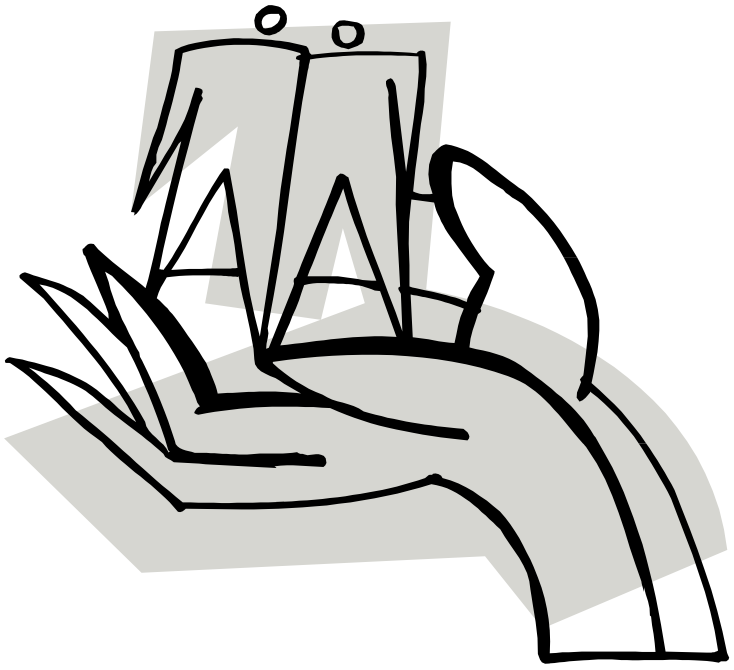
A GUIDE TO COMMUNITY CARE FACILITY LICENSING IN BRITISH COLUMBIA



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PRINCIPLES

The following principles of fairness inform the work of licensing staff.

Communication

- Public information is easily available and understandable.
- Forms are in plain language.
- Clients are given all the information they need.
- Clients are treated with respect and courtesy.
- Individual's right to privacy is 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 why the decision was made.
- All people deserve to be treated with respect and courtesy, and in a way 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.

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.

IMPORTANT NOTE

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

INTRODUCTION

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 facilities' licensing system and the activities that are part of the range of protections provided to vulnerable people who reside in community care facilities or 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 of the Guide describes the roles and responsibilities of the many partners in ensuring that licensed community care facilities in BC protect the health, safety and well-being of those who use them. Part II summarizes of 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 procedures for carrying them out. Other information and documents of interest to licensing officers are included in the appendices.

A community care facility is a premises or part of a premises (including the outdoor area) in which a person provides care to three or more individuals who are not related to him/her by blood or marriage. A person who provides care is described as a *licensee* in the *CCALA* and may also be described informally as an *operator*. A licensee may be an individual -- as is often the case in small child day care facilities -- a not-for-profit society, a corporation, a local/municipal government or an aboriginal governing body. Facilities that provide care as defined in the *CCALA* require a community care facility licence.

Community care facilities 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 abuse disorders, facilities for persons with mental health disorders or brain injuries, and residential care facilities for children and youth. Residences providing highly-specialized care, such as hospices, are also licensed under the *CCALA*.

Legislative requirements such as licensure, registration, monitoring, and inspection are often established by governments to protect vulnerable populations or to protect users of specific services from risks to their health and safety. For example, many professions are regulated, and many services that may pose a risk to the health and safety of the public, such as transportation, restaurants, food processing plants, and establishments that serve alcohol, require licensing or registration. In addition to licensure and monitoring, governments frequently also use funding contracts as a mechanism to ensure that services meet specific standards.

Community care 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 *CCALA*, the Residential Care Regulation, and the Child Care Licensing Regulation establish the minimum health and safety requirements that licensees must meet. 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 *Act* and its regulations.

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 the 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 the CCALA as responsible for licensing, inspection, and monitoring of community care facilities; programs within the health authorities (e.g., mental health and addictions and home and community care) or other programs such as CLBC are responsible for the funding of these facilities. As MHO's are not involved in operational decisions regarding funding programs, the recommendations they make, or requirements they impose, have more independence. This separation of the funding and monitoring of facilities means that there is a dual system of safeguards for residents of BC care facilities.

Many organizations that provide licensed residential community care are also accredited through agencies such as Accreditation Canada or through the Commission on Accreditation of Rehabilitation Facilities. In order to achieve and maintain their accredited status, licensees have additional standards they must meet.

The purpose of community care licensing is to prevent risk of harm through working proactively with applicants for a community care facility licence, through assessment of applicants, and through ongoing monitoring, risk assessment, and inspection of licensed community care facilities. Day-to-day licensing activities are typically carried out by licensing officers who are delegated their responsibilities by MHO's.[1] In addition to regular monitoring and inspection of community care facilities, licensing officers are responsible for educating licensees to ensure that they understand their obligations. If licensees do not meet the requirements of the *CCALA* and its regulations or there is a complaint that a licensee does not meet the requirements of the *Act* and regulations, licensing officers conduct investigations on behalf of MHO's. Licensees who become aware of their non-compliance with the requirements of the *Act* and its regulations are usually willing to correct that situation. However, in circumstances where a licensee is

[1] Unless referring explicitly to statutory requirements, this document refers to licensing officers or staff, rather than to medical health officers.

unable or unwilling to take appropriate steps to ensure the health, safety, and dignity of persons in care, progressive action may be taken. Action can include the attachment of terms and conditions, or 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. Harm may include physical (unintentional injuries, medication errors, falls, other injuries, poor quality or inappropriate care), mental, developmental harm (especially for children and youth), disability, or the spread of disease.

- ***To implement the monitoring and inspection system that has been established by government to promote the health, safety, well-being and dignity of individuals in care.*** The regulatory framework for community care licensing has been established to promote the optimal development and functioning, quality of life, individuality, autonomy, and well-being of persons in care. Licensing staff monitor the services provided by licensees to ensure that the requirements of the *Act* and regulations are being met.

- ***To provide a predictable system of rules for operators***. The *Act* and regulations provide a set of rules that all operators must follow. By following or exceeding the standards established by these rules, licensees demonstrate that they are working diligently to protect persons in care and are also promoting their health, safety, dignity, and well being. If licensees have a legitimate alternative means of meeting the intention of the *Act* and the regulations, there is a mechanism for providing an exemption from a rule or standard. When a decision that affects a license 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.

This Guide will be updated regularly to reflect issues of concern to the Ministry of Health, funding partners, MHO's, or licensing staff, changes in legislation and policy, and the growing knowledge of best practices in licensing.

This document does not contain information about assisted living residences as the Assisted Living Registration process is in place for that purpose as established by the *CCALA (*see Part 3 for more information).

I ROLES, RESPONSIBILITIES, AND RELATIONSHIPS

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 people in care. The following sections briefly describe these partners and their roles and responsibilities.

MINISTRY OF HEALTH

The role of the Ministry of Health 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 ensure British Columbians are supported in their efforts to maintain and improve their health and to provide access to 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 enacts 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 Community Care Licensing program is located within the Home, Community and Integrated Care Branch of the Ministry of Health. The Community Care Licensing program is responsible for the development and implementation of legislation, policy and guidelines to protect the health, safety, well-being and dignity of persons cared for in licensed community care facilities. The Director of Licensing is a statutory decision maker designated by the Minister as required by the *CCALA*.

Role of the Director of Licensing

The Director of Licensing provides leadership for the community care licensing program, and leads the development and implementation of regulations, standards and policies to promote the health, safety and well-being of children in child day care facilities and children/youth and adults in residential community care facilities.

The statutory powers of the Director are discretionary powers and are set out in the *CCALA,* and include:

- requiring a health authority to provide routine or special reports on:
    - the operation of licensed community care facilities;
    - the operation of the licensing program of the health authority, and;
    - the results of any investigations of community care facilities or complaints [s. 4(1) (a)];
- inspecting or making an order for the inspection of any books, records, or premises in connection with the operation of a community care facility [s. 4(1) (b)];
- requiring a health authority to conduct an audit of the operations of a community care facility [s. 4(1) (c)];
- 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 [s. 4(1) (d)];
- 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 [s. 4 (1) (e)].

The Director of Licensing (or delegate) also has discretionary statutory powers to visit and inspect community care facilities [s. 9(1)] and to enter and inspect unlicensed premises being used or intended to be used as a community care facility [s. 9 (2)]. The legislation provides the authority for the Director to delegate or assign the powers and duties of the Director to individuals who in the director's opinion "possesses the experience and qualifications suitable to carry out the tasks [s.3 (2) (a)]. See Appendix A for a complete discussion of delegation of authority.

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* (Ministry of Health, May 2002). 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 community care licensing programs. MMHO's, who are employees of health authorities, typically delegate the licensing activities they are responsible for under the CCALA to the licensing program. 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. While the *CCALA* does not provide the MHO with explicit statutory authority to delegate their powers and duties, in practice, the day to day work of monitoring and inspecting is carried out by letter of delegation from the MHO to licensing officers or to specific health authority staff who carry out licensing functions within their health authority.

Health authorities are also designated agencies under the *Adult Guardianship Act* and are mandated 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.

Community Care Facility Licensing

Medical health officers are employees of health authorities whose primary duties and powers are prescribed by the *Public Health Act*. 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 *Act* 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 and 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.

Licensing officers are not named in legislation as are the Director of Licensing and MHO's as they carry out their duties as delegates (See Appendix A for a complete discussion of delegation of authority.)

The primary duties of licensing officers include:

- 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 provide 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 *Act* and regulations;
- investigating complaints and/or allegations that a community care facility does not meet the requirements of the *CCALA* and regulations;
- investigating and following up on reportable incidents.

In carrying out their duties, licensing officers work in partnership with the licensee (service provider), 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 well-being of persons in care is promoted and protected.

Environmental Health Officers are responsible for inspecting care facilities that are required to have a food premises permit, as well as those that have therapeutic pools or personal service establishments such as hair salons.

