



**Community Care and  
Assisted Living  
Appeal Board**

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**DECISION NO. 2013-CCA-002(b)**

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

**BETWEEN:** JM, Licensee **APPELLANT**  
(operating as Peek a Boo Daycare)

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

**BEFORE:** A Panel of the Community Care and  
Assisted Living Appeal Board  
Alison H. Narod, Panel Chair  
Lynn McBride, Member  
Gordon Armour, Member

**DATE:** Hearing of Appeal, May 12, 2014

**PLACE:** Victoria, British Columbia

**APPEARING:** For the Appellant: Self-represented  
For the Respondent: Kathryn Stuart, Counsel

**APPEAL**

[1] This appeal deals with the Respondent's decision to cancel the Appellant's license to operate Peek a Boo Daycare, a licensed family childcare facility, effective December 14, 2013.

[2] The Appellant's licence was cancelled after the Community Care Facilities Licensing Program ("Licensing") conducted an investigation prompted by an anonymous complaint that the Appellant left a group of young children unsupervised in a van, in a busy parking lot adjacent to a high-traffic street, while she conducted personal business in a bank.

[3] Following a contested hearing, the Panel has decided to confirm the Respondent's decision, for the reasons that follow.

[4] The Decision under appeal is the Medical Health Officer's November 4, 2013 "Final Decision and Reasons of the Medical Health Officer", where he affirms his Preliminary Decision dated September 13, 2013 to cancel the Appellant's license. Briefly, he found that:

- (a) The Appellant failed to operate the daycare in a manner that would promote the health, safety and dignity of the children in care, by exceeding the maximum number of children under 48 months of age she was permitted to have in care pursuant to section 7(1)(b)(i) of the *Community Care and Assisted Living Act* (the "Act") and Schedule E of the *Child Care Licensee Regulation* (the "Regulation").
- (b) She failed to ensure on April 17, 2013 that the children in her care were supervised at all times by a person who was an educator, an assistant or a responsible adult, contrary to section 39(1) of the Regulation.
- (c) She failed to ensure that the children under her care or supervision on April 17, 2013 were not subjected to "neglect" as that term is defined in Schedule H of the Regulation, contrary to section 52(2) of the Regulation. The term "neglect" is defined to mean, in relevant part, "the failure of a care provider to meet the needs of a child, including ... care or supervision".
- (d) She failed to notify the children's parents immediately, and the Medical Health Officer within 24 hours that, on April 17, 2013, the children had been involved in or may have been involved in a "reportable incident", as described in Schedule H, while under her care or supervision, contrary to sections 55(1)(b) and 55(2)(a) of the Regulation.
- (e) She failed to keep daily attendance records for the children in her care, contrary to section 57(2)(c) of the Regulation.
- (f) She was not a person employable in the daycare, as she was not a person of good character, nor did she have the personality, ability and temperament necessary to manage or work with children, pursuant to sections 19(2)(a) and (b) of the Regulation.

[5] Relevant portions of applicable statutory and regulatory provisions are set out in Schedule 1 to this Decision.

[6] The Appellant's Notice of Appeal indicates that she challenges the decision of the Chief Medical Health Officer of Island Health, dated November 4, 2013, on various grounds based on breaches of procedural fairness and natural justice. She elaborated on her reasons for challenging the decision in supplementary documents and at the hearing of this matter. Her primary grievance was that although she agreed what she had done on April 17, 2013 was wrong, she had not engaged in conduct so harsh or drastic as to amount to neglect, and she had apologized, complied with the *Act* and Regulation, and learned from her mistakes. Additionally,

although she had not been truthful with Licensing respecting how long she had left the children alone, out of fear of criminal charges, she had been truthful about everything else.

## **BACKGROUND**

[7] The Appellant was first licenced to operate Peek a Boo Daycare in 2000. At the time her licence was cancelled she was authorized to provide care for up to a maximum of seven children, no more than four of whom being under the age of 48 months, provided no child younger than 12 months was present.

[8] The Appellant presently admits that on April 17, 2013, she left six children in her care alone in her parked and locked van for over four minutes outside a branch of the CIBC Bank at 2925 Tillicum Road, Victoria, B.C. while she conducted personal banking. Each child was secured in a car seat. It was later ascertained that five of these children were under 4 years of age. One was almost 5 years old.

[9] The Appellant did not notify the children's parents, immediately, or the Medical Health Officer, within 24 hours, of the April 17, 2013 incident that the children had been or may have been involved in a "reportable incident".

[10] Later the same day, as a result of a complaint by an anonymous observer, Constable Ryan Miller of the Saanich Police Department attended at Peek a Boo Daycare. He discussed the complaint with the Appellant, who told him that she was away from the van for three minutes and that the vehicle was in her eyesight at all times. He told the Appellant that he was not going to investigate further. He made no mention of criminal charges. In his evidence at the hearing, Constable Miller said he did not intend to pursue criminal charges.

[11] At the hearing, the Appellant's recollection was that the Constable attended with another person, who she believed was one of the Respondent's Licensing Officers or Medical Health Supervisors. The Constable had no recollection or record of this. The Respondent denied it.

[12] On April 17, 2013, Licensing also received a complaint from the same observer. As a result, Licensing contacted Constable Miller. He reported that the Appellant said she left the van for three minutes and that it was in her eyesight at all times.

[13] The next day, on April 18, 2013, Licensing Officer Jenny Williams attended at Peek a Boo Daycare to conduct a complaint investigation. Again, the Appellant admitted to leaving six children in her care in her van at the bank on April 17, 2013, but this time she said she left them "for about a minute" while she was in the bank doing a quick transaction. Ms. Williams explained that the Appellant had failed to provide supervision to the children and so had contravened section 39(1) of the Regulation. She noted this in her Inspection Supplementary Report of the same date. She had the Appellant sign the report and gave her a copy.

[14] Later, by email dated April 18, 2013, the Appellant advised the Licensing Officer that on April 17, 2013, she thought that when she quickly went into the bank looking at the children through the glass window/door, it would be alright to leave them in the van "for a quick minute" while she was getting a cashier's cheque. She now knew that this was not in compliance with Licensing and was truly sorry for this. She would not do this again.

[15] On April 26, 2013, the Licensing Officer contacted the Appellant by telephone and notified her of the results of her investigation. In addition to the Appellant's failure to comply with section 39(1) of the Regulation regarding supervision, the Appellant had been found to be in non-compliance with section 52(2) because her failure to supervise the children constituted neglect, section 55(1)(b) because she failed to notify parents of a child involved in a reportable incident immediately, and section 55(2)(a), because she failed to notify the Medical Health Officer of a reportable incident within 24 hours. The Licensing Officer told the Appellant to submit an Incident Report regarding the incident, notify all parents of the incident and provide documented evidence that the parents had been so informed, by May 1, 2013. The Appellant did not comply.

[16] In her evidence at the hearing, the Appellant said that during the April 26, 2013 telephone conversation, the Licensing Officer told her that she did not understand why the police officer did not charge her and that he should have done so. As noted below, it was shown that the Appellant had maintained she was absent from the van for about a minute until mid-August, 2013 when she was provided video evidence that the absence was over 4 minutes. The Appellant did not explain the discrepancy until the hearing, where she revealed, for the first time, that she had told Licensing that she was only absent from the van for about a minute because the Licensing Officer's comments on April 26, 2016 put her in fear of criminal charges. She said she was defending herself. She also said that although she had misled Licensing about this, she had told the truth about the other matters. This was the first time she had offered this explanation for providing misleading information. In her evidence, the Licensing Officer denied discussing criminal charges with the Appellant, at all.

[17] In any event, the Licensing Officer did not hear from the Appellant by May 1, 2013 and was not able to contact the Appellant until May 7, 2013. In a telephone call that day, the Appellant said she did not intend to submit an Incident Report about neglect or any documentation that she had notified the parents of the affected children about the April 17, 2013 incident. The Licensing Officer then told the Appellant that she must submit an Incident Report and the names and contact information for the parents of the affected children by 8:30 a.m. Wednesday, May 8, 2013.

