Community Care and Assisted Living Appeal Board

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DECISION NO. 2014-CCA-005(c)

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

BETWEEN:	ZH-H, Licensee, (operating Playtime Childcare Center's Kwaleen Daycare and After School Program and Playtime Childcare Center's - Westridge Daycare)	**APPELLANT**
AND:	Dr. Robert Parker, Medical Health Officer, Interior Health	**RESPONDENT**

BEFORE: A Panel of the Community Care and Assisted Living Appeal Board
Alison H. Narod, Vice Chair

DATE: Conducted by way of written submissions concluding on February 19, 2016

APPEARING: For the Appellant: Self-represented
For the Respondent: Erika Lambert, Counsel

PRELIMINARY DECISION: APPLICATIONS FOR STAY OF PROCEEDINGS AND SUMMARY DISMISSAL

[1] I have before me two applications:

1) An application by the Appellant to stay these appeal proceedings; and

2) An application by the Respondent to summarily dismiss the appeal.

[2] Both applications were made after I held a pre-hearing conference on December 22, 2015 and, among other things, gave a number of pre-hearing directions relating to procedural and other issues pertinent to the management, scheduling and hearing of this appeal.

[3] The Decision under appeal is the Respondent's November 24, 2014 decision of a Medical Health Officer ("MHO") to cancel the licences of two child care facilities ("Facilities") operated by the Appellant, for three reasons:

1. ongoing non-compliance with the *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75 (the "*Act*") and the *Child Care Licensing Regulation*, BC Reg 332/2007 (the "Regulation");

2. repeated assessments of high risk dating back to December 2012;

3. failure of the Appellant to comply with the October 28, 2014, approved health and safety plan, subsequent to approval by Crown Counsel of criminal charges against the Appellant as follows:

    a. Count 1 – abduction of a person under 14, contrary to section 281 of the Criminal Code

    b. Count 2 – failure to perform a legal duty to provide necessaries of life to that person, contrary to section 215(2)(b) of the Criminal Code.

[4] Although the Appellant has been charged with the above-noted criminal offences, she has not been convicted of them. Indeed, at the time of her application, the trial of the criminal charges had not yet been scheduled. Nor has the hearing of the Appellant's appeal.

[5] There have already been a number of pre-hearing disputes in this matter. On December 22, 2014, the Chair of the Board declined to grant the Appellant's application for a stay of the MHO's decision to cancel her licences, because she was not satisfied that staying or suspending the cancellation decision would not risk the health or safety of a person in care. The Chair described the facts before her as follows:

> [9] The Appellant holds two licenses to operate the Facilities: (a) one for Playtime Childcare Center's Kwaleen Daycare and After School Program which provides Group child care-school age (capacity 30) and Multi-age child care (capacity 32) and, (b) another for Playtime Childcare Center's Westridge Daycare provides Multi-Age child care (capacity 8).
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> [10] The Facilities were first licensed in September 2012.
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> [11] Mr. B is the Business Manager and Licensee Contact for the Facilities. In the materials submitted to the Board for this application, all of the written communications on behalf of the Licensee to Interior Health regarding the Facilities are under his name. In the materials, Mr. B also describes himself as "part owner" of the business.
>
> [12] The Appellant has been charged with but not convicted of the following criminal offences:
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> - abduction of person under 14, contrary to section 281 of the Criminal Code of Canada; and

- failure to perform the legal duty of providing the necessaries of life contrary to section 215(2)(b) of the Criminal Code of Canada

[13] After the criminal charges were laid, the Licensing Authority required the Appellant to submit a health and safety plan in order to ensure the safety of the children during the period of investigation. Before finalizing the health and safety plan, there was an exchange of several emails on October 27 and 28 between Mr. B and the Licensing Officer specifically about the requirement that the Appellant have no contact with the children in care and whether she would be allowed to pick up and drop off the children. Mr. B had proposed that the Appellant be allowed to pick up and drop off the children with a responsible adult in attendance but the Licensing Officer did not accept the proposal as performing the pick-up and drop off duties would mean that the Appellant would remain in contact with the children in care.

[14] After the exchange of emails, Mr. B responded to the Licensing Officer that "[the Appellant] will be kept out of contact with children. I will be assessing the costs incurred by your action, in violation of due process clauses of the Charter, and again give constructive notice of intent to sue. Playtime will be in compliance with your demand, at a cost of [Interior Health]."

[15] On or about November 17, 2014, the Appellant drove two children home with another employee.

[16] On November 24, 2014, Licensing cancelled the Appellant's licenses to operate the Facilities and ordered her to cease operation as of December 24, 2014 based on:

- The Licensee's ongoing non-compliance with the *Community Care and Assisted Living Appeal Act* and Child Care Regulations
- The repeated "high risk" assessments assigned to the Facilities dating back to December 2012; and
- The Licensee's failure to comply with the October 28, 2014, Health and Safety Plan.

[6] Additionally, the Chair noted that in prior court proceedings, the Appellant had been declared a "vexatious litigator" by the Supreme Court of British Columbia. The Chair expressed concern for the potential that the Appellant's and Mr. B's litigious propensities could protract and multiply the disputes so as to inadvertently embroil the children and the parents in the middle of the conflict. She wrote, at paragraph 30:

[30] Both the Appellant and Mr. B have been declared vexatious litigants by the Supreme Court of British Columbia in an action unrelated to the proceeding before me. Such a declaration is extremely rare and made only in highly exceptional cases where a litigant has virtually formed a habit of commencing litigation. ... Based on the record that the

> Appellant and Mr. B have established in the justice system, I believe that this dispute over the operation of the Facilities could well be only the beginning of multiple protracted and bitter disputes among multiple parties and I fear that the children and their families could inadvertently be dragged into or somehow caught in the middle of the conflict.

[7] On May 13, 2015, after a lengthy exchange of submissions by the parties about the contents of the Appeal Record, I issued a number of pre-hearing directions relating to production of documents and the composition of the Appeal Record as well as a schedule for exchanging Statements of Points.

