BRITISH COLUMBIA

Community Care and Assisted Living Appeal Board

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DECISION NO. 2016-CCA-001(a)

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

BETWEEN:	KN, Licence Applicant, (operating as Speckled Frogs Daycare)	**APPELLANT**
AND:	Dr. Trevor Corneil, Medical Health Officer, Interior Health Authority	**RESPONDENT**

BEFORE: A Panel of the Community Care and Assisted Living Appeal Board
Patrick F. Lewis, Panel Chair
Helen Ray del Val, Board Chair
Harry Gray, Member

DATE: Hearing conducted on July 12, 13, 14 and 15, 2016 with written submissions closing on August 22, 2016

PLACE: Penticton, BC

APPEARING: For the Appellant: Megan A. McLeod, Counsel
For the Respondent: Erika Lambert-Shirzad, Counsel

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1. NATURE OF APPEAL

[1] This is an appeal of a refusal to issue a licence under section 29(2)(b) of the *Community Care and Assisted Living Act* (the "*Act*").[1] The Appellant was the applicant for a licence to operate and manage Speckled Frogs Daycare at 1399 Government Street, Penticton, B.C. (the "1399 Daycare"). The Respondent, Dr. Trevor Corneil, Medical Health Officer ("the Respondent" or "the MHO"), is the member of the Interior Health Authority ("IHA") whose decision is challenged before us.

[2] The Appellant operated and managed Speckled Frogs Daycare out of leased premises at an elementary school (the "School") for almost four years. When the lease for the premises was not renewed on expiry she applied to IHA Community Care Licensing ("Licensing") for a new licence to operate a child care facility at a different location, namely 1498 Government Street, but on September 23, 2015 Licensing denied her application. Virtually immediately thereafter the Appellant made an application to operate the 1399 Daycare, which application was denied on October 15, 2015.

[3] The Appellant then sought a reconsideration of the denial decisions pursuant to section 17 of the *Act*, at which stage the Respondent became directly involved in the matter. The reconsideration application was refused by a decision of the Respondent on February 9, 2016. It is this decision ("the reconsideration decision" of "the decision below") which the Appellant seeks to overturn on this appeal.

[4] Section 11(2)(a) of the *Act* prohibits the MHO (or delegate) from issuing a licence to operate a child care facility unless the MHO is of the opinion that the person:

> (i) is of good character;
>
> (ii) has the training, experience and other qualifications required under the regulations;
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> (ii) has the personality, ability and temperament necessary to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for; and
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> (iv) agrees to be readily available to respond to inquiries from the director of licencing or the medical health officer and to provide to them financial and other records of the community care facility that can reasonably be presumed to contain information relevant to the administration of this *Act* and the regulations.

[1] The full text of sections of legislation and regulations referred to in these reasons are set out in Appendix A to this decision.

[5] The request for reconsideration by the MHO was refused on the expressed basis of all of subsections 11(2)(a)(i), (ii) and (iii). In relying upon a perceived lack of good character, the MHO went beyond the underlying decisions of the licensing officers, which had been based strictly on subsections 11(2)(a)(ii) and (iii).

[6] The Appellant challenges the MHO's conclusions on all three grounds and seeks a licence for the 1399 Daycare. Broadly speaking, she asserts a lack of procedural fairness and an erroneous decision on the merits of the matter. The Respondent seeks to uphold his decision in its entirety.

[7] Eight witnesses including the two parties gave evidence over the course of the four day hearing, and extensive submissions were subsequently tendered. We have carefully considered all evidence given and all of the submissions made, though we do not see it as necessary to refer to every aspect of either in expressing our reasons below.

[8] The approach to be taken by this board on an appeal before it is described in section 29(11) of the *Act*, as follows:

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

[9] This board's powers in adjudicating an appeal such as this are wide, and are expressed thusly in section 29(12) of the *Act*:

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

[10] It is against that broad framework that we have considered this appeal.

2. BRIEF SUMMARY OF DECISION ON APPEAL

[11] After careful consideration we have decided to dismiss the appeal, on the basis that the Appellant has not shown, following a full hearing as though occurring at first instance, that the reconsideration decision was not justified. In particular, the Appellant has not shown that the Respondent's application of subsections 11(2)(a)(ii) and (iii) of the *Act* was not justified. That said, we do not agree with the Respondent's conclusion that the Appellant lacked good character, and we therefore do not deny this appeal on the footing of subsection 11(2)(a)(i) of the *Act*. But as the Appellant has not overcome the second and third hurdles in her path, the appeal cannot succeed.

3. PRELIMINARY MATTERS

3.1 Conduct of the appeal proceeding

[12] As a consequence of the language of section 29(11) of the *Act*, we are not confined by the findings of fact made by the original decision-maker, nor are we constrained by the manner in which he decided the issues presented. We must examine the evidence and arguments anew, undertake our own analysis of the issues and, where appropriate, make our own findings of fact to decide whether the decision not to grant the licence was justified, always bearing in mind that the burden of so demonstrating rests on the Appellant's shoulders.

3.2 Request for site visit

[13] Before the hearing started, the Appellant requested that the hearing Panel visit the proposed site of the 1399 Daycare. Appendix B to this decision is the Board information sheet on requests for site visits explaining when it would and would not be appropriate for a hearing panel to conduct such a visit. While the panel hearing an appeal has discretion to determine whether or not to grant a request for a site visit, as a general practice site visits are not normally conducted as part of a hearing and must not be used as a fact-finding expedition. The purpose of such a visit must not be to gather evidence and the panel's observations during a site visit do not form evidence. Rather, as set out at Appendix B, "The purpose of a site visit is to provide the panel with the opportunity to see the facility that is the subject of the appeal, learn more about the issues in the appeal and better understand the evidence."[2]

[14] The Appellant and Respondent were invited to and did make written submissions on the appropriateness of a site visit in this case. At the beginning of the hearing, both parties were given the opportunity to make oral submissions and then to answer questions from the hearing Panel. The relevance of the state of the proposed site at the time of the hearing was not immediately clear to us but it became clear in questioning that the Appellant wished us to visit the proposed site in order to gather evidence.

[15] We did not grant the Appellant's request to conduct a site visit but invited her to renew the request at any time during the hearing if she believed that a site visit would assist us to better understand the evidence led in the course of the hearing. No renewed request was made and no site visit was conducted.

4. FACTS

4.1 The history generally

[16] The Appellant worked in various capacities providing child care for many years, and from 1987 to 1989 was a licensed operator of her own daycare. From 2006 to September 2011, she was an employee at Little Rascals Daycare ("Little Rascals"), a licensed childcare facility located inside the School which provided primarily before and after school care to children attending the School. In 2011 the owner of Little Rascals retired while the Appellant was employed there as a

[2] Community Care and Assisted Living Appeal Board information sheet on "Requesting a Site Visit".

qualified "responsible adult"[3]. Presented with the opportunity to take over the daycare, the Appellant decided to buy it and change its name to "Speckled Frogs Daycare." She had thought that in order for her to continue the operations of the daycare, a simple licence transfer and a name change would suffice. When Licensing explained to her that a daycare licence was not transferable but was specific to each licensee and location, the Appellant applied for a new licence in June 2011.

