



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. CCALB-CCA-20-A002(a)

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

BETWEEN: The Society of Richmond Children's Centres **APPELLANT**

AND: Dr. Meena Dawar, Medical Health Officer,
Vancouver Coastal Health Authority **RESPONDENT**

BEFORE: A panel of the Community Care and Assisted
Living Appeal Board
Alison Narod, Board Chair

DATE: Conducted by way of written submissions
concluding on June 05, 2020

APPEARING: For the Appellant: Kevin Lim-Kong, SRCC Board Chair
For the Respondent: Robert P. Hrabinsky, Counsel

Preliminary Decision on Form of Hearing and Preliminary Issues

[1] The Respondent/Applicant is the Vancouver Coastal Health Authority - Community Care Facilities Licensing (the "Respondent" or "Licensing"). The Appellant/Respondent is the Society of Richmond Children's Centers (the "Appellant" or "SRCC").

[2] The Respondent applies for directions concerning the mode of conducting the hearing of the Appellant's Appeal and the disposition of certain preliminary issues.

Relevant History

[3] The history of this appeal is complex and disputed. A very brief description of that history is set out below. I have considered all of the facts and submissions the parties raised, whether or not I have specifically referenced them in this decision.

[4] An alleged assault involving a staff member and a child occurred at the Appellant's facility on January 3, 2019. On January 4, 2019, the staff member was

suspended pending the outcome of an investigation. Eventually, the Respondent acknowledged that the evidence did not support a finding that there was an assault, although it also acknowledged that the staff member accidentally scratched the child.

[5] To date, there have been three relevant reports, one application for reconsideration, two applications for appeal, and one preliminary decision by the Tribunal, although not in that order.

[6] First, on February 7 or 8, 2019, Licensing produced a "Preliminary Report", reviewing four allegations and stating that the Appellant had engaged in four regulatory breaches and contraventions of paragraphs 51(1)(a), 52(1)(b), 52(2), and 56(2) of the *Child Care Licensing Regulation*, BC Reg 332/2007 (the "Regulation"). The document did not propose or implement any actions or summary actions under section 17 of the *Community Care and Assisted Living Act*, SBC 2002, c 75 (the "Act").

[7] In response to objections and requests made by the Appellant for what, in administrative parlance, amounts to disclosure and reasons (an issue that the Appellant continues to raise to date), Licensing issued a "Final Report" on March 29, 2019. This Final Report, which included additional information, reviewed the allegations and affirmed three of the four regulatory breaches referred to in the Preliminary Report; including contraventions of paragraphs 51(1), 52(1), 52(2) and 56(2) of the Regulation. Licensing also immediately imposed a requirement that the staff member not be left alone with children during the facilities operating hours. The Final Report failed to advise the Appellant of its statutory right to request that a Medical Health Officer (a "MHO") reconsider the March 29, 2019 Final Report.

[8] On April 10, 2019, not knowing of its right to seek reconsideration, the Appellant filed a Notice of Appeal (the "First Appeal") regarding the March 29, 2019 Final Report.

[9] On April 24, 2019, without being asked to do so, Licensing advised the Appellant that it would re-open its investigation in order to provide the Appellant with more comprehensive reasons. Additionally, it advised that it had taken "summary action" to impose a term and condition on the Appellant's license that the staff member not be left alone with children during the Appellant's operating hours, pending the taking of any further "action" with respect to the licence following the completion of the re-opened investigation.

[10] On April 29, 2019, the Appellant opposed Licensing's authority to reopen its investigation, saying this was nothing more than an attempt to have a second kick at the can after learning of the Notice of Appeal. The Appellant argued this was an abuse of process. Moreover, a reopening for the sole purpose of redrafting a second final decision would constitute an unreasonable delay.

[11] The parties made written submissions about two preliminary questions raised by the Tribunal about the Notice of Appeal, one of which was whether the Tribunal had jurisdiction to hear the First Appeal. In brief, the Appellant claimed the March 29, 2019 Final Decision had gone through the reconsideration process and met the precondition for an appeal to the Tribunal. The Respondent disputed this, saying no

decision had yet been made to trigger the right to seek reconsideration and therefore no reconsideration decision existed that met the precondition for appeal.

[12] In the meantime, on May 9, 2019, Licensing issued a further report containing its "more comprehensive written" reasons, and attaching a number of documents, including interview notes previously requested by the Appellant. The Appellant had not been invited to provide submissions about the issues that led to the reopening or the newly disclosed documents beforehand.