[8] On December 22, 2015, I held a pre-hearing conference with the parties to address the scheduling and management of the hearing of the appeal. The matters canvassed at that conference included the issues in dispute, the number of witnesses to be called and the number of days needed for hearing.

[9] During the pre-hearing conference, the parties agreed that the issue of the Appellant's guilt or innocence in the criminal charges is not properly before this Board and that is a matter to be determined by the courts. They agreed that the remaining issue was the relevance of the fact that the Appellant was charged and the steps taken by the Respondent that were triggered by the charges. Despite this agreement, the Appellant made it clear that she wishes to address the criminal charges at the appeal hearing. She maintains that she is not guilty of them, that the criminal proceedings amount to false and malicious prosecution, that the basis of the MHO's findings are bogus, and that the Respondent and its representatives are biased and corrupt and that they engaged in, among other things, fraud, misrepresentation, fabrication of evidence, spoliation, lying, perjury, discrimination, harassment and conspiracy to harm the Appellant.

[10] The Appellant provided a list of 52 witnesses she proposes to call to give testimony in person, including her employees, parents, children, RCMP Officers, employees of the Ministry of Children and Family Development ("MCFD") and the Minister for MCFD. She wishes to summons each of her proposed witnesses. She estimates the hearing will take 40 days.

[11] One of the children the Appellant listed as a witness was SB, a 13 year old who is the alleged victim in the criminal charges. The Appellant stated that she was trying to protect SB from having been abused by MCFD in collusion with the RCMP, SB's foster parents and the Licensing Officer (by way of neglect). The Appellant says that SB is her key witness who will speak to this. The Appellant will also seek to enter a two-hour video of this child's interview taken by the RCMP constable, along with her statements in the criminal proceeding.

[12] The Respondent did not object to employees being witnesses. However, the Respondent objected to the relevance and utility of calling all of the witnesses listed by the Appellant, especially the many parents and children the Appellant wishes to call to testify in person about their opinion of the Facilities and/or MCFD. It contended that evidence of the impact on families of the closure of the Facilities is not relevant and evidence of their opinion of the service is usually tendered by way of letters and affidavits.

[13] The Respondent objected to any children being accepted as witnesses, saying that would be intimidating, inappropriate and irrelevant to the issues. In particular, the Respondent objected to the Appellant's proposal to call SB, the alleged victim in the criminal charges. The Respondent expressed concern for SB's privacy and advised that there is a protective order prohibiting contact between the Appellant and SB. The Respondent submitted that the Appellant can explain her reasons for what she did without the necessity of calling witnesses to speak to the criminal charges and the child's situation, as the fact of her guilt or innocence of the criminal charges does not impact the justification for the cancellation decision.

[14] Although the Appellant disagreed with the Respondent's objections, she indicated a willingness to reduce the number of witnesses by half to help reduce the number of witnesses and possible repetition, saying the potential witnesses would be able to provide evidence of their own unique experiences.

[15] I indicated that I was not inclined to hear testimony from any children 8 years and younger, as their views would not be relevant to the key issue of whether the decision was justified. Additionally, it was questionable whether their parents would authorize their participation.

[16] In view of the history of the appeal proceedings thus far and in light of the pre-hearing conference, it was abundantly clear that this appeal amounts to an exceptional case that will require close case management to expedite a just and fair hearing whose length and cost is proportionate to the issues within the Board's jurisdiction.

[17] I note that the Board's Rules for Appeals under the *Act* permit a party to summons the witnesses it seeks to call to give testimony in an appeal (Rule 17). This Rule, however, is not immutable. According to section 11 of the *Administrative Tribunals Act (*the *"ATA")*, the Board has the power to control its own processes and may make rules, including rules respecting the filing and service of a summons to a witness, to facilitate the just and timely resolution of the matters before it. However, where the Board makes such a rule, as it has done, it may waive or modify the rule in exceptional circumstances (section 11(3) *ATA*).

[18] Given the extensive number of witnesses the Appellant wishes to call (52), the scope of the issues she wishes them to address and the very real prospect that some of the evidence of the witnesses may be repetitive, irrelevant or immaterial to the appeal or related to issues that fall outside the scope of the Board's jurisdiction (this is discussed further below), I deemed it prudent to supervise the list of witnesses and summonses and, where reasonable and necessary, to make determinations in advance about whether any of the proposed witnesses need not be called (by summons or otherwise) to give oral evidence, and thus obviate the need for a lengthy and costly hearing that would be disproportionate to the circumstances. Accordingly, I provided each party with an opportunity to provide a summary of the evidence their witnesses are expected to provide and have an opportunity to exchange submissions before any I made any determinations limiting oral evidence. In this regard, I gave a number of directions at the pre-hearing conference, the relevant ones can be summarized as follows:

(a) the Appellant is to provide brief written "will-say" statements for each proposed witness stating who they are and what they are going to say. The Appellant was informed that witnesses to be called must be able to provide evidence that is relevant to the question of whether the decision under appeal was justified.

(b) the Appellant must indicate that she has spoken to each of the individuals she is seeking to call as a witness between now and when the statements are submitted to confirm that is what they will be saying at the hearing in this proceeding.

(c) The Respondent is to provide "will-say" statements for each of its witnesses.

(d) Each party will be able to make submissions about the relevance of the other party's witnesses' evidence once the will-say statements are received.

(e) The Appellant is to make submissions regarding her request for summonses, including for SB. These submissions should explain why a summons is required, which is to include a brief statement of why the witnesses' testimony is relevant and necessary to this proceeding.

[19] Time limits were specified for complying with these directions. There is no dispute that the Appellant did not comply with these directions within the stipulated time limits.

[20] After the time limits expired, the parties made the applications presently at issue. I address each application below.

