

# A GUIDE TO COMMUNITY CARE FACILITY LICENSING IN BRITISH COLUMBIA

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## IMPORTANT NOTE

*This information in this Guide is intended to support Health Authority Community Care Facility Licensing operational policies and procedures and is not intended as a substitute for or comprehensive interpretation of the Community Care and Assisted Living Act, the Residential Care Regulation, and the Child Care Licensing Regulation nor for the advice of a lawyer.*

The Guide was developed jointly by the Ministry of Health and regional Health Authorities. This Guide will be updated every 3 years, last revised Spring 2016.



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# PRINCIPLES of Fairness

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The following principles of fairness inform the work of community care facility licensing programs and staff.

## Communication

- Public information is easily available and understandable.
- Forms are in plain language.
- All people are treated with respect and courtesy and communicated with in a way that they can understand.
- Individuals rights to privacy are respected.
- Agencies cooperate with one another to provide better service to the public.
- Staff share information with their partner agencies, as appropriate.

## Decision-making Process

- How decisions will be made is clear from the beginning.
- Those affected by a decision should be involved in the making of that decision.
- Those affected by a decision should be informed and consulted in a meaningful way and have their point of view heard and considered.
- Decisions should be made within a timely, fair, and consistent process, be based on relevant facts and be made without bias.
- People should understand who will make the decision, how the decision is to be made, and after the decision was made, why the decision was made.
- There should be a clearly defined complaint procedure that everyone involved is made aware of directly and which protects against retribution.

## Appeal, Review, and Complaint Procedures

- At the time of decisions, people are provided with information about review or appeal procedures.
- Complaint procedures are clearly defined.

# INTRODUCTION

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*A Guide To Community Care Facility Licensing In British Columbia* describes the system of legislation and policy that governs the provision of care and supervision in British Columbia's licensed community care facilities. This Guide provides an overview of the community care facility licensing system and the activities that are part of the range of protections provided to vulnerable people who live in community care facilities as well as children who attend child day care facilities licensed under the *Community Care and Assisted Living Act (CCALA)*.

This document is arranged as follows:

**Part I** describes the roles and responsibilities of the many partners who help to ensure that licensed community care facilities in BC protect and promote the health, safety and dignity of those who use them.

**Part II** summarizes the requirements of the [CCALA](#), the [Residential Care Regulation](#), and the [Child Care Licensing Regulation](#), and other relevant provincial legislation.

**Part III** describes how licensing activities are approached using rules of administrative decision-making and procedural fairness.

**Part IV** focuses on key licensing activities and the procedures used to carrying them out.

Many professions are regulated, as are services that may pose a risk to the health and safety of the public, such as transportation, restaurants, and food processing plants. These types of services often require licensing or registration.

Legislative requirements such as licensure, registration, monitoring, and inspection are established by governments to protect vulnerable populations or to protect users of specific services from risks to their health and safety.

Community care facility licensing is one of the primary mechanisms used by government to ensure that care and supervision provided to vulnerable persons meet minimum health and safety requirements. The *Community Care and Assisted Living Act*, the Residential Care Regulation, and the Child Care Licensing Regulation establish the minimum health and safety requirements that must be met.

**Facilities that provide care as defined in the CCALA require a community care facility licence.**

**"care"** means supervision that is provided to

- (a) a child through a prescribed program,
- (b) a child or youth through a prescribed residential program, or
- (c) an adult who is
  - (i) vulnerable because of family circumstances, age, disability, illness or frailty, and
  - (ii) dependent on caregivers for continuing assistance or direction in the form of 3 or more prescribed services

**"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 and includes any other premises or part of a premises that, in the opinion of the medical health officer, is used in conjunction with the community care facility for the purpose of providing care, or
- (b) designated by the Lieutenant Governor in Council to be a community care facility

A person who provides care is described as a *Licensee* and may also be described as an *operator*. A Licensee may be an individual, a partnership, a not-for-profit society, a corporation, a local/municipal government or an aboriginal governing body. Licensees protect and promote the health, safety and dignity of the persons to whom they provide care through meeting and in many cases, exceeding, the requirements of the CCALA and its regulations.

Community care facilities (CCF) include child day care and residential care facilities for children, youth, and adults. These include residential care facilities for seniors, sometimes referred to informally as *long-term care facilities*, *continuing care facilities* or *nursing homes*. Also included are facilities that are sometimes referred to informally as *group homes*; these may include smaller residential care facilities for persons with developmental disabilities, facilities that provide detoxification and intensive treatment for persons with substance use disorders, facilities for persons with mental health disorders or brain injuries, and residential care facilities for children and youth. Facilities providing highly specialized care, such as hospices, are also licensed under the [CCALA](#).

Licensees who receive funding from an organization such as a health authority, Community Living BC (CLBC), or the Ministry of Children and Family Development have specific contractual obligations they must meet in addition to the requirements of the CCALA and its regulations. These organizations assess potential clients to determine whether they are eligible for services and also monitor their contracts with service providers to ensure that their clients are receiving appropriate services, and that their needs are being met. When a person in care is also a client of such a program, that program and Community Care Licensing are partners in ensuring that person's health and safety.

BC's system of community care licensing is somewhat different from other jurisdictions. In most Canadian jurisdictions, the licensing and funding of residential care facilities is located within the same government agency; in BC, these responsibilities are separate.

In BC, the medical health officer (MHO) is named in legislation (CCALA) as having responsibility for licensing, inspection, and monitoring of community care facilities. MHO's<sup>1</sup> delegate their authority to licensing officers to carry out the day-to-day work of licensing, inspection, and monitoring. As MHO's are not involved in operational decisions regarding funding programs, the recommendations they make, or requirements they impose, have greater independence than if they were part of the funding program area. This separation of the funding and monitoring of community care facilities means that there is a dual system of safeguards for persons in care.

The purpose of community care licensing is to prevent risk of harm by working proactively with applicants for a community care facility licence. This is done through assessment of applicants/managers, ongoing monitoring, risk assessment, and inspection of compliance with legislated requirements. In addition to regular monitoring and inspection, licensing officers are responsible for providing information and informal education to applicants and Licensees to ensure that they understand the legislation/regulations and their obligations. If Licensees do not meet the requirements

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<sup>1</sup> Unless referring explicitly to statutory requirements, this document refers to licensing officers or staff, rather than to medical health officers.

of the CCALA and its regulations or there is a complaint that a Licensee does not meet the requirements, licensing officers are required to conduct an investigation on behalf of the MHO. Licensees who become aware of their non-compliance with the requirements of the CCALA and its regulations are usually willing to correct that situation. However, in circumstances where a Licensee is unable or unwilling to take appropriate steps to ensure the health, safety, and dignity of persons in care, progressive enforcement action may be necessary. Progressive enforcement can include a range of actions such as the attachment of terms and conditions, suspension, or cancellation of a licence.

The objectives of British Columbia's community care facilities' licensing system are:

- ✓ ***To promote the health, safety and dignity of persons in care through regular monitoring of community care facilities.*** Regular monitoring and ongoing assessment helps to identify and prevent risks that may harm persons in care.
- ✓ ***To implement the monitoring and inspection system that has been established by government to promote the health, safety, and dignity of persons in care facilities.*** The regulatory framework has been established to protect optimal quality of life and promote the development, individuality, autonomy, and well-being of persons in care. Licensing staff monitor the services provided by Licensees to ensure that the requirements of the CCALA and regulations are being met.
- ✓ ***To provide a predictable system of rules for operators.*** The CCALA and regulations provide a set of rules that all operators must follow. By following or exceeding the standards established by these rules (legislation), Licensees promote the health, safety, dignity, and well-being of their clients, demonstrating that they are working diligently to protect persons in care. When a decision that affects a licence is made by a MHO (or delegated licensing staff) and the Licensee or applicant disagrees with that decision, a means for reviewing and appealing that decision is available.



# I. ROLES, RESPONSIBILITIES, AND RELATIONSHIPS

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There are a variety of partnerships associated with community care facility licensing in British Columbia. Licensing officers work collaboratively with these partners to protect the health, safety, and dignity of persons in care. The following sections briefly describe these partners and their roles and responsibilities.

## MINISTRY OF HEALTH

The role of the [Ministry of Health](#) (MoH) is to set the overall direction for the health care system. The Ministry works with health authorities, care providers, agencies and other groups to guide and enhance the Province's health services and to ensure British Columbians are supported in their efforts to maintain and improve their health and to provide access to health care. The Ministry provides leadership, direction and support to these service delivery partners and sets province-wide goals, standards and expectations for health service delivery by health authorities. The Ministry carries out this leadership role through the development of social policy, legislation and professional regulation, through funding decisions, negotiations and bargaining, and through its accountability mandate.

The provincial **Community Care Facility Licensing program** is located within the Health Services Policy Division of MoH and is responsible for the development and implementation of legislation, and policy to promote and protect the health, safety, and dignity of persons cared for in licensed community care facilities.

### Director of Licensing

The Director of Licensing is a statutory decision maker designated by the Minister as required by the [Community Care and Assisted Living Act](#). The Director of Licensing (and delegates) provides leadership for the MoH Community Care Facility Licensing program, and leads the development and implementation of regulations, standards and policies

The statutory powers of the Director are discretionary powers set out in section 4 of the CCALA, and include requiring a health authority to provide routine or special reports on:

- the operation of licensed community care facilities;
- the results of any investigations of community care facilities or complaints;
- inspecting or making an order for the inspection of any books, records, or premises in connection with the operation of a community care facility;

- requiring a health authority to conduct an audit of the operations of a community care facility;
- carrying out or ordering the investigation of:
  - a reportable incident at a community care facility, or;
  - a matter affecting the health or safety of a person in care specifying policies and standards of practice for all community care facilities or a class of community care facilities;
- making other orders considered necessary for the proper operation of a community care facility, including an order that is contrary to the decision of a MHO; and,
- the operation of the health authority community care licensing program.

The Director of Licensing also has discretionary statutory powers under section 9 of the CCALA to visit and inspect community care facilities and to enter and inspect unlicensed premises being used or intended to be used as a community care facility. The legislation provides the authority for the Director to delegate these powers and duties to individuals who in the Director's opinion possess the experience and qualifications suitable to carry out the tasks. See Appendix A for delegation of authority.

## **ASSISTED LIVING REGISTRY**

The Assisted Living Registrar is also part of the Health Services Policy Division. The mandate of the [Assisted Living Registrar](#) under the CCALA is to protect and promote the health and safety of adults who are assisted living residents. Assisted living residences and licensed residential care facilities both provide housing and services.

Assisted living residences are intended for persons who are independent and require day-to-day assistance in one or two areas (e.g., medications, bathing or life skills). Persons in licensed residential care typically require a greater level of assistance on a daily basis and have more complex health care needs.

The Assisted Living Registrar is responsible to:

- administer the registration of all assisted living residences in BC, whether they are publicly subsidized or private-pay;
- establish and administer health and safety standards, policies and procedures;
- ensure timely and effective investigation of complaints about the health and safety of assisted living residents;
- refer issues that are not within the Registrar's jurisdiction to the appropriate authorities; and,
- inspect residences if there is a concern about the health or safety of a resident.

## HEALTH AUTHORITIES

Health authorities are established by the [Health Authorities Act](#) with the role of delivering health services in accordance with provincial legislation and policy. Their overall responsibilities are summarized in the *Health Services Management Policy*. Health authorities have established internal governance, management, and planning processes that enable them to meet the requirements established by government, and to deliver effective services to residents of their health authority.

Health authorities are responsible for the delivery of regional community care facility licensing programs. Medical Health Officer's (MHO), who are employees of health authorities, typically delegate the licensing activities they are responsible for under the CCALA to licensing officers or specific health authority staff. In addition to being employees of health authorities, MHO's have a reporting relationship to the [Provincial Health Officer](#), who is the chief medical officer of the Province of British Columbia, and is an employee of the provincial government.

Health authorities are also designated agencies under the [Adult Guardianship Act](#). Their mandate is to receive complaints that an adult is abused or neglected (including self-neglect), to determine whether an adult needs support and assistance, and to investigate to determine if the adult is abused or neglected and is unable to seek support and assistance, and investigate reports of abuse, neglect, or self-neglect of vulnerable adults. (See s. 44, s. 61, the definition of "designated agency," and the [Designated Agencies Regulation](#)).

### Community Care Facility Licensing

Medical health officers primary duties and powers are prescribed by the [Public Health Act](#). While the CCALA does not provide the MHO with explicit authority to delegate their powers and duties, the *Public Health Act* allows an MHO to delegate the day-to-day work of monitoring and inspecting under the CCALA to licensing officers in the form of a letter of delegation.

The primary statutory responsibilities of MHO's under the [CCALA](#) are to investigate applications for licensure, to carry out ongoing inspection and monitoring, to investigate allegations that community care facilities do not meet the requirements of the CCALA and regulations, and to take action, if necessary, to protect the health and safety of persons in care. If circumstances exist that put the health, safety, dignity or well-being of a person in care at risk, and the Licensee is unable or unwilling to take appropriate action, the MHO may take action, from the attachment of terms and conditions, to cancellation or suspension of a licence.

A MHO delegates licensing officers to carry out the following duties:

- monitoring and inspection of licensed community care facilities to ensure that they are meeting the requirements of the applicable legislation and regulations;
- providing information and education regarding community care licensing to potential applicants, Licensees, funding partners, and the public;
- consulting with individuals, groups or organizations on all aspects of the licensing process;
- assessing applications to operate community care facilities and providing assistance and guidance throughout the application process;
- assessing the suitability of applicants (Licensees) and/or their designated managers to ensure that they meet the requirements of the CCALA and regulations;
- investigating complaints and/or allegations that a community care facility does not meet the requirements of the CCALA and regulations or that an unlicensed facility is being operated; and,
- investigating and following up on reportable incidents.

In carrying out their duties, licensing officers work in partnership with the Licensee, the funding program (if the facility is funded), the MHO, environmental health officers, and a number of allied health professionals that provide services to persons in care. The overarching goal of these partnerships is to reduce risk of harm to persons in care, and to ensure that the health, safety and dignity of persons in care is promoted and protected.

*Environmental Health Officers* are responsible for inspecting services under the *Public Health Act* related to the health and safety of food, drinking water and other services such as hair salons that are on site at some community care facilities.

## **Home and Community Care Services**

[Home and Community Care](#) (HCC) is a health authority program that provides a range of health care and support services for eligible adults. HCC assists adults who have acute, chronic, palliative or rehabilitative health care needs to remain independent in their own home for as long as possible. HCC is a key stakeholder in assisting adults to transition to assisted living or licensed residential care services when they can no longer be supported in their own home and those who are nearing the end of their lives.

## **Mental Health and Substance Use**

Mental health and substance use programs are health authority programs that are consistent with legislation, standards and policy established by the Ministry of Health that provide funding for residential care and treatment programs for clients with a mental health and/or substance use diagnoses, many of which are licensed under the CCALA.

## RELEVANT MINISTRIES AND PROGRAMS

Many ministries, programs, agencies and stakeholders may play a role in promoting and protecting the health, safety, well-being and dignity of adults and children in community care facilities.

### THE MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

The Ministry of Children and Family Development (MCFD) purpose is to ensure that the province's children and families have the best chance possible to succeed and thrive. MCFD plays a key role in funding child day care, as well as residential care resources for children and youth often informally referred to as “group homes”.

MCFD general responsibilities include:

- early childhood development and child care;
- special needs children and youth;
- child and youth mental health;
- youth justice and youth services;
- child protection and family development;
- adoption and foster care;
- programs to assist families and child care providers:
  - Child Care Operating Fund;
  - Child Care Capital Funding Program; and,
  - Child Care Subsidy.

#### ***MCFD EARLY CHILDHOOD EDUCATOR REGISTRY***

The [Child Care Licensing Regulation](#) assigns responsibility to MCFD for the oversight and registration of those working in the Early Childhood Education field.

The [Early Childhood Educator Registry](#) is responsible for:

- Certification of Early Childhood Educators (ECE) and;
- Early Childhood Educator Assistants (ECEA).
- Recognition, monitoring and support to post-secondary educational institutions that offer early childhood education curriculum in BC; and,
- Investigation of practice concerns of ECEs and ECEAs.

## **MCFD CHILD CARE RESOURCE AND REFERRAL PROGRAMS**

The Child Care Resource and Referral ([CCRR](#)) Program provides support, resources and referral services for child care providers and parents in all communities throughout the province. The program also works with community groups to promote quality child care choices that meet the needs of local families. CCRR programs are funded by MCFD to provide services to parents seeking child care such as lists of local child care providers, and information about how to choose a child care provider. CCRR's also support local child care providers by offering them resources, training and support.

## **MINISTRY OF SOCIAL DEVELOPMENT AND SOCIAL INNOVATION**

The Ministry of Social Development and Social Innovation administers the BC Employment and Assistance program which provides temporary assistance, disability assistance, supplementary assistance and employment programs for British Columbians in need. This program is guided by the [Employment and Assistance Act](#) and the [Employment and Assistance for Persons with Disabilities Act](#). The Ministry's clients may live in, or use the services of, licensed community care facilities.

This Ministry also provides funding, oversight and stewardship to Community Living Authority of BC, which in turn provides licensed residential care facilities for persons with developmental disabilities. These facilities may be informally referred to as group homes.

## **COMMUNITY LIVING AUTHORITY OF BC**

[The Community Living Authority Act](#) establishes the mandate of the [Community Living Authority of BC](#). The Authority is responsible for a variety of community living supports and services for children and adults with developmental disabilities. It has a board of self-advocates, family and community members, as well as staff located throughout the province. Many of the Authority's clients live in licensed community care facilities.

## **MINISTRY OF FINANCE**

The [Ministry of Finance](#)'s Risk Management Branch provides risk management consulting services and claims and litigation management services to health authorities and assists in the identification, analysis, evaluation and management of risks. The Health Care Protection Program plays an ongoing role in assisting in the management of some adverse events originating in health authorities. In addition, the Risk Management Branch provides risk management consulting services to the Ministry of Health at the request of the ministry.

## MINISTRY OF JUSTICE

The Ministry of Justice administers the [Criminal Records Review Act \(CRRRA\)](#) that helps protect children and vulnerable adults from individuals whose criminal record indicates they pose a risk of physical or sexual abuse, and in the case of adults, financial abuse. Under the CRRRA, individuals working with children or vulnerable adults directly or potentially have unsupervised access must authorize a Criminal Record Check for their employer or organization. This authorization is submitted to the [Criminal Records Review Program](#) for review. Physicians, nurses, health authority employees, dentists, teachers, registered students in post-secondary institutions who will work with children, and child care providers are just some of the groups whose records must be checked. Volunteers and residents age 12 and older at a licensed or licence-not-required child care facility are also included. View the forms for applying for a [Criminal Record Check](#):

## CORONERS SERVICE

The [Coroners Service of British Columbia](#), under the jurisdiction of the Ministry of Justice, is responsible for the investigation of all unnatural, sudden and unexpected, unexplained or unattended deaths. It makes recommendations to improve public safety and prevent death in similar circumstances. The Coroner is responsible for ascertaining the facts surrounding a death and must determine the identity of the deceased and how, when, where and by what means the deceased died. The death is then classified as natural, accidental, suicide, homicide or undetermined. The Coroners Service is a fact-finding, rather than a faultfinding agency that provides an independent service to the family, community, government agencies and other organizations. The [Coroners Act](#) governs the coroner's scope of activity.

The Ministry of Health has a memorandum of understanding with the Coroners Service that sets out reporting requirements and communication expectations concerning deaths in licensed community care facilities.

## ACCREDITATION

Many organizations that provide licensed residential community care may also be accredited through agencies such as [Accreditation Canada](#) or through the Commission on Accreditation of Rehabilitation Facilities. Accreditation is a voluntary form of quality assurance not mandated by law.

# PUBLIC BODIES

## FIRST NATIONS HEALTH AUTHORITY

The [First Nations Health Authority](#) (FNHA) goal is to reform the way health care is delivered to BC First Nations to close gaps and improve health and wellbeing.

This FNHA has taken over the administration of federal health programs and services previously delivered by Health Canada's First Nations Inuit Health Branch - Pacific Region.

The First Nations Health Authority plans, designs, manages, and funds the delivery of First Nations health programs and services in BC. These community-based services are largely focused on health promotion and disease prevention such as:

- Primary Care Services
- Children, Youth and Maternal Health
- Mental Health and Addictions Programming
- Health and Wellness Planning
- Health Infrastructure and Human Resources
- Environmental Health and Research
- First Nations Health Benefits
- eHealth Technology

## OMBUDSPERSON

[The British Columbia Ombudsperson](#) is an independent office of the Legislature. The Ombudsman is responsible for promoting administrative practices and services of public agencies that are fair, reasonable, appropriate and equitable.

The Ombudsperson can:

- provide information about what steps to take in resolving concerns with a public agency;
- attempt to settle complaints through consultation;
- investigate complaints about administrative unfairness by a public agency;
- make recommendations to a public agency to resolve an unfairness;
- report to the provincial legislature; and,
- issue public reports.

The Ombudsperson has jurisdiction over a wide range of public agencies, including health authorities.



## REPRESENTATIVE FOR CHILDREN AND YOUTH

The [Representative for Children and Youth](#) supports children, youth and families who need help in working with the child welfare system and advocates for changes to the system itself. The Representatives responsibilities include advocating for children and youth, protecting their rights, and improving the system for the protection and support of children and youth, particularly those who are most vulnerable. The Representative for Children and Youth is also an independent office of the Legislature.

## SENIORS ADVOCATE

The [Seniors Advocate](#) is responsible for monitoring seniors' services, promoting awareness of seniors' issues and supports, and working collaboratively to identify solutions and make recommendations about system-wide issues facing seniors in key areas: health care, personal care, housing, transportation and income support. The Office is a go-to resource for seniors information and referrals.

## POLICE

The Royal Canadian Mounted Police (RCMP) and local police forces are responsible for protecting the public through enforcing the federal [Criminal Code](#). Police may become involved with community care facility licensing programs in response to allegations of criminal offences, such as:

- sexual offences and disorderly conduct including sexual interference, invitation to sexual touching, sexual exploitation, sexual exploitation of a person with a disability, and voyeurism; or,
- offences against the person and reputation including duty of person to provide necessities of life, criminal negligence, assault, assault with a weapon or causing bodily harm, and aggravated assault.

## OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

The [Public Guardian and Trustee](#) (PGT), is an independent office of the legislature established under the [Public Guardian and Trustee Act](#) and mandated to:

- protect the legal and financial interests of children under the age of 19 years;
- protect the legal, financial, and in some cases personal and health care interests of adults who require assistance in decision making; and,
- administer estates of deceased persons and missing persons.

The PGT may become involved with a licensed community care facility in situations regarding abuse or neglect or where a resident requires assistance in making financial decisions or where there is no one to make health care decisions for an incapable adult.

## **COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD**

The [Community Care and Assisted Living Appeal Board](#) is an administrative tribunal established to hear appeals under section 29 of the CCALA. The Board provides a specialized, impartial, and cost-effective forum to appeal decisions where action was taken against a CCF, an assisted living residence or an ECE.

Decisions made under the CCALA must balance the need to ensure minimum standards of health and safety for persons in care and the need to ensure fair process for applicants, operators and educators.

## **PATIENT CARE QUALITY OFFICES AND REVIEW BOARDS**

[Patient Care Quality Review Board Act](#) establishes a timely and transparent approach to managing patient care complaints in BC. This process provides patients with the opportunity to resolve concerns and improve the health care system and patient safety.

Under this Act, Patient Care Quality Offices (PCQO), in each health authority, process and respond to patient complaints related to the quality of care (a health care service that a patient/client/resident received, or expected, but did not receive, from a health authority).

The PCQO serves as a liaison between patients and health care providers during the complaint process review. The PCQO is expected to:

- formally record and manage complaints in a prompt and fair manner;
- work with complainants towards a resolution by connecting with the appropriate care providers and investigating relevant policies and procedures; and,
- provide complainants with a response as well as an explanation of decisions and actions taken as a result of a complaint.

If the PCQO response does not resolve the complaint to the satisfaction of the complainant, a complainant may contact the Patient Care Quality Review Board for an independent assessment of the matter. There are review boards in each health authority, and one for the Provincial Health Services Authority.

The CCALA Appeal Board and PCQ Review Board have complementary roles under different legislation. While the PCQO focus is in resolving patient complaints, the role of community care facility licensing is investigating to determine compliance with the

CCALA and its regulations, and if needed take action to bring the Licensee into compliance with the legislation. The PCQ Review Board does not have a mandate to review complaints about statutory decisions made under the authority of the CCALA. This responsibility falls to the Community Care and Assisted Living Appeal Board.

## **LOCAL GOVERNMENT: MUNICIPALITIES AND REGIONAL DISTRICTS**

In BC, local government - municipalities and regional districts - are responsible for community planning, fire protection and regulation, recreation and libraries, street lighting, solid waste disposal, the water supply and distribution, sewage collection and disposal, and other services. With respect to licensed care facilities, municipalities may be involved in roles such as issuing business licences, issuing a variety of permits, considering zoning applications, and conducting fire and building safety inspections.

## **LICENSEES**

Operators of licensed care facilities are referred to as Licensees under the CCALA. Licensees and their staff provide direct care and supervision to persons in care, and have the primary responsibility to protect and promote the health, safety, dignity, and well-being of persons in care. The [CCALA](#) requires that Licensees of community care facilities:

- operate the facility in a manner that will promote the health, safety and dignity of persons in care;
- employ only persons of good character who meet the standards for employees specified in the regulations;
- display the licence in the prescribed manner;
- appoint a manager for the community care facility, and,
- facilitate a forum for persons in care and family members and substitute decision makers through the establishment of resident and family councils, for Residential Care Facilities.

## II. THE FOUNDATION: THE LAW

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This part of the Guide explains the difference between legislation and other government-established rules, provides some guidelines for reading and interpreting legislation, and summarizes the [CCALA](#) and regulations, as well as other provincial legislation that may have an impact on community care facility licensing.

### THE HIERARCHY OF RULES

**Statutes** (Acts) are written and enacted by the legislative authority; in BC, the legislative authority is the Legislative Assembly. Statutes are overarching instruments that regulate activity in a given area. They come into force either on royal assent or proclamation.

**Regulations** are also referred to as *delegated* or *subordinate* legislation because the Legislature delegates the power to pass regulations to another body and because regulations are subordinate to legislation. Regulations may only be made if authorized by legislation. Usually a statute will set out the classes of regulation the Lieutenant Governor in Council (Cabinet) is authorized to pass.

Statutes and regulations are collectively referred to as **legislation**.

CCALA, s. 34 gives the authority for Cabinet to make regulations regarding certain matters, for example, how an application for a licence to operate a community care facility must be made to a MHO, and the content of the application.