[13] In its reasons, Licensing rejected the Appellant' argument that the March 29, 2019 Final Decision was a nullity. It found there was insufficient evidence to conclude that a child was assaulted at the facility. Nonetheless, it found there had been inappropriate behavioural guidance and restraint. Licensing found the Appellant had contravened paragraphs 51(1)(a), 52(1)(b), 56(1)(d) and (2) and 58(1)(a)(b) and (c) of the Regulation. The contraventions of paragraph 58 were new. Additionally, Licensing confirmed the summary action it previously imposed against the staff member, but it did not impose any new action.

[14] Notably, the May 9, 2019 Final Report was not provided to the Tribunal member who was then receiving submissions about the preliminary question.

[15] In a decision dated September 20, 2019, this Tribunal concluded that it did not have jurisdiction to consider the Appellant's Notice of Appeal. This was because, although the March 29, 2019 Final Decision was a decision that could be the subject of an application to an MHO for reconsideration, no such application had been made. The Tribunal found this was because Licensing failed to comply with its statutory obligation to give the Appellant notice of its right to do so. As a result, no reconsideration decision had been made. It is a pre-condition to the right to appeal an action or summary action taken under the Act that an MHO has made a reconsideration decision.

[16] Despite this conclusion, the Tribunal was critical of the Respondent's conduct towards the Appellant. This issue will likely be raised in the appeal on the merits. I will not repeat the Tribunal's comments here, except to note that the Tribunal expressed the view that the Respondent should provide the Appellant with a clear and fair process for seeking reconsideration going forward. It rendered its decision without prejudice to the Appellant's ability to file an appeal of any reconsideration decision made or to be made by an MHO relating to either the March 29, 2019 Final Report or the "more comprehensive written reasons" the Respondent was provided after the appeal process started.

[17] On October 7, 2019, the Respondent advised the Appellant of its right to seek reconsideration of the May 9, 2019 "summary action". No mention was made of any right to seek reconsideration of the March 29, 2019 Final Report.

[18] By letter dated November 5, 2019, the Appellant requested a reconsideration of the findings and summary action relating to the March 29, 2019 Final Investigation Report.

[19] On December 1, 2019, the Medical Health Officer, among other things, decided a preliminary issue raised by the Appellant in its November 5, 2019 letter and gave directions to the parties about the reconsideration application. The MHO

decided it would not be appropriate to reconsider Licensing's findings and actions in its March 29, 2019 Final Report alone and without considering Licensing's "more fulsome reasons" in its May 9, 2019 Report.

[20] In her reasons, first, the MHO rejected the Appellant's argument that the May 9, 2019 Report was void ab initio. Second, she said, reconsidering the March 29, 2019 Final Report alone would not advance the objectives of the Act, which are to provide for the well-being of persons in care. Third, she said considering both would not frustrate the Appellant's right to a fair proceeding, rather, the May 9, 2019 Report was an effort to rectify what "may have been" an unfairness to the Appellant. Additionally, the MHO requested submissions from the Appellant on the May 9, 2019 Report.

[21] Despite this, it does not appear that mention was made in the MHO's letter, or subsequently, of the possibility that the MHO might find further regulatory infractions or take new summary or other actions against the Appellant. The Appellant does not appear to have been invited to make submissions about that prospect.

[22] By letter dated December 24, 2019, the Appellant objected to the position that in order for it to request reconsideration of the "summary action" imposed on it by the March 29, 2019 Final Report, it must request reconsideration of the reasons and findings of the May 9, 2019 Investigation Report.

[23] On March 6, 2020, the Appellant asked the Respondent to confirm whether the March 9, 2019 "summary action" was still under reconsideration. There does not appear to be a response to this question.

[24] On March 10, 2020, the MHO issued a decision on the merits of the reconsideration application. Among other things, she found that the March 29, 2019 Report was so deficient that it could not be relied on as a basis for any of the decisions made by Licensing. She did not find the Report or summary action void. The deficiencies she described could be construed as matters of natural justice and procedural fairness.

[25] The MHO concluded that:

- a) the reasons and evidence in the May 9, 2019 Report supported all of the alleged infractions except one, the alleged breach of paragraph 52(1)(b) of the Regulation, which she instead found to be a breach of paragraph 52(1)(c) of the Regulation.
- b) the May 9, 2019 Report supported the conclusion that there were reasonable grounds to believe there was an immediate risk to the health and safety of the children in care, within the meaning of section 14 of the Act. This supported the requirement that the staff member not be left alone with children during the facility's operating hours "as was imposed on March 29, 2019".
- c) the "summary action" and the "action" imposed by the May 9, 2019 Report, which focussed exclusively on the staff member, did not go far enough.