[18] By an email of the same date, the Licensing Officer confirmed her prior advice that the Appellant had been found non-compliant with sections 39(1), 52(2), 55(1)(b) and 55(2)(a) of the Regulation. She confirmed that the Appellant had advised that she did not intend to submit an Incident Report regarding neglect of the children in her care on April 17, 2013 and that she had not notified the parents

of the affected children of the April 17, 2013 incident yet. The Licensing Officer reiterated that the outstanding Incident Report and the parents' names and contact information were to be supplied by 8:30 a.m. on May 8, 2013. She requested that the names and birth dates of the affected children be provided by the same time.

[19] By email dated May 7, 2013, the Appellant forwarded a waylaid email she sent on April 28, 2013 to the Licensing Officer. In that email, the Appellant acknowledged her April 26, 2013 conversation with the Licensing Officer, the Licensing Officer's statement that the Appellant had neglected the children on April 17, 2013, as well as the Licensing Officer's advice that the Appellant needed to inform the parents and supply an Incident Report. The Appellant acknowledged that it was a bad decision to leave the children in the van, but said she did not believe she neglected the children and wanted to dispute the allegation or accusation. She wrote "... I was supervising/had my eyes on them for the minute I was in the bank. They could see me and intern [*sic*] would wave at me."

[20] Notably, the Appellant attached a number of photographs to the April 28, 2013 email and stated, "Here are a few photos of how well I had my eye on the children." The photos include the view from inside the bank's outer door to the Appellant's van, which is shown parked in the nearest parking spot to the door.

[21] Later on May 7, 2013, the Appellant sent the Licensing Officer another email stating that she spoke with all the parents but one that day between 4:00 and 5:00 p.m. She would speak to the other parent the next morning. She said she had told the parents about what happened on April 17, 2013 and she had shown them the Inspection Supplementary Report, along with the photos she had sent earlier that day. She supplied the name of each child, his or her birth month and year, and each parent's first name and phone number (with the exception of one parent). This birth date information, however, was incomplete and contained errors. It could not be used to reliably ascertain whether the Appellant complied with the age and number restrictions in her license during the April 17, 2013 incident.

[22] On June 6, 2013, Licensing received a security camera photo from the bank showing the Appellant standing at the service counter, some distance from the door, as well as excerpts from three of the bank's security cameras showing the Appellant's attendance at the CIBC Bank on April 17, 2013. One camera recorded a view of the parking lot outside the bank from the double set of entrance doors, and showed the Appellant parking the van and entering and exiting the bank. A second camera recorded another view of the parking lot, from outside the doors showing the same activities. A third camera recorded a view of the interior of the bank from behind the service counter, showing the Appellant approaching the service counter, attending at the counter, quickly checking over her shoulder in direction of the parked van on five occasions and walking back through the interior of the bank towards the doors. The vast bulk of the time, she was not looking at the children. None of the footage showed the Appellant waving to the children. The video was not given to the Appellant at that time.

[23] On July 19, 2013, the Licensing Officer conducted a second interview of the Appellant, which was recorded and then transcribed. The Appellant consented to the interview being taped. According to the transcript of the interview, the Licensing Officer and the Appellant reviewed the photos the Appellant sent on May 7, 2013 showing the view of the Appellant's parked van from the doors of the bank. When asked what she was trying to convey by sending these particular photos she responded, "that I could see them through the glass and they could see me". She was asked where she was standing exactly and was advised she could draw it on the photo. She maintained that she was standing inside the doors of the bank, close to the windows of those doors, and estimated that her parked van, as shown in the photo, was approximately 10 feet away from her. When asked if there was anything she would like to share about her intent in submitting the photos, she said that she was "just saying that I could see them and they could see me, that it wasn't behind a wall". She knew they could see her because she would wave at them and they could wave back at her. They could see her. She said maybe two of the children waved back at her. She added that she took the photos to show that she could see them through the glass door. She did not think anything was blocking her view.

[24] On July 22, 2013, Licensing staff attended at the CIBC Bank and, among other things, measured and sketched the configuration of the bank and part of the parking lot. According to the measurements on this diagram, the Appellant would have walked at least 9.8 metres from the parked van to the service counter. The point at which she took the photos was been between 2.4 and 4 metres from the van. It appears from this that, while at the service counter, the Appellant would not have had a clear view of the whole of the van or of all of the children in it.

[25] On July 23, 2013, the Licensing Officer asked the Appellant for further birth date information for the children in care on April 17, 2013, which the Appellant provided on July 24, 2013. This new information indicated that the information she had previously given about three of the six children was incorrect and established for the first time that there were five children under four years of age in the Appellant's care during the April 17, 2013 incident.

[26] Later the same day, July 24, 2013, two Licensing Officers conducted a follow-up inspection at Peek a Boo Daycare for the purposes of reviewing the Appellant's records. When they asked to review the facility's attendance records, the Appellant responded that she had not been keeping a record lately and that she was "not so good at that lately". Among other things, it was observed that the Appellant again had five children under the age of four in her care. She was advised that this contravened section 7(1)(b)(i) of the *Act*. She was told to ensure that no more four children were present at any one time that were under the age of 48 months. Licensing staff completed an Inspection Report, which they and the Appellant signed, and a copy of it was given to the Appellant.

### The Summary of Apparent Findings

[27] Licensing staff prepared a Summary of Apparent Findings dated July 30, 2013, which set out their views that the Appellant had contravened various sections of the *Act* and Regulation. Licensing identified three general issues described as follows: (1) supervision and neglect of children, (2) notification of reportable incident, and (3) ability of licensee/manager. It noted that the Appellant had still not provided the requested Incident Report. It stated, among other things:

The issues in this report appear to indicate that the Licensee is unwilling or unable to ensure the health and safety of the children in care. She was not honest and forthright with Licensing and appeared to attempt to mislead Licensing in this investigation by not providing accurate information on the incident. In addition, a recent inspection indicates that she is continuing to disregard the requirements of the legislation.

[28] A copy of this document and the video were given to the Appellant in order to provide her with an opportunity to respond before the Investigation Report was finalized.

[29] On August 19, 2013, the Appellant provided a brief response to the Summary of Apparent Findings. She apologized for her actions on April 17, 2013. She acknowledged, for the first time, that when she went into the bank she left the six children in her van for a little over four minutes. She did not, however, admit to neglect. She said she believed that at some point she did wave to the children although she acknowledged this was not depicted on the video. She said she did not know that she had to advise the Licensing Officer of the incident when the police attended her daycare with someone else she believed was from the Health Authority. She wrote about her response to the Licensing Officer's advice that her conduct was considered to be neglect and that she must give notification of a reportable incident to parents and the Medical Health Officer:

I believe that I was truthful, helpful, punctual with replying. I did make a few errors sending it to the wrong email adress [*sic*] which caused a week to go by, thinking I did not reply. The parents have full confidence in my abilities to take care of their children and understand the mistake that was made that day.

### The Formal Investigative Report

[30] A Formal Investigation Report was finalized and dated September 9, 2013. The Report contained a detailed review of the history of the matter and the investigation process. It noted that the Appellant had an opportunity to review and respond to these issues and the Summary of Apparent Findings.

[31] With respect to the issue of "Supervision and Neglect of Children", the Report stated that there had been a number of contraventions of section 7(1)(b)(i) of the *Act* relating to the number and ages of children in her care on both April 17 and

July 24, 2013, when the Appellant had five children in care under the age of 48 months, thereby exceeding the applicable maximum set out in Schedule E of the Regulation. Moreover, the Appellant contravened section 39(1) and section 52(2) of the Regulation by leaving children unsupervised and neglected when they were left alone in the van for over four minutes. She appeared to deliberately attempt to mislead Licensing in its investigation by providing photographs that did not accurately reflect where she was located in the bank and by minimizing the length of time she left them, describing it as a minute. She did not admit or apologize for her actions until her August 19, 2013 response, after she had reviewed the Summary of Apparent Findings and the security camera videos which showed she had left the children for over four minutes. The Report continued:

Licensing is concerned with the Licensee's disregard for the severity of her actions. It appears that the Licensee provided inaccurate photographs and a misleading description of her supervision of the children to minimize the risk to the health and safety of children in her care. Furthermore, it appears the children left unattended in the van while the Licensee was in the bank, ranged in age from 23 months to 4.75 years old. The potential for a disastrous outcome is significant especially when the high traffic location of this particular bank is considered and the ages of the children in care.