1) APPELLANT'S APPLICATION FOR STAY

[21] The Appellant seeks a stay of the appeal proceedings pending the outcome of criminal proceedings against her in Provincial Court, based on her contention that there is a presumption that when there are issues before the Provincial Court, the Board is prevented from hearing the same subject matter. She says that on January 29, 2016, she raised jurisdictional issues relating to the criminal proceedings that she believes may well result in a stay of the criminal proceedings or a dismissal of the criminal charges. She says that the Provincial Court, and soon the BC Supreme Court, will determine the issue of whether it has jurisdiction over the criminal charges, as well as other issues relating to unlawful conduct of the MCFD, one or more of its employees, its witnesses, Crown counsel and the RCMP. The outcome of all of this will impact the MHO's cancellation decision and therefore the appeal proceedings. As a result, she says, it is impossible to surmise what can and cannot be heard by the Board. Further, she says "will-say" statements cannot be done, since it is not known which witnesses will be required after charges have been stayed or dismissed.

[22] She says that there will be no prejudice if the stay is granted because evidence in the criminal proceeding regarding the conduct of the Licensing Officer may have an impact on the basis of the MHO's decision to cancel her license and, therefore, the appeal proceeding.

[23] The Respondent says the developments and outcome of the criminal charges are irrelevant to the Appeal, that the Board has exclusive jurisdiction to determine the Appeal, and the Respondent and the public will be prejudiced by a stay of the Appeal. It says there is absolutely no reason to stay the Appeal. Moreover, the Respondent says that the Board should summarily dismiss the Appeal for the reasons outlined below, which include that the Appellant has not complied with the orders the Panel made at the pre-hearing conference. Alternatively, the Board should order the Appellant to comply with its January 14, 2015 orders, forthwith.

[24] More specifically, the Respondent says that the criminal matter has not been scheduled for trial, the Appellant no longer has a lawyer in that matter and she has not raised any jurisdictional issues in those proceedings. Moreover, the Respondent says the Board's exclusive jurisdiction in this Appeal is not affected by issues raised in the criminal matter. Further, the Respondent says that it and the public will be prejudiced by a stay, because they have an interest in the efficient and speedy determination of the Appeal, which has already been delayed for over a year, mostly due to the Appellant's multiple pre-hearing applications about the contents of the Appeal Record.

[25] The Respondent also says that there is no statutory or procedural rule governing the Appellant's request for a stay of the appeal pending the outcome of the criminal proceedings. It submits that the Appellant is effectively seeking an adjournment and suggests that in dealing with this application, the Board should consider the factors set out in Rule 16(4), which govern an application for an adjournment of a scheduled hearing. It says that all of those factors militate against granting the application.

[26] I have considered the parties' submissions. I preface my comments by noting that the Board is a creature of statute. It can only exercise the powers conferred on it by statute. It cannot exercise powers expressly denied it by statute. The Board has been created by the *Act*, which confers an array of powers on it, including the power to make certain decisions and orders. Its powers are both supplemented and limited by the *ATA*. The Board must look to both of those enactments to determine whether it has the power to grant the relief sought by the parties.

[27] The first question is whether the Board has the power to stay its proceedings in the manner requested by the Appellant. While a court of superior jurisdiction has the inherent or equitable power to grant a stay, a statutory tribunal has no such jurisdiction unless conferred on it by statute. A general power to stay an appeal proceeding has not been expressly conferred on the Board by the enactments that govern it. However, the *Act* confers a limited power under section 26(6) to grant a stay or stay the operation of a decision of a Medical Health Officer ("MHO"), provided it is satisfied that a stay or suspension would not risk the health and safety of a person in care.

[28] Notably, a stay of an MHO's decision pending the outcome of an appeal is somewhat different than a stay of the appeal proceedings themselves. A tribunal typically has the power to control its own processes, but the power to stay the decision of another statutory decision-maker, such as the MHO's decision in this case, may be seen as falling outside the scope of controlling the process of an appeal. Therefore, I turn to whether the Board has been granted the power to control its own proceedings and if so, whether that assists the instant case.

[29] The *ATA* expressly confers on the Board the power to control its own processes and in that regard permits a tribunal to make rules of practice and procedure "to facilitate the just and timely resolution of the matters before it" (section 11 (1)).

[30] As mentioned, the Board has issued Rules. Those Rules do not contain a general power to grant a stay or an adjournment. However, as the Respondent points out, Rule 16 confers a limited power to adjourn hearings that have already been scheduled, but not hearings that have not yet been scheduled. I agree with the Respondent that the relief the Appellant seeks, a delay in the appeal pending the outcome of the criminal proceedings, would be satisfied by an adjournment of an unscheduled appeal, but not by Rule 16.

[31] Therefore, I turn again to the *ATA* for assistance. Notably, the *ATA* confers on the Board a general power to adjourn "applications", which are defined to include appeals, and sets out the factors to be considered in an application for such an adjournment. Section 39 of the *ATA* states:

> **Adjournments**
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> 39 (1) An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.
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> (2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:
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> (a) the reason for the adjournment;
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> (b) whether the adjournment would cause unreasonable delay;
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> (c) the impact of refusing the adjournment on the parties;
>
> (d) the impact of granting the adjournment on the parties;
>
> (e) the impact of the adjournment on the public interest.

[32] In my view, this statutory provision gives the Panel the power to grant the relief sought by the Appellant, on its own motion or where the Panel is satisfied, on

consideration of the relevant factors, that relief is required in order to permit "an adequate hearing" to be held. The relevant factors are addressed below.

(a) the reason for the adjournment

[33] I turn first to the Appellant's reasons for her application. The theory that appears to underlie her application is that there is a presumption that the Board has no jurisdiction to determine the appeal, once the "subject matter" of the appeal is brought before a Provincial Court. She contends that the result of the criminal proceedings will determine the outcome of the appeal as well as some of the issues to be decided in the appeal.

