



Community Care and Assisted Living Appeal Board

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DECISION NO. 2019-CCA-003(c)

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

BETWEEN:	Safwana Ahmed	APPELLANT
AND:	Vancouver Coastal Health Authority	RESPONDENT
BEFORE:	A Panel of the Community Care and Assisted Living Appeal Board Richard Margetts, Panel Chair	
DATE:	Conducted by way of written submissions concluding on September 16, 2020	
APPEARING:	For the Appellant: Clea F. Parfitt, Counsel For the Respondent: Robert P. Hrabinsky, Counsel	

Preliminary Decision Regarding Application for Disclosure and Cross-Examination on Affidavits

APPLICATION

[1] This is an application by the Appellant, Safwana Ahmed, that she be at liberty to cross-examine Dr. H and M on their affidavits filed in these proceedings, and for the production of further specified documentation. The Respondent opposes both the application for cross-examination and the request for further document disclosure.

PRELIMINARY MATTER – EXTENSION OF TIME TO FILE SUBMISSIONS

[2] The Appellant was required to file her final reply submissions with the Board by September 14, 2020, but did not do so until September 16, 2020. At the time she filed her final reply, she sought an extension of time to file. The Respondent confirmed it did not oppose the extension request and, as such, I have granted the extension by consent, and have considered the Appellant's final reply submissions as part of this application.

APPLICATION FOR CROSS-EXAMINATION

[3] The circumstances in this matter are somewhat unusual in that the appeal was filed in the early days of the COVID-19 pandemic, and by the April 22, 2020 decision of the Chair of the Appeal Board (the "Form of Hearing Decision"),¹ it was determined that the matter should proceed in a composite fashion. In the Form of Hearing Decision, Chair Narod gave directions respecting the exchange of affidavits, and thereafter the opportunity to make submissions on various issues including cross-examination. In particular, Chair Narod stated (at para 42):

[42] Accordingly, I have decided to order that there be a composite form of hearing of this appeal. This will require the assigned panel to exercise its discretion to engage in case management discussions with the parties and make decisions from time to time about how to proceed. The hearing will start with each party exchanging affidavits setting out their evidence. Each party will then have an opportunity to make submissions about the following issues:

- a) which parts, if any, of the other side's affidavit evidence the panel should subject to cross-examination,
- b) what additional questions each party may put to the other side's affiants, and whether those affiants must obtain the answers to those questions from the Authority if they do not know the answers themselves.
- c) whether any further questions should be asked in the form of cross-examination, or by further affidavit.
- d) whether a party may seek evidence from a person who has not provided an affidavit, but who could be subpoenaed by that party, and if so whether and, if so, how to obtain the evidence of that person.

[4] The parties have now reached an impasse – the Respondent says that cross-examination is not necessary, arguing that cross-examination is not of right and that the Board should only proceed to allow cross-examination where:

- a. there is conflicting evidence on a material fact in issue;
- b. cross-examination is relevant to an issue that may affect the outcome of the appeal; and
- c. cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

[5] The Appellant submits cross-examination is required to "establish the limits of the witnesses' direct knowledge and the assumptions they made in accepting the observations and opinions of others which are hearsay evidence here".

[6] At paragraph 5 of the Form of Hearing Decision Chair Narod stated that "jurisprudence and statute have recognized the right of an administrative tribunal to control its own process, including the right to determine the form of a hearing absent any statutory constraint on that right".

¹ Decision No. 2019-CCA-003(a).

[7] She pointed out that the CCALAB appeal process is a hybrid between a hearing *de novo* and an appeal on the record, with the appeal being closer to a *de novo* hearing. However, an appeal differs from the written process that the medical health officer undertakes, among other things, because the Appellant bears the burden of proving her case.

[8] In paragraphs 31 through 37 of her written argument, the Appellant identifies areas that would be explored in cross-examination. Examples of what issues the Appellant says need to be clarified or further explored through cross-examination include:

- a. the context and timing of the witnesses' reliance on breaches of the *Act*;
- b. the limits of liability of persons who are not community care operators;
- c. alleged argumentative content of one witness' affidavit material;
- d. the witnesses' knowledge of institutional practices of the Respondent;
- e. confirmation of what specific information the witnesses considered in their decision-making and the ability to challenge what the witnesses said in this regard; and
- f. whether and how the witnesses might have relied on information which was not before them.

[9] Each of the above areas relates to the credibility and weight to place upon the affidavit material of the Respondent's deponents and in my view, can assist in determining whether the institutional decision-making here was reasonable, justified and fair.

[10] I note a further argument of the Appellant that (at para 37 of her written submissions):

When an individual is challenging the decision-making of a large government institution, it is not unusual for considerable information to be in the hands of the government institution alone. As a consequence, it is not unusual for an individual to require cross-examination to make part of their case against the government institution. These are the circumstances here.

[11] I accept the Appellant's submission and agree that in the present case the Respondent has access to greater information and detail about the decision which was made than the Appellant, and the Appellant should be allowed to cross-examine the Respondent's witnesses as a matter of fairness to ensure she is able to make her case fully before this Board.

