



**Community Care and
Assisted Living
Appeal Board**

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DECISION NO. 2012-CCA-002(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: AMS, Licensee **APPELLANT**
(operating Joan Crescent Manor, an Adult Long
Term Care Facility)

AND: Dr. Richard S. Stanwick, Chief Medical Health **RESPONDENT**
Officer, Vancouver Island Health Authority

BEFORE: Helen Ray del Val, Chair

APPEARING: For the Appellant: PB, Agent
For the Respondent: Kathryn Stuart, Counsel

DISCLOSURE DECISION

[1] This decision deals with the Appellant's request that the Respondent produce additional documents and recordings collected and prepared in relation to the Respondent's investigation of Joan Crescent Manor initiated in March 2012 and resulting in the June 28, 2012 Formal Investigation Report S-12-043. In particular the Appellant has requested:

- Interview notes and tapes of interviews with all residents in care, residents' family members, current and former staff, and any persons interviewed in regards to the investigation; and
- Internal notes and memos by the Respondent's staff pertaining to the directives and strategies of the investigation.

(collectively the "Requested Information")

[2] Pursuant to the power to order disclosure that the Community Care and Assisted Living Appeal Board (the "Board") has under section 34(3)(b) of the *Administrative Tribunals Act* S.B.C 2004, c. 45 (the "ATA"), I order that the Respondent produce copies of the Requested Information for the Appellant on or before April 26, 2013. My reasons for so ordering are set out below.

Background

[3] The Appellant asked the Respondent to produce the Requested Information. After having produced a very substantial appeal record and voluntarily accommodated some of the Appellant's requests for more disclosure, the Respondent refused to produce more. The Respondent's position is that the production of the documents requested by the Appellant is "inconsistent with the principles of administrative law and decisions made by the courts on the level of disclosure required in these kinds of administrative tribunal proceedings."

[4] The Respondent relies on the common law in support of its position, citing decisions made by our higher level courts which tackled the difficult question of what level of disclosure should apply in the context of administrative proceedings. I am aware of those decisions and others which support a different level of disclosure than that advocated by the Respondent for this proceeding. The common law is hardly settled on this issue but fortunately for the Board its governing legislation is clear. In general, legislation trumps the common law and a statutory power granted in the Board's enabling legislation may expand the disclosure otherwise required by the common law¹.

The Board's Governing Legislation

[5] The *Community Care and Assisted Living Act*, S.B.C 2004, c.75 ("CCALA") requires the Board to receive evidence as if the proceeding before it were a decision of the first instance and the ATA expressly gives the Board authority to compel the production of documents to facilitate that mandate.

Section 34 ATA

[6] Section 34 of the ATA is incorporated into the Board's enabling statute by section 29(1.2) of the CCALA. Section 34(3)(b) of the ATA gives the Board the power to order the production of documents that are relevant and admissible to an issue in an appeal. Under s. 34(3)(b), the first question to ask is "are the documents both admissible and relevant?" If the answer to that question is yes, then the second question to ask is "should the Board exercise its discretion to order production of the documents?"

Relevance and Admissibility

[7] The nature of the Requested Information does not raise any issues on its admissibility and the Respondent has raised none.

[8] On the question of the relevance of the Requested Information, the central issue in this appeal is whether the Respondent's decision imposing the conditions on the Appellant's license is justified. The Respondent arrived at the decision to impose the conditions after an investigation which resulted in several findings made

¹ Frank A.V. Falzon, "Disclosure in Administrative Law" in *Advocacy Conference – 2010* (CLEBC, 2010 at para. 55

against the Appellant. The Requested Information the Appellant has asked the Respondent to produce consists of all interview notes and tapes of persons interviewed during the course of the investigation and all internal notes and memos kept by the Respondent pertaining to the directives and strategies of that investigation. This information is relevant for the purposes of ordering pre-hearing disclosure under section 34 as it was collected for the purposes of an investigation into allegations about the health and safety of persons in care that forms the basis of the findings which led to the Respondent's decision to impose conditions on the Appellant's license.

Discretion to order production

[9] Having decided that the Requested Information is relevant and admissible for purposes of disclosure under section 34, the next question is whether to exercise the Board's discretion to order the Respondent to produce it. Three main considerations guide me in answering this question:

1. The Board's obligation under s. 29(11) to receive evidence as if the proceeding before it were a decision of the first instance;
2. The shifting of the onus of proof onto the Appellant under s.29(11) so that the Appellant must prove that the original decision was not justified; and
3. The unique circumstances and nature of the case before me.

1. Decision of the "first instance"

[10] Section 29(11) of the CCALA requires that the Board "receive evidence and argument as if a proceeding before the board were a decision of first instance". A proceeding before the Board is not an appeal on the record.