[34] The Appellant has not supplied any jurisprudence governing this Panel that substantiates the existence of presumption of a stay such as is described by the Appellant. There is authority for the proposition that a tribunal has the discretion to adjourn a hearing pending the conclusion of criminal proceedings, but it is not obliged to do so (assuming it has been granted the power to do so): Francis (c.o.b. Sister Icee's Hemp B.C.) v. Vancouver (City), [1999] B.C.J. No. 1303, at paragraph 56.

[35] It should be noted that the Appellant does not claim that the appeal proceedings will make determinations that will bind the Provincial Court or prejudice her in that forum. Rather, she claims that the Provincial Court will decide jurisdictional or other issues that will have an impact on the basis of the MHO's decision and therefore on the appeal proceedings. Accordingly, she says the criminal charges should be decided first. She refers in particular to her belief that she will be exonerated by the Provincial Court of the criminal charges. She adverts to her view that the events at issue occurred outside the territorial jurisdiction of British Columbia. It appears that the Appellant is of the view that if the Provincial Court decides it lacks jurisdiction, the Board will somehow be bound by that decision.

subject matter

[36] The starting point of this inquiry is to determine whether the subject matter of the criminal proceeding is indeed the same as the subject matter of the Appeal. In my view, it is not.

[37] The question of what is the subject matter of a dispute has been addressed in a number of contexts, often in the context of determining who, as between a court and a tribunal, has jurisdiction over the subject-matter of a dispute. For example, in Peacock v. Norfolk (County), (2006) 81 O.R. (3d) 530, Rouleau J.A., speaking for a majority of the Ontario Court of Appeal, wrote, at paragraph 86

> **86** "**Subject matter**" has been variously defined in legal dictionaries. For instance, Black's Law Dictionary refers to it as "the issue presented for consideration."[11] Burton's Legal Thesaurus equates the term with the "tenor" of what is under consideration.[12] Weiler J.A. of this court has described the "matter" of a law, for purposes of constitutional analysis, as "its dominant or most important characteristic": *Adler v. Ontario* (1994), 19 O.R. (3d) 1 at 41 (C.A.),

> per Weiler J.A., dissenting. Other authorities have defined the "matter" of a law as its leading feature, its true meaning or character, its pith and substance: [citations omitted]

[38] Identification of the subject matter is tied to the relevant, material facts. In *Muirhead v. York (Regional) Police Services Board*, 2014 ONSC 6817, the Court concluded that the subject matter of the dispute is to be determined by considering the factual context of the dispute, not how the legal issues may be framed, and by identifying the essential character of the dispute. The Court relied on the following excerpt from the judgment of the Supreme Court of Canada in *Regina Police Association v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, where the issue was whether a court or a labour arbitrator had jurisdiction over a dispute, and where Mr. Justice Bastarache wrote:

> 25. To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. **In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties and not on the basis of how the legal issues may be framed**: (citations omitted). Simply, the decision-maker must determine whether having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. (emphasis added)

(See also *TWU v. TELUS Communications Inc.*, 2010 BCSC 748)

[39] In the instant case, the essential character of the matter before the Board, viewed in its factual context, is not the same as the essential character of the matter before the Provincial Court.

[40] The Board cannot decide the ultimate decision to be made by the Provincial Court and vice versa. Nor are the substantive issues to be determined in each case the same. The purposes of the criminal proceedings are public, social and penal in nature (*B.C. (Pharmacare Program) v. Shaw*, [1992] B.C.J. No. 2208 (BCCA)). The subject matter of the criminal proceedings is to determine whether the Appellant is guilty of the criminal charges in connection with the alleged abduction of SB and the alleged withholding of necessaries from SB based on facts alleged by the Crown. The purposes of the proceedings under the *Act* are public and regulatory, not penal. The subject matter of the appeal proceedings is to determine whether the MHO's decision to cancel the Appellant's licences was justified based on the three grounds relied on by the MHO. In particular, the Board cannot decide whether the Appellant is guilty or innocent of the criminal charges.

[41] Although there may be some overlap in the facts involved in the decision under appeal and the facts alleged in the criminal charges, the facts material to each proceeding are not identical. The criminal charges relate to allegations of

abduction of a child, SB, and a failure to provide her with necessities of life and they concern events that occurred over a relatively short time frame: on or about May 5, 2014. They do not include the Appellant's conduct as the Licensee of the Facilities. In contrast, the appeal relates to whether or not the MHO was justified in his decision to suspend the Appellant's licence, based on events that spanned a number of years. They do not include all the facts necessary to prove or disprove the criminal charges.

[42] The two proceedings have different legal consequences. The outcome of the appeal proceedings will be that the Board will confirm, vary or reverse the MHO's decision to cancel the Appellant's licence to operate her two day care Facilities. The outcome of the criminal proceedings will be to either acquit the Appellant or to convict her and impose a punishment, which could include imprisonment.

[43] Notably, the triers of fact (the person who makes findings of fact) and the standard of proof in each proceeding are significantly different. In a criminal proceeding, the trier of fact is a Judge of the Provincial Court or a Justice of the Supreme Court and the Crown must prove its case to a standard of "beyond reasonable doubt". This is a high standard. In the appeal proceeding, the trier of fact is a panel of an administrative tribunal and the Appellant must prove that the decision of the MHO was "not justified" to a standard of "balance of probabilities". This is a much lower standard and a different onus of proof.

[44] The Appellant believes she will succeed in the criminal proceedings and, if so, there will be an impact on the appeal proceedings. Although a conviction may well be binding on the Panel, and impact her appeal, she is expecting an acquittal. However, an acquittal will not have an impact on the instant appeal proceedings. That is, if the Appellant is acquitted of having engaged in the acts alleged in the criminal proceedings on the higher and more strict standard of "beyond reasonable doubt", it does not mean that she cannot be proven to have engaged in the same acts in a forum that decides issues on the much lower and more easily proved standard of "balance of probabilities". In short, if the Appellant believes that her acquittal, alone, of the acts that are the foundation of the criminal charges will be conclusive to the Board that she did not engage in the same acts in the context of the appeal proceedings, she may well find she is mistaken.