[12] The Respondent's principal objection is that the decision speaks for itself, and that all the information required to undertake an assessment is within the decision. It does not allow that cross-examination or disclosure of further information may provide insight into the decision-making process and the reasonableness of the decision itself which, given the *de novo* nature of the hearing, is fundamental to the consideration of the decision.

[13] The Respondent further argues that cross-examination and disclosure will add to the delay, and to the cost, of the hearing. It submits that the appeal process of this Board should, quite correctly, be as economic and expeditious as may be possible in all the circumstances. But while that is an admirable objective, and certainly a guide to how the proceeding should be conducted, it cannot be accepted as an end in itself in circumstances where the prima facie objective of any judicial or quasi-judicial function is to achieve a proper outcome. Here the delays are all explainable in terms of process. The various applications that are being undertaken by the parties arise from the peculiar circumstances that now exist in the community or otherwise arise as a result of legitimate differences that exist between the parties that must be resolved in order to allow the hearing to proceed with all reasonable fairness.

[14] The Respondent argues that cross-examination should only be permitted in circumstances that align themselves with court practice. I am not satisfied that the Respondent has, in any event, established that a court would not allow cross-examination in these circumstances. That being said, this tribunal is not a court and has the authority to determine its own processes. Much of the information contained in the affidavits provided by the Respondent is predicated upon information and belief, as a result of the work product of others employed by the Respondent. It is only fair that the Appellant should have the opportunity of examining the deponents with a view to assessing the reliability, accuracy and reasonableness for the conclusions that have been drawn to support the refusal to grant a license to the Appellant.

[15] Accordingly, I allow the Appellant to cross-examine Dr. H and M. I am mindful of Dr. H's professional commitments at this time and trust that counsel can satisfactorily arrange for a mutually convenient time for the examination to take place in such fashion that it will present as little inconvenience to Dr. H as may be possible in all the circumstances.

[16] I note that the Appellant has sought to conduct the cross-examination "in person in Vancouver in a room large enough to provide for social distancing", however, the Board has determined that at present time no in-person hearings will be taking place. The Registry will work with the Parties to arrange a suitable electronic meeting for the purposes of conducting the above-ordered cross-examination.

APPLICATION FOR DISCLOSURE OF INFORMATION/DOCUMENTS

[17] The Appellant also seeks disclosure of specific information and documentation set out in paragraph 15 of her written argument. In particular, the Appellant is seeking disclosure of the following:

- a. The number of Family Child Care licenses applied for from Vancouver Coastal Health Authority ("VCHA") in 2018 and 2019.
- b. The number of Family Child Care licenses issued by VCHA in 2018 and 2019.

- c. The Number of Family Child Care license Applications denied by VCHA in 2018 and 2019 for the sole reason that the operator had in the past been found to be operating with too many children.
- d. The Number of Family Child Care Licensees found by VCHA, after inspection, to be operating with too many children in their care in 2018 and 2019.
- e. Actions taken by the VCHA in respect of Family Child Care Licensees found after inspection to be operating with too many children in their care in 2018 and 2019.
- f. The number of Family Child Care Licenses cancelled in 2018 and 2019 and the communications with the licensees explaining the decision to cancel their licenses.

[18] The Appellant argues that this information is necessary to evaluate the basis upon which the Respondent has denied her a license. She also submits that personal information should be redacted from all of the documents/information she is seeking to have disclosed.

[19] She says that some of the information being requested is necessary to set out the general practice of VCHA, and she argues that if VCHA is less strict in circumstances in which a child care facility is found to be operating with too many children, the Board should be more wary of accepting that the denial of her license was reasonable in all the circumstances.

[20] The Respondent opposes disclosure of this information and argues that the information is "irrelevant, immaterial and entirely extraneous to the issues before the CCALAB". The Respondent argues the requested information is about circumstances which are not analogous to those of the Appellant. Further, the Respondent submits that even if the circumstances were analogous, "it is well established that a regulator's response to others in similar circumstances is irrelevant and immaterial" and, therefore, "it would constitute an error for the CCALAB to have regard to such irrelevant and extraneous matters".

[21] The Board is cognizant that these documents and the facts they reflect may or may not ultimately be found by the Panel to be relevant, as is submitted by the Respondent. They may have little or no probative value - their ultimate admissibility to be determined in due course. However, bearing in mind the nature of this hearing (tending toward a *de novo* hearing), it is not unreasonable for this information to be sought and produced. Accordingly, that order is also made.

[22] I would expect disclosure and any necessary documentation should be provided in anticipation of cross-examination.

DECISION

[23] For the above reasons, I order that by no later than **October 30, 2020**, the Respondent shall provide the Appellant with the information set out at paragraph 15 of the Appellant's submissions.

[24] I further order that the Appellant shall be permitted to cross-examine Dr. H and M on their affidavits. The Board will be in contact with the Parties after provision of the requested information/documentation to arrange a time which is mutually agreeable to the parties for the cross-examination to occur by electronic means.

"Richard Margetts"

Richard Margetts,
Panel Chair, Community Care and Assisted Living Appeal Board

October 13, 2020