In her response to the Summary of Apparent Findings, the Licensee offers no corrective action and fails to acknowledge the seriousness of the incident. She does apologize for her actions of April 17, 2013 but does not explain why she attempted to mislead Licensing by providing photographs that did not accurately reflect the situation and making statements that indicated she always had her eyes on the children. The Licensee only acknowledges leaving the children for four minutes after receiving the evidence in the Summary of Apparent Findings Report. Her apology does not address the issue. In conclusion, Licensing cannot be assured that this Licensee will not make an equally delinquent decision in the future and again put the daycare children's health and safety at risk. Licensing has no confidence that the Licensee will not jeopardize the health and safety of children in the future.

[32] With respect to the issue of "Notification of Reportable Incident", the Report says that the Licensee contravened sections 55(2)(a) and 55(1)(b) of the Regulation by failing to report an incident to the Medical Health Officer and failing to immediately notify parents of a reportable incident. The Report went on:

[The] Licensee ... appears to be unable or unwilling to meet the requirements of the legislation. She did not notify the Medical Health Officer, or parents immediately after their children were involved in a reportable incident and then only when prompted by Licensing.



In her response, the Licensee states that she did not know that she had to advise Licensing of the incident (leaving children unsupervised in a vehicle). She defends her lack of reporting by suggesting it was Licensing's responsibility to contact her and request the Incident Report. The onus is on the Licensee to be in compliance at all times and to be familiar with the legislation. It is disappointing, that an operator of a family daycare for 13 years does not understand her obligations as a licensee. To this date, Licensing has yet to receive an Incident Report for the neglect of children in care while the Licensee attended to personal business in the bank, leaving the children unattended in a vehicle.

[33] With respect to the issue, "Ability of Licensee/Manager", the Report noted that there was a contravention of section 7(1)(b)(i) of the *Act* specifically relating to the number and ages of the children in the Appellant's care because the Appellant, on April 17 and July 24, 2013, exceeded the maximum number of children younger than 48 months old she was entitled to have in care. Additionally, there was a contravention of section 57(2)(c) of the Regulation when it was found on July 24, 2013 that she did not maintain accurate attendance records.

[34] Based on the issues in the Report, showing that the Licensee was unwilling or unable to ensure the health and safety of children in care, that she was not honest and forthright with and that she had appeared to attempt to mislead Licensing in the investigation, there had been a contravention of section 7(1)(b)(i) of the *Act* and of section 19(2)(c) and (b) of the Regulation. (Notably, the section 19(2) breaches amounted to a finding that the Appellant did not have the good character and the personality, ability and temperament necessary to manage or work with children in the facility).

[35] In its conclusion, Licensing recommended cancellation of the Appellant's license.

### **The Medical Health Officer's Decisions**

[36] The Medical Health Officer reviewed the Report and videos and issued a Preliminary Decision dated September 13, 2013. In it, he concluded there had been contraventions of section 7(1)(b)(i) of the *Act* and sections 19(2)(a) and (b), 39(1), 52(2), 55(1)(b), 55(2)(a) and 57(2)(c) of the Regulation. He stated that he intended to cancel Peek a Boo Daycare's license. Additionally, he notified the Appellant that she was entitled to seek reconsideration of his Preliminary Decision and provide a written response within 30 days, which he would review before making a final decision.

[37] By letter received by Licensing on October 2, 2013, the Appellant applied for reconsideration of the Preliminary Decision. She wrote that she was deeply saddened by the decision. She had been operating Peek a Boo Daycare since June 2000. She hoped he would reconsider taking her license away. She raised three children and loved and enjoyed taking care of young children in her home. She appended a September 22, 2013 Incident Report indicating she had notified parents

of the April 17, 2013 incident. Additionally, she supplied a document she drafted that was signed by the parents of five of the six children that had been left in the van, in which they agreed that she was a respectful, trustworthy and honest caregiver, she had notified the parents about the April 17, 2013 incident and she acknowledged that it had been a bad decision. Nonetheless, the parents continued to have faith in her abilities to take care of their children.

[38] On November 4, 2013, the Medical Health Officer reviewed the materials and issued a Final Decision and Reasons confirming his Preliminary Decision to cancel the Appellant's license. Among other things, the Medical Health Officer described his prior involvement in the matter, his Preliminary Decision, the Appellant's Request to Reconsider and her written response to the Preliminary Decision.

[39] He went on to state that based on the information provided, he believed that allowing the Appellant to continue operating the daycare would pose a significant risk to the health and safety of children in care. She had not provided any information to explain her misleading conduct during Licensing's investigation: providing photographs that did not accurately reflect her location in the bank on April 17, 2013, making misleading statements about her ability to supervise the children with respect to her line of sight and length of absence, and her failure to admit the length of her absence until she was provided with the bank's video recording. He believed she had attempted to deliberately mislead Licensing in its investigation. Moreover, she had not submitted an Incident Report until after the Formal Investigation Report and, indeed, until more than five months after the incident. She had not provided any information addressing exceeding the maximum number of children under 48 months and not maintaining accurate attendance records.

[40] He wrote:

In conclusion, this investigation clearly demonstrated that the Licensee left five children under the age of 48 months alone in her vehicle for over four minutes in a very busy parking lot. The children ranged in age from 23 months to 4.75 years. There could have been serious consequences to the children. A child could have opened the door resulting in children exiting the vehicle or a child could have become entangled in their carseat restraint. The Licensee was not honest and truthful throughout the investigation and only provided the truth when she was faced with the undeniable evidence of the bank recording. I have no confidence that the Licensee will not jeopardize the health and safety of children in care in the future.

[41] At the hearing, the Chief Medical Officer elaborated on his reasons for cancelling the Appellant's license.

[42] His first reason for deciding to cancel the Appellant's license was that the Appellant failed to provide the requisite degree and level of supervision expected of a Licensee providing care for children, by leaving the six children unattended in a van. He noted that the standard of care expected of a Licensee is not the same as

one would expect of a parent. Rather, it is a higher standard of care; the Licensee must "ensure" the safety of children in care.

[43] The Appellant failed to meet this standard on two grounds. One was that the Appellant had little or no line of sight of the children for the few seconds she spent looking at the van from the bank, and she left the children in an environment that put them at risk. With respect to the dangers of leaving children unattended in vehicles, he recalled that, just the day before the incident, there had been extensive coverage in the media of a case where an unlicensed daycare operator pled guilty to criminal negligence for leaving a child unattended in a car seat with the result that the child was strangled and died. He had personal experience with other instances demonstrating that leaving children unattended in cars can have disastrous consequences. For example, children had been kidnapped in a car-jacking. One had exited the car and been run over. In this case, the van was parked in a busy parking lot adjacent to a high traffic thoroughfare. One could imagine that these children could have exited the van and wandered away into traffic.

[44] The Medical Health Officer emphasized that the outcomes that could have happened are not hypothetical. They had happened to other children. However, the fact that they did not happen in this particular case does not minimize the seriousness of the situation.

[45] He pointed out that under section 39 of the Regulation, children in care must be supervised at all times and, where a clear line of sight is not always maintainable, this may be mitigated where the child is in an environment that offers a greater assurance of safety. Moreover, under section 52(2), a child under the care or supervision of a licensee must not be subjected to neglect, as per Schedule H of the Regulation, which defines neglect to include a failure to meet the needs of a child, including by way of supervision. Here, there was a failure of supervision both in line of sight and in that the Appellant did not know what was happening to those children for more than four minutes in that potentially dangerous environment.

[46] With respect to the Appellant's failure to provide the Incident Report and section 55 notifications, the Medical Health Officer said that these notifications are very valuable. They help give parents a good and complete picture of what is happening to their children while at daycare. It is expected that if a child is injured, parents will be notified immediately of reportable incidents so that they may take appropriate steps such as removing the child and obtaining medical care or assistance for the child. For example, if the child has bumped his or her head at daycare and then exhibits vomiting at home, this may be a sign of concussion for which the child requires treatment. The parent will need to know what happened at daycare so they can take such steps. The importance of notifying the Medical Health Officer is to alert it to the prospect there may be a hazard at a daycare facility that could be remediated.

[47] The Medical Health Officer explained that the limitation on the number and ages of small children in care at daycares has been established by the legislation as minimum health and safety standards. These numbers are established by expert committees to show what is considered to be a reasonable ratio of supervisors to children, based on their needs at different ages.