[17] The licence application process became rather arduous for the Appellant and Licensing, but after a period of over three months, the Appellant was granted a licence to operate Speckled Frogs Daycare ("Speckled Frogs") at the School effective September 26, 2011. Through her management for the four years that followed, Speckled Frogs' compliance record was in general decline and its risk rating deteriorated from low to high. By April 2015, a condition to complete a compliance plan to which the Appellant agreed was attached to her licence. At no time was her licence revoked.

[18] The licence to operate Speckled Frogs at the School came to an end in the summer of 2015 when the School did not renew the Appellant's lease for the daycare premises and the daycare closed.

[19] The Appellant planned to relocate the daycare temporarily to a church at 1498 Government Street (the "1498 Daycare") and submitted an application to Licensing for a licence to operate a daycare there while she searched for a permanent site. Her application to operate the 1498 Daycare was denied on September 23, 2015, because Licensing found the application documentation deficient and the Appellant's compliance record unsatisfactory. On September 29 and October 13, 2015, the Appellant submitted incomplete documentation in support of an application to operate Speckled Frogs out of 1399 Government Street on a permanent basis, which application was also denied.

4.2 The licence applications

(a) Little Rascals to Speckled Frogs at the School

(i) May 2011

[20] In May 2011, the Appellant contacted Licensing to ask for a licence transfer and a name change for the operation. Licensing Officer Michelle Page explained to the Appellant that the purchase of a facility requires a new application and license as a Community Care Facility license is non-transferable and daycare licenses are specific to both a location and an operator; a change in either operator or location requires a new license. The Appellant therefore had to submit an application for a new licence to operate Speckled Frogs. Ms. Page directed the Appellant to the IHA website for the application package.

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[3] Section 1 of the Child Care Licensing Regulation states that "responsible adult" means a person who is qualified to act as a responsible adult under section 29 [responsible adults]. Section 29 provides that to qualify for employment as a responsible adult a person must be at least 19, be able to provide care and mature guidance to children, have completed a course in child development, guidance, health and safety or nutrition and have relevant work experience. See Appendix A for full text of s. 29 of the Regulation.

[21] Much of IHA's licensing process was managed online. The Appellant was not computer-literate at the time and did not have access to a computer or printer. Licensing was aware of this limitation and accommodated the Appellant. Correspondence and submissions were typically delivered and picked up by hand from the IHA Penticton office instead of exchanged electronically, which was the usual Licensing practice. Licensing provided material to the Appellant in other formats, accepted her handwritten documents and generally guided her through the application process.

(ii) June 2011

[22] The Appellant submitted her first batch of documents on June 13 in support of her application for a licence to operate Speckled Frogs. Most of that material was documentation for the previous Little Rascals daycare, with her handwritten notation that the form was actually meant for Speckled Frogs. She suggested that Licensing check the file for Little Rascals for papers " . . . to be transferred to my folder." Licensing again explained that licences are not transferable and that a new application was required.

[23] This was an explanation that Licensing would give to the Appellant many more times over the course of the four years to follow.

(iii) July 2011

[24] The Appellant submitted a second Community Care Facilities Licensing Application on July 25 using a form no longer in use or accepted by Licensing. The material submitted with this application included some documents that were duplicates of the material in the June 13 submission, while some were revisions and others were new. Some required information was missing from the application.

(iv) August 2011

[25] On various dates in August the Appellant submitted more documentation, some of which further revised material provided earlier. At the end of August, some required information was still missing and the application remained deficient.

[26] The Appellant contacted Licensing persistently to enquire about the progress of her application. As the school season was about to begin, the Appellant also asked if she could be granted a licence on an interim or temporary basis while her application was being completed and processed.

(v) September 2011

[27] A facility inspection was conducted by Michelle Page on September 1 as part of the licensing process and found that the refrigerator at the daycare was not running at a temperature that met food safety standards and that not all hazardous materials were kept out of reach of the children. The daycare's health and hygiene program was also noted as deficient where it related to the sanitation procedure using bleach.

[28] In her contemporaneous notes, Ms. Page noted:

1. her concerns that the Appellant had not comprehended the written and verbal information presented to her during the inspection that day;
2. that she provided to the Appellant extensive guidance about developing a supervision plan and aspects of facility operation, including Community Care License Regulations;
3. that she had confirmed to the Appellant that there was no interim license process; and
4. that she advised the Appellant that due to the noted deficiencies in the site inspection she would not receive a license.

[29] Later that day the Appellant contacted Ms. Page requesting a further meeting to review her information so that her application for a license would be passed. On September 2, Ms. Page again explained the licensing process to the Appellant, and that the applicant for a license was responsible for providing all the information necessary to obtain a license. The Appellant maintained that her application was, in fact, just a name change, and that the license should be granted to her quickly. According to her notes, Ms. Page tried several different ways to explain the process to the Appellant. Ms. Page explained that a license was specific to an individual operator and location. Additionally, according to her contemporaneous notes, Ms. Page expressed to the Appellant two or three times, in different ways, that she had serious concerns with her suitability to become a licensee or to do the job of an operator. Ms. Page made these efforts in order to ensure that the Appellant understood both the requirements and her concerns.

[30] The Appellant responded on the same day with a letter to Licensing advising that she had been led to believe that the process would move quickly because the daycare was exactly as it had been since opening and that Little Rascals had already received the required paperwork. She then called to again ask if she could operate the day care on a 'temporary license'. Licensing repeated that they did not issue temporary licenses.

[31] A few days later on September 6, the Appellant again asked if she could be issued an emergency or temporary permit by September 7 to operate in order to accommodate families whose children were starting school. She was again advised that Licensing had no authority to issue licences on a temporary or emergency basis.

[32] At the same time, Licensing decided that rather than rejecting the Appellant's application for its deficiencies and her apparent lack of ability to understand and meet the requirements, they would conduct an assessment of the Appellant's suitability to afford her another chance to complete her application.

[33] In the meantime, the office of the Member of Legislative Assembly ("MLA") representing the Appellant contacted Licensing to enquire about the progress of her application. Several parents who were planning on placing their children in Speckled Frogs also called to express their support for the Appellant and/or frustration at the slowness of IHA's licensing process.

[34] On September 14, a licensing officer conducted an interview of the Appellant to assess her suitability to be a child care manager. At the end of the interview, the Appellant asked that the officer add to the interview report "…that she [the Appellant] has misunderstood the application process and that she thought that only a name change was necessary and that it was just a transfer of ownership and some of the previous paperwork would have been transferable." On the same day, an inspection of the facilities and review of the application showed continued deficiencies. Licensing gave the Appellant more time and explanations to address the deficiencies. Over the following weeks Licensing made more follow-up inspections. The office of the MLA representing the Appellant called again. Finally, on September 28, Licensing deemed the Appellant "minimally qualified" and issued her a licence to operate Speckled Frogs effective September 26, 2011.

(b) Request for temporary relocation

[35] On December 2, 2013, the Appellant requested a temporary relocation of the daycare to a different site in the event of a threatened teachers strike at the School that would result in the School closing and the daycare being behind picket lines. Ms. Page again explained that licences were site specific, that a new application would have to be submitted, and that licences could not be issued on a temporary basis.

(c) Further request for temporary relocation

[36] On June 11, 2014, the Appellant asked Ms. Page for her opinion on moving the daycare to another location due to more anticipated strike action by the teachers. Ms. Page referred the Appellant to the earlier December 2013 discussions about moving the daycare, and that all the requirements of applying for a licence for a new location would have to be met.