- d) Two new conditions would be added to the Appellant's license concerning the child's Care Plan and staff training.

[26] The MHO wrote, at pages 18 to 19 of the March 10, 2020 reconsideration decision:

Therefore, I hereby exercise my jurisdiction under paragraph 17(3)(b) of the CCALA to vary the action so as to add two further conditions on SRCC's license:

1. SRCC must, within 2 weeks of the date of this decision, submit all Care Plans in place for children in care at the facility to CCFL. While I appreciate that CCFL cannot "approve" a Care Plan, it is possible that CCFL may be able to make some recommendations or comments concerning what may be missing from a Care Plan in order to assist the licensee to meet its obligations under the CCALA; and
2. Within 2 weeks of having been requested to do so by CCFL, SRCC must submit to CCFL satisfactory evidence that all staff caring for children at the facility have been trained in the requirements of all applicable Care Plans, and in the requirements of section A "Discipline" set out in pages 9 through 12 of the SRCC policies and procedures.

At the risk of being repetitive, I do recognize the significant deficiencies in CCFL's process leading up to the March 29 Report. I can fully understand why SRCC was of the view that CCFL's process, at least to that point, was unfair. However, CCFL did take steps to rectify those significant procedural deficiencies and I am satisfied that SRCC has since been provided with a meaningful ability to respond.

For all the reasons described above, I confirm the "summary action" and "action" taken by CCFL as described in the March 29 Report and in the Written Reasons dated May 9, 2019, as varied by me, pursuant to paragraph 17(3)(b) of the CCALA. If I am incorrect in my view that the May 9 Reasons should be considered as providing supplementary reasons for the "summary action" and "action" described therein, as well as for the action described in the March 29, 2019 report, then I conclude that the action taken by CCFL on March 29 has been suspended by the "summary action" and "action" taken on May 9. For all the same reasons described above, I adopt the "summary action" and "action" described by CCFL in the May 9 Reasons, as varied by me, and substitute them for the action taken by CCFL in the March 29 report, pursuant to paragraph 17(3)(b) of the CCALA.

[27] On April 9, 2020, the Appellant filed a Notice of Appeal of the MHO's reconsideration decision containing its grounds of appeal, detailed submissions and appendices. Among other things, it appealed the MHO's March 10, 2020 reconsideration decision saying that:

- a) the MHO declined to act on the Appellant's request for reconsideration of the condition attached to its license by Licensing's Final Report and
- b) the MHO appended two further conditions to its license relating to Care Plans.

The Present Application

[28] On May 15, 2020, the Respondent applied to the Tribunal for directions about the mode of hearing and the disposition of three preliminary issues. It says that the issues in the appeal on the merits fall into three categories:

- a) Did the MHO err in deciding, on December 1, 2019, that “it would be [inappropriate] ... to reconsider [Licensing’s] findings and actions without any regard to the “more fulsome reasons for the findings” set out in the May 9, 2019 report? In other words, do [Licensing’s] uncontested procedural deficiencies leading up to and including its March 29, 2019 report operate to prevent the MHO and the [Tribunal] from examining the substantive issues exemplified in [a photo attached as an Appendix to the Notice of Appeal] and detailed in [Licensing’s] May 9, 2019 report?
- b) Was SRCC provided with a full and fair opportunity to make meaningful submissions with respect to the “more fulsome reasons for the findings” set out in the May 9, 2019 report?
- c) Are the MHO’s findings in her reconsideration decision dated March 10, 2020 reasonable and supported by evidence?

[29] The Respondent acknowledges that there were procedural deficiencies leading up to and including its March 29, 2019 report. It says that the first two issues may be addressed by written submissions and could be addressed by this Tribunal as preliminary issues. The Respondent also says that if the deficiencies cause the Tribunal to decide the first issue in SRCC’s favour, in whole or in part, the appeal could be allowed without any examination of the third issue.

[30] The Appellant responds, firstly, that the Respondent has mischaracterized certain documents and it continues to withhold, and fails to include, certain requested documents. The Appellant argues this has been going on for more than a year and cannot be blamed on the current pandemic.

[31] Moreover, the Appellant disputes the Respondent’s characterization of its appeal, saying it relates to the March 29, 2019 Final Report:

Specifically, the [Appellant] is appealing the MHO’s decision pursuant to section 17(3)(b) of the Act, in relation to the Summary Action taken pursuant to section 14 of the Act, (attaching a condition to the [Appellant’s] License), by [the Respondent] by the March 29, 2019 Final Report which included the written reasons pursuant to section 17(2)(a) of the Act, for taking that summary action.