[48] The Medical Health Officer commented on whether the Appellant met the requirements of section 19(2)(a) and (b) of the Regulation, that is, whether she had the good character and the personality, ability and temperament required to manage or work with children in a daycare facility. Although the Appellant clearly cares about children, she had deliberately and knowingly left six children in a van unattended while attending to her personal banking. For four minutes, she was not fulfilling her role as a licensee. She put her personal needs above her responsibility to provide continuous supervision of the children. She failed to put the children first.

[49] He was also distressed that instead of acknowledging what had occurred, the Appellant had misled and misdirected Licensing's investigation until she was confronted with the bank's videos. This spoke to either a lack of appreciation or care for the seriousness of the incident. Additionally, this spoke to whether she was of good character insofar as she was not someone who would immediately step up and acknowledge her conduct. It also gave him grounds for concern about the Appellant's understanding of the importance of taking care of children, and of being honest, truthful and forthright with Licensing.

[50] The Medical Health Officer said his conclusion about the Appellant's ability to meet the requirements of Sections 19(2)(a) and (b) arose out of a combination of the Appellant's failure to provide supervision, her placement of the children in a dangerous environment, her failure to appreciate the dangerousness of the situation, her efforts to minimize it through misrepresentation, and her lack of candor, cooperation and willingness to address the issues, as well as her failures to notify the parents and the Medical Health Officer of the incident either immediately or within 24 hours.

## **ISSUES ON APPEAL AND DISCUSSION**

[51] The Panel's task in the instant appeal is to determine whether the Applicant has proved, on a balance of probabilities, that the decision under appeal was not justified. The onus of proof is on the Appellant. In making its determination, the Panel must hear and consider the evidence and argument as if it were the decision maker at first instance. It must also consider the record and the decision below (section 29(11) of the *Act*, Decision 2010-CCA-006(a) page 16).

[52] Below, we will first address the issues of procedural fairness and natural justice raised by the Appellant and then we will address the issues on the merits.

**A. Procedural Fairness and Natural Justice**

[53] As mentioned, the Appellant's Notice of Appeal challenges the Medical Health Officer's decision on various grounds that can be generally described as alleged breaches of procedural fairness and natural justice. At the hearing she gave evidence that her lawyer drafted the Notice and she was not aware of what part of it meant. However, it became clear that her complaint in this regard related to her view that she would have liked to have met the Medical Health Officer who made the decision to cancel her license. She said she did not get the chance to speak on her own behalf and, therefore, she lost the opportunity to present her character and show that she had learned from her mistakes.

[54] It therefore appears that the Appellant's primary complaint was that she did not have an opportunity to make representations in person to the Medical Health Officer about her character and her ability to learn from her mistakes. The question of the Appellant's "character" is directly relevant to the finding that she lacked the good character to be a licensee, as per section 19(2) of the Regulation.

[55] This raises a question of what is the nature of the hearing the Appellant is entitled to have before the Medical Health Officer makes a final decision about cancelling her license. Is she entitled to meet with him and make oral representations?

[56] In the instant case, the answer is provided by the *Act*. The Legislature has given specific procedural direction about the nature and extent of a licensee's participation in proceedings that may lead to a Medical Health Officer's decision to cancel a license. Under section 13 of the *Act*, the Medical Health Officer may suspend or cancel a license if, in his or her opinion, the licensee no longer complies with the *Act* or Regulation, or has contravened a term or condition of the license. Section 17 of the *Act* requires that prior written notice and reasons be given to a licensee 30 days before a license is cancelled, along with written notice that the licensee may give a written response to the proposed action. The legislation does not contemplate the licensee making oral representations to the Medical Health Officer in addition to making a written response to a preliminary decision before the final decision is made.

[57] In the instant case, the procedural terms of the *Act* were complied with. The Appellant was given multiple opportunities by Licensing to provide her side of the story. She was given opportunities to have input into the Formal Investigation Report on which the Medical Health Officer relied, as well as to supply a written response to the Medical Health Officer before he reconsidered his Preliminary Decision and issued his Final Decision to cancel the license.

[58] Indeed, in her evidence, the Appellant acknowledged that she had a number of opportunities to respond to the proceedings that ended in the cancellation of her license. The Appellant confirmed that she had been interviewed by the Licensing Officer on April 18, 2013, she had seen the bank's security videos and she was able to provide her side of the story. Moreover, she had been provided a Summary of

Apparent Findings dated July 30, 2013 and she was invited to make a response before the Final Investigation was completed.

[59] The Summary of Apparent Findings addressed the Appellant's ability as one of the three issues it canvassed. It also addressed her character. The Summary concluded that there was sufficient evidence to substantiate that she was in contravention of section 19(2)(a) and (b) of the Regulation. It specifically spoke to the view that she was unwilling or unable to ensure the health and safety of the children in her care. She was not honest and forthright with Licensing and appeared to attempt to mislead it in the investigation. Additionally, a recent inspection indicated that she continued to disregard the legislative requirements. She had an opportunity to respond to this and did so.

[60] The Appellant supplied her response by email dated August 19, 2013, in which she confirmed that she had received and read the Summary of Apparent Findings and had seen the videos. Indeed, the Formal Investigation Report, dated September 9, 2013, quoted from her response.

[61] Additionally, the Appellant received the Medical Health Officer's Preliminary Decision dated September 13, 2013, which enclosed a copy of the Formal Investigation Report. The Formal Investigation Report, which formed part of the Medical Health Officer's deliberations, described in some detail Licensing's concerns about the Appellant's character and abilities. Among other things, it expressed the view that she had not demonstrated good character, or that she had the personality, ability and temperament to ensure the safety of children. Licensing had no confidence in her ability to provide adequate supervision and ensure the health and safety of children in her care at all times. She did not meet the requirements of section 19(2)(a) and (b) of the Regulation. The Appellant was notified of her entitlement to seek reconsideration of that decision and provide a response to the Preliminary Decision within 30 days. She did so and provided materials in support on or before October 2, 2013. Ultimately, the Medical Health Officer considered these materials and confirmed his earlier decision and ordered that her license be cancelled.

[62] In view of the foregoing, the Appellant has failed to establish that the November 4, 2013 decision was not justified because of breaches of procedural fairness of natural justice, or because she was not given an opportunity to meet with the Medical Health Officer and make oral representations to him, in addition to providing him with her written response to the Preliminary Decision.

## **B. The Merits**

[63] It is convenient to group the issues raised on the merits as follows:

- (1) Number of Children in Care;
- (2) Facility Attendance Records;
- (3) Supervision and Neglect of Children;

- (4) Notification of Reportable Incident;
- (5) Character and Ability of Appellant.

[64] Credibility was an issue in this appeal. The legal approach to assessing credibility was addressed by our Court of Appeal in *Faryna v. Chorny* (1952), 2 D.L.R. 354. Without quoting extensively from that decision, we note that the Court in that case wrote, at page 357, that:

... The real test of the truth of the story must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[65] In assessing the credibility of a witness's evidence, regard may be had to various factors, including, but not limited to, the firmness of the witness's memory, whether the witness has a motive to lie, whether the witness's evidence is consistent with independent evidence, whether the witness's evidence changes during the course of the hearing, whether the witness's testimony seems unreasonable, impossible or unlikely, and the demeanour of the witness, generally (*Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186).

[66] In the instant case, we found that the evidence of the Respondent's witnesses was forthright, reliable and consistent with the independent evidence. We found that the Appellant's evidence, as recorded in the documents, was not consistent or reliable, particularly as it related to her description of the incident on April 17, 2013, and the changes in her descriptions once she was faced with contradicting evidence, such as the bank's security videos. Not only did her evidence change during the pre-hearing process, but it also shifted during the hearing itself. Her explanations for the changes in her evidence were not reasonable or credible and contradicted other evidence. We deal with this in more detail, below. Suffice it to say at this point that wherever the Appellant's evidence conflicts with that of the Respondent's witnesses, we accept the evidence of the Respondent's witnesses in preference to hers.

### **(1) Number of Children in Care**

[67] As noted above, the Appellant's license permits her to care for a maximum of four children under 48 months of age. This accords with Schedule E of the Regulation which requires a licensee of a Family Childcare having no child younger than 12 months present to ensure that (a) no more than four children are under 48 months, and (b) the ratio of employees for that group of children is comprised of no less than one employee for the group, ie. "the Licensee". We accept the Medical Health Officer's evidence that this standard was set by experts for the health and safety of the children in care based on their ages and numbers.