(d) Closure of Speckled Frogs

[37] In May 2015, the Appellant and Licensing discussed the closure of the Speckled Frogs Daycare at its location; its lease for the premises at the School would not be renewed beyond the summer. Licensing informed the Appellant that with the closure of that location, the license would no longer be valid and that a new license would be required. The Appellant was directed to the website for information on applying for a new license and reminded that transferring a license to a new location was not possible.

(e) Relocation of Speckled Frogs

[38] Over the following five months, the Appellant made two applications for a licence to relocate the operations of Speckled Frogs, one temporarily to 1498 Government Street and the other permanently to 1399 Government Street. Licensing assigned these applications to licensing officer Michelle Cushway, who was from a different regional office and had had no previous dealings with the Appellant, so that the applications would be assessed with a "fresh pair of eyes."

(i) Application for 1498 Daycare

[39] On June 23, 2015, the Appellant submitted an application to operate Speckled Frogs in a church basement at 1498 Government Street for the summer. The application contemplated her being the manager of the daycare. In her application she again asked that the move be considered as a change in address and not a new application as she had intended the relocation to the church as a temporary measure until she found a permanent home for the daycare.

[40] On July 25, 2015, Licensing conducted an interview of the Appellant to assess her suitability as part of the licensing process to provide the Appellant with an additional opportunity to demonstrate that she could meet the requirements to hold a daycare licence.

[41] On September 23, 2015, the application for 1498 Daycare was denied for a number of reasons which included incorrect and incomplete documentation and a record of non-compliance in the operation of Speckled Frogs Daycare at the School location. The deficiencies in the documentation included the error that several of the documents did not reflect the proposed location of the daycare and referred instead to the old location in the School. For example, the proposed staff plan was the one used in the operation of Speckled Frogs at the School and directed use of the "side door" for entering the daycare when the proposed location had no side door.

(ii) Application for the 1399 Daycare

[42] Less than a week later on September 29, 2015, the Appellant submitted a new application for 1399 Government Street which was intended to be the permanent location for Speckled Frogs. The application contemplated the Appellant being the manager of the 1399 Daycare. The Appellant had followed the application checklist and supplied many but not all of the required documents. The application was disorganized, incomplete and fraught with mistakes. She continued to characterize this application as an "address change."

[43] On October 9, the Appellant's lawyer wrote to the MHO asking that her application be expedited.

[44] On October 13, the Appellant submitted yet another application for the 1399 Daycare marked as "address change". The application included a number of documents but missed many required ones.

[45] On October 15, Licensing denied the Appellant's application for a licence to operate the 1399 Daycare as the application did not meet required standards and the applicant did not meet the legislated suitability requirements.

[46] Despite the denial of her licence application for the 1399 Daycare, the Appellant continued to submit documents in support of her application. On November 10, 2015, the Appellant requested reconsideration by the MHO of the decision to deny the 1399 Daycare licence application (and, the MHO construed, of the denial of the application respecting 1498 Government Street) and submitted further required documentation. On review of all of the documents submitted (both before and after the denial of the licence application) in support

of the 1399 Daycare licence, there were still a number of significant deficiencies including but not limited to:

- An inadequate Safety Plan for regular transportation of children outside property boundaries
- Incomplete Floor Plans
- An incomplete Emergency Plan
- Inappropriate policies in several areas including the pickup and release of children, behavioural guidance of children, storage and administration of medication, and usage of electronics

4.3 Speckled Frogs' operation under the Appellant's management

(a) The inspections

[47] Licensing has a practice of regular and routine follow-up inspections of daycare facilities. During the inspections observations about the general operation of the daycare are made and any outstanding issues from prior inspections are reviewed to ensure that the issue has been appropriately resolved. A record is kept of the inspections, as well as of comments by the licensing officers regarding telephone calls with the facility. Where there are infractions, the licensing officer notes the specific section of the *Act* or regulation that has been contravened. When an inspection is completed, a risk rating is usually assigned to the daycare and a tentative date for the next inspection is entered into the system.

[48] The record shows that all but two of the inspections of Speckled Frogs revealed infractions of the regulations and that, where a previously identified instance of non-compliance had been remedied, a new one had surfaced. The risk rating assigned to Speckled Frogs was generally low at the beginning of its operations but eventually became high.

[49] The following summary of regulatory breaches found during the inspections carried out on the noted dates shows the Appellant's compliance pattern:

- September 2011 – at a pre-licensing facility inspection, licensing officer Page found the Appellant's program of health and hygiene practices to be inadequate particularly where it related to the use of bleach for sanitizing. The four step method of cleaning was outlined for the Appellant.
- January 11, 2012 –some of the children's immunization records and/or pictures were missing from the day care records.
- June 5, 2012 – the issue related to missing child records was marked 'resolved.' However, the Appellant's program for health and hygiene practice, which had been discussed with the Appellant during the September 2011 pre-licensing inspection, had surfaced again as she had failed to sanitize the tables used for the children's snacks. Additionally, a program of activities for the children was not available and the

Appellant said that she had not done one for a long time. Finally, it was noted that the substitute staff did not have a current first aid certificate.

- October 15, 2012 - the issues related to sanitizing the tables and the program of activities had been resolved but a number of new issues had arisen. The First Aid kit was missing gauze. There were uncovered electrical outlets in the wall and the Appellant took the position with the inspecting licensing officer that she did not consider this a big issue as the children were all kindergarten age or older. Craft paint, which should not be used by children under the age of twelve, was being used (the children at Speckled Frogs, as we understand it, or at least the majority of them, were under age twelve). A shelf in the playhouse had an unfinished edge and was splintering.
- November 7, 2013 – the issues related to the First Aid kit, the splintered shelf in the playhouse and the covering of the electrical wall plugs had been resolved but a new issue regarding emergency evacuation drills had arisen. There was no record that required annual emergency evacuation drills had been carried out. The Appellant said that an evacuation drill had in fact been done, but just not recorded.
- December 30, 2014 - There was still no record that required emergency evacuation drills had been carried out.
- February 10, 2015 - There remained no record that required emergency evacuation drills had been carried out. The food and drink policy was incomplete and inconsistent with guidelines that Licensing had previously provided to the Appellant. Attendance records were not completed and a head count was not done as soon as the children were placed in her care. The Appellant was unable to immediately give the licensing officer an accurate head count of how many children were present when asked. Employee documents for the volunteers were not on the premises and could not be produced on request. The Appellant stated that the volunteer records were complete but had been taken off the premises for photocopying.
- February 19, 2015 – the volunteer records were on the premises but the documentation was incomplete.
- April 21, 2015 - infractions noted included not having complete policies for the safe release of children; not following the supervision plan that had been submitted and approved by Licensing; not obtaining the parents' consent for release of children to persons other than the parents; not completing attendance records when children were released from care.
- May 5, 2015 – policies regarding safe release of children and other policies to guide employees in the care and supervision of children remained incomplete; children's attendance was not marked on the attendance records at the time of their arrival.

- May 26, 2015 – The volunteer documentation remained incomplete because the required immunization records were missing. The records for 2 children missed information regarding their immunization status and their medical practitioner. A child did not have food for snack time and the Appellant stated that this happened once or twice a week. The Appellant did not offer the child any food or drink. The inspecting officer observed the Appellant telling the child "Well then, I guess you are out of luck then. You need to remember to bring enough." Another violation concerned the disinfection of a table using bleach when children were sitting at the table and removing food for their snack. Some of the children complained that their snack items got wet from the bleach, and that they did not like the smell.

