appellant: BC, Agent For the Respondent: Guy McDannold, Counsel	

APPEAL

[1] This is an appeal under section 29(1)(2)(b) of the *Community Care and Assisted Living Act* (the "Act")[1]. The Appellant was the licensee (the "Licensee") of Smiley Stars Daycare (the "Daycare") and the Respondent is Mr. Paul Hundal of the Fraser Health Authority ("Fraser Health"). The Licensee has appealed Mr. Hundal's decision to the Community Care and Assisted Living Appeal Board (the "Board"). Mr. Hundal's decision was to uphold an earlier action taken by Fraser Health to cancel the Licensee's licence to operate the Daycare. The Licensee asks this Board to order that her licence be reinstated without conditions.

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[1] Relevant sections of the Act, Child Care Licensing Regulation and the *Administrative Tribunals Act* are reproduced for convenience in Appendix A to this decision.

BACKGROUND

[2] The Licensee operated the Family Child Care[2] out of her home in Aldergrove from 2003 to the summer of 2009. In the last year of the Daycare's operation, the relationship between Fraser Health and the Licensee deteriorated rapidly.

[3] Licensing officer Darla Faulkner cancelled the Daycare's Licence for the first time in September 2009. Susanne Sellin, the licensing manager, later reinstated the Licence, but attached twelve conditions to the Licence (the "Twelve Conditions"). In June 2010 Ms. Sellin cancelled the Licence again.

[4] The Licensee, believing that Fraser Health staff was biased and failed to address her concerns, asked for reconsideration of Ms. Sellin's cancellation decision. On reconsideration Mr. Hundal concluded that there was no evidence of bias against Fraser Health, nor was there evidence that Fraser Health failed to address the Licensee's concerns. He found that the Licensee was unable to assure compliance and, accordingly upheld the cancellation decision. The Licensee appealed Mr. Hundal's decision to this Board.

Main issue and conclusion

[5] The central issue to be decided is whether the Appellant has satisfied the burden of proving that Mr. Hundal's decision to confirm the cancellation of the licence was not justified. After considering all of the evidence and arguments, we have concluded that Mr. Hundal's decision was justified.

PRELIMINARY MATTERS

[6] Prior to the commencement of the hearing, Fraser Health's counsel asked for a preliminary jurisdictional ruling on:

1. Which of Fraser Health's cancellation and reconsideration decisions the Board has jurisdiction to hear in this appeal; and,

2. What is the scope of evidence that the Board has jurisdiction to hear in this appeal.

The decision under appeal

[7] During the hearing, the parties agreed and the Board confirmed that the only decision under appeal is Mr. Hundal's reconsideration decision: That is the only decision that the Board can confirm, reverse, vary or send back for reconsideration under section 29(12) of the Act in this appeal.

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[2] Defined in section 2 of the Child Care Licensing Regulation as a "...program in which the licensee (i) is a responsible adult, and (ii) personally provides care, within the licensee's personal residence, to no more than 7 children;"

The scope of the evidence

[8] The Board can receive any information that it considers "relevant, necessary and appropriate" and it is not bound by the strict rules of evidence that bind a court[3].

[9] In this appeal, the scope of admissible evidence is very broad because of:

- the nature of the allegations the parties made against each other; and,
- the evidence that the parties each adduced to support their respective positions.

[10] Both the Appellant and the Respondent referred to the history of their extensive past dealings. The Appellant submits the history contains evidence of Fraser Health's bias against her, and the Respondent submits it is evidence of the Licensee's pattern of non-compliance with the Act and its regulations and Fraser Health's patience. Thus, both relied on past events and documents, some dating back to the beginning of their licensor/licensee relationship in 2003, to prove their respective points.

[11] There was some evidence that the Appellant sought to introduce to which Fraser Health's counsel objected. The purpose for which the Appellant wished to adduce some of the evidence was sometimes not readily apparent and a significant amount of time was spent determining the purpose and relevance of that evidence. We have determined that except for those specific pieces of evidence that we ruled as irrelevant and therefore inadmissible during the hearing, all other evidence adduced by the parties is admissible and forms part of the information on the appeal.

[12] We granted the Appellant significant latitude in order to ensure that there was a "full and fair disclosure of all matters relevant to the issues"[4] and that the Appellant was given a full and fair opportunity to present her case. We appreciate the patience and courtesy the parties extended to the Panel and to each other during this process.

FACTS

Daycare inspections and hazard ratings

[13] Fraser Health's licensing officers inspected the Daycare facilities periodically. After the Licence issuance, the Daycare was inspected 14 times. Sarb Rehal had been the licensing officer who inspected the Daycare from the time that the Licence was issued on October 22, 2003, until March 28, 2006. Ms. Faulkner carried out the inspections from August 2007 until July 30, 2009.

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[3] Section 40(1) of the *Administrative Tribunals Act*
[4] Section 38(1) of the *Administrative Tribunals Act*

[14] The inspecting licensing officers wrote a facility inspection report ("inspection report") during and/or immediately following each inspection and assigned the Daycare a "hazard rating" which can be "low", "moderate" or "high". Licensing officers arrive at a facility's hazard rating based not only on the seriousness of an individual incident of non-compliance with the Act and the Child Care Licensing Regulation, B.C. Reg 332/2007 (the "Regulations"), but also on the cumulative effect and frequency of all of the non-compliant items.

The pre-2007 inspections by Ms Rehal

[15] Ms. Rehal inspected the Daycare on October 22, 2003, for the purpose of issuing a permanent licence. Following issuance of a permanent licence, Ms. Rehal made 7 more inspections between July 30, 2004, and March 28, 2006, and rated the Daycare as high hazard twice, moderate 4 times, and low once. In 6 of the 7 cases, the Licensee wrote to Ms. Rehal after the inspection to advise how she had corrected or planned to correct the non-compliance found.

[16] Prior to licence issuance, the Daycare operated under an interim permit for about 7 months during which period Fraser Health frequently monitored the Daycare. On October 22, 2003, when the Licence was finally issued, Ms. Rehal recorded in her inspection report that all previously identified compliance issues had been satisfactorily addressed. She specifically noted that work to the outside area and yard that the children could access during outdoor play had been completed. For the Licensee, Ms. Rehal recommended "continued use of self inspection checklist throughout the year to ensure compliance and promote pro-active management".

[17] During each of the 7 inspections after licence issuance, Ms. Rehal found a number of contraventions in the Daycare. Some examples of the salient ones include:

Hazardous materials storage and other hazardous practices:

- July 30, 2004 – there was unsafe storage of garden tools, fence posts and ladder in outdoor area and the screen to prevent access to the storage room was open.
- October 26, 2004 - wood pieces with protruding nails were found in the outdoor area. A tree stump and uncoiled garden hose were stored near the Daycare entrance.
- October 26, 2004 - the closet door to the area where detergent and bleach were stored was broken.
- January 31, 2005 – the backyard was not suitable as an outdoor play area for children as the fence was in disrepair and construction materials and tools were stored in yard.
- March 11, 2005 – the fence was still under repair posing a potential risk to the children because of a Rottweiler dog next door.
- May 27, 2005 – the main playroom was crowded with too much play equipment and storage of other items. The stump outside by the playhouse continued to pose a tripping hazard.

- May 27, 2005 – in the backyard there were two ladders and an extra fencing panel leaning against deck stairs. Storage areas for potentially hazardous materials were accessible to the children.
- May 27, 2005 - the water table in the yard contained water that needed to be emptied.
- October 14, 2005 – a rusted hockey net frame was accessible in the backyard.
- March 28, 2006 – the hockey frame was still stored in the backyard and a wheelbarrow leant against the side of the house.

Failure to keep mandatory staff records:

- During the July 30, 2004, October 26, 2004, and October 14, 2005, inspections, personnel records that a daycare is required to keep such as criminal record, reference checks and immunization records were missing from the Daycare's staff records.

Making structural changes without first informing health authority:

- During the July 30, 2004, inspection, Ms. Rehal noted that the Licensee was planning to build a new playground structure in the backyard and advised her to ensure regulatory compliance before starting construction. The Regulations[5] require a licensee to first obtain a health authority's approval before making structural changes to a daycare facility.
- When Ms. Rehal next inspected the Daycare outdoor play area on October 26, 2004, she found that construction of a retaining wall along the side of the yard was underway without prior notification to Fraser Health. Ms. Rehal required the Licensee to submit a Health and Safety Plan for managing construction risks within 24 hours.

[18] As a result of the construction there was no suitable outside play area for the children as required by the Regulations. Ms. Rehal advised the Licensee that a licensee could be exempted from this requirement by taking the children to a play area away from the Daycare, however, she would need to apply for an exemption ("Exemption"). She gave the Licensee an opportunity to submit an application by November 5, 2004. The Licensee said that she faxed her request for an Exemption on November 2, 2004, but Ms. Rehal said that she was unable to locate a record of the request in her office. The January 31, 2005, follow up inspection report recorded that although the retaining wall had been completed, the back yard remained unsuitable as a play area for the children in care because the fence was in disrepair and construction materials and tools were stored in the yard.

[19] An Exemption was granted on March 5, 2005, with the requirement that the fence be repaired by mid April 2005.

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[5] See section 10(2) of the Child Care Licensing Regulation

Ms. Faulkner's first inspection – August 2007

[20] Licensing officer Ms. Faulkner joined Fraser Health in 2007 and carried out her first inspection of the Daycare in August 2007. The Exemption had expired by then, but the children in care continued to use an outdoor play area away from the Daycare. The Daycare's own outdoor area remained unsuitable due to another project that was underway - the construction of a deck. The Licensee had failed to notify Fraser Health of this construction project as well.