[68] On April 17, 2013, the Appellant left six children alone in her parked van just outside the CIBC bank. Five of them were under 48 months of age. Licensing did not discover this until July 24, 2013. That is because, when it first requested the

birth dates of the children, on May 7, 2013, the Appellant responded with incomplete and inaccurate information. Significantly, that information was insufficient to determine whether the Appellant had too many children under 48 months of age in her care on April 17, 2013.

[69] Indeed, the Appellant did not provide complete and accurate information until July 24, 2013, after Licensing made a second request. The corrected information showed that there were indeed five children under 48 months of age in her care on April 17, 2013. The same day, two Licensing Officers visited the daycare to check the Appellant's records. At that time, the Appellant was again found to be in care of five children under 48 months of age. While there, the Licensing Officers reviewed the Appellant's registration documents, which contained the correct birth date information and showed she had it all along.

[70] In her evidence at the hearing, the Appellant said that she had made a mistake in the birth dates, but this was not intentional. She said she took the erroneous information from her calendar. She provided the right information promptly on the day after the second request.

[71] There is no explanation for why the Appellant did not ensure that the information that she gave Licensing was complete and accurate when she had the correct information at hand. The evidence, however, does show that the manner in which she answered the first request interfered with Licensing's ability to ascertain whether she had breached the conditions of her license by exceeding the maximum number of children under 48 months that she was permitted to have in her care on April 17, 2013.

[72] In her evidence, the Appellant denied knowing what the maximum number of children under 48 months she could care for was, but she did agree that it was her responsibility to know the Regulation that covers such matters. At the least, the Appellant's conduct in twice contravening this requirement and failing to supply accurate information on the first request demonstrates a degree of disregard for keeping abreast and compliant with standards that, as the Medical Health Officer noted, were set for health and safety reasons. It also suggests she did not understand these obligations or take them seriously.

[73] The evidence establishes that the Appellant exceeded the maximum number of children under 48 months of age she was entitled to have in her care on April 17, 2013 and on July 24, 2013. This contravened section 7(1)(b)(i) of the *Act* and Schedule E of the Regulation.

## **(2) Facility Attendance Records**

[74] There is no dispute that on July 24, 2013, two Licensing Officers attended Peek a Boo Daycare and, while there, asked to see the Appellant's facility attendance records. The Appellant responded that she had not been keeping good records lately. This conduct reflects an attitude of disinterest in and disregard for compliance with regulatory standards. This amounted to a contravention of section 57(2)(i) of the Regulation.



**(3) Supervision and Neglect of Children**

[75] Section 39(1) of the Regulation obliged the Appellant to ensure that the children were supervised at all times by a person who was an educator, an assistant or a responsible adult. Section 52(2) required her to ensure that the children were not, while under her care or supervision, subjected to "neglect". Schedule H of the Regulation defines "neglect" as meaning "the failure of a care provider to meet the needs of a child, including ... supervision".

[76] The Appellant claims that she met her obligations to supervise the children. She says she had adequate line of sight of them during the period she left them in her van. The Appellant disputes whether her supervision of the children during the April 17, 2013 incident amounted to neglect and whether she was obliged to give the notification required by section 55, at all. In her view, the term "neglect" is too harsh and drastic to describe her conduct.

[77] The following excerpt from Appeal Board Decision 2008 BCCCALAB 3 which addressed similar facts, assists the Panel insofar as it describes the standard of supervision applicable to a licensee and, in particular, whether that standard of care was satisfied in a case where young children were left unattended in a vehicle:

[84] The Panel accepts that the Appellant struggles with issues regarding the level of supervision she is required to provide. This was demonstrated by her evidence that she believed it was a safe practice to leave children in her vehicle as long as they were within her line of sight. What the Appellant did not demonstrate to the Panel's satisfaction was understanding that her responsibility as a licensed caregiver exceeds what may be considered "common sense" by a parent. The Appellant must exhibit a standard of care of the children in her care that ensures their safety. This can only be achieved if she has the children in her supervision (by which we mean line of sight or hearing) and that they are not left in situations that are potentially unsafe.

[85] The Panel accepts that it is unsafe for a licensee to leave children under the age of five alone in a vehicle, even if they are within the line of sight of the caregiver. The Panel also accepts that it is unsafe to leave children under the age of five out of both earshot and line of vision, especially when the children are not in a crib or other environment where there is a greater assurance of their safety.

[78] The question might be restated as being whether the Appellant met the standard of care owed by a licensee to children in care by providing a level of supervision that ensured the needs of the particular children in her care were met.

[79] Below, we first turn to the particular children and the environment in which they were left.

**(a) Particulars of children and environment**

[80] There is presently no dispute that the Appellant left six preschoolers, strapped in carseats, in a locked van parked in a busy parking lot situated adjacent to a high-traffic thoroughfare. One was less than five years old, the rest were less than four years old. Some were old enough to exit the van and help others do the same, or assist another adult to remove them from the van. They were exposed to all of the dangers described by the Medical Health Officer in his evidence: strangling, kidnapping and wandering away into traffic or other harm. These dangers are not speculative. They happen to small children in our society. The Appellant clearly left the children in an unsafe environment and did nothing of note to mitigate the risks and provide a greater assurance of their safety.

[81] We next turn to the level of supervision provided to the children, in terms of length of absence, as well as line of sight and hearing. We note there were conflicts in the evidence before and after the decision under appeal, which are addressed below.

**(b) Length of absence from van**

[82] The Appellant's pre-hearing description of the amount of time she was absent from the van varied depending on to whom she spoke.

[83] On April 17, 2013, she told Constable Miller that she was absent for three minutes. He conveyed this to Licensing the next day, April 18, 2013. In contrast, from April 18 to mid-August 2013, when she received the bank's security video, the Appellant repeatedly maintained to Licensing that her absence was "only about a minute". More particularly, on April 18, 2013, the Appellant told the Licensing Officer that she was absent "for about a minute". The same day, she emailed to say she had been absent "for a quick minute". In her April 28, 2013 email, she referred to her absence as being "the minute I was in the bank".

[84] Indeed, it was not until August 19, 2013, after the Appellant received the Summary of Apparent Findings and the bank's security video, that the Appellant acknowledged that her absence was somewhat in excess of four minutes. This was sufficient time for these children to come to some harm if not adequately supervised.

[85] In her direct evidence at the hearing, the Appellant said the reason why she did not admit the length of her absence to Licensing until she was faced with the video evidence was because the Licensing Officer had put her in fear of criminal charges by telling her, in their telephone conversation on April 26, 2013, that the police should have charged her criminally and the Licensing Officer could not understand why he did not do so. She said she was scared, she was under pressure, and she was defending herself from charges when she said that she had been in the bank for a minute. Despite knowing that Constable Miller had been satisfied with her explanation, she believed the Licensing Officer could persuade him to pursue charges.

[86] In cross-examination, the Appellant denied she had lied, but she said that she misled the Respondent “a little” on the timing issue. She said she “played” with the number of minutes she was away from the van, but she was truthful about the other matters.

[87] The difficulty with the Appellant’s evidence is that it contradicts the evidence showing that the Appellant had already told the Licensing Officer at least twice by then that she had been absent for about a minute. The inference that can be drawn from this contradiction is that the Appellant’s earlier misrepresentations had nothing to do with criminal charges, especially since she had given a more honest estimate of the length of her absence to the police officer (i.e. three minutes). Rather, this suggests she knew that the length of her absence from the children was problematic and could attract a more thorough investigation and/or potentially serious consequences from Licensing.

[88] In any event, fear of criminal charges does not justify repeatedly misleading Licensing about the amount of time she left the children alone and interfering with its investigation.

[89] The Appellant’s conduct shows that she failed to appreciate the seriousness of the situation and put her own interests (ie. against self-incrimination) ahead of her duties and obligations to others as a Licensee. Moreover, the act of repeatedly and deliberately misrepresenting this fact compounded the seriousness of her conduct by revealing that she has a character that will engage in repeated dishonesty where she fears negative consequences and that she cannot be relied on to understand and accept responsibility for serious misconduct.

### **(c) Line of Sight and Hearing**

[90] With respect to “line of hearing”, there is no question that the children in this case were left out of the Appellant’s earshot for over four minutes while the Appellant did her personal banking.