**Policies, guidelines, best practices** and other such documents created by a public body do not have the force of law. This means that if the relevant document is inconsistent with a statute or regulation, the statute or regulation will take precedence the policy.

Decision makers may only rely on policy established under *explicit* or *implicit* statutory authority. Under s. 4 of the CCALA:

- the director of licensing may “specify policies and standards of practice for all community care facilities or a class of community care facilities”;
- In considering whether to attach terms and conditions to a license, the MHO must have regard to the standards of practice specified by the director of licensing under.

The Director of Licensing’s Standards of Practice established under the CCALA are examples of policy made with explicit statutory authority, therefore are considered to be equivalent to regulations (see [Interpretation Act](#) “definition of regulation”). When using these types of instruments in their work, licensing officers, as delegated statutory decision makers, must first determine whether the guidelines apply to the situation and then determine how they apply.

## GUIDELINES FOR INTERPRETING LEGISLATION

It is not always easy to read and understand legislation; it is often necessary to hold multiple points in your mind while you are reading statutes and regulations. The Supreme Court of Canada has endorsed the following as the correct approach, referred to as the *modern approach*, to interpreting statutes and regulations:

*Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>2</sup>*

The following guidelines may assist you in interpreting legislation.

- ✓ **Read** the section you are interpreting a few times to get a preliminary idea of what it says. Note the use of the words “*may*” or “*shall*” or “*must*”, and the use of the words “*and*” or “*or*” in lists.
- ✓ **Read** all other sections of the statute to which the provision you are interpreting refers (e.g., CCALA, s. 25(3), which refers to s. 9 of the CCALA);
- ✓ **Review** definitions sections in the legislation to determine if words in the section you are interpreting are defined. There may be a definition section for the legislation as a whole (e.g., CCALA, s. 1), for the Part of the legislation you are interpreting, or for the section you are interpreting (e.g., CCALA, s. 17 and s. 9(7) and Child Care Licensing Regulation, s. 20(2));
- ✓ **Read** the statute’s table of contents, noting how the statute is organized (for example the CCALA is divided into parts by types of facilities with some general provisions in the first and final parts) and any other potentially relevant sections (e.g., the definitions section in CCALA, s. 1);
- ✓ **Review** any regulations under the statute to ensure you understand how the statutory scheme as a whole operates;
- ✓ **Skim** the entire statute or regulation to ensure there are no other relevant provisions. Be particularly alert to exemptions to legislative framework. (e.g., s.3 (1) of the CCLR an early learning program within the meaning of the [School Act](#) is exempt from the CCALA)

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<sup>2</sup> [1984] 1 S.C.R. 536 at 578, citing Elmer A. Driedger, *Construction of Statutes*, 2<sup>nd</sup> ed. (Toronto: Butterworths, 1983) p. 87

- ✓ **Consider** whether the plain language of the section could be given different meanings or is ambiguous. If so, you may wish to consult Hansard<sup>3</sup> or other evidence regarding the purpose of the section. If there is no definition of a given word in the relevant statute, you may consult interpretation aids such as dictionaries. Be alert that judicial interpretation may be available to interpret those words. Decisions of the Community Care and Assisted Living Appeal Board may also have interpreted phrases in the CCALA or the regulations.<sup>4</sup>

In addition to the *modern approach* to statutory interpretation described above, additional principles of statutory interpretation include:

- If a statutory provision includes a list, the drafters are presumed not to have intended the section to apply to any items not on the list: for example, s. 19(1) of the CCLR. Sometimes this rule does not apply because a list in a statute is illustrative, not exclusionary. Usually an illustrative list will have a word like "includes" before it.
- When a list of words has a modifying phrase at the end, the phrase refers only to the last item in the list, e.g., fire fighters, police officers, and doctors in a hospital.

The *Interpretation Act*<sup>5</sup> also includes the following principles of statutory interpretation:

- S. 11: A head note to a provision or a reference after the end of a section or other division is not part of the enactment and must be considered to have been added editorially for convenience of reference only;
- S. 12: Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing a definition or interpretation provision; and,
- S. 28 (1): If a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

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<sup>3</sup> The official transcript of the proceedings of the Legislative Assembly of BC.

<sup>4</sup> See, for example, Summary No. 43 on the Former Appeal Board decisions web site in which the Former Appeal Board held certain acts (instructing staff to forge documents and hiding in her car to avoid licensing officers) were sufficient to conclude the appellant was not of good character.

<sup>5</sup> RSBC 1996, c. 238.

# SUMMARY OF THE CCALA AND REGULATIONS

## *The CCALA*

The [CCALA](#) governs both licensed community care facilities and registered assisted living residences. In BC, assisted living and facility care are parts of a continuum of care provided to persons who need ongoing support and assistance for a variety of health and disability-related reasons. CCALA also applies to children in licensed child day care facilities and children and youth in group homes.

A community care facility is a building or part of a building in which a person provides care to three or more persons who are not related by blood or marriage to that individual. The CCALA defines care as *supervision provided to a child through a prescribed program, to a child or youth through a prescribed residential program, or to an adult who is vulnerable because of family circumstances, age, disability, illness or frailty, and dependent on caregivers for continuing assistance or direction in the form of three or more prescribed services.*

The population in licensed community care facilities are more vulnerable and dependant than the population of assisted living residences. Assisted living residences and licensed residential care facilities both provide housing and services.

The key differences include:

- The number and level of services provided on a daily basis;
- The number of staff to assist people;
- Whether a person is able to make decisions on their own behalf; and,
- Whether a person can evacuate safely and independently in an emergency.

Assisted living residences support persons who are more independent and require day-to-day assistance in one or two areas (e.g., medications, bathing or life skills). People in licensed residential care facilities may require more assistance on a daily basis and with complex health care needs.

The CCALA also sets out the powers and duties of the Director of Licensing and MHO's as well as the obligations of Licensees of community care facilities. These powers and duties taken together are the basis for licensing activities such as issuing a licence, attaching terms and conditions to a licence, inspecting and monitoring compliance in licensed facilities, investigating licensed and unlicensed facilities, providing exemptions, and responding to non-compliance, conducting reconsiderations and appeals. The CCALA also allows for the certification of Early Childhood Educators (administered by MCFD) and the establishment and functioning of the Community Care and Assisted Living Appeal Board for those affected by a decision under the Regulations. (See Appendix C for the appeal process).

## The Regulations

The Regulations are the detailed, operational part of the overall legislative scheme that regulates community care facilities. Regulations under the [CCALA](#) include the [Child Care Licensing Regulation](#), [Residential Care Regulation](#) and the Community Care and Assisted Living Regulation. Operators of a CCF must comply with regulations regarding:

- Care and/or supervision
- Hygiene and communicable disease control
- Licensing
- Medication
- Nutrition and food services
- Physical facility, equipment and furnishings
- Policies and procedures
- Program
- Records and reporting
- Staffing

The [Community Care and Assisted Living Regulation](#) establish the list of prescribed services. The number of prescribed services offered by an operator is one of the factors that distinguish a licensed community care facility from a registered assisted living residence. Care programs that provide three or more of the prescribed services are required to be licensed, while those offering only one or two of the services must be registered as assisted living.

The Child Care Licensing Regulation specifies the following categories of child care (based on age of children, location, and number of children) that require licensing:

- Group child care (under 36 months): no more than 12 children per group, staffed by certified Early Childhood Educators (ECE)/Infant Toddler.
- Group child care (30 months to school age): no more than 25 children per group, staffed by certified ECE/ECE Assistants.
- Preschool (30 months to school age): care for no more than four hours/day per child for no more than 20 children per group, staffed by certified ECE/ECE Assistants.
- Group child care (school age): care outside school hours, including vacations, for children attending school under 12 years of age. No more than 24 children per group (kindergarten and Grade 1), no more than 30 children per group (Grade 2 or higher), staffed by Responsible Adults.
- Family child care: care in a personal residence for no more than 13 hours/day for no more than seven children under 12 years of age, including the provider's own children under the age of 12, staffed by Responsible Adult.



- Occasional child care: short-term care for children at least 18 months old, for no more than eight hours/day to each child and no more than 40 hours in a calendar month to each child; maximum number of children depends on age groupings, staffed by Responsible Adults.
- Multi-age child care: groups of eight children under 12 years of age (restrictions apply regarding age groupings), staffed by certified ECE.
- In-home multi-age child care: care in a personal residence for no more than 13 hours/day for no more than eight children under 12 years of age, including the provider's own children under the age of 12, (restrictions apply regarding age groupings), staffed by a certified ECE.
- Child-minding: children younger than 12 years of age where parents are attending programs/services in respect of English as a Second Language, settlement or labour market integration for no more than 5 hours/day, 24 children per group, staffed by Responsible Adults.

The Residential Care Regulation specifies the following categories of residential care:

- Long Term Care: care for persons with chronic or progressive conditions, primarily due to the aging process.
- Community Living: care for persons with developmental disabilities.
- Hospice: care services for persons at the end of their lives.
- Mental Health and Substance Use: persons who are in care primarily due to a mental disorder, substance dependence or both.
- Acquired Injury: care for persons whose physical, intellectual and cognitive abilities are limited primarily due to an injury, including persons suffering from brain injuries or injuries sustained in accidents.
- Child and Youth Residential: care that provides services to children and youth, including the types of care described above.

## RELEVANT PROVINCIAL LEGISLATION

A broad knowledge of other provincial legislation is important in the work of licensing officers for a number of reasons. For example:

- under s. 13(1) of the CCALA, a MHO may suspend or cancel a licence, attach terms or conditions to a licence or vary the existing terms and conditions of a licence if, in the opinion of the MHO, the Licensee, among other things, has contravened a relevant enactment of British Columbia or of Canada.
- provisions of other legislation apply to the conduct of licensing officers, e.g., [the Freedom of Information and Protection of Privacy Act](#) has implications for the type of information that must be protected and what can be released.

**Licensing officers should also be aware other Acts and regulations such as:**

### **[Adult Guardianship Act](#)**

Provides the Public Guardian and Trustee's with authority for the appointment of persons to make decisions or to assist an adult to make decisions. Under s. 46 of this Act, anyone who has information that an adult is abused and/or neglected and is unable to seek support and assistance may report the circumstances to designated agency; BC does not have mandatory reporting of abuse and/or neglect legislation for adults. However, if a designated agency has reason to believe a criminal offence has been committed against an adult about whom a report is made under s. 46 of the *Adult Guardianship Act*, the designated agency must report the facts to the police s. 50.

Under CCALA, s. 18(3) (d), a Licensee must not act as a decision maker or guardian under the *Adult Guardianship Act*. For the purposes of this section of the CCALA, a Licensee is defined broadly to include a Licensee, an officer or director of the Licensee and an agent, designate or employee of the Licensee.

### ***British Columbia Building Code***

The BCBC is a regulation under the [Local Government Act](#), and is based on the model *National Building Code*. The *Code* regulates safety in the design, construction, and occupancy of buildings in the province. The BCBC may be purchased from [BC Codes](#).

Like the *British Columbia Building Code*, the ***British Columbia Fire Code*** is based on a national code, and has been enacted as a regulation, in this case under the *Fire Services Act*. The Code contains technical requirements designed to provide an acceptable level of fire safety within a community.

### **[Fire Services Act](#)**

Provides for the appointment of a Fire Commissioner who has powers including investigating conditions under which fires are likely to occur (s. 3) and inspecting any premises anywhere in BC (s. 21). This Act also sets out requirements for various classes of buildings. See particularly s. 31(h) of the *Fire Services Act*, which requires every community care facility to adopt, and practice, an approved fire drill system.

Local municipalities, like the City of Vancouver, may have additional fire and safety bylaw requirements. ([Vancouver Charter](#))

### **Criminal Records Review Act**

Anyone who works with vulnerable adults, and with children or who has unsupervised access to children must submit to a Criminal Record Check. This Act helps protect children and vulnerable adults from individuals whose criminal record indicates they pose a threat of physical, sexual, or in the case of adults, financial abuse.

### **Freedom of Information and Protection of Privacy Act**

Provides for the appointment of the province's [Information and Privacy Commissioner](#) which provides independent oversight of the information and privacy practices of public bodies and private organizations that collect, use or disclose personal information.

There are exceptions to this Act regarding the collection of personal information if the information is collected for the purposes of "law enforcement" s. 27(1)(c), which is defined in Schedule 1 as including "investigations that lead or could lead to a penalty being imposed." This may apply to licensing investigations; however, it may be necessary to consult with internal health authority FOI programs with respect to a specific investigation and ensure internal policy and procedures are being followed.

### **Child, Family, and Community Service Act**

Regulates the care, safety, and the removal of children in the province. Under s. 14, a person who has reason to believe that a child needs protection must promptly report the matter to the director or designate of the Ministry of Children and Family Development. (See s. 13, which defines child in need of protection).

Under the CCALA, a Licensee must not bring, cause to be brought, or advertise for or in any way encourage the entry of a person less than 19 years of age into BC to become a person in care without first obtaining written approval of the director designated under the *Child, Family, and Community Service Act* s. 19(2).

### **Continuing Care Act**

Provides for the Minister of Health, through the health authorities to enter into written agreements with operators under which the government will make payments to operators on behalf of clients who receive continuing care. Under the Continuing Care Programs Regulation, prescribed continuing care services include care in continuing care residential facilities (group homes, family care homes, and long-term care facilities).

### [Health Care \(Consent\) and Care Facility \(Admission\) Act](#)

Establishes the right of capable adults to give, refuse, or revoke consent to health care treatment and requires health care providers to obtain valid consent from adults before providing health care to them.

### [Pharmacy Operations and Drug Scheduling Act](#)

Establishes the [College of Pharmacists](#); which regulates and licenses pharmacists. This Act sets the duties for pharmacists as well as rules relating to dispensing of prescription medications in the province.

Licensed community care facilities are subject to a number of requirements under the [Pharmacy Operations Requirements](#).

### [Patient Care Quality Review Board Act](#)

Provides for the establishment of Patient Care Quality Review Boards. The review boards are independent of the health authorities and are accountable to the Minister of Health. The boards receive and review care quality complaints that have first been addressed by a health authority's PCQO and which have not been resolved to the satisfaction of the complainant. Upon completion of a review, the boards may make recommendations to the Minister of Health and to the health authorities for improving the quality of patient care. **These review boards do not have the authority to review complaints about decisions of a MHO under the CCALA, or complaints about a decision of the Community Care and Assisted Living Appeal Board.**

### [Public Guardian and Trustee Act](#)

Provides for the appointment of a the Public Guardian and Trustee, who protects the legal rights and financial interests of children, provides assistance to adults who need support for financial and personal decision-making, and administers the estates of deceased and missing persons where there is no one else able to do so.

Under CCALA, s. 18(4), a provision of a will, gift, or benefit is void if it confers a benefit on a Licensee or the Licensee's spouse, relative or friend and the Public Guardian and Trustee has not given written consent to it. Similar provisions require consent in writing by the Public Guardian and Trustee for a Licensee to act under a power of attorney granted by a person in care s. 18(5).

### **Ombudsperson Act**

The Ombudsperson conducts impartial investigations of complaints about government administration or unfairness. The Ombudsperson investigates to determine whether in making a decision that becomes the subject of a complaint, a public agency acted fairly and reasonably, and whether the public agency's actions and decisions were consistent with relevant legislation, policies, and procedures. Complaints may be made about unfair administrative decisions or actions of a public agency including delay, rudeness, negligence, arbitrariness, oppressive behaviour, and unlawfulness.

### **Public Health Act**

Establishes the Provincial Health Officer for BC. This comprehensive Act provides the authority for all matters pertaining to public health and disease prevention within the province and establishes a framework to maintain public health by preventing and removing a broad range of health hazards. This Act lays out standards for a variety of infrastructures, facilities and activities that may pose a risk to public health (e.g., drinking water systems, sewage disposal, food services and commercial pools). Local and regional boards of health and Environmental Health Officers (EHO) are responsible for ensuring inspection and enforcement of *Public Health Act*. MHO and EHO have significant powers under the *Public Health Act* to protect the health of the public.

### **Food Premises Regulation**

Establishes requirements for safe food handling where food is intended for public consumption, is sold, offered for sale, supplied, handled, prepared, packaged, displayed, served, processed, stored, transported or dispensed. Facilities with 7 or more persons in a residence or 9 or more children in day care may be subject to the Food Premises Regulation. Licensing officers should refer new facilities to the EHO for review. The Food Premises Regulation does not apply in single family dwellings (i.e., Family Child Care); however health authorities have procedures for referring these facilities if there are health and safety concerns.

### **Drinking Water Protection Act**

This Act and regulations are intended to ensure safe drinking water. This Act and regulations set out requirements for the construction of new systems, and for regulating water suppliers. This statute does not require the owner or occupier of an existing single family dwelling to provide proof that their water supply is safe prior to the issuance of a community care facility licence. Although the *Drinking Water Protection Act* does not apply to single family dwellings, safe water provision is essential to safe care. If there is a concern the recommended course of action is to report any concerns to the local Drinking Water Officer who can make Orders and take action if there is a safety concern regarding the drinking water supply to the facility.

### **Sewerage System Regulation**

Requires that all domestic sewage originating from a structure is properly discharged and does not cause or contribute to a health hazard. The Regulation empowers EHO's to respond to complaints and to make orders to ensure that the health hazard is abated. There is nothing in the Regulation which requires the owner of a single family dwelling to provide certification that the sewage system is adequate or functioning properly prior to the issuance of a community care facility licence. The preferable course of action is to refer a concern of a malfunctioning sewerage system to the EHO for follow up.

### **Communicable Disease Regulation**

Establishes a list of communicable disease that labs and physicians must report to the MHO and establishes appropriate control measures. Each health authority has policies and procedures that outline the roles and responsibilities around reporting of, and response to, communicable diseases.

### **Business Practices and Consumer Protection Act**

The BPCPA applies to all service providers of residential care, child care and assisted living residences. Consumer Protection BC has determined that under section 17 of the BPCPA, contracts of this nature are defined as future performance contracts.

The BPCPA contains a provision for refunds and requires that the service provider contract must contain an itemized purchase price for the goods or services to be supplied under the contract.

# III. THE LAW: STATUTORY DECISION-MAKING AND ADMINISTRATIVE LAW

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## STATUTORY DECISION-MAKING

Statutory decision-making is making decisions based on powers granted by legislation. The Director of Licensing, MHO's, their delegates, such as licensing officers, are empowered to make a variety of decisions about community care facilities licensed under the CCALA.

Statutory decision makers have powers to make decisions only because they are explicitly given such power by statute (legislation) or the power has been delegated to them. The rule of law<sup>6</sup> requires that statutory decision makers identify the legal authority for powers that they exercise. To act without statutory power is to act outside of *jurisdiction*, which means that any such action is void and could, if sufficiently serious, provide a basis for tort liability.<sup>7</sup>

**Statutory power of decision** means a power or right conferred by an enactment to make a decision deciding or prescribing:

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
- (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it.

*Judicial Review Procedure Act*

## DELEGATION

A statute may explicitly allow a statutory decision maker to delegate some or all of his/her powers to another person. For example, under the CCALA, s. 3(2), the Director of Licensing may delegate, in writing, any power or duty of the Director to a MHO or a person who, in the opinion of the Director of Licensing, possesses the experience and qualification suitable to carry out the tasks as delegated. If there is no explicit delegation in the statute, delegation is permitted as a matter of statutory interpretation - that is, it is assumed that if the legislature did not reasonably expect the named statutory officer to exercise the powers personally, delegation is permitted. In BC, MHO's delegate authority to licensing officers in writing, citing the relevant sections of the CCALA. (See Appendix A for a more thorough discussion of delegation.)

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<sup>6</sup> The principle that no one is above the law, which requires that governmental authority must be exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps.

<sup>7</sup> The legal requirement that a person responsible, or at fault, shall pay for the damages and injuries caused.

# ADMINISTRATIVE LAW

*Administrative law is the legal rules and institutions used to regulate and control the conduct of the state in its relations with citizens. This body of law is concerned primarily with issues of substantive review (the determination and application of a standard of review) and with issues of procedural fairness.*

## PROCEDURAL FAIRNESS

Whenever the legal rights of an individual may be affected by officials exercising legal decision-making authority, there is an expectation that the decision will be made in accordance with the principles of procedural fairness. For licensing practice, such decisions include processes such as inspections, review of requests for exemption, application review, and investigations, that is, all the licensing processes that could have an impact on a Licensee or applicant. The principles of procedural fairness include:

- those affected by a decision should be involved in the making of that decision.
- those affected by a decision should be informed and consulted in a meaningful way and have their point of view heard and considered.
- decisions should be made within a timely, fair, and consistent process and be based on relevant facts and without bias.
- people should understand who will make the decision, how the decision is to be made, and why the decision was made.
- all people deserve to be treated with respect and courtesy and in a way in which they can understand.
- there should be a clearly defined complaint procedure that everyone involved is made aware of directly, and which protects against retribution.
- the public is invited to participate in planning programs and services, and has access to information needed to evaluate and improve performance.

Procedural fairness comprises two broad common law rules designed to ensure fair procedures are followed in making of decisions that affect the rights, obligations or legitimate expectations of individuals. The two rules expressed in traditional terms, are:

1. the decision maker must afford a hearing in appropriate circumstances; and,
2. the decision maker should not be biased or be seen to be biased.



Decisions by statutory decision makers may be the subject of an appeal or judicial review, and a failure to follow procedural fairness rules may be a basis for a successful appeal.

The following principles of procedural fairness are particularly relevant to licensing decisions:

- **The notice requirement:** The notice to the affected person must identify the critical issues and contain sufficient information for the person to be able to participate meaningfully in the decision-making process.
- **The fair hearing rule:** A fair hearing means that the affected person is given a reasonable opportunity to speak or respond and also that the decision maker genuinely considers the affected person's submission in making the decision.
- **The lack of bias rule:** The person making the decision must act impartially in considering the matter. Bias is a lack of impartiality for any reason and may be in favour of or against the affected person. It may arise from the decision maker having some financial or personal interest in the outcome of the decision, or giving the impression that they have prejudged the issue.
- Bias can be actual or apprehended (i.e., with the appearance of). Apprehended bias is judged by whether a fair-minded observer properly informed as to the facts or the nature of the proceedings or process might reasonably apprehend that the decision maker might not bring an impartial or unprejudiced mind to the resolution of the issue.

#### **Tips To Avoid Bias or the Appearance of Bias**

Fairness is a state of mind and a style of communication reflecting that state of mind. To avoid bias or the appearance of bias:

- ✓ Maintain balanced, courteous communication and avoid the appearance of prejudice.
- ✓ Do not appear impatient, listen carefully and keep an open mind.
- ✓ Don't react prematurely; wait until you hear the whole story.
- ✓ Be aware of feeling cross or irritated and your body language.
- ✓ Do a mental check: am I assuming a favourable or unfavourable conclusion?
- ✓ Check that the tone of your questions and responses is neutral.
- ✓ When documenting events, trust your doubts about a word or a phrase, check with a colleague, then remove the content that may appear biased.

*In Blanes-Richter v. Interior Health Authority*,<sup>8</sup> the Appeal Board concluded that in licensing under the CCALA, bias means whether a reasonable person would believe that the outcome of an investigation was predetermined.

The Appeal Board concluded that the following conduct indicated a biased mind. The licensing officer made statements to a Licensee that:

- she would not issue a licence to the Licensee;
  - she would not grant the Licensee exemptions from the regulations;
  - she would not process applications for new licences for the facility;
  - as the Licensee was familiar with the regulations, she asked the Licensee “why are you calling me?”
  - the licensing officer routinely did not return telephone calls from the Licensee and did not acknowledge e-mails from her; and,
  - the licensing officer failed to inform a Licensee of the ability to request an exemption, but rather pre-determined that the exemption would not apply.
- **Duty to give reasons:** The person making the decision must provide reasons to the affected person for that decision.
  - **Fettering of discretion:** To *fetter*<sup>9</sup> discretion means to restrain or limit the use of a decision maker’s judgment usually through the strict application of policies without taking individual circumstances into account. If the decision maker can exercise discretion in making the decision and is not prepared to do so in particular circumstances, he or she may be found to have interfered with a person’s right to a fair hearing. The courts have long reacted against public bodies that impose rigid policies or rules that are incapable of considering exceptions. When this happens, the form of unlawfulness is called a *fettering of discretion*.
  - **Burden of Proof:** Burden of proof is a rule of evidence that imposes on a participant in a court case the initial obligation to prove a certain thing or the contrary will be assumed by the court. For example, in criminal trials, the prosecution has the burden of proving the accused guilty because innocence is presumed. The Licensing Program is responsible for providing the evidence that a facility is not complying with legislation. If there is no evidence to support an alleged contravention, then licensing staff cannot cite a contravention.
  - **Balance of probability:** The standard of proof in civil matters is said to be on the *balance of probability*, whereas *reasonable doubt* is the standard for criminal cases. The balance is not fixed in any arithmetical way; the standard means that the court or decision makers are satisfied that the event was more likely to occur

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<sup>8</sup> 2006 CCALAB 9 at paras. 17-26 and 51.

<sup>9</sup> A *fetter* is a kind of physical restraint used on the feet or ankles to allow walking but prevent running and kicking.

than to have not occurred.

The duty of fairness has been described as *flexible and variable*. This means that the fairness protections to which a person dealing with a statutory decision maker is entitled depend on a number of variables including:

- the nature of the decision and its underlying procedures; that is, the degree of similarity of the administrative process to the judicial process;
- the role of the particular decision in relation to the statutory scheme;
- the importance of the decision to the individual affected by it;
- the legitimate expectations of the person challenging the decision where expectations were created as to the procedure to be followed; and,
- the choice of procedure made by the tribunal (or statutory decision maker), as well as its expertise and its institutional constraints.<sup>10</sup>

Some of these factors will always be the same for licensing officers; for example, investigations are the same as the judicial process and courts have recognized that there is generally a lower standard of fairness in investigations.<sup>11</sup> Some factors may change; for example, the importance of the decision to the individual affected by it and a higher standard of fairness is required to revoke a licence than to evaluate an application for a licence.

## PROCEDURAL FAIRNESS AND CCALA

The CCALA contains particular fairness rules. For example, under:

- S. 8 - a certificate as an educator for children may be suspended or cancelled or terms or conditions attached to it “following a hearing conducted in accordance with the regulations”
- S. 17(2) - thirty days before taking an action or as soon as practicable after taking a summary action s. 17(1), a MHO must give the Licensee or applicant for the licence written reasons for the action or summary action and written notice that the Licensee or applicant for the licence may give a written response to the MHO setting out reasons why the MHO should delay or suspend the implementation of an action or a summary action or confirm, rescind, vary, or substitute for the action or summary action.

The CCALA also limits fairness protections under certain circumstances. For example, under s. 14, if a MHO suspends a licence, attaches terms or conditions to a licence, or varies the terms or conditions of a licence he or she may do so without notice if there is an immediate risk to the health or safety of a person in care.