[32] With respect to the mode of hearing, the Appellant seeks an oral hearing via electronic means, which it says is necessary to ensure fairness between the parties. It points out that it is self-represented and lacks the resources to obtain legal advice. Proceeding by written submissions thus far has been difficult. An oral hearing would allow it the ability to respond in real time to questions and issues raised by the Board or the Respondent that might not be possible for it to do or anticipate in written arguments.

Preliminary Issues

[33] This application raises a number of issues arising from the context of the parties' conduct in these proceedings. The Appellant maintains that it seeks to appeal the March 29, 2019 Final Decision. The MHO's March 10, 2020 Reconsideration Decision addresses both the March 29, 2019 Final Report and the May 9, 2019 Report.

[34] I am not persuaded that the preliminary issues can be tackled in the manner suggested by the Respondent, because

- a) the Respondent's description of its first category of issues is unclear. The second sentence appears to limit the first. Additionally, it relies on a photograph, the relevance of which to the various decisions at issue is hotly disputed;
- b) the MHO's reasons appear to inextricably intermingle her views on Licensing reports;
- c) the Respondent's conduct throughout, including in respect to the March 29, 2019 Final Report, which raised allegations such as abuse of process, may inform any procedural fairness and natural justice issues with the May 9, 2019 Report; and
- d) the proposed manner of proceeding does not address the substantive issues underlying the summary and/or ordinary actions, such as whether those actions were warranted by the facts which are in dispute and have not yet been tested in an oral hearing.

[35] I recognize that the Appellant does not have legal counsel and, in particular, may not be familiar with legal concepts, including those commonly referred to by lawyers in Latin terms. I acknowledge that in this case, it will be of assistance to the Appellant to have an oral hearing where the disputed facts may be tested and issues may be addressed on a real time basis to ensure the parties have a meaningful opportunity to make their cases. This appears to be a case in which shifting positions have been taken about the alleged facts and therefore an oral hearing would be beneficial. I expect it will be helpful for the Tribunal to be able to ask questions at an oral hearing, as well.

[36] The issues, from my perspective involve not only procedural fairness and natural justice as addressed by the parties, but also a number of other issues such as those described below:

- a) Did the decision maker who issued the March 29, 2019 Final Report make errors that warrant setting that decision aside or declaring it void, for example, because of a failure of natural justice or procedural fairness? If so, what should happen to the decision maker's findings of fact?
- b) Did that decision maker have the authority to reopen the investigation that led to the March 29, 2019 Final Report and provide supplementary reasons in the May 9, 2019 Report, after the Appellant challenged the March 29, 2019 Final Report? If so, should that decision be set aside or declared void, for example, because of a failure of natural justice or procedural fairness,

because of abuse of process or because it may have been a results-oriented decision?

- c) Should the MHO's decision of March 10, 2020 be set aside or declared void, for example, because of a failure of natural justice or procedural fairness, because of abuse of process or because it may have been a results-oriented decision?
- d) Did the MHO have the authority to impose two new actions on the Appellant in the reconsideration decision and, if so, did she make an error, for example, by failing to seek submissions about the two new actions before imposing them?
- e) Did the MHO cure relevant deficiencies and, if not, can the Tribunal cure them?

[37] I recognise that the Appellant, lacking legal counsel, may not be aware of legal principles I have alluded to in describing the issues. For the benefit of the Tribunal and the parties, the parties may wish to consider the following cases (which can be found at the links I have provided) in addressing the issues raised above:

- a) *Fraser Health Authority v Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 (CanLII), <http://canlii.ca/t/gfppc> and *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25 (CanLII), [2016] 1 SCR 587, <http://canlii.ca/t/gs78q>
 - regarding the doctrine of "functus officio", the power to reopen a decision, and decisions that are void or nullities.
- b) *Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)*, 2010 BCCA 97 (CanLII), <http://canlii.ca/t/287x5>
 - regarding an appeal tribunal's power to cure deficiencies in the decision of a tribunal and invalid decisions.
- c) *R v Teskey*, 2006 ABCA 191 (CanLII), <http://canlii.ca/t/1nn03> and *R v Teskey*, 2007 SCC 25 (CanLII), [2007] 2 SCR 267, <http://canlii.ca/t/1rq5q>
 - which address results-based decisions, the presumption of integrity and bias.

Decision

[38] For all of the above reasons, I dismiss the Respondent's application and order that the hearing of this matter will proceed orally, by electronic means. I will ask Tribunal staff to arrange a pre-hearing teleconference in the coming weeks to address pre-hearing matters and to canvass for a hearing date.

"Alison Narod"

Alison Narod, Chair
Community Care and Assisted Living Appeal Board

July 17, 2020