Home and Community Care Services

Home and community care services provide a range of health care and support services for eligible residents who have acute, chronic, palliative or rehabilitative health care needs. These services are designed to complement and supplement, but not replace, the efforts of individuals to care for themselves with the assistance of family, friends and community. Publicly subsidized home and community care services may be accessed by contacting the local home and community care office in the regional health authority. Home and community care services include case management, community nursing, community rehabilitation, adult day services, home support, assisted living services and residential care services. In addition, health authorities offer other specialized services

to persons with unique care needs, including health services for community living, acquired brain injury, and specialized hospice palliative care services.

Home and community care services:

- support clients to remain independent and in their own homes for as long as possible;
- provide services at home to clients who would otherwise require admission to hospital or would stay longer in hospital;
- provide assisted living and residential care services to clients who can no longer be supported in their homes; and
- provide services that support people who are nearing the end of their life, and their families, at home or in a hospice.

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*.

LICENSEES

Operators of licensed care facilities (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. While the *CCALA* and its regulations provide the minimum legislative requirements that licensees must meet, many licensees exceed these requirements. In particular, as noted previously, licensees who have contracts with funding agencies may have additional contractual obligations they must meet. Licensees who engage in voluntary accreditation programs also have additional requirements that must be met.

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;
- facilitate a forum for persons in care and family members and substitute decision makers through the establishment of resident and family councils.

THE MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

The Ministry of Children and Family Development (MCFD) works to ensure that the province's children and families have the best chances possible to succeed and thrive. The Ministry has a variety of responsibilities that make it an important partner in the

delivery of care programs throughout British Columbia. The Ministry also funds a number of resources for child and youth residential care. These residential facilities are often informally referred to as “group homes.”

The ministry's 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;
- foster care;
- programs to assist child care providers in improving the quality of child day care:
  - Child Care Operating Fund;
  - Child Care Capital Funding Program;
  - Child Care Subsidy;
  - Child Care Resource and Referral programs.

EARLY CHILDHOOD EDUCATOR REGISTRY

The Child Care Licensing Regulation assigns responsibility to the MCFD for the registration of certificate holders working in the Early Childhood Education field.

As part of this role the Early Childhood Educator Registry is responsible for providing:

- training information to those interested in pursuing early childhood education careers;
- information regarding the requirements to obtain a Licence to Practice as an Early Childhood Educator, Infant/Toddler Educator, Special Needs Educator, or Early Childhood Educator Assistant; and
- a registration system for individuals who wish to practice in these areas.

The Early Childhood Educator Registry is also responsible for the approval, support and monitoring of post secondary training institutions offering early childhood education, as well as the investigation of licensed Early Childhood Educators when concerns arise regarding their practice.

CHILD CARE RESOURCE AND REFERRAL PROGRAM

The Child Care Resource and Referral (CCRR) Program provides support, resources and referral services for child care providers and parents in all communities in 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 the Ministry of Children and Family Development to provide services to parents seeking child care such as lists of local child care providers, and information about how to choose a provider. CCRR’s also support local childcare providers by offering them resources, training and support.

MINISTRY OF SOCIAL DEVELOPMENT

The Ministry of Social Development 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*. This Ministry's clients may live in or use the services of licensed community care facilities.

The Ministry also provides funding, oversight and stewardship to the BC Community Living Authority, which in turn provides licensed residential care facilities for persons with developmental disabilities. These facilities are referred to informally 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 and their families. 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 or use the services of licensed community care facilities.

ASSISTED LIVING REGISTRY

The mandate of the Assisted Living Registrar under the *CCALA* is to protect the health and safety of assisted living residents. The Registrar administers the assisted living provisions of the *Act*, which require assisted living operators to register their residences and meet provincial health and safety standards.

To meet this mandate, the Registrar:

- administers the registration of all assisted living residences in British Columbia, whether they are publicly subsidized or private-pay;
- establishes and administers health and safety standards, policies and procedures;
- ensures timely and effective investigation of complaints about the health and safety of assisted living residents;
- has authority to inspect residences if there is a concern about the health or safety of a resident; and
- refers issues that are not within the Registrar's jurisdiction to the appropriate authorities.

COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

The Community Care and Assisted Living Appeal Board is an administrative tribunal that hears appeals under section 29 of the *CCALA*. The Board handles the adjudication for contested decisions concerning the licensing of community care facilities, the registration of assisted living residences, and the certification of early childhood educators. The Board consists of members and one chair, appointed by the Lieutenant

Governor in Council (Cabinet) to represent the various regions and sectors in both the fields of community care and assisted living in BC. Members are selected to include professionals, academics and industry service providers.

For more information about the Community Care and Assisted Living Appeal Board go to: http://www.ccalab.gov.bc.ca/index.asp

LOCAL GOVERNMENT: MUNICIPALITIES AND REGIONAL DISTRICTS

In BC, local government - municipalities and regional districts - are responsible for 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 have a variety of roles such as issuing business licences, issuing a variety of permits, considering applications for zoning, and conducting fire and building safety inspections.

OMBUDSPERSON

The British Columbia Ombudsperson is an officer of the provincial legislature, independent of government and political parties and does not report through a provincial ministry. The Ombudsperson 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 dealing with a public agency;
- try 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 dealing with the child welfare system and advocates for changes to the system itself. Responsibilities of the Representative 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 an independent office of the BC Legislature and does not report through a provincial ministry. The Representative advocates on behalf of children and youth to ensure services meet their needs. The Representative also advocates for improvements to the system of services for children, youth and their families. It is the responsibility of the Representative to initiate reviews and investigate government agencies that provide services to children in B.C.

POLICE

The Royal Canadian Mounted Police and local police are responsible for protecting the public through enforcing the federal *Criminal Code*. Police may become involved with licensed and unlicensed care facilities and licensing programs in response to 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;
- offences against the person and reputation including duty of person to provide necessaries of life, criminal negligence, assault, assault with a weapon or causing bodily harm, and aggravated assault;
- offences against rights of property including theft.

OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

The Public Guardian and Trustee, established under the *Public Guardian and Trustee Act* are mandated is to serve:

- children and youth under the age of 19 by protecting their legal and financial interests;
- adults who require assistance in decision-making through protection of their legal rights, financial interests and personal care interests; and
- heirs and beneficiaries of deceased persons when there is no one willing or able to administer their estates, the estates of missing persons, and the beneficiaries of personal trusts.

The Office of the Public Guardian and Trustee may become involved with licensed 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.

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

The Ministry of Public Safety and Solicitor General administers the *Criminal Records Review Act (CRRA)* that was designed to help 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. All individuals who work with children or vulnerable adults, or have unsupervised access to children or vulnerable adults in the ordinary course of their employment, or in the practice of an occupation, or during the course of an education program and who are employed by or licensed by, or receive operating funds from the provincial government are included under the *CRRA.*

Physicians, nurses, health authority employees, dentists, teachers, registered students in a post secondary institution 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.

CORONERS SERVICE

The Coroners Service of British Columbia, under the jurisdiction of the Ministry of Public Safety and Solicitor General, 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 fault-finding 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 protocol agreement with the Coroners Service that sets out reporting requirements and communication expectations concerning deaths in licensed care facilities.

FIRST NATIONS COMMUNITIES

In BC, First Nations people receive health services through a unique combination of federal, provincial, and First Nations-operated programs and services. The Province has responsibility for providing all aspects of health services to all residents of British Columbia, including Status Indians living on and off-reserve. The federal government has a financial responsibility to support the delivery of health services to Status Indians on reserve and pays for Medical Services Plan premiums for Status Indians. The federal government, through the First Nations and Inuit Health (FNIH) department of Health Canada, also provides for a range of health programs (for First Nations people on reserve). In partnership with FNIH, many First Nations communities have established their own community health facilities and deliver a wide range of health programs and services. Regardless of where facilities (including child care facilities) are located, or which organization operates them they are required to be licensed under the CCALA.

RISK MANAGEMENT

Health authorities govern, plan, manage, deliver, monitor, and report on health services. Thus, health authorities have primary responsibility for managing risk and adverse events related to the services for which they are responsible, including licensing community care facilities.

The Health Care Protection Program (HCPP) of 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. This program assumes that the HCPP 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.

PATIENT CARE QUALITY OFFICES AND REVIEW BOARDS

The Patient Care Quality Offices (PCQO) in each health authority handle patient care quality complaints in an open, transparent manner, serving as a liaison between patients and health-care providers during the complaint process. Feedback is used to identify improvements to the quality and safety of patient care.

PCQO's are 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 response from the PCQO does not resolve the complaint, a complainant may contact the Patient Care Quality Review Board for an independent assessment of the matter. There are six review boards, one for each health authority, and one for the Provincial Health Services Authority. These review boards do not have a mandate to review complaints about decisions under the *CCALA.*

II THE FOUNDATION: THE LAW

This part of the Guide explains the difference between legislation (statutes and regulations) and other government-established rules, provides some guidelines for reading and interpreting legislation, and summarizes *CCALA* and regulations, and other provincial legislation that has an impact on the work of licensing officers.

THE HIERARCHY OF RULES

Statutes (*Acts*) and regulations are collectively referred to as **legislation.**

Statutes are written and enacted by the legislative authority of a given jurisdiction; in BC, the relevant 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.

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 form and 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 trump (take precedence over) the policy. Decision makers may only rely on policy established under *explicit* or *implicit* statutory authority. The Director of Licensing's standards established under the *CCALA* are examples of policy made with explicit statutory authority.

Under the *CCALA*:

- s. 4(1) (e), the director of licensing may "specify policies and standards of practice for all community care facilities or a class of community care facilities";
- s. 11(4): 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 s. 4 (1) (e).

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.*[2]

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 (e.g. *Child Care Licensing Regulation* s. 74(5), which provides an exemption to s. 30(3)(b), and s. 28, which provides an exemption to ss. 25-27);

- ✓ **Consider** whether the plain language of the section could be given different meanings or is ambiguous. If so, you may wish to consult Hansard[3] 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 like dictionaries. Be alert that judicial interpretation may be available interpreting those words. Decisions

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

[3] The official transcript of the proceedings of the Legislative Assembly of BC.

of the Community Care and Assisted Living Appeal Board may also have interpreted phrases in the *CCALA* or the regulations.[4]

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 *Child Care Licensing Regulation.* 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., firemen, policemen, and doctors in a hospital.