(b) Notable incidents

- Bathroom exemption

[50] On being licenced in 2011, the daycare had been granted an exemption from certain requirements pertaining to its bathroom, which exemption would expire in June 2012. The exemption letter specified that the exemption was time limited and that a new one would be required on expiry. The Appellant allowed the exemption to lapse and did not apply for a new exemption until Licensing uncovered the expired exemption in May 2014, after which the Appellant applied for and obtained another exemption. During her testimony, the Appellant pointed out that Licensing had not followed up with her on the expired exemption during previous inspections.

- January 6, 2015

[51] On January 5, 2015, the Appellant first advised the parents of the children in her care that if the schools were to be closed the next day due to heavy snowfall her daycare would also be closed. She later decided that she would close the daycare in any event. According to the Appellant, she made every reasonable effort to communicate with all the families to tell them of the daycare closure.

[52] On January 6, 2015, four children from two families arrived at the daycare in the afternoon after classes ended at the School. When the School's Principal contacted the Appellant and asked her to provide emergency care, she refused. Instead, she provided approximate pick-up times for the two sibling groups and the School was left to arrange for their immediate pick-up. At the hearing, the Appellant testified that she told the School Principal it was not fair that she had to come in to work when she had said the daycare was closed, especially when other parents "knew what closed means". She testified that she would not do anything differently under similar circumstances.

- February 4, 2015

[53] The Appellant admitted to forcibly taking a granola bar out of a child's hand when the child did not comply with her request to put the snack away. The child had been playing rather than eating during the 20 to 35 minute period the

Appellant normally allotted for snack time and had refused to stop playing when the Appellant asked her to do so. When snack period was over the Appellant told the child to put her snack away but the child did not comply, and instead started to eat a granola bar. The Appellant took the granola bar out of the child's hand telling her that she had had enough time to eat.

[54] She explained to the licensing officers that she had a 'three strike rule, just like in baseball' and that the children in her care were familiar with that rule. That rule apparently stemmed from the previous daycare operator's practice of setting up three stations for certain activities and the Appellant had extended that practice to apply as a behaviour guidance rule. She explained that only three children were allowed to be at any one play station, such as the playhouse, at a time. Using that rule to manage the children's behaviour, she would give a child three chances if his/her behaviour at a play station were unacceptable. After three chances, if the bad behaviour continued, the child would be told to move somewhere else. The Appellant felt that giving the child three chances to correct behavior was in accordance with her posted facility rules. On inspection, licensing officer Page found that the posted facility rules referred to the use of play mats and the playhouse limiting the use of that equipment and not to measures to be taken to correct behaviour.

[55] As to the granola bar incident, the Appellant testified that she did not believe she was denying the child a chance to eat because that child had been given the same opportunity as every other child to eat.

[56] Following the denial of her snack, the child became very upset and went out into the hallway to hide inside a locker. When the Appellant either prevented the locker door from closing or opened the locker door, the child ran toward the door that led to the playground outside. The Appellant testified that she physically restrained the child from going outside and brought her back into the daycare, as it was dark and cold outside and the child was not dressed for the weather, and the hallway and the outside entrance door had people milling about who were unknown to the Appellant as the gym was rented out at the time. The Appellant also testified that she was concerned about the safety of the child as the child was acting irrationally.

[57] There was no care plan filed for this child authorizing or prescribing the use of any type of physical restraint against her at any time.

4.4 Other complaints and allegations

[58] There were other complaints and allegations against the Appellant which were the subject of a Licensing investigation that the Respondent relied upon in making additional adverse findings against the Appellant. While the Appellant admitted that the incidents mentioned above occurred, she challenges the Respondent's findings regarding these other allegations. We decline to specify these other allegations, however, and to determine their merit as we consider them peripheral and unnecessary to the reasoning we see fit to employ and the decision we see fit to reach. Our having heard these other allegations in no way has worked against the Appellant's interests on this appeal.

[59] The Appellant also disputes the Respondent's assessment of her in the suitability interview Licensing conducted on July 25, 2015. We do not think it necessary to consider the suitability interview and the concerns around it given our views on other, independent matters that we consider sufficient to support the decision we have reached, without taking the Respondent's concerns about the suitability interview into account.

5. ISSUES ON APPEAL

[60] The issues we have considered in determining whether the decision under appeal was justified are:

> Procedural Fairness
>
> **1. Whether there has been a breach of procedural fairness in IHA's process.**
>
> **2. If there has been a breach of procedural fairness, whether that breach is curable by this appeal proceeding and if so, whether the appeal proceeding remedied it.**
>
> The Merits of the Decision
>
> **3. Whether the statutory requirements for a licence to be granted have been met.**

We will now set out our views concerning those issues in more detail.

6. DISCUSSION AND ANALYSIS

Procedural Fairness

6.1 Whether there been a breach of procedural fairness.

[61] The Appellant submits that the rules of procedural fairness were breached during the IHA investigation and reconsideration process because:

(a) the MHO did not answer all of the questions she posed to him on reconsideration;
(b) the MHO did not provide the Appellant with one of the binders of documents he reviewed in the reconsideration process; and
(c) the investigating officers neglected to interview two witnesses who would have given favourable testimony for the Appellant

We will take those arguments in turn.

(a) Not answering questions

[62] The MHO gave the Appellant the opportunity to make written submissions, as it is her right to do under the *Act*.[4] After she made her initial submissions, he also invited her to make further submissions which he had no obligation to do. On receipt of those submissions, the MHO's obligation is to consider them and give reasons for his decision.[5] The MHO fulfilled his obligation by giving detailed reasons to explain how and why he made the findings he did and came to the conclusion he reached. While it was certainly open to the MHO to do, there was no duty on his part to answer in his reasons each question posed to him by the Appellant, and accordingly the failure to do so was not a breach of procedural fairness.

(b) Not providing a certain binder of documents

[63] The binder in question ("Binder 3") was the third of three binders the investigating licencing officer prepared for the MHO to brief him on the case. Binder 3 contained documents the Appellant had submitted in her request for reconsideration such as policies and plans submitted in her application for a licence and the licensing officer's explanatory notes on why each document was non-compliant and how she had assessed the application and the applicant.

[64] It would have been preferable for Licensing to give the Appellant a copy of Binder 3 as was done with the other two binders. That said, the failure to provide Binder 3 to the Appellant was not particularly significant because it largely contained information that had already been made available to the Appellant before, during and after the licensing and investigation processes. The form in which the information was presented in Binder 3 was new but the substance of the information was fundamentally as the Appellant had seen previously. We therefore find that the failure to provide Binder 3 under these circumstances was not a breach of the rules of natural justice or procedural fairness.

(c) Failure to interview witnesses

[65] The Appellant submits that the failure of Licensing to interview her son (who at times volunteered at the Appellant's previous daycare) and her employee is evidence that the investigation was biased and therefore a breach of her right to an impartial adjudication. Both of these people testified before us and their evidence was indeed favourable to the Appellant in relation to her interaction with the children and to certain incidents of concern.

