BRITISH COLUMBIA

Community Care and Assisted Living Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website:
www.ccalab.gov.bc.ca
Email: ccalab@gov.bc.ca

DECISION NO. 2018-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:	Alyson Culbert, Licencee (Operating as Sundance Playschool)	**APPELLANT**
AND:	Clare Cronin, Reginal Senior Licensing Officer, Shelley McClure, Acting Regional Manager, Community Care Facility Licensing, Dr. Richard Stanwick, Chief Medical Officer, Island Health Authority	**RESPONDENT**
BEFORE:	A panel of the Community Care and Assisted Living Appeal board Helen Ray del Val, Board Chair	
DATE:	Conducted by way of written submissions concluding on March 12, 2018	
APPEARING:	For the Appellant: Peter W. Klassen For the Respondent: Kathryn Stuart	

PRELIMINARY ISSUE OF JURISDICTION

INTRODUCTION

[1] On January 08, 2018 the Appellant provided the Community Care and Assisted Living Appeal Board (the "CCALAB" or the "Board") with a Notice of Appeal which purported to appeal certain findings of regulatory non-compliance made by the Respondent. The Appellant believes the Respondent's adverse findings resulted in an unduly negative risk assessment and rating for the care facility, and the improper imposition of certain conditions on the facility's operations. The Appellant seeks the following relief from the Board:

> The **Appellant seeks** an order of the **Board** that each of the enumerated items of non-compliance are unsubstantiated and that the items be removed from the Risk Assessment Report of the Sundance Playschool. [Emphasis in original]

[2] On receipt of the Appellant's Notice of Appeal, the Board asked for written submissions from the parties on the preliminary issue of whether the Board has jurisdiction to hear and decide this appeal.

[3] I have concluded that the Board does not have the jurisdiction to hear this appeal because the Board has authority to consider only those matters prescribed by s. 29 of the *Community Care and Assisted Living Act* [SBC 2002] c. 75 (the "*Act*"), and the regulatory measures taken by the Respondent against the Appellant do not fall within s. 29.

BACKGROUND

[4] In 2016, following a Licensing Investigation, a Medical Health Officer ("MHO") with Island Health attached conditions to the Appellant's licence to operate her daycare facility, including the condition that "*Alyson Culbert will not direct any aspect of care provided to children in care and will not be the manager*" (the "2016 Licence Condition"). The Appellant did not and has not sought a reconsideration of the action taken by the MHO attaching the 2016 Licence Condition.

[5] On August 11, 2017, the Respondent carried out an inspection of the care facility, in part to monitor compliance with the 2016 Licence Condition. During this inspection, Licensing officers documented several significant contraventions of the *Child Care Licensing Regulation* (BC Reg. 332/2007).

[6] Licensing conducted a risk assessment of the Appellant's childcare facility on August 14, 2017. The risk assessment assigned the Appellant's care facility a risk rating of "high", due to both the contraventions of the Regulation observed during the August 11 Inspection, and the "Operational History" of the centre, which included the imposition of the licence conditions in 2016.

[7] As a result of the August 11, 2017 Inspection, Island Health undertook a Licensing Investigation of the Appellant and her facility (the "2017 Investigation"). In the course of the 2017 Investigation, and in accordance with s. 12(2) of the *Child Care Licensing Regulation*, the Appellant provided Licensing with a Health and Safety Plan which was approved by Licensing on August 11, 2017. The Health and Safety Plan contained a several terms, including the following: (collectively, the "Health and Safety Plan Terms")

1. MS employed by the facility, as a child educator, could not work alone at the facility.

2. MS will be required to take a behaviour guidance course by December 2017.
3. That the Licensee (Alyson Culbert) will work half days each day until AMR, the new ECE's paperwork has arrived. MS will work in the afternoon, when it is calmer in the daycare and most children are either napping or having quiet time."
4. Confirmation that the Appellant will continue to comply with the 2016 Licence Condition that she 'not direct any aspect of care provided to children in care and will not be the Manager".