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<sup>10</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>11</sup> See e.g. *F.W.T.A.O. v. Ontario (Human Rights Commission)* (1988), 67 O.R. (2d) 492 (Div. Ct.)

As a practical matter, it is generally safer to also follow common-law procedural fairness rules unless there is a good reason not to do so, for example, if it is relatively clear that the right would not be available to the person under investigation or it would waste resources to do so. The relationship between the statute and the common law is somewhat uncertain. Some courts have said that the only requirement for licensing is to comply with procedural fairness protections in the statute,<sup>12</sup> but the more likely result is that some of the common-law procedural fairness protections would apply.

The Community Care and Assisted Living Appeal Board considered the right to make submissions on any information harmful to the Licensee's (or applicant's) case.

In *RA v. Early Childhood Educator Registry*, 2006 CCALAB 3, the parties agreed to remit the Director of the Early Childhood Educators' Registry's decision to deny the appellant RA an early childhood education certificate to the registrar for reconsideration. RA had not been given the opportunity to make submissions on an investigation report produced by the health authority that the registrar relied on to find the appellant was not of good character. This case arose later in the licensing process; however it illustrates the general principle of fairness.

The Appeal Board has also recognized additional procedural fairness rights:

- That there is the right to a timely and transparent determination by various statutory officers involved in licensing. Under general administrative law principles, for a challenge to a decision on the basis of delay to succeed, the delay must lead to prejudice impacting on hearing fairness or amounting to abuse of process.<sup>13</sup> This is a high standard.
- That an investigation process has been flawed due to a failure to follow procedural rights set out in relevant policy and procedure manuals.<sup>14</sup>

## **DUE DILIGENCE**

Due diligence is a term that refers to the concept of actions. These actions are a measure of prudence, activity, or assiduity; is properly to be expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstances and is not measured by any absolute standard, but dependant on the relevant facts of the special case.

In the context of licensing officers' functions, due diligence means taking all reasonably prudent steps prior to exercising authority including:

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<sup>12</sup> See e.g. *Re McDonald*, 2007 BCPC 186.

<sup>13</sup> *Blencoe v. British Columbia (Human Rights Commission)*, SCC 2000 134.

<sup>14</sup> See Summary of Community Care Facilities Appeal Board Decisions (1993 - 2003), Digest 8.

- understanding the standards that the CCALA and the regulations establish;
- gathering the necessary facts and evidence regarding an issue including all relevant documentation and interviewing those persons with knowledge of the issue;
- communicating the requirements of the CCALA and regulations to the Licensee and having followed progressive enforcement if there is a contravention of the CCALA and regulation;
- following any applicable policy; and,
- if in doubt seeking clarification from health authority management.

## **EXERCISE OF DISCRETIONARY AUTHORITY**

The concept of exercising administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions. There must be a reasonable factual and legal basis for delegated officials to exercise a discretionary power of authority. If there is not, the exercise of the authority can be set aside on a number of grounds including:

- unauthorized use of authority;
- bad faith;
- irrelevant considerations;
- acting on the basis of inadequate evidence or material or, alternatively, ignoring relevant considerations;
- abuse of authority including unreasonable or discriminatory decision making; and,
- error of law and misinterpreting the CCALA or regulation(s).

# IV LICENSING ACTIVITIES

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Ensuring that licensing activities are based on the legislated mandate, the principles of fairness and on a common provincial approach, helps to insure that licensing staff are taking the right steps at the right time, allows them to better educate applicants and Licensees about their responsibilities, and results in more transparent and predictable processes. While health authorities and local licensing programs may have adopted their own internal practices, the following broadly summarizes licensing activities.

1. The Approach
2. The Application
3. The Licence
4. Exemptions
5. Reconsiderations
6. Monitoring Standards
7. Inspections
8. Investigations
9. Taking Action on a Licence
10. Offences and Legal Remedies

# THE APPROACH

## EDUCATION

Regulation of community care facilities through licensing has its roots in the law and thus necessarily involves the need to monitor and inspect to ensure compliance with that law. However, it has become increasingly clear that enforcement is only one part of the licensing function and one strategy for ensuring compliance with requirements.

It is important for Licensees and facility managers to understand their roles and responsibilities, be educated and informed about statutory requirements. Licensing officers can assist by providing resources such as self-assessment checklists, detailed inspection reports and risk assessment results that identify contraventions that need to be addressed, as well as training and education to assist in Licensees' and managers' understanding.

Licensees are responsible for complying with the legislation. Licensing staff need to recognize and appreciate that there are many ways of arriving at desired outcomes and that all reasonable approaches should be considered. It is the responsibility of licensing officers to assess a Licensee's compliance with the legislation through a broad analysis of the Licensees' processes and systems. Licensing officers work with Licensees to help them understand what needs to be addressed, and why, to achieve and maintain compliance.

The provision of education and support to applicants and Licensees/managers is a method that the licensing officer can use to promote compliance. Education is a key method in working towards compliance. Licensees and applicants for licences need to understand the rules to which they are subject, the laws governing them, and opportunities for decisions to be reconsidered or appealed.

*The Panel is left to wonder if the difficulties noted in the inspection reports prepared by the licensing officer would have or could have been alleviated had the licensing officer established a more positive and cooperative relationship with the Appellant from the start. If Licensing had properly accepted **its role as involving a component of education and guidance** and, if it had properly used more progressive techniques to demonstrate to the Appellant the standards it required of her, we wonder if we would now be hearing an appeal into a decision to cancel the Facility's license.*

SBR v. Interior Health Authority 2006 CCALAB 9, para 105.

The licensing activities described in this part of the Guide and how they are approached must be clearly communicated to applicants and Licensees at all points in the processes.

## **PROGRESSIVE ENFORCEMENT**

The Licensee has the primary responsibility to ensure the health, safety, and dignity, of persons in care and to operate a facility in compliance with the CCALA and regulations. Licensing staff, as well as funding programs, also play a role in the protection and promotion of the health, safety, and dignity of persons in licensed facilities.

Through on-going monitoring, licensing staff ensure that non-compliance is identified, that Licensees and managers are made aware of any non-compliance, and that appropriate plans for correction are developed and implemented. All processes for addressing non-compliance must follow the principles of administrative fairness.

In situations where there is on-going non-compliance, a plan of progressive enforcement may be put into place. The important principle behind this concept is the staged or gradual nature of the enforcement that introduces increasingly formal action to correct the lack of compliance with a legislated requirement. When there have been serious, high risk issues or repeat instances of non-compliance in a specific area of operation and those issues of non-compliance negatively affect the health, safety or dignity of persons in care, licensing staff review the file and determine potential strategies for addressing non-compliance. For example, repeated problems in areas of staffing or policies and procedures should trigger a plan for addressing non-compliance, even if the issues are not precisely the same.

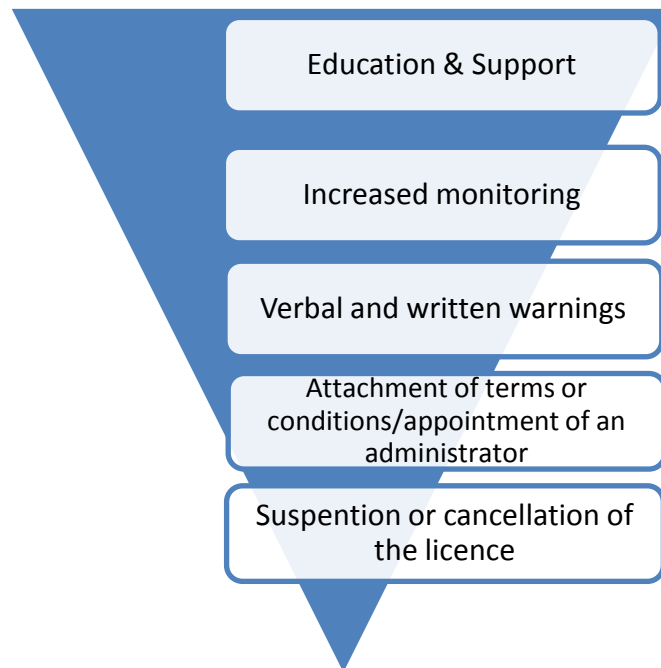
Except in unusual or high risk circumstances, licensing officers will first seek compliance through educative approaches such as discussion of the outstanding issues and the provision of information. Where this does not lead to resolution, this may be followed by verbal, and/or written warnings. If compliance is still not achieved, and there is a risk to the health or safety person in care, the next steps may include taking action against a licence, such as setting terms and conditions, and so on.

Progressive enforcement strategies may involve the following general progressive strategies, each of which may be repeated more than once depending on the risk of harm to persons in care and the cooperation of the Licensee.

- **Increased inspections:** A number of inspections and follow-up inspections may be needed to ensure the Licensee is moving toward compliance. The majority of Licensees are willing to correct any outstanding issues, and often this is the only strategy that is required.
- **Letters to the operator:** Depending on the nature, potential risk of harm and repetitiveness of the non-compliance identified during the inspections and investigations, written follow-up in the form of one or more letters may be necessary. The letters will typically reference the licensing history including inspections, risk assessment results, investigations, meetings, previous letters, and Licensee's response to non-compliance.



- Meetings between Licensee/manager/licensing officer and/or MHO. Licensing programs should ensure that the appropriate documentation of the items discussed at the meeting and is provided to the Licensee in advance.



Generally, a progressive enforcement strategy to address non-compliance involves licensing staff using risk assessment, following any Ministry and health authority policy, and moving from least intrusive to the most intrusive action. However, the starting point within the sequence of actions will vary depending on issues of severity, frequency, risk to persons in care, and response of the Licensee. These factors must be considered when determining the appropriate enforcement strategy. If health and safety concerns place persons in care at high risk and the Licensee is uncooperative or unable to mitigate the risk, licensing staff may need to move directly to a more aggressive approach, such as attaching terms or conditions or taking summary action.

The success of the steps licensing officers take towards enforcement may be enhanced by collaboration between licensing and a funding body (e.g., home and community care, mental health and addictions programs, MCFD, or the Community Living Authority of BC). To meet their shared objectives of health and safety, funding programs and licensing officers may need to be in frequent contact, identifying and sharing information about issues of concern and working closely together and with Licensees to promote the health, safety and dignity of persons in care.

Throughout the progressive enforcement process, the Licensee should be informed that if issues of non-compliance are not addressed, this may result in action on the facility licence. This statement should be documented on inspection reports and other written documentation that is provided to the Licensee.

## THE APPLICATION

This section of the Guide looks at the broad activities behind an application for a community care facility licence from the perspective of the licensing officer. Section 15 of the CCALA requires MHO's to investigate every application for a licence to operate a community care facility. Regardless of where a child care or residential care facility is located within the Province, or which organization, group or authority intends to operate the facility, the MHO must investigate, unless it is specifically exempt from the CCALA (i.e. Youth Custody Centre).

### LICENSING APPLICATION

Typically, the licensing process begins when an applicant for a community care facility licence contacts their local health authority community care licensing program and asks about getting a licence. Health authority staff may direct applicants to their websites for application forms and other relevant information or they may have information packages that can be purchased. The most up-to-date copies of applicable legislation can be found on the [BC Laws](#) website. Licensing staff and/or their health authority website also provide the applicant with information about other agencies to contact such as municipal zoning and business licensing and the criminal record review program.

Licensing officers play an important role as educators and facilitators for applicants as they work towards the goal of licensure.

## **APPLICATION REQUIREMENTS**

The application requirements for a residential care facility are in sections 6, 7 and schedule B of the Residential Care Regulation and for child day care facilities application requirements are found in sections 7, 9 and schedule B of the Child Care Licensing Regulation.

Licensing officers should create a positive and facilitative relationship with applicants to ensure that all the requirements for a successful application are understood by the prospective applicant. Applicants who have a clear understanding of their obligations are better equipped to make a good decision about what is needed to successfully establish and operate a facility, and whether they have sufficient resources to proceed with the process of operating a care facility and.

## **ASSESSING THE APPLICATION**

The intent of assessing an application is to ensure that the applicant is suitable and capable of promoting the health, safety and well-being of persons who will be provided the care and supervision. The licensing officer reviews many areas of the legislation and regulations prior to issuing a community care facility licence. This review is conducted to determine if the applicant has met all requirements as an indication that the facility will likely be operated in a manner that will promote the health, safety and dignity of persons in care.

Typically, three key areas of assessment are conducted. With various assessment activities under each area, examples of assessment activities include but are not limited to:

### ***1. Assess the Applicant***

- determine if the Licensee / manager has previously provided a similar service;
- the applicant's suitability to operate a community care facility; and,
- the proposed manager's suitability or the process by which a manager is chosen
  - is of good character,
  - has the training, experience and other qualifications required under the regulations; and,
  - 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,
- obtain criminal record check(s).

## **2. Assess the Operational Plan**

- proposed policies and procedures;
- proposed staffing;
- projected monthly revenues and expenditures; and,
- the programs/services to be offered.

## **3. Assess the Premises**

- facility floor plan, drawn to scale and a site plan, drawn to scale;
- approvals from other agencies as required e.g., fire, environmental health, municipality zoning/business licence; and,
- site visit to inspect the proposed premises and verify that they conform with the floor plan and site plan documents originally submitted and meet the requirements of the legislation.

## **1. Assessing the Applicant**

Determine if an applicant is an individual with sole proprietorship, in a partnership or represents a corporation and/or society. A **sole proprietorship** is a person who takes full responsible for all aspects in their business name and related to business operations. The operator of a sole proprietorship performs all the functions required for the successful operation of the business including securing the capital, establishing and operating the business, assuming all risks, accepting all profits and losses, and paying all taxes.

Assessing an applicant for sole proprietorship is based on section 11 of the CCALA that requires the MHO to determine if an **applicant who is a person**:

- is of good character
- has the training, experience and other qualifications required under the regulations, and
- 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.

A **partnership** is an agreement in which two or more people combine resources in a business arrangement. In a general partnership, two or more individuals share the management of a business, and each partner is personally liable for all debts and obligations incurred. This means that each partner is responsible for, and must assume the consequences of the actions of the other partner(s). Each individual of the partnership is assessed under Section 11 of the CCALA.

A **corporation**, also known as a limited company, is a legal entity that is separate and distinct from its members (shareholders). When a company is incorporated, it acquires all the powers of an individual, has an independent existence separate and distinct from its shareholders, and has an unlimited life expectancy. In other words, the act of incorporation gives life to a legal entity known as the corporation. A corporation can acquire assets, borrow money, enter into contracts and can be held liable; its existence does not depend on the continued membership of any of its members.

If a Licensee is a corporation licensing officers should know that while shareholders, officers or directors may change, the company remains the same legal entity. Such changes do not affect responsibilities under the CCALA; even if facility services are contracted out, the Licensee remains responsible and accountable for compliance with the CCALA and regulations. If the applicant represents a company, licensing officers should confirm the status of the corporation, the registered office, the officers and directors, and the records office if more detailed information about the board of directors is required.

Assessing an **applicant that is a corporation** [s. 11 (2) (b)] to determine if it:

- has a director that meets the requirements of the CCALA;
- has appointed as manager of the community care facility a person who
  - is of good character,
  - has the training, experience and other qualifications required under the regulations,
  - 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
  - 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 CCALA and the regulations,
- has delegated to that manager full authority to operate the community care facility in accordance with the requirements of the CCALA and the regulations.

A **society** is a non-profit organization. By filing the necessary documents and paying the prescribed fees, five or more individuals can form a society. Societies are not required by law to incorporate; however, there are benefits to incorporating including having the powers of an individual as well as an independent existence separate and distinct from its members, and an unlimited life expectancy.

### ***Assessing the Proposed Manager***

If an applicant represents a corporation or a society, a person must be hired as a manager of the facility with responsibility for its day-to-day operation. The manager must be screened using the same criteria for a Licensee CCALA, s. 11 and operate the facility in compliance with the CCALA and regulations. The applicant should also declare in writing that the person proposed as the manager meets the requirements in the CCALA and Regulation.

These screening criteria may also be used by an applicant who is a sole proprietor, who is responsible for determining that the manager is qualified by education and experience and has the personal attributes to operate the facility in a manner that will promote the health and safety of persons in care and maintain compliance with the legislation. An applicant for a licence must ensure that appropriate documentation for the proposed facility manager is completed prior to confirmation of his/her employment as manager of a community care facility. Manager information should remain at the facility for review by licensing at time of a site inspection or be readily available upon request.

In the case of Family Child Care and In-Home Multi Age Child Care the Licensee must also be the facility manager.

## ***2. Assessing the Operational Plan***

Licensing officers should review the applicant's operational plan including the proposed revenue and expenditures to determine if the plan is sufficient to establish the basis for operating a facility able to comply with the CCALA and regulations.

Central to an operational plan is ensuring that there are sufficient numbers of qualified staff to meet the needs of persons in care. For the [Residential Care Regulation](#) a staffing plan should include consideration of:

- number of persons in care, and number of staff;
- staff qualifications;
- type of care and programming;
- needs of persons in care;
- the physical layout of the facility; and,
- any standards set by the funding programs for similar facilities;

Staffing requirements and qualification for child care programs are set out in Schedule E of [Child Care Licensing Regulation](#). Requirements and qualifications are based on the type of community care facility licence. For example, a preschool requires an Early Childhood Educator for each group of 10 children.

Licensing officers should also determine if the applicant has developed policies and procedures for the facility that are appropriate to meet the needs of the proposed population of persons in care and as required by the regulations.

### ***Assessing the Program/Services To Be Provided***

The Licensee is responsible to ensure that the program or services to be offered are appropriate for the persons who will be provided care. Licensing officers may find it helpful to consult with funding programs (i.e., MCFD, MSD, HCC, and CLBC), external experts and other health authority resources to assist with their assessment.

### ***3. Assessing the Premises***

Licensing officers should determine if all the required documents have been submitted and should let the Licensee know if the application is incomplete and whether further information is required. It may be the practice of the health authority to ensure all documents have been received and are satisfactory prior to conducting a physical premise inspection.

The assessment of the physical premise is to ensure that the facility meets any prescribed space requirements established in legislation, has been built according to the previously approved plan, or whether an exemption is needed. The physical premises assessment will also identify any physical hazards that need to be addressed prior to issuing a licence.

## **ISSUING A LICENCE**

A Medical Health Officer or their delegate is responsible for issuing a community care facility licence under s 11 of the CCALA. A community care facility licence does not expire and should not be issued until the application is complete and assessed as meeting all requirements. If not all requirements can be met, and there are no increased risks to health and safety, considerations may be given to providing an exemption. Before considering an exemption request, it must be determined whether or not the exemption is permitted under regulation. If licensing staff are not satisfied with or confident in the applicant and/or the application, they should:

- inform the Licensee of areas of concern and ask for additional information;
- ensure that the applicant is aware of the requirements to be met under the CCALA and Regulations;
- assess any requests for exemptions;
- consider attaching terms and conditions to the licence; or,
- consider refusing to issue the licence.

## **REFUSING A LICENCE**

If the decision has been made by the MHO (or delegate) to refuse to issue a community care facility licence, the applicant must be advised in writing of the reasons for the refusal as well as their right to request reconsideration under s. 17 of the CCALA. An applicant who requests reconsideration is allowed one written response to the decision maker outlining why the decision maker should reconsider the refusal. The decision maker must consider the applicant's written response on its **own merits** and either grant the reconsideration and issue the licence, or provide written reasons for the continued refusal to issue the licence. The written reasons should address the major points in the applicant's response and address each of the arguments raised.

In the final written reasons for a refusal to issue a licence, the applicant must be advised of their right to appeal the decision to the Community Care and Assisted Living Appeal Board (s. 29 of the CCALA). The applicant must also be advised of the 30 day time period to appeal the decision and be provided with the Appeal Board's contact information.

## **ATTACHING LICENCE TERMS AND CONDITIONS**

Section 11 (3) of the CCALA allows a MHO to attach terms and conditions to a licence.

Terms and conditions are requirements above and beyond those of the CCALA or Regulations, and compliance with the terms and conditions is required either to begin or to continue operation of the facility.

Terms and conditions may be used when a Licensee needs additional direction to ensure that the health and safety of persons in care is protected. Prior to attaching terms and conditions licensing staff should discuss the areas of concern with the applicant/Licensee and must inform them in writing of the reasons why the decision to attach terms and conditions has been made. The applicant/Licensee must also be provided with the information for reconsideration and appeal (s. 17 & 29 CCALA).

## **EXPIRY and SURRENDER OF A LICENCE**

Although community care facility licences do not need to be re-applied for annually, as is the case in most jurisdictions, section 10 of the CCALA outlines the circumstances that would lead to a licence expiry. If a Community Care Facility has not operated for 12 consecutive months the licence will automatically expire on the last day of the 12<sup>th</sup> month. A licence may expire in two situations:

- 1) The Licensee temporarily closes their facility and does not resume operation within 12 months.



The Licensee of a Family Child Care may choose to close their facility for a maternity leave of a several months. The Licensee may not be providing care services, however, the facility remains licenced and the Licensee is entitled to resume operation anytime within 12 months from the date of closure.

If the Licensee does not resume operation prior to the last day of the 12<sup>th</sup> month the licence automatically expires. The Licensee must then reapply if they wish to continue operating as a licensed Family Child Care facility.

- 2) The Licensee is unable to increase or maintain enrollment over the minimum threshold of 3 persons in care and therefore does not meet the definition of a community care facility.

The definition of a Community Care Facility means a premise, 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 and includes any other premises or part of a premises that, in the opinion of the medical health officer, is used in conjunction with the community care facility for the purpose of providing care; or,
- (b) designated by the Lieutenant Governor in Council to be a community care facility.

The 12 months would typically start at the earliest date that licensing staff could determine (on a balance of probability) that the facility has not been operating. A licensed facility is deemed to be not operating if the Licensee no longer has the intent of delivering (or is not delivering) the care services the facility is licensed to provide. An intention to operate the facility without actual operation is not sufficient to maintain the community care facility licence.

When a Licensee voluntarily surrenders their licence, licensing officers should ensure that the Licensee understands the facility is no longer licensed as a community care facility, and that care must not be provided to more than two persons. Licensing staff should follow up conversations regarding voluntary surrender of a licence in writing so Licensees have all the information needed to make an informed business decision and there are no misunderstandings.

A Licensee who has voluntarily surrendered their licence must apply for a new community care facility licence if they wish to care for more than two persons.

## EXEMPTIONS

Section 16 of the CCALA allows exemptions to be granted from some requirements of the CCALA and regulations; if the MHO is satisfied that there would be no increased risk to the health or safety of persons in care, and the exemption meets any prescribed requirements.

Exemption requests may cover a wide range of areas for example, temporarily allowing an employee to act in a position that they are not yet fully qualified for, allowing for physical space modifications such as a smaller floor space or alternate provisions for toilet and bathing amenities to name just a few examples. Schedules A of the [Child Care Licensing Regulation](#) and of the [Residential Care Regulation](#) list the sections of the CCALA and regulations, which are not subject to exemption.

In considering whether to grant an exemption the MHO must also consider the Director of Licensing's Standards of Practice.

### Child Care Standards of Practice

- Safe Play Space
- Family Child Care

### [Residential Care](#) Standards of Practice

- Advance Directives
- Agreement in Writing to the Use of Restraints
- Immunization of Adult Persons in Residential Care
- Incident Reporting of Aggressive or Unusual Behaviour in Adult Residential Care Facilities

Factors that must be considered in assessing if an exemption may be granted include:

- whether or not the proposed section of the legislation is exemptible;
- whether there is an increased risk to health and safety;
- whether the exemption request is in the best interest of the person in care that it may affect;
- what alternate measures are proposed to ensure health and safety;
- any previous exemptions granted; other exemption requests and decisions;
- history of risk assessment ratings; any other risk considerations;
- history of compliance and non-compliance;
- history of reportable incidents and whether follow up was appropriate;
- number of persons in care who will be affected by proposed exemption;
- length of time for which the exemption is being requested;
- whether persons in care and their families/decision makers have been informed by the licensee of the exemption request and of their right to appeal the exemption should it be granted;
- any support or concerns from persons in care or their families/decision makers; and
- if the exemption request is granted, whether there are any terms and conditions that should be imposed to ensure health and safety.

## DENYING AN EXEMPTION REQUEST

An exemption request must be denied if there is an increase risk to the health or safety of persons in care. If an exemption request is denied the Licensee/licence applicant must continue to meet the requirements of the CCALA and/or regulations as they are set out. The decision to deny an exemption request is not subject to reconsideration or appeal; however, a new exemption request with new information may be submitted.

Licensees/licence applicants may also make a request to vary an existing exemption that is in place. If the request to vary the exemption is not granted, or is not granted in full, the MHO must provide written reasons for not granting the variation as requested by the Licensee/ licence applicant. The decision to not grant an exemption variation is not subject to reconsideration or appeal.

The following commentary from a CCAL Appeal Board decision highlights the need for Licensees to inform persons in care and their families/decision makers when there has been a request for an exemption to requirements that may affect them. These parties must be provided with an opportunity to make their views on the proposed exemption known to the decision maker, prior to the decision being made.

Another significant error was that, while the MHO required Valleyhaven to bring forward information or approval from others and she herself sought out opinions of the fire inspector and the Geriatric Residential Supported Living Services branch, she failed to take into consideration information from the residents or their families.

By not requiring Valleyhaven to notify residents and families, or the resident council at the least, about the application for the Exemption, Valleyhaven was relieved of providing any information (letters of support or concerns about increased risk to the health and safety of person in care) from that constituency.

Given that the nature and scale of the Exemption made it specific and significant in its effect on each person in care, with the possible exception of the four private pay residents who would remain in their existing bedroom accommodations, the residents' perspective on increased risk to their health or safety - as formulated by them or their family or family council representatives - was a relevant consideration that the MHO should have required Valleyhaven to bring to the table in connection with its application.

**BG and FS v. Fraser Health Authority and Valleyhaven Guest Home 2008, CCALAB 5 para**

## OTHER EXEMPTIONS

Section 20 of the CCALA permits exemptions from other legislative requirements for smaller facilities which operate in single family dwellings. Some sections of other provincial legislation such as the *Drinking Water Protection Act*, *Sewer System Regulation* and the *Fire Services Act*, may also fall under section 20.

## TEMPORARY PLACEMENT AND RETENTION

Is a temporary placement or retention similar to an exemption? Yes, they are similar as both an exemption and a temporary placement/retention enable the Licensee to request a modification to meeting legislated requirements. However, temporary placement/retention applies to the age of persons in care whereas an exemption may be requested for broader requirements such as physical space adjustments or staffing qualifications. More often temporary placement/retention requests are made under the Child Care Licensing Regulation s. 5 (2). There may also be circumstances in which a licensee needs to request a temporary placement for youth or adults due to developmental disabilities.

