Community Care and Assisted Living Appeal Board
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DECISION NO. 2019-CCA-003(e)

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:	Dr. Althea Hayden, Medical Health Officer Vancouver Coastal Health Authority	**RESPONDENT**
BEFORE:	A Panel of the Community Care and Assisted Living Appeal Board: Richard Margetts, Q.C., Panel Chair Lynn McBride, Member Shelene Christie, Member	
DATE:	Conducted by way of written and oral submissions concluding on August 9, 2021	
APPEARING:	For the Appellant: Clea F. Parfitt, Counsel For the Respondent: Robert P. Hrabinsky, Counsel	

DECISION ON THE MERITS

NATURE OF APPEAL

[1] This is an appeal, pursuant to section 29(2)(b) of the *Community Care and Assisted Living Act* (the "*Act*"), of a refusal to issue a licence. The Appellant, Safwana Ahmed, applied for a licence to operate a family child care facility in the Vancouver Coastal Health Authority region. Dr. Althea Hayden, Medical Health Officer ("MHO") for Vancouver Coastal Health Authority (the "Respondent"), made the decision that is challenged on this appeal.

[2] The Appellant submitted her application for a licence in March 2019. In April 2019, KM, a Senior Community Care Facility Licensing ("CCFL") Officer employed by the Respondent, denied the application. In her decision letter dated April 16, 2019 (the "1st CCFL Decision") she stated, "Based on your chronic history of unlawful operation, Licensing is of the opinion that you do not meet the requirements under s. 11(2)" of the *Act*.

[3] The Appellant requested a reconsideration of the 1st CCFL Decision. In June 2019, the MHO wrote to the Appellant, indicating that she was unable to determine the reasons for denying the licence and what evidence was relied upon in making that decision (the "June 2019 Reconsideration Decision"). As a result, the MHO

exercised her authority under section 17 of the *Act* and suspended the refusal to issue a licence until she received:

a. a letter from CCFL more thoroughly documenting the reasons for the decision; and

b. a package from CCFL including all evidence relied upon in making the decision.

[4] The Senior CCFL Officer prepared and delivered more comprehensive reasons in early July 2019 (the "2nd CCFL Decision") which stated that the decision not to issue a licence was based on the Appellant's "history of unlawful operations as confirmed on three separate occasions in 2012, 2015 and 2018." The 2nd CCFL Decision also stated that "through this history of non-compliance [the Appellant] has demonstrated a disregard for the regulatory system, the regulators and the law" and "has shown herself to be ungovernable", citing and quoting sections 11(2)(a)(i) through (iii) of the *Act*.

[5] By letter dated July 23, 2019, the MHO confirmed CCFL's decision refusing to issue a licence to the Appellant. In that letter (the "July 23rd Reconsideration Decision") the MHO concluded, on a balance of probabilities, that the unlawful operations in 2012, 2015 and 2018 had occurred. The MHO also found that "through a repeated history of unlawful operation [the Appellant] has demonstrated herself to be ungovernable", citing section 11(2) of the *Act* without referring to any particular subsections under section 11(2)(a).

[6] On September 11, 2019, the Appellant wrote to the MHO requesting that the July 23rd Reconsideration Decision be set aside so the Appellant could make submissions on the 2nd CCFL Decision, and that a new reconsideration decision then be made by another medical health officer.

[7] On September 12, 2019, the Appellant filed a Notice of Appeal to this Board in relation to the July 23rd Reconsideration Decision.

[8] On September 19, 2019, the MHO wrote to the Appellant, giving her an opportunity to make submissions in relation to the 2nd CCFL Decision. The MHO did not agree that it was necessary for another medical health officer to review the Appellant's submissions, and stated that she would "consider them in earnest" and "not hesitate to depart from [her July 23rd Reconsideration Decision] if warranted."

[9] This Board ordered that the appeal of the July 23rd Reconsideration Decision be held in abeyance until the MHO received the Appellant's submissions on the 2nd CCFL Decision and issued a new reconsideration decision.

[10] On November 7, 2019 the MHO issued her new reconsideration decision (the "November 7th Reconsideration Decision"), once again confirming CCFL's decision refusing to issue a licence to the Appellant, but this time relying specifically and solely on section 11(2)(a)(iii) of the *Act*:

> [The Appellant] takes issue with CCFL's finding that she had demonstrated herself to be "ungovernable". I regard "ungovernability" as a legal term of art. I am satisfied that the evidence shows that [the Appellant] does not have the personality, ability or temperament necessary to operate a community care

> facility within the meaning of paragraph 11(2)(a)(iii) of the [*Act*]. I do not think it is necessary to make any finding with respect to "ungovernability".

[11] Section 11(2)(a) of the Act states:

> (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

[12] On this appeal, the Appellant seeks to overturn the November 7th Reconsideration Decision pursuant to an Amended Notice of Appeal filed in January 2020.

[13] This appeal, heard during the COVID-19 pandemic, proceeded by way of a composite form of hearing pursuant to an order made by the Chair of this Board. The hearing began with each party exchanging affidavits setting out their evidence. The Appellant filed three affidavits (her own and two other witnesses) and the Respondent filed two affidavits (the Senior CCFL Officer and the MHO). The Appellant applied to cross-examine the Respondent's two witnesses and for disclosure of additional information and documents from the Respondent. This Board granted both those applications in October 2020[1]. The witnesses were cross examined before the full panel using video technology, and the Respondent disclosed the additional information and documents. The Respondent did not request to cross-examine the Appellant or her two witnesses.

[14] In early 2021, the Appellant made a further application for disclosure of information and/or documents. This Board granted that application, ordering the Respondent to provide further information to the Appellant[2]. Following that disclosure, the parties filed extensive written submissions.