[21] Ms. Faulkner recorded 17 violations in the inspection report. Four of the violations were recorded as "critical hazards" which meant that they posed "critical health hazards and required immediate attention". The Daycare was assessed as having a high hazard rating on August 3, 2007, "due to the number of critical hazards and contraventions noted".

[22] During that inspection the Licensee asked Ms. Faulkner about expanding the Daycare and obtaining a Group Child Care[6] licence. Ms. Faulkner encouraged the Licensee "to focus on coming into compliance as a [Family Child Care], prior to applying for a new license/facility."

Expansion hopes and Mr. C

[23] The Licensee and her husband ("Mr. C") had hopes of expanding the Daycare facility into a Group Care and/or Multi-Care facility[7] and made plans to extensively renovate their home.

[24] Mr. C took charge of the rezoning application and the renovation plans and poured considerable resources into the project. In order to operate a Group Care facility out of their home, the Township of Langley required a rezoning of their property to change its use.

[25] In order for Langley to approve rezoning, the township required Mr. C to submit to them a set of proposed floor plans for a Group Care facility (the "Rezoning Floor Plan") that had first been approved by the health authority under the Act. Therefore, Mr. C had to first obtain Fraser Health's approval of the Rezoning Floor Plan before Langley would finally approve the rezoning. Mr. C took charge of the rezoning application and the renovation plans. He was, by and large, not involved in the Licensee's Daycare operation and her dealings with Fraser Health before mid-2008.

June 13, 2008, inspection

[26] The June 13, 2008, inspection report noted that a number of items in the Daycare's outdoor play area posed health and safety hazards as they were accessible to the children and had not been properly stored. The items included exposed bolts underneath the balcony; bricks, tires, freezer, door and plastic sink stored under the balcony; and wheelbarrow leant against stairs to an unsafe

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[6] See section 2 of the Child Care Licensing Regulation

[7] See section 2 of the Child Care Licensing Regulation

playhouse in order to bar access to the playhouse. The report recorded that Mr. C committed to fixing the bolts before the children next attended the Daycare.

[27] The June 13 report required the Licensee to provide a written response to Fraser Health by June 27, 2008, and assessed the Daycare as having a low hazard rating on that day. The Licensee did not provide a written response to Fraser Health by June 27, 2008.

[28] Ms. Faulkner also noted in her report that she discussed the "Licensee's plan to apply for an amendment to their Licence to change service type" from Family to Group Child Care and advising that she would follow up on the discussion by separate letter at a later date.

[29] There is a five page letter dated June 25, 2008, from Ms. Faulkner to the Licensee in which she summarized their June 13 discussion and listed the documentation to be submitted for an amendment to the Licence or a new licence to operate a Group Child Care facility. She specifically described the requirements of the Health and Safety Plan that must be approved by Fraser Health before the Licensee could start renovations. Ms. Faulkner also required the Licensee to file two Compliance Plans to address Fraser Health's concerns about the Daycare's pattern of regulatory non-compliance as part of any application for an amendment or a new licence. Ms. Faulkner said she issued that letter to the Licensee on or about June 25, 2008. The Licensee and Mr. C said that they never received the letter until March 3, 2009.

October 2008 inspection

[30] On October 1, 2008, Ms. Faulkner conducted a follow up inspection of the Daycare. The inspection report noted that Fraser Health had not received any written response from the Licensee as required by the June 13 report but that the Licensee had "suitably" dealt with the hazardous items listed in the June 13 report. However, Ms. Faulkner identified other items which she found to be hazardous, for example, pavers "stacked on top of a retaining wall", "wood pieces stored on grass near gate", bricks under trees, 2x4's stored on west side of house, and "wood pieces had nails protruding from them". Ms. Faulkner noted the Licensee's explanation that "when the children are outside, staff place a board between the deck stairs and fence to block access to this area."

[31] The October report also noted that the Daycare's staff records were missing some mandatory documentation. For example, the requisite proof of references, medical clearance, immunization, first aid certification and completion of 20 hours of training were not on file for some of the staff. The October inspection resulted "in a moderate hazard rating due to the number of items noted as being stored unsafely and due to the inappropriate screening of staff."

[32] The report required the Licensee to take corrective action for compliance and provide a written response to Fraser Health by October 10, 2008. The Licensee did not provide a written response by October 10, 2008.

Strains on the Licensor/Licensee relationship

The "Flash Point" – the January 23, 2009, inspection

[33] The January 23, 2009, inspection lasted almost 4 hours. Ms. Faulkner, and the Licensee and Mr. C, do not agree on what was said and what transpired during their exchange on that day.

[34] That inspection was to follow up on the non-compliance matters found in October 2008. In the January 23 inspection report, Ms. Faulkner noted that some, but not all of the hazardous items identified in the earlier report had been "suitably addressed". However, construction materials and discarded items such as a washing machine, wash basin, cradle and toys were stored in places which the children could access from the outdoor play area. An audit of staff files again revealed that some staff files were missing the same documentation as noted in the October 2008 inspection.

[35] Ms. Faulkner rated the Daycare as a high hazard on January 23, 2009, "due to on-going non-compliance with respect to the inadequate screening of staff and the unsafe storage of construction materials in the outdoor play area." By the same report, Ms. Faulkner asked for the Licensee's response by February 4, 2009, and called for a meeting which would involve her manager Ms. Sellin in order to address the Licensee's on-going non-compliance.

[36] During the January 23, 2009, inspection, Mr. C discussed with Ms. Faulkner plans to amend the Licence so as to operate a Group Child Care facility and wanted to know how he could obtain Fraser Health's approval of the Rezoning Floor Plan.

[37] Mr. C alleges that Ms. Faulkner had verbally indicated to him that the inspection would result in a low or moderate hazard rating. Ms. Faulkner denies that she would have told him about the rating since he was not the licensee. Mr. C alleged that Ms. Faulkner changed the rating to "high" in the report because she was malicious. Mr. C believed that she changed the hazard rating because she felt offended by his approach to seeking approval for the Rezoning Floor Plan and by his request for her supervisor's contact information when he was not satisfied with her responses. In Mr. C's view, Ms. Faulkner called for a meeting with her manager to deal with the Daycare's non-compliance issues only because he had asked to talk to Ms. Faulkner's supervisor to deal with the expansion plans. Mr. C says that the change in the rating is an indication of Ms. Faulkner's bias, malice and vindictiveness and that the high hazard rating was therefore given in bad faith. Ms. Faulkner denies these allegations and says that the high hazard rating was warranted by the Licensee's history and frequency of contraventions.

[38] Ms. Faulkner said that during the January 23, 2009, discussion Mr. C became agitated and argumentative and that she felt intimidated. Mr. C denies that he was agitated and said that he remained calm throughout.

"Shut you down" comment – January 28, 2009

[39] On January 28, 2009, Mr. C had a telephone conversation with Ms. Sellin, Ms. Faulkner's supervisor. While discussing what happened during the January 23

inspection, Ms. Sellin made a statement to Mr. C to the effect that all Ms. Faulkner could think about was how to "shut you down."

[40] Ms. Faulkner denies that she made such a statement. Ms. Sellin had explained to the Licensee and Mr. C that she, not Ms. Faulkner, made the statement to Mr. C but that it was made in reference to Mr. C's behaviour during the January 23 exchange and not to the closure of the Daycare. The Licensee and Mr. C do not believe Ms. Sellin's explanation. They believe that Ms. Faulkner had indeed made that comment to Ms. Sellin and that Ms. Faulkner wanted to shut the Daycare down.

Plan approval process – tying rezoning to a licence application (March 3-11, 2009)

[41] In a meeting on March 3, 2009, with Fraser Health staff, Mr. C complained that Ms. Faulkner had yet to explain how he could obtain Fraser Health's approval of the Rezoning Floor Plan so that he could proceed with his rezoning application. When Ms. Faulkner referred him to the June 25, 2008, letter the Licensee and Mr. C said that they had never seen it before this meeting. They do not believe that Ms. Faulkner had sent them the letter earlier.

[42] Ms. Faulkner wrote that during the March 3 meeting, "It was discussed that floor plan approval was done as part of an application for licence and that an application had not been received from them" for a Group Child Care facility. The parties then agreed that if an application for licence with the Rezoning Floor Plan were submitted by March 4, 2009, then Fraser Health would give verbal feedback by March 10, 2009, which feedback may include "required changes, recommendation and/or approval 'in principle'".

[43] On March 4, 2009, the Licensee submitted for Fraser Health's approval the Rezoning Floor Plan as part of an application to amend the Licence to operate a Group Child Care and In-Home Multi-Care Child Care[8] facility (the "Group Care Licence Application"). At the end of the day on March 10, Ms. Faulkner left Mr. C two voice messages that "for the most part the plans looked good" but that she had a few questions before she could approve the plan in principle. Anxious that the Rezoning Floor Plan would not be approved, Mr. C called Ms. Faulkner but was unable to reach her. Mr. C and Ms. Faulkner traded voice messages afterwards.

[44] Mr. C was very frustrated by his many unsuccessful attempts to speak to Ms. Faulkner after he submitted the Rezoning Floor Plan. He was dissatisfied with Ms. Faulkner's efforts to respond to his calls and with the responses that he did receive. The Licensee said:

> Although Ms. Faulkner grudgingly acknowledges <u>some</u> of the numerous messages she received over a one week period, she has not indicated <u>all</u> the messages left on her voice mail that can be confirmed by our phone records (See attached TELUS phone record). This is another example of Ms. Faulkner presenting a one-sided and distorted picture of the facts.