The *Interpretation Act*[5] 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.

SUMMARY OF THE *COMMUNITY CARE AND ASSISTED LIVING ACT* AND REGULATIONS

The *Act*

The *CCALA* governs both community care facilities and assisted living residences. In BC, assisted living and facility care are parts of a continuum of care provided to individuals who require support and assistance for a variety of health and disability-related reasons as well as for children in child day care. Community care facilities provide maximum support and assistance, while assisted living provides housing, hospitality services, and at least one but not more than two prescribed services.

The *CCALA* defines a community care facility and requires facilities that meet the definition to apply for and maintain a community care facility licence. A community care facility is a building or part of a building in which a person provides care to three or more individuals who are not related by blood or marriage to that person. The *Act* 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 services referred to in the *Act* are *prescribed*, that is, specified in the regulations. The

[4] See, for example, Summary No. 43 on the Former Appeal Board decisions web site <http://www.ccalab.gov.bc.ca/former_decisions.asp> 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.

[5] RSBC 1996, c. 238.

prescribed services can be found in the Community Care and Assisted Living Regulation.

Assisted living is an option between home health services and care in a facility that is available for adults (e.g., a community care facility, also known as residential care or complex care). The *CCALA* is based on the principles that an assisted living residence does not need the same extensive regulation and proactive monitoring of a community care facility because people are capable of making decisions on their own behalf, but that there needs to be greater protection than when living persons are in independent private homes or in supportive housing. Facilities that provide high levels of care must be licensed under the *Act*, while residences that provide assisted living services must be registered.

The *Act* also sets out the powers and duties of the Director of Licensing and MHO's as well as the requirements of licensees of community care facilities. These powers and duties taken together are the basis for licensing activities such as issuing a license, 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 *Act* also allows for the certification of Early Childhood Educators and the establishment and functioning of the Community Care and Assisted Living Appeal Board.

The Regulations

The *CCALA* Regulations contain the detailed, more operational part of the law that regulates community care facilities. In the Regulations in-depth requirements of licensing are provided -- definitions of prescribed services, standards for residential and child care, procedures for applications, staffing requirements, and a range of requirements for most aspects of care as well as the facility in which the care is provided.

The Community Care and Assisted Living Regulation establish the list of prescribed services. The number of prescribed services offered by an operator for adult residential care distinguishes a community care facility from an assisted living residence. Care facilities that provide three or more of the following services are required to be licensed, while those offering only one or two services must be registered as assisted living.
The prescribed services are as follows:

- regular assistance with activities of daily living, including eating, mobility, dressing, grooming, bathing or personal hygiene;
- central storage of medication, distribution of medication, administering medication or monitoring the taking of medication;
- maintenance or management of the cash resources or other property of a resident or person in care;
- monitoring of food intake or of adherence to therapeutic diets;
- structured behaviour management and intervention;
- psychosocial rehabilitative therapy or intensive physical rehabilitative therapy.

The *Act* establishes the Community Care and Assisted Living Appeal Board for those affected by a decision with the Regulations outlining the specific details of an appeal process. (See 14. Appeals for a fuller discussion of the appeal process).

The Child Care Licensing Regulation defines 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);
- Group Child Care (30 months to school age);
- Preschool (30 Months to School Age) for children who are at least 30 months old on entrance to the program and 36 months old by December 31 of the year of entrance;
- Group Child Care (school age) provides, before or after school hours or during periods of school closure, care to children who attend school, including kindergarten
- Family Child Care for which the licensee is a responsible adult and personally provides care in his/her personal residence to no more than 7 children;
- Occasional Child Care provides care on a short-term basis to preschool children who are at least 18 months old, and to each child for no more than 40 hours in a calendar month;
- Child-minding is care to children who are younger than 13 years old and is provided by a person who under contract to government, operates a program that provides services to immigrants in respect of English as a Second Language, settlement or labour market integration ;
- Multi-Age Child Care provides care to children of various ages, and
- In-Home Multi-Age Child Care for which the licensee personally provides care in his/her own personal residence to no more than 8 children of various ages.

The Child Care Licensing Regulation also stipulates the maximum number of children to be cared for under each of these categories as well as required ratio of employees to children in each group.

Operators of licensed child care facilities must comply with regulations regarding:
- Staff qualifications (academic, first aid, medical clearance, criminal record checks) and staff-to-child ratios;
- policies and procedures such as behavioural guidance, safe release of children, nutrition and emergency preparation, and
- age and developmentally appropriate programming and activities
- physical premises, indoor and outdoor space and equipment; hygiene and maintenance.

The Residential Care Regulation includes licence application procedures, health and safety, physical facility, and management requirements. The Residential Care Regulation protects vulnerable children, youth, and adults in licensed facilities that provide residential care by setting minimum standards that operators must meet. Such as:

- management and staffing;
- health and safety;
- physical premises food service and nutrition;
- medication administration;
- resident care, and incident reporting.

OTHER 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.*
- the *CCALA* or its associated regulations may refer to another statute [e.g. s. 22(1)(a)] of the Child Care Licensing Regulation refers to requirements of the *Fire Services Act*).

Licensing officers should be aware of the following Acts and regulations; this is not an exhaustive list:

The ***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. These decisions may be about the adult's personal care, health care, legal matters, or financial affairs [s. 4(1)].

Under s. 46 of the *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. (see also s. 44, s. 61, the definition of "designated agency," and the *Designated Agencies Regulation*, which makes health authorities designated agencies). 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.

The ***British Columbia Building Code*** 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 ***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 British Columbia (s. 21). The *Act* also sets out requirements for various classes of buildings. See particularly s. 31(g) of the *Fire Services Act*, which requires every community care facility to adopt, and have the employees in the building practice, an approved fire drill system. However, Section 20 of the *CCALA*, provides for an exemption to certain other provincial legislation, including

the *Fire Services Act*, for residential care facilities with fewer than under 7 residents and for child day care with no more than 8 persons.

While small facilities are not required to comply with *Fire Services Act*, both the Residential Care Regulation and the Child Care Licensing Regulation contain fire safety requirements to protect the health and safety of persons in care.

For example:

- Under s. 22(1)(a) of the Child Care Licensing Regulation, a licensee must have emergency exits and a fire drill system approved by a local assistant under the *Fire Services Act*.
- Under s. 20 of the Residential Care Regulation, a licensee must ensure a facility with fewer than 7 persons has emergency equipment including interconnected smoke alarms, sprinklers that conform to the BC Building Code and emergency lighting.

Local municipalities may also have additional fire safety bylaw requirements, for example the City of Vancouver has established additional requirements that licensees must meet.

The Ministry of Health, in consultation with the Office of the Fire Commissioner, has developed *Fire and Life Safety for Licensed Home Based Child Care Settings in British Columbia.* http://www.health.gov.bc.ca/library/publications/year/2010/Fire_and_life_safety_licensed_home_based_childcare.pdf

Like the *British Columbia Building Code*, the ***British Columbia Fire Code*** is based on a model 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.

Under the ***Criminal Records Review Act***, anyone who works with vulnerable adults, children or who has unsupervised access to children must submit to a Criminal Record Check. The *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.

The ***Freedom of Information and Protection of Privacy Act*** provides for the appointment of the province's Information and Privacy Commissioner (s. 37), regulates the collection of information by public bodies, and provides rights of access to information by persons whose information is held by public bodies. The Act applies to both the Ministry of Health and to health authorities.

There are exceptions to the *Act*'s normal rules 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 legal advice should be sought with respect to a specific investigation.

Child, Family, and Community Service Act regulates, among other things, 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 (see also 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)].

The ***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 (s. 4). The Minister may appoint inspectors under the *Act* (s. 7). Under the Continuing Care Programs Regulation, prescribed continuing care services include care in continuing care residential facilities (group homes for independent living, family care homes, and long term care complex 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 (s. 4) and requires health care providers to obtain valid consent from adults before providing health care to them (s. 5).

The ***Pharmacy Operations and Drug Scheduling Act*** establishes the College of Pharmacists, which regulates pharmacists, provides for the licensing of pharmacists by the College, and sets out duties for pharmacists and rules relating to dispensing of prescription medications in the province.

This *Act* defines a facility as "a community care facility holding a licence under the *CCALA* that provides residential care to adults." Licensed community care facilities are subject to a number of requirements under this *Act.* They can be found at http://library.bcpharmacists.org/D-Legislation_Standards/D-2_Provincial_Legislation/5007-PPODS.pdf

The ***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 remain unresolved. 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 review complaints about decisions of a MHO or their delegate under the *CCALA,* or complaints about a decision of the Community Care and Assisted Living Appeal Board.

The ***Public Guardian and Trustee Act*** provides for the appointment of a the Public Guardian and Trustee, who protects 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)].

The Ombudsperson appointed under the ***Ombudsperson Act*** is an independent officer of the legislature established to conduct impartial investigations of complaints about government administrative 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.

The Ombudsperson has limited powers but may among other things, issue findings and recommendations under s. 23 of the *Ombudsperson Act.* The Ombudsperson may address complaints against health authorities and against provincial Ministries.

The ***Public Health Act*** established the Provincial Health Officer as the senior public health official 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. The *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.

The ***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 facilities to the EHO for review. The Food Premises Regulation does not apply in single family dwellings; however health authorities have procedures for referring these facilities if there are health and safety concerns.

The ***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 Environmental Health Officers 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. Licensees must report disease outbreaks as reportable incidents.

The ***Drinking Water Protection Act*** and regulations are intended to ensure safe drinking water in community water systems. The *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 a licensing officer issuing a licence for a facility. Although the *Drinking Water Protection Act* does not apply to single family dwellings, safe water provision is essential to safe care. Health Authorities approach this aspect of care through local policy and procedures. If there is a concern the recommended course of action is to report any concerns to the appropriate Drinking Water Officer (DWO). The DWO can make Orders and to take direct action if there are reasonable grounds to believe that there is a safety concern regarding the drinking water supply to the facility.