[15] In making this decision, we have considered all of the affidavit, oral and documentary evidence presented during the hearing of this appeal, as well as all of the submissions made by the parties, although we do not find it necessary to refer to every aspect of the evidence and submissions in expressing our reasons below.

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[1] Decision No. 2019-CCA-003(c).
[2] Decision No. 2019-CCA-003(d).

[16] Section 29(11) of the *Act* states that 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." We agree with earlier panels of the Board which have held that the language in section 29(11) of the *Act* means that "we are not confined by the findings of fact made by the original decision-maker, nor are we constrained by the manner in which [she] 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 or not.[3]

BRIEF SUMMARY OF DISPOSITION

[17] After careful consideration, we have decided to allow the appeal on the basis that the November 7th Reconsideration Decision was not justified. In particular, we find that the MHO's reliance on section 11(2)(a)(iii) was not justified on the facts of this case, and that the three instances of "non-compliance" relied upon by the MHO are not, on their own, sufficient to justify the refusal to issue a licence to the Appellant.

[18] Pursuant to section 29(12) of the *Act*, we are sending the matter back for reconsideration by the MHO with the following directions:

1. Due to the length of time which has elapsed since the original licence application which forms the basis of this appeal, provide the Appellant with an opportunity to submit updated information in respect of her application, or a new application if there are new forms or documents that are currently required which weren't required when the Appellant originally submitted her application. Prioritize the consideration of the Appellant's application such that no unnecessary delay is occasioned.
2. Consider and assess the Appellant's licence application **in full**, in accordance with the findings and analysis in this decision.
    a. In particular, given the finding in this decision that the three instances of "non-compliance" relied upon by the MHO are not, by themselves, sufficient to justify the refusal to issue a licence to the Appellant, and given the length of time which has elapsed since these instances of "non-compliance", these three instances of "non-compliance" are not to be considered as a basis for refusal of the Appellant's licence application.
3. In assessing the Appellant's licence application **in full**, ensure that all relevant aspects of the *Act* and the *Child Care Licensing Regulation*, including Part 2 – Licensing and Facility Requirements, Part 3 – Manager and Employee Requirements, and all the matters set out in Schedule B, are considered.
4. Consider and determine if it is appropriate to issue a licence to the Appellant with terms and/or conditions attached to the licence that the MHO considers

[3] *KN v Interior Health Authority*, Decision No. 2016-CCA-001(a), at para 12.

necessary or advisable to protect or promote the health and safety of persons in care, pursuant to section 11(3) of the *Act*.

5. Due to the considerable history and difficult relationship between the Appellant and CCFL, ensure that a new Licensing Officer is assigned to work with the Appellant to assess the licence application and that no Licensing Officer(s) involved in the assessment of the original licence application participate in the reconsideration.

BACKGROUND

[19] Between 2003 and 2007, the Appellant had a licence to operate a family child care facility from her home in Vancouver. On March 1, 2007, she voluntarily surrendered that licence. She subsequently continued to provide child care services from her home as an unlicensed operator. The Appellant acknowledges in her affidavit that when operating without a licence, she was limited to caring for two unrelated children at a time.

[20] On January 4, 2012, after receiving information that the Appellant and her daughter were providing care for eight children, CCFL officers conducted an inspection of the Appellant's home and observed four children being cared for by the Appellant's daughter. The Appellant was not present at the time of this inspection. On January 12, 2012, the CCFL officers met with the Appellant and she stated that she was not operating a child care facility in her home but that she did assist her daughter by occasionally watching the children.

[21] In June 2015, CCFL received information suggesting that the Appellant was providing care to more than two children at a time in her home. On June 4, 2015, two CCFL officers attended at the Appellant's home to conduct an inspection, but the Appellant did not permit the officers to enter her home.

[22] There is conflicting evidence as to how many children were present in the home on that day. The CCFL officers recorded in their notes that the Appellant verbally confirmed that four children were in attendance, that she provided the names and ages of the children (which are set out in the CCFL officers' notes), and confirmed that all four children attend full-time and are not sibling groups.

[23] In contrast, the Appellant states in her affidavit that she "was providing care for four children, with no more than two being present at one time." She also states that she "did not permit the officers to enter [her] home that day because [she] was not well and a friend was caring for the two children that were present." The Appellant agreed to meet with the officers at her home the next day.

[24] When the officers attended at the Appellant's home on June 5, 2015, they showed her their notes from June 4, 2015. The Appellant takes issue with the notes, stating:

> Those notes incorrectly reported that I had said I was caring for four children in the house on June 4, 2015. I advised the officers that only two children were being cared for on June 4, 2015, and that although I was providing care for four children in total, only two were present at any one time. I also advised that the days and times the children were attending were variable.

[25] On October 19, 2018, two CCFL officers attended the Appellant's home, where they observed and recorded a total of four children receiving care. The Appellant admits that she was caring for four children at the time "for economic reasons, and because there is a high demand for childcare services which are not available to parents." The CCFL officers completed an "Operating Without a CCFL Licence (Unlawful) – Form" which they presented to the Appellant. That form is signed by the two officers and by the Appellant, and expressly states that the Appellant was informed that she is operating in contravention of the *Act*. The Appellant states that she "immediately reduced the number of children to two", and that the CCFL officers confirmed this on a return visit on October 22, 2018.

[26] In March 2019, the Appellant applied for a licence to operate a family child care facility in her home. CCFL refused to issue a licence, and that decision was ultimately confirmed by the MHO in her November 7th Reconsideration Decision which is the subject of this appeal.

ISSUE ON APPEAL

[27] The central issue to be decided on this appeal is whether the Appellant has satisfied the burden of proving that the November 7th Reconsideration Decision was not justified.

DISCUSSION AND ANALYSIS

[28] The 2nd CCFL Decision and the MHO's July 23rd Reconsideration Decision relied on the Appellant's "history of unlawful operations" in 2012, 2015 and 2018 as the basis for finding that the Appellant was "ungovernable".