[45] In any event, the Respondent reminds the Board that the parties agreed during the pre-hearing conference that the outcome of the criminal charges is not relevant to the Appeal. The Respondent says that it was the fact that charges of a serious nature had been laid, not the truth of the underlying charges, that triggered his decision to require that the Appellant implement a health and safety plan. Further, it was the Appellant's non-compliance with that plan that formed one of the three bases of the MHO's decision, not whether she was guilty of the criminal charges. In this regard, the Respondent must be taken as saying that it does not matter to its case whether the Appellant is ultimately found guilty or innocent of the criminal charges; even if the Appellant is innocent of the criminal charges, her failure to comply with the health and safety plan supports the MHO's decision.

jurisdiction

[46] With respect to the Appellant's argument about jurisdiction, I am not persuaded by the Appellant's submissions in the instant proceedings that she has raised a strong or serious issue that the Provincial Court's jurisdiction in the criminal proceedings will impact the appeal proceedings. It does not automatically follow that the Provincial Court's finding about whether it has jurisdiction under one statute deprives another tribunal of jurisdiction under another, where the subject matter in dispute before both of them took place on aboriginal land. I note that recent jurisprudence of the Supreme Court of Canada, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 indicates that the applicability of general provincial legislation to aboriginal rights, including aboriginal land, must be determined on the particular facts and circumstances of a case, including an analysis of the right at stake and whether it is infringed by the specific enactment.

[47] Notably, in that case, the Court observed that general regulatory legislation, will often pass the accepted tests for applicability, established in *R. v. Sparrow*, [1990] 3 S.C.R. 1075. It stated, at paragraph 123:

> 123. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardships, and not deny the holder of the right their preferred means of exercising it. In such cases, no infringement will result.

[48] The *Act* is general regulatory legislation and as such it may well fall within the scope of the Court's observation. The Court went on to comment at paragraph 151:

> 151. For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982.*

[49] The Appellant does not argue that the *Act* is unreasonable. Nor does the Appellant claim to be entitled to personally exercise an aboriginal right in the instant proceedings. On the basis of *Tsilhqot'in Nation*, *supra,* I am unable to conclude that the Appellant's argument that the Provincial Court's determinations about its jurisdiction will impact the appeal proceedings is sufficiently serious and strong as to justify an adjournment pending the outcome of the criminal proceedings.

[50] In any event, as previously mentioned, this Board has only those powers that are conferred on it by statute. The *Act* confers the exclusive jurisdiction on the Board to decide the question of whether the MHO's decision was justified. It requires the Board to conduct a fresh hearing, although the onus is on the Appellant, not the Respondent, to prove her case.

[51] Perhaps more importantly, the *ATA* prohibits the Board from deciding constitutional questions (s. 44 *ATA*). I infer from these provisions that the Legislature of British Columbia has decided that the Board is not to concern itself with the issue of the Board's constitutional jurisdiction. Rather, the Legislature has concluded that this issue is left to be decided by the superior courts that supervise the Board, and in particular, by the Supreme Court of British Columbia. Whatever the reason for this, the Legislature clearly contemplated that the Board has the obligation to make the decision now before it, and that it should proceed to do so, fairly and expeditiously.

[52] In the circumstances, it may be available to the Appellant to apply to the Supreme Court to prohibit the appeal from proceeding on the basis that the Board lacks jurisdiction or to seek judicial review seeking to set aside the Board's decision on the same basis. However, no such application to the Supreme Court has been brought to the attention of this Board.

[53] Additionally, the outcome of the criminal proceedings will not determine all of the bases on which the MHO made his decision. As mentioned, the MHO relied on three conclusions in making his decision, which I repeat for convenience:

1. ongoing non-compliance with the *Act* and the Regulation;

2. repeated assessment of high risk dating back to December 2012;

3. failure of the licensee to comply with the October 28, 2014, approved health and safety plan, subsequent to charge approval by Crown Counsel.

[54] Therefore, even if the Appellant's case succeeds on her position that the health and safely plan was not required because she did not commit a crime, she will still have to show that her failure to comply with the plan does not justify cancellation of her license. Moreover, she will still have to prove that the MHO's decision was not justified on the two other bases relied on by the Respondent. In other words, there will still have to be a hearing of the appeal, even if the Appellant succeeds in the criminal proceeding.

[55] In the circumstances, I find that the Appellant's reasons for postponing the appeal are not compelling.

(b) whether the adjournment would cause unreasonable delay

[56] As mentioned, neither the appeal proceedings nor the criminal proceedings have been scheduled for hearing to the Board's knowledge. The Appellant says that the Provincial court will deal with the issues she raises and they will then be dealt with by the Supreme Court of B.C. This indicates that the Appellant seeks to have

a postponement until after the criminal charges are dealt with and appeals exhausted. It may be many months and possibly years before the criminal trial and appeals are exhausted.

[57] It is well recognized that a lengthy delay of a hearing will cause prejudice to the parties and is not in the public interest because witnesses' memories fade over time and they may be less available to attend a hearing. Moreover, as their memories fade, their evidence can become less clear and reliable, making it increasingly difficult for the trier of fact to make determinations of fact as time passes by. Therefore, lengthy delay can adversely affect the decision-maker's ability to make findings of fact and can result in unfairness.

[58] There has already been significant delay in scheduling the hearing of this appeal, in large part due to the Appellant's various and extensive pre-hearing applications and submissions. I find that the additional and indeterminate delay entailed in awaiting the outcome of the criminal proceedings and potential appeals would be unreasonable in the circumstances.

(c) the impact of refusing the adjournment on the parties

[59] The impact of refusing the adjournment is that the appeal will proceed and may be decided before the criminal proceedings are decided. As mentioned, the Appellant argues that the criminal proceedings should proceed first and that their outcome may impact the appeal proceedings or otherwise resolve some of the issues in the appeal. Additionally, she says she will not know who to call as witnesses until the outcome of the criminal proceedings are known. The Appellant does not say that she will be prejudiced in the criminal proceedings if the appeal proceedings are decided first.