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[8] See section 2 of the Child Care Licensing Regulation

Escalation – March 11, 2009

[45] On March 11, 2009, Mr. C went to Fraser Health's Langley office asking to see Ms. Faulkner after he had been informed that she would not be available to meet on that day. When the receptionist again advised him that Ms. Faulkner was not available, Mr. C demanded the contact information of the manager. Those present at this March 11 incident have different recollections of exactly what happened. The receptionist said Mr. C made her feel intimidated and uncomfortable. Mr. C said that the receptionist was patronizing, "difficult and obstructive" and made him feel belittled and "stymied".

[46] Following the March 11 incident Fraser Health launched an internal investigation into staff safety and Mr. C complained of the treatment he had received from Fraser Health staff to the Regional Manager Tim Shum. Mr. Shum found that Fraser Health staff did not act improperly, but that Mr. C's conduct was "aggressive and confrontational and made the clerk feel uncomfortable, intimidated and unsafe". Not satisfied with Mr. Shum's findings, Mr. C appealed to Fraser Health's Vice-President, Clinical Support & Strategic Planning who found no grounds to change Mr. Shum's findings. Mr. C also made requests under the *Freedom of Information and Protection of Privacy Act* for disclosure of documents by Fraser Health.

The taped meeting – March 24, 2009

[47] On March 24, 2009, Ms. Faulkner, Ms. Sellin and Mr. Shum met with the Licensee, Mr. C and his father. Mr. C tape recorded the meeting with Fraser Health's consent.

[48] Ms. Faulkner advised that the Group Care Licence Application would not be approved.

[49] They discussed Mr. C's involvement and he was told that licensing staff found him sometimes aggressive and intimidating. Mr. C disagreed and believed he was only being assertive, particularly when Fraser Health staff was not discharging their duties properly. Fraser Health reminded the Licensee that it was she, not Mr. C, who legally held the Licence.

[50] The Licensee submitted Compliance Plans to address the non-compliance of the existing Daycare and the parties agreed to move forward to achieve on-going compliance.

The April 8, 2009, letters

[51] The parties met in April 2009 and discussed the next steps to take in addressing the on-going non-compliance issues at the Daycare. After the meeting, Ms. Sellin issued a letter dated April 8 setting out what Fraser Health believed to be the agreements and commitments made. Ms. Sellin sent that letter under Fraser Health letterhead to the Licensee by attaching it to an email as an unprotected document in Word format. The Licensee and Mr. C made changes to the document three times, each time sending the revised document back to Ms. Sellin highlighting only some but not all of the revisions.

[52] Ms. Faulkner stated in the First Cancellation Report that she found the way that the Licensee and her husband had altered the letter to be misleading. Mr. C said that the onus was on Ms. Sellin to read the letters and catch the changes.

[53] The Licensee testified that she thought that she was supposed to have an opportunity to "sign off" on the document when an agreement was reached. She admitted that, in hindsight, not highlighting all the revisions was a mistake and explained that she did not know it was poor business practice.

Plan approval – untied from licence application

[54] In late March 2009 Ms Faulkner advised the Township of Langley that the Group Care Licence Application had not been approved. In early April 2009 the Township explained to Ms. Faulkner that a review of the Rezoning Floor Plan was for rezoning only rather than licensing purposes.

[55] On April 24, 2009, Ms. Faulkner issued an 896 page decision report setting out the reasons for not granting the Group Care Licence Application but did not deal with the Rezoning Floor Plan.

[56] Mr. C grew increasingly frustrated. Ms. Sellin advised him on May 13, 2009, that review of the plan was not a high priority matter since the plan was "no longer connected to an open application."

[57] On May 27, 2009, Ms. Faulkner granted approval in principle of the Rezoning Floor Plan but only after many phone calls, emails and letters exchanged among Mr. C, the Licensee, Ms. Faulkner, Ms. Sellin and the Township of Langley escalating the matter.

Breakdown – the May 26, 2009, meeting

[58] On May 26, 2009, medical health officer Dr. Elizabeth Brodkin along with Mr. Shum, Ms. Faulkner, and Ms. Sellin attended a meeting with the Licensee. Mr. C and his father were also present and did almost all of the talking for the Licensee.

[59] The meeting started off with Mr. C asking to tape record the meeting. Fraser Health did not consent and the meeting was not tape recorded.

[60] For Fraser Health, the key purpose of the meeting was to discuss how to move forward. The Licensee's preoccupation, however, was with how wrong Fraser Health's treatment had been in the past. Mr. C's main focus was on what he viewed as the inaccuracy, "one-sidedness" and unfairness of Fraser Health's allegations, reports and records. Mr. C and his father repeatedly expressed their concerns with whether Fraser Health would again document this meeting in a self-serving way to prejudice the Licensee.

[61] Mr. C referred to the comment Ms. Sellin made on January 28, 2009, about Ms. Faulkner wanting "to shut you down". He said the Licensee was uncomfortable with Ms. Faulkner continuing as the licensing officer for the Daycare.

[62] Ms. Sellin brought up the unmarked alterations made to her April 8, 2009, letter and described not highlighting revisions made to her letter as "unprofessional".

[63] After approximately 2 hours and much debate over a number of past events and matters (including whether letters/responses claimed to have been mailed on a certain date were actually sent on that date) the meeting was adjourned but only after more argument over how the meeting would be documented. The parties agreed that Fraser Health would not issue a letter summary of the meeting.

Last inspections

[64] On June 17, 2009, Ms. Faulkner and Ms. Sellin carried out a routine inspection of the Daycare. A few non-compliant items were noted including one pertaining to staff records and a "low" hazard rating was assigned.

[65] The Licensee was reminded that a Health and Safety plan must be approved before renovations could commence.

[66] The Licensee was required to advise Fraser Health in writing by July 8, 2009, on how she addressed the non-compliant items. The Licensee did not respond as required.

[67] On July 30, 2009, Ms. Faulkner and Ms. Sellin attended at the Daycare where major renovations had begun and the facility had been vacated. No Health and Safety plan had been filed nor notification given to Fraser Health. Ms. Faulkner and Ms. Sellin inspected the premises and issued their inspection report which assigned the facility a high hazard rating and required the Licensee to submit a Health and Safety plan addressing the renovations by August 7, 2009.

[68] On August 4, 2009, Ms. Faulkner received a three line letter dated July 12, 2009, from the Licensee advising that the Daycare was taking vacation until the second week of September during which time the facility would be renovated. She did not submit a Health and Safety Plan as required.

Licence cancellation and conditions

[69] On September 25, 2009, Ms. Faulkner issued the first decision to cancel the Licence. The Licensee asked for reconsideration under section 17 of the Act.

[70] Ms. Sellin reconsidered Ms. Faulkner's cancellation decision and reinstated the Licence on November 10, 2009, but attached 12 terms and conditions to the Licence. (A list of the Twelve Conditions is in Appendix B.)

[71] Condition #2 required the Licensee to ensure that Mr. C did not interact with Fraser Health licensing staff in person or in writing. Condition #4 required that "all documentation to Licensing" be written by herself personally and be submitted before requested deadlines.

[72] Between November 10 and December 10, 2009, Ms. Sellin and the Licensee's counsel corresponded several times to negotiate and clarify the terms and conditions. On December 10, 2009, Ms. Sellin wrote to the Licensee's counsel to give Fraser Health's "final response".

[73] During the hearing, Mr. C testified that he and the Licensee discussed the Twelve Conditions with their counsel. Mr. C and the Licensee were concerned with the period of time over which some of the conditions would be in effect, and

whether the Licensee would have the support she needed from Mr. C during that period. As the Twelve Conditions would be reviewed after a year, they considered adopting a practical approach and thought they could "live with" them for a year. However, they approached their MLA about their dissatisfaction with Fraser Health.

[74] Mr. C sent emails to Mr. Shum on December 31, 2009, January 6, 7, February 6, 12, 15 and 21, March 6 and 21, and April 7, 2010, regarding the operation of the Daycare. He emailed Ms. Sellin on April 9 and Ms. Faulkner on April 15 and May 12, 2010.

[75] On March 2, 2010, Ms. Sellin had written to the Licensee to advise of the breach of Condition #2 and requested a response by March 17. The Licensee did not respond as requested. On March 29 Ms. Sellin sent a reminder letter.

[76] On April 9 the Licensee emailed Ms. Sellin to state that she was still reviewing the Twelve Conditions and had not committed to them yet.

[77] Fraser Health's counsel sent reminder letters to the Licensee on April 13 and 16, 2010 asking for a response by April 27. By June 15, 2010, the Licensee still had not responded. Fraser Health found the Licensee's failure to respond to be a violation of Condition #4.

<u>The second cancellation and reconsideration decisions</u>

[78] On June 15, 2010, Ms. Sellin issued Fraser Health's decision to cancel the Licence (the "Second Cancellation Decision"). The Licensee applied for reconsideration under section 17 of the Act.

[79] On reconsideration, Mr. Hundal concluded that the Licensee had not provided sufficient evidence to suggest that Ms. Sellin had been unfair, or that she had erred in fact, law or judgment in making the Second Cancellation Decision. He further concluded that there was no substantive evidence to dispel the concerns underlying Ms. Sellin's decision. Accordingly, he confirmed the Second Cancellation Decision on August 12, 2010.

[80] The Licensee appealed Mr. Hundal's decision to this Board.

ISSUES

[81] The ultimate question is whether the Appellant has proved that Mr. Hundal's decision was not justified. In considering that question, we examined particularly:

1. In determining whether the Appellant has met the burden of proving that the reconsideration decision under appeal was not justified, to what extent, if any, is the Board required to grant deference to Mr. Hundal's decision?