[29] The 2nd CCFL Decision cited sections 11(2)(a)(i) through (iii) of the *Act* in support of the refusal to issue a licence to the Appellant. The MHO's July 23rd Reconsideration Decision cited section 11(2) of the Act in confirming the decision refusing to issue a licence, but did not state which one or more of the subsections in section11(2)(a) she was relying upon in reaching her decision.

[30] After receiving submissions from the Appellant in relation to the 2nd CCFL Decision, the MHO issued a new reconsideration decision – the November 7th Reconsideration Decision which is the subject of this appeal. In the November 7th Reconsideration Decision, the MHO again confirmed the decision not to issue a licence, but did so on different, more specific grounds as compared to her July 23rd Reconsideration Decision:

1. She stated that she was "satisfied that the evidence shows that [the Appellant] does not have the personality, ability or temperament necessary to operate a community care facility within the meaning of paragraph 11(2)(a)(iii)", which section references operation of a community care facility "in a manner that will maintain the spirit, dignity and individuality of the persons being cared for."
2. She stated that the single instance of non-compliance in October 2018 was "itself sufficient to support the decision to deny [the Appellant] a licence", but then added that she was "also satisfied that [the Appellant's] conduct in

2012 and 2015 demonstrates a disregard for the regulations in a way that reveals her to be an unsuitable candidate for a licence."

3. She stated that "the decision to deny a licence is properly grounded in paragraph 11(2)(a)(iii) of the [*Act*] … rather than in paragraph 11(2)(a)(i) … (i.e., that she is not 'of good character')."
4. After acknowledging that the Appellant took issue with the finding that she was "ungovernable", the MHO said that it was "not … necessary to make any finding with respect to ungovernability", which is a significant shift from her July 23rd Reconsideration Decision and from the 2nd CCFL Decision.

Reliance on section 11(2)(a)(iii)

[31] In *KN v Interior Health Authority*[4], this Board discussed and distinguished subsections 11(2)(a)(ii) and (iii) of the *Act* as follows (at paras 122-123):

> … 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 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 [in subsections (i) through (iii)], and could not have intended them to be conflated when the time for interpretation arrived.

[32] We agree with that analysis in *KN v Interior Health Authority*. Determining which particular subsection(s) of section 11(2)(a) apply in any given case is highly fact dependent. Certain behaviours or transgressions could fall into one or more subsections. In the context of a case involving a child care facility, we find that subsection 11(2)(a)(iii) relates to interaction with children, i.e. having 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*" [emphasis added]. That final qualifying phrase in subsection 11(2)(a)(iii) is key and clearly doesn't relate to regulatory matters that fall into the realm of management and administration of a community care facility.

[33] The 2012, 2015 and 2018 instances of non-compliance relied upon by the Respondent are all instances of having more than two children in care in an unlicensed family child care setting. These instances of non-compliance do not relate to interaction with children, and the MHO has not articulated how exceeding the allowable number of children could reasonably lead her to the conclusion that the Appellant lacks "the personality, ability or temperament necessary to operate a

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[4] *Supra* at footnote no 3.

community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for".

[34] The Appellant points out in her written submissions on this appeal "there is no logical connection between operating on one or more occasions with up to four children and the Respondent's claim that the Appellant therefore lacked 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." We agree with the Appellant that "this requires an unacceptably strained reading of section 11(2)(a)(iii) which is not consistent with other parts of the Act".

References to an Incident in December 2006

[35] The 1st CCFL Decision refers to an alleged incident that occurred in December 2006 "which resulted in an injury to a child" in the Appellant's care when she was operating a licensed child care facility in her home. This incident is referenced at the outset of the 1st CCFL Decision in a paragraph setting out the Appellant's "operational history" from 2003 to March 2007 when she surrendered her licence. This is followed by several paragraphs relating to "three separate occasions" (2012, 2015 and 2018) when the Appellant was "found to be operating unlawfully". Based on those three instances of operating unlawfully, the Senior CCFL Officer concluded that the Appellant did not meet the requirements under section 11(2) of the *Act* and denied the licence application.

[36] The 2nd CCFL Decision makes no mention of the alleged incident in December 2006.

[37] In her July 23rd Reconsideration Decision, the MHO refers to the 1st CCFL Decision and states that it "notes the following history with licensing" which she then summarizes, including the reference to the December 2006 incident. In her November 7th Reconsideration Decision, the MHO quotes extensively from the 1st CCFL Decision, including the paragraph that refers to the December 2006 incident. She also quotes extensively from the 2nd CCFL Decision which makes no mention of the December 2006 incident. The MHO then summarizes the Appellant's submissions regarding the 2nd CCFL Decision, including the submission that it was "improper and unfair … to place any weight" on the alleged 2006 incident.

[38] In her submissions on this appeal, the Appellant asserts that the "old and poorly documented events of 2006 were improperly a factor in the Respondents' decision-making, even though this is denied by the Respondents."

[39] In her November 7th Reconsideration Decision, the MHO addresses the December 2006 incident as follows:

> Furthermore, I do not think that it is "improper" for CCFL to refer to the history of its dealings with the applicant, even where those dealings are not relied on as a basis to refuse to issue the licence. I infer from [the Appellant's] submissions that CCFL's reference to an incident in 2006 in which a child was allegedly injured is unfairly prejudicial. However, it is clear that CCFL did not base its decision to deny the licence on that incident. … I am satisfied that references to this incident are germane only insofar as they provide some background context.