[91] With respect to “line of sight”, from the outset until well into the hearing, the Appellant maintained that she was adequately supervising the children because she had her eyes on them and she could see them while she was in the bank.

[92] On April 17, 2013, the Appellant told Constable Miller that the van was in her eyesight at all times. In her April 18, 2013 email to the Licensing Officer, she said that she quickly went into the bank looking at the children through the glass window/door. By email dated April 28, 2013, she said that she had her eyes on the children “for the minute I was in the bank”. They could see her and in turn would wave at her.

[93] The Appellant then sought to bolster her credibility on this point by supplying the April 27, 2013 photographs showing the view from just inside the bank’s door to where her van had been parked a short distance away on April 17, 2013. At a July 19, 2013 interview, she said she produced these photographs to show how well she had her eyes on the children. She said she could see the children through the

glass and they could see her, that she was not behind a wall and she did not think anything was blocking her view.

[94] The Appellant admitted at the hearing that she took the photos at a time when the bank was closed, but she admitted she did not tell this to the Licensing Officer. She said the photos inside the bank's outer door were taken about 10 feet from the van. She also admitted that the photos gave the impression that she was "that close" to the van while she was in the bank.

[95] Counsel for the Respondent questioned the Appellant about a handwritten dot on one of the photos. The Appellant said she recalled putting a dot on a document during the interview, but thought she did not put it on a photo, rather on a diagram of the bank. When it was pointed out to her that the diagram had not been created by the time of the interview, she suggested that maybe she put the dot there to show the angle from which she was viewing the van. There is no record that the Appellant had said this before. This was an example of the Appellant's shifting explanations when faced with contradictory evidence.

[96] At the hearing, the Appellant maintained that she could see the children, that she waved at the children and that they waved to her. When the bank's security videos were shown at the hearing, the Appellant acknowledged that they did not record her waving at the children and said she must have waved at the children in the few seconds that she was not being recorded by video, which was before she entered the bank.

[97] Notably, the videos did not record the Appellant looking at the children throughout the time she was in the bank. In fact, they depicted her briefly looking in the direction of the van in a manner she described as a "shoulder check" on approximately five occasions. This amounted to a matter of seconds in total, with a significant break between shoulder-checks in the middle of the time she spent in the bank.

[98] After the videos were shown at the hearing, the Appellant admitted that she could not see the children the whole time she was in the bank. She was not looking at them constantly. She could not see the children while she was at the service counter. Ultimately, she conceded that while she was at the service counter, she would have seen the back window of the van and probably one child. The Appellant admitted that she did not think she told Licensing how much she could see the children. This was another example of the Appellant's shifting explanations.

[99] The Appellant was taken to her statement in an email where she said that she had her eyes on the children. She was asked if that statement left the impression that she had her eyes on them the whole time. She responded that she did this because she was afraid. She wanted to make it look like it was really quick. It was an exaggeration, not a lie. She tried to make it less serious.

[100] We disagree with the Appellant's assessment of her conduct. Her description of her line of sight went beyond exaggeration. She deliberately misled Licensing by

her acts and her omissions regarding her ability to see the children. Moreover, she continued to give misleading evidence about her line of sight at the hearing.

**(d) Summary re supervision**

[101] The evidence established that the Appellant misrepresented the length of her absence from the children for months and only admitted this when faced with irrefutable evidence. Moreover, she misrepresented how well she could see the children until well into the hearing. In fact, for most of the time the Appellant was in the bank, she did not have and could not have had a clear view of the children in her van. Indeed, she could not see more than, possibly, the backs of the heads of one or two of them.

[102] The evidence, in context, demonstrates that the Appellant had the six preschool children, five of them less than 48 months of age, in her care contrary to her license, and she deliberately left them in her van without supervision by way of line of sight and hearing while she was in the bank for more than four minutes. Moreover, she deliberately left them in a dangerous environment: in a busy parking lot adjacent to a high-traffic street. She failed to take any reasonable steps to mitigate their exposure to danger.

[103] In the result, the Appellant did not meet the standard of supervision owed by a licensee to children in her care to provide a level of supervision that ensures their safety. The Medical Health Officer was justified in finding the Appellant breached section 39(1). Moreover, he was justified in finding her in contravention of section 52(2), because she failed to ensure she did not subject the children in her care to "neglect", as defined by Schedule H of the Regulation, namely by failing to provide them with supervision.

**(4) Reportable Incident - Neglect**

[104] According to section 55 of the *Act*, the Appellant is required to notify a parent or emergency contact "immediately" and the Medical Health Officer within 24 hours where a child under her care or supervision is involved in, or **may have been** involved in a reportable incident described in Schedule H. "Neglect" is listed as a reportable incident in Schedule H. Notably, section 55 does not require that the notification be in writing, despite the fact it may be prudent to provide it in writing.

[105] The Appellant did not provide notification to parents or emergency contacts within the very short time frame after the incident required by statute. At the hearing, the Appellant said she did not know she had to provide notification, but she told the Police Officer and the person who accompanied him about the incident on April 17, 2013, and she told the Licensing Officer on April 18, 2013 when the Licensing Officer attended at the daycare. Therefore Licensing had already received notification. Additionally, she said for the first time, at the hearing, that she did not want to provide documentation of notification out of fear that she might be charged criminally.

[106] Assuming that a licensee can give notification to the Medical Health Officer under Section 55 by orally describing the event to a Licensing Officer, it was apparent that the information the Appellant gave orally to the Licensing Officer on April 18, 2014 was inaccurate and misleading and, therefore, did not satisfy the obligation to notify parents or licensing that a child was or may have been involved in a "reportable incident".

[107] It is possible that a licensee may not realize from the outset that a particular failure to provide supervision is or may amount to "neglect" and that the notification obligation has been triggered. In some cases it may be obvious, in others it may not. In such a case, it is prudent for Licensing to advise a licensee to give the notification.

[108] In this case, the obligation to give notification was brought clearly to the Appellant's attention in a telephone conversation on April 26, 2013, when the Licensing Officer told her that the incident of April 17, 2013 met the definition of "neglect" set out in Schedule H of the Regulation and, therefore, it was a "reportable incident". She was told to submit an Incident Report to Licensing and to provide Licensing with documented evidence that the parents had been fully informed, by May 1, 2013. This would have constituted notification to both the parents and the Medical Health Officer, because the Licensing Officer was his delegate. However, the Appellant did not comply by the deadline, apparently because she did not accept that she had engaged in neglect.

[109] What she did not tell Licensing or the Medical Health Officer before the hearing was that she did not want to write about the incident in an Incident Report because she was fearful of criminal charges as a result of comments made by the Licensing Officer in the April 26, 2013 telephone call. At the hearing, her husband gave evidence that he told her not to put it in writing because that would be saying she was guilty.

[110] Instead, the Appellant began preparing her case in her defence to the allegation of neglect. On April 27, 2013, the Appellant went to the bank, at a time it was closed, positioned herself inside the outer door of the bank, and took the photographs mentioned earlier of her van, parked in the same spot as it was on April 17, 2013. These photos were taken about 10 feet away from the van.

[111] The next day, April 28, 2013, the Appellant prepared an email to the Licensing Officer, which she inadvertently sent to the wrong address. In it, she said that she wanted to dispute the allegation that she had neglected the children. She wrote that she had made a "bad decision" to leave the children alone in the van, but she was supervising and had her eyes on the children for the minute she was in the bank. She said neglect was a "harsh word", which she did not want on her childcare record. In support of her defense, she attached the photographs mentioned above which, she wrote, showed how well she was watching the children in her van.

[112] As noted, the Appellant agreed that the photos left the impression that she was about 10 feet away from the van throughout the time she was in the bank. In

my view, this was a misrepresentation. Notably, this was not a spur of the moment misrepresentation that the Appellant promptly corrected.

[113] Rather, on May 7, 2013, after learning that the Licensing Officer had not received the email, she sent it out again. Moreover, she maintained her position that she had supervised and could see the children at all times until well into the hearing. All of this is particularly troubling.

[114] At the hearing, the Licensing Officer gave evidence she and the Appellant had not discussed criminal charges at all. Moreover the Licensing Officer said that, after not having received documentation that notifications had been made by May 1, 2013, she tried calling the Appellant a couple of times in early May to follow up. In the morning of May 7, 2013 the Appellant returned her call and said she would not be supplying the documentation and she had not notified the parents of the incident. Her reason for this refusal was that although she accepted that her supervision had been inadequate, she did not agree with the determination that her conduct amounted to neglect. She did not raise a fear of criminal charges as an explanation for her refusal.