III. STATUTORY DECISION-MAKING AND ADMINISTRATIVE LAW

STATUTORY DECISION-MAKING

> **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*

Statutory decision-making is making decisions based on powers granted by legislation. The Director of Licensing, MHO's, and licensing officers who are delegated such responsibility are empowered to make a variety decisions about community care facilities by 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[6] 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.[7]

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 section of the *CCALA*. See Appendix A for a thorough discussion of delegation.

[6] 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.

[7] 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, exemption review, 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. [8]

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 even-handed, courteous communication and avoid the appearance of prejudgment.
- 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.
- 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,[9] 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 licenses for the facility; and
    - 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.

[8] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369
[9] 2006 BCCCALAB 9 at paras. 17-26 and 51.

- **Duty to give reasons**: The person making the decision must provide reasons to the affected person for that decision.

- **Fettering of discretion:** To *fetter*[10] 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 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.[11]

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.[12] 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.

[10] A *fetter* is a kind of physical restraint used on the feet or ankles to allow walking but prevent running and kicking.
[11] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
[12] See e.g. *F.W.T.A.O. v. Ontario (Human Rights Commission)* (1988), 67 O.R. (2d) 492 (Div. Ct.)

PROCEDURAL FAIRNESS AND THE *COMMUNITY CARE AND ASSISTED LIVING ACT*

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 [defined in s. 17(1)] or as soon as practicable after taking a summary action [also defined in 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 terms 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.

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 authorities is to comply with procedural fairness protections in the statute,[13] 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 recently 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 BCCCALAB 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.

The Appeal Board has also recognized additional procedural fairness rights when it:

- held 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

[13] See e.g. *Re McDonald*, 2007 BCPC 186.

prejudice impacting on hearing fairness or amounting to abuse of process.[14] This is a high standard.
- found that an investigation process has been flawed due to a failure to follow procedural rights set out in relevant policy and procedure manuals.[15]

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:

- understanding the standards that the *Act* 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 *Act* and regulations to the licensee and having followed progressive enforcement if there is a contravention of the *Act* 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 courses 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 *Act* or regulation.

[14] *Blencoe v. British Columbia* (*Human Rights Commission*), SCC 2000 134.
[15] See Summary of Community Care Facilities Appeal Board Decisions (1993 – 2003), Digest 8.

IV LICENSING ACTIVITIES

Ensuring that licensing activities are based on the principles of licensing (see page i) and on a common provincial approach, assures licensing staff that they are taking the right steps at the right time, allows them to better educate applicants and licensees about the licensing process and their responsibilities, and results in more transparent and predictable processes. While health authorities and local licensing offices may have adopted their own procedures, the following elaborations of licensing activities are broad enough to include them.

Starting with observations about an approach that should be taken to all licensing activities, Part V of the Guide looks at the following activities in turn:

- the application process
- the licence
- attaching terms and conditions
- allowing exemptions
- reconsiderations
- monitoring standards
- assessing risk
- inspections
- receiving and responding to complaints and reportable incidents
- investigation
- taking action on a licence
- offences and legal remedies
- appeals

THE APPROACH: EDUCATION AND PROGRESSIVE COMPLIANCE

EDUCATION

> *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 BCCCALAB 9, para 105.

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

The role of the regulator requires a balanced approach to the use of power as it may encourage unfortunate and counterproductive attitudes. Enforcers may become suspicious, assume wrong doing, adopt a "them and us" approach, and may develop adversarial attitudes and practices that negatively influence their relationships with their clients. As already noted, this is one of the great dangers of having power and it requires close attention to behaviour and attitudes. It may often be difficult to balance the need to enforce while maintaining a helpful, impartial attitude that will facilitate and encourage compliance.

The current approach to provincial care facility licensing in British Columbia emphasizes the need for licensees and facility managers to understand their roles and responsibilities, be educated and informed about statutory requirements, and use the tools they are given to achieve and maintain compliance. Licensing officers provide tools such as self-assessment checklists, detailed inspection reports that identify contraventions that need to be addressed, and education and support to assist in licensees' and managers' understanding.

Licensees are responsible for complying with the legislation. Licensing staff recognize and appreciate that there are many ways of arriving at desired outcomes and that all possible approaches should be considered. Licensing staff do not prescribe specific methods of achieving compliance. It is the responsibility of licensing staff to assess a licensee's compliance with the legislation through a broad analysis of processes and systems. Licensing staff need to ensure the licensee understands what needs to be addressed to achieve and maintain compliance. If requested by the licensee, licensing staff may provide examples/options to the licensee/manager.

A licensing officer's mandate to provide education to applicants and licensees/ managers is an effective means of providing a balance to the enforcement role. Education is in fact a compliance technique in the broadest sense. Licensees and applicants for licences must understand the licensing activities, to which they are subject, the laws governing them, and opportunities for decisions to be reconsidered or appealed. Moreover, the licensing officer who provides information, guidance, and consultation related to licensing requirements demonstrates to applicants and licensees/managers that they share the same goal -- compliance with standards in order to ensure the health, safety and dignity of those in care.

The education role of licensing officers depends on their thorough knowledge of each one of their functions and on their ability to make their activities predictable and understandable to applicants and licensees/managers. 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 these processes.

PROGRESSIVE COMPLIANCE

The primary responsibility to promote the health, safety, dignity, and well being of persons in care and to operate a facility in compliance with the *CCALA* and applicable regulations rests with the facility licensee and/or manager. Licensing staff, as well as funding program staff, also play a role in the protection and promotion of the health, safety, dignity, and well being of persons being cared for in licensed facilities. Licensing staff ensure that issues of non-compliance are identified, that facility licensees and managers are informed of non-compliance, and that appropriate plans for correction are identified and implemented by licensees and managers. All processes for addressing non-compliance must follow the basic principles of administrative law and natural justice. (See Part III of this Guide.)

Progressive compliance, as the term implies, is the staged or gradual process of compelling the fulfilment of a law, demand, or requirement. The important principle behind this concept is the staged or gradual nature of the enforcement that introduces increasingly formal action to correct lack of compliance with a requirement.

Progressive compliance encourages licensing officers to play their role as guides and educators of licensees and assists licensees in achieving and maintaining compliance with legislative requirements. Progressive compliance techniques can be used to inform licensees about and demonstrate the standards required of them. Although the process may vary in each health authority, the stages of progressive compliance used to ensure compliance with the *CCALA* and regulations include, but are not limited to, the following:

- education and support;
- verbal warning; written warning;
- attaching terms or conditions to the licence;
- suspension or cancellation of licence;
- a recommendation of appointment of an administrator (this action is only taken by the Minister or the board of the health authority).

When there have been critical issues or repeat instances of non-compliance in a specific area of operation and those issues of non-compliance 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.

Generally, a progressive compliance strategy to address non-compliance involves licensing staff utilizing appropriate 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 operator. These factors must be considered when determining the appropriate level of 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 summary action.

The success of the steps taken towards compliance will often involve the partnership 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, funding and licensing organizations need to be in frequent communication, 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.

- Enforcement strategies may involve the following general progressive strategies, each of which may be repeated more than once depending on the severity of the issues and the cooperation of the licensee
- Facility Inspections by Licensing Staff: A number of Inspections and follow-up inspections may be required 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 by Licensing Staff: Depending on the nature, severity 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 typically reference the licensing history including inspections, investigations, meetings, previous letters, and licensee response to non-compliance.
- Meetings between Licensee/Manager and Licensing Staff/Manager and/or MHO. Licensing programs should ensure that the appropriate documentation of the items discussed at the meeting is provided to the Licensee.

Throughout the progressive enforcement process, the Licensee should be informed that if issues of non-compliance are not addressed, it 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.

1. THE APPLICATION PROCESS

Section 15 of the *CCALA* requires MHO's to investigate every application for a licence to operate a community care facility. This section of the Guide looks at the broader activity behind this requirement -- the application process for a community care facility licence -- from the perspective of the licensing officer.

PROVIDING A LICENSING APPLICATION

Generally, the licensing process begins when an applicant for a community care facility licence contacts the community care licensing program for a preliminary discussion of licensing requirements. At that time, the applicant may be given an information package with necessary forms and copies of the *CCALA* and Regulations. If copies of the legislation are not provided, the applicant should be directed to Crown Publications http://www.crownpub.bc.ca/ or (250) 386-4636 or http://www.qp.gov.bc.ca/statreg/ -- from which copies may be obtained. At that time or shortly thereafter, the licensing officer should assist the applicant with information about the appropriate agencies to contact to request necessary assessments and reports to support requirements of legislation such as smoke alarm systems, sprinklers, fire drill system approval, municipal zoning and business licensing.

This initial contact between an applicant and a licensing officer is important as it sets the tone for the relationship that follows. This is the time for licensing officers to establish good working relationships with potential licensees and to play a role as an educator, partner, and facilitator and to work *with* applicants and licensees to assist them in meeting licensing requirements and in meeting their shared goal of providing quality care.

APPLICATION REQUIREMENTS

In accordance with Section 7 of the Residential Care Regulation, an applicant for a licence for a **residential care facility** must submit an application that includes the requirements specified in Schedule B of that regulation. In accordance with Section 7 of the Child Care Licensing Regulation, an applicant for a licence for a **child care facility** must submit an application that includes the requirements specified in Schedule B of that regulation.

Licensing officers should make themselves available to applicants to ensure that all the requirements for a successful application are understood and met.

ASSESSING THE APPLICATION

The overall intent of assessing an application is to ensure that the applicant has met all requirements of the legislation that will indicate that the facility will be operated in a manner that promotes the health, safety and dignity of persons in care, prior to receiving a community care facility licence.

There are eight major activities involved in assessing an application for licensing:

- Determine if the licensee / manager has previously provided a similar service;
- checking the licensee/manager on the confidential provincial alert system;
- assessing the written submission of information of the facility plans;
- inspecting the proposed facility's premises to verify that they conform with the written submission and meet the requirements of the legislation;
- ensuring appropriate approvals from other agencies as required have been received e.g. fire approvals , environmental health, local municipality zoning/business licence;
- assessing the applicant's suitability to operate a community care facility;
- assessing the manager's suitability or the process by which a manager is chosen;
- assessing the operational plan, and
- the programs(s)/service(s) to be offered.