[8] On August 31, 2017, Licensing sent the Appellant a "Preliminary Summary Report of Investigation" which outlined the investigation process and tentative findings. By letter dated October 10, 2017, the Appellant, through her counsel, responded to this preliminary report and provided additional information and disputed some of the report's findings, including the August 14, 2017 risk assessment score. The Appellant also took corrective measures to address the findings.

[9] The Health and Safety Plan was terminated on October 30, 2017.

[10] On November 03, 2017, Licensing provided the Appellant with the Final Summary Report of Investigation in relation to the 2017 Investigation, which concluded that "*Licensing recommends no action on the license for Sundance Playschool at this time*".

[11] In a subsequent letter dated December 07, 2017, Licensing provided a response to the Appellant's request for a review of the August 14, 2017 Risk assessment, which was made in the Appellant's October 10, 2017 letter to Licensing. The December 07, 2017 letter declined to remove the stated items of non-compliance from the risk assessment as the Appellant had requested, but Licensing did reduce the weight of some of the items on the risk assessment resulting in a lowering of the risk assessment score. It is the decision of the Licensing officers in this December 07 letter that the Appellant seeks to appeal.

The Notice of Appeal

[12] The Appellant's Notice of Appeal to the Board was sparse in content, and stated the Appellant was appealing a "REVIEW conducted by the RESPONDENTS of an August 11, 2017 Inspection and an August 14, 2017 Risk Assessment of Sundance Playschool" [emphasis in original]. The 'decision' which was identified and attached to the Notice of Appeal as required by Rule 2(2)(c) and (d) of the Board's Rules, was the December 07, 2017 letter from Licensing which reviewed the Risk Assessment.

[13] On receiving the Notice of Appeal, the Board asked counsel for the Appellant to specify the provisions of the *Act* on which the Appellant was relying to bring this appeal.

[14] In an undated letter following the Board's request for clarification, the Appellant's counsel stated that the appeal was brought under sections 29(2)(b) and 29(2)(d) of the *Act*, and listed the four Health and Safety Plan Terms which he stated were imposed as a result of "[t]he referenced non-compliance determinations" which he said resulted in "a detrimental and erroneous Risk Assessment of 'High'".

[15] Following correspondence from counsel for the Respondent, dated January 30, 2018, which raised the issue of the Board's jurisdiction to hear this appeal, the Board proceeded to solicit written submissions from the parties on the preliminary issue of whether the Board has jurisdiction to hear and decide this appeal.

The Appellant's Late Reply

[16] Before dealing with the issue of jurisdiction, I will first deal with the question of whether the Appellant's "Reply Submission to Respondent's Reply", filed after the expiry of the second deadline for provision of reply submissions, will be accepted.

[17] On February 02, 2018, the Director of the CCALAB provided the parties with instructions regarding the submission process and schedule for the preliminary issue of jurisdiction in this appeal. The letter set February 23, 2018 as the deadline for the parties to file their submissions, and March 5, 2018 as the deadline for filing replies for either party who wished to reply to the opposing party's original submissions.

[18] Both parties filed their initial written submissions by Feb 23, 2018, and on March 5, 2018, the Respondent filed its reply submission. No reply submission by the Appellant was received on or before this deadline.

[19] On March 07, 2018 the Board received a letter from counsel for the Appellant objecting to the Respondent's filing of a reply and to the substance of the reply, and seeking an extension of time to file a Reply submission on the following basis:

> It was my understanding of instructions from the Board, that both parties were to make submissions by February 23, and there would be no further submissions. My submission was based on this understanding.

[20] I wrote to the Appellant's counsel on March 08, 2018 drawing his attention to the deadlines and procedures for filing submissions and replies set out in the Director's February 02, 2018 letter. At the same time, I explained to the parties that the reason the Board required the parties to file

reply submissions at the same time was to avoid giving either party the perceived advantage of "having the last word", and to prevent delays caused by a protracted submissions process. I granted the Appellant an extension to 10am on March 12, 2018 and advised the Respondent that if it wished, it could file a revised reply by the same extended deadline. The Respondent did not object to this extension of time.