A Licensee may submit a temporary placement/retention request, to the MHO, to request a child/person attend their care program, who would not normally be eligible for that program due to their age. In order to grant a request for temporary placement/retention, the MHO must be satisfied that the placement is in the best interests of the child/person and there will be no increased risk to health and safety.

Each request for temporary placement/retention is reviewed on its own merits. The MHO will determine on a case-by-case basis whether or not to temporarily place or retain a child/person. The length of time for the approval is at the discretion of the MHO.

The following definitions may assist in assessing a temporary placement or retention:

**“temporary placement”** means a limited time admission of a child/person in care who does not meet the age requirement for a particular care program. In the case of an under-aged child, most often the situation will be resolved by the passage of time as the under-age child reaches the required age.

**“retention”** means the continued provision of care and supervision to a child who exceeds the age requirement of the particular care program.

**“best interest”** includes that the child/persons physical, psychological, emotional safety, security and well-being. The following factors should be considered however, this is not an exhaustive list:

- age and developmental levels of the child/person;
- proposed length of stay (hours, days per week etc.);
- needs of the child/person who is the subject of the request (i.e., cultural appropriateness, community resources available, stability and continuity of care, child’s care plan);
- ages of the other children in care;
- staffing levels and qualifications;

- other temporary placements or retentions in place and expiry dates;
- notice to other parties and their responses (parents with children currently enrolled in the program), and
- assessment of proposed plans to ensure health and safety of all children/persons in care including the child/person who is the subject of the request (emergency evacuation, supervision, health and hygiene practices).

## **RECONSIDERATION**

To provide administrative fairness, reconsideration provisions have been included in the CCALA. Reconsideration allows for an informal review of decisions (refusal of a licence, attachment of terms and conditions, suspension or cancellation of term and conditions or of an exemption) by the decision maker before they are eligible for appeal. Reconsideration allows an opportunity for those affected by the decision to present their concerns and for the possible resolution of concerns at a local level without a formal and potentially costly appeal.

If a Licensee or licence applicant remains unsatisfied with a reconsideration decision, then the issue may proceed to an appeal. The reconsideration process provides an important record of the administrative fairness steps that occurred prior to the appeal. The reconsideration record should include:

- the reasons for the decision;
- the concerns and objections regarding the decision; and,
- the response of the decision maker to those concerns and objections.

In this way, reconsideration can reduce the number of appeals and encourage decision making at the local level.

To provide administrative fairness for Licensees, the CCALA requires that 30 days prior to taking an action, or as soon as possible after taking summary action, a Licensee or licence applicant must be informed in writing of:

1. the reasons for the action or summary action; and,
2. their right to reconsideration of the decision

These provisions apply to the following:

- refusal to issue a new licence or an amended licence;
- attachment of terms or conditions prior to issuing a new licence;
- summary action;
- suspension, cancellation, attachment of terms or conditions, or varying of terms or conditions of existing licenses; or,
- suspension or cancellation of an exemption or an attachment or variation of terms or conditions to an exemption.

Written notification must identify the action that will be taken (refusal of a licence, summary action etc.) and clearly state the period of time in which the Licensee or licence applicant has to respond. The 30 day period is in place to allow adequate time for a Licensee/applicant to consider the proposed action and to provide a response to the proposed action.

In the event that summary action has been taken, the decision maker must notify the Licensee as soon as possible that action has been taken, provide reasons for the action, establish a clear timeline for the Licensee to respond and include information about the reconsideration process.

The Licensee/applicant should be advised that their response must be in writing and should include:

- reasons why the Licensee/applicant thinks the MHO's decision is incorrect;
- reasons why the Licensee/applicant thinks the MHO's decision should be delayed or suspended;
- any provisions the Licensee/applicant has put into place to protect the health and safety of persons in care;
- any provision of the CCALA or regulations that the Licensee/applicant thinks is relevant to their request;
- additional documents supporting the request for reconsideration (such as staffing plans or physical modifications as applicable); and,
- any new evidence that the Licensee/applicant thinks the MHO should consider.

If a reconsideration request is denied, written reasons must be provided to the applicant or Licensee, including information about the right to appeal, the time period for submitting an appeal, and the address and contact information of the Community Care and Assisted Living Appeal Board. The CCALA does not permit applicants or Licensees to make further any written responses after receipt of the final reconsideration decision.

## **MONITORING STANDARDS**

The CCALA places responsibility on the Licensee to promote and protect the health, safety and dignity of persons in care. To meet their responsibilities Licensees must comply with the CCALA and regulations. Licensing staff have an important monitoring role to play to assist Licensees to fulfill their responsibilities. The promotion of good practice and compliance begins with licensing staff guidance and education.

A proactive monitoring role assesses compliance with legislation, standards, and policy and is more than just watching and reacting when problems occur. In addition to

assessing compliance, licensing officers and staff must take the initiative to work with Licensees and managers to help them understand their legal obligations.

Ongoing monitoring of a Licensees compliance with legislation, standards, and policy includes:

- conducting site inspections;
- conducting risk assessments;
- remaining in regular contact with Licensees/managers;
- scheduling meetings;
- providing Licensees/managers with updates on legislative and policy changes;
- encouraging Licensees/managers to bring forward issues to problem solve;
- reviewing exemption requests;
- encouraging and guiding Licensees to take corrective action where required; and,
- establishing relationships with applicable funding programs to avoid or correct areas of potential or actual non-compliance.

## **ASSESSING RISK**

The purpose of the CCALA and regulations is to provide a regulatory system that protects and promotes the health, safety and dignity of persons in care. As the threshold set by the legislation is at the minimum acceptable level, any non-compliance poses some degree of risk to persons in care.

The goal of assessing risk is to identify issues that may negatively impact persons in care. The objective for licensing officers who carry out risk assessments is to act on the findings of the risk assessment.

Risk can be defined as an estimate of the scope of harm that may result from a non-compliance situation as well as the severity of that harm likely to be suffered from the non-compliance.

For example, two facilities may have the same number of non-compliances identified during an inspection. In this case, if we use “number of violations” as a proxy marker of safety of persons in care these two facilities would appear to present the same degree of risk to persons in care. However, if we use the degree of risk posed to persons in care by the specific contraventions we may get quite a different picture. One facility’s violation may have posed very little immediate risk to a person in care - perhaps an employee record was not present. The other facility violation may have been to store hazardous chemicals within reach of persons in care, which poses both an immediate and serious degree of risk of harm to a person in care.

Assessing risk of harm can be influenced by the subjectivity of the assessor, having a structured systematic approach to evaluate the impact of non-compliance therefore diminishes bias and supports decision-making with a clear established criteria.

The Ministry of Health and health authorities have collectively developed a standardized Risk Assessment Tool. The risk assessment tool is incorporated into a comprehensive routine compliance inspection, adding richness and meaning to how compliance relates to the health and safety of the persons in care and supporting licensing officers in making evidence-based decisions.

A licensing officer begins a risk assessment with a review of the facilities compliance with the existing CCALA and regulation based on the comprehensive routine inspection, observations, interviews and examination of records. The risk assessment tool has classified all legislative requirements into one of the following broad categories:

- Care and/or supervision;
- Hygiene and communicable disease control;
- Licensing;
- Medication;
- Nutrition and food services;
- Physical facility, equipment and furnishings;
- Policies and procedures;
- Program;
- Records and reporting; and,
- Staffing

When non-compliance is identified that area of non-compliance is assessed on two components of risk: Scope and Severity.

The assessment of the potential risk of harm must take into consideration the many variables of a facility, such as the unique features and physical characteristics, policies, procedures and preventative measures that may be in place, as well as the care and supervision needs of the persons in care.

The second step in assessing risk is reviewing the facilities operational history. Licensing officers assess the actions of the Licensee regarding the timeliness and appropriateness of reportable incident reporting as well as the type and number of any previous non-compliances and the Licensees response to issues identified and timeliness in correcting non-compliance. The licensing officer also reviews the facility for any investigations and the Licensees history in responding to and addressing investigation findings.

Together the compliance inspection and operational history review are calculated to identify a facility risk rating of low, medium or high. The facility risk rating is an indicator for areas assessed as having the potential for risk of harm to persons in care due to being non-compliant with the *Community Care and Assisted Living Act* or its regulations, and those areas require additional precautions and/or actions to protect the



health, safety and dignity of persons in care. A high risk rating may mean there are significant concerns that could have serious and widespread consequences to persons in care, and that enhanced monitoring is needed to protect the health, safety and dignity of persons in care.

A risk assessment is typically completed annually during a comprehensive routine compliance inspection. Low risk facilities will typically receive their next comprehensive routine compliance inspection within 12 to 18 months and high risk facilities will receive their next comprehensive routine compliance inspection within 3 to 6 months. Licensing officers may also visit a facility for follow up inspections to ensure non-compliances have been corrected or for the purpose of a complaint investigation or incident report.

## **INSPECTIONS**

Section 9 of the CCALA requires Licensees to make their facilities available for inspection by the Director of Licensing or MHO's. The CCALA also outlines the conditions under which licensing staff may enter, inspect and make records of any aspect of the operation of licensed or unlicensed premises.

An inspection is an on-site review of the facility to assess compliance with legislation and regulations. The method of a facility inspection may depend on the facility itself, the community in which it is located and its history and relationship with the local licensing program and staff. Diversity in inspection style and approach is acceptable provided that basic principles of administrative fairness are followed.

### **INSPECTION PLANNING**

Planning for an inspection involves careful preparation so that licensing officers know in advance what they intend to accomplish and how they intend to do so. Good planning leads to a thorough and appropriate inspection.

### ***Inspection Types***

An inspection is on-site review of the facility to assess compliance with legislation and regulations.

Initial Inspection: This is the first inspection that will occur after the application for licence has been submitted and the licensing officer has received all applicable documentation. There may be more than one initial inspection, which may be referred to as follow-up inspections. Initial/follow inspections may be carried out until the facility has met all the requirements necessary to issue a community care facility licence.

Routine Inspection: This is a comprehensive inspection of the facility. A routine inspection may include a “top to bottom” review of all licensing requirements. Routine compliance inspections are typically carried out with little or no notice to ensure the setting can be viewed as it normally operates. Routine inspection follow-up may also occur to follow up on any identified issues of non-compliance or for ongoing risk monitoring.

Complaint Inspection: This is an inspection in response to a complaint or concern about a facility. Subsequent inspections may be carried out to follow-up on the initial complaint inspection to ensure issues have been resolved or to further monitor the situation. Complaint follow-up inspections also occur to follow up any identified issues of non-compliance or for ongoing monitoring.

Reportable Incident Inspection: This is an inspection in response to a reportable incident, which the facility has submitted to the licensing officer. Subsequent incident follow-up inspections may be carried out to follow-up on the incident to ensure that the issues have been resolved or to further monitor the situation.

Follow-up Inspection: Any inspection that follows-up on a previous inspection, such as complaint, routine, initial, or complaint inspection in a licensed facility. A follow-up inspection may be performed to ensure the Licensee/manager has resolved issues of non-compliance identified during a previous inspection. Typically, follow-up inspections occur after an initial, routine or complaint inspection; licensing staff then undertake a focused inspection to verify whether the Licensee has achieved compliance in specific areas of the legislation.

Unlicensed Inspection: Is an onsite inspection that may be carried out when the licensing officer receives information (possibly a complaint) that a facility may be operating without a valid community care facility licence.

### ***Inspection Methods***

There are different inspection methods that may be suitable for various circumstances.

Unannounced Inspections: It is important that most aspects of a facility operation are assessed at a time when the facility is in its usual routine. Unannounced inspections are standard practice in most regulatory activities such as community care licensing, restaurant and food inspections, liquor licensing, bylaw enforcement, and occupational safety.

Scheduled Inspections: It is sometimes necessary to schedule inspections; for example,

an inspection to assess specific aspects of a facility's operation that require the involvement of the Licensee/manager. It may also be appropriate to schedule a complaint or reportable incident inspection, unless doing so would compromise the timely gathering of information and evidence or would increase the risk to health and safety of the persons in care (e.g., inspecting a facility in response to a complaint about too many children in a child care facility).

Joint Inspections: There are situations where it is appropriate, and may be necessary for more than one licensing staff or a combination of licensing and funding program staff (or others such local fire authorities) to conduct an inspection together. Examples of such situations include:

- Inspection where specific expertise is needed (i.e., nutritionist, nurse) to assess specific issues.
- Inspection of a facility where a previous history exists of a challenging working relationship or there is the possibility for a volatile response. For example, a complaint inspection, or where action on the licence is being recommended.
- Situations where there may be a risk to licensing officers' safety; for example, an inspection of an unlawful operator or an inspection in response to a complaint about violence in a facility. In some circumstances, police assistance may be requested.

### ***Identify the Depth and Degree of Inspection***

Licensing staff must determine the depth and degree of inspection that is required as well as the approach that will enable them to best assess compliance with statutory requirements. It may not be necessary for licensing staff to review every file or record to make a determination of compliance for each legislative requirement. Auditing a facility by looking at random samples of records such as care plans, staffing records, medication administration records and policy and procedures may be used to determine overall compliance. If the findings of the random samples are consistently compliant, it is reasonable to assume that the facility generally meets the requirements. If the findings consistently demonstrate non-compliant, further assessment or additional samples need to be reviewed.

### ***Review the Facility File and Previous Risk Assessments***

Before carrying out an inspection, licensing officers should conduct a file review to familiarize themselves with the background of the facility including the history of the licence, Licensee and previous risk ratings. This step assists licensing officers in gathering information about any previously identified issues and concerns that may require follow-up.

## CONDUCTING INSPECTIONS

An organized inspection process should ensure the least amount of disruption to the operation of a facility. This includes explaining to the Licensee/manager/staff the reason for the inspection and expectations of the inspection such as reviewing records, policies and procedures, or discussions with staff and persons in care at the facility. Licensing staff should inform the Licensee/manager that any information gathered during the inspection will be reviewed with them and will be securely maintained to ensure the protection of privacy for the persons in care, family members and staff.

Observation is a key technique of an inspection and it is essential to document the observations made. The type of inspection being carried out will guide the licensing officer to the areas they need to concentrate on during the inspection. For example, a complaint regarding too many children in care would require the licensing officer to note of staff-to-children ratios at the time of the complaint inspection, review attendance records and perhaps children's files.

During a routine inspection the licensing officer will assess a number of requirements under the legislation including what type of care the program is licensed for, physical plant safety, record keeping, health and hygiene, care plans, minor incident/injury logs, staff interactions with children/residents and more to assess compliance and the risk of harm to persons in care.

### ***Completing a risk assessment***

After a routine inspection has been completed, any non-compliance that has been found during that inspection will be used to populate a risk assessment.

A risk assessment is a two part process: Part A - the Inspection Risk Assessment is based on the routine inspection (the current/point in time inspection information) and Part B - the Operational History Assessment. Both Parts A & B are used to create a Facility Risk Score.

Part A uses a: **scope** and **severity** methodology.

- **SCOPE** means the scale (or breadth) of non-compliance observed. Scope may be isolated (single), a pattern (multiple) or a widespread (extensive) observation of non-compliance.
- **SEVERITY** is the potential risk of harm presented by the SCOPE of non-compliance observed at the time of the risk assessment (based on the comprehensive routine inspection). It is an estimate of the potential impact to children/persons in care by the non-compliance, and considers whether there are any mitigation strategies in place, and whether the non-compliance increases the risk of harm based on the children/persons in care at that facility.

<b>RISK INSPECTION MATRIX</b>		<b>Scope</b>		
		<b>Isolated</b>	<b>Pattern</b>	<b>Widespread</b>
<b>Severity</b>				
<b>potential for imminent harm/immediate harm</b>	15	18	19	
<b>potential for significant harm</b>	10	13	14	
<b>potential for more than minimal harm</b>	5	8	9	
<b>potential for minimal harm</b>	1	2	3	

In addition to assessing the non-compliance found during the routine compliance inspection the licensing officer will assess the operational history of the facility by reviewing last three years of the facility/Licensee's file. If the Licensee has operated less than three years, a review of the application process and operation to date is acceptable. Licensing officers should consider past interactions and actions of the licensee and choose a value for each category. Values are between "1" met requirements and a "5" did not meet requirements (*half values may not be applied*). The Operational History score evaluates the licensee's history of

➤ **Reportable Incidents:**

- appropriately reporting incidents to MHO (for example knowledge of incident types, 24 hour reporting, sufficient and relevant information provided).
- responding to and taking appropriate corrective action for reported incidents (e.g. have they been proactive to take appropriate corrective actions).
- appropriately planning for the prevention and mitigation of future incidents.

➤ **Inspection and monitoring:**

- responding to non-compliance identified in previous inspections (e.g. have they been proactive to take appropriate corrective actions).
- identifying and responding to potential issues of non-compliance (e.g. licensee proactively obtains all necessary documentation for staff).
- sustaining compliance.
- compliance with temporary placements and/or exemptions (if applicable).
- compliance with terms or conditions (if applicable).

Licensing officers will also evaluate the licensee’s history of interactions and actions relating to investigations. When determining an Investigation History score consider the following:

- cooperation during an investigation (proactive response to health and safety plan request).
- appropriately responding to and taking corrective action for substantiated non-compliance.
- substantiated non-compliance (is there a pattern or multiple ongoing non-compliances).
- action being taken on a licence (CCALA section 17, including summary action).

Investigations are scored on a sliding scale of 1- 10 that best supports the assessment. Values are between “1” met requirements and a “10” did not meet requirements (*half values may not be applied*).

When determining a value any of the assessment scales, the following should be considered:

- Are there any exacerbating variables? What are mitigating variables?
- Are there unique features of the facility or population in care that may protect or increase the risk of harm?
- Will the risk of harm affect multiple people or just one?
- Would the risk of harm require outside intervention such as, transport by ambulance or review by another professional?
- Would the risk of harm result in permanent disability, trauma or death?
- Is the risk of harm reversible or would the risk of harm get worse over time?

### **RISK RATING**

Determining a score for Part A of the assessment is calculated on an interval-scoring chart. Using the interval cross reference score enables the overall score of Part A to be a maximum number of 20. Part B scoring is also at 20, giving a Total Risk Assessment Score to be out of **40**.

Part A  $\times$  20 + Part B  $\times$  20 = Total Risk Assessment Score  $\times$  40. The Facility Risk Rating is then determined using the score out of 40.

<b>Low: 3-13</b>	<b>Medium: 14 -20</b>	<b>High: 21-40</b>
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### ***Before writing the inspection report***

Whenever possible, licensing staff should allow time for the Licensee/manager to ask questions and provide clarification of issues prior to finalizing the written inspection report. Licensing officers should allow the Licensee/manager to set reasonable time frames regarding the correction of low-risk issues, keeping in mind that the Licensee is responsible for planning, actions and implementing solutions.

### ***Documentation: writing the inspection report***

Every aspect of the inspection process must be documented using plain and easily understood language. Licensing staff should use their health authority approved methods and tools which may include inspection checklists. The way in which the inspection report is written should help the Licensee to clearly understand any contraventions and what needs to be done to correct them. When an inspection report has been completed, a copy must be provided to the Licensee/manager and a copy is kept on file with the licensing office.

#### **Guidelines For Writing An Inspection Report**

- Use plain language; avoid jargon, technical or legal terms that you and/or the Licensee may not fully understand.
- Ensure that hand-writing, if used, is neat and large enough to be legible.
- Document all contraventions clearly; cite and quote relevant sections of the legislation/applicable regulation.
- If an issue is not related to legislation, but is merely a helpful suggestion, then it should clearly state it is a recommendation only.
- Record specific observations or evidence that supports each contravention; state what was observed and what corrections are needed.
- Identify timelines for correction for all contraventions.
- Include all relevant Licensee responses and statements.

## INVESTIGATIONS

Section 15 of the CCALA establishes the statutory duty of MHO's to investigate all complaints that a community care facility does not fully meet the requirements of the CCALA and/or regulations.

There is a very important distinction between inspections and investigations. Inspections verify compliance with legislative requirements and investigations verify non-compliance.

To investigate means to learn the facts/information about something in order to determine what happened. The fact that an investigation is underway does not mean that the licensee has done something wrong. There are several circumstances which may trigger an investigation, with the most common being a complaint or a reportable incident.

When complaints or incidents are reported to a licensing office, the licensing officer must respond promptly to ensure the health and safety of the persons in care. Balancing the health and safety of persons in care, and the principles of and need for administrative fairness for the rights of Licensees is critical.

The findings from an investigation are based on the balance of probability – meaning the event was more likely to occur than to have not occurred. An investigation under the CCALA does not need to have evidence and facts to prove beyond a reasonable doubt that an event occurred.

Section 22 of the CCALA provides protection for persons, who in good faith<sup>15</sup> report incidents of abuse. This limited protection should be communicated to those who report abuse incidents.

Confidentiality is not absolute for complainants due to other processes in which information might be revealed. If the outcome of the investigation results in legal action, an appeal or a request is made under the Freedom of Information and Protection of Privacy Act (FOIPPA), these may result in a release of information.

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<sup>15</sup> Good faith, or in Latin *bona fide*, is the mental and moral state of honesty, conviction as to the truth or falsehood of a proposition or body of opinion.



## RESPONDING TO COMPLAINTS

The following provides a high-level overview of the process for responding to a complaint:

- determine whether the complaint is within the mandate of the *Community Care and Assisted Living Act* or if it should be referred to another agency such as the PCQO, MCFD child protection, ECE Registry, Assisted Living Registry, Police, Consumer Protection or the Office of the Public Guardian and Trustee etc.;
- review and follow health authority processes (including agreements with the PCQO or funding programs);
- complete appropriate intake documentation;
- determine the scope and urgency of the complaint based on risk to health and safety;
- considerations in determining the scope and urgency may include:
  - whether a person/s in care has been harmed, exposed to risk;
  - number of people affected;
  - whether the allegation is a contravention of the CCALA/regulation; or,
  - presenting problem or perception of the problem.
- preparation of an investigation plan may include:
  - possible interviews;
  - determine what documentation to review;
  - determine internal policy for informing the licensing manager and/or MHO;
- notify the Licensee of allegations when appropriate (timing may vary, for example when the Licensee is the subject of the investigation);
- establish an investigation team in consultation with the licensing manager, MHO or practice consultants; determine who needs to be involved and contact relevant agencies and police, *if the matter involves action that might be criminal in nature*;
- develop a plan for obtaining relevant evidence; organizing interviews; and,
- conduct the investigation, wherever appropriate in collaboration with the Licensee and other agency partners.

## RESPONDING TO REPORTABLE INCIDENTS

A reportable incident is an event where a person in care has been injured, has been seriously or adversely affected, or has gone missing while under the care and supervision of the Licensee. Licensees are required to notify the MHO within 24 hours if a person in care is involved in, or may have been involved in, a reportable incident defined under schedule H of the Child Care Licensing Regulation and schedule D of the Residential Care Regulation.

The licensing officer follows-up or investigates reports of incident reports to assess the factors that led to the incident as well as the appropriateness of the Licensee's response and corrective actions. The goal of this process is to review the Licensee's actions to determine whether there is a recurring pattern, and to prevent a similar occurrence in the future, if possible. In addition to notifying the MHO when a reportable incident has occurred, the Licensee must notify the appropriate persons as noted in the regulation (family, guardian, primary health care provider, funding program etc.).

Licensees must have written policies and procedures acceptable to the MHO for all matters of care including the reporting of reportable incidents. Each health authority has a specific reportable incident form and process that must be completed and submitted to notify the MHO. Incident reports must include information documented directly by the witness to the incident.

Licensees must also keep a log of minor unexpected accidents and illnesses that do not require medical attention and are not reportable incidents. Sections 56 (f) CCLR and 88 (a) RCR require this information to be kept on record and made available during inspections.

## **INVESTIGATION PROCESS**

As is the case with all licensing activity, an assessment of risk is the first step in an investigation. Licensing staff must analyze the information available, determine the level of potential risk to persons in care, and develop an investigation plan. Licensing staff should explain what an investigation is to the Licensees so they have a better understanding of the language and processes used.

### **Principals Of An Investigation**

There are many different kinds of investigations. Regardless of the topic of the investigation or the depth of the investigation, the purpose is to determine whether or not there was non-compliance to the legislation or regulation. An investigation must be factual and fair. The following principals must be considered:

- The licensing staff must be as independent as possible.
- The licensing staff must be trained and experienced.
- All potentially relevant issues must be identified and pursued, where appropriate.
- The investigation must be sufficiently resourced.
- All relevant evidence must be identified, collected and preserved.
- All relevant witnesses must be identified and interviewed, where appropriate.
- The analysis of materials gathered in the investigation must be objective and based on facts.

## Health and Safety Plan

Section 12 (2) of the Child Care Licensing Regulation and section 12 (2) of the Residential Care Regulation provide that during the course of an investigation, a MHO may request a plan to ensure the health and safety of persons in care.

A licensing officer may request that a Licensee develop a health and safety plan to mitigate risk. The Licensee will typically develop a plan they think that they will be able to put into effect and comply with for the duration of an investigation. The health and safety plan is submitted to the licensing officer for review and (if appropriate) accepted

Licensing staff should use caution if they are asked by the Licensee to provide input to the health and safety plan. If a health and safety plan is unduly influenced, interfered with, directed or dictated by licensing staff, the Licensee and/or their legal counsel may view this as constituting terms or conditions on the licence.

The MHO may attach terms and conditions to a licence as part of a health and safety plan, these are actions taken against the licence and are subject to reconsideration and appeal.

- Consideration may be given to attach terms and conditions where a Licensee is unwilling or unable to develop a satisfactory health and safety plan.
- The MHO may also consider summary action under section 14 of the CCALA, if necessary to preserve health and safety.

At any time during an investigation, new information may emerge that could lead licensing staff to re-evaluate their assessment of the risk of harm to persons in care.

## **PHASES OF INVESTIGATION**

The following section focuses on investigations and the role of licensing officers in the investigation of licensed community care facilities as well as those operating without a licence.

The investigation process can be divided into the following major phases:

- intake;
- planning;
- evidence collection;
- analysis of evidence and preliminary findings;
- communicating the findings;
- Licensee response to findings; and,
- conclusions and recommendations.

## ***Intake***

The purpose intake is to receive and document initial and relevant information. The intake information will help to determine the investigation plan.