[66] The licensing officers who testified regarding this apparent omission in the investigation explained that they had not been aware that these two persons were witness to incidents of concern, not having been so advised by anyone. There was a contradiction between the evidence of the employee, who stated that on one occasion she did advise Licensing that she was present during one of the incidents being investigated (though she could not recall at which meeting or the name of the officer), and that of the licensing officers, who denied having been so advised. In any case, Licensing did have information in the file for the facility

[4] Section 17(2)(b)
[5] Section 17(5)

showing involvement of the Appellant's son and employee at the daycare, and the failure to speak with them does show that the investigation was not as comprehensive as it could, and in our view should have been.

[67] We did not, with respect, find the arguments from either party around whether this failure to interview constituted a lack of procedural fairness to be well developed, in relation to the underlying legal principles, the particular facts Licensing presumably would have learned from these two witnesses had they been interviewed, and the significance of those facts in the overall picture. It cannot be that every failure to interview a witness, even if falling short of revelation of bias as we find to be the case here (more on this below), amounts to denial of a legal right deserving of a remedy. As stated, we do believe that these two witnesses should have been interviewed by Licensing, given the easy access to information that they worked in the facility and given the seriousness of the matter for the Appellant, but the legal significance of the omission is a more testing question. As will become apparent in the discussion below on curability, we have concluded that, at least at this post-appeal hearing stage, the point is not in fact legally significant, and for that reason we do not consider that the argument ultimately assists the Appellant on this appeal.

[68] A second reason we are not giving effect to the Appellant's argument around the failure to interview these two witnesses is that, as it happens, we have made our findings and determinations on this appeal largely in light of uncontroversial, documented non-compliance by the Appellant with various regulatory requirements, admissions made by the Appellant and the Appellant's own evidence at the hearing. While we have listened to and considered carefully the evidence of third party witnesses, that evidence did not alter our views of the central difficulties the Appellant faces in trying to obtain the desired licence.

6.2 Curability of breach on appeal

[69] The latter comments aside, if it should be concluded that there was a breach of natural justice or procedural fairness as urged by the Appellant, can such a breach be cured by this appeal process and has that occurred?

[70] In *Taiga Works Wilderness Equipment Ltd. V. British Columbia (Director of Employment Standards)* 2010 BCCA 97, the British Columbia Court of Appeal examined the issue of whether an appellate body has the ability to cure breaches of the rules of natural justice or procedural fairness committed by the body that made the decision under appeal. The court held that "In appropriate circumstances an appellate body does have the ability to cure breaches of the rules of natural justice or procedural fairness."

[71] Whether an appeal proceeding such as this one has cured a breach of natural justice or procedural fairness depends on:

(i) whether the nature of the breach is one that is capable of being cured;

(ii) whether the mandate of the appellate board is one that is capable of conducting the type of proceeding that could remedy a curable breach, and

(iii) whether the appellate body having such a mandate did conduct the appeal proceeding in such a manner that cured the breach.

[72] We will examine those three questions in relation to this case.

(i) Is the breach curable?

[73] Whether a breach of the rules of natural justice or procedural fairness is curable will depend on the specific facts of the case. There may be cases where the breaches are of such a grave nature or consequence that they cannot be cured but this is not one of them.

[74] We find that in this case the impugned incidents, even if they did amount to breaches of the rules of natural justice, were not grave procedural defects that would warrant a finding that the original decision is null and void or that it should be remitted back to the original decision-maker. The evidence shows that Licensing did in many ways ensure that the Appellant was accorded her fundamental rights to a fair process. There is no evidence that IHA committed or omitted any act with intent or ill will to deprive the Appellant of her rights.

[75] We are aware the Appellant's view is that Licensing provided insufficient guidance during the application process and that there was little opportunity for discussion or feedback. However, we find the evidence shows that licensing officers were exceedingly patient with the Appellant in assisting her with the application for a licence in 2011 and then in guiding her in the operation of Speckled Frogs Daycare in the four years that followed. They accommodated her lack of computer skills by accepting hand-delivered and handwritten (and sometimes barely legible) hard copies of documents where many other authorities would not have. An inordinate amount of time and effort was required to sort through the disorganized paperwork the Appellant submitted and Licensing dedicated the resources to do so. They explained the licensing process and the concept that licences are specific to a site and an operator to the Appellant multiple times. They conducted interviews with her to provide her with additional opportunities to answer deficiencies in her applications for a licence when she would have failed based on the documentation she submitted. In the operation of the daycare, licensing officers were generous, diligent and consistent in offering her resources and helping her achieve and maintain compliance.

[76] In connection with the Appellant's applications for a licence in 2015, the MHO took the extra step to engage an experienced licensing officer from a different office who had had no previous dealings with the Appellant to carry out the assessment. Engaging a "fresh pair of eyes" to examine the Appellant's applications was wise and evidences the Respondent's efforts to ensure impartiality.

[77] In this case, while there is no evidence of intent to deny justice there is clear evidence of effective and competent action taken to ensure fairness and

impartiality, and we certainly do not find any facts suggesting bias on the part of licensing offers against the Appellant.

(ii) Does the mandate of this Board give it the capability to remedy a curable breach?

[78] This Board's mandate does give it the power to cure breaches of procedural fairness because these breaches clearly are curable by what is effectively a first instance hearing,[6] which is the way this appeal was required to be and has been conducted.[7]

(iii) Did the Board's conduct of the appeal proceeding cure the breaches of procedural fairness and natural justice?

[79] We will now examine the appeal process to determine whether the proceedings generally have been fair to the Appellant.

[80] In order to discharge our mandate to "receive evidence and argument as if a proceeding before the board were a decision of first instance" the Board and the Appellant received a complete copy of the record of the proceedings below and the parties were provided an opportunity to submit a written Statement of Points and any additional documents prior to the hearing. As earlier stated, the Board held a four day hearing to hear oral testimony from the Appellant, the Respondent's representatives and their respective witnesses. Both parties were represented by able counsel. At the hearing the Appellant and Respondent each called four witnesses, including in the Appellant's case the two relevant witnesses whom Licensing had not interviewed (ie, the Appellant's employee and son). All witnesses were cross-examined. After the hearing, the Appellant and Respondent were given the opportunity to submit their final arguments in writing, and the Appellant was given a further opportunity to reply to the Respondent's argument.

[81] The Board held a full oral hearing into the merits of the appeal and accorded the Appellant procedural fairness to the fullest extent. Given the curable nature of the alleged procedural breaches and the measures to ensure impartiality taken by the MHO, we find that the process as a whole has been fair to the Appellant.

[82] In summary, we find that even though the investigation process was certainly not perfect (given the failure to interview two witnesses with relevant information to offer), the imperfection did not amount to a breach of natural justice. Further, even if there was a defect amounting to a breach of natural justice or procedural fairness, it was curable and, in our view, it was in fact cured by this appeal proceeding.

6.3 The Merits of the Decision

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[6] *King v. University of Saskatchewan* [1969] S.C.R. 678, 6 D.L.R. (3d) 120; *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14.

[7] See DECISION NO. 2010-CCA-006(a) of the Board for an analysis of the Board's enabling legislation and history of legislative changes broadening the Board's appellate mandate from conducting an appeal on the record to proceeding as if the hearing were a decision of first instance

6.3.1 Whether the statutory requirements to issue a licence have been met.

(a) A daycare licence – when may the MHO issue one, when may an applicant obtain one?