2. Is there sufficient evidence to prove that the conduct of Fraser Health staff gave rise to a reasonable apprehension of bias, or that there was actual bias or bad faith?

3. Is there sufficient evidence to prove that Fraser Health's records and inspection reports relating to the Daycare were inaccurate, incomplete or otherwise unreliable?

4. What do the Fraser Health records and inspection reports prove regarding

   (a) history and pattern,
   (b) breach of the Act and/or its regulations, and,
   (c) breach of conditions of the Licence?

5. Is the Licensee likely to achieve and maintain compliance?

DISCUSSION AND ANALYSIS

1. Deference

Appellant's submissions

[82] The Appellant submitted that there is an assumed expertise and knowledge of the Act and the Regulations held by members of the Board and that accordingly no deference ought to be granted by the Board to the Respondent on appeal of the reconsideration decision.

Respondent's submissions

[83] The Respondent refers to the standard-of-review analysis set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 in support of his argument that the appropriate standard of review for this Panel is 'reasonableness', as that term is described in *Dunsmuir*, with deference being given to the decision made by the Respondent. The Respondent further suggests that the Panel must determine whether the decision "falls outside the range of possible acceptable outcomes which are defensible in respect of the facts and law." In particular, in advocating a deferential or "reasonableness" standard, the Respondent relies on the purpose of licensing under the Act, the special expertise of licensing officers and the nature of the question at issue as the determining factors to be considered when applying the standard-of-review analysis.

Panel's determination on deference

[84] We have determined that no deference is owed to the Respondent in assessing whether the Respondent's reconsideration decision is justified because the Act requires the Board to proceed as if the appeal were a decision "of first instance". The Legislature clearly intended the Board to examine the evidence and arguments anew, and if it deems appropriate, to make its own findings of fact.

Nature of Appeals

[85] The types of appeals to a specialized administrative tribunal can range from the "most narrow . . . a true appeal, where the appeal is founded on the record

and where the appellant must demonstrate a reviewable error of fact, law or procedure" to the "broadest...which is an appeal *de novo*, where the original decision is ignored in all respects." [9]In between those two ends are mixed or hybrid models of appeal.

Community Care and Assisted Living Appeal Board – deliberate legislative change from pure appeal to decision of first instance

[86] The Board's enabling legislation and the historical amendments instruct us that the Board, when considering an appeal of a licensing decision, is meant to have a broad appellate mandate, exercised in a flexible way, in the nature of a fresh hearing into the merits of the matter.

[87] On May 14, 2004, the current *Community Care and Assisted Living Act* came into force, repealing and replacing its predecessor the *Community Care Facility Act* (the "CCFA"). The scheme of the former legislation had the hearing of first instance conducted at the Director level (which was usually delegated to the Medical Health Officer), and an appeal to the Community Care Facility Appeal Board, as it was then known, was a "pure" appeal based on the record of the decision below. [10]

[88] Under the current Act, the appellate body became this Board with new powers in addition to a new name. Most significantly, section 29(11) of the Act changed the nature of the appeal such that it was no longer a "pure appeal on the record", but instead a fresh hearing of the merits of the matter on appeal with a duty to receive evidence and argument from the parties "as if a proceeding before the board were a decision of first instance..." Appeal Board hearings now replace the former Medical Health Officer hearings as the "first instance" proceeding.

[89] In support of this new mandate, the majority of the provisions of the *Administrative Tribunals Act* SBC 2004 c. 45 (the ATA) were incorporated by reference, as might be granted to a decision maker of first instance, to provide the Board with the full range of procedural powers in order to conduct a full and effective hearing into the merits. For example, the Board has the power to set its own practice and procedure; hearings before the Board are to be open to the public; a duty to receive evidence and argument is imposed; parties themselves, as well as the Board, are granted the power to summon witnesses; the grounds of appeal are not limited; broad remedial powers are granted including the power to confirm, reverse, vary or send the matter back for reconsideration; the Board is deemed to be an expert tribunal and is given a privative clause such that its own decisions, within its exclusive jurisdiction, are not open to question or review in any court. The Board also has the authority to issue a stay of the decision appealed from, if it is satisfied that a stay would not risk the health or safety of a person in care. That the Board is entrusted with the authority and obligation to ensure the health and safety of vulnerable citizens is a further indicator that the Board is considered to be an expert tribunal.

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[9] Frank A.V. Falzon QC, in *Appeals to Administrative Tribunals* (2005) 18 C.J.A.L.P.1 at page 34

[10] See the decision of the former board in *KV v. Vancouver Island Health Authority*, (November 10, 2003); *Kucher v. Benson*, January 23, 1995, unreported, B.C.S.C.

[90] That it is meant to be a full hearing of the matter is further evidenced by the move away, as mentioned above, from a first instance hearing previously required under section 6 of the CCFA[11] by the Medical Health Officers prior to taking enforcement action. The summary reconsideration process in the current legislative scheme is followed by an expanded right of appeal where the Board, as the appeal body, has the express power in section 31.1 of the Act to "inquire into, hear and determine all those matters of fact, law and discretion arising or required to be determined in an appeal under section 29 and to make any order permitted to be made." This particular language invites both fact-finding and the exercise of discretion on the part of the Board.

[91] At the same time, there are two significant differences in the approach of this Board from a traditional hearing "de novo". First, while not required by the Act, the Board requests that a copy of the record be produced and does look at the reconsideration decision, rather than disregard it completely as might be expected in a truly *de novo* proceeding. Secondly, section 29(11) places the burden of proof on the Appellant, to establish "that the decision under appeal was not justified". In other words, unless the Appellant meets the burden the prior decision stands. These differences suggest that the mandate is not a true "*de novo*" appeal but is instead a "mixed model appeal"[12], or in other words, a hybrid review with *de novo* considerations.

[92] Accordingly, we find that an appeal to the Board under the Act fits somewhere between the two ends of the "true appeal/de novo" dichotomy, closer to the '*de novo*' end. It is in the nature of a hybrid review or mixed model of appeal by way of a full hearing into the merits, where the record and the decision below are not ignored in all respects but where the Board freely hears, and in fact must receive evidence and argument as if it were a first instance decision maker; and where the appellant still bears the onus of establishing that the decision appealed from was not justified.

Review by court vs. review by administrative tribunal

[93] When Courts review the decisions of administrative tribunals, the common law principle of deference has, to a large extent, been adopted by the courts. It has been recognized that deference may be given in a situation where there is an appeal from a decision made by an individual or tribunal with special expertise to a decision-maker, such as a Supreme Court Justice, who is not a specialist in the matter at issue. In the judicial review context, deference is also granted in recognition of the advantage enjoyed by lower courts and quasi-judicial bodies in

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[11] Section 6 of the CCFA read as follows: "If the director determines following a hearing that a license or permit holder has contravened an enactment of British Columbia or of Canada or a term or condition of the licence or permit, the director may attach terms or conditions to, suspend or cancel the licence or interim permit." Section 13(1) of the Act does not require a hearing and now provides that "A medical health officer may suspend or cancel a licence, 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. (Emphasis added)

[12] Falzon supra note 45 at page 35

that they are in a better position to assess the evidence, i.e. they see and hear witnesses whereas a court on judicial review does not.

[94] When appellate administrative tribunals deal with appeals from the decisions below, the principle of deference should not be automatically applied.

[95] In British Columbia, courts have expected appellate administrative decision-makers to do what their enabling statutes say and have not required them to apply the standard-of review analysis set out in Dunsmuir.

[96] In a February 24, 2010 decision in *Investment Industry Regulatory Organization of Canada* (IIROC*) v. Rahmani*, 2010 BCCA 93, the Honourable Madam Justice Rowles of the British Columbia Court of Appeal had this to say:

> [39] The argument IIROC wishes to advance on appeal is that the common law standard of review as elucidated in *Dunsmuir* ought to be applied by the Commission on a review of the decision of an SRO. In my opinion, IIROC's proposed argument ignores the fact that the Commission's review of the IDA Hearing Panel's decision is not a judicial review and that nothing in the legislative scheme for the regulation of the securities industry suggests that the Commission must give significant deference to a decision of an SRO.
>
> ...
>
> [41] ...A Commission hearing and review of an SRO decision is not a judicial review. Courts developed the principles of judicial review in the absence of legislative authority. The principles were meant to protect administrative decisions from undue interference when there was clear legislative intent to deal with certain issues in a specialized administrative forum. In *Dunsmuir*, at para. 27, the Supreme Court of Canada explained the basis for judicial review in these terms:
>
> ... [j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers....
>
> [42] Unlike the court's jurisdiction on judicial review, the Commission's jurisdiction on a hearing and review of a decision of an SRO is set out in the *Act*. ...

Dunsmuir not applicable

[97] We adopt the approach set out by the BC Court of Appeal in the case above. It avoids importing unnecessary complexity into Board proceedings. We find that we are not required to apply the common law 'standard-of-review' analysis set out by the court in *Dunsmuir* – an analysis expressly stated to be applied within the context of judicial review by a court, which by its very nature, is a limited review. We do not find any support in the legislation for an approach that incorporates all the requirements and limitations of a traditional judicial review conducted by the courts, including the standard-of-review analysis, into a hybrid, fresh hearing type of proceeding before this Board.