Licensing officers should:

- Follow intake policies: Each health authority may have specific intake forms or tools to use for documenting complaint information.
- Document relevant information: Document the complaint and what the alleged event was that triggered the complaint.
- Listen and ask relevant questions: When information is provided over the phone or in person allow the speaker to offer general and broad scope information first, and then ask more specific questions in order to collect more focused information.
- Avoid prejudgement: Remain objective and impartial. Do not make a conclusion about an alleged event or about who may be responsible. Decisions must only be made after all information is collected, reviewed and weighted on a balance of probability.
- Identify specific facts: Refer to the basics of who, what, where, when, why and how when asking questions and documenting intake information. Ask for specific examples or observations such as dates, times, names of people, etc. Licensing staff may need to refocus the complainant, if necessary, so that relevant and detailed information can be obtained.
- Maintain confidentiality: Persons providing information may request confidentiality (or to remain anonymous) and this must be documented. Inform complainants of confidentiality rules at the time of intake so that persons providing information understand the limitations of confidentiality. If the outcome of the investigation results in legal action or a request is made under the Freedom of Information and Protection of Privacy Act (FOIPPA), these may result in release of information. In addition, the Licensee or their employees may sometimes be able to presume the source of complaint based on the investigation process.

## ***Investigation Planning***

Good investigations begin with careful planning. A well thought out investigation plan will act as the road map for the licensing staff throughout the investigation. Careful planning also promotes collaboration and clear responsibilities about respective roles and keeping others informed throughout the process.

A good investigation plan<sup>16</sup> will assist licensing staff to:

- Stay focused on the issues;
- Avoid issue creep;
- Plan an investigation strategy;
- Identify all reasonably viable investigation avenues;
- Pinpoint sources of evidence;
- Use resources efficiently;
- Anticipate problems before they arise;
- Set strict milestones and times lines; and,
- Get the investigation completed on time.

**Identifying and informing others:** It is important to determine who needs to be contacted, in what sequence, and when and where.

- The funding agency may be contacted to participate in the planning of the investigation and the investigation process, if appropriate.
- The Coroner may need to be contacted, if an unexpected death has occurred (as per Memorandum of Understanding, 2006). A number of agencies including the coroner, police and MHO may concurrently investigate the unexpected death. Each agency must fulfill their independent statutory duties.
- All incidents that have the potential to be of a criminal nature must be referred to the police/law enforcement agency. The police/RCMP investigate allegations of criminal conduct (theft, fraud etc) under the [Criminal Code of Canada](#) and may conduct a concurrent investigation regarding an unexpected death or suspected abuse of a person in care.
- Other agencies, such as the designated agency under the [Adult Guardianship Act](#), staff of the Office of the Public Guardian and Trustee, may require notification and/or a request to assist in the investigation.
- Facility staff and persons in care (or representatives) may also need to be notified of an investigation depending on the nature of the allegation. This will be determined on a case by case basis. If notification is deemed necessary and appropriate, the MHO is responsible for ensuring that persons in care (or representatives) who are affected by an investigation are informed that an investigation is taking place.

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<sup>16</sup> Conducting Administrative, Oversight & Ombudsman Investigations, Gareth Jones

**Balancing issues:** While investigating licensing staff may need to balance a number of competing and sometimes conflicting issues such as;

- the need to protect the health and safety of vulnerable persons in care;
- the right of the Licensee to administrative fairness;
- the rights of the person alleged to have been involved in the situation;
- the administrative process and requirements of the licensing program; and,
- the needs and requirements of other agencies involved.

**Reviewing history:** In the planning phase, the investigating staff reviews all of the information obtained during the intake phase. This review provides an opportunity to re-evaluate all the information collected in chronological order. It may also be necessary to carry out some degree of file review and risk assessment review. A thorough working knowledge of the facility will assist in determining any patterns, taking into consideration compliance history and the Licensee's response to any previous investigations and compliance issues, if applicable.

**Determining scope and depth:** Planning for an investigation includes determining the scope and depth of investigation to be completed. Considerations include:

- *Is the allegation of a minor nature that may allow the investigation to be completed through a complaint inspection, or will a more formal investigation be required?*
- *What type of information is needed and where can that information be found?*
- *What questions need to be asked?*
- *Are interviews required? Who will be interviewed, by whom and where?*
- *Will other professionals (such as a social worker) be required to assist in the interviews?*
- *How many witnesses will be sufficient to make a determination?*

**Making a plan:** All planning activity culminates in a documented investigation plan. The investigation plan indicates what the licensing officer and others involved will do, who will be interviewed in what sequence, when and where, what documents will be reviewed, whether there will be a facility visit(s), and the timelines for these activities. The investigation plan also includes notification to the Licensee of the investigation, an explanation of investigation process, and how the investigation findings will be communicated and to whom.

## **Evidence Collection**

Evidence collection brings all the considerations of the planning phase into action with the goal of determining whether an allegation can be substantiate.

Methods for collecting information may include (but are not limited to):

- an in-depth review of the facility files to identify relevant historical information, previous inspections, incident reports, investigations and risk assessment;
- conducting an onsite inspection/s to review facility records, policies and procedures, and records of persons in care;
- interviewing witnesses, persons in care(if appropriate), staff, the Licensee, families, or others to obtain information, and obtaining written statements from witnesses.

## ***Analysis of Evidence and Preliminary Findings***

When an event is alleged to have occurred and is being investigated, licensing staff must determine whether that allegation indicates non-compliance with the CCALA/regulations. Decisions must be based on careful weighing of all evidence gathered during the course of the investigation. Licensing officers must analyze and assess whether, on a balance of probability, something is more likely to have occurred rather than not occurred. Evidence from the investigation and determination of preliminary findings needs to be documented.

## ***Communicating the Preliminary Findings***

Prior to reaching conclusions and making recommendations to the MHO, the preliminary findings of the investigation must be communicated in writing to the Licensee. This allows the Licensee to provide any additional information about the issue and to plan a response to ensure health and safety in the future.

## ***Licensee Response to Preliminary Findings***

If the preliminary findings determine that this is contravention to the legislation, the Licensee must be given an opportunity to respond to these findings before making final conclusions and recommendations to the MHO. In addition, the Licensee will need to provide their plan to ensure that the contravention is addressed and to ensure the health and safety of persons in care. For a complex investigation, preliminary findings may be documented in a formal preliminary report and the Licensee should be given a reasonable length of time to respond in writing.

## ***Conclusions and Recommendations***

At the completion of the investigation, licensing staff determine whether there are contraventions to the *Community Care and Assisted Living Act* and Regulations and

determine whether to make recommendations for action on the facility licence. Conclusions and recommendations must be documented in writing. Action on a licence could include attachment of terms and conditions, suspension or cancellation. Action may also include the appointment of an administrator; however, that decision is made by the Board of the relevant health authority on the recommendation of the MHO.

### **Guidelines For Communicating During Investigations**

- Persons being interviewed should be given the opportunity to have a person of their choice present for support, if they wish.
- Keep the Licensee/manager aware of the progress of the investigation. This helps to ensure a productive working relationship and that necessary corrective actions are taken in a timely manner.
- Notify the Licensee of the preliminary findings, and decisions as soon as possible. This should be completed prior to the formal written notification. This communication should provide an appropriate level of detail to the Licensee/manager without releasing personal information of third parties, such as names, addresses, etc.
- Complete the formal written notification of the investigation process, the outcomes, and findings in a timely manner and provide a copy to the Licensee for comment and response.
- Where an allegation has been made against staff of a community care facility the responsibility to communicate the findings of the licensing report to that staff lies with the Licensee. Licensing staff should ask the Licensee for evidence that the investigation report findings were communicated to that staff. The onus is on the Licensee to address the issues identified in an investigation report whether the non-compliance results from their own actions, or actions of staff.
- Do not release information to any party other than the Director of Licensing, the Licensee (and the funding body as appropriate), or another investigator with statutory responsibilities (i.e., ECE Registry, Coroner) prior to formal conclusion of the investigation.

### ***Writing an Investigation Report***

When you are writing an investigation report, keep the audiences in mind, this will assist with what material should be included, organization of the content, and supporting the findings.

Who is the primary audience for the investigation report?

- Will there be more than one audience?
- What does the audience/s need to know?
- What will be most the important information for the audience/s?



The clearer your points are, the more likely you are to have a strong report. Before you begin the process of writing, take the time to consider who your audience is and what they may be looking to understand when reading your report.

It is important to be clear about the purpose of the investigation report. The investigation report's purpose guides all of the decisions about what information to include or not include, and about the reporting format. The investigation report will:

1. State what the allegations are;
2. State what you want the audience to do with the information in the report;
3. Confirm whether allegations have been substantiated;
4. Make a recommendation or decision; and,
5. Serve as a permanent record for future use.

An investigation report may have the purpose of the report summarized in a "Statement of Purpose" which allows the specific goals of the report to be declared. Statements of Purpose are recorded at the beginning of the report and are designed to give the reader an understanding of what the document will cover and what can be gained from reading it. To be effective, a Statement of Purpose should be:

- Specific - not general, broad or obscure.
- Concise - one or two sentences.
- Clear - not vague, ambiguous or confusing.
- Goal-oriented - stated in terms of desired outcomes.

Some common introductory phrases for a Statement of Purpose include:

- "The purpose of this report is to..."
- "The purpose of this report is twofold: to \_\_\_ and \_\_\_"
- "In this report, I will describe/explain/review/etc. the..."
- "This report will outline the..."

If there are concurrent investigations being conducted parties should inform each other of the status and/or findings of their respective investigations before any public announcements are made, so that affected persons in care (and their families) may be notified first and can make any necessary decisions about their care. In the case of concurrent investigations, notification may be delayed, so that the integrity of any investigations still underway are not jeopardized.

Upon completion of an investigation and after the Licensee has been notified of the findings, any affected persons in care, their families and representatives, and any others who were previously informed of the investigation (if any), may be notified that the investigation is concluded. Licensing staff should be familiar with health authority reporting relationships and agreements such as PCQO and funding bodies and communications planning in the event the investigation findings will be released publicly.

## **INVESTIGATION OF UNLICENSED FACILITIES**

Unlicensed operation of a community care facility is a contravention of the CCALA; it is also a contravention, if the operator continues to provide care to 3 or more persons during the period of time of application for a licence and the application process.

Licensing staff should provide the unlicensed operator with a copy of their letter of delegation and explain the purpose for their visit, which is to determine whether a service is being operated that is in need of licensure. Licensing staff should inform an unlicensed operator verbally and in writing that he/she may provide care to only 1 or 2 persons, and that if they provide care to more than 2 persons they are in contravention of the CCALA (which may result in enforcement action).

If an illegal facility is found, the operator must either reduce the number of persons in their care or apply for a licence. The licensing officer must monitor the facility to ensure the operator has taken appropriate steps to come into compliance and if necessary take appropriate action if the operator continues operating in non-compliance.

### ***Entry and Warrant Process***

Section 9 of the CCALA provides that if licensing staff has cause to believe that an unlicensed premises is being used as a CCF, that they may enter and inspect the premises. s. 9(4) provides that if the premises are a private single-family dwelling, licensing staff cannot enter and inspect unless either the occupant consents or entry is authorized by a warrant.

The entry and search warrant process applies to unlicensed premises in private single-family dwellings. Other unlicensed facilities are required to allow access and failure to grant access could result in an application to the Courts for an entry order.

If an unlicensed facility is operating in a private single-family dwelling, the first step should be to seek the consent of the occupier to enter and inspect. If consent to inspect is refused, or if there are circumstances relating to the prior history that make it probable that consent would be refused, licensing officers should seek advice of the MHO or licensing manager in applying for an entry warrant/tele-warrant to a Justice of the Peace or a Judge of the Provincial Court. It may also be necessary to obtain legal advice.

Section 9(6) provides that licensing officers must not enter a home or facility without appropriate authorization. Even with a warrant/tele-warrant, licensing staff must not physically force their way into the premises unless that force is specifically authorized in advance in a warrant. If it is expected that the occupier will resist and refuse entry even in the face of the warrant, that belief (and the basis for that belief) should be set out in the information provided to obtain the warrant so that the appropriate provisions can be included. In these cases, licensing staff, in collaboration with the licensing manager and/or MHO, should consider whether they need to be accompanied by another staff member and/or by police.

# **TAKING ACTION ON A LICENCE**

## **RECOMMENDATION OF ACTION ON FACILITY LICENCE**

Section 13 of the CCALA empowers the MHO to suspend, cancel or attach terms and/or conditions to a licence. Prior to action being taken, licensing officers are typically required to make a recommendation to the MHO. Recommendations may be made during progressive enforcement or during a complaint investigation.

## **SUMMARY ACTION**

Summary action means taking immediate action without giving prior notice to the affected party. Section 14 of the CCALA allows the MHO to suspend or attach terms and/or conditions to a licence without notice if he/she has reasonable grounds for believing that there is an immediate risk to health and safety of persons in care.

Summary action is to be used only for situations where there are reasonable grounds to believe that there is an immediate risk of harm to persons in care. The decision to take summary action is made on a case by case basis, and in accordance with local health authority policies. Summary action can include suspension of a licence, attaching terms or conditions to a licence, or varying terms or conditions of a licence. Summary action does NOT include the cancellation of a licence. The key provision in Section 14 of the CCALA that differentiates it from Section 13 is that this action can be taken without notice.

The authority to take immediate action without notice also brings with it immediate consequences for Licensees and, potentially, for persons in care. While the ability to request reconsideration and to file an appeal does apply to these decisions, the fact that a MHO may act summarily means that the right to reconsideration and appeal cannot be exercised until after the decision has been made. Summarily suspending a licence will immediately remove an operator's ability to earn a livelihood and may necessitate persons in care to make other arrangements. Imposing terms or conditions may also have financial implications for the operator. This authority to take summary action without notice means that these decisions must be made carefully and with scrupulous regard for administrative fairness.

A licence can be suspended summarily, however it cannot be cancelled summarily, and it should not remain suspended indefinitely. Summary suspension of a licence should be viewed as a means of mitigating immediate risk to persons in care while allowing Licensing to gather more information or to work with the Licensee to mitigate risk. Summary suspension should be followed either by cancellation of a licence under Section 13 of the CCALA, or reinstatement of the licence once the risk has been appropriately mitigated. (See Appeal Board decision 2007 BCCALAB 6, dated 20071024.)

The authority of a MHO to take summary action is subject to the reconsideration process in section 17, which provides that the MHO must, as soon as practicable after taking summary action, advise the Licensee in writing of the reasons for the action and of his/her right to respond.

## **OFFENCES AND LEGAL REMEDIES**

The following are legal remedies available when a Licensee or unlicensed operator does not comply with specific requirements of the legislation. It is the decision of Crown Counsel, not the MHO, whether to proceed with a charge under Section 33 of the CCALA.

### ***Fines***

Section 33 of the CCALA allows for a fine of up to \$10,000 for a person committing an offence under the CCALA. This legal remedy is not often used and should be seen as a last resort after other means of seeking compliance have been unsuccessful. Specifically, these offences are attached to contraventions of the following parts of the CCALA:

- operating an unlicensed facility (s. 5),
- a Licensee or manager who is not an adult (s. 6),
- bringing to, or advertising to bring a person under 19 years of age into BC to become a person in care without first obtaining written approval of the director designated under the [Child, Family and Community Service Act](#), s.18 (2),
- breaching the section related to prohibited financial inducements of a person in care s.18 (3).

A Provincial Court Judge may impose a fine following prosecution for the offence that results in either a guilty plea or a conviction.

### ***Appointment of a Public Administrator***

The [CCALA](#) (s. 23) empowers the Minister to appoint an administrator, if the Minister has reasonable grounds to believe that there is a risk to the health or safety of persons in care. This duty has been delegated to the Boards of the health authorities. For residential care facilities, an administrator may also be appointed under the [Continuing Care Act](#). In such circumstances, the administrator assumes the role of Licensee and exercises all powers necessary to continue the operation of the facility including hiring staff and paying their wages.

Licensing programs should seek legal advice if they are contemplating a recommendation regarding the appointment of an administrator under the CCALA.

# APPEALS

An appeal is a request to change the decision of a statutory decision maker. An appeal may begin after all other avenues have been exhausted, including reconsideration.

Section 29 of the CCALA provides for an appeal to the [Community Care and Assisted Living Appeal Board](#) in relation to:

- a refusal to issue a licence to operate a community care facility, an early childhood educator certificate, or a registration of an assisted living residence;
- a decision taken against a licence, certificate or registration; and
- a decision to grant an exemption; and,
- the appointment of an Administrator to operate a community care facility.

The following persons have the right to appeal:

- Holders of and applicants for certificates for early child educators and registrants, Licensees and applicants for registration or licensing.
- Persons affected by an exemption that has been granted.

## TECHNICAL REQUIREMENTS FOR A VALID APPEAL

A person seeking to appeal a decision under s. 29(3) (the “appellant”) must comply with the requirements of the CCALA and the Appeal Board Rules in relation to appeals. In summary, those requirements are:

- The appellant must file a notice of appeal within 30 days of receiving notification of the decision or within 30 days after a decision is made under s. 16. Section 29(2) of the CCALA provides that an appeal must be made in the prescribed manner within 30 days of receiving notification <sup>17</sup> although the Appeal Board has the power to extend that time limit.
- The notice of appeal must meet the requirements set out in Rule 2 of the [Rules for Appeals](#) under the CCALA. <sup>18</sup> Rule 2 states:

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<sup>17</sup> Section 24(1) of the *Administrative Tribunals Act* (the ATA) provides that a notice of appeal be filed within 30 days of the decision being appealed unless the tribunal's enabling Act provides otherwise. Section 24(2) of the ATA provides that the tribunal may extend the time to file a notice of appeal even if the time to file has expired, if satisfied that special circumstances exist.

<sup>18</sup> Section 27(3) of the ATA permits the Appeal Board to allow a reasonable period for an appellant to correct any deficiencies in a notice of appeal.

*The notice of appeal must:*

- (a) be in writing;*
  - (b) contain the appellant's contact information;*
  - (c) identify the decision being appealed, the person who made the decision, the date of the decision and the date the appellant was notified of the decision;*
  - (d) include a copy of the decision being appealed;*
  - (e) state why the decision being appealed should be changed and what outcome is being requested; and,*
  - (f) be signed by the appellant or the appellant's lawyer or agent. If the notice of appeal appears to be deficient, the Board will notify the appellant and allow up to 14 days for the appellant to correct the deficiency"<sup>19</sup>*
- The appellant must have *standing* to appeal - that is, the person must fall within the category of an affected Licensee, applicant, holder of a certificate, or registrant within meaning of s. 29(2) or a person in care, agent, personal representative, spouse, relative or friend of the person in care within the meaning of s. 29(3).
  - The subject matter of the appeal must fall within the scope of s. 29(2) or 29(3). If it does not, the Community Care and Assisted Living Appeal Board does not have jurisdiction. Rule 15(1) of the Appeal Board Rules sets out a process for seeking summary dismissal of an appeal on the basis that it is not within the Appeal Board's jurisdiction as well as other grounds. (See example, SBR v. *Bockner*, 2006 BCCALAB)

The appeal process can be very time consuming and requires a significant amount of resources. There are several processes that may occur once an appeal has been submitted such as:

- Dismissal of an appeal
- Application for intervener status
- Notice of hearing ( written, oral or electronic)
- Appeal management conference
- Appeal Records

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<sup>19</sup> In SBR v. Brockner, 2006 CCALAB 2, the Appeal Board permitted the appellant six weeks to correct the deficiencies in her notice of appeal based on her explanation that she was under considerable stress and needed to attend to the set-up of her new facility.

## THE DIFFERENCE BETWEEN JUDICIAL REVIEW AND A STATUTORY APPEAL

Whenever a public official makes a statutory decision, that decision can be challenged by way of an application for judicial review under the [Judicial Review Procedure Act](#). The BC Supreme Court exercises inherent jurisdiction to conduct judicial reviews to oversee the conduct of statutory decision makers. Administrative tribunals (such as the CCALAB) do not have any authority to conduct judicial reviews.

On a judicial review application, the reviewing court ensures that the decision maker has exercised his or her authority within jurisdiction (in conformance with his or her statutory powers and in a procedurally fair manner). In other words, the reviewing court will not rehear the appeal but rather is concerned with the legality of a decision (whether it was made within jurisdiction or not).

In contrast, there is no automatic right of appeal (to a court or an appellate tribunal) unless specifically set out in legislation. If a statutory scheme gives a right of appeal to a court or an appellate tribunal, as does s. 29 of the CCALA, the appellate body can generally consider both the legality of a decision and its merits. The legislation will generally set out the remedial authority of the court or appellate tribunal on an appeal. See Appendix C for more information.

# APPENDIX A: DELEGATION OF STATUTORY AUTHORITY

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## I. INTRODUCTION

We all delegate acts to others in our professional and personal lives. The act of “delegating” simply means entrusting authority to another person to complete a task.

As simple as the concept is, it is fundamental to how our system of government operates. In our constitutional democracy, the legislative branches delegate the power to administer the laws that they make to the executive and judicial branches of government. The scope of delegation can range from the authority to make a decision in a particular case to the comprehensive transfer of authority to regulate an entire industry.

This paper will examine the legal concept of delegation as it relates to “statutory authority”, and contrast it to delegation of other functions to which the legal rules do not apply (such as delegation of medical acts by a medical practitioner). It will review the requirements for the process of delegation of statutory authority, the legal consequences which flow from delegation of such authority and the ways in which an exercise of delegated authority can be challenged.

This paper is designed as a resource for public officers who delegate statutory authority to others and those who act under delegated authority under regulatory schemes such as the *Public Health Act*, the *Drinking Water Protection Act*, the *Food Safety Act*, and the CCALA. Understanding the concept of delegation of statutory authority can assist decision-makers to avoid the technical pitfalls relating to the rules of delegation.

## II. DELEGATION OF STATUTORY AUTHORITY

In our modern system of government, legislatures cannot deal with all aspects of the laws that they enact without the assistance of other governmental agencies. As a consequence, legislatures regularly delegate powers to the executive branch of government to enact subordinate legislation (regulation-making power) and to administer laws. Subject only to constitutional limitations, Parliament and the provincial legislatures are free to enact statutory schemes and define the scope and limits of the powers that will be conferred on public bodies<sup>20</sup> to administer those schemes.

The public bodies that are established to administer laws do not have inherent power to act by virtue of the fact that they are performing governmental functions. They must act on statutory authority and only have such authority as the legislature has expressly or by implication conferred on them: *British Columbia (Milk Board) v. Grisnich*, [1995] 2

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<sup>20</sup> The term “public bodies” includes individuals who exercise statutory power for the purposes of this paper.



S.C.R. 89. If public bodies act outside the scope of their statutory authority, they exceed their jurisdiction.

The superior courts in each province exercise inherent supervisory jurisdiction to ensure that public bodies act within the scope of their jurisdiction through the process of judicial review.<sup>21</sup> Any exercise of statutory power can be challenged on the basis that it was made outside the scope of authority conferred by the legislation or exercised in a manner that contravened the rules of procedural fairness.

### III. DISTINCTION BETWEEN MANDATORY AND DISCRETIONARY AUTHORITY

In assessing whether a public body has acted within the scope of its jurisdiction, courts draw an important distinction between statutory powers, which create mandatory duties, and those which confer discretion.

#### (a) Statutory duties

Legislation is administered in large measure through the imposition of mandatory “statutory duties” on public officials to enforce rules which are set out in the legislation. In some cases, those “duties” are clearly identified as such in the legislation. For example, s. 16(1) of the *Health Professions Act* provides that self-regulating colleges have the following duty:

16(1) it is the **duty** of a college at all times

- to serve and protect the public, and
- to exercise its powers and discharge its responsibilities under all enactments in the public interest.

In other cases, the duties are set out in terms of responsibilities that a statutory delegate “must” carry out. For example, ss. 73 (2), (3) and (4) of the *Public Health Act* set out the duties of MHO’s in the following terms:

(2) A MHO **must** monitor the health of the population in the designated area and, for this purpose, may conduct an inspection under Division 1 [Inspections] of Part 4.

(3) A MHO **must** advise, in an independent manner, authorities and local governments within the designated area

- on public health issues, including health promotion and health protection,
- on bylaws, policies and practices respecting those issues, and
- on any matter arising from the exercise of the MHO’s powers or performance of his or her duties under this or any other enactment.

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<sup>21</sup> That process is governed by the *Judicial Review Procedure Act*.

(4) If a MHO believes it would be in the public interest to make a report to the public on a matter described in subsection (2) or (3), the MHO **must**

- (a) consult with the provincial health officer and each authority and local government who may reasonably be affected by the intended report, and
- (b) after consultation under paragraph (a), make the report to the extent and in the manner that the MHO believes will best serve the public interest.

Courts have authority to order *mandamus* to compel the performance of a statutory duty where the public body has refused to exercise a power that it is compelled to use. However, the following conditions must be fulfilled before such an order will be issued: (a) there must be a public legal duty to act; (b) the duty must be owed to the person seeking the order (they must have legal standing to seek the order); and (c) there must also be a clear right to expect performance of the duty (i.e. the applicant must satisfy all pre-conditions giving rise to the duty and the applicant must have made a demand that the duty be performed, and the decision-maker must have failed to comply with the demand).

### **(b) Statutory discretion**

Laws cannot generally be enforced through the imposition of “statutory duties” alone. It is difficult to prescribe rules of general application which are applicable to all cases and to identify all of the factors that should be considered in a particular case. Since there is generally a need for flexibility, legislatures grant discretionary powers to public bodies to make decisions on an as needed basis.

Unlike a statutory “duty” that must be performed, the grant of “discretion” enables the public body to do or not to do something under a statute as in its discretion it considers appropriate.

Grants of statutory discretion may contain conditions precedent. For example, a drinking water officer has the discretion, in certain conditions, to require a water supplier to give public notice in a manner approved by the drinking water officer in s. 14(1) of the *Drinking Water Protection Act*:

- (1) The drinking water officer **may** request or order a water supplier to give public notice in a manner approved by the drinking water officer, or in accordance with the directions of the drinking water officer if
  - (a) the drinking water officer has received a report under section 12,
  - (b) the drinking water officer has received a report under section 13, or
  - (c) the drinking water officer considers that there is, was or may be a threat to the drinking water provided by a water supply system.

The drinking water officer's authority to exercise the discretion is conditional upon receiving a report under s. 12 or 13, or determining that there is, was or may be a threat to the drinking water provided by a water supply system. These are conditions precedent to the exercise of the officer's discretion. In other words, the drinking water officer cannot exercise his or her discretion until one or more of those conditions are met.

Similarly, the Minister has discretion to designate a temporary quarantine facility under s. 26(1) of the *Public Health Act*:

(1) the minister **may** by order designate a place as a quarantine facility if the minister reasonably believes that the temporary use of the place for the purposes of isolating or detaining infected persons is necessary to protect public health.

The Minister cannot proceed with the exercise of his or her discretion until he or she forms the reasonable belief that the temporary use of the place is necessary to protect public health.