> What is important to understand is that [the Appellant] was at one time a licensee, and should therefore be familiar with the applicable regulations.
>
> I place no weight on the "2006 allegations" and I am satisfied that CCFL did not base its decision having regard to the nature or content of those allegations. … I am satisfied that CCFL did not rely on the "2006 allegations" as providing a basis for the decision to refuse to issue a licence. More importantly, I regard these references as significant only insofar as they provide context, and help one to understand that [the Appellant] was at one time licensed. I place no weight whatsoever on the nature or content of the 2006 allegations.

[40] We accept the MHO's statement that she placed no weight on the nature or content of the 2006 allegations, and reject the Appellant's submission that the events of 2006 were a factor in the MHO's decision-making.

[41] It is not necessary for us to determine whether or not the events of 2006 were a factor in the CCFL's decision-making, as it is the MHO's November 7th Reconsideration Decision which is the subject of this appeal. In determining this appeal, we have placed no weight on the very limited evidence before us relating to the alleged incident in December 2006.

"Unlawful Operations" by the Appellant in 2012, 2015 and 2018

[42] In her November 7th Reconsideration Decision, the MHO states:

> It is to be noted that Ms. Ahmed admits that she had four children in her care in October 2018, contrary to the [Act]. Ms. Ahmed's counsel says that Ms. Ahmed "appreciates that she was wrong to care for four children without a licence", but argues that this single event is insufficient to ground an opinion that she does not have the requisite personality, ability or temperament to operate a community care facility. I disagree. As a former licensee, Ms. Ahmed should be familiar with the applicable regulations. By operating contrary to the [Act], Ms. Ahmed has demonstrated a disregard for the regulations in a way that reveals her to be an unsuitable candidate for a licence.
>
> While I think that this instance on non-compliance is itself sufficient to support the decision to deny Ms. Ahmed a licence, I am also satisfied that Ms. Ahmed's conduct in 2012 and again in 2015 demonstrates a disregard for the regulations in a way that reveals her to be an unsuitable candidate for a licence. While Ms. Ahmed argues that these incidents are too far in the past to have any probative value, or that they ought not to be considered at all due to a lack of complete documentation, I find the following facts to be persuasive:
>
> - In 2012, an unlawful daycare was operating at [Ms. Ahmed's home]. While [Ms. Ahmed's daughter] was the primary operator, Ms. Ahmed assisted. The following history is noted:
>   - A complaint was made that Ms. Ahmed and her daughter … were caring for 8 children.
>   - During a subsequent inspection … it was found that four children were being cared for at [Ms. Ahmed's home], primarily by [Ms. Ahmed's daughter].
>   - A follow-up letter to Ms. Ahmed … notes "[your daughter] stated that on occasion you have watched the children or have been the

second care provider." This letter further notes, "While you weren't the primary caregiver, you did assist your daughter on occasion."

- In 2015, an unlawful daycare was operating at [Ms. Ahmed's home]. [Ms. Ahmed's daughter] and Ms. Ahmed cared for children at that time.
    - A Craigslist advertisement for a daycare … was forwarded to licensing for investigation. This advertisement states that care is needed for: "Children ages 1-3. Altogether 5 children."
    - On June 4th, 2015 an inspection … revealed one double stroller, and two single strollers. In addition, it was verbally confirmed that four children were in attendance. At that time Ms. Ahmed confirmed the names and ages of the children, and that "All four children attend full time and are not sibling groups."
    - On June 5th, 2015 [a CCFL officer] notes … that Ms. Ahmed & [her daughter] contradicted the information provided on the previous day, stating that only two children are cared for at one time as not all children attend full-time.

[43] The MHO does not cite a specific section of the *Act* in the above-quoted passage of her decision. However, it is clear from the evidence on this appeal that the CCFL officers relied on section 5 of the *Act* when they concluded that there was non-compliance with the *Act* in 2012, 2015 and 2018. In her November 7th Reconsideration Decision, the MHO quotes extensively from the 2nd CCFL Decision, including the sections of that decision that expressly rely upon section 5 of the *Act*. We conclude that the MHO also relied upon section 5 of the *Act* in reaching her conclusions, quoted above, about non-compliance and "an unlawful daycare".

[44] Section 5 of the *Act* states:

> **Operating or advertising without a licence**
>
> 5 A person who does not hold a licence must not
>
> a) operate, or hold themselves out as operating, a community care facility,
>
> b) provide, or hold themselves out as providing, care in a community care facility, or
>
> c) accommodate, or hold themselves out as accommodating, a person who, in the opinion of a medical health officer, requires care in a community care facility.

[45] In the circumstances of this case, the relevant portion of the definition of "community care facility" is as follows:

> **"community care facility"** means a premises or part of a premises
>
> a) in which a person provides care to 3 or more persons who are not related by blood or marriage to the person

[46] We must review and consider the evidence before us on this appeal relating to "unlawful operations" by the Appellant in 2012, 2015 and 2018.

January 2012 Inspection

[47] On January 4, 2012, two CCFL officers conducted an inspection of the Appellant's home and observed four children being cared for by the Appellant's daughter. CCFL sent a letter dated January 12, 2012 to the Appellant's daughter, which refers to the inspection and the observation of four children in the daughter's care, and then stated:

> You also stated that you were aware that you were operating in contravention of the Community Care and Assisted Living Act which states:
>
> [The definition of "community care facility" and section 5 of the Act are then set out in the letter]
>
> It is this office's expectation that you will immediately reduce the number of children in care to ensure not more than two children unrelated to you by blood or marriage are in your care at any one time.

[48] In her affidavit filed in this appeal, the Appellant states:

> On January 4, 2012, Community Care Facilities Licensing officers conducted an inspection at my house. At the time, my adult daughter was operating an unlicensed childcare service in the ground-level suite of the house with four children. I was not operating this service and was not present for the inspection.

[49] The Appellant's daughter states in her affidavit:

> My mother was not involved in operating the daycare in any way. I was operating the daycare and was the primary caregiver. Any contact my mother had with any children being cared for by me at this daycare was brief and incidental.