[21] At approximately 3pm on March 12, 2018, after the expiry of the extended deadline for filing reply submissions, the Appellant provided to the Board via email a "Reply Submission to Respondent's Reply" without acknowledgement that the filing was late or an explanation therefor.

[22] In my view, styling the submission as a "Reply Submission to the Respondent's reply" shows no appreciation for the Board's instructions that what was to be filed, if a party wished, was a reply to the other party's original submissions. Further, not abiding by the original deadline in-effect enabled a circumvention of a process intended to avoid giving either party the advantage of "having the last word."

[23] Since the Respondent has not raised any objection to the Appellant's late filing of a rebuttal to its reply, I have accepted the submission; however, I find the apparent lack of regard for the Board's instructions, processes and deadlines disconcerting.

ISSUES

[24] The question of whether the Board has jurisdiction to hear this appeal depends on the answers to the following questions:

With respect to an appeal under s. 29(2)(d)

1) Was the Appellant's ECE certificate suspended, cancelled, or made subject to terms and/or conditions?

With Respect to an Appeal under s. 29(2)(b)

2) Was any action or summary action taken within the meaning of s. 17 of the *Act* through:

    a. the imposition of conditions on the Appellant's license; and/or
    b. the performance of the risk assessment and assignment of a risk rating?

RELEVANT LEGISLATION

[25] Section 29(2) of the *Act* sets out what matters can be appealed to the Board.

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

(a) the minister has appointed an administrator under section 23,
(b) a medical health officer has acted or declined to act under section 17 (3) (b),
(c) the registrar has acted or declined to act under section 28 (3) (b), or
(d) a person has refused to issue a certificate, suspended or cancelled a certificate or attached terms or conditions to a certificate under section 8. [Emphasis added]

29(2)(d) appeals

[26] Appeals under section 29(2)(d) involve the certification of early childhood educators, including the issuance, cancellation or variation of an ECE's certification.

Certification of educators of children

8 (1) A certificate may be issued to a person in accordance with the regulations stating that the person has the qualifications required by the regulations for certification as an educator of children, or as an educator in the manner specified in the certificate respecting children, at a community care facility.

(2) A certificate issued under subsection (1) or under section 9 of the Community Care Facility Act, R.S.B.C. 1996, c. 60, may be suspended or cancelled, or terms and conditions may be attached to it, following a hearing established and conducted in accordance with the regulations.

Section 29(2)(b) Appeals

[27] Appeals under s. 29(2)(b) involve specified "actions" which a MHO can reconsider under s. 17(3)(b) of the *Act.* Under s. 17 (2) of the *Act*, before taking certain specified "actions" (or soon after taking specified "summary actions") on a licensee's licence, a MHO must give the licensee written reasons for the action or summary action, and an opportunity to respond. Under s. 17(3)(b) of the *Act* a MHO may, on receipt of a written response to the reasons given for the "action" or "summary action", decide to either act to change the proposed action or summary action, or decline to act to change the proposed action or summary action. Under s. 17(5) of the *Act*,

the MHO must provide written reasons to the licensee for either acting or declining to act under s. 17(3)(b).