[98] We have considered the submissions of the parties as well as the enabling legislation and have concluded that we owe no particular deference to the decision of the Respondent. For the reasons set out above, our view is that the legislature has made it clear that a hearing before the Board, and accordingly before this

Panel, is to be conducted as a "first instance" or fresh hearing, akin to a hearing *de novo*, before a specialized, expert, independent tribunal with broad remedial powers. Under these circumstances the Panel is not bound to give deference to the reconsideration decision below.

[99] We must consider the totality of the evidence before us and undertake our own analysis of the issues. If we agree that Mr. Hundal's decision confirming the licence cancellation was justified, that decision will be confirmed and the appeal dismissed. If we do not agree that Mr. Hundal's decision was justified, the decision below may be reversed or varied, or we may remit the matter back to the licensing authority for reconsideration, with or without directions: s. 29(12).

[100] Our task then, is to determine whether the Appellant, after a full hearing, has met her burden of convincing us that the reconsideration decision made by Mr. Hundal to confirm the cancellation of her childcare licence was not justified.

2. Bias/Bad faith

Apprehension of bias

[101] The test for bias is not whether there is actual bias, but whether there is a reasonable apprehension of bias. To examine whether there is a reasonable apprehension of bias we ask "would a reasonable person who knows of all the relevant facts conclude that the decision maker is unlikely to be able to decide impartially and fairly." That question must be examined in the context of the duties that the law requires that decision maker to discharge: different decision makers are measured differently according to the functions that the law requires them to perform. Those functions could range from investigative to administrative to adjudicative. If a decision making body has only an adjudicative function, then the standard against which we measure whether there is a reasonable apprehension of bias is very high. For example, a judge of a court would not be allowed to hear a case in which he/she had previously played an investigative role. However, legislation can lower that standard by giving the same body which adjudicates the power and/or duty to investigate.

[102] In this case, the original decision makers are members of Fraser Health's licensing staff. The Appellant is particularly concerned with alleged bias on the part of licensing officer Ms. Faulkner who carried out the administrative/ investigative task of inspecting and monitoring the Daycare. Later, Ms. Faulkner participated in the decision to cancel the Licence based on her own inspections.

[103] The Act requires Fraser Health to monitor, investigate and judge whether licences should be issued or cancelled. Therefore, the legislation specifically allows Fraser Health to be investigator, administrator and decision maker in the same case. Under these circumstances, the fact that Fraser Health staff members who carried out the investigations and inspections also participated in the decision to cancel a licence does not give rise to a reasonable apprehension of bias.

Actual bias/bad faith

[104] The Licensee and her husband described Ms. Faulkner as "biased" and some of her actions as "malicious" and "vindictive". They believe that Fraser Health staff acted in bad faith in cancelling the Licence.

[105] The Licensee and Mr. C were particularly distressed by Ms. Faulkner who was direct and assertive in her dealings with them about the Daycare's continued non-compliance; the Licensee felt intimidated by her. We acknowledge that the Licensee and Mr. C disagree with Ms. Faulkner's style and her conclusions. However, the evidence falls far short of proving that Ms. Faulkner was biased, malicious, vindictive or otherwise acting in bad faith.

[106] In order to prove bad faith, there must be evidence that Fraser Health staff acted with less than candour, frankness and impartiality. Impartiality or actual bias may be established where there is sufficient evidence to indicate that the decision maker had a preformed judgment without taking into account all of the evidence and factors that one is required to consider.[13]

[107] The evidence shows that Ms. Faulkner's conclusions about the Daycare had a factual basis and were consistent with those reached by another licensing officer Ms. Rehal. At the hearing, the Licensee testified that her relationship with Ms. Rehal was good. Like Ms. Faulkner, Ms. Rehal had inspected the Daycare 7 times. She had rated the Daycare as high hazard twice and moderate 4 times; only once did Ms. Rehal give the Daycare a low hazard rating. Thus, the Daycare had already established a record of needing more monitoring before Ms. Faulkner was assigned as its licensing officer. After Ms. Faulkner took over, she also inspected the Daycare 7 times and assigned hazard ratings of "high" 3 times, "moderate" twice and "low" twice. By an objective measure, the evidence shows that Ms. Faulkner's assessment of the Daycare was not atypical and the Licensee's poor record of compliance was sustained regardless of whether it was Ms. Faulkner or another licensing officer who carried out the inspections.

[108] The two examples the Licensee consistently cited as evidence of Fraser Health's bad faith or bias were: (i) Ms. Faulkner changing the hazard rating to high after having told Mr. C that it would be "low" during the January 23, 2009, inspection; and (ii) Ms. Sellin's comment to Mr. C on January 28, 2009, that all Ms. Faulkner could think of was how to "shut you down."

(i) Hazard rating change

[109] We do not find the change of the hazard rating from a verbal "low" to a written "high" to be evidence of bias or bad faith because, firstly, the evidence is inconclusive as to whether Ms. Faulkner did actually tell Mr. C that the inspection would result in a low hazard rating. More importantly, even if she did, there is no reason why she could not have changed her mind on reflection after completing the entire inspection and sitting down to write the report. There is no evidence to support the allegation that if Ms. Faulkner changed her mind, that change was motivated by bias, malice, vindictiveness or dishonesty. The factors which Ms.

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[13] Gwen Taylor, *BCCAT Adjudicator's Manual* BC: September 2008 at pg. 33.

Faulkner listed as forming the basis of a high hazard rating on that day were the Daycare's history, and the cumulative effect and frequency of coded violations. Those were relevant factors to consider under the circumstances and the record of the Daycare would have given any reasonable licensing officer cause for concern. The strong factual basis for her final assessment does not support an allegation that Ms. Faulkner acted in bad faith.

(ii) "Shut you down" comment

[110] The "shut you down" comment was an extremely unfortunate choice of words for a licensor to use with a licensee. There is, however, no evidence that Ms. Faulkner said those words. Ms. Sellin had explained to the Licensee and Mr. C that it was she, not Ms. Faulkner, who used those words to describe how Ms. Faulkner wanted to stop Mr. C's conduct and her communications with him on January 23, 2009, and that those words were not used in reference to the Daycare's operation.

[111] Both before and after this event, Fraser Health had shown the Licensee leniency and many opportunities to bring the Daycare into compliance. For example, there were several occasions where Fraser Health disregarded the Licensee's failure to provide written responses when required to. Another example of Fraser Health's leniency was their advising and waiting for the Licensee to obtain Exemptions after finding that the Daycare had not been meeting the requirement to provide a suitable outdoor play area.

[112] Ms. Sellin's choice of words on January 28 was poor. However, based on her explanation and the opportunities Fraser Health had given to the Licensee to achieve compliance both before and after this event, there is insufficient evidence of bias or bad faith to make a finding against Fraser Health staff.

[113] There is no evidence that Ms. Faulkner or other Fraser Health staff failed to take into account all the factors that should have been considered in arriving at the decision to cancel the Licence. Mr. Hundal considered a voluminous amount of material and concluded that he could not find sufficient evidence to support an allegation of bias against Fraser Health staff. We have reviewed afresh all the relevant evidence and cannot find sufficient evidence of bias or bad faith on Fraser Health's part.

Addressing concerns

[114] One of the Licensee's repeated complaints about Fraser Health is that the health authority failed to address her concerns. In his reconsideration decision, Mr. Hundal concluded that Fraser Health had addressed the concerns of the Licensee and her husband. After reviewing the evidence afresh, we come to the same conclusion.

[115] The record of this appeal is over 1200 pages and includes numerous documents submitted by both the Licensee and Fraser Health on the communications between them. The Licensee was thorough in explaining her concerns which were often repeated in several documents (for example, exhibits 61, 62, 63, and 64 written by Mr. C and/or the Licensee set out their issues and

disagreements with Fraser Health). The volumes of evidence show that the communications between Fraser Health and the Licensee or Mr. C after January 2009 were routinely documented by one or both parties. The evidence shows the various concerns which the Licensee or her husband raised at one point or another were all addressed at some point by Fraser Health staff. However, few of the issues were resolved to their satisfaction because Mr. C either did not believe or did not agree with the answers that Fraser Health provided. We acknowledge that Mr. C and the Licensee do not agree with how Fraser Health dealt with their concerns, but conclude that the health authority did address them.

3. Integrity of the inspection reports

[116] The Licensee and Mr. C challenge the integrity of the inspection reports and Fraser Health's records about the Daycare, some dating back as far as 2003. They believe that the reports and records are self-servingly inaccurate and incomplete, and that the mistakes and omissions were detrimental to the Licensee.

[117] The Licensee did not voice any concerns about the accuracy of the reports to Fraser Health until 2009. Mr. C. felt that the inspection reports did not paint a true picture of the Daycare and that they often exaggerated the non-compliances. He testified that he had told the Licensee that the reports, left unchallenged, created a very negative impression of the Daycare.

[118] Prior to 2009, Fraser Health had issued 11 inspection reports: one following each inspection (7 by Ms. Rehal and 4 by Ms. Faulkner). The Licensee admitted that she neither denied nor disputed the findings of non-compliance in the reports until after January 2009. In fact, she had admitted non-compliance for the most part: She wrote letters to Fraser Health to explain what she had done or planned to do to address the non-compliance in response to 8 of the 11 pre-2009 inspection reports. Those response letters were written contemporaneously with the issuance of the inspection reports. There is no evidence of any written response contradicting Fraser Health's findings of non-compliance.

[119] The Licensee offered no reasonable explanation for why she did not dispute the findings earlier other than that she felt intimidated by Ms. Faulkner. Even if that were so, there is no explanation for why she did not dispute earlier the accuracy or fairness of the 7 inspection reports made by Ms. Rehal.