[83] Subsections 11(1) and (2) of the *Act* govern when the MHO may grant a licence. Subsection (2) prohibits the MHO from issuing a licence unless he can form an opinion that the applicant has the skills, qualifications and traits to discharge the duties of a licensee. Subsection (1) gives the MHO the authority to issue a licence if the requirements under the *Act* and regulations have been met. The language used in subsection (1), namely the word "may", gives the MHO discretion as to whether to issue a licence without imposing any obligation on him to do so. Therefore, even where all the legal requirements have been met, the MHO is not compelled to issue a licence.

[84] The two subsections read together create the licensing scheme for new applicants: The MHO is not allowed to issue a licence unless certain conditions are met and, even where they are met, he is not obligated to issue a licence. In other words, it is important to note that the grant of a licence is a privilege which an MHO has no authority to extend unless certain statutory requirements are met. A licence is not a right to which any applicant is entitled.

[85] In the Appellant's Reply, she characterized the MHO's decision as "revoking an individual's means of earning a living." This is not accurate because the decision is not about the revocation or cancellation of an existing licence pursuant to which the Appellant had a right to operate a daycare. In this case, the Appellant is applying for a new licence: the case concerns the grant of a privilege rather than the revocation of a right.

(b) How does the MHO assess a licence application to determine whether it meets the requirements?

[86] The assessment of a licence application entails an examination of the documentation submitted and an evaluation of the applicant herself. Both the paperwork and the applicant must meet the requirements of the *Act* and regulations before the MHO can exercise his discretion to grant a licence.

[87] In this case, the MHO decided that neither the documentation nor the applicant met the requirements and therefore refused to grant the Appellant a licence. To examine whether that decision is justified, we have considered the evidence afresh to assess whether the documentation submitted meets the requirements and whether the Appellant fulfills the criteria for being licensed.

(i) Assessing the documentation - did the Appellant submit all the documentation that was required in her application?

[88] We find that the Appellant's application to operate the 1399 Daycare did not contain all of the required documents, that some of the material submitted did not include the required information and other portions of it contained wrong information.

[89] "The Guide to Applying for a Child Care Licence" published by IHA provides detailed instructions and guidelines to applicants of the steps that must be followed and the documentation that must be submitted in an application for a licence to operate a child care facility. It sets out the contact persons and resources for each of the required steps or documents and, where applicable, the section of the *Act* or regulation that applies to that requirement. The Guide also directs applicants to the links to all the required forms, resources and agencies that can be found on the Interior Health website.

[90] At the time it was denied on October 15, 2015, the Appellant's application for the 1399 Daycare was deficient in various respects, including but not limited to:

- An inadequate Safety Plan for regular transportation of children outside property boundaries
- Incomplete Floor Plans
- An incomplete Emergency Plan
- Inappropriate policies in several areas including the pickup and release of children, behavioural guidance of children, storage and administration of medication, and usage of electronics

[91] Given these deficiencies, we find that the Appellant's application for a licence to operate the 1399 Daycare did not meet the requirements and Licensing had no choice but to reject it. Under the legislation, the MHO has no authority to approve an application that does not satisfy him that the facility meets the regulatory requirements.

(ii) Assessing the applicant - did the Appellant demonstrate that she has met all of requirements under the *Act* and regulations to hold a licence to operate a child care facility and to be employed as the manager of a child care facility?

[92] As with all of her other applications for a licence, the Appellant's application for a license to operate the 1399 Daycare contemplates her being the manager of the daycare. Unfortunately the evidence strongly suggests that she lacks the ability to manage a daycare facility in accordance with the many regulatory and policy requirements that understandably apply to such an important function.

[93] In order for the MHO to be able to grant a licence to the Appellant to operate a daycare where she is to be manager, he must be able to form the opinion that she is able to work with and manage children and that she is able to carry out the duties expected of a manager of a daycare.

[94] As earlier stated and in part only, a person cannot be employed as a manager of a community care facility unless he/she has the:

- personality, ability and temperament necessary to manage or work with children[8], and
- training and experience and demonstrates the skills necessary to carry out the duties assigned to the manager[9].

[95] We find that the cumulative evidence surrounding her licence applications and her operation of Speckled Frogs Daycare does not support an opinion that the Appellant is suited to be the manager of a daycare. The evidence does not support an opinion that she is able to work with and manage children or that she is able to carry out the duties expected of a manager of a daycare.

The licensing applications

[96] Although the appeal is only in regard to the refusal to issue a licence for the 1399 Daycare, the whole application history is relevant in determining the skill and ability of the Appellant to make a proper application and successfully operate a community care facility. In reviewing the evidence around the Appellant's applications for licences and their deficiencies the troubling conclusion we reached is that the inadequacy of the paperwork is but a symptom of a more serious and difficult problem regarding the Appellant's suitability to be a manager of a child care facility.

[97] The Appellant was a diligent daycare worker and had been successfully employed in the capacity of a qualified "responsible adult" working under the supervision of a manager in daycares; however, administration, communications and managerial skills were not her forte. Coupled with a strong, determined and an at times impatient (as we find) personality, her licence applications, which all contemplated that she would be the manager of the proposed daycare, posed significant challenges both for her and Licensing. Those challenges eventually proved insurmountable.

[98] The Appellant submitted three applications for licences in under four years. The documentation she submitted in support of each application was disorganized and contained many mistakes requiring Licensing to dedicate an inordinate amount of time to sort out the poor paperwork and to guide her through correcting the deficiencies. The first licence application she submitted in 2011 to operate Speckled Frogs Daycare at the School took over three months, numerous phone calls and meetings and several onsite inspections to complete. The Appellant admitted that the original documents submitted were disorganized and voluminous in her rush to prepare her application but felt that Licensing did not offer her sufficient help or guidance in her applications. We acknowledge that the Appellant is dissatisfied with Licensing and has submitted that Licensing did not give her meaningful assistance in the licensing process but we do not agree with that submission. It is an applicant's responsibility to submit a complete application especially when she expects an expedited approval as the Appellant did in this case. We find that IHA and its licensing officers did more than they

[8] section 19(2)(b)of the Child Care Licensing Regulation
[9] section 19(2) of the Child Care Licensing Regulation

were legally required to do to ensure that the Appellant would have a fair chance at success in her licence application and in her operation of the daycare.

[99] Licensing repeatedly explained to the Appellant that licences were specific to the site and operator, but to no avail. The Appellant seemed unable or unwilling to accept that a daycare licence is inextricably tied to its named owner/operator and to its specified location and that a change in either ownership or location required a new licence. She also seemed unable to understand that Licensing had no authority to grant temporary or interim licences.

[100] For example, she asked about or for a temporary relocation of her daycare three times during operation of Speckled Frogs Daycare. In her application for a licence to operate the daycare at 1498 Government Street, a location she described as temporary, she submitted documentation that did not reflect the proposed location of the daycare. Documents purporting to pertain to the new location described the physical features of the daycare at its old location in the School. Since a licence is specific to a location, a mistake of that nature was decisively important to an application for licence. As for her application for the 1399 Daycare, she marked it as an "address change."

[101] The Appellant's repeated errors and consistent failure to properly manage her licence applications and documentation point to an underlying lack of understanding of the requirements and an inability or willingness to learn them. That lack of understanding may account for her dismissive attitude toward administrative requirements and processes. That attitude would hinder her in discharging managerial duties expected of an independent small daycare operator: administration will necessarily form a vital part of those duties.