Assessing the Written Submission

Licensing officers should determine if all the documents required for a complete application have been submitted, and should let the licensee know if the application is incomplete and further information is required.

Inspecting Premises

The purpose of the assessment of the physical premise is to ensure that the facility meets any space requirements established by the legislation, or needs an exemption, and whether the facility will provide a safe environment for the persons in care, and meets the health and safety requirements of a community care facility.

Assessing the Applicant

Assessing an applicant for suitability is based on Section 11 of the *Act* that requires the MHO to assess an **applicant who is a person** to determine if he/she:

- 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

or an **applicant that is a corporation** 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 meets the above requirements, and
- has delegated to that manager full authority to operate the community care facility in accordance with the requirements of the *Act* and the regulations.

Thus, the first step in assessing an applicant is to determine if he/she is an individual with sole proprietorship or in partnership or represents a corporation and/or society.

A **sole proprietorship** is fully responsible for all debts and obligations related to a business. A creditor with a claim against a sole proprietor would normally have a right against the sole proprietor's assets, whether business or personal. 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. A **partnership** is an agreement in which two or more people combine resources in a business with a view to making a profit. 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).

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 or company. A company can acquire assets, go into debt, enter into contracts, sue or be sued because the corporation is a separate legal entity; its existence does not depend on the continued membership of any of its members.

If a licensee is a company, 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 *Act*; even if facility services are contracted out, the licensee remains responsible and accountable for compliance in the *Act* 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.

If the applicant is not an incorporated company, the applicant and the manager may be the same person or the applicant can choose to hire a manager.

A **society** is a non-profit organization. Any funds or profits must be used only for purposes of the society itself. Funds or profits cannot be distributed to a member of a society without the member giving appropriate compensation to the society first. 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, an individual must be hired as a manager of the facility with responsibility for its day-to-day operation. The corporation or society must ensure that candidates for manager are screened using the criteria for a

licensee (*CCALA*, s. 11) and will operate the facility in compliance with the *Act* and regulations. The applicant should also declare in writing that the person proposed as the manager meets the requirements in the *Act* 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 is to remain at the care facility (or the health authority if health authority is the licensee) and may be reviewed by licensing at time of a site inspection.

Assessing the Operational Plan

Licensing officers should review the applicant's operational plan including budget to determine if the proposed population of persons in care matches that of the application and whether the plan will 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:

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

For the child care programs, a staffing plan will comply with s. 34 and Schedule E of Child Care Licensing Regulation.

Licensing officers should also determine if the applicant has developed policies and procedures for the facility that are consistent with the needs of the proposed population of persons in care, the care and programming would meet the needs of persons in care and fulfill the requirements of the *Act* and Regulations.

Assessing the Program/Services To Be Provided

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

2. THE LICENCE

Health authorities establish their own policies and procedures regarding who is authorized to issue or refuse to issue a licence. If the decision maker is not the MHO, proper letters of delegation should be issued to the delegated decision maker. (See Appendix A for a discussion of delegation).

A licence for a community care facility should not be issued to the applicant until the application is complete and has been assessed as meeting all requirements or the applicant has been granted exemptions. If licensing staff are not satisfied with or confident in the applicant and/or the application, they should:

- ensure that the applicant is aware of the standards to be met, and of the exemption process if an exemption is allowable under the *Act and Regulations;*
- assess any requests for exemptions that the licensee has requested;
- consider attaching terms and conditions to the licence or issue a time-limited licence considered necessary to ensure compliance, or
- consider refusing to issue the licence.

REFUSING TO ISSUE AND IMPOSING TERMS AND CONDITIONS ON NEW LICENCES

If a decision has been made to refuse to issue a licence, the applicant must be advised in writing of the reasons for the refusal as well as rights to seek reconsideration under s. 17 of the *Act*. The applicant seeking reconsideration is allowed one written response to the decision maker, and the decision maker must consider the applicant's written response and either grant the reconsideration and issue the licence, or provide written reasons for the continued refusal to issue.

If there is a refusal to issue a licence after the reconsideration response has been considered, the decision maker must provide written reasons for the refusal to issue. 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 the right to appeal the decision to the Community Care and Assisted Living Appeal Board. The applicant should be advised of the time period to appeal the decision and be provided with the Appeal Board's contact information.

Licensing staff must also inform the applicant in writing of the reasons if a decision has been made to place terms and conditions on the licence and must inform the applicant of the avenues for reconsideration and appeal of that decision

Section 11 (3) of the *Act* allows a MHO to attach terms and conditions to a licence, although not explicitly stated in the *Act* the MHO may also consider including time limits on the licence to protect the health and safety of persons in care.

EXPIRY OF A LICENCE

In BC, unlike other jurisdictions, licences do not have an expiry date, however the *Act* allows a licensee to cease operation of a licensed facility for up to 12 consecutive months before the licence automatically expires. Although the licensee may not be providing service, the facility remains licensed and the licensee is entitled to resume operation or reopen prior to the expiration of the 12 months. For example, a Family Child Care operator may take a maternity leave, and resume operation before the 12 months expiration.

To avoid the automatic expiry of the licence, a licensee must operate the facility within the 12 month period. An intention to operate the facility without actual operation is not sufficient. The 12 months would typically start at the earliest date that licensing staff can determine on a balance of probability that the facility has not been operating such as documents, witnesses or admission by operator that proves.

A licensed facility that is "not operating" still holds a community care facility licence and is subject to inspection and must continue to comply with the *CCALA* and Regulations.

When a licensee voluntarily gives up or surrenders a licence, licensing officers should ensure that the licensee understands the facility is no longer licensed as a community care facility and must not provide care to more than two persons;

In order to ensure a fair and transparent process, Licensing Officers should provide clear and accurate information to licensees who are considering a voluntary surrender of their licence, and should follow up that conversation in writing so that there are no misunderstandings. Licensees must have all the information needed to make an informed business decision, so that they do not rush into a situation that has unanticipated or undesired future consequences. Licensees must also be made aware of the requirements for notice under Section 9 of the Residential Care Regulation.

3. ATTACHING TERMS AND CONDITIONS

Terms and conditions are requirements above and beyond those of the *Act* or Regulations and may be attached to a licence by a MHO or their delegate. Compliance with terms and conditions is required to continue to operate the facility.

Terms and conditions may be used when a licensee needs more direction than the statutory requirements to ensure that the health or safety of persons in care is properly maintained. The benefits of attaching terms and conditions to a licence may become apparent during the initial assessment of a licensing application or later as the result of regular monitoring and inspections. Terms and conditions are written on the facility licence and posted at the facility. The attachment of terms and conditions is subject to reconsideration and appeal.

4. CONSIDERING EXEMPTIONS

Section 16 of the *Act* provides for exemptions from requirements of the *Act* or regulations to be granted to a licensee or an applicant for a licence, if the MHO or delegated licensing officer is satisfied that that there will be no increased risk to the health and safety of persons in care, and the exemption meets 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 qualified for, allowing for physical space modifications such as a smaller floor space area or alternate provisions for toilet and bathing amenities.

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

- whether there is an increased risk to health and safety;
- what alternate measures the licensee is proposing to ensure health and safety;
- previous exemptions or variances granted to this licensee; other exemption requests and the resulting decisions;
- overall risk assessment of the facility;
- 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;
- concerns of persons in care and their families and decision makers regarding the proposed exemption;
- views of residents and their families re the effects of the requested exemption;
- how the exemption and reasons for it may better address the objectives of the *Act;*
- if the exemption request is granted, whether there are terms and conditions that should be imposed to ensure health and safety, and
- whether the exemption should be posted with the facility licence.

In considering whether to grant an exemption for a new licence or for an existing licence, a MHO or delegate must ensure that the Director of Licensing's standards of practice are also considered.

*(standards for residential care http://www.health.gov.bc.ca/ccf/adult_care.html and for child care http://www.health.gov.bc.ca/ccf/child_care.html).

The *Act* allows for an appeal process of exemption request that has been granted; a person in care, a family member or representative may not agree that the exemption does not cause an increased risk to health and safety of persons in care, therefore have the right to be consulted and provide input into the matter. If terms or conditions are attached to an exemption, or subsequently varied or cancelled, then those actions are subject to reconsideration and appeal.

If an exemption request is denied it is because there is an increased risk to health and safety of the persons in care. When an exemption is denied the applicant must continue to meet the requirements of the *Act* and regulations as they are set out.

A denied exemption request is not subject to reconsideration or appeal; however an applicant may reapply with new information.

The following commentary from the Community Care and Assisted Living Appeal Board decision highlights the need for licensees to inform persons in care and/or their agents or representatives when there has been a request for an exemption to licensing requirements that may affect them. These individuals 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.

BG and FS v. Fraser Health Authority and Valleyhaven Guest Home 2008, BCCCALAB 5 para 30.

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 of the Fraser Health Authority (a so-called stakeholder in the Exemption), 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.

An applicant for an exemption or a variation of an exemption should provide relevant information in writing and in a form acceptable to the MHO. If the exemption or variation requested is not granted, or is not granted in full, the MHO should provide written reasons for not granting the exemption or for not granting part of the exemption. The MHO may grant an exemption to any section of the *Act* or regulation, except those listed in Schedules A of the Child Care Licensing Regulation and the Residential Care Regulation and the prescribed services listed in Section 2 of the Community Care and Assisted Living Regulation.

A MHO who rejects a request for an exemption, or who does not grant the requested exemption in full, must provide the applicant with written reasons for the rejection or for not granting part of the exemption.

5. TEMPORARY PLACEMENT AND RETENTIONS

A licensee who is applying to temporarily place or retain a child under s. 5 (2) of the Child Care Licensing Regulation, who would not otherwise be eligible for the program must show that the temporary placement is in the best interests of the child, and the limits or ratios specified for the facility in respect of group size, the number of children cared for in the facility at one time and the ratio of employees to children are not exceeded.