[115] Nonetheless, the Licensing Officer gave the Appellant a further opportunity to comply. By email the same day, the Licensing Officer listed the Appellant's various contraventions of the *Act* and Regulation and gave the Appellant until 8:30 a.m. the next day, May 8, 2013 to submit the Incident Report as well as the affected parents' names and contact information.

[116] As mentioned, the Appellant did not immediately retreat from her refusal to comply. Rather, she then sent the Licensing Officer her April 28, 2013 email disputing the allegation of neglect and attaching the photos that she claimed showed how well she had her eye on the children for the minute she had been in the bank.

[117] Later on May 7, 2013, the Appellant emailed the Licensing Officer to say she had informed all of the parents, but one, of the April 17, 2013 incident. She showed them the April 18, 2013 Inspection Supplementary Report (which indicated she had been absent "for about a minute") and she showed them the photos she had sent the Licensing Officer earlier that day.

[118] The Appellant gave evidence that she told the parents why she took the photos – to show them how well she was watching the children. Moreover, she informed the Licensing Officer of this, by email that day.

[119] Despite this, the Appellant did not comply with the instruction to supply the requested Incident Report or documented evidence of notification of the parents before the Medical Health Officer issued his September 13, 2013 Preliminary Decision. The documentation, dated September 22, 2013, was ultimately received by Licensing on October 2, 2013, two days before the Medical Health Officer issued his Final Decision cancelling the Appellant's license.

[120] At the hearing of this matter, the Appellant explained that her intention was to tell the parents, but not write it down because she was scared of being criminally charged. She said that she wrote the Incident Report once the Medical Health Officer indicated he was going to take her license away, and once the parents assured her she would not be sued.

[121] It appears that the Appellant did not supply an Incident Report or written evidence of notification of the parents in a timely way for three reasons:

- (a) she did not believe she had engaged in neglect;
- (b) she did not want to be charged criminally or sued and so she did not want to put anything in writing that could be seen as an admission of guilt; and
- (c) she believed she had given sufficient notice to the Medical Health Officer by telling Licensing, and to the parents by telling them about the incident orally.

**(a) Neglect**

[122] As noted above, neglect is defined by Schedule H of the Regulations:

“Neglect” ... means the failure of a care provider to meet the needs of a child, including ... supervision ...

[123] In the instant case, as found above, the licensee failed to provide the children in her care with supervision on April 13, 2013 when she left them alone, in her parked van, outside the CIBC bank while she conducted her banking inside the bank for over four minutes. This failure meets the definition of “neglect” within the meaning of the Regulation.

[124] The section 55 notifications must be provided not only where a child is involved in a reportable incident, but also where a child “may have been involved in” such an incident. The fact that the Appellant did not agree that she had not engaged in neglect does not excuse her from complying with the statutory obligation of giving section 55 notice where children “may have been involved in” an incident that amounted to neglect. When she was told by the Licensing Officer in no uncertain terms that Licensing believed she had engaged in neglect, and knowing that she had not provided supervision for a period of time, there was a reasonable basis to conclude that she fell within the scope of the section 55 obligation and was statutorily compelled to give the notice.

**(b) Criminal charges**

[125] As already mentioned, the Appellant gave evidence that the Licensing Officer had put her in fear of criminal charges by telling her in their telephone conversation on April 26, 2013 that the police should have charged her criminally and she could not understand why he did not do so. In her evidence at the hearing, the Appellant



admitted that Constable Miller had not told her he was going to charge her, but she thought the Licensing Officer would go back and tell him to pursue charges.

[126] Constable Miller gave evidence that he had not discussed criminal charges with the Appellant when he attended at Peek a Boo Daycare on April 17, 2013. He did not consider a criminal investigation or criminal charges, because there was no basis for it. He said his usual practice, if he was going to consider criminal charges, would have been to tell her that there would be an investigation and there may be criminal charges. He followed his usual practice.

[127] In her evidence, the Licensing Officer specifically denied saying anything to the Appellant about criminal charges. We accept that evidence.

[128] We note that section 55 of the Regulation requires notification to parents where the child, "is involved in, or **may have been involved in** a reportable incident" [emphasis added]. It does not require that a licensee agree that they engaged in neglect. Indeed, the Appellant could have stated in the notice that she did not agree that she had engaged in neglect. Additionally, the Appellant could have asked Constable Miller or sought legal advice about prospective criminal charges. There is no evidence that she did either.

[129] We find that the Appellant disagreed that her conduct amounted to negligence and she did not want it to be on her record. It may be that as a result of her April 26, 2013 conversation with the Licensing Officer the Appellant feared criminal charges or a civil lawsuit. However, that is no defence to a failure to comply with the statutory obligation to provide the notifications required by Section 55 in a timely way. Further, fear of criminal charges does not justify a person minimizing or misrepresenting an incident that they are obliged by law to report. That kind of conduct reflects adversely on the character of the proponent.

[130] Finally, the obligation to provide the notifications required by section 55 in a timely way is a statutory obligation. It is a requirement of a statutory regulatory scheme that the Appellant voluntarily obliged herself to comply with when she sought and obtained her license. There were no criminal or penal proceedings contemplated at the time the obligation to give notification was triggered, and none have subsequently been commenced. The Appellant took no steps or legal action to relieve herself of the obligation to comply. In the circumstances, she failed to persuade the Panel that her fear of self-incrimination justified her refusal to provide the section 55 notification.

[131] In the circumstances, the Appellant was obliged to comply with section 55. The question of whether written contents of such notifications are admissible in criminal proceedings is for the trial judge hearing those proceedings, not this Panel (*Cockerham v. College of Physicians & Surgeons of New Brunswick*, 2013 NBQB 197, *R. v. Rice*, 2009 BCCA 569).

**(c) Form of Notification**

[132] The Appellant's oral notification of the incident to Licensing and the parents did not satisfy the objectives or requirements of section 55 in the circumstances.

[133] One of the purposes for requiring that a licensee notify a parent immediately and notify the Medical Health Officer within 24 hours where a child is involved in or may have been involved in a reportable incident is to ensure that these persons are adequately and promptly informed of the facts and can take appropriate steps to respond. For example, in the case of injury, the parents can ensure their children have medical attention and the Medical Health Officer can ensure hazards are remediated. The Licensing Officer's April 26, 2013 direction that the Appellant supply an Incident Report to Licensing and provide documented evidence of notification of the parents was designed to satisfy this objective.

[134] In the instant case, the Appellant failed to supply evidence to the Panel that the parents or the Medical Health Officer were adequately or promptly notified of the April 17, 2013 incident. The evidence is that the Appellant maintained to Licensing that she had left the children for only a minute until August 19, 2013, when she received the bank's security videos. She continued to maintain that she had her eyes on the children while she was in the bank.

[135] Most significantly, she gave evidence that when she told the parents about the incident, she showed them the April 18, 2013 Inspection Supplementary Report and the photos she took on April 27, 2013. Notably, in showing the parents the April 18, 2013 Inspection Supplementary Report, which reported that the Appellant had said that she was only away from the van for a quick minute, the parents would likely have inferred that was indeed the case. In showing the parents her photographs, they likely would have concluded that she was only a short distance from the van and that the children were in clear view for the whole of that quick minute. In these circumstances, the parents were likely left with the misleading impression that the Appellant intended to leave with Licensing, which was that the situation was not serious.

[136] This likelihood finds some support in the independent evidence. For example, on May 8, 2013, the father of one of the children wrote an email to the Licensing Officer in which he said the Appellant had told him and his spouse about the April, 17, 2013 incident, and he wrote:

She has shown pictures to my spouse of her vehicle from outside the bank. She has been open and honest about what occurred and feels terribly sorry for leaving our children in the van when she ran in to get a cashier's check.

He and his spouse had confidence in the Appellant and did not think the Respondent needed to take any other action, "especially charges of neglect".

[137] This shows the Appellant showed at least one parent photos that were misleading as to her location in the bank and left an impression on the parents that the April 17, 2013 incident was not serious.