[102] The history of the Appellant's licence applications would not have given the MHO confidence to form the opinion that she has the qualifications required under the regulations, namely, the skills necessary to carry out the duties assigned to a manager of a daycare.

The Appellant's management of Speckled Frogs Daycare from 2011 to 2015

[103] The history of operation of Speckled Frogs also raised questions as to whether the Appellant has the skills necessary to carry out the duties of a manager. Under her management for almost four years from September 2011 to June 2015, Speckled Frogs did not have a good compliance record. Furthermore, there were episodes where she did not demonstrate that she was able or willing to meet all of the demands of a managerial position responsible for supervising the entire operations.

[104] The inspections record a history of regulatory infractions. Some of the infractions seem trivial on their own but the pattern of continual, repeated and increasingly serious non-compliances is disconcerting. That pattern points to a more significant systemic problem which is that the operations as a whole lacked proper managerial oversight.

Notable incidents

[105] Aside from the daycare's poor compliance record that calls into question her ability to manage the operations, the following incidents also raise doubt as to whether she understands the duties of a manager and is willing to perform all that is expected of a manager:

- Bathroom exemption

[106] Despite the letter regarding the daycare's bathroom clearly stating that the exemption was time limited and a new one was required on expiry, the Appellant allowed the exemption to lapse and did not apply for a new exemption until Licensing uncovered the expired exemption in May 2014. This resulted in the daycare having operated in continuous non-compliance for two years with respect to its bathroom facilities. While the Appellant obtained another exemption to correct the infraction she pointed out that Licensing had not followed up with her on the expired exemption earlier.

[107] The Appellant's pointing to Licensing's failure to bring to her attention the issue of the expired exemption betrays her failure to appreciate her own responsibility to ensure that the daycare operations were legally compliant. As manager, she is expected to proactively prevent infractions from occurring rather than to only react where the licensing authority uncovers non-compliance.

[108] There are similarities between her raising Licensing's failure to follow up in the case of the exemption and her complaint that Licensing did not offer her more guidance in her licence applications. We find that the Appellant is overly reliant on Licensing to achieve compliance and tends to shift the onus of compliance at least partially to Licensing rather than to accept it as her ultimate responsibility as manager.

- Snow day closure on January 6, 2016

[109] We find this incident significant, though not for the miscommunication that occurred, and we are not making any finding of fault regarding the failed communication. Rather, we consider most telling the Appellant's unwillingness to assume responsibility by failing to provide emergency care to four children for no apparent reason other than that their parents could have been wrong in interpreting her messages. For the sake of the children and of the reputation of her daycare, a responsible manager would have done more for children regularly placed in her care who had been brought to the daycare by reason of miscommunication, even if spontaneous and unexpected action was needed.

[110] What is most disappointing is her testimony that she would not do anything differently should similar circumstances arise. This shows that she still does not understand what being a manager entails and does not accept the burden of having to be ultimately responsible for all that happens in the daycare's operations including when plans do not unfold as expected.

- Snack Day on February 4, 2015

[111] The Appellant punished a child on this day by not allowing her to finish her snack. The regulations are clear that food is not to be used as a disciplinary tool.

Section 48(7) of the Child Care Licensing Regulation prohibits the use of food and drink as a form of reward or punishment for children and section 52 (1)(f) requires a licensee to ensure that a child is not subjected to deprivation of snacks as a form of punishment.

[112] The Appellant's testimony that she did not believe she was denying the child a chance to eat because that child had been given the same opportunity as every other child is troubling as it shows a lack of insight that she had clearly used food as a disciplinary tool. This apparent lack of insight diminishes the likelihood of correction of this type of problem.

- Inappropriate behavioural guidance

[113] The "three strike rule" the Appellant implemented to manage the children's behaviour is misguided. She felt that the children were familiar with the rule because it was "just like in baseball" and also because of practices originally established by the previous owner of the daycare who had set up three food tables. The Appellant felt that giving the child three chances to correct her behavior was in accordance with her posted facility "Rules". The posted rule, however, referred only to the use of play mats and the playhouse limiting the children's use of that equipment.

[114] That policy had not been written to apply to other aspects of the daycare's operation. There was therefore no written behavioral guidance policy that would have informed the children and their guardians that the children only had three chances to comply with rules before punishment would ensue. It would appear that the Appellant had arbitrarily extended a rule meant for limiting the use of the daycare's equipment to limiting the children's chances to make amends for misbehaviour.

[115] Not only is the way that the three chances behavioural policy came to be created and implemented problematic, but the substance of a policy which arbitrarily limits choices and chances is wrong for such young children and the Appellant ought to have known that. Such limiting policies are specifically addressed in the booklet "Guiding Children's Behaviour" published by BC Health Planning which is a resource made available to all child care providers. The Appellant had been provided with a copy of this guide in June 2013 during an inspection following a complaint that she had suspended a child for poor behaviour. The booklet promotes strategies and techniques, and recommends practices for guidance that reinforce requirements in the *Act* and regulations. The Appellant's three strike rule is not consistent with those teachings.

- Use of physical restraint prohibited and inadequate prevention and intervention

[116] With respect to the complaint about inappropriate behavioural guidance and physical actions toward a child, the Appellant admitted the incident occurred, accepted the consequences and worked on a Compliance Plan in an attempt to make amends. However, her interpretation of what happened differs from that of Licensing. The Appellant testified that she was concerned about the safety of the

child and that in the circumstances, where the child was already irrational and at risk of injury, the event happened too fast to use solely verbal reasoning.

[117] The Appellant admitted physically restraining the child to prevent her from running outside. Section 52(1)(b) of the Child Care Licensing Regulation prohibits a licensee from subjecting a child to physical restraint, except as authorized in a child's care plan if the care plan includes instructions respecting behavioural guidance. There was no care plan filed for this child authorizing or prescribing the use of any type of physical restraint against her at any time. The use of physical restraint under these circumstances is a violation of the regulations.

[118] The booklet "Guiding Children's Behaviour" provides many options for prevention strategies to "set the stage" for encouraging positive behaviour and intervention strategies to ensure that guidance is supportive rather than punitive. The emphasis is that physically restraining a child should only be used as a last resort.

[119] The strategies the Appellant used to prevent the situation from escalating to where physical intervention was necessary were ineffective and inappropriate. In fact, her limiting the child's time to finish her snack and then forcibly taking the snack out of the child's hand unnecessarily and significantly escalated the situation.

[120] The Appellant justifies the physical action she took against the child as necessary to protect her. In our view, however, the Appellant had failed to use appropriate prevention and intervention strategies to de-escalate the situation before even any thought of physical restraint need be made. We find that she could and should have better managed both the child and her own actions. The Appellant's physical restraint of the child was rash and reactive, calling into question, alongside other evidence we have discussed above, her temperament and ability to work with and manage children in the manner required of the operator/manager of a child care facility.

6.3.2 Conclusions regarding section 11(2)(a) of the Act

[121] We reproduced this provision at paragraph 4 above.

[122] Without repeating the findings and determinations we have expressed in the foregoing reasons, we have concluded that we should not disturb the decision below arising from subsections 11(2)(a)(ii) and (iii), which respectively concern "training, experience and other qualifications required" and "personality, ability and temperament". We are not able to conclude otherwise given the great number of instances of non-compliance by the Appellant, some of them chronic despite considerable guidance offered by Licensing. Many of these transgressions fell into the realm of management and administration, and certain of them related to interaction with children, both of which are important dimensions of the running of a child care facility. We do not find it necessary to parse the language in those statutory provisions, but simply observe that in light of these many failings we do not see how it could be thought that the Appellant had the necessary "training" (that is, proper training in the full function, regardless of

years of experience) or "temperament" necessary to properly operate the facility, to take two examples from the applicable language.