6. RECONSIDERATIONS

Reconsideration provisions have been included in the *CCALA* to allow for an informal review of certain decisions by the decision maker before they are eligible for appeal. Reconsideration allows an opportunity for those subject to decisions to present their concerns and for the possible resolution of concerns without a formal and potentially costly appeal.

If an issue proceeds to an appeal, then there is a record of the decision making and reconsideration processes available to the Appeal Board that will explain:

- the reasons for the decision
- the concerns and objections regarding the decision
- 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 facility operators, the *CCALA* provides that 30 days prior to taking an action, or as soon as possible after taking summary action, an applicant or licensee must be informed in writing of:

- the reasons for the action or summary action
- their right to reconsideration of the decision

These provisions apply to the following:

- refusal to issue a new licence
- attachment of terms and conditions prior to issuing a new licence
- summary action
- suspension, cancellation, attachment of terms or conditions, or varying of terms and conditions of existing licenses (that the licensee has not agreed to).
- suspension or cancellation of an exemption or an attachment or variation of terms or conditions to an exemption (that the licensee has not agreed to)

Written notice to the party against whom an adverse action will be taken should identify the action that will be taken, and should also include a time frame in which to respond that takes into consideration the nature of the risk to the health and safety of persons in

care. This period should be 30 days, which is parallel to the amount of time a MHO must give a licensee before taking action, and to time limitations for appeals to the Community Care and Assisted Living Appeal Board. A thirty-day time period should allow adequate time to ensure that a licensee or applicant is able to provide a full response to the proposed action. Where 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, and establish a timeline for the licensee to respond.
Written notice from a MHO or licensing officer should include information about the reconsideration process.

The licensee should be advised that their written submissions should identify:

- reasons why the applicant or licensee thinks the MHO's decision is incorrect;
- reasons why the applicant or licensee thinks the MHO's decision should be delayed or suspended;
- provisions the licensee has put into place to protect the health and safety of persons in care;
- any provision of the *Act* or regulations that the applicant or licensee thinks is relevant to their request;
- copies of any documents supporting the request for reconsideration, and
- new evidence that the applicant or licensee thinks the MHO should consider.

If reconsideration is denied, written reasons must be provided to the licensee. The licensee must also be provided with information about the right to appeal the timeframe for appeal, and the address and contact information of the Community Care and Assisted Living Appeal Board. The *CCALA* does not permit applicants and licensees to make further written responses after receipt of the final decision. Reconsideration documents must be securely filed as they will form part of the appeal record if the licensee appeals the decision to the Appeal Board.

7. MONITORING STANDARDS

Although the primary responsibility to promote the health, safety and dignity of persons in care and to comply with the *CCALA* and regulations rests with the facility licensee and/or manager, licensing staff have an important role to play in assisting licensees and managers to fulfill their responsibilities. Licensing staff's education role begins with the initial application process and should form part of all licensing functions including the ongoing monitoring of licensed facilities.

Monitoring facilities' compliance with legislation, standards, and terms and conditions is not a passive role; monitoring is more than simply watching and waiting for problems to occur. Rather than waiting for complaints to be made or critical incidents to be reported, licensing officers and staff should proactively work with licensees and managers to help them better meet shared goals of compliance and quality care.

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

- remaining in regular contact with licensees/managers;
- scheduling meetings;
- conducting both scheduled and unscheduled inspections (see page 48 on inspections);
- providing licensees/managers with updates on legislative and policy changes;
- encouraging licensees/managers to discuss issues or problems;
- reviewing exemptions granted;
- encouraging and guiding licensees to take corrective action where required;
- problem solving with licensees and funding programs to avoid or correct areas of potential or actual non-compliance, and
- consulting with funding programs (for facilities that are funded) on an ongoing basis.

8. CARRYING OUT INSPECTIONS

Section 9 of the *CCALA* requires licensees to make their facilities available for inspection by the Director of Licensing or MHO's at all times. The *Act* 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. The extent of these powers is based on whether the facility is licensed or unlicensed.

The style and approach to facility inspection will 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 and in many cases may be beneficial, provided that basic principles are followed.

INSPECTION PLANNING

Planning for an inspection involves careful preparation so that licensing officers know in advance what they intend to do and how they intend to do it. Good planning leads to an appropriate inspection informed by all pertinent and available information.

Review the Facility File

Before an inspection, licensing officers conduct a file review to familiarize themselves with the background to the licence and to identify and document any previous contraventions. This step assists licensing officers in gathering information about previously-identified issues and concerns.

Review Risk Assessments

In order to plan their work and use their time effectively, licensing officers determine the importance of an inspection based on the risk to the health and safety of those in care and rank the inspection accordingly in the context of their other work.

Choose An Inspection Method

There are different inspection methods suitable for different 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. This is best carried out through unannounced inspections. Unannounced inspections are standard practice in most regulatory activities such as restaurant and food inspections, liquor licensing, bylaw enforcement, and occupational safety.

- Scheduled Inspections: It is sometimes appropriate to schedule inspections; for example, an inspection to assess specific aspects of a facility's operation that require the licensee/manager to spend time with licensing staff is usually scheduled to ensure those individuals are available. When completing an initial complaint incident, or follow-up inspection, it may be appropriate to schedule the inspection, unless the licensing staff assesses that doing so would compromise the gathering of information and evidence (for example, 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 for more than one licensing staff or a combination of licensing and funding program staff or other authority such as Fire Protection to conduct an inspection together. Examples of such situations include:
  - Inspection when a licensing officer needs to be accompanied by funding program staff (i.e. nutritionist, nurse) with current clinical expertise or funding program expertise to assess specific issues.
  - Inspection of a facility where a witness is required as a result of previous history, an especially challenging relationship with a licensee/manager, significant complaint follow-up, or where action on the licence is being recommended.
  - Inspection where licensing staff safety may be at risk; for example, a joint inspection of an unknown unlicensed premises or an inspection in response to a complaint about violence in a facility. For serious risk, police assistance should be requested.

Identify the Depth and Degree of Inspection

Licensing staff must determine the depth and degree of inspection that is required and what approach will best allow them to determine compliance or non-compliance with statutory requirements. Auditing a facility by looking at random samples[16] may be used for large facilities if it allows licensing staff to determine overall compliance based on a balance of probability. Licensing staff need not review every file, record, bedroom, etc.; a general determination of compliance can be made based on a review of a random sample for each legislative requirement. If the findings of all samples are consistently

[16] A random sample is one chosen by a method involving an unpredictable component. Random sampling can also refer to taking a number of independent observations from the same probability distribution, without involving any real population.

compliant, it is reasonable to assume that the facility generally meets the requirements. If the findings of any of the sample indicate non-compliance, further assessment or additional samples may be necessary.

THE INSPECTION PROCESS

An organized and transparent inspection process will ensure the least amount of disruption to the operation of a facility. This includes outlining to the licensee/manager/senior staff person the reason for the inspection and the inspection method that will be used. The inspection may need to include a review of facility records, policies and procedures, and may include discussions with other staff of the facility.

During an inspection, licensing staff may also collect valuable information through conversations with a variety of people such as persons in care, family, or guardians, licensees, managers and staff, and, later, with funding programs and other regulatory agencies. Licensing staff should inform the licensee/manager that any information gathered during the inspection will be fully reviewed with them and be maintained to ensure the protection of privacy for the persons in care and family members.

Observation is a key technique of inspection. Licensing staff should inspect the site and also observe staff interactions with persons in care.

Licensing staff should take note of staffing levels for staff-to-children-in-care ratio for child day care and assess the adequacy of staff to meet the needs of persons in residential care. They should also check the licence capacity against number of persons in care. When conducting an inspection, licensing officers should also:

- observe a segment of the facility's daily program, and
- note if care provided is consistent with facility's policies and procedures.

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 timelines regarding the correction of low-risk issues, keeping in mind that the licensee is responsible for planning, actions and 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 contraventions and what needs to be done to correct them. The following guidelines for writing an inspection report may assist licensing staff.

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 and/or the applicable regulation. (Note: If an issue is not related to legislation, but is merely a helpful suggestion, then it should clearly state in writing that 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.

When an inspection report has been completed, a copy must be provided to the licensee or manager and a copy is kept on file with the licensing office.

Inspection Type Definitions

- Initial Inspection: This is the first inspection following receipt of an application for licence. An initial inspection is undertaken after a facility has submitted an Application for Licence and has been entered into the database and assigned a facility number by the computer system. Inspections conducted prior to issuance of a licence are considered initial inspections. Inspections conducted after the issuance of the licence may be considered as routine or follow-up inspections.

- Routine Inspection: This is a comprehensive inspection of a licensed facility. A routine inspection may be a complete and comprehensive review of all licensing requirements or may be focused on a particular aspect of the facility or care provided.

- Complaint Inspection: This is a first inspection of a complaint in a licensed facility. A complaint inspection is conducted when licensing staff investigate a complaint in a facility that is operating with a valid community care facility licence. Subsequent inspections may be carried out to follow-up on the initial complaint inspection to ensure that the issues from the complaint have been resolved or to further monitor the situation. These inspections are coded as follow-up inspections.

- Incident Inspection: This is an initial inspection in response to a reported reportable incident. An incident inspection is conducted when licensing staff investigate an incident in a facility that is operating with a valid community care facility licence. Subsequent inspections may be carried out to follow-up on the initial incident inspection to ensure that the issues from the incident have been resolved or to further monitor the situation. These inspections are coded as follow-up inspections.

- Follow-up Inspection: Any inspection that follows up on an identified issue of non-compliance following a routine, initial, or complaint inspection in a licensed facility. A

follow-up inspection may be performed at any time 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: An unlicensed inspection is carried out when the licensing officer investigates information received that a facility may require a community care facility licence. (See Investigations section)

9. RECEIVING AND RESPONDING TO COMPLAINTS

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 *Act* and regulations.

When complaints or concerns are reported to a licensing office, licensing officers must respond promptly and appropriately and ensure accurate and timely documentation of the complaint and to ensure the health and safety of the persons in care. Each health authority has specific policies and procedures on how to accept and process complaints depending on the nature of the complaint.