[50] The Appellant describes her involvement in her daughter's daycare in these terms:

> On January 12, 2012, I met with Community Care Facilities Licensing officers at their request. At this meeting I confirmed that I was not operating a childcare facility in my home, and that my only involvement with my daughter's service was occasionally watching the children if my daughter was in the bathroom. Even though I was not in contravention of the *Community Care and Assisted Living Act* because I was not operating a community care facility, Community Care Facilities Licensing provided a letter suggesting that I could be penalized in the future for not complying with the legislation.

[51] In response to that affidavit evidence, the Senior CCFL Officer states in her affidavit:

> I note … the Appellant asserts that "[she] was not in contravention of the *Community Care and Assisted Living Act* because [she] was not operating a community care facility". This is not correct, as the Appellant did not have a licence to provide care in a community care facility, or to accommodate persons who require care in a community care facility … as required pursuant to section 5 of the CCALA.
>
> …

> … the Appellant was provided with a letter dated February 2, 2012…. Among other things, that letter states that "we found your daughter … providing care to 4 children **in your home**" (emphasis added). The letter goes on to advise that a person who does not hold a licence must not "accommodate, or hold themselves out as accommodating, a person who, in the opinion of a medical health officer, requires care in a community care facility."

[52] The above referenced February 2, 2012 letter from CCFL to the Appellant also states that the Appellant's daughter "said that she has provided 'drop in' care for up to 4 children between the ages of 2-3 years since September 2011 plus one school age child during the month of October 2011." The letter also notes that the Appellant's daughter "stated that she was aware she was operating in contravention of the Community Care and Assisted Living Act", specifically section 5, and that her daughter "advised us she would stop providing care." The letter to the Appellant then goes on to state:

> When we met, you stated you only watched the children whilst your daughter was in the bathroom and "didn't interfere with what your daughter was doing in the basement". While you weren't the primary caregiver, you did assist your daughter on occasion.
>
> This is of serious concern to this office. You surrendered your Family Child Care Licence in March, 2007 and your name was placed on the ALERT list.
>
> You assured us care is not and will not be provided at your home by yourself or your daughter.
>
> Please be advised that your non compliance with the legislation may render you liable to the penalties provided and we will be visiting you within the next 30 days to ensure care is not being provided.

[53] The evidence establishes that the Appellant's daughter was operating an unlicensed community care facility in the Appellant's home and was providing care for four children on January 4, 2012. On that date, the Appellant's daughter was in contravention of subsections 5(a) and 5(b) of the *Act*. The evidence also establishes that the Appellant was not present on January 4, 2012.

[54] The Appellant's daughter states in her affidavit that she "was operating the daycare and was the primary caregiver." The Appellant states that she "was not operating this service" but admits that she occasionally helped her daughter by "watching the children if my daughter was in the bathroom." Based on this evidence, we find that the Appellant was not operating a community care facility within the meaning of section 5(a) of the *Act*. However, the evidence establishes that she was occasionally providing care to the children.

[55] The licensing officers who conducted the inspection on January 4, 2012 recorded in their January 12, 2012 letter to the Appellant's daughter that she admitted she has "provided care for *up to 4 children* [emphasis added] since September 2011". If there were three or more children (not related to the Appellant by blood or marriage) present on any of the occasions when the Appellant watched the children for her daughter, then the Appellant would have been in contravention of section 5(b) of the *Act*. During cross-examination, the Senior CCFL Officer agreed that she did not know how many children were present when the Appellant was

providing care to them. There is no evidence before us as to the number of children who were present on those occasions. We cannot assume or infer that there were three or more children present on those occasions, as the Senior CCFL Officer and the MHO appear to have done.

[56] In the excerpt from her affidavit quoted above, the Senior CCFL Officer appears to assert that the Appellant was in contravention of the *Act* in January 2012 because she was both providing care (a reference to subsection 5(b) of the *Act*) when she occasionally assisted her daughter, and also accommodating persons who require care (a reference to subsection 5(c) of the *Act*) by allowing her daughter to provide daycare services to children in the Appellant's home.

[57] During cross-examination on her affidavit, the Senior CCFL Officer stated that "care was being accommodated" by the Appellant in her home even though her adult daughter was providing the care. She also stated that "unlawful care" was taking place and the Appellant was involved in it, and that "at the least" the Appellant was "accommodating" it. This is a misapprehension of subsection 5(c) of the *Act*.

[58] Subsection 5(c) of the *Act* states that a person "who does not hold a licence must not … accommodate, or hold themselves out as accommodating, a person who, in the opinion of a medical health officer, requires care in a community care facility." This subsection relates to providing accommodation or lodging to a person who, in the opinion of a medical health officer, requires care in a community care facility such as a seniors' residence, extended care home or group home. It does not relate nor apply to a person who owns premises (the "owner") and knows that another person is operating a daycare and providing care to children on the owner's premises.

[59] We find that the Appellant was not in contravention of subsections 5(a) or 5(c) of the *Act* in January 2012, because she was not operating the child care facility (her daughter was operating it) and she was not accommodating a person requiring care within the meaning of subsection 5(c). We find it unlikely that a contravention of subsection 5(b) – providing care – is made out on the evidence before us; however, for reasons described more fully below, we need not make that determination on this appeal.

June 2015 Complaint and Attempted Inspection

[60] On May 28, 2015, CCFL received an email from Westcoast Child Care Resource and Referral which set out the text of a Craigslist ad that stated, in part:

> Daycare (Dundas)
>
> Compensation: $10.00 per hour. This is only on Fridays starting July 24 to Aug. 21.
>
> Looking for somebody who can look after my daycare …. Children ages from 1 – 3. Altogether 5 children

[61] Based on the street name and the telephone number included in the Craigslist ad, CCFL determined that this ad was for a daycare at the Appellant's home. On June 4, 2015, two CCFL officers went to the Appellant's home to conduct

an unscheduled inspection. The Appellant did not permit the CCFL officers to enter her home, so they were unable to observe how many children were present. However, the CCFL officers' notes state that the Appellant said there were four children in attendance, and she provided the names and ages of the children and indicated that all four children attended full time.