[123] As stated at the onset, however, and based upon our careful assessment of the Appellant while testifying and, indeed, the evidence as a whole, we do not consider it fair to say that she lacks good character, as the term is used in subsection 11(2)(a)(i) of the *Act*. We have considered all of the authorities the Respondent has submitted in relation to the legislation, some of which feature consideration of more than one of the section 11(2)(a) benchmarks, and we are not persuaded that there is any authority compelling a conclusion that, on the evidence we have heard, the Appellant lacks good character within the meaning of the section. There is no element here, for example, of dishonesty or deceit, as is the case in certain of the authorities submitted. In his written argument, the Respondent puts little focus on the question of good character, his essential point there simply being that the Appellant is unwilling to learn and to admit to her failures. A lack of self-insight, however, or a basic failure to learn and apply the breadth and meaning of the rules, neither of which is consistent with suitability to run a daycare, is far different than a lack of good character. We also observe that the legislature in drawing section 11(2)(a) as it did must have intended distinct meanings for the different considerations set out there, and could not have intended them to be conflated when the time for interpretation arrived. "Good character" must, it seems to us, refer to something other than (to paraphrase) a lack of training or experience or of the required personality, ability and temperament picked up in the succeeding provisions. The concept of good character is less specific than these other qualities and strikes at the core of an individual's integrity, honesty and/or decency. One could certainly conclude on application of section 11(2)(a) that training and experience, and the required personality, ability and temperament, are all lacking, without also finding a lack of good character. As it happens, that distinction was reflected in the decision of Licensing prior to the reconsideration decision, and it likewise shall be reflected in our decision on this appeal, as we do not share the view that the Appellant lacks good character.

[124] We have made findings adverse to the Appellant in this decision, but it is important to add the following. First, she struck us as an honest and forthright witness. Second, we believe that she genuinely cared for the children formerly in her charge, and that her work in child care was in that sense more than just a job to her. Third, she appeared to us a decent person – an odd comment to make in most adjudicative contexts, but not so here where the Appellant's character has been impugned.

[125] The difficulty for the Appellant is that good character was only one potential contra-indication here for a licence. There are, as we have said, two other important ones, as to which we are unpersuaded, despite the comments just made.

[126] Before closing, we will comment on the Appellant's submission that her application should receive particular favour because of an apparent or possible lack of similar resources in the Penticton area, such that the community interest would be harmed by a refusal. The Respondent answers that this cannot be a

factor to be considered against the need for fully qualified licensees and in light of the strict statutory mandate that applies to the MHO in connection with these applications. We agree with the Respondent.

7. DECISION

[127] For the above reasons we have concluded that the Appellant has not met her burden of showing that the reconsideration decision was not justified. In the result, that decision is confirmed and the appeal is dismissed.

"Patrick F. Lewis"

Patrick F. Lewis, Panel Chair
Community Care and Assisted Living Appeal Board

"Helen Ray del Val"

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

"Harry Gray"

Harry Gray, Member
Community Care and Assisted Living Appeal Board

April 4, 2017

APPENDIX A

EXCERPTS FROM THE *COMMUNITY CARE AND ASSISTED LIVING ACT*

[SBC 2002] CHAPTER 75

Powers of medical health officer

11 (1) Subject to this Act and the regulations, a medical health officer may issue to an applicant a licence to operate a community care facility and specify in the licence the types of care that may be provided in the community care facility.

(2) A medical health officer must not issue a licence under subsection (1) unless the medical health officer is of the opinion that the applicant,

(a) if a person, other than a corporation,

(i) is of good character,

(ii) has the training, experience and other qualifications required under the regulations,

(iii) has the personality, ability and temperament necessary to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for, and

(iv) agrees to be readily available to respond to inquiries from the director of licensing or the medical health officer and to provide to them financial and other records of the community care facility that can reasonably be presumed to contain information relevant to the administration of this Act and the regulations,

Reconsideration

17 (1) In this section:

"action", in relation to a licence, means

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

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

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

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

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

(3) If a medical health officer considers that this would be appropriate to give proper effect to section 11, 13, 14 or 16 in the circumstances, the medical health officer may, on receipt of a written response,

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

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

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

Appeals to the board

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

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

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

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

EXCERPTS FROM THE
CHILD CARE LICENSING REGULATION

Definitions

1 In this regulation:

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

"responsible adult" means a person who is qualified to act as a responsible adult under section 29 *[responsible adults]*.

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, and

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

Responsible adults

29 To qualify for employment in a community care facility as a responsible adult, a person must

(a) be at least 19 years of age,

(b) be able to provide care and mature guidance to children,

(c) have completed a course, or a combination of courses, of at least 20 hours duration in child development, guidance, health and safety, or nutrition, and

(d) have relevant work experience.

Nutrition

48 (7) A licensee must ensure that food and drink are not used as a form of reward or punishment for children.

Harmful actions not permitted

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

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

(b) confinement or physical restraint by an employee, except as authorized in a child care's plan if the care plan includes instructions respecting behavioural guidance;

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

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

(e) separation, without supervision by a responsible adult, from other children;

(f) as a form of punishment, deprivation of meals, snacks, rest or necessary use of a toilet.

APPENDIX B

COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD
REQUESTING A SITE VISIT

Most hearings are conducted at a place in the same city as the facility that is the subject of the appeal but the hearing panel would not normally visit or see the facility in person in the usual course of a hearing.

However, prior to or during a hearing the Board may in some circumstances, either on its own initiative or at the request of a party, schedule a site visit to the facility as part of the hearing process.

If a party wishes to schedule a site visit, the request should be made as early as possible because additional time in the hearing schedule may be required to accommodate the visit. If the site visit will be on private property not owned by the appellant, the party requesting the site visit must ensure that the property owner consents to the site visit.

A request for the panel to make a site visit during a hearing should be made in writing, prior to the start of the hearing, with a copy of the request delivered to the other party as well as the Board office. Reasons for the site visit should also be included in the request.

The purpose of a site visit is to provide the panel with the opportunity to see the facility that is the subject of the appeal, learn more about the issues in the appeal and better understand the evidence. The purpose is not to gather evidence.

The panel's observations during a site visit are not evidence. A site visit is not to be used as a fact-finding expedition, and new evidence will normally not be accepted, unless in accordance with the rules of procedural fairness and in the presence of the official recorder.

Some examples of when a site visit has been done in the past include situations where viewing the location of the facility would provide a context for issues around safety for children walking to off site playground facilities or school in order to show the routes taken, distances and traffic patterns or to view the nearby hazards and the type, height and state of repair of fencing around an outdoor play space that is alleged to be inadequate, or viewing the layout of an adult care facility room where the issues on appeal revolve around the size and configuration of the space.

Prior to a site visit, the panel and parties will agree upon the date and time of the visit and how the visit will proceed. Normally, the site visit will not be conducted unless all parties to the appeal and all members of the panel hearing the appeal are present and transportation arrangements will ensure that the Panel travels separately from either of the parties.