[120] The Daycare's continued non-compliance was a primary factor that Fraser Health considered in arriving at the conclusion that the Licensee had not operated the Daycare in a way that promoted the safety of the children in care. The Licensee and Mr. C vehemently opposed Fraser Health's conclusion and insisted that the Daycare was a safe place for the children. They introduced many letters and written evaluations/surveys from the parents of children who attended the Daycare, all of which letters and surveys reflected very positively on the care that the Licensee provided the children. At the hearing, the Appellant also led evidence from parents who found the Daycare to be a safe environment for their children.

[121] A number of parents believed strongly in the Daycare and offered to testify in its favour during the hearing. Two parents, who dealt routinely with safety issues in their respective fields of work, testified that despite their heightened

awareness of safety and/or health hazards they had not seen anything in the Daycare that raised a safety concern for them. Under cross examination, counsel for the Respondent brought to the attention of the two witnesses some of the Licensee's letters to Fraser Health explaining how she had corrected and/or planned to correct some of the safety violations identified. Neither parent had previously known of the correspondence or its content.

[122] The letters, surveys and oral testimony do not offer any probative evidence about the completeness or accuracy of the inspection reports because they shed no light on the events that caused the inspecting officers to find the non-compliance recorded in the reports.

[123] The only other evidence that the Licensee had to contradict the findings in the reports is her recollection of the state of the Daycare at the time of the reports. For example, her recollection of things that had been missed and infractions that had not been as serious as reflected by the reports. There is, however, no evidence to support why her recent recollection more accurately replicates the past events than the records written at the time the events occurred. Given her prior admissions and failure to dispute, we assign more weight to the inspection reports and records written at the time that the events occurred than to the Licensee's recollection of a version of events that contradicts the written records.

[124] There being no evidence or information that casts reasonable doubt on the integrity of the reports, they are accepted as founding the factual basis for determining the compliance pattern and history of the Daycare.

4. Summary of inspections – what do the inspection reports show

a) History and Pattern

[125] The inspection reports establish a long standing history and pattern of non-compliance in the operation of the Daycare.

[126] According to the inspection reports, the first inspection after the Licence was issued took place on July 30, 2004, and the last on July 30, 2009. During this period, 14 inspections were carried out: 5 of the inspections resulted in a "high" hazard rating, 6 in moderate and 3 in low. Every one of the 14 inspections required follow up action by the Licensee: she had to take corrective measures and/or provide written responses. In 8 cases, the Licensee responded by writing to the licensing officer to advise how she had corrected or planned to correct the non-compliance.

[127] More than half of the inspections resulted in Fraser Health needing to make follow up inspections. In every year of its operation except for 2006, the Daycare was assessed as a "high inspection priority" meaning that it required a high level of monitoring by Fraser Health (at least three inspections a year: one routine and two follow up).

[128] Fraser Health documented more than 60 coded violations of the Act or Regulations over the years of the Daycare's licensed operation, and many of them

as repeat infractions. In every year of operation after 2003 there had been violations for improper storage of hazardous materials. In every year except for 2008, there had been infractions because of operational practices that created physical and health hazards for the children in care (for example, allowing objects to obstruct emergency escape routes, not clearing objects that could injure children in the outdoor play area). In every year except for 2006, mandatory staff records had not been kept in accordance with the Regulations.

[129] There were often construction materials around the outdoor play area of the Daycare, accessible to the children and posing safety hazards. More than once, the Licensee allowed structural changes to be made to the Daycare premises without informing Fraser Health after having been told that she had a statutory duty to obtain Fraser Health's prior approval before making these types of changes.

[130] Of the coded violations that Fraser Health noted, only 6 constituted "critical hazards". The others were not individually grave or urgent, but they were many and they were repeated.

[131] The number of violations and their recurrences sustained over a significant period of time establish that the Daycare has a history and pattern of non-compliance.

b) Breach of Act – Duty to Manage

[132] Under the Act, the Licensee must operate the Daycare in a manner that will promote the health and safety of the children in care.[14] The Regulations require that one who has the duty to manage a Daycare must possess the skills to do so.[15]

[133] The Daycare is a Family Child Care facility[16] and the Licensee is in charge of its operation. She is personally responsible for managing the Daycare and must demonstrate "the skills necessary to carry out the duties" of a manager.[17]

[134] There is a difference between care giving and operations management. By all accounts, the Licensee is a good care giver for the children placed in her care. Ms. Faulkner acknowledged in her report that from what she had seen of the programs the Licensee ran for the children and the way she interacted with them and their parents, there was no reason to doubt the Licensee's ability to care for the children "in a manner that promoted the spirit, dignity and individuality of the children". The parents' letters, surveys and testimony are a testament to that.

[135] The task of managing the Daycare's operation is different from and in addition to that of purely care giving. Managing a daycare calls for organizational skills to attend to critical administrative and logistical details so as to ensure that there are no health and safety hazards in and around the facility.

[14] section 7(1)(b) of the Act
[15] section 19(2) of the Regulations
[16] section 2 of the Regulations
[17] Section 19(2)(c) of the Regulations

[136] The evidence shows that the Licensee seemed unable to consistently attend to vital operational matters. For example, almost every inspection report recorded a failure to keep hazardous materials (mainly construction debris and sometimes medication) inaccessible to children. Most of the inspection reports documented a failure to keep mandatory records that prove that those working with the children had clear criminal record checks, proper health records and proof of qualifications. These contraventions amount to a failure to operate the Daycare in a manner that promoted the safety and health of the children. This is a breach of section 7(1)(b)(i) of the Act. The fact that they are repeated and frequent demonstrates the lack of skills to manage the Daycare as required by legislation.

c) Licence conditions

Acceptance

[137] There is a preponderance of evidence that the Licensee had accepted the Twelve Conditions even though she and her husband found them demoralizing and heavy handed. We acknowledge how some of the conditions such as:

> Condition #8 - requiring the Licensee to take assertiveness training and report back to Fraser Health on how she was going to apply what she had learned in her day-to-day interactions; and,
>
> Condition # 12 - requiring the Licensee to not only post the Twelve Conditions in the Daycare for public view but also obtain the written acknowledgement of all current or future daycare families that they had read the Twelve Conditions.

would have caused a licensee to feel humiliated, embarrassed and daunted.

[138] In this case, we find that the Licensee accepted the Twelve Conditions because of the exchange of correspondence between the parties in November and December 2009 regarding the conditions. The logical conclusion that a reasonable person would draw from the correspondence is that she had accepted the Twelve Conditions.

[139] Furthermore, the more compelling piece of evidence of acceptance is Mr. C's testimony that the Licensee and he had discussed the Twelve Conditions with her counsel. We find that they made a conscious decision after seeking legal advice not to further negotiate the conditions with Fraser Health or pursue any avenue of appeal under the Act at that time. Instead, they decided to approach their MLA about their troubles with Fraser Health.

Breach of condition #2 and #4

[140] Section 13(1)(c) of the Act gives Fraser Health the discretion to cancel the Licence if the Licensee breaches a condition of licence.

[141] Condition #2 required the Licensee to ensure that Mr. C not interact with Fraser Health staff. The evidence is straightforward that Mr. C wrote to Fraser Health staff despite the Licensee's promise to ensure that he would not

intentionally contact them. Thus, the Licensee breached Condition #2. There is also evidence that Mr. C continued to send emails to Fraser Health staff even after the breach had been brought to the Licensee's attention. Condition #2 was an important condition because Fraser Health had felt that Mr. C's embroilment had been a key obstacle in their effort to normalize the licensor's relationship with the Licensee. This was, therefore, a serious breach of Licence condition.

[142] Condition #4 required her to submit responses as requested and on time. The Licensee breached Condition #4 because she did not respond to several written requests from Fraser Health and their counsel asking her for a written response to address the apparent breach of Condition #2. The Licensee's breach of Conditions #2 and #4, therefore, gave Fraser Health the power to exercise its discretion under section 13(1)(c) of the Act to cancel the Licence.

5. Continued Non-compliance likely

[143] We find that the Daycare's non-compliance is likely to continue under the Licensee's management. She is unlikely to achieve and maintain compliance for the following reasons:

a) Not pro-active

[144] The history of the Daycare's non-compliance demonstrates that the Licensee has not been proactive in managing the Daycare even though Fraser Health had encouraged her to be pro-active since Licence issuance.

[145] The Licensee comes across as a mild-mannered and somewhat timid young woman who, until 2009, tried to avoid all conflict with Fraser Health. But she took no independent action to minimize the need for Fraser Health's monitoring or pre-empt the continual findings of non-compliance, nor was she pro-active in allaying their concerns. Fraser Health and the Licensee were in a continual mode of the health authority prodding and the Licensee reacting. For example, the Licensee had allowed the Exemption to lapse and applied for another only after Fraser Health again pointed out the need to do so. Fraser Health needed to continually monitor the Licensee who appeared to have come to rely on the health authority to manage the Daycare's compliance. The Daycare remained on Fraser Health's high inspection priority list every year of its operation except for one. The level of monitoring required of Fraser Health is not sustainable and the degree to which the Licensee relied on Fraser Health to address non-compliance is unreasonable.

[146] After January 23, 2009, the Licensee also came to rely heavily on Mr. C in communicating with Fraser Health. Quite unlike the Licensee, Mr. C is assertive and very ready to "push the envelope" and he quickly took over the lead in most of the communications between the Licensee and Fraser Health. The extent of reliance the Licensee placed on Mr. C amounted to an abdication of the critical management function of handling the licensor/licensee relationship.