[11] Where the legislature intends a proceeding before an administrative appellate tribunal to be an appeal or review on the record, it can expressly and clearly so stipulate². In the case of the Board, it is significant to note that deliberate legislative revisions were made in 2004 to remove the requirement for a full hearing at the licensing level and to change the nature of an appeal before the Board from a pure appeal on the record to a proceeding more akin to a "first instance" hearing to enable a full hearing at the appeal level.³

² As it has done, for example, in the cases of the Health Professions Review Board and the Financial Services Tribunal. The *Health Professions Act*, R.S.B.C. 1996, c. 183 creating the Health Professions Review Board stipulates in section 50.6(6) that a review of a decision of a college's inquiry committee is a "review on the record". Similarly, the *Financial Institutions Act*, R.S.B.C 1996, c. 141 which continues the Financial Services Tribunal specifies under s. 242.2(5) that a proceeding before that tribunal is an appeal on the record.

³ A more thorough explanation of the changes in the legislative scheme can be found in paragraphs 85 to 92 of the Board's decision no. 2010-CCA-006(a).

[12] Changing the appellate mandate of the Board from hearing an appeal on the record to conducting a proceeding as if it were a decision of the first instance necessarily meant a broadening of the scope of evidence that the Board must receive. The Board must now decide the question of whether the decision appealed from is justified in light of all of the relevant and admissible evidence available to it as if it were a first instance decision maker.

[13] Section 29(11) of the CCALA thus directs the Board that in exercising its discretion under s. 34 of the ATA to order production, it is not to be confined to only the information which the original decision maker considered.

2. Onus of Proof

[14] Section 29(11) of the CCALA places the onus on the Appellant to prove that the original decision is not justified. In this case, the information that was collected during the investigation which forms the basis of the decision that the Appellant is challenging is largely in the Respondent's possession and/or control. The onus that the legislation has placed on the Appellant is thus particularly difficult to discharge without the Respondent's full cooperation. Under these circumstances, the Board is more inclined to exercise its discretion to facilitate the production of relevant and admissible information that the Appellant is seeking in support of an issue in the appeal in order to ensure a full and fair opportunity to present her case.

3. Nature of Case

[15] The last consideration to take into account in deciding whether to exercise discretion to order production is the nature of the case and its unique circumstances. An important question to examine is "what's at stake?" In this case, ordering the production of the Requested Information is warranted because the stakes are high for the reputation of both parties and in order to foster public confidence in the process through openness and transparency of the decision-making process.

[16] For the Appellant, the conditions attached to the licence reflect very poorly on her operation. The prohibitions against the Appellant in the first condition that she "will not direct any aspect of care provided to persons in care, and will not be the Manager", and some of the disturbing findings of emotional abuse and not demonstrating appropriate training and skills made against her are damaging to her reputation and status in the community. In my view, in proceedings such as licensing reviews where professional reputation and loss of livelihood for a licensee is at stake a higher level of disclosure is expected of the authority.

[17] The Appellant seeks a fair opportunity to clear her name which is not an unnatural reaction particularly when the Respondent is relying to some extent on the testimony of former employees whose motives the Appellant questions. Under the circumstances, practising a greater degree of transparency will benefit not only the Appellant but the Respondent whose reputation as a fair authority is also at stake.

[18] For all of the above reasons, I am satisfied that the Appellant has laid an adequate foundation for disclosure in this case and I am ordering that the Respondent produce the Requested Information. I cannot disagree with the Respondent that requiring the disclosure of documents and recordings created in the Licensing's investigative process would create a burden on the Licensing Program. However, given the clear requirements of the legislation and weighed against what is at stake, I disagree that the burden is undue.

"Helen del Val"

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

April 8, 2013

APPENDIX– Relevant Legislative Provisions

COMMUNITY CARE AND ASSISTED LIVING ACT

[SBC 2002] CHAPTER 75

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 as follows:

(a) a member appointed and designated by the Lieutenant Governor in Council as the chair;

(b) other members appointed by the Lieutenant Governor in Council after consultation with the chair.

(1.1) The Lieutenant Governor in Council may designate one of the members as vice chair after consultation with the chair.

(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

(a) the minister has appointed an administrator under section 23,

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

(c) the registrar has acted or declined to act under section 28 (3) (b), or

(d) a person has refused to issue a certificate, suspended or cancelled a certificate or attached terms or conditions to a certificate under section 8.

(3) Within 30 days after a decision is made under section 16 to grant an exemption from this Act and the regulations, the decision may be appealed to the board under this section by

(a) a person in care or the agent or personal representative of a person in care, or

(b) a spouse, relative or friend of a person in care.

(4) A fee paid by an applicant to initiate an appeal under subsection (2) or (3) must be remitted to the applicant if the board grants the appeal.

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

(6) The board may not stay or suspend a decision unless it is satisfied, on summary application, that a stay or suspension would not risk the health or safety of a person in care.

(7) to (10) [Repealed 2004-45-79.]

(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.

(13) [Repealed 2003-47-17.]

(14) and (15) [Repealed 2004-45-79.]

ADMINISTRATIVE TRIBUNALS ACT

[SBC 2004] CHAPTER 45

Power to compel witnesses and order disclosure

34 (1) A party to an application may prepare and serve a summons in the form established by the tribunal, requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in the application, or

(b) to produce for the tribunal, that party or another party a document or other thing in the person's possession or control that is admissible and relevant to an issue in the application.

(2) A party to an application may apply to the court for an order

(a) directing a person to comply with a summons served by a party under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with a summons served by a party under subsection (1).

(3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).