> **Reconsideration**
> **17** (1) In this section:
> **"action"**, in relation to a licence, means
>
> (a) a refusal to issue a licence under section 11 (1),
> (b) an attachment, under section 11 (3), of terms or conditions,
> (c) a suspension or cancellation, an attachment of terms or conditions, or a variation of terms or conditions under section 13 (1), or
> (d) a suspension or cancellation of an exemption or an attachment or variation of terms or conditions under section 16 (2);
>
> **"summary action"** means a suspension or cancellation of a licence, an attachment of terms or conditions to the licence, or a variation of those terms or conditions under section 14;
>
> **"written response"** means a written response referred to in subsection (2) (b).
>
> (2) Thirty days before taking an action or as soon as practicable after taking a summary action, a medical health officer must give the licensee or applicant for the licence
>
> (a) written reasons for the action or summary action, and
> (b) written notice that the licensee or applicant for the licence may give a written response to the medical health officer setting out reasons why the medical health officer should act under subsection (3) (a) or (b) respecting the action or summary action.
>
> (3) If a medical health officer considers that this would be appropriate to give proper effect to section 11, 13, 14 or 16 in the circumstances, the medical health officer may, on receipt of a written response,
>
> (a) delay or suspend the implementation of an action or a summary action until the medical health officer makes a decision under paragraph (b), or
> (b) confirm, rescind, vary, or substitute for the action or summary action.
>
> ...
>
> (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.

Health and Safety Plans

[28] Health and Safety Plans are typically filed in the course of an investigation pursuant to s. 12(2) of the *Child Care Licensing Regulation* which provides as follows:

> **Investigation or inspection**
>
> **12** … (2) If requested by a medical health officer, a licensee who is being investigated must provide to the medical health officer a plan to ensure the health and safety of children during the investigation.

DISCUSSION AND ANALYSIS

Parties Positions

[29] The Respondent says that none of the measures taken against the Appellant, namely subjecting the care facility to conditions under a Health and Safety Plan, carrying out the risk assessment, and assigning a risk rating to the facility constitutes taking an "action" within the meaning of s. 17 of the *Act*.

[30] The Appellant says that the appeal is brought pursuant to sections 29(2)(b) and 29(2)(d) of the *Act*. The Appellant does not explain how or why the appeal falls under s. 29(2)(d).

[31] The Appellant explains that the appeal fits under s. 29(2)(b) because "the Respondents cited in the Notice of Appeal failed to act under section 17(3)(b) of the *Act* to rescind the conditions and vary the findings contained in the Preliminary Summary Report of Investigation …and the Risk Assessment on which the Summary Report was based."

[32] The Appellant argues that the Health and Safety plan constitutes "conditions" which are attached to the Appellant's licence "in the form of restrictions". The Appellant further argues that the conditions fall under the definition of "action" under s. 17(1)(c) of the *Act*, because they cannot be altered or removed without the approval of Licensing.

[33] In her March 12 Reply, the Appellant raises the additional argument that the Licensing officer's "imposition" of the Health and Safety Plan amounts to "summary action" as described in s. 14 of the *Act* because through it, Licensing "imposed a condition on the License without notice". The Appellant goes on in her March 12 Reply to argue that although it may be that the "condition" imposed through the requirement of the Health and Safety Plan is imposed in a manner which is "different", "from the

perspective of import and effect, so long as the plan remains in place it is as much a restriction on the License as conditions imposed in a different fashion".

[34] The Appellant also submits that the risk assessment conducted on August 14, 2017 is an 'action' within the meaning of ss. 7 and 29 of the *Act*, because the classification of "high risk" is a "term of the license that can have a serious adverse impact on the license".

[35] The Appellant states that "the inspection report" (the Summary Report) is an integral part of the risk assessment in this instance". However, the Appellant does not explain how the connection between the two makes either the "Summary report" or the risk assessment appealable.

ISSUE #1 - Section 29(2)(d) - Was the Appellant's ECE certificate suspended, cancelled, or made subject to terms and/or conditions?

[36] Although the Appellant has sought to bring this appeal under s. 29(2)(d), the Appellant has offered no submission regarding why this appeal would fall under this section of the *Act*.

[37] In my view, s. 29(2)(d) does not apply to this appeal. This section of the *Act* deals with the certification of Early Childhood Educators, and gives the right to appeal a refusal for issuance, cancellation, suspension or variation of the terms of certification, to a person who is a holder of, or applicant for an Early Childhood Educator's Certificate.

[38] There is no evidence that the Appellant or any other party to this proceeding is such a person, or if she is such a person that her certification as an ECE is at issue. Therefore, the Board does not have jurisdiction to consider this appeal under s. 29(2)(d) of the *Act*.