[60] The Respondent disagrees with the Appellant's position. It says there has already been unnecessary delay and presses for the appeal to proceed.

[61] As discussed above, I am of the view that the Appellant's argument that the criminal proceeding will decide jurisdictional and other issues that will impact the appeal proceeding is weak. The information before me about the nature of the jurisdictional issue the Appellant has raised before the Provincial Court is unlikely to determine the applicability of the Act in the appeal proceedings. The Provincial Court's findings on the other issues that the Appellant claims will favourably impact the appeal proceedings may well not be binding on the Board. This is especially so in light of the parties' agreement that the outcome of the criminal proceedings is irrelevant to the appeal proceedings.

(d) the impact of granting the adjournment on the parties

[62] The impact of granting the adjournment on the parties will be to delay the appeal proceedings indefinitely. The Appellant believes this outcome will benefit her because she is confident she will be exonerated in the criminal proceedings and this outcome will favourably assist her in the appeal proceedings. Additionally, she believes that other issues, such as her complaints of wrongdoing by various parties,

will be dealt with in the Provincial Court to the benefit of her position in the appeal proceedings.

[63] It seems that the Appellant believes that if she succeeds on all of her issues in the criminal proceedings, she can rely on those criminal findings in the appeal proceedings. For example, she might exonerate herself of the allegations that triggered the Respondent to impose the health and safely plan with which she did not comply. Additionally, she might rely on them to assert that the Respondent engaged in wrongdoing against her. However, as explained above, neither the facts found in her favour in the criminal proceedings nor an acquittal of the criminal charges will likely be binding in the appeal proceeding, nor determinative of the issues on appeal before this Board.

[64] The Respondent says that the impact of granting the adjournment flows from the additional and indefinite delay it will cause to the proceedings, which may be years. There is prejudice in the form of fading memories of witnesses, availability of witnesses and unfairness.

[65] As mentioned, delay is a well recognized and serious prejudice, for the very reasons cited by the Respondents. The Appellant's argument that she will be prejudiced if the adjournment is not granted is weak and mitigated by the Respondent's agreement that the outcome of the criminal proceedings is irrelevant to the appeal proceedings. The proposed delay is indeterminate. Had the delay been short, the result may have been different.

(e) the impact of the adjournment on the public interest

[66] The public has a legitimate interest in the fair and timely adjudication of appeals under the Act. Indeed, the Act incorporates this objective in its terms. This is also reflected in the Board's Rules (Rule 12) and the *ATA* (s. 11) which reinforce that the Board will manage the appeal process to ensure and facilitate "the just and timely resolution" of appeals. The impact of the adjournment on the public interest also flows from the delay. The longer the delay, the more likely that witnesses memories will fade, they will become less available to give testimony, and it will be more difficult for the trier of fact to fairly adjudicate the facts. This compromises the Respondent's and the public's legitimate interest in natural justice and procedural fairness. Therefore, the longer the delay, the more prejudice results to the public interest.

[67] On the other hand, the public also has a legitimate interest in ensuring that the parties are not prejudiced by an unseemly "rush to judgment" that may bring the administration of justice into disrepute. However, that is not the instant case. There has already been a lengthy delay. The proposed additional delay is lengthy and indeterminate. The Appellant's concerns are mitigated by the parties' agreement that the outcome of the criminal proceedings is irrelevant to the appeal.

[68] Additionally, the Appellant has been declared to be a vexatious litigator. Her repeated and lengthy pre-trial applications demonstrate a disposition towards litigiousness that tends to delay and complicate the management of the appeal process. Should she succeed in causing undue and disproportionate delay and

expense, the result could bring the administration of the appeal process under the *Act* into disrepute.

Balance of factors

[69] On considering all of the parties' submissions, on balancing all of the factors, and for the reasons set out above, I conclude that the proposed delay of the appeal hearing until after the criminal proceedings are concluded is not required to permit an adequate hearing of the matters before the Board to be held. Rather, an adequate hearing of those matters can proceed at the present time, without further delay. Therefore, I exercise my discretion to deny the Appellant's application to delay the scheduling of the appeal hearing.

2) RESPONDENT'S APPLICATION FOR SUMMARY DISMISSAL OF THE APPEAL

[70] The Respondent seeks an order summarily dismissing the Appeal on the basis that:

(a) The Appellant has failed to diligently pursue the Appeal and has failed to comply with several orders of the Board; and

(b) There is no reasonable prospect the Appeal will succeed.

[71] In this regard, the Respondent relies on Rules 15(1)(e) and (f) of the Rules for Appeals under the *Act* which reflect the powers granted to the Board under s. 31(1)(e) and (f) of the *ATA*.

[72] The Respondent says that the Appellant failed to comply with any of the Board's Orders of January 14, and in particular, its orders that the Appellant:

(a) Make an application, with reasons in support, that the Board issue a summons to SB, the child who was allegedly the victim of the criminal charges, by January 21, 2016;

(b) Provide the Board with "will-say" statements for each witness she intends to call at the appeal hearing, by January 26, 2016; and

(c) Indicate that between January 14 and 26, 2016, she has spoken to each witness she intends to call.

[73] Moreover, the Respondent says, the Appellant has not acknowledged this non-compliance, she has not provided any reasonable explanation for it and she has not indicated her willingness to comply with Board Orders in future. Accordingly, her actions indicate that she has no intention of diligently pursuing the Appeal or complying with the Board's Orders in relation to the Appeal. The Respondent submits that the Board may summarily dismiss the Appeal on this ground alone.

[74] The Respondent also says there is no reasonable prospect the Appeal will succeed, and in particular that the Appellant will be able to prove:

(a) she did not have an ongoing pattern of non-compliance with the *Act* and Regulation, and

(b) she is of good character and has the personality, ability and temperament necessary to (1) operate a child care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for, and (2) manage and work with children.