The following steps provide a high level overview of a licensing officer's response to a complaint:

- determine if the complaint is within the mandate of licensing or if it should be referred to another agency such as the PCQO, the funding program, child protection, or the Office of the Public Guardian and Trustee etc;
- complete appropriate intake documentation;
- determine the scope and urgency of the complaint based on:
    - whether the alleged incident is a contravention of the *Act* or Regulation
    - presenting problem or perception of the problem
    - indicators of the alleged infraction
    - level and urgency of intervention required - assess the degree of risk to persons in care;
- establish investigation team in consultation with the manager, MHO or practice consultants; determine who needs to be involved and contact relevant agencies and police, if needed;
- prepare a plan of action including identification of next steps, possible interviews, and review of documentation and determine when to inform the licensing manager or MHO;
- notify licensee of allegations when appropriate (timing may vary, for example when the licensee is the subject of the investigation), and
- organize and conduct the investigation, wherever appropriate in collaboration with the licensee and other agency partners. (see next section)

Section 22 of the *CCALA* provides protection for persons, especially staff, who in good faith[17] report incidents of abuse. This protection should be communicated to those who report incidents to licensing staff.

This section of the *Act* is limited to reports of abuse that are made in good faith. As many complaints received by staff are not about abuse, licensing staff need to ensure that they do not promise protection to a complainant that is not available.

10. RESPONDING TO REPORTABLE INCIDENTS

In a licensed facility, a reportable incident is an event that must be reported to the MHO or licensing staff. Reportable incidents are events that may jeopardize the health and safety of persons in care and thus require follow-up. The Licensing Officer follows up or investigates reports of serious incidents to assess the factors that led to the incident as well as the appropriateness of the licensee's response. The goal of this process is to work with the licensee to prevent a similar occurrence in the future. The Residential Care Regulation and the Child Care Licensing Regulation lists incidents that are reportable. When a reportable incident has occurred, the licensee must notify:

- the appropriate persons as noted in the regulation (family, guardian, primary health care provider)
- the MHO and the applicable funding program, in the form and manner specified by the MHO

Licensees must have written policies and procedures acceptable to the MHO for all matters of care including the reporting of reportable incidents. In addition, licensees must keep a log of minor accidents and illnesses that do not require medical attention, are not reportable incidents, but are unexpected events involving residents or children in day care; this information must be kept and made available to the MHO if requested.

11. INVESTIGATIONS

This section of the Guide focuses on investigations and the role of licensing officers in the investigation of both licensed and unlicensed community care facilities.
The word *investigate* means *to observe or study by close examination and systematic inquiry*. Investigating does not necessarily mean that something negative or inappropriate has occurred in a facility; it may simply mean that licensing staff are gathering information in order to make a fair and balanced decision about the facility. Licensing staff should explain this broad understanding of investigation to licensees/facility operators so they have a better understanding of the language and processes used.

[17] 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.

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 and determine the level of risk to persons in care. At any time during an investigation, new information may emerge that may lead licensing staff to change their assessment of the risk of harm to persons in care.

PHASES OF INVESTIGATION

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

- Intake;
- planning;
- evidence collection;
- initial analysis of evidence and preliminary findings;
- communicating the findings;
- licensee response to findings;
- conclusions, recommendations for action to the MHO and next steps.

Intake and Evidence Collection

The purpose of the intake portion of an investigation is to receive and document initial information. This will set the tone and determine the subsequent steps of investigation. The format of information collection and documentation will vary depending upon the type of event that triggers the investigation and on the individual processes within each health authority.

Licensing staff should:

- Document all information provided: Record intake notes in the appropriate manner Document the complaint or what the event was that triggered the complaint.

- Listen to the information and ask relevant questions: When intake information is provided orally allow the speaker to provide general and broad scope information first, and then ask more specific questions in order to collect detailed and more focused information.
- Identify specific facts: Licensing staff should always refer back to the basics of who, what, where, when, why and how when asking questions and documenting intake information. Licensing staff should ask for specific examples or observations such as dates, times, names of people, etc. Licensing staff should use their interview skills to refocus the speaker, if necessary, so that specific, relevant, and detailed information may be obtained and recorded.

- Follow and use required tools or forms: Each health authority has specific forms or tools to use for documenting information obtained during the intake process.

- Maintain confidentiality: Confidentiality rules must be communicated to all parties at the time of intake so that those providing information understand the limitations of confidentiality and protection of privacy. Persons providing information may request confidentiality; requests for confidentiality must be recorded by licensing staff in

writing on the appropriate form. However, there are limits to ensuring confidentiality; for example, if the outcome of the investigation results in a legal action that requires disclosure by lawful means such as an appeal, other legal proceedings, or a request under *the Freedom of Information and Protection of Privacy Act* (FOIPPA). These may result in release of information, or the licensee may sometimes be able to identify the source of information through the investigation process.

- Avoid prejudgement: Remain objective and impartial. Decisions must only be made after all information is collected, reviewed and considered on a balance of probability. Until then, do not make a judgment about an alleged event or about who may be responsible.

Investigation Planning

Each health authority has specific policies and procedures about how to conduct and investigation which take into consideration the nature of the allegation. Good investigation begins with planning that includes several important considerations as outlined below. One of the essential considerations is planning to promote collaboration and ensuring that all responsible agencies are clear about their respective roles and responsibilities and keep each other informed throughout the process.

- **Identifying and informing others**: Licensing staff determine who they need to contact, in what sequence, and when. Staff from other agencies may be delegated by the MHO to assist in the investigation or may do a concurrent investigation.
    - The funding agency may be contacted and invited to participate in the planning involved and investigation processes.
    - If an unexpected death occurs in a community care facility, this requires an incident report to the MHO and the MHO to then report to the coroner. The unexpected death may be investigated by the MHO, the police and the coroner. During a concurrent investigation, the MHO must fulfill his or her duties under the Legislation without interfering with the police or coroner.
    - The police investigate allegations of criminal conduct under the *Criminal Code of Canada* (the Criminal Code), and may conduct a concurrent investigation regarding the unexpected death or suspected abuse of a person in care (incidents of this nature should be referred to the police).
    - Other agencies, such as the designated agency under the *Adult Guardianship Act*, staff of the Office of the Public Guardian and Trustee, may require immediate notification and/or a request to assist in the investigation.
    - Facility staff and persons in care or their family members may also need to be contacted depending on the nature of the concerns. Licensing will determine who needs to be contacted on a case by cases basis. In the case when contact is deemed necessary and appropriate, the MHO is responsible for ensuring that the licensee, and family or representative of persons in care who are affected by an investigation, are informed that an investigation is taking place and that interviews may be requested of them. If the investigation may cause concern

among other families of persons in care, minimal, factual information may be shared. If there are a number of others involved, a planning meeting may be required to coordinate activity and ensure good communication.

- **Balancing issues**: While investigating it is essential for licensing staff to balance a number of competing and often conflicting issues.

  These issues include:
  - the need to protect the health and safety of persons in care,
  - the rights of the licensee to administrative fairness,
  - responsibilities of a licensee,
  - the rights of the person/persons alleged to have been involved in the situation,
  - the process and administrative requirements of the licensing program.
  - the needs and requirements of other professionals involved, and
  - competent adult persons in care right to self determination and the dignity of risk.

- **Reviewing history**: In the planning phase, the investigating licensing staff reviews all of the information obtained during the intake phase. This initial review provides an opportunity to re-evaluate all the information collected to date in context, taking into consideration facility compliance history and the licensee's response to any previous investigations.

- **Determining scope and depth**: Planning for an investigation includes determining the scope and depth of investigation to be completed. Some questions to consider are: What type of information is needed? Are interviews required? Who will be interviewed and by whom? If the facility is funded, is a member of the funding agency available and willing to assist? Will an interpreter, expert or other professional be required to assist in the interviews? How many staff or witnesses will be sufficient to make a determination based on a balance of probability? Is the allegation of a minor nature that allows the investigation to be completed through a complaint inspection, or will a more formal investigation be required?

- **Reviewing the file**: A thorough file review is a useful process to assist in planning an investigation. Some degree of file review should be completed in all cases so that a thorough and accurate working knowledge of the facility history informs the investigation. This will ensure that patterns of concern are identified and considered as part of the investigation planning.

- **Making a plan**: All planning activity culminates in a documented plan for the investigation. The plan indicates what the licensing officer and others involved will do, who will be interviewed, what documents will be reviewed, whether there will be a facility visit/s, and the timelines for these activities. The plan includes how information about and resulting from the investigation will be communicated and to whom it will be communicated.

Factors To Consider During An Investigation: *Transfer Of Care*

The point in time at which a licensee or facility ceases to supervise or oversee the person in care is referred to as the *transfer of care*. At that point the cares, custody, control and decision making has been transferred to another individual or institution. Transfer of care takes place when:

- the ambulance crew takes charge of the person for placement on the stretcher when an ambulance transports the person in care to the hospital; on arrival at the hospital emergency department, transfer of care to the hospital takes place when the hospital accepts the person in care from the ambulance crew even if formal admission procedures have not been completed.
- a person in care leaves a facility to go on a family outing with family or friends
- a person in care goes outside the facility to attend a day program operated by a different agency, care and supervision
- a person in care discharges him or herself from the facility
- a person in care is at home alone pursuant to an exemption granted under the Residential Care Regulation, which allows them to stay at home for limited periods of time with no staff from the facility

Transfer of care does not arise when:

- a person in care goes on a facility-organized field trip under the supervision, direction and control of the licensee
- a person in care is missing or wandering while under the care of the facility.

Evidence Collection

Evidence collection brings all the considerations of the planning phase into play with the goal of determining whether, on the balance of probabilities, an allegation is more or less likely to have occurred. Methods for collecting information may include:

- reviewing the facility file to identify relevant historical information including previous inspection, incident reports, investigation reports and risk assessments.
- conducting an onsite inspection/s.
- reviewing facility records, policies and procedures.
- reviewing records of persons in care and other records kept by the facility.
- interviewing persons in care, staff, the licensee, families, or others and explaining the investigation process and their role in the process.
- obtaining written statements from witnesses.