[147] The Licensee's forte and primary interest is in care giving not managing. She comes across as a reluctant manager: She does not show an interest in managing an operation and so, does not demonstrate the skills to do so. For as long as this is the case, the Licensee will not be able to bring the Daycare into

compliance and sustain an acceptable level of compliance over time.

b) Not understanding need for compliance

[148] The Licensee does not appreciate or accept the need for regulatory compliance. She does not seem to comprehend the relationship between specific rules (that the Daycare repeatedly breaks) and safety issues: She does not accept that obeying those rules is necessary to run a good daycare. We come to this conclusion because:

(i) Frequent and repeated contraventions

[149] The Licensee frequently and repeatedly breached the Regulations that are designed to ensure the safety of children attending daycares. She violated the rules prohibiting improper storage of hazardous material in every year of the Daycare's operation after 2003. There were contraventions in every year except for 2008 because of operational practices that created physical and health hazards for the children. In every year except for 2006, mandatory staff records were not kept in accordance with the Regulations.

[150] The fact that the Licensee allowed these infractions to recur demonstrates a lack of understanding for the underlying purpose of the Regulations which is to keep daycare operations safe for children in care.

(ii) Ignoring advice and warnings

[151] The Licensee continually ignored Fraser Health's advice about the need to comply as illustrated by the above examples of recurring infractions. Furthermore, the Licensee also disregarded Fraser Health's warnings against non-compliance. For example, the licensing officers warned the Licensee several times against starting construction in and around the Daycare facilities without first obtaining Fraser Health's approval. Fraser Health had pointed out to the Licensee her duty under section 10 of the Regulations to keep the health authority informed of such activities and to obtain prior approval. Despite these prior warnings, the Licensee allowed renovations to be made to the Daycare facilities in contravention of section 10.

c) Defiant breaches

[152] The Licensee knowingly allowed contraventions to occur. At the hearing, Mr. C admitted that, knowing that prior approval of the Fraser Health was required, he and the Licensee closed and vacated the Daycare in July 2009 and commenced major renovations without first advising the health authority. In March, April and May 2010, Mr. C continued to email Fraser Health staff even after the Licensee had been told that such interaction contravened a condition of Licence.

d) An ungovernable relationship

[153] The relationship between the Licensee and Fraser Health had become so dysfunctional as to be ungovernable. The May 26, 2009, meeting is a good

example of how the relationship between them had deteriorated to a point where the parties could hardly communicate or cooperate in any meaningful way.

[154] Mr. Hundal found that Fraser Health had lost the trust needed in the Licensee to maintain a manageable licensor/licensee relationship. He was justified in his concerns because of the Licensee's poor track record of compliance. Furthermore, a number of dealings with the Licensee and/or her husband would also have justifiably eroded Fraser Health's trust in the Licensee. For example, making unmarked changes to Ms. Sellin's April 8 letter was unconstructive and taking the position that it was Ms. Sellin's responsibility to uncover the changes herself was antagonistic. Advising Fraser Health curtly that she had not yet committed to the Twelve Conditions months after they had been finalized was ill-advised regardless of how demoralizing and heavy-handed the Licensee found them to be. Fraser Health had reason to believe that the Licensee was reneging on a prior promise. Questioning the accuracy of old inspection reports years after they had been accepted gave Fraser Health more cause to be concerned with whether they could trust that the Licensee's acceptance meant commitment.

[155] The Licensee's relationship with Ms. Faulkner had been somewhat strained because she found Ms. Faulkner intimidating. Mr. C's involvement severely exacerbated the strain. Although Mr. C maintains that he was always calm in his demeanour in phone calls and meetings with Fraser Health, his correspondence evidences a very accusatory, antagonistic and argumentative approach towards the health authority. He profoundly distrusted Ms. Faulkner and other Fraser Health staff and he tape recorded some conversations with Fraser Health staff members without their prior consent. He told Ms. Sellin that he had tape recorded their January 28, 2009, conversation when he had not because he believed that that was the only way to ensure that Ms. Sellin would tell the truth. Sometimes, he would over-react when Fraser Health did not resolve matters in the manner he wanted, for example, the communications around the March 11, 2009, incident. Fraser Health staff found Mr. C extremely difficult to deal with and believed that he hindered their efforts to salvage the licensor/licensee relationship. Fraser Health would eventually impose Licence conditions to avoid interactions with him.

[156] Fraser Health's reports all suggest that the Licensee and her husband were entirely to blame for destroying the trust between the parties. However, we note that Fraser Health staff did not help the situation by communicating the "shut you down" comment to Mr. C on January 28, 2009. Those words would have made any licensee feel threatened under the circumstances. Mr. C and the Licensee were understandably upset by that comment.

[157] Another area where Fraser Health staff could have been more helpful and shown more sensitivity was in the Rezoning Floor Plan approval process. On March 3, 2009, Ms. Faulkner and Ms. Sellin told Mr. C that the Rezoning Floor Plan would be reviewed as part of a licence application. This information triggered the Licensee to immediately submit a licence application so that the plans would be reviewed and approved. The application ultimately resulted in an 896 page report from Ms. Faulkner denying the licence application and a short letter from Ms. Faulkner to the Township of Langley advising of the licence denial. Then Mr. C and the Licensee would find that, contrary to the information that Ms. Sellin and Ms.

Faulkner had given them, Fraser Health could have reviewed the proposed floor plans for rezoning purposes without the submission of a licence application. Ms. Sellin then told Mr. C that the plan review was not a high priority matter for Fraser Health because it was no longer tied to a pending licence application. Ms. Faulkner would later review and approve their proposed floor plans after the Township of Langley advised her that the floor plan approval the municipality required was not dependent on a grant of licence.

[158] To the Licensee and her husband, the information about bundling the floor plan with a licence application was wrong because it created a process that was overly complicated and precipitous. It unduly delayed the plan approval process and precipitated an application that need not have been made immediately and an 896 page report that need not have been written.

[159] Fraser Health's handling of the floor plan approval process and communicating the "shut you down" comment to the Licensee hastened the deterioration of the licensor/Licensee relationship. But the primary, though not sole, cause of the deterioration is the defiance of Mr. C and the Licensee which ultimately made the relationship ungovernable.

[160] We conclude that the Licensee is unlikely to be able to achieve and maintain compliance in the operation of the Daycare because she is not pro-active and does not understand or accept the need for regulatory compliance. The non-compliance would most likely worsen if the Licence were not cancelled because the deliberate contraventions show defiance and the licensee/licensor relationship has become ungovernable.

Guidance points

[161] The Respondent's counsel asked the Board for guidance on the scope of a reconsideration under section 17 (3)(b) of the Act. In particular, counsel asked the Board to comment on what issues a licensee can raise when requesting reconsideration, whether the reconsidering officer must address whatever issue a licensee raises on reconsideration and what is the scope of evidence that the reconsidering officer should review.

[162] On the question of what a licensee can raise on reconsideration, section 17(2)(b) requires only that the licensee set out the reasons the medical health officer should act under section 17(3)(b). The legislation does not place a limit on the types of reasons or grounds the licensee can plead in asking for a reconsideration of a cancellation decision.

[163] Likewise, the Act does not fetter the medical health officer's discretion on how to address the issues raised by the licensee on reconsideration and what evidence he/she believes must be reviewed in order to discharge his/her obligations on reconsideration. Section 17(5) requires only that the medical health office give reasons for acting or declining to act under section 17(3)(b).

[164] How to address the issues raised and the scope of evidence to be reviewed on reconsideration depends on the nature and seriousness of the allegations, the history leading up to the charges and other circumstances of the case. In this

case, Mr. Hundal decided that he needed to be thorough given the serious nature of the accusations against Fraser Health, some of the words spoken and actions taken by Fraser Health staff against the Licensee and the acrimonious relationship that had developed between the parties. In our view, Mr. Hundal was wise to have taken the approach he took.

CONCLUSION

[165] Having received and considered the parties' evidence and arguments afresh as if this appeal were a decision of first instance, we have arrived at the same conclusion that Mr. Hundal did. The evidence supports Mr. Hundal's reconsideration decision and there is not sufficient evidence to show that it was not justified. The Appellant has not met the burden of proof required by section 29(11) of the Act. Accordingly, we confirm the Respondent's decision under appeal. The appeal is dismissed.

"Helen Ray del Val"

Helen Ray del Val, Chair
Community Care and Assisted Living Appeal Board

"Gordon Armour"

Gordon Armour, Member
Community Care and Assisted Living Appeal Board

"Richard Margetts"

Richard Margetts, Q.C., Member
Community Care and Assisted Living Appeal Board

June 13, 2011

APPENDIX A – Relevant Legislation

COMMUNITY CARE AND ASSISTED LIVING ACT S.B.C. 2002, c. 75

Definitions

1 In this Act:

"community care facility" means a premises or part of a premises

(a) in which a person provides care to 3 or more persons who are not related by blood or marriage to the person and includes any other premises or part of a premises that, in the opinion of the medical health officer, is used in conjunction with the community care facility for the purpose of providing care, or

(b) designated by the Lieutenant Governor in Council to be a community care facility;

Standards to be maintained

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

(a) employ at a community care facility only persons of good character who meet the standards for employees specified in the regulations;

(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 licence, 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

(a) a refusal to issue a licence under section 11 (1),

(b) an attachment, under section 11 (3), of terms or conditions,

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

(d) a suspension or cancellation of an exemption or an attachment or variation of terms or conditions under section 16 (2);

"summary action" means a suspension or cancellation of a licence, an attachment of terms or conditions to the licence, or a variation of those terms or conditions under section 14;

"written response" means a written response referred to in subsection (2) (b).