[75] In this regard, the Respondent says there is ample evidence in the Amended Appeal Record to the contrary. It reveals over 80 contraventions of the *Act* or Regulation, three progressive compliance letters and three risk assessments resulting in "high" risk ratings. The Respondent submits the Appellant continued to violate the *Act* and Regulation despite repeated warnings of the seriousness of her conduct.

[76] The Respondent also says that the Appellant expressly and directly contravened the health and safety plan implemented to ensure the health and safety of children in care in the Appellant's Facilities was not compromised during the investigation of the Appellant's conduct that was the subject matter of the criminal charges. Further, the Respondent contends that the Appellant's attitude toward her violations at issue in the appeal, on the one hand, and the criminal charges on the other, demonstrate that she does not have the necessary personality (judgment and maturity), ability and temperament to operate a child care facility in the manner stipulated by statute or to manage and work with children. It says she fails to appreciate the significance of the violations and their impact on children in her care and she completely denies the existence of her violations.

[77] In this regard, the Respondent says that the Appellant maintains that persons involved in the subject matter of this Appeal have engaged in an elaborate and malicious conspiracy to fabricate evidence against her in order to shut down her business and imprison her on false criminal charges. The Appellant also maintains that the laws of BC do not apply to her in these circumstances, saying that a Protective Intervention Order issued by Church J. prohibiting her from contacting or attempting to contact or interfere with SB had been overturned by a November 11, 2015 judgment that the Appellant herself authored and issued under the auspices of a court invented by the Appellant and Mr. B. The Respondent says that judgment confirms the Appellant's view that she is not subject to the laws of British Columbia and therefore the Board can have no confidence that the Appellant will comply with the Act, the Regulation, or the Board's orders in future. The Respondent submits that summary dismissal of the Appeal can also be justified by this ground alone.

[78] Additionally, the Respondent says the jurisdictional issue is irrelevant to the Appeal. It contests the Appellant's claim of authority as Chief Justice of the Universal Supreme Court of the Tsilqot'in, saying the Tsilquot'in National Government has disavowed any affiliation with that court. It says the Appellant's

Facilities are not located within the area of Aboriginal title recognized by the Supreme Court of Canada. Moreover, British Columbian laws of general application are not as limited in application as the Applicant contends.

[79] The Appellant disagrees that the Appeal has no reasonable prospect of success after the criminal charges are dismissed. She says certain issues will be fully explored in the criminal proceeding. She alleges that the Respondent's submissions about what has transpired in the Provincial Court contain errors and lies. She says that jurisdictional and other issues are now before the Provincial Court and will soon be before the BC Supreme Court. In this regard, she relies on an affidavit filed in the criminal proceedings, but not produced to the Board.

[80] Additionally, the Appellant defends her appointment as Chief Justice of the Tsilhqot'in Nation's Universal Supreme Court and takes the view that the authority of the Respondent is now void in the Tsilhqot'in Nation's territory. This is because the Board and Interior Health have no jurisdiction or authority where the Tsilhqot'in, which is a sovereign nation, sets up daycare facilities in their nation and territory, whether or not under the Appellant's control.

[81] Under section 15 of the Rules (and s. 31 of the *ATA*), the Board has the jurisdiction to summarily dismiss an appeal, for various reasons, including where the applicant has failed to diligently pursue the application or to comply with an order of the tribunal or where there is no reasonable prospect that the appeal will succeed. As mentioned above, in order to succeed in this appeal, the Appellant bears the onus of demonstrating that the decision of the MHO was not justified. The relevant portions of section 15(1) of the Rules state:

> **15** (1) To apply to the Board for an order summarily dismissing an appeal, the respondent must deliver a written request to the Board that demonstrates any one of the following apply:
>
> **....**
>
> (e) the appellant has failed to diligently pursue the application or failed to comply with an order of the tribunal,
>
> (f) there is no reasonable prospect the appeal will succeed,....

[82] Therefore, in this application for summary dismissal, the Panel must decide:

(a) whether the Appellant failed to diligently pursue the appeal or failed to comply with an order of the Panel; and

(b) assuming all of the facts and arguments of the Appellant are correct, whether those facts and arguments would support a finding by the Panel that the MHO's decision was unjustified.

(a) failure to diligently pursue the application or to comply with an order

[83] On the basis of the material before me, I am unable to conclude at this time that the Appellant has failed to diligently pursue the appeal or to comply with an order of the Panel.

[84] An application to summarily dismiss an appeal before a hearing seeks a draconian result. It should only be granted in clear and compelling circumstances. The Board is a quasi-judicial forum that is made available outside the court system to allow for fair and expeditious hearings that are expected to be less costly and more accessible to the public than the court system. Often, the persons that come before the Board are unrepresented and lack legal training.

[85] The Appellant is unrepresented. As noted, the Appellant has been declared to be a vexatious litigator. She is familiar with court proceedings, but is not legally trained. She has pursued the appeal, albeit in a somewhat irregular manner, which may be the result of her lack of legal expertise. She has made a number of applications and sought a number of rulings in pre-hearing submissions that a trained lawyer may know either do not come within the scope of the Panel's authority or cannot properly be the subject of determinations outside the process established by the *Act*. She has made intemperate comments and cast aspersions against various individuals that a lawyer would be expected to refrain from under the Code of Ethics or simply for reasons of civility. Additionally, her litigious conduct has contributed to a delay in these proceedings.

[86] Although the Appellant's conduct of her case is one that tends to frustrate the legislative objective of timely and expeditious hearings of appeal, at this point, I am not prepared to conclude that the Appellant's conduct thus far presently amounts to a failure to diligently pursue her appeal. However, if her conduct continues to delay the appeal to the point that it obstructs the timely hearing of her appeal, the result may be different.