ISSUE #2(a) - Section 29(2)(b) - Was any action or summary action taken within the meaning of s. 17 of the Act through the imposition of conditions on the Appellant's Licence?

[39] The Appellant has argued that the four Health and Safety Plan Terms constitute 'conditions' on the Appellant's licence which the Appellant is entitled to appeal. I disagree with this position.

The 2016 Licence Condition

[40] While the 2016 Licence Condition (that the Appellant not direct any aspect of care provided to children in care and will not be the Manager) is clearly a condition which was attached by a MHO to the Appellant's licence in 2016, it is not within the purview of this appeal for the Board to consider the question of whether the MHO should have rescinded or varied it since the deadlines for asking for reconsideration and appealing the action taken in 2016 have all long passed. That condition was attached to the Appellant's licence in 2016 and was an action taken by the MHO within the meaning of section 17 of the *Act,* but it is not within the scope of this proceeding to reconsider the action taken by the MHO in 2016.

The remaining three terms of the Health and Safety Plan

[41] The question of whether the imposition of the remaining three Health and Safety Plan Terms amounts to an action or summary action taken under s. 17 of the *Act* is now academic, because the Health and Safety Plan which contained these conditions is no longer in place; it was terminated as of October 30, 2017. Therefore, even if they were once conditions attached to the Appellant's licence, they no longer are.

[42] I would comment that not all supervisory or regulatory restraints imposed by the regulator amount to an action or summary action under s. 17 of the *Act*.

[43] Enforcement actions against a licensee can range from mild to severe, from short-term to permanent. As noted by former Member Barnsley in Decision No. 2010-CCA-009(a), "*'[a]ction' and 'summary action' do not mean any type of action by a medical health officer. These terms have specific definitions within section 17 of the Act"*[1].

[44] Section 17 of the *Act* prescribes what types of enforcement actions are severe enough to be appealable and to warrant external intervention. In my view, the imposition of temporary terms of the Health and Safety Plan in this case do not rise to this level.

ISSUE #2(b) - Section 29(2)(b) - Was any action or summary action taken within the meaning of s. 17 of the Act through the performance of the risk assessment and assignment of a risk rating?

[1] Decision of Member Barnsley in 2010-CCA-009(a), at para. 15.

Risk assessment and Risk Rating

[45] The risk assessment conducted by the Licensing Officer on August 14, 2017 resulted in the assignment of the "high" risk rating to the Appellant's facility. I do not agree with the Appellant that the risk assessment can be characterized as a "term of the license" simply because of its potential to bring negative publicity to the licensee, or adversely affect the "marketability of the facility".

[46] A risk rating is not a license or operational condition. Further, a risk assessment is not an enforcement action. It is a standard monitoring or supervisory tool used by regulators across many industries for early detection of risk factors which an individual regulated entity and/or the regulated industry as a whole may be facing. Carrying out a risk assessment, in and of itself, is not an enforcement action even though poor assessment results may eventually lead to the consideration of whether enforcement action is necessary.

[47] Since neither the performance of the risk assessment nor the assignment of a risk rating constitutes an action within s. 17 of the *Act*, they do not attract a right of reconsideration under s. 17(3)(b), and, therefore, are not appealable. The Board has no jurisdiction to adjudicate the findings made in a risk assessment report or an assignment of risk rating.

DECISION

[48] For the reasons set out above, I find the Board does not have jurisdiction to consider the matter. "The Board is a tribunal created by statute and its jurisdiction is limited to those powers that are conferred on it in the *Act*."[2] Under the *Act*, the Board has jurisdiction to hear only those matters specified in s. 29. The decision that the Appellant is seeking to appeal is not one of those matters that can be appealed to this Board.

"Helen del Val"

Helen Ray del Val
Board Chair

March 19, 2018

[2] Decision of Member Barnsley in 2010-CCA-009(a) paragraph 4.