[138] In view of all of this evidence, the Appellant has failed to show that the Medical Health Officer was not justified in concluding that neither he nor the parents were notified about the incident in a manner that complied with sections 55(1)(b) and 55(2)(a) of the Regulation.

#### **(5) Good Character and Personality, Ability and Temperament**

[139] Perhaps the most difficult aspect of this case is the issue of whether the Appellant has established that the Medical Health Officer's decision was not justified when he found she was not a person of good character and did not have the personality, ability and temperament necessary to manage her work with children, as required by section 19(2)(a) and (b) of the Regulation.

[140] The evidence before the Medical Health Officer was sufficient to establish that the Appellant breached the conditions of her license. She left six children in her care, four of whom were under 48 months, in a dangerous environment on April 17, 2013, without requisite supervision, in circumstances that amounted to neglect within the meaning of the Regulation. She again breached the condition of her license preventing her from having more than four children under 48 months in her care on July 24, 2013. Additionally, she was not diligent in keeping attendance records and in giving Licensing accurate information about the children's ages on request. Although she acknowledged it was her responsibility to know her obligations under the *Act* and Regulation, she appeared to take no steps to ensure she was knowledgeable about those obligations.

[141] More importantly, perhaps, was the fact that she refused to comply with her section 55 notification obligations and went out of her way to mislead and misrepresent to Licensing what occurred on April 17, 2013 so as to minimize its seriousness. In so doing, she interfered with Licensing's investigations. Her acts and omissions demonstrate that she did not understand the importance of her duties and obligations, she did not appreciate the seriousness of her misconduct and she did not put her duty of care to the children ahead of her personal interests.

[142] All this was apparent to the Medical Health Officer at the time he made his decision.

[143] The Appellant, however, complicated her situation by not being honest and forthright at the hearing where she continued to maintain that she adequately supervised the children and did not neglect them until she was compelled on cross-examination to acknowledge that she did not have them in her line of sight during the incident on April 17, 2013 and that she had not been completely truthful and had deliberately minimized the seriousness of her conduct.

[144] The Appellant attempted to explain her dishonest and misleading conduct by saying she feared criminal charges and therefore was "defending" herself by

engaging in this misconduct. It can be no “defence” to regulatory or criminal charges to deviate from the truth and take misleading and misrepresentative action. This is not a reasonable justification for misleading parents and Licensing about matters she is obliged by statute and regulation to candidly and proactively disclose.

[145] What is disturbing in this case is the fact that the Appellant went to some lengths to mislead and misrepresent the facts. She provided contradictory accounts depending on whether she spoke to the police or Licensing. Her descriptions changed when she was faced with incontrovertible evidence to the contrary. She provided misleading evidence when she feared the consequences of the truth. She interfered with Licensing’s investigation. She altered her explanations when it suited her purpose and she kept tailoring her evidence during the hearing. For example, she said she told Licensing she was only absent from the van for about a minute because she feared criminal charges. However, the conversation in which she said she discussed criminal charges with the Licensing Officer occurred after she began misrepresenting the length of her absence. At the hearing, she disagreed that she placed a dot on a photograph at the July 19, 2013 interview, saying that she placed a dot on a diagram. However, the diagram did not exist at the time of the interview.

[146] The Appellant’s lack of candour and her ease in changing her evidence give no confidence that she will comply with her regulatory obligations in the future or, if she does not, that she will be honest and candid in a timely way about it.

[147] Moreover, the Appellant’s efforts to minimize the incident belied her ability to appreciate the seriousness of her conduct and the need to comply with the *Act* and Regulation. Despite acknowledging that she bears responsibility for knowing her obligations under the *Act* and Regulation, she did not ensure she complied with them after this serious incident. For instance, she had too many children under 48 months in her care on April 17, 2013, she then gave inaccurate birth date information to Licensing, and then she again had too many children under 48 months in her care. This demonstrated an unacceptable laxity in her compliance with the Regulation and a lack of understanding about the need for compliance. Moreover, it interfered with Licensing’s investigation of the April 17, 2013 incident and its discharge of its ongoing oversight obligations.

[148] In light of the whole of the evidence, the Appellant has failed to establish that the Medical Health Officer’s decision was not justified when he concluded that the Appellant lacked the good character as well as the personality, ability and temperament to manage and care for children, as required by section 19(2)(a) and (b) of the Regulation and that her license should be cancelled.

## **DECISION**

[149] For all of the reasons given above, and on considering all of the issues raised in this appeal, we find that the Appellant has not met the burden of proving that the decision under appeal was not justified under section 29(11) of the *Act*.

[150] More particularly, we affirm the Medical Health Officers findings that:

- (a) The Appellant failed to operate Peek a Boo Daycare in a manner that would promote the health, safety and dignity of the children in care, by exceeding the maximum number of children under 48 months of age she was permitted to have in care as a condition of her license, pursuant to section 7(1)(b)(i) of the *Community Care and Assisted Living Act* (the "Act") and Schedule E of the *Child Care Licensee Regulation* (the "Regulation").
- (b) She failed to ensure on April 17, 2013 that the children in her care were supervised at all times by a person who was an educator, an assistant or a responsible adult, contrary to section 39(1) of the Regulation.
- (c) She failed to ensure that the children under her care or supervision on April 17, 2013 were not subjected to "neglect" as that term is defined in Schedule H of the Regulation, contrary to section 52(2) of the Regulation. As noted, the term "neglect" is defined to mean, in relevant part, "the failure of a care provider to meet the needs of a child, including ... care or supervision".
- (d) She failed to notify the children's parents immediately, and the Medical Health Officer within 24 hours that, on April 17, 2013, the children had been involved in or may have been involved in a "reportable incident", as described in Schedule H of the Regulation, while under her care or supervision, contrary to sections 55(1)(b) and 55(2)(a) of the Regulation.
- (e) She failed to keep daily attendance records for the children in her care, contrary to section 57(2)(c) of the Regulation.
- (f) She was not a person employable in the daycare, as she lacked the good character and the personality, ability and temperament necessary to manage or work with children, pursuant to sections 19(2)(a) and (b) of the Regulation.

[151] Accordingly under section 29(12) of the *Act* the Panel confirms the Respondent's decision, made under section 13(1) of the Act, to cancel the Appellant's licence to operate Peek a Boo Daycare, a family child care facility.

[152] The appeal is dismissed.

"Alison Narod"

Alison H. Narod, Panel Chair  
Community Care and Assisted Living Appeal Board

"Lynn McBride"

Lynn McBride, Member  
Community Care and Assisted Living Appeal Board

"Gordon Armour"

Gordon Armour, Member  
Community Care and Assisted Living Appeal Board

October 24, 2014

**SCHEDULE 1**

**Statutory and Regulatory Provisions**

Section 7(1)(b)(i) of the *Act* states:

Standards to be maintained

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

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

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

Schedule E of the Regulation states:

Column 1 Care program	Column 2 Maximum group size	Column 3 Children per group	Column 4 Ratio of employees to children in each group
Family Child Care, if no child younger than 12 months old is present	7, having no more than 4 children younger than 48 months old and, of those 4, no more than 2 children younger than 24 months old	≤7	The licensee

Section 19(2)(a) and (b) of the Regulation state:

**Character and skill requirements**

**19** (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, ....

Section 39(1) of the Regulation states:

**Continuous supervision required**

**39** (1) A licensee must ensure that children are supervised at all times by a person who is an educator, an assistant or a responsible adult.

Section 52(2) of the Regulation states:

**Harmful actions not permitted**

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

Section 55(1)(b) and 55(2)(a) of the Regulation state:

**Notification of illness or injury**

**55** (1) A licensee must immediately notify a parent or emergency contact if, while under the care or supervision of the licensee, the child

(b) is involved in, or may have been involved in, a reportable incident described in Schedule H

(2) A licensee must notify the medical health officer within 24 hours after

(a) a child is involved in, or may have been involved in, a reportable incident described in Schedule H while under the care or supervision of the licensee,....

Section 57(2)(c) of the Regulation states:

**Records for each child**

**57** (2) A licensee must keep, for each child, a record showing the following information:

(c) daily attendance record, indicating for each day whether the child is absent or, if the child is present, the time of arrival and departure;....

Schedule H of the Regulation states, in relevant part:

**Reportable incidents**

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

**"neglect"**, which means the failure of a care provider to meet the needs of a child, including food, shelter, care or supervision;