[87] The Respondent alleges that the Appellant has failed to comply with the Panel's orders. I note that I issued what I carefully described as directions, not orders, that were designed to manage and expedite the hearing. A direction, particularly a preliminary one that deals with the management and scheduling of an appeal hearing, is not an "order" that can form the basis of an application for summary dismissal. While there is a difference between a direction and an order, the expectation was that the Appellant would comply with either one.

[88] Perhaps most importantly, I am concerned that summarily dismissing an appeal on the basis of non-compliance with a direction or an order might be seen as unfair to an unrepresented party who may not have been aware that this draconian remedy might be the result of her non-compliance. Therefore, I will restate my directions as orders, below, and I hereby point out to the Appellant in no uncertain terms that failure to comply with these orders may result in a dismissal of the appeal. Moreover, the Respondent may renew its application for summary dismissal of the appeal or apply for other remedies if the orders set out below are not complied with within the stipulated time limits.

(b) no reasonable prospect the appeal will succeed

[89] With respect to section 15(f) of the Rules (and s. 31(1)(f) of the *ATA*), I find the following comments by the Supreme Court of Canada relevant and useful in my analysis:

> Whether an appeal has any reasonable prospect for success is a highly discretionary issue and a question of fact, militating in favour of deference: Baker v. Canada (Ministry of Citizenship and Immigration), [1999] 2 S.C.R. 817 at 61.

It is therefore quite clear that in considering the application before me, I must ensure that proper discretion is exercised and ensure that the principles of natural justice and procedural fairness are followed.

[90] The Respondent's application under this ground relies primarily on its argument that the Appellant has demonstrated she is unlikely to comply with the *Act* and the Panel's orders in the future. It says this is seen in her failure to comply with the health and safety plan that forms one of the three reasons the licences were cancelled. It is seen in her failure to acknowledge her wrongs. Additionally, it is seen in her position that the *Act* does not apply to her or her operations because they were situated in Tsilhqot'in Territory.

[91] As mentioned, in an application to summarily dismiss an appeal on this ground, the Panel must decide whether, assuming all of the facts and arguments of the Appellant are correct, those facts and arguments would support a finding by the Panel that the MHO's decision was unjustified.

[92] Assuming they are correct, I am unable to conclude that those facts and arguments, if correct, have no reasonable prospect of resulting in a finding that the MHO's decision to cancel her License was unjustified for one or more of the three reasons on which it is based.

[93] This is a pre-hearing application. It is not an occasion to make a decision on the merits. The facts and arguments presently before me are contained in the Amended Appeal Record and the parties' written submissions thus far (which include the Appellant's supporting documentation). There is no affidavit evidence. Notably, the Respondent relies in part on facts and arguments based on facts that post-date the MHO's decision, including the Appellant's argument about jurisdiction, as well as her attitude towards the criminal charges. For example, the Respondent relies in part on the Appellant's post-decision jurisdictional submissions and her November 11, 2015 Reasons for Judgment as evidence that the Appellant does not intend to comply with the *Act*, the Regulation and the Board's orders.

[94] I understand that at the hearing the Respondent will be arguing on the basis of evidence that was in the record before the MHO, as well as evidence that arose afterwards that the Appellant has demonstrated that she lacks the personality and temperament to hold the licence that was cancelled.

[95] The panel hearing the appeal will have the jurisdiction to entertain those arguments at the hearing of the appeal and make findings based on the totality of evidence adduced and arguments made at a full hearing on the merits.

[96] The Appellant has indicated she wishes to adduce evidence at the hearing of her appeal.

[97] Accordingly, it is arguable that the facts and arguments of the Appellant that are now before me are not complete. Indeed, that is what the Appellant argues. Among other things, she alleges that various parties involved in her case engaged in various acts of wrongdoing including suppression and fabrication of evidence and conspiracy to harm her. She says the MHO failed to consider relevant evidence. Additionally, she has argued from the outset that she requires a hearing that allows her the right of cross-examination in order to prove her case. The facts and allegations of wrongdoing she relies on are of a type that are not usually readily admitted and cross-examination would be required to establish their existence. In the circumstances, I am not presently able to determine, on the Appellant's facts and submissions alone, that there is no reasonable prospect the appeal will succeed after a hearing on the merits. Accordingly, I deny the Respondent's application for summary dismissal.

ORDERS

[98] I now restate my previous directions to the Appellant as the following orders:

(a) Within 30 days of the date of this decision, the Appellant will provide a statement for each witness she proposes to call to testify on her behalf. The statements shall include:

(i) the name of the witness;

(ii) a summary of the evidence the witness will give;

(iii) the Appellant's confirmation that she has spoken to the witness between the date of the pre-hearing conference and the date of the statement, confirming that the summary reflects the evidence the witness expects to give at the hearing;

(iv) if the Appellant is unsuccessful in contacting the witness or is unable to confirm that the summary reflects the evidence the witness expects to give at the hearing, the Appellant shall so advise the Panel and shall provide particulars of the Appellant's efforts to contact the witness, <u>but not</u> the substance of her communications with the witness; and

(v) reasons why the Appellant says the witness' evidence is relevant and material to the case before the Board: i.e.; whether the MHO's decision was not justified;

(b) within 15 days of the date of receipt of the Appellant's statement, the Respondent is to provide its submissions about whether the evidence to be given by the witnesses is or is not relevant material and/or admissible,

and whether a summons should or should not be issued to compel the witnesses to attend the appeal hearing;

(c) within 5 days of receipt of the Respondent's submissions, the Appellant may reply to the Respondent's submissions;

(d) no further submissions will be entertained on these issues without the Panel's prior consent; and

(e) should the Appellant fail to provide the statements within the above-noted time limit, the Panel will entertain a renewed application by the Respondent for summary dismissal of the appeal and may consider any other application for a remedy for the failure that it considers fair and reasonable in the circumstances.

[99] I ask the Registrar to schedule the appeal hearing as soon as reasonably possible given the Orders made above and the parties' schedules.

"Alison Narod"

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

June 24, 2016