[62] When the CCFL officers returned to the Appellant's home the next day (June 5, 2015), the Appellant and her daughter were both present. The CCFL officers showed them their notes from the June 4th visit and the Appellant informed the officers that she was only caring for two children on June 4th, not four children, and that although she was providing care for four children in total, only two were present at any one time. The CCFL officers asked her to provide the names of the two children who were present on June 4th, and advised her that it was her choice to do so. The Appellant chose not to provide the names of the two children.

[63] CCFL sent the Appellant a letter dated June 23, 2015 "to confirm that on June 5 & 19, 2015 Community Care Facilities Licensing (CCFL) visited your home and on both occasions two children were present" and there was "no contravention of the Community Care and Assisted Living Act". Having confirmed on those two occasions that the number of children in care had been reduced, the complaint file was closed.

[64] Although the CCFL officers did not observe how many children were present on June 4, 2015 and the Appellant disputed the accuracy of their notes the following day, the Senior CCFL Officer who wrote the 1st and 2nd CCFL Decisions concluded that it was more likely than not that more than two children were receiving care that day. She reached that conclusion based on the following evidence:

- the fact that the Appellant refused to let the CCFL officers enter her home;
- the CCFL officers' notes from the June 4th visit which indicate that the Appellant verbally confirmed there were four children in attendance and that all four children attend full time;
- the Craigslist ad that stated "Altogether 5 children" which does not reconcile with the Appellant's assertion on June 5, 2012 that she cares for up to four children, but only two children at one time;
- the fact that the Appellant refused to provide the names of the two children who were in attendance on June 4th when asked to do so by the CCFL officers on June 5th; and
- the fact that the Appellant was given an opportunity to make corrections to the CCFL officers' notes but did not avail herself of that opportunity.

[65] We agree that the Craigslist ad, the refusal to let the CCFL officers enter the home, and the refusal to provide the names of the two children in attendance on June 4th all raise suspicion that there were more than two children present that day. In that context, we can see how the Senior CCFL Officer could choose to prefer the CCFL officers' detailed notes about what the Appellant told them on June 4th over the Appellant's statement to them the following day that she cares for up to four children but only two children at one time. It was not unreasonable for the

Senior CCFL Officer to reach the conclusion that, more likely than not, there were more than two children receiving care that day.

[66] In her November 7 Reconsideration Decision, the MHO found that "an unlawful daycare was operating" at the Appellant's home in 2015, and that the Appellant and her daughter "cared for children at that time." Following these statements, she noted the following history:

- the Craigslist ad;
- the number of strollers at the home on June 4th;
- the CCFL officers' notes that indicate the Appellant verbally confirmed there were four children in attendance and that all four children attend full time; and
- the fact that, on June 5th, the Appellant contradicted the information provided on the previous day by stating that only two children are cared for at one time as not all children attend full time.

[67] This history noted by the MHO does not provide as strong a basis for concluding, on the balance of probabilities, that there were more than two children receiving care on June 4, 2015. Her conclusion would be more supportable if she had relied on the same factors as the Senior CCFL Officer. However, we do not need to determine whether or not there was non-compliance on June 4, 2015, because we have determined that even if we accept the three instances of non-compliance relied upon by the Respondent were made out on the evidence, those three instances are not sufficient to deny the licence application on the facts of this case.

October 2018 Inspection

[68] On October 18, 2018, while conducting a routine inspection of a licensed child care facility near the Appellant's home, a CCFL officer observed children being dropped off at the Appellant's home. She consulted with a senior licensing officer and they decided they would return to the Appellant's home the next day.

[69] On October 19, 2018, that CCFL officer and the Senior CCFL Officer went to the neighbourhood and observed a total of four children being dropped off at the Appellant's home. They knocked on the door and, after some discussion, the Appellant permitted them to enter the premises. They observed four children on the premises. They completed an "Operating Without a CCFL Licence (Unlawful) – Form" which they presented to the Appellant. Both officers and the Appellant signed that form, which expressly states that the Appellant was informed that she is operating in contravention of the Act.

[70] The Appellant does not contest that she was in contravention of the *Act* in October 2018. In her affidavit she states that she was caring for four children "for economic reasons, and because there is a high demand for childcare services which are not available to parents."

[71] In her written submissions on this appeal, the Appellant asserts that in "considering the weight to be given to the finding on October 19, 2018, it is necessary to take into account evidence about the pressure of parental

expectations and needs on the Appellant, and the severe shortage of daycare spaces in Vancouver which is very difficult for parents and existing caregivers."

[72] We disagree most emphatically. The *Act* is designed to ensure the health and safety of persons in care, and the Appellant must comply with the *Act* regardless of any pressures or expectations she may feel from parents. It would be inappropriate, and inconsistent with the purposes of the *Act*, for either the licensing authority or this Board to place less weight on a finding on non-compliance in circumstances where a person feels "pressure" to care for more children than the *Act* allows, or in areas of the province where there is a shortage of daycare spaces.

Subsequent Inspections in 2018 and 2019

[73] On October 22, 2018, CCFL officers returned to the Appellant's home and confirmed that the number of children in care had been reduced to two and that notice had been given to the parents of two other children.

[74] On two subsequent unscheduled inspections on November 1, 2018 and April 3, 2019, CCFL officers observed that the Appellant was not caring for more than two children unrelated to her by blood or marriage and confirmed that she was in compliance with the *Act*.