Grants of discretion may also set out a list of general or specific factors to be considered. In such cases, those factors must guide the public body in the exercise its discretion. A failure to consider relevant factors or consideration of irrelevant factors will cause the public body to lose jurisdiction and its decision may be set aside on judicial review: *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

Even if the statute does not set out the criteria which are to guide the public body in its decision-making process, the discretion must always be exercised in a manner that conforms to the legislative objects and scheme of the *Act* under which it is conferred. In the seminal case, *Roncarelli v. Duplessis*, [1959] S.C.R. 121, Rand J. observed:

*In public regulation ... there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The legislature cannot be so distorted.*

#### IV. RULES GOVERNING DELEGATION OF STATUTORY AUTHORITY

What then are the requirements for proper delegation and the principles that govern the proper exercise of delegated authority?

The general rule is that a delegate may not sub-delegate statutory powers (reflected in the maxim *delegates non potest delegare*). Only Parliament or provincial legislatures may authorize sub-delegation of powers. In other words, delegation requires legislation to authorize it. It is therefore fundamental that statutory authority must be exercised by the individual or body authorized by the grant of authority unless the statute confers the authority to sub-delegate to another individual or body.

Courts have held that powers or functions that are legislative or judicial in nature must be exercised by the very individual or body to whom they have been granted unless there is express or implied authority to sub-delegate. Legislation routinely provides broad regulation-making authority to Cabinet because such authorization is required to make subordinate legislation which is a legislative function.

Courts will generally infer an intention on the part of Parliament or the provincial legislatures to permit sub-delegation, even in the absence of express words, in two circumstances. First, express authority is not required to authorize sub-delegation of “ministerial” or “administrative” functions. A grant of authority will be characterized as “ministerial” or “administrative” if it authorizes, or requires, administrative action that involves the exercise of little or no significant discretion or independent judgment, or is limited to gathering information and reporting or signing documents. When public officers are entrusted with ministerial or administrative functions, they are entitled to act by any authorized individual within their organizations.

Secondly, courts will infer the power to sub-delegate where legislation delegates a power to a person who clearly will not be able to exercise that power personally, such as a minister of the Crown who would otherwise have to deal with a multitude of matters. Thus the general rule also has limited application to the exercise of powers conferred on ministers that are exercised by their departmental officials. In *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, the Court observed:

28 ... Where power is entrusted to a Minister of the Crown, the acts will generally be performed not by the Minister but by delegation to responsible officials in his department: *Carltrona, Ltd. v. Commissioner of Works*, [1943] 2 All E.R. 560 (C.A.); *R. v. Harrison*, [1977] 1 S.C.R. 238, at pp. 245-46.

In addition, s. 23 of the *Interpretation Act*, RSBC 1996, c. 238 provides general authorization for ministers and other public officials to have others act for them:

23(1) Words in an enactment directing or empowering a minister of the government to do something, or otherwise applying to the minister by his or her name of office, include a minister designated to act in the office and the deputy or associate deputy of the minister.

- If a deputy minister is absent or unable to act, an assistant deputy minister, or some other official authorized by the minister, has the powers and must perform the duties of the deputy minister.
- Words in an enactment directing or empowering a public officer to do something, or otherwise applying to the public officer by his or her name of office, include a person acting for the public officer or appointed to act in the office and the deputy of the public officer.
- This section applies whether or not the office of a minister or public officer is vacant.
- Subsection (1) does not authorize a deputy or an associate deputy of a minister to exercise an authority conferred on the minister to enact a regulation as defined in the Regulations Act.

By virtue of s. 23(3), the Deputy Provincial Health Officer has the same powers and duties as the Provincial Health Officer.

Where there is express or implied authority to delegate, the public body cannot sub-delegate authority that is not within the original statutory grant of authority. In other words, a public body cannot sub-delegate greater authority than it has under the statute.

In terms of legal effect, any decision made under the delegation of authority can be reviewed by the courts on the same grounds as if it had been made by the public body that delegated the authority. In addition, the decision may also be reviewable on the ground that it was not authorized by the delegation instrument itself (e.g. non-compliance with terms or conditions contained in the delegation instrument) or that the formalities of the delegation were not observed in the appointment process. So, for example, where the power to delegate is limited to delegation to certain individuals, the delegation must only be to those persons: *Endeavour Developments Ltd. v. Comox-Strathcona (Regional District)* (1995), 27 M.P.L.R. (2d) 240 (B.C.S.C.). There must be strict compliance with any statutory requirements for the delegation process.

Generally, the public body that delegates authority cannot continue to exercise the statutory powers so long as the sub-delegation exists unless the legislation specifically provides that this can be done. For example, s. 82(3) of the *Public Health Act* expressly provides that “a delegation does not prevent the person who delegates the power or duty from exercising the delegated power or performing the delegated duty at any time”.

Once the delegate has made a decision, the public body that delegated the power has no residual authority to reverse or alter the decision that has been made. However, a delegation may be revoked at any time before the decision is made, and the grant of authority is exercisable thereafter by the public body that is authorized by the grant of authority in the statute unless the public body delegates the authority to another individual.

### **(a)The role of the public body that delegates authority**

A public body that wishes to delegate authority must ensure that there is proper authority under its statute to do so (unless it is simply a ministerial or administrative task). The public body must consider whether the legislation expressly authorizes delegation of the authority to act. The authority to delegate will usually be set out in the legislation that confers the principal grant of authority. For example, s. 3(4) of the *Drinking Water Protection Act*, SBC 2001, c. 9 provides:

3(4) Subject to the regulations, a drinking water officer may, in writing, delegate to any person a power or duty of the drinking water officer under this or another enactment.

If the legislation does not expressly authorize delegation, consideration must be given to whether the statute impliedly authorizes delegation. Courts generally undertake a pragmatic and functional analysis to determine whether the relevant statute impliedly authorizes delegation. They will consider such factors as the amount of discretion called for in the exercise of the power, the relevance of the delegator's attributes for the exercise of the power, the possession of relevant expertise by the delegate, the existence of controls over the delegate, and the importance of the individual rights affected by the exercise of the grant of authority.

If there is express or implicit authority to delegate, the public body should be satisfied that the person to whom the delegation is provided has the appropriate skills, training and judgment to exercise the powers in relation to the matters being delegated. Statutes may be silent on this requirement or indicate that the power may be delegated to "any person" without qualification. Statutes may also specify the qualifications for the proposed delegate or confer authority on the public body to determine what those qualifications should be.

For example, s. 24(2) of the CCALA, SBC 2002, c. 75 authorizes the assisted living registrar to delegate in writing any power or duty under the CCALA to a person who "in the opinion of the registrar, possesses the experience and qualifications suitable to carry out the tasks as delegated". While the assisted living registrar's judgment as to who has the suitable experience and qualifications would not be lightly interfered with by a court, it is nevertheless a statutory requirement that would have to be demonstrated in the event of a challenge to the form of the delegation.

Along the same lines, the public body should also ensure that the person to whom authority is being delegated is familiar with the legislative framework under which they will be acting and any relevant guidelines, policies, and directives.

Where legislation expressly authorizes delegation, it will generally specify that the delegation must be in writing. However, even if the legislation is silent on the form of delegation, the public officer who delegates authority should provide a written delegation instrument. The delegate should be able to provide proof of the delegation if requested to do so and indeed may be required to do so on judicial review unless the implied authority is capable of being delegated without a formal instrument: *Harrison, supra*. Statutes may also require delegates to produce evidence of their authority to act before exercising a delegated power or duty. For example, s. 82(5) of the *Public Health Act* provides as follows:

82(5) If requested to do so, a delegate must produce evidence of his or her authority before exercising a delegated power or performing a delegated duty.

Subject to any contrary intention in the statute, the public body that delegates the authority ceases to have any further authority over the matter once it has been delegated to another individual subject only to the power to revoke the delegation and to ensure compliance with any terms or conditions of delegation. The public body cannot direct the delegate to make a particular decision.

A delegation can be revoked at any time before a decision is made by the delegate. On revocation, the public body assumes responsibility for making the decision itself or appointing another delegate to make the decision in its place.

#### **(b) The role of the delegate**

The delegate holds the statutory powers in the same way as the person who delegates those powers. Subject to revocation of the delegation or the imposition of any terms or conditions, the delegate has the same powers as the public officer who delegated those powers in the first place with the exception of the ability to further sub-delegate the authority.

The delegate cannot be directed by other officials within his or her organization (including those to whom the delegate reports) in the exercise of that statutory authority. That does not preclude consultation on matters, particularly those that may have broader implications for the organization; however, the decision must still be made by the delegate.

Once the decision is made, it should always be signed by the delegate in his or her own name. The decision should not be signed by the public officer who delegated the authority or any other person other than the delegated decision-maker. The delegate should not use his or her own job title, or the job title of the public officer who delegated

the authority when signing the decision or any communications relating to the matter. The delegate should simply use his or her name, and indicate that he or she is acting under delegated authority from the public officer.

Where the delegate is unable to complete the decision-making process for any reason, responsibility for making the decision reverts back to the public body that delegated the authority. The public body must either hear and consider the matter *de novo* or appoint a new delegate to hear and consider the matter *de novo* (unless the legislation permits the parties to consent to the appointment of a replacement).

#### (i) Fettering of Discretion/Acting under Dictation

A delegate must ensure that he or she exercises independent judgment in relation to the matter that he or she must decide. A “fettering of discretion” occurs whenever a delegate makes a decision in accordance with a contract or other undertaking that is regarded as determinative of the exercise of statutory power without exercising independent judgment. It also occurs where a delegate mechanically applies a policy, guideline or rule that has been previously formulated without considering whether it is appropriate to the particular facts of the case.

Subject to a contrary intention in a statute, non-statutory instruments such as policies do not have binding effect. The delegate must always consider whether it is appropriate to apply the policies to the case under consideration.

In *Ainsley Financial Corp. v. Ontario Securities Commission*, [1994] O.J. No. 2966, the Ontario Court of Appeal observed that non-statutory instruments such as guidelines do not have to be issued pursuant to any specific statutory grant of authority. The Court characterized guidelines as administrative tools available to regulators to ensure that they can exercise their statutory authority in a more transparent and efficient manner. However, the Court went on to state that the limits of such tools must also be recognized:

14 Having recognized the Commission’s authority to use non-statutory instruments to fulfill its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation... Nor can a non-statutory instrument pre-empt the exercise of a regulator’s discretion in a particular case... Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines. Iacobucci J. put it this way in *Pezim* at p. 596:

However, it is important to note that the Commission’s policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.



Similarly, in *Fahlman (guardian ad litem of) v. Community Living British Columbia*, [2007] B.C.J. No. 23 (C.A.), the Court of Appeal held that Community Living BC (“CLBC”) could not use an IQ limit set out in policy as a mandatory criteria for establishing eligibility for benefits when that limit was not set out in the CCALA or regulation. The Court emphasized that the legislature could have easily incorporated the IQ limit in its legislative scheme but it did not. The Court concluded that applying the IQ limit in the policy as a mandatory requirement, without consideration of the facts of the case, constituted an unlawful sub-delegation of authority (adopting a policy which amounts to a binding regulation) and an unlawful fettering of discretion. In reaching this conclusion, the Court observed:

46 As Professor David J. Mullan explains in his test at 115-16, fettering of discretion as a ground of review falls under the category of abuse of discretion. The essential allegation is that the decision-maker failed to exercise its discretionary powers genuinely in an individual case; rather, it rendered a decision on the basis of pre-existing policy. Judicial tolerance for the adoption of guidelines has not extended to the establishment of formal rules to govern in particular cases. A specific statutory power is a prerequisite to promulgating such rules.

47 Further, Professor Mullan observes how courts have admonished against informal policies and guidelines becoming invariable rules applied automatically in every case. Individual matters warrant individual attention. Accordingly, a statutory authority’s discretion should not be so fettered as to preclude individualized consideration of particular cases.

Whether such powers confer authority to create rules that have the force of law, or merely guide the judgment of decision-makers in much the same way as those made without explicit statutory authority, will depend on their construction (p. 12-51). For example, s. 4(1) of the *Drinking Water Protection Act* provides for both the establishment of non-binding guidelines and legally binding directives:

4(1) the minister may establish

- (a) guidelines that must be considered, and
- (b) directives that must be followed by drinking water officers and other officials in exercising powers and performing duties or functions under this *Act* and the *Health Act* in relation to drinking water.

Since the guidelines are not binding, drinking water officials must consider the Drinking Water Officers’ Guide in the exercise of their duties but are “able to depart from the Guide in any case where sound reason exists to do so”. The Guide goes on to state:

*It is important to note that, even though approved as a guideline under section 4 of the Act, this Guide does not have the force of law. As such, if there is ever a*

*conflict between this Guide and the Act, the Regulation or the principles of administrative fairness, this Guide is superseded by the latter authorities to the extent of any such conflict.*

*Further, this document is intended only as a policy guide to inform the exercise of statutory discretion. Decision-makers are expected to consider this document and to apply it as a general rule, but if application of this Guide is not considered appropriate to particular facts or circumstances, the provisions of this Guide should not be applied. The only exception relates to “directives” which may be issued by the minister, as “directives” must be followed. At present there are no directives.*

If a statute provides that a policy is to have binding effect, it has the force of law and must be followed. If, however, the statute is silent, the policy should be taken into account but cannot be treated as binding or conclusive without consideration of the facts of the particular case.

Delegates must also ensure that the comments that they provide to other agencies (for the purposes of inter-agency consultation) cannot be seen as fettering their own discretion in relation to matters that come before them. This issue arose in *Koopman v. Ostergaard* (1995), 34 Admin. L.R (2d) 144 (B.C.S.C.) which involved an application by Imperial Oil for a well authorization from the Ministry of Energy, Mines and Petroleum Resources (“Energy”). Energy referred the application to other ministries, including the Ministry of Forests (“Forests”), for their views. Forests expressed its objection because of the proposed location of the site in a prime alpine wilderness area. Energy ultimately granted the well site authorization. Imperial Oil then submitted an application to Forests for a Licence to Cut so that it could build an access road to the well site. Forests granted the application because the well site authorization included road access. The Court set aside the Licence to Cut on judicial review on the basis that Forests had fettered its discretion as a result of its misapprehension that it was compelled to issue the Licence to Cut in spite of its own objections to the project. Allan J. observed:

51 ... the circumstances clearly indicate that Mr. Gevatkoff abdicated his statutory obligation under the *Forests Act* to exercise independent judgment. ...

52 In the end, despite Forests’ opposition to the proposal for environmental reasons, Mr. Gevatkoff clearly felt compelled to issue the Licence to Cut because of Mr. Ostergaard’s decision to authorize the Well site.

53 I conclude that Mr. Gevatkoff did not exercise his discretion in accordance with the principles and objectives of the applicable legislation.

In the result, the Licence to Cut application was remitted back to the Ministry of Forests for consideration on proper considerations under the *Forests Act*. The new decision-maker limited the scope of his discretion under s. 47 of the *Forests Act* to consideration

of the impact of harvesting trees rather than the impact of the road construction in that area and ultimately concluded that the licence should be granted. A second judicial review application was brought to challenge the issuance of the licence. The Court dismissed the application on the basis that the decision-maker had properly exercised his discretion under the *Forests Act*. The Court observed:

51 The evidence discloses the Respondent Dyer did not issue the Licence “automatically” or upon any preconceived premise that a Licence to Cut must be issued. He did consider and give weight to the prior granted permission of Energy to construct an access road to the well site. That was not improper. It is wrong to say that in defining his discretion he focused upon the impact of the harvest of trees from the right of way thereby fettering his discretion.

52 I am satisfied on review of the Respondents stated Reasons for his decision to issue the Licence to Cut it confirms he took only relevant matters into consideration and excluded those extraneous. The weight applied to those proper factors was properly for his discretion.

There is an important difference between providing feedback to other agencies and exercising authority under one’s own statutory scheme. Just as a delegate cannot fetter his or her judgment by mechanically applying policies or other legal instruments that are not legally binding, the delegate cannot permit another person or organization to direct the decision to be made.

A charge that a statutory delegate has acted under dictation is very similar in this sense to a charge of fettering of discretion. The law is clear that a statutory delegate cannot abdicate responsibility for making a decision by allowing another person or body to dictate what the decision should be (even if the other person is the individual who delegated authority or is in a reporting relationship with the delegate).

## **(ii) Limits of Proper Consultation**

The rules with respect to fettering of discretion and dictation do not prevent decision-makers from consulting with others during the course of their deliberations. Discussing a case with a colleague to receive some input does not constitute improper sub delegation nor does it contravene the rules of procedural fairness provided that the decision-maker makes his or her decision in an independent manner.

The Supreme Court of Canada considered the issue of consultation in *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282. A three-member panel of the Ontario Labour Relations Board had decided that the appellant had failed to bargain in good faith by not disclosing during negotiations for a collective agreement that it planned to close a plant. During the course of its deliberations, the panel met with the full board to discuss the draft of its reasons. The meeting was limited to discussing the policy implications of the draft

decision and the facts set out in the draft were accepted as true. The Court held that the discussion of policy or legal issues did not contravene the rules of natural justice:

- It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision makers to adopt positions with which they do not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom. Whatever discussion may take place, the ultimate decision will be that of the decision maker for which he assumes full responsibility.

The Court went on to observe, however, that discussions on factual matters would contravene the rules of natural justice (the *audi alteram partem* rule that he who hears must decide):

- For the purposes of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues. In every decision, panel members must determine what the facts are what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards. ... The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

The Supreme Court of Canada has also held that the adoption of a process for mandatory consultation on draft decisions which operates as a constraint on the delegate's ability to make independent decisions would contravene the rules of procedural fairness: *Quebec (Commission des affaires sociales) v. Tremblay*, [1992] 1 S.C.R. 952. Since statutes provide that delegates must decide matters, they must retain the right to initiate consultation; they cannot be compelled to do so. A consultation process must not impede the ability or freedom of the delegate to decide the matter in accordance with his or her own conscience.

Some statutes expressly authorize the use of consultants and lawyers for decision-making processes. Even in the absence of express statutory authority, courts have also affirmed the general right of statutory decision-makers to seek legal advice, including advice from staff: *Omineca Enterprises Ltd. v. B.C. (Minister of Forests)* (1993), 85 B.C.L.R. (2d) 85 (C.A.), leave to appeal to SCC ref'd [1994] 6 W.W.E. 1xxi(n).

## **V. DELEGATION OF NON-STATUTORY AUTHORITY**

Public officers in the area of health regulation are often health care professionals (medical practitioners and other persons authorized to practice a designated health profession under the *Health Professions Act*). It is therefore important to distinguish between the concept of delegation of “statutory authority” on the one hand, and the delegation of non-statutory functions on the other hand.

The requirements relating to the law of delegation do not apply to the delegation of non-statutory functions such as the delegation of tasks by employers to their employees. When employers delegate functions to their staff, they are still accountable and responsible for the functions that are completed. While prudent employers will set out clear expectations and monitor the performance of those functions, the legal rules governing delegation of authority do not apply.

Similarly, the requirements relating to the delegation of non-statutory functions by professionals within the scope of their professional practices do not engage the legal rules of delegation. The fact that a statutory delegate must be a qualified medical practitioner does not mean that every exercise of his or her regulatory authority is a “medical act”.

Many professional regulatory bodies have published guidelines to assist their members in determining when it is appropriate to delegate tasks to others. For example, the College of Physicians and Surgeons of British Columbia has developed a guideline entitled “Delegation of a Medical Act” to assist physicians in deciding when to delegate a medical act to a person other than a physician. It provides in part as follows:

The delegation of a medical act to persons other than physicians may be appropriate in certain restricted circumstances in the interests of good patient care and efficient use of health care resources. The CMA’s Guidelines for the Delegation of a Medical Act were established to help physicians when they decide to delegate a medical act to a person other than a physician. Such delegation does not absolve the physician of responsibility for the care of the patient; it merely widens the circle of responsibility for the safe execution of the procedure.

The medical act must be clearly defined and circumscribed with the degree of medical supervision indicated. The supervision may be direct, with the physician

in attendance, or through telemedicine (video link, digital imaging, telephone or radio communication) or according to a written protocol.

Only certain medical acts may be delegated. There should be a broad consensus from the medical community (local, provincial, national and specialty organizations) that the delegation is appropriate. There must also be formal assent from the provincial licensing authority.

The delegation of a “medical act” (or an act performed by any of health care professional in their professional capacity) differs in a number of respects from the delegation of statutory authority exercised by a professional. First, the medical community (or the regulatory body for the health professional) determines when delegation is appropriate and the proper scope of delegation for medical acts. Delegation in this context is the transfer of responsibility for carrying out a medical act. Second, the authority to delegate is not dictated by statute but is rather based on professional judgment. Third, the health professional who delegates authority to carry out a medical act still retains responsibility and may have continuing involvement with the non-professional who has been delegated to act and the patient for whom the act is carried out. There is no legal impediment which prevents the health professional from providing direction to the non-professional on how to complete the medical act.

For these reasons, the delegation of a “non-statutory” function, such as a medical act, does not import the legal requirements that apply to delegation of statutory authority.

## **VI. OVERVIEW OF STATUTORY PROVISIONS AUTHORIZING DELEGATION**

The following statutes each contain provisions that expressly authorize delegation of statutory powers and duties to other persons:

- (1) Sections 69, 74 and 82 of the *Public Health Act*, SBC 2008, c. 28 provide as follows:

69 The provincial health officer may in writing delegate to a person or class of persons any of the provincial health officer’s power or duties under this *Act*, except the following:

- (a) a power to further delegate the power or duty;
- (b) a duty to make a report under this *Act*.

74(1) Subject to subsection (2), a MHO may in writing delegate to a person or class of persons any of the MHO’s powers or duties under this or any other enactment, except the following:

- (a) a power to further delegate the power or duty;
- (b) a power or duty under another enactment, if the other enactment provides that the power or duty is not delegable;

(c) powers and duties under section 73 [advising and reporting on local public health issues].

(2) A MHO must not delegate a power or duty to a health officer who has not been designated to act in the geographic area in which the delegated power or duty is to be exercised or performed.

82(1) This section applies in respect of a delegation made under section 69 [delegation by provincial health officer] or 74 [delegation by MHO's].

(2) A delegation may be made subject to terms and is revocable at any time.

(3) A delegation does not prevent the person who delegates the power or duty from exercising the delegated power or performing the delegated duty at any time.

(4) If the person who delegates a power or duty ceases to hold office, a delegation continues in effect for its term or until revoked,

(a) in the case of the provincial health officer, by the succeeding provincial health officer, or

(b) in the case of a MHO, by another MHO having authority over the same geographic area as the MHO who made the delegation.

(3) If requested to do so, a delegate must produce evidence of his or her authority before exercising a delegated power or performed a delegated duty.

(a) Section 3(4) of the *Drinking Water Protection Act*, SBC 2001, c. 9 provides:

3(4) Subject to the regulations, a drinking water officer may, in writing, delegate to any person a power or duty of the drinking water officer under this or another enactment.

(c) Section 21 of the *Food Safety Act*, SBC 2002, c. 28 provides:

21(1) Subject to the regulations, the minister may delegate to any person or class of persons any of the minister's powers, duties and functions under this *Act*, except the power set out in section 22(a).

(4) The minister may include any limits or conditions the minister considers advisable with respect to a delegation under subsection (1).

(d) The CCALA, SBC 2002, c. 75 contains the following powers of delegation:

3(1) The minister must designate a person who is employed under the *Public Service Act* to be the director of licensing.

(2) The director of licensing may delegate, in writing, any power or duty of the director of licensing under this CCALA to

- (a) a person who, in the opinion of the director of licensing, possesses the experience and qualifications suitable to carry out the tasks as delegated, or
  - (b) a MHO.
- (3) A delegation under subsection (2) may include any terms or conditions the director of licensing considers advisable.

24(1) The minister must designate a person to be the assisted living registrar.

- (2) The registrar may delegate, in writing, any power or duty of the registrar under this CCALA to a person who, in the opinion of the registrar, possesses the experience and qualifications suitable to carry out the tasks as delegated.
- (3) A delegation under subsection (2) may include any terms or conditions the registrar considers advisable.

34(6) In making regulations under subsection (2)(h.1), the Lieutenant Governor in Council may do one or more of the following in relation to the person who issues certificates for the purposes of section 8:

- (a) delegate a matter;
- (b) confer a discretion;
- (c) set out considerations that the person may take into account when a matter is delegated under paragraph (a) or a discretion is conferred under paragraph (b).



## **APPENDIX B: ETHICS AND THE APPROPRIATE USE OF AUTHORITY**

***We are not the authority. We are its instrument.***

Ethics play an important role in the daily functions of licensing officers and should be considered as part of a balanced approach to the use of authority in carrying out licensing activities.

### **ETHICS IN LICENSING PRACTICE**

An *ethic* is a moral principle by which a person is guided. Ethics are also the principles of conduct governing an individual or a group. Licensing is founded on ethical principles, meaning that it is concerned with the distinction between right and wrong in relation to the actions of responsible human beings. Licensing also requires ethical behaviour and decision making on the part of licensing staff. Thus, it is important that licensing officers have a clear understanding of these two meanings of ethics with respect to their roles.

The government has made a public commitment to protect persons in care through enacting legislation that sets out the minimum standards that must be met to ensure their health, safety and dignity; these standards of care reflect the collective values of our society. On behalf of government and society, licensing authorities work to protect vulnerable persons. Licensing's methods also reflect an ethical ideal: that is, to protect and balance the rights of all parties affected by government action through procedures designed to achieve equity and justice. In the light of this ideal, the licensing profession is one of the most ethically demanding.

Making ethical choices is not always easy and straightforward. To be an ethical licensor requires that you do more than merely obey the law; it requires that you exercise the authority of your position with respect for the rights, needs and sensitivities of others. Licensing staff are publicly accountable for making hard choices at the same time as they must be privately accountable to their own consciences. There are no simple answers and formulae for making ethical decisions. Ethical people continually struggle with the ethical dimensions of their professional and personal lives. They try to develop the skills and tools, both intellectual and emotional, to manage their choices and decisions with ethical sensitivity that is broad, deep and constant.

### **THE COMMUNITY CARE FACILITIES LICENSING OFFICERS of BC SOCIETY**

The CCFLOBC believes in the intrinsic worth and dignity of all persons. In order to uphold this philosophy, it is necessary that all members carry out their responsibilities without discrimination on any grounds. Further, it is recognized that Community Care Licensing Programs are guided by several principles:

- community care facilities must promote and maintain the spirit, dignity and individuality of persons in care.

- determination of the goal and activities for persons in care must be balanced with the risks to health and safety.
- community care facilities are an integral part of the community.

## **NATIONAL ASSOCIATION FOR REGULATORY ADMINISTRATION'S CODE OF ETHICS**

### **Purpose**

The National Association for Regulatory Administration recognizes that regulation, by definition, involves the use of governmental authority. Inherent in the use of authority is the potential for the abuse of authority. Public trust and consumer confidence and respect require that regulators use their authority with integrity. To that end, the Association has adopted this Code of Ethics to guide its individual and agency members. Member agencies are encouraged to adopt this code or an equivalent one for their employees.