(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,

(a) delay or suspend the implementation of an action or a summary action until the medical health officer makes a decision under paragraph (b), or

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

(4) A medical health officer must not act under subsection (3) (a) unless the medical health officer is satisfied that

(a) further time is needed to consider the written response,

(b) the written response sets out facts or arguments that, if confirmed, would establish reasonable grounds for the medical health officer to act under subsection (3) (b), and

(c) it is reasonable to conclude that

(i) if the delay or suspension is granted, the health or safety of no person in care will be placed at risk, and

(ii) the licensee or applicant for the licence will suffer a significant loss during the proposed delay or suspension, if the delay or suspension is not granted.

(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).

(6) A licensee or applicant for the licence may not give a medical health officer a further written response concerning an action or summary action on or after receipt of written reasons under subsection (5) concerning the action or summary action.

Appeals to the board

29 (1) The Community Care and Assisted Living Appeal Board is continued consisting of individuals appointed after a merit based process ...

...

(1.2) Sections 1 to 20, 22, 24 to 42, 44, 46.2, 47 (1) (c) and (2), 48 to 55, 57, 58, 60 and 61 of the *Administrative Tribunals Act* apply to the board.

(2) A licensee, an applicant for a licence, a holder of a certificate under section 8, an applicant for a certificate under section 8, a registrant or an applicant for registration may appeal to the board in the prescribed manner within 30 days of receiving notification that ...

(b) a medical health officer has acted or declined to act under section 17 (3) (b),

...

(5) The person whose action described in subsection (2) is being appealed is a party to the appeal proceedings.

...

(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.

Exclusive jurisdiction of board

31.1 (1) The board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 29 and to make any order permitted to be made.

(2) A decision or order of the board on a matter in respect of which the board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

ADMINISTRATIVE TRIBUNALS ACT S.B.C. 2004, c. 45

Examination of witnesses

38 (1) Subject to subsection (2), in an oral or electronic hearing a party to an application may call and examine witnesses, present evidence and submissions and conduct cross examination of witnesses as reasonably required by the tribunal for a full and fair disclosure of all matters relevant to the issues in the application.

(2) The tribunal may reasonably limit further examination or cross examination of a witness if it is satisfied that the examination or cross examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic hearing.

Information admissible in tribunal proceedings

40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

...

CHILD CARE LICENSING REGULATION BC Reg. 332/2007

Definitions

1 In this regulation:

"Act" means the *Community Care and Assisted Living Act*;

...

"care program" means supervision that is provided to a child under a program described in section 2 *[care programs]*;

...

"licensee" means a person licensed to provide a care program;

Care programs

2 For the purpose of paragraph (a) of the definition of "care" in section 1 of the Act, the following programs are prescribed:

(a) Group Child Care (Under 36 Months), being a program that provides care to children who are younger than 36 months old;

(b) Group Child Care (30 Months to School Age), being a program that provides care to preschool children;

(c) Preschool (30 Months to School Age), being a program that provides care to preschool children who are at least

(i) 30 months old on entrance to the program, and

(ii) 36 months old by December 31 of the year of entrance;

(d) Group Child Care (School Age), being a program that provides, before or after school hours or during periods of school closure, care to children who attend school, including kindergarten;

(e) Family Child Care, being a program in which the licensee

(i) is a responsible adult, and

(ii) personally provides care, within the licensee's personal residence, to no more than 7 children;

(g) Multi-Age Child Care, being a program that provides, within each group, care to children of various ages;

(h) In-Home Multi-Age Child Care, being a program in which the licensee personally provides care, within the licensee's personal residence, to no more than 8 children of various ages.

...

Exemptions by medical health officer

5 (1) An applicant for a licence or a licensee may apply for an exemption under section 16 *[exemptions]* of the Act by submitting an application to a medical health officer.

...

Continuing duty to inform

10 (1) Applicants for licences and licensees must notify a medical health officer immediately of any change in the information provided under section 9 *[applying for a licence]*.

(2) Licensees must not make any structural change to a community care facility unless the licensee first

(a) submits plans for the change to a medical health officer, and

(b) receives written approval from the medical health officer.

...

Environment

13 (1) A licensee must ensure that a healthy and safe environment is provided at all times while children are under the supervision of employees.

(2) A licensee must ensure that the community care facility and the furniture, equipment and fixtures within it are clean and in good repair while children are in attendance.

...

Furniture, equipment and fixtures

15 (1) A licensee must supply equipment, furniture and supplies that are

(a) of sturdy and safe construction, easy to clean and free from hazards, and

(b) located so as not to block or hamper an exit in the case of fire or other emergency.

...

Play area, materials and equipment

16 (1) A licensee, other than a licensee who provides a care program described as Occasional Child Care, must have for each child at least 7 m^2 of outdoor play area.

(2) Subsection (1) does not apply to a licensee who provides a care program described as Family Child Care, but the licensee must provide an indoor and outdoor play area for children.

(3) A licensee must ensure that the entire outdoor play area is

(a) enclosed in a manner that is suitable for the age and development of children, and will ensure that children are free of harm, and

(b) constructed in a manner, and using materials, that are suitable for the age and development of the children intended to use it.

(4) A licensee must ensure that all indoor and outdoor play materials and equipment accessible to children are

(a) suitable for the age and development of the children, and

(b) safely constructed, free from hazards and in good repair.

Hazardous objects and substances

17 A licensee must ensure that children do not have access to any object or substance that may be hazardous to the health or safety of a child.

Character and skill requirements

19 (1) A licensee must not employ a person in a community care facility unless the licensee or, in the case of a person who is not the manager, the manager has first met with the person and obtained all of the following:

(a) a criminal record check for the person;

(b) character references in respect of the person;

(c) a record of the person's work history;

(d) copies of any diplomas, certificates or other evidence of the person's training and skills;

(e) a statement signed by a medical practitioner indicating that the person is physically and psychologically capable of working with children and carrying out assigned duties in a community care facility;

(f) evidence that the person has complied with the Province's immunization and tuberculosis control programs.

(2) A licensee must not employ a person in a community care facility unless the licensee is satisfied, based on the information available to the licensee under subsection (1) and the licensee's or, in the case of an employee who is not the manager, the manager's own observations on meeting the person, that the person

(a) is of good character,

(b) has the personality, ability and temperament necessary to manage or work with children, and

(c) has the training and experience and demonstrates the skills necessary to carry out the duties assigned to the manager or employee.

...

Community care facility records

56 A licensee must keep current records of each of the following:

...

(b) for each employee, the records required under section 19 (1) *[character and skill requirements]*;

APPENDIX B – The Twelve Conditions imposed on the licence

1) Licensee will maintain low hazard ratings at all routine and follow-up inspections and maintain a low inspection priority rating (ongoing condition).

2) Licensee will ensure that there will be no interactions between [the Licensee's husband or his father] and Licensing staff, either in person or in writing. This includes any intentional contact sought by either [the Licensee's husband or his father], which could include intentionally entering or passing through the daycare area when the Licensing staff is present. This does not refer to incidental and unintentional contact, with respect to [the Licensee's husband and/or his father], such as meeting in passing in the driveway.

3) Licensee will ensure that there will be no tape recording or video recording of any interactions between the daycare staff (including Licensee) and licensing staff unless written permission is received from all parties. This does not include the incidental recording of Licensing staff through the use of regular security monitoring used by the daycare for the sole purpose of recording and monitoring the safety and security of the children in care. Licensee will ensure that any recordings made of licensing staff while using the security monitoring system can be viewed by Licensing, upon request, and will not be released in whole or in part to any other party without the written permission of the licensing staff that is captured on the film (ongoing condition).

4) Licensee will ensure that all written documentation to Licensing will be written by Licensee herself; it will meet requested timelines: and it will be dated accurately indicating the date of submission to Licensing. This does not include correspondence received from Licensee's legal counsel (ongoing condition).

5) Licensee will meet in person with licensing staff to discuss file issues, whenever requested by Licensing (ongoing condition).

6) Licensee will complete self-assessment inspection checklists and submit them to Licensing on a regular basis for one full year, starting in January 2010. Completed checklists are to be submitted to Licensing on or before January 15, 2010; April 16, 2010; July 16, 2010; October 15, 2010; and January 14, 2011 (condition to be assessed after January 14, 2011).

7) Licensee will provide, with each completed self-assessment inspection checklist a written plan as to how she intends to address any self identified non-compliance.

8) Licensee will attend, before December 31, 2010, a course related to Assertiveness Training and/or Conflict Resolution skills. Appropriate proof of attendance must be submitted to Licensing. Licensee will personally write and submit to Licensing, no later than two weeks after completing the course, a synopsis of what was learned and how it will be applied to Licensee's day to day interactions.

9) Licensee will attend, before December 31, 2010, the Fraser Health Licensing "Understanding Legislation" workshop. Licensee will personally write and submit to Licensing, no later than two weeks after taking the workshop, a synopsis of what was learned and how it will be applied to the day to day practices at the daycare.

10) Licensee will agree to not submit any new applications for any new licences or amendments to her Family Child Care licence, including changes to service type, until the final review of Terms and Conditions and licensee performance has been assessed after January 2011.

11) Licensee will ensure that prior to re-opening the daycare, all required inspections and approvals will have been completed, including meeting all legislation pertaining to Community Care and Facilities Licensing and fire/building approvals from the Township of Langley. A copy of an Occupancy Permit issued by the Township of Langley is required for the Licensing file.

12) Licensee will immediately post the licence and this set of terms and conditions in a place in the daycare where the public can view them and ensure that they remain posted. All current and future daycare families are required to sign a record indicating that they have read the terms and conditions (ongoing condition).