[75] CCFL's Nexus notes include a record of an email that the Senior CCFL Officer sent to the Appellant on November 1, 2018. After stating that she and another CCFL officer had attended the Appellant's home that morning and confirmed compliance with the *Act* (two children unrelated to the Appellant by blood or marriage, and the Appellant's grandson, were present), the email concludes:

> As you did enquire about becoming licensed again I am attaching a Licence Application for your convenience. It was explained that you [sic] history of non-compliance in operating unlawfully with more than two children would be considered during your assessment of suitability. You were also informed that legislation is in place which could mean legal follow-up regarding the October 19, 2018 findings. I explained that the legislation allows for penalties such as a fine. You were also advised that Licensing may need to return to confirm continued compliance and you agreed.
>
> Should you have any questions regarding this email you can contact me as below.

[76] The Appellant submitted her application for a licence on March 18, 2019. On April 3, 2019, the Senior CCFL Officer and another CCFL officer conducted another inspection of the Appellant' home, when compliance with the *Act* was once again confirmed. CCFL's Nexus notes about that inspection, which were created by the Senior CCFL Officer, include the following information:

> I explained to [the Appellant] that her application package had been couriered to the wrong office and that this was only discovered yesterday and that this will impact Licensing's response time. I also stated that her history would be taken into consideration as part of the assessment of suitability.

[77] On April 16, 2019, the Senior CCFL Officer issued the 1st CCFL Decision, refusing to grant a licence to the Appellant.

Was the non-compliance in October 2018 sufficient to deny the licence application?

[78] Of the three "unlawful operations" relied upon by CCFL and the MHO to deny the licence application, the October 19, 2018 instance is the only one where the evidence is clear and undisputed that the Appellant herself was caring for four children unrelated to her, and where she was expressly found to be in contravention of section 5 of the *Act* by the CCFL officers who conducted the inspection on that date.

[79] In her November 7th Reconsideration Decision, the MHO states "I think that [the October 2018] instance of non-compliance is itself sufficient to support the decision to deny Ms. Ahmed a licence".

[80] We disagree that this single instance of non-compliance with the *Act* – by caring for two more children than the *Act* allows in an unlicensed family child care setting – is sufficient to support a decision to deny the Appellant's licence application. The MHO completely ignores the three subsequent inspections which confirmed that the Appellant was complying with the *Act* – only two unrelated children were being cared for. The MHO also ignores the fact that the Appellant, in March 2019, applied for a licence pursuant to the Act which, if granted, would allow her to lawfully care for more than two unrelated children, indicating an intention to continue operating in compliance with the *Act*.

Was there an appropriate assessment of the licence application?

[81] It is clear from the evidence led by the Respondent in this appeal that the Appellant's 2019 licence application was considered in the shadow of the "Baby Mac" incident which occurred in January 2017. In that case a child died while in the care of an unlicensed daycare facility and it was alleged in the resulting litigation that the Vancouver Coastal Health Authority failed to fine the unlicensed daycare or otherwise stop it from operating[5].

[82] In August 2017, R. Lynn Stevenson, Associate Deputy Ministry Health Services (BC), issued a letter to the Chief Medical Officers, Directors of Health Protection, and Regional Managers of Licensing which stated, in part:

> … Given that it is an offence to operate an unlicensed community care facility, and that young children are in need of protection, it is important that you utilize the enforcement tools that are available when persons are operating an unlicensed child day care, particularly when they are found to be repeat offenders. I appreciate that some repeat offenders may move to different addresses, making it difficult to monitor; however, where ever possible, efforts should be made to track and monitor non-compliant operators and escalate enforcement, as appropriate, to ensure the health and safety of the children in care.

[83] This is a direction about how to monitor unlicensed operators, not how to approach the assessment of a licence application.

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[5] *Sheppard et. al. v Vancouver Coastal Health Authority,* Vancouver Registry [S – 181008].

[84] As stated in *KN v Interior Health Authority*[6]:

> 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.

[85] There is no evidence before us which shows that the Respondent fully assessed the Appellant's licence application in that way. It is troubling to us that when the Appellant inquired about becoming licensed again, in November 2018, the Senior CCFL Officer immediately raised the Appellant's "history of non-compliance in operating unlawfully" and also informed her that "legislation is in place which could mean legal follow-up regarding the October 19, 2018 findings." During her cross-examination in this appeal, the Senior CCFL Officer referred to the Appellant as "an unlawful" and referred to her "past history of blatantly ignoring the regulations". These statements make it appear that she had already formed negative opinions about the Appellant which impacted her ability to objectively and impartially assess the Appellant's licence application.

[86] Licensing officers do need to review an applicant's previous history and contact with licensing when assessing a licence application. That is an integral and necessary part of the licensing process. However, that is only one part of the assessment. It is important to consider and weigh all of the information available and to fully assess the licence application before reaching a decision. In this case, it appears to us that the assessment of the licence application began and ended with a review of the Appellant's previous history, without any consideration or assessment of the documentation submitted and without a full and proper evaluation of the applicant herself.

[87] Both the Senior CCFL Officer and the MHO focused solely on the "history of unlawful operations" on three separate occasions spanning six years to justify the refusal of a licence. We find it was wrong for them to focus their assessment so narrowly. Although the Appellant was clearly operating unlawfully on October 19, 2018, the evidence of the other two contraventions was not as strong, there was a significant amount of time between the earlier contraventions and the licence application, and there may have been other mitigating factors worthy of consideration.

[88] Even if we accept that in addition to the October 2018 contravention the Appellant was in contravention of subsections 5(a) and 5(b) of the *Act* in January 2012 and June 2015, we have concluded – looking at the totality of the evidence before us – that those three instances of non-compliance are not, on their own, sufficient to justify the refusal to issue a licence to the Appellant under any of the subsections in section 11(2)(a).