### **1. Who Is Covered**

Persons who as part or all of their employment are engaged in regulating individuals or organizations that provide human care services to children and adults are covered by this code. This includes but is not limited to: child day care and development programs, foster homes for children or adults, day and residential care and treatment programs and facilities for children or adults, and adoption and placement agencies for children.

### **2. Competency**

Persons engaged in regulation should:

- receive current training in regulatory administration theory and principles and in the laws and regulations they are expected to apply;
- possess education and program experience related to the needs of the population in care in the facilities being regulated, e.g. development disabilities, child development, gerontology, social services, behavioural sciences, health sciences, etc., sufficient to apply the regulations and to evaluate and assist a facility's program of care and services;
- have a working knowledge of appropriate referral or assistance resources;
- have a working knowledge of current theories and techniques of effective communication and in the dynamics of the balances of use of authority;
- meet local employer or job certification credentialing requirements; and
- exhibit a willingness to seek out and participate in professional growth and training experiences.

### **3. Actions Expected**

Regulators should:

- vigorously uphold applicable provisions of law related to public disclosure, avoidance of conflict of interest, observance of administrative fairness requirements,

management of public records and information, and management of confidential information;

- enforce regulations in accordance with agency compliance management policies and principles;
- be able to explain the reasons for each regulatory provision they apply;
- encourage those whom they regulate to achieve the highest possible performance in their services areas;
- provide those whom they regulate with information and assistance to improve their understanding and abilities to serve individuals in care;
- actively participate in the development and improvement of the regulation they apply;
- actively assist clients, their families and the general public to understand the purpose and function of the regulatory process; and
- carry out their duties in a professional, competent, even-handed and courteous way.

#### **4. Actions Prohibited**

Regulators must not:

- use their positions for personal gain from those they regulate;
- accept gifts, services, benefits, advantage, or favours from those they regulate;
- apply regulations inconsistently because of their arbitrariness, caprice, favouritism, nepotism, or personal bias;
- engage in regulation with someone with whom they have or have recently had a significantly financial or personal relationship;
- exceed the authority delegated to them by laws, regulations or their employees; or,
- depart from processes established by the regulatory agency to assure fair and objective decision-making.

#### **5. Maintenance of Professional Appearances**

Regulators must:

- avoid the appearance as well as the fact of improper, unfair, unethical, or self-serving conduct;
- behave in a manner that earns respect, trust and confidence, and in a manner that reflects positively on their profession and their employers;
- promptly disclose any personal or financial interest they have or have had that might appear to influence their actions;
- avoid the fact or appearance of using their positions to endorse a particular product, Licensee or service provider or a group of such Licensees or providers;
- not engage in partisan political activity or endorse organizations or religious affiliations while in the role of a regulator; and
- report promptly to the appropriate supervisory agency for proper inquiry and reasonable suspicion or evidence that they or any other regulatory may have abused the authority of a regulatory position.

# LICENSING RELATIONSHIPS

## Licensing and Authority

*Authority* is defined as the power to command, enforce laws, exact obedience, determine or judge. The term is also applied to a person or group invested with this right and power (such as a government agency).

Licensing staff need to be aware that dealing with regulatory authorities may be stressful for many Licensees. To one degree or another, most people have ambivalent or contradictory attitudes towards authority. On the one hand, we recognize that authority is necessary for an orderly society. On the other, we are aware of how authority can be misused and of its destructive potential. In our culture, we have a strong respect for the authority of law as the glue that binds society together, but at the same time we value freedom and independence and mistrust too much regulation.

## Conflicts Related to Authority

Most conflicts are based on a reaction to the perceived use of power and authority and can be readily resolved by correcting some misinterpretation of events. For example, a Licensee who initially over-reacted to a rule because he misunderstood the rule accepts the situation once the facts are known. An individual's sense of having been treated unjustly is usually resolved once he has more information to assure him that no injustice occurred or that power and authority are being correctly used. Providing information and communication usually restores rationality to a conflict unless one of the parties is unable to move ahead due to past experiences of the misuse of power and authority.

Good communication skills, especially listening skills, and a balanced, non-provocative use of authority are critical in all licensing activities. However, what most Licensees experience as a licensor's non-provocative use of authority may occasionally trigger an exaggerated reaction of anger/hurt for another Licensee. Individuals have very different experiences of power and authority that lead to different reactions to the same events.

Serious conflicts can escalate into challenges that can slow down and complicate licensing processes. When serious conflicts arise, the reaction often appears to be out of proportion to the situation and it may not appreciably subside in the face of information or assurances of good will. In these situations, the licensor needs to:

- be able to understand and manage his/her own reactions
- try to understand what is happening in the transaction, and
- try to get the transaction back on course, either alone or with the help of a supervisor or colleague.

## **The Licensor's and Licensee's Authority**

Licensing authority, in the legal sense, begins and ends with the law and the licensing rules. Licensors do not personally create consumer safety. Rather, they interpret and apply laws and rules that authorities have adopted according to lawful procedures. Risks to consumers will be reduced only to the extent that we have well-conceived laws and rules that we conscientiously apply.

Any licensor who needs or enjoys power for its own sake has made a serious error in career choice. Licensors possess little professional authority or discretion in the use of their official authority. Instead, they personify and reflect the authority of abstract laws and rules. The kind of power they exercise is quite different from what many Licensees will try to assign to them. It is their responsibility to manage the confusion that can arise.

A licensor has three kinds of power. First, she has the power of personality, the personal attributes and characteristics of the licensor as a unique and distinct personality. The licensor also derives power from her professional image based on the education, credentials and professional experiences the person brings to bear on social interactions while conducting licensing functions. Finally, the licensor has the power of institutional representation; as the MHO delegate. The licensor is the personification of the state for the purpose of conducting a specific government responsibility or task, in this case, licensing.

The Licensee is in a more dependent position and thus has less power. Dependency is a threatening state for some adults even though it is also natural for us to depend on others. The dependence of a Licensee is based on the fact that he/she is petitioning for permission, trying to prove eligibility or worthiness, and probably feeling under some obligation to respect the authority of the state and is not truly free and equal in the relationship. The licensor needs to be sensitive and empathetic concerning the Licensee's fears about his reputation, money, self-esteem, etc., or his feeling threatened by an outsider.

While the Licensee is not in an equal power position with the licensor, the Licensee has access to four power activities that seek to equalize the power balance:

- using the agency's formal and informal appeal process,
- seeking political intervention,
- influencing public policy development, either legislative or administrative and
- influencing public opinion, media or appeals to groups

## Guidelines for Achieving Balance

Follow the Principle of Good Licensing Practice: Emphasize the authority of the rules. Never personalize the transaction with the use of “*I, me or mine*” or “*You, your*”. Use impersonal language. For example;

- Never say “*I’ll have to write you up for this.*” Or, “*I’m disappointed to see this violation.*” Or, “*Your practice violates the rules.*” Instead, simply state, “*The rules require ...*” Or “*This diapering system does not comply with the rules because ...*”
- Emphasizing the authority of the rules is not only accurate, but less likely to draw the Licensee into conflict with you.

Use the Least Enforcement Needed: All violations must be cited openly and appropriately. Correction, however, need not go beyond that necessary to accomplish diligent and lasting compliance. Moreover, enforcement responses should be risk-based and follow a generally consistent pattern in order to be/seem fair. Reasonable consistency is the goal. Perfect uniformity is not possible because of the many variables across facilities. The use of reasonable discretion is part of the job. The agency should have guidelines for inspectors to reasonably assure that providers with similar violations, compliance profiles and operating circumstances receive similar sanctions or correction plans. Violations must be supported by evidence which could include documents, individuals interviewed, and/or direct observation by the licensing officer.

Use Technical Assistance Appropriately: Technical assistance in all its styles is a form of positive enforcement and is a valuable consumer protection tool. It is not, however, a substitute for citing violations or expecting prompt correction, and it is not appropriate to continue assistance when sanctions are required to protect the public. It is also important to remember that while licensing staff provide suggestions or support, the primary responsibility for compliance rests with the Licensee.

Show Respect for the Rules and Explain Their Protective Intent: The merits of the rules are not a subject for personal opinion or debate in enforcement practice.

- Every rule was adopted with the intent to reduce a specific risk. Licensees may not immediately grasp the intent of the rule. It is the licensor’s responsibility to teach not only the rules but also the purpose of each rule as necessary.
- Licensees are entitled to understand the intent of the rules as a matter of respect.
- Licensees can also do a much better job of compliance when they appreciate the underlying risks.

- Encourage Licensees to work alongside you during an inspection to learn the process and the use of your compliance instrument.
- Talk through what you see and make sure the Licensee understands the basis for your decision about compliance.
- Once the Licensee understands the process, encourage self-monitoring between inspections. This should improve compliance and protections.

Observe Both the Limits and the Latitude in the Rules: Licensing must always be used with complete fairness and objectively. If the rule is specific, it must be enforced. If the rules can be met in several acceptable ways, the Licensee must be free to exercise preference in method. (This is essentially the intent of out-come based regulations/standards).

Use Organizational Resources: When disputes arise, encourage the use of available resolutions channels, e.g. informal/formal appeals, reviews through supervisory channels. Any appearance of discouraging the exercise of these channels can only cast doubt on the fairness and integrity of the licensor and the licensing agency. Encouraging the Licensee to use appeal channels helps to preserve their dignity and sense of fair treatment, which can avert a tendency to resort to irrational tactics. Use the power inherent in the collective experience and wisdom of colleagues and supervisors. No single licensor can possibly do the job well without using these resources.

Gather Facts Fully and Objectively: Authority is always suspect when it is employed without fair, complete and factual findings.

Provide Findings Promptly, Clearly and Factually; Help the Licensee Understand How to Comply: Delayed or unclear findings only heighten anxiety if the Licensee is uneasy in the licensing relationship. (They also reduce consumer protection). Presenting findings in an objective, factual way helps to defuse an emotionally charged situation. Anything less than this is inappropriate. Helping the Licensee understand how they may come into compliance without dictating the solution.

Learn and Practice Good Verbal/Non-verbal Communication: Most of us are aware of the importance of choosing our words carefully but we need to be equally aware of other types of communications because Licensees are hyper-alert to everything the licensor does. Make a habit of watching yourself as well as the Licensee to keep the transactions on track.

- Keep your voice tone quiet, calm, confident, and clear. What you say should be professionally phrased, not flippant or sarcastic.

- Body language should be monitored, both your own and the Licensees. Keep your own body language relaxed, comfortable, and interested. Watch for body and voice cues that the Licensee may be getting tense, upset, fearful or suspicious, so that you can try to identify the cause and intervene to moderate the Licensee's reaction.
- Monitor facial expressions, fidgeting, breathing patterns, throat-clearing and similar signs of internal states.
- Behaviour speaks louder than words. Be aware of what words you select for attention both in conversation with the Licensee and also in how you do your job.

Refine Daily Licensing Practice: We can examine and use our experiences constructively to promote our own growth and professional efficacy. We can refuse to impose any of our own emotional baggage on others who carry their own, often greater, burdens. We can carry the authority of our profession with regard for the feelings, rights and dignity of others. We can model healthy, constructive, growth-oriented personal and professional authority. We can model the wisdom of not wasting our experiences, i.e. make the process and benefits of learning and healthy introspection visible in our professional transactions. Licensing always takes place in an interpersonal minefield. Strong communication skills and an understanding of the balanced use of authority are essential competencies for licensing staff.



## **APPENDIX C: APPEALS**

### **PRELIMINARY AND PROCEDURAL MATTERS**

#### **Statutory Decision Maker Has Party Status**

Party status refers to any participant who has a direct interest in a legal proceeding. The statutory decision maker is a party to an appeal proceeding by virtue of s. 29(5) of the CCALA. The decision maker is referred to as the respondent in the appeal proceeding and has the same rights of participation as the person making the appeal to present evidence and argument and to challenge an adverse decision by way of judicial review in the Supreme Court.

The Appeal Board requires the respondent to prepare and deliver the appeal record under Rule 7(2) to the Appeal Board and to the applicant within 21 days after delivery of the notice of appeal unless the Appeal Board authorizes otherwise. The appeal record is all of the documents kept by a tribunal as permanent record of its proceedings but excludes any documents protected by solicitor-client privilege. In the context of the CCALA, the appeal record would include all of the records compiled during the investigation (excluding legal advice) and the decision.

#### **Process for Summary Dismissal of Appeal**

If it appears that the notice of appeal was not filed within the 30 day time limit or the subject matter of the appeal does not fall within the jurisdiction of the Appeal Board, the respondent (health authority or MHO) may make a written application to the Appeal Board to have the appeal dismissed before it proceeds to a hearing on the merits. There are also other grounds on which the respondent can seek to have the appeal dismissed prior to a hearing. These grounds are set out in Rule 15(1) of the Appeal Board Rules that provides that an application can be made to summarily dismiss an appeal on the following grounds:

- the appeal is not within the jurisdiction of the Board,
- the appeal was not filed within an applicable time limit,
- the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process,
- the appeal was made in bad faith or for an improper purpose or motive,
- the appellant has failed to diligently pursue the appeal or has failed to comply with an order of the Board,
- there is no reasonable prospect the appeal will succeed, or
- the substance of the appeal has been appropriately resolved in another way.

This is referred to as a summary process because it is dealt with by the Appeal Board before a hearing on the merits and usually on the basis of written submissions although the board may also hear oral evidence by telephone on a preliminary issue. The summary process is initiated by making a written request to the Appeal Board for dismissal of the appeal on any one or more of the grounds set out in Rule 15(1).

If the respondent believes that the appeal is not within the jurisdiction of the Appeal Board, they need to demonstrate that the subject matter of the appeal does not fall within the scope of s. 29(2) or (3) of the CCALA. (See for example WM V. Bateman, 2004 CCALAB 1.)

If the respondent believes that the appeal was not filed within the applicable time limit, they will need to have evidence of the date that the decision was served on the appellant (because the 30 days begins from the date of receiving notification of the decision). The Appeal Board has discretion to extend the time period and may well consider doing so if the delay is relatively short and the appellant can demonstrate special circumstances to justify an extension,

The tests set out in Rule 15(1)(c), (d) and (e) parallel the tests used by the Supreme Court in Rules 19(24) of the Rules of Court. The courts have developed a body of law for dealing with summary applications for dismissal, for example, courts have held that the power to strike out a claim on a summary basis should only be exercised in plain and obvious cases. A pleading is considered to be vexatious if it does not go to establishing the basis for the appeal and does not advance any claim known in law. A pleading is considered frivolous if it is not sustainable. A pleading constitutes an abuse of process if it is made for an improper or collateral purpose or is an attempt to circumvent the rules of court.

After the respondent makes an application for summary dismissal, the appellant will be given an opportunity to respond, usually with written submissions, and the respondent will have a right to submit a written reply to the appellant's submissions. The Appeal Board will determine whether or not the appeal should be dismissed after hearing from the parties and issue a written decision on its jurisdiction to proceed. If the Appeal Board accepts the respondent's application, the appeal cannot proceed.

### **Decision Remains In Effect Unless Appeal Board Orders Suspension**

The decision made by the respondent which is under appeal remains in effect unless a party (normally the appellant) applies for an order temporarily suspending the effect of that decision under Rule 8, Section 29(6) of the CCALA provides that:

The board may not stay or suspend a decision unless it is satisfied, on summary application, that a stay or suspension would not risk the health or safety of a person in care.

If the appellant is seeking a suspension or a stay, he/she must provide a written request to the Appeal Board setting out the following information:

- the reason the suspension of the decision is required;
- whether the appeal concerns a serious issue;
- the harm that will result if the decision is not suspended;
- why granting a suspension would not risk the health or safety of any person in care; and
- whether the other parties agree to the suspension (if known).

The respondent will be given the opportunity to make a written submission on whether the decision under appeal should be suspended or not pending the outcome of the hearing.

The fundamental consideration in granting a stay or suspension depends upon whether that action would risk the health and safety of persons in care. The respondent's submission should address whether there would be any risk to the health or safety of a person in care and whether any such risk could be addressed with continued monitoring or other special terms or conditions.

See also: KL v. Sellin, 2006 CCALAB 1 in which the Appeal Board declined to grant an interim stay because the appellant had not provided any indication to the panel that she would agree to comply with requirements of the CCALA or cooperate with ongoing monitoring and inspections.

### **Applications For Intervener Status**

Sometimes individuals or groups who do not have the right to challenge a licensing decision want to participate in an appeal. Such individuals may be affected by the issues being considered or may wish to support one of the parties. In such cases, individuals or groups may apply for intervener status under Rule 10(1).

Applicants seeking intervener status must file a written request demonstrating:

- he/she/they can bring a valuable contribution or valuable perspective to the appeal.
- the potential benefits of the intervention outweigh any prejudice to the parties caused by it.

The Appeal Board will give the appellant and the respondent an opportunity to respond to an application for intervener status. The Appeal Board has authority under Rule 10(3) to limit or impose terms and conditions on the participation of an intervener and, unless specifically authorized, an intervener cannot submit evidence in an appeal. The latter point means that an intervener cannot present oral or documentary evidence from witnesses. Normally, interveners are not permitted to raise new issues. Without specific authorization, interveners are limited to making legal arguments.

## **Appeal Management Conferences**

On its own initiative or at the request of one or more party(ies), the Appeal Board may schedule an appeal management conference by issuing a written notice to the participants. An appeal management conference is an informal teleconference with the participants convened by the Appeal Board.

The panel member conducting the teleconference will not hear evidence from witnesses or permit cross-examination of witnesses during the appeal management conference, but will address some or all of the following issues permitted by Rule 13(4):

- clarification and simplification of issues
- mediation
- scheduling date, time and place of hearing
- identification of agreed facts
- type of evidence that will be required
- document production or inspection
- delivery and exchange of documents
- setting dates for preliminary applications

Where confidential settlement matters are discussed during the appeal management conference, the presiding Board member will not sit on the panel hearing the merits of the appeal unless the parties consent. This is designed to facilitate settlement discussions if possible.

## **Scheduling the Hearing and Adjournments**

The Appeal Board will schedule a written, oral or electronic hearing by issuing a document entitled a notice of hearing. Most appeals will proceed to an oral hearing, although the Appeal Board may conduct a written hearing at the request of the parties, or where the Appeal Board determines that is the most appropriate form of hearing. In an oral hearing, the parties have the right to present oral evidence and argument. In a written hearing, the parties must file documentary evidence and submit written arguments.

The length of the hearing will depend on the complexity of the appeal and the number of witnesses that each party intends to call. Hearings can range from several hours to two or more days. The Appeal Board will also arrange for the hearing to be recorded by a court reporter. The parties may order a transcript of all or part of the proceeding at their own expense.

A participant seeking to adjourn a hearing that has been scheduled but has not yet started must submit a written request under Rule 16(2) explaining why an adjournment is required and the position of the other participants (if known). If the hearing is

underway, the participants seeking an adjournment may make an oral request to the panel. All participants will be given the opportunity to respond to the request for an adjournment before the Appeal Board makes a decision.

The Appeal Board has discretion to adjourn hearings. That discretion must be exercised in accordance with the principles of procedural fairness. This requires consideration of the “balance of convenience” between the parties. The Appeal Board will consider: a) the reasons for the adjournment request; b) the impact of refusing or granting the adjournment on the person requesting it and on the other parties; and c) the impact of the adjournment on the public interest. The guiding principle is whether the adjournment is necessary for the proceeding to be conducted in a procedurally fair manner.

Where the Appeal Board has provided notice of the hearing and a participant fails to attend, the Appeal Board may proceed with the hearing without providing further notice to that participant.

### **Compelling Attendance of Witnesses At A Hearing**

If the appellant or respondent requires evidence or documents from a witness who will not voluntarily attend the hearing, it is necessary to complete and deliver a summons. Rule 17(1) provides that, unless the Appeal Board authorizes otherwise, a summons must be delivered to the witness at least 7 days before the witness is required to attend to give evidence at the hearing or to produce the requested documents or things in their possession or control. The party issuing the summons must offer reasonable estimated traveling expenses to the witness in advance of the required attendance.

The witness may apply to the Board to amend the terms of his/her attendance or to cancel the summons (either prior to or at the outset of the hearing) if he/she can demonstrate reasons why his/her attendance should not be required. An application to amend or cancel the summons must also be served on the party that issued the summons.

## **PREPARING FOR A HEARING**

### **File Review**

It is impossible to overestimate the importance of good preparation for the hearing. Licensing staff review all of the letters, reports, and other documents on the file to ensure that they have a clear understanding of the chronology of events. It is often helpful to prepare a chronology to assist in giving evidence and for the assistance of the Appeal Board. If there are any inconsistencies in the file material or licensing staff require clarification or further explanation, it must be dealt with before the hearing. It is important to consider whether there are any omissions or matters that should have been followed up on but were not.

Licensing staff must be able to clearly explain the contents of all of the documents and the basis for all of their actions or the actions of any of their colleagues who acted on their behalf. Licensing staff must be able to identify the statutory authority for any of the actions that were taken during the investigation process and demonstrate their understanding of the scope of their statutory powers.

In their review of the material, licensing staff should anticipate potential areas for cross-examination by the appellant. In other words, licensing staff must put themselves in the appellant's shoes and consider what issues to focus on if they were trying to challenge the decision or the process that led to it.

### **Preparation and Delivery of the Appeal Record**

The respondent must assemble and deliver the appeal record to the Appeal Board and to the appellant within 21 days after delivery of the notice of appeal by virtue of Rule 7(2) of the Appeal Board Rules. An appeal record includes all written material except anything that would be covered by solicitor-client privilege (that is, all communications with legal counsel for the purposes of seeking legal advice or representation). The information contained in the record must not be edited, redacted or severed.

Licensing staff must ensure they have copies of all necessary documents in the appeal record. The record must only include the information upon which the decision under appeal was made. Any relevant documentation post-dating the decision may be filed separately as part of a preliminary application or with the Statement of Points.

The record only includes information up to and including the licensing decision under appeal. The purpose is to give to the Appeal Board and the appellant, as a starting point for the appeal, a complete and full copy of all information that was used or considered in making the decision that is being reviewed.

Any later correspondence, documents or evidence regarding the appeal to the appeal board is not part of the licensing appeal record that the respondent must prepare. Other documents, evidence and information may be provided to the Appeal Board separately leading up to the hearing of the actual appeal itself, but the licensing appeal record is meant only to be a complete record of the decision below that led up to the appeal.

### **Preparation of the Respondent's Statement of Points**

The Appeal Board general practice is to usually require the appellant and respondent to file Statements of Points prior to the hearing. The respondent's Statement of Points sets out the response to the appellant's arguments. It is helpful to provide a chronology of events and then outline the response to each of the arguments set out in the appellant's Statement of Points, referring to the relevant evidence and citing any relevant statutory provisions and case law (relevant court decisions or previous Appeal Board decisions with similar facts or that deal with similar issues).

## **Determine What Documentation Is Needed From Appellant Or Other Participants**

Licensing staff need to determine whether there are any documents that they need from the appellant (that have not been previously disclosed) that may be relevant to the issues in the appeal. It may be necessary to request an appeal management conference if there are disclosure issues.

Copies of any additional documents that the party intends to rely on that are not included in the appeal record or have not already been provided to the Appeal Board and the other participants should be filed with the Statement of Points.

## **Determine What Evidence Licensing Staff Will Need To Present**

The rules of evidence are designed to ensure that logically relevant facts are put before the decision maker (whether it is a court or tribunal) in the search for truth. In an adversarial system, it is up to the parties to a proceeding to present the evidence. The decision maker cannot gather its own evidence; it must base its decision on the evidence presented by the parties.

Evidence may take many forms - oral testimony from witnesses, documentary evidence and objects. Evidence can be any form of proof presented by a party to prove the existence of a fact. The touchstone for admissibility of evidence is relevance. If a form of evidence is relevant to an issue in the appeal, it must be admitted and considered by the Appeal Board. There are no degrees of relevance.

Once evidence is admitted, it is necessary for the Appeal Board to determine how much reliance it will place on that evidence. This involves a weighing of the evidence. It is important to understand that the Appeal Board is not bound to rely on evidence simply because it is relevant and admissible. For example, the Appeal Board may decide that it is not prepared to give any weight to certain evidence because of concerns regarding credibility. The Appeal Board must consider all of the relevant evidence, decide what weight to place on conflicting evidence, and then make findings of fact. In other words, the Appeal Board will determine what the facts are based on the evidence given by the parties. The Appeal Board must make findings of fact before it can apply the law (the relevant statutory provisions).

Licensing staff must decide what evidence they will need to respond to the appeal. They will be speaking to the events and the documents contained in the appeal record. However, they may wish to call additional witnesses to give evidence at the hearing (e.g., complainants, other licensing staff who were involved in the investigation or expert witnesses). If so, licensing staff must contact those witnesses to ensure their availability and issue a summons for their attendance if necessary. The parties are usually required to provide a list of the witnesses that they intend to call to testify at an oral hearing when they file their Statement of Points.

Licensing staff may meet with potential witnesses in advance of the hearing to review the hearing process and the evidence that they will require each witness to give. Such meetings should/could:

- be held sufficiently in advance of the hearing that a second meeting could be scheduled if required.
- allow licensing staff to explain the hearing process to the witness if they have never given evidence before (see guidelines for witnesses on pages 76-77).
- provide the opportunity to review evidence and then conduct a mock direct examination (outline the questions that licensing staff intend to put to the witness)
- provide the opportunity for a mock cross-examination (licensing staff play the role of the appellant and conduct a cross-examination of their witness to identify any weaknesses ahead of time and discuss how problem areas can be approached).

Licensing staff should also determine whether they need audio-visual equipment to assist them or their witnesses in giving evidence. Visual chronologies, maps, flow charts, or other types of aid can be helpful in giving evidence. If equipment is required at the hearing, licensing staff need to confirm the availability of such equipment through the hearing venue. The party requiring such equipment is responsible for the rental costs and arranging it for the hearing room.

### **Preparation of Direct Examinations**

Licensing staff need to prepare notes for the evidence that they will personally give at the hearing (their testimony) and direct examination questions for any witnesses that they intend to call as part of their case. The purpose of a direct examination (which is also referred to as an examination-in-chief) is to elicit from the witness, in a clear and logical manner, the activities and observations of the witness as they relate to the dispute in issue. While cross-examinations are considered the glamorous part of litigation, most cases are won on evidence presented during the direct examinations. Direct examinations provide the opportunity to tell the story to the decision maker in a way that is most advantageous to the teller's side.

When preparing direct examinations, licensing staff should put themselves in the shoes of the decision maker by determining what the important facts are and considering how to best organize the evidence so that it will come out clearly, logically and forcefully.

Licensing staff should ensure that their witnesses provide evidence in a neutral and fair manner. This suggests avoiding the use of adjectives, personal-sounding or confrontational statements and always being respectful of the other participants in the hearing process. Witnesses who are not being called as experts should avoid providing any opinion evidence (opinion evidence should only come from expert witnesses).