[89] It appears from the evidence led on this appeal that the Senior CCFL Officer and the MHO believed that the Appellant would fail to comply with the *Act* and regulations in future based on the three instances of "non-compliance" between 2012 and 2018. They should have taken a more objective and impartial approach to

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[6] *Supra* footnote no 3 at para 86.

assessing the Appellant's application, considering and weighing all the information before them, including the various unscheduled inspections in 2015, 2018 and 2019 which confirmed that the Appellant had brought herself into compliance with the *Act*. They had the option of issuing a licence to the Appellant with terms and/or conditions attached, pursuant to section 11(3) of the *Act*, but it appears that they did not consider this option. For example, they could have attached terms or conditions to mitigate risks and provide for increased supervision and inspections to ensure that the Appellant was complying with the *Act* and regulations.

[90] The Appellant argues that the Respondent held her to a higher standard than those already licensed. The Appellant spent considerable time and energy gathering and leading evidence of several inspection reports of licensed facilities that were operating in non-compliance with the *Act* (mainly around numbers and ages of children present). In each of those cases, licensing officers worked with the licensee to bring them into compliance. The Appellant submits that the approach by licensing in those cases was educational and corrective rather than punitive, and that licensing should act in a consistent manner with a licence applicant. The Appellant argues that the Respondent used a more punitive approach with the Appellant which results in unfair treatment. She further submits that the decision not to issue her a licence is grossly disproportionate.

[91] The Respondent takes the position that it is irrelevant and immaterial how licensing dealt with licensed facilities that were operating in non-compliance with the *Act*, and that each case must ultimately be assessed individually. During her cross-examination, the MHO stated that a licence holder requires a different approach than a licence applicant. She differentiated between a licence holder who is "out of compliance" with their licence in relation to child ratio, ages and numbers and a licence applicant who is "acting unlawfully" by having too many children on three occasions when unlicensed.

[92] While we question the soundness of the above distinction being made by the Respondent, whether licensed operators and applicants for licences should be treated in a consistent manner by the licensing authority or each require a different approach is a question for another day. We do not have to determine that question because we have found for the Appellant on other grounds.

CONCLUSION

[93] We find the Appellant has met her burden of showing the MHO's November 7th Reconsideration Decision was not justified.

[94] The Appellant submits that if we find in her favour, that the appropriate remedy would be for us to reverse the decision of the MHO and grant her a licence "subject to satisfactory inspection from the City". In the alternative, the Appellant submits we should remit the matter back to CCFL with instructions that "no person involved to date shall be involved in the reconsideration decision" and that "only the October [2018] finding of operating without a license is to be considered".

[95] Pursuant to section 29(12) of the *Act*, we have determined that the appropriate remedy is to send the matter back for reconsideration by the MHO with directions.

[96] We have come to this determination for the following reasons. First, although the Appellant argues that the record before this board is complete and the Board is in as good a position to make the determination as Licensing is, we have found that the Respondent failed to consider the full details of the Appellant's application, and, therefore, we do not have the requisite information in order to fully assess the Appellant's licence application. For example, references were not checked, the Appellant was not interviewed and the physical space was not inspected.

[97] Second, with respect to the Appellant's concern about the MHO and CCFL Officer having made up their minds about the Appellant's ability to be licensed, we disagree that the evidence shows that the MHO will not have an open mind with respect to reconsideration of the licence application. In conducting the reconsiderations of the Licensing decisions, the MHO has demonstrated she is willing to seek out additional information where necessary (e.g. in her June 2019 Reconsideration Decision), and that she will provide a fair process by allowing further submissions where necessary (e.g. when she allowed the Appellant to provide submissions on the 2nd CCFL Decision).

[98] Having said that, we have found above that the Licensing Officer formed negative opinions about the Appellant which impacted her ability to assess the Appellant's licence application objectively and impartially. We find that the relationship between the Licensing Officer and the Appellant has become difficult, such that it is most appropriate to have a different licensing officer undertake any further assessments of the Appellant's licence application which may be directed by the MHO on reconsideration.

[99] For the above reasons, we order that this matter be remitted to the MHO with the following directions:

1. Due to the length of time which has elapsed since the original licence application which forms the basis of this appeal, provide the Appellant with an opportunity to submit updated information in respect of her application, or a new application if there are new forms or documents that are currently required which weren't required when the Appellant originally submitted her application. Prioritize the consideration of the Appellant's application such that no unnecessary delay is occasioned.
2. Consider and assess the Appellant's licence application **in full**, in accordance with the findings and analysis in this decision.
    a. In particular, given the finding in this decision that the three instances of "non-compliance" relied upon by the MHO are not, by themselves, sufficient to justify the refusal to issue a licence to the Appellant, and given the length of time which has elapsed since these instances of "non-compliance", these three instances of "non-compliance" are not to be considered as a basis for refusal of the Appellant's licence application.
3. In assessing the Appellant's licence application **in full**, ensure that all aspects of the *Act* and the *Child Care Licensing Regulation*, including Part 2 – Licensing and Facility Requirements, Part 3 – Manager and Employee Requirements, and all the matters set out in Schedule B, are considered.

4. Consider and determine if it is appropriate to issue a licence to the Appellant with terms and/or conditions attached to the licence that the MHO considers necessary or advisable to protect or promote the health and safety of persons in care, pursuant to section 11(3) of the *Act*.

5. Due to the considerable history and difficult relationship between the Appellant and CCFL, ensure that a new Licensing Officer is assigned to work with the Appellant to assess the licence application and that no Licensing Officer(s) involved in the assessment of the original licence application participate in the reconsideration.

"Richard Margetts, Q.C."

Richard Margetts, Q.C., Panel Chair

"Lynn McBride"

Lynn McBride, Member

"Shelene Christie"

Shelene Christie, Member

March 18, 2022