Following are some key principles that will guide licensing staff in preparing direct examinations.

#### **Guidelines For Direct Examination Of Witnesses**

- The witness should be the focus of the attention; the purpose of direct examination is to elicit the story from the witness.
- Licensing staff and their witnesses must focus on providing direct evidence (i.e., what they or their witnesses saw, heard, did etc.) and cover the *who, where, when, what and why*. Direct evidence is always admissible as long as it is relevant.
- Ask short open-ended questions (e.g. *What did you do? Then what happened?*)
- Do not ask *leading questions*, questions that suggest the answer. While you can lead on non-contentious introductory background material, you must not ask leading questions once you get into the substance of the witness's evidence. This is both a rule of evidence and a rule of persuasion. By eliciting evidence through leading questions, you diminish the impact of having the witness volunteer the facts.
- Keep it simple; get to the important evidence quickly.
- Control the tempo with questions. If a witness glosses over a key part of the story, go back to the important details with a series of shorter questions (e.g. *let's go back to your visit to the facility, when did that occur?*). If the witness gets bogged down in unnecessary detail, speed up the questions. If the panel members are frantically trying to take notes, slow down and go through the evidence frame by frame.
- Use simple language to put your witness at ease and make it easier for the panel members to take notes. Avoid stilted language and jargon. Instead of *When did you exit the vehicle?* ask *When did you get out of your car?*
- If a witness says something confusing or uses a technical term, have the witness explain what he/she means. It is critical that the panel members understand all the evidence.
- Organize the points that you want to cover in a logical/chronological order.
- Elicit description, then action. Set the stage for the panel members to be able to visualize the facility. The easier it is for the decision maker to visualize what is going on, the more convincing the evidence will be from your witnesses.
- Listen carefully to the answers to ensure that they are responsive to your questions. Unexpected answers come out and you may have to do some damage control.
- Never look surprised when damaging and/or unexpected answers come out.
- Always look interested in the witness's answers.

These principles also inform the process that licensing staff use to question other witnesses including licensing colleagues, beginning with confirmation of their position and responsibilities, when and how they first became involved in this matter, what they did and why. Using a series of short, open-ended questions, the goal is to elicit a narrative of their involvement. For example:

- *Mr. Smith, you are a licensing officer with the Fraser Health Authority, is that correct?*
- *Could you briefly outline your job responsibilities as a licensing officer?*
- *Were you assigned to conduct an investigation with respect to the appellant's licence to operate an adult care facility? By whom? When?*
- *What did you do after you were assigned to conduct an investigation?*
- *Can you outline the investigation process that you followed for this case?*
- *Outline the investigation findings - What did you do? Why did you do that? What happened next?*
- *Since completing your investigation report, have you had any further involvement with this matter?*
- *Thank you, Mr. Smith, Please answer any questions that the appellant may have or members of the panel*

#### **Guidelines For Licensing Staff Giving Evidence**

- Start by stating your position, and your responsibilities in that position.
- Briefly provide background information on the licence, the nature and date of licence, and relevant terms and conditions.
- Describe physical attributes of the facility; create a verbal picture.
- Outline the compliance history of the facility.
- Outline in chronological order events leading up to the investigation and the investigation process, reference relevant documents in the Appeal Record.
- Explain the conclusions that you formed from the facts at each stage and explain why you reached the conclusions that you did as you went through the process.
- Explain how your concerns were clearly communicated to the appellant, and the opportunities that were given to the appellant to achieve compliance.
- Explain that the appellant failed to achieve compliance notwithstanding your efforts to assist and why this was a concern. Discuss the nature and seriousness of the contravention.
- Explain how the specific contravention affects health and safety. If the contravention is not critical to health or safety, how is it indicative of the appellant's attitudes towards the regulatory requirements?
- Explain clearly what the appellant did wrong and then explain what the appellant could have done to meet the regulatory requirements. Explain the process that you went through to clarify these requirements with the appellant and what he/she could do to meet those requirements.

## Identifying and Preparing Witnesses

Licensing staff may wish to give the following instructions to the witnesses that they call to give evidence.

### Guidelines For Witnesses

- Dress conservatively and do not chew gum while giving evidence.
- Be serious at all times. Avoid discussing the case in the hallway or restroom or any place where you might be overheard outside the hearing room.
- When the panel chair /reporter administers the oath, respond (swear or affirm to tell the truth) in an affirmative clear voice.
- When you give evidence, direct responses to the panel members.
- Speak clearly and loudly so all panel member can hear you.
- Do not nod your head for a “yes” or “no.” Always provide a verbal response as the proceeding is being transcribed.
- Listen carefully to the questions that are asked. Make sure you understand the question before answering. Have it repeated if necessary and then give a thoughtful, considered answer. Try not to give a snap answer without thinking.
- If a question can be answered with a simple ‘yes” or “no,’ then answer that way.
- If a question cannot be truthfully answered with a “yes” or “no” but requires elaboration, you have the right to explain the answer in your own words and should do so.
- On cross-examination, you should always first answer yes or no, if possible, and then provide further elaboration if necessary.
- Answer directly and simply only the question that is asked and then stop. Do not volunteer information that is not actually asked for.
- If you answer wrong, correct it immediately or as soon as you realize that you made a mistake.
- If your answer was not clear, clarify it immediately or as soon as possible.
- The panel only wants to hear facts, not hearsay, speculation, or opinions.
- Avoid the words “never” or “always”; the other side may come up with an exception. Avoid saying things like “that’s all that happened” or “nothing else happened” say “that is all that I recall” or “that is all that I remember happening.”
- Always be polite and respectful to the party/counsel questioning you. Avoid sarcasm or cockiness, as you will lose the respect of the panel.
- Do not exaggerate. Be as accurate as possible in giving your evidence.
- Stop speaking the moment that the panel chair/member interrupts you or a party objects to what you say or the question that you have been asked. Await direction from the panel chair or the party who is asking you the questions.
- Give positive, definite answers where possible. Avoid saying “I think” or “I believe” or “in my opinion.” If you do not know the answer, say so.
- Stay calm; avoid mannerisms that will be distracting or make the panel think that you are being evasive or holding information back.
- If you do not want to answer a question, do not ask the panel whether you must answer it. If it is an improper question, the party/lawyer who has called you will make an objection. Do not ask the panel chair or any of the parties for advice. If there is no objection to the question, you must answer it.

**Guidelines For Witnesses continued:**

- Do not “hedge” or argue with the other side. It is never proper for a witness to ask questions. Witnesses are there to answer questions.
- If you are asked about distances or time, and your answer is only an estimate, be sure that you say it is only an estimate.
- When the panel rules that an objection has been sustained, that means that the party making the objection has prevailed. Do not continue to answer the question wait for the next question. If the panel overrules the objection, you will be called upon to answer the previous question. Do not be afraid to ask to have the question repeated because it is easy to forget the question or start answering something that has not been asked.
- Use plain language, avoid jargon. Do not use “prior” or “subsequent”; use “before” or “after.’ Make your testimony as clear and as understandable as possible.
- If a question is repeated, give the same answer given earlier to the question.
- Do not start your answer by repeating the question. Just answer the question asked. People who repeat the question before answering appear to be stalling for time to make up an answer.
- You are sworn to tell the truth. Tell it. Every material truth should be readily admitted, even if not to the advantage of the party for whom you testify. Simply answer every question to the best of your memory.

**Prepare Expert Evidence**

The opinion evidence rule generally does not allow witnesses to give evidence of their opinions because this is not helpful to judges or tribunal members who must make decisions based on evidence of facts, not on opinions. However, experts are permitted to give opinion evidence because they are testifying with respect to a subject that is beyond the knowledge of the ordinary layperson, that is, in an area in which a judge or tribunal member would need assistance because of its technical nature. An expert is any person who possesses specialized knowledge through skill, experience, training or formal education; there is no requirement that an expert witness be a member of a recognized profession.

If an expert is required, licensing staff choose the most qualified and objective expert available. Licensing staff will meet with the expert in advance to outline the area in which an opinion is needed, provide the necessary background material to study, and request a report. Licensing staff should ask the expert to contact him/her before writing his or her report to discuss the opinion; as drafts of expert reports can be disclosed as are communications between the respondent (licensing staff) and the expert. Communications with the expert should be neutral and not indicate the outcome that is sought.

There are notice requirements under the Appeal Board Rules for production of expert evidence. A participant who wishes to submit the evidence of an expert witness as part of his/her case must deliver a report outlining the expert’s qualifications and a summary of the evidence that the expert is going to provide at the hearing at least 30 days before

the scheduled hearing date of the appeal. If a participant wishes to submit rebuttal evidence from an expert witness to respond to evidence adduced by the other party(ies), the report must be scheduled at least 7 days before the scheduled hearing date. Unless the Appeal Board directs otherwise or the other participants agree, it is necessary to make the expert witness available for cross-examination at the hearing of the appeal. It is often helpful to retain an expert to help review the expert report from the other side (to assist with potential cross-examination questions) or to prepare a rebuttal report to the other side's expert report.

The process for calling expert evidence differs slightly from calling evidence from other witnesses. For an expert, it is necessary to first conduct an examination on qualifications and then tender the person as an expert in a certain area with expertise to give the opinion that you have sought. Once licensing staff have examined the expert on his/her qualifications (using his or her curriculum vitae as an outline for reviewing the highlights of the expert's education, training, experience, and publications), the appellant will have the opportunity to cross-examine on those qualifications. The appellant may attempt to narrow the scope of the expert's expertise as much as possible. For an eminently qualified expert, opposing counsel will sometimes waive the right to cross-examine and advise the Court or tribunal at the outset that they accept that the person is qualified to give expert evidence. The counsel calling the expert may nevertheless go through the expert's qualifications to highlight witness qualifications.

After the direct examination on qualifications has been completed and the appellant has conducted a cross-examination on qualifications, the respondent must tender the individual as an expert in a particular area qualified to provide an opinion on (subject matter of opinion). The appellant will be given the chance to respond and the panel will then make a ruling on whether it accepts the expert or not; if the panel accepts the expert, the party who called the expert then continues with a direct examination on the substance of the expert's opinion.

If the appellant is calling an expert witness, licensing staff should review the expert's qualifications and the summary of evidence that he or she intends to give.

After the review of the expert's qualifications and proposed evidence, licensing staff need to:

- Consider whether or not to retain another expert to review the summary and assist with cross-examination questions or preparing a rebuttal expert report.
- Familiarize themselves with expert literature in the area, to educate and look for potential material that can be used to challenge the expert opinion.
- Ask for letter of instructions requesting opinion and draft opinions; there may be something in the instructions or earlier drafts of the opinions which may be very helpful.

- Inquire into the basis of the expert's opinion and ask him/her if the opinion would be different if other facts were relied on as true (vary the hypothetical).
- Ask the expert to agree with propositions which make up the basis for the respondent's expert's opinion if you have one.
- Ask the expert to agree that in his/her area of expertise legitimate differences of opinion exist between qualified experts.
- Demonstrate that the witness has no first-hand knowledge of the topic that he or she is testifying to; maybe the expert has never performed field work and is relying on his/her reading of journal articles.
- Get expert to agree that his or her opinion is based to some degree on subjective information from the other party.

### **Prepare Cross-Examinations**

Cross-examination is the process used to test the other side's evidence and gain admissions. There are two basic approaches to cross-examination:

- elicit helpful testimony by asking the witness to agree with those facts which support your case in chief and are consistent with your theory of the case; and
- ask questions which demonstrate the weaknesses in the appellant's case (favourable testimony should always be elicited first)

The initial issue to be addressed is whether or not to cross-examine at all. This decision should be based on whether the witness is important, whether his or her testimony has hurt the respondent's case, whether his or her testimony was credible, and whether the witness said less than expected on direct examination. The decision to cross-examine can only be made after the respondent has prepared potential cross-examination questions in advance and has a realistic understanding of what can be achieved during the cross-examination. Preparing questions in advance will necessarily be a fluid and dynamic process as the questions will change or become refined as the hearing unfolds but it is always helpful to have a list of the areas to cover off when it comes time to conduct a cross-examination.

What are the relevant facts? The appellant may readily concede that he/she has not met the regulatory requirements or may instead argue that he/she has met those requirements and the respondent has misconstrued the evidence or issued an unduly harsh decision which is not justified in the circumstances. The appellant's approach (which will be reflected in his/her Statement of Points) will largely dictate how the licensing staff approaches their cross-examination. If, for example, the appellant admits that he/she has not met the requirements, the respondent would focus on obtaining admissions of non-compliance. If the appellant claims to have met the requirements, it will be necessary to use cross-examination to demonstrate that the appellant has not complied with the regulatory requirements.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. *Farnya v. Chorney*, (1952), 2 DLR. 354 (B.C.C.A.) at pp. 356 -358

Consider whether it is possible to challenge a witness's testimony by questioning the witness about motive, bias, the witness's ability to observe the event, memory (the witness' ability to remember details of an event or his/her failure to record events) or inconsistent conduct (did the witness act in a manner that was inconsistent with the evidence that he/she has given)

#### **Guidelines For Preparing A Cross-Examination**

- Focus on a few basic areas in your cross-examination which support your case.
- Use short focused questions which are designed to elicit a "yes" or "no" response. Do not ask long compound questions. It is far more difficult for a witness to deny a simple assertion of fact than a long question.
- Start and end with your strongest points.
- Vary the order of your subject matter so that it is more difficult for the witness to anticipate where you are going with your questions.
- Do not simply repeat the direct examination.
- Know the probable answer to a question before you ask it.
- Listen carefully to the witness' answers; watch the witness as he/she gives evidence looking for signs of reluctance or hesitation and gauge his/her reaction to your questions and ask appropriate follow-up questions.
- Do not argue with the witness.
- Do not give the witness the opportunity to explain when you ask open-ended questions; witnesses will have an opportunity to control their answers more. Never ask "how" or "why" or elicit explanations of any kind.
- It is never proper to cut off a witness's response.
- If the witness gives a non-responsive answer, repeat the question until the witness gives a responsive answer. It lets the witness know that you cannot be put off with a non-responsive answer and highlights that the witness is evading a tough question
- Only ask enough questions to establish the points that you want to make.
- Resist the temptation to keep asking questions.
- Cross-examination involves the art of slowly making mountains out of molehills. Don't make your big points in one question; lead up to each point with a series of short, precise questions.
- Don't look concerned when you get a bad answer; maintain a good poker face.
- Determine whether there are factual gaps, ambiguities, inconsistencies, or credibility issues with respect to the appellant's case (assemble evidence to contradict any factual assertions that are being made that you disagree with). The test for credibility is whether a witness's story is consistent with probabilities that a practical and informed person would recognize as reasonable in those circumstances.

## **Consider Possible Legal Arguments**

Consider whether there are any issues about the interpretation of the statutory provisions that you are relying on or any issues concerning procedural fairness or the process that led to the decision under appeal. If so, it may be helpful to seek a legal opinion on these issues in advance of the hearing and obtain copies of any relevant case authorities that will assist at the hearing.

## **THE HEARING PROCESS**

### **Nature of Hearing and Burden Of Proof**

Section 29 (11) of the CCALA sets out the Appeal Board's appellate jurisdiction. It provides 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 the decision under appeal was not justified. In this context, the burden of proof refers to the obligation imposed on the appellant to prove that the decision was not justified. The standard of proof is the civil standard on balance of probabilities.

The hearing is an appeal by way of re-hearing and the parties are not confined to the evidence that was put before the initial decision maker and can introduce new evidence to demonstrate that the decision was or was not justified or put in evidence concerning any subsequent events that are relevant.

The Appeal Board has broad remedial authority under s. 29(12) of the CCALA to "confirm, reverse or vary a decision under appeal" or to send the matter back for reconsideration to the initial decision maker with or without directions.

### **Introductions**

At the outset of the hearing, the panel chair will convene the hearing and introduce the members of the panel who will be conducting the appeal. The panel chair will then ask the participants to introduce themselves. Each participant should state their name and indicate whether they are the appellant, respondent, or intervener.

At the end of introductions, the panel chair may ask if there are any preliminary matters that need to be discussed (such as scheduling issues or miscellaneous matters). At this point, the panel chair will likely mark the appeal record as the first exhibit in the hearing process and then ask the parties if they wish to make an opening submission. Maintain your own list of exhibits on a separate piece of paper so that you will be able to keep track of all of the exhibits during the proceeding and mark copies of your own documents with the exhibit number.



## Opening Statement

Parties do not have to make an opening statement but it is always prudent to do so as it is the first opportunity to describe the case in the most favourable light. An opening statement should have an introduction that summarizes the case in one or two sentences, a statement of the issues and a brief outline of who the witnesses will be and what to expect each of the witnesses to say. It is important to avoid the actual argument as this should only be done at the conclusion after all of the evidence is presented.

The following is an example of an opening statement by licensing staff:

*This appeal concerns my decision dated January 15,2007 to cancel the appellant's licence on the basis that \_\_\_\_\_.*

*The issue in this appeal is \_\_\_\_\_.*

*For the purposes of this appeal, I will be giving evidence summarizing the chronology of events leading up to the cancellation decision and the information that I relied on in making my decision. I will also be calling Jane Doe, a licensing officer, who will outline her role in the investigation that led up to the cancellation.*

### The Appellant's Case

After opening submissions, the evidentiary portion of the hearing begins. The appellant should be asked to present his/her case (also known as the "appellant's case-in-chief") first as he/she bears the burden of proving that the decision under appeal is not justified.

However, the Appeal Board will sometimes ask the respondent to put its evidence in first to expedite the hearing process and the respondent should always be prepared to go first if requested. The parties may also agree beforehand at a case management conference, with the panel's approval, who will present their case first.

The appellant will generally start by providing evidence to the panel as to why he/she feels there was compliance or why the non-compliance does not justify the decision that was made. The appellant will likely outline the beneficial services that he or she provides, the hardship that the licensing decision will have on the facility, the staff, the individuals in care and their families. If there is strong evidence of non-compliance, a prudent appellant would explain why the non-compliance occurred and outline the steps that have been taken or will be taken to achieve compliance and to ensure that compliance continues to be maintained. After the appellant completes his/her evidence, the respondent is entitled to conduct a cross-examination of the appellant.

### Guidelines For Opening Statements

- Be careful not to overstate your case because that undermines your credibility and gives the appellant the opportunity to highlight any shortfalls in your evidence in closing argument.
- Be accurate and be fair. If anything, understatement is the safer course.
- Never refer to evidence that may not be admissible.
- The length of the opening submission will depend on the complexity of the case and number of witnesses but it should be kept fairly brief.

After the respondent has cross-examined the appellant, the appellant may call his/her next witness (e.g., staff members, family members of individuals in care who support the continued operation of the facility). The appellant will conduct a direct examination of his/her witness by asking a series of open-ended (non-leading questions) designed to elicit helpful evidence that will assist in demonstrating that the decision under appeal is not justified. When the appellant completes his/her direct examination of the witness, the respondent is entitled to conduct a cross-examination of that witness as well. At the end of the cross-examination, the appellant may have the opportunity to do a brief re-examination to clarify anything that came up in cross-examination that was not addressed in the direct examination.

The same process is followed for any subsequent witnesses called by the appellant. The appellant will conduct a direct examination of each witness followed by a cross-examination of the witness by the respondent and a brief re-examination by the appellant and then the witness steps down. The appellant's case will be concluded after all of his/her witnesses have given evidence and been cross-examined. It is then time for the respondent to present his/her case.

Note that the panel members may ask questions during or at the conclusion of the witness' evidence to clarify any points or ensure that they understand the evidence. After the panel members ask questions, they generally ask the appellant and the respondent if there are any questions arising that the parties would like to put to the witness before the witness is excused from the stand.

### **The Respondent's Case**

The respondent should start by giving evidence of the events that led up to the decision under appeal. The evidence should be given in as clear and logical manner as possible. It is usually helpful for licensing staff to present the events in chronological order and walk the panel through the process that led to the decision.

After evidence has been provided, the appellant has the right to cross-examine the respondent. Following this cross-examination, the respondent has the opportunity to call his/her next witness and will then conduct a direct examination of that witness eliciting their evidence through a series of open-ended questions. That witness will then be cross-examined by the appellant and the respondent will have the right to conduct a brief re-examination to clarify any matters that came up in cross-examination. After this re-examination, the witness may step down.

The same process is followed for all of your witnesses. The respondent conducts a direct examination, the appellant then conducts a cross-examination and the respondent has the right to do a re-examination of any new matters arising on cross-examination. The respondent's case in chief will be concluded after all of his/her

witnesses have given evidence and been cross-examined by the appellant. After the last witness has finished providing evidence, the respondent should indicate to the panel that his/her case is now concluded.

### **Dealing With Evidentiary Objections**

The strict rules of evidence used in courts do not apply to hearings before the Appeal Board. The Appeal Board may receive and accept any information that it considers relevant, necessary and appropriate, and also allows a great deal of latitude to parties (particularly unrepresented parties), to put their case forward in the manner that they choose. That is not to say, however, that there will never be grounds for objecting to proposed evidence. If the other party is tendering evidence that is objectionable, the respondent should indicate to the panel that he/she objects to the question being asked or the evidence being given and state the basis of that objection: For example,

*I object to that question on the basis that it calls for speculation.*

*I object to that answer on the basis that it is hearsay evidence*

*I object to that question on the basis that it is irrelevant*

The panel chair will ask the other party to respond to the respondent's objection and the respondent will be given a chance to reply. The panel will then either make an evidentiary ruling as to whether the evidence is admissible or not or indicate that it will reserve its decision and deal with it in the final decision.

#### **Common Grounds For Objections**

Relevance: for one fact to be relevant to another there must be a connection or nexus between the two which makes it possible to infer the existence of one from the other. The panel will only accept evidence that is relevant to the appeal.

Leading: it is inappropriate to ask leading questions on anything but non-contentious introductory evidence.

Hearsay: written or oral statements or communications made by persons outside the proceeding in which they are offered are inadmissible if such statements or communications are tendered as proof of their truth. The concern is that the evidential value of hearsay rests on the credibility of an out-of-court asserter who is not subject to the oath or cross-examination.

Similar-fact evidence: where a party offers evidence of discreditable conduct of the other side on other occasions as evidence of the probability that he or she did or did not perform the alleged act in the present case.

Speculative evidence: witnesses can only testify as to what they saw, did, heard, etc. Questions which ask witnesses to speculate or guess are not appropriate.

Opinion evidence: lay witnesses may only express opinions upon a number of established subjects (sobriety, speed, distance, identity, handwriting).

Privilege: a party cannot be forced to answer questions regarding certain privileged communications such as solicitor-client communications.

## Closing Submissions

After the evidence is completed, the panel will ask the parties whether they are ready to proceed with closing submissions. The appellant will likely be asked to provide his/her closing submission first and then the respondent will have the opportunity to make his/her closing submission.

Closing submissions are much different from opening statements. A respondent's closing submission should be much more forceful, and should summarize and analyze the evidence that is important to the case, apply the law to that evidence, and explain why the appellant has failed to prove that the decision under appeal is not justifiable.

The closing submission should be structured so the argument is a series of logically linked facts; the submission should contain the following basic elements:

- *introduction*
- *reiteration of the issues noting that the burden of proof is on the appellant*
- *summary of the key evidence on each of the issues with reference to relevant statutory provisions*
- *application of the law (relevant statutory provisions) to the key evidence in a manner that justifies the licensing action being appealed*
- *summary of appellant's arguments and refutation of them on the basis of evidence and the law*
- *summary of respondent's position (i.e., appellant has failed to prove that the decision under appeal is not justified and appeal should be dismissed).*

A closing submission is the final opportunity to restate the issue, summarize all of the evidence in support of the positions, deal with problematic evidence, and address any legal arguments about the interpretation of the relevant legislation and, in a nutshell, to explain why the decision under appeal is entirely justified and why the appeal should be dismissed.

In some cases the panel may request that the parties make their closing submissions in writing after the close of the oral hearing and in that case will set out a schedule for filing the written closing submissions.

### **Guidelines For Closing Submissions**

- A closing submission should be simple, focusing on evidence and explaining how the relevant statutory provisions should be applied to that evidence.
- State the case as forcefully as the evidence reasonably permits.
- Always concentrate on the strengths of your case. If you concentrate on the weaknesses in the appellants case an inference might be drawn that you have little to say about supporting your own case.
- Ensure that you only refer to facts that are put into evidence. If there is no evidence of the proposition that you wish to assert, you cannot make it.
- Summarize the evidence as accurately as possible as the panel members will have their own notes and it seriously undermines the credibility of a party if he/she distorts the evidence in their closing submissions.
- Listen carefully to the appellant's closing submission. Ensure that the appellant does not misstate the evidence and only refers to information that was actually put into evidence. Make notes of any factual or legal issues that you will have to respond to in your closing submission. Do not interrupt the appellant's submission but note any mistake when you make your closing submission.

### **Conclusion of Hearing**

At the conclusion of closing submissions, the panel chair will likely indicate that the decision will be reserved and adjourn the proceeding. This means that the panel needs time to review the evidence and submissions and to provide a written decision with reasons after the completion of the hearing. The Appeal Board will provide a written decision in every case. The decision will be available on the Appeal Board's website.

If there is some urgency to the case or the case is relatively straight-forward, the Appeal Board may be prepared to issue a decision immediately. In those circumstances, it would likely "stand down" for a few minutes and reconvene to issue its decision orally.

The decisions of the CCALAB are final and conclusive within their jurisdiction and cannot normally be further appealed. The parties to the appeal may seek further redress, in certain circumstances, if they believe the CCALAB acted outside its jurisdiction or the appeal process was unfair, as follows:

- Under the Judicial Review Procedure Act.
- Through the BC Ombudsperson.
- Supreme Court of BC Judicial Review

## APPENDIX D: RESOURCES AND LINKS

British Columbia Legislation:

<http://www.bclaws.ca/>

Legislation made easy

[https://www.crownpub.bc.ca/Product/Details/7610003430\\_S](https://www.crownpub.bc.ca/Product/Details/7610003430_S)

Fraser Health Community Care Licensing

<http://www.fraserhealth.ca/health-info/health-topics/facilities-licensing/>

Interior Health Community Care Licensing

<http://www.interiorhealth.ca/YourEnvironment/Pages/default.aspx>

Island Health Community Care Licensing

<http://www.viha.ca/mho/licensing/>

Northern Health Community Care Licensing

<https://northernhealth.ca/YourHealth/CommunityCareLicensing.aspx>

Vancouver Health Community Care Licensing

<http://www.vch.ca/your-environment/facility-licensing/>

Ministry of Children and Development

<http://www.gov.bc.ca/mcf/>

Community Care and Assisted Living Appeal Board of British Columbia:

<http://www.ccalab.gov.bc.ca/>

BC Council of Administrative Tribunals <http://www.bccat.net/Default.asp>