Initial Analysis of Evidence and Preliminary Findings

When an event is believed to have occurred and is investigated, licensing staff must decide whether that allegation constitutes a contravention of the *CCALA* or Regulations. Decisions must be based on careful weighing of all information 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 need to be documented.

Communicating the Preliminary Findings

Prior to reaching final conclusions and making recommendations to the MHO, the preliminary findings of the investigation should 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. Some general guidelines that can be used in communication throughout the investigation process are provided below.

Licensee Response to Preliminary Findings

If the preliminary findings determine that this is contravention to the legislation, the licensee should 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 in the future 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 an opportunity 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 Act* and Regulations and also determine whether to make recommendations for action on the community care facility licence. Action could include: attachment of terms and conditions, suspension, cancellation, and/or appointment of an administrator. Conclusions and recommendations should be documented. Upon completion of an investigation, affected persons in care, their families and representatives, if any, of persons in care, and any others who were previously informed of the investigation, may be notified that the investigation is concluded. The need to notify is determined on a case by case basis and should be done in cooperation with the PCQO if applicable.

At the completion of an investigation, (if there are concurrent investigations being conducted), parties should inform each other of the status and/or results of their respective investigations before any public announcements are made, so that affected persons in care and their families may be notified first. In the case of concurrent investigations, notification may be delayed, so that the integrity of any investigations still underway are not jeopardized.

Guidelines For Communicating During Investigations

- 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. This will also help the licensee achieve compliance and reinstate normal operations.
- Whenever possible and appropriate, the licensee should be involved in the investigative process. There are some cases where this may not be appropriate, for example if a person being interviewed requests that the licensee not be present, or where the allegation or content of the investigation is regarding the licensee.
- Notify the licensee of the outcome, 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. 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, PCQO) prior to formal conclusion of the investigation.
- Do not release third-party personal information such as names, addresses, telephone numbers, as this information may be subject to protection under the *FOIPPA*.
- Provide the licensee with written information regarding the reconsideration process and the appeal process, including timelines and contact information, as appropriate.

HEALTH AND SAFETY PLANS ESTABLISHED DURING AN INVESTIGATION

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.

In the majority of circumstances, licensees will take the initiative to voluntarily develop health and safety plans during an investigation. Licensing staff should use caution in cases where they are asked to provide guidance about what/how the licensee should put in place as a health and safety plan. If a health and safety plan is unduly influenced, interfered with, directed or dictated by licensing staff, this may be viewed by the licensee and/or their legal counsel as constituting terms or conditions. If a licensee voluntarily develops and implements their own measures to ensure health and safety during an investigation, these additional requirements are unlikely to be considered terms and conditions under the *Act* and are less likely to be subject to reconsideration or appeal. If a MHO attaches terms and conditions to a licence as part of a health and safety plan, these will be subject to reconsideration and appeal.

Licensing Officers should inform licensees about both voluntary and imposed health and safety plans and their reconsideration and appeal rights:

- Voluntary: Licensees develop a health and safety plan independently and seek licensing approval. This plan is approved, should be complied with, and due to its voluntary nature is not subject to reconsideration or appeal.
- Imposed: The MHO or delegate officially attaches terms and/or conditions to the existing licence. The terms and conditions constitute an imposed health and safety plan and must be complied with; the decision to impose them is also subject to reconsideration or appeal.

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

If illegal operation of a facility is found, the licensing officer should monitor the facility during period of time of application for a licence, the application process or to ensure the operator has taken appropriate steps to come into compliance**.**

Entry and Entry Warrant Process

Section 9(2) of the *CCALA* provides that if licensing staff has cause to believe that an unlicensed premises is being used as a community care facility, that they may enter and inspect the premises. However, to protect the privacy of single family dwellings, s. 9(4) provides that if the premises are a private single-family dwelling, licensing staff cannot enter and inspect the premises unless either the occupant consents or licensing staff obtains an entry warrant under s. 9(5).

The entry and search warrant process only applies to an unlicensed facility operating out of a private single-family dwelling. Other licensed facilities are required to allow access under section 9(1) and failure to grant access could result in an application to the Courts for an entry order. Licensing staff should consult with legal counsel if it is necessary to make an application to Court.

If an unlicensed facility is operating out of a private single-family dwelling, unless there are circumstances relating to the past history of unlawful operation by the operator, the first step should be to seek the consent of the occupier to conduct an inspection. Introduce yourself and provide information about the requirement for services of the nature that the operator is providing to be licensed. If consent to inspect the premises 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 preparation for applying for an entry warrant to a Justice of the Peace or a Judge of the Provincial Court. It may also be necessary to consider whether Legal Counsel advice should be sought.

Section 9(6) provides that licensing officers must not enter a home or facility unauthorized. Even with a warrant, licensing staff must not physically force their way into the premises unless that is specifically authorized in advance in the 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 to obtain the search warrant so that the appropriate provision can be added into the warrant prior to attempting the inspection. 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 the police.

12. TAKING ACTION ON A LICENCE

RECOMMENDATION OF ACTION ON FACILITY LICENCE

The next step in progressive compliance may be to take action on the licence. Section 13 of the *CCALA* empowers the MHO to suspend, cancel or attach terms and conditions to a licence. Prior to action being taken, licensing officers are typically required to make a recommendation to the MHO.

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 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. This section outlines the processes for undertaking these actions.

Summary action is reserved for a situation 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 is carried out 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. The key provision in Section 14 of the *Act* that differentiates it from Section 13 is that this action can be taken without notice to anyone affected by the decision; the check and balance on exercising this power is the requirement for reasonable grounds to believe that immediate risk is present.

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 can act summarily means that the right to reconsideration and appeal cannot be

exercised until after the decision. Summarily suspending a licence will immediately remove an operator's ability to earn a livelihood and force persons in care to make other arrangements. Imposing an immediate term or condition brings with it a regulatory burden on a licensee and opens up the offence and penalty provisions of the CCALA if there is failure to comply. Imposing terms or conditions may also have financial implications. This authority to take action without notice with potentially significant and long-term consequences, and the ability of a licensee to challenge these decisions only after the fact, means that they must be made carefully and with scrupulous regard to 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 while allowing Licensing to gather more information or to work with the licensee to correct the underlying problems. Summary suspension should be followed either by cancellation of a licence under Section 13 of the *Act*, or reinstatement of the licence when the risk has been properly 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 his/her right to respond.

13. OFFENCES AND LEGAL REMEDIES

The following are the legal remedies available when a licensee does not comply with specific requirements of the legislation.

Fines

Section 33 of the *CCALA* allows for a fine of up to $10,0000 for a person committing an offence under the *Act*. 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 *Act*:

- 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 British Columbia 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 (20]
- breaching the section related to prohibited financial inducements of a person in care [s.18 (3)]

If an offence is of a continuing nature, each day that the offence continues constitutes a separate offence. A fine is only imposed by a Provincial Court Judge following a prosecution for the offence charged resulting in either a guilty plea or a conviction after

a trial. It is the decision of Crown Counsel, not the MHO, whether to proceed with a charge under this section of the *Act*.

Appointment of a Public Administrator

The *CCALA* 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. 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. While the Minister retains the ability to appoint an administrator, 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* rather than the *CCALA*.

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

14. APPEALS

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 British Columbia Supreme Court exercises inherent jurisdiction to conduct judicial reviews to oversee the conduct of statutory decision makers. Administrative tribunals 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, 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.

STATUTORY APPEAL

Section 29 of the *CCALA* provides for an appeal to the Community Care and Assisted Living Appeal Board in relation to four categories of decisions:

- an appointment of an Administrator to operate a community care facility
- 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
- a decision to grant a local exemption

The following persons have the right to appeal:

- holders of and applicants for certificates for child educators and
- registrants, licensees and applicants for registration or licensing.

TECHNICAL REQUIREMENTS FOR A VALID APPEAL

A person seeking to appeal a decision under s. 29(3) of the *CCALA* (the "appellant") must comply with the requirements of the *Act* and the Appeal Board Rules[18] 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 to grant an exemption. Section 29(2) of the *CCALA* provides that an appeal must be made in the prescribed manner within 30 days of receiving notification[19] although the Appeal Board has power to extend that time limit.(see *SBR* v. *Bockner,* 2006 *BCCCALAB* 2)

- The notice of appeal must meet the requirements set out in Rule 2 of the Rules for Appeals under the *CCALA.*[20] Rule 2 states,

  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"[21]

[18] http://www.ccalab.gov.bc.ca/pdf/CCALABRevisedRulesMay07.pdf
[19] Section 24(1) of the *Administrative Tribunals Act* (the ATA) provides that a notice of appeal must 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.
[20] Section 27(3) of the ATA permits the Appeal Board to allow a reasonable period of time for an appellant to correct any deficiencies in a notice of appeal.
[21] In SBR v. Brockner, 2006 BCCCALAB 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 appellant must have *standing* to appeal -- that is, the person must fall within the category of an affected licensee, applicant, holder of a s. 8 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 below). See, for example, SBR v. *Bockner,* 2006 BCCCAL.AB 2.

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 ss. 29(2) or (3) of the *CCALA.* For example, see *WM V. Bateman,* 2004 *BCCCALAB* 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.[22] 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. [23] 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[24] or is an attempt to circumvent the rules of court.[25]
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.

[22] *Hunt v. T & N plc* (1990), 49 B.C.L.R. (2nd) 273.
[23] *Citizens For Foreign Aid Reform Inc.v.Canadian Jewish Congress* (1999),36 C.P.C. (4th) 266 (B.C.S.C.)
[24] any personal or outside interest
[25] *Chapman v. Canada* (2003), 21 B.C.L.C. (4th) 272.

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 or 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
- 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 [(CCALA, Section 29 (6).] 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. In *Imagination Boulevard Learning Society* v. *Hoffman,* 2005 *BCCCALAB* 5, for example, the appellant sought a stay of the cancellation of licenses for two child care facilities. The respondent did not oppose the application as he/she was satisfied that a stay would not risk the health and safety of persons in care with adequate monitoring. The Appeal Board ordered a stay on two conditions: (a) the parties would accommodate the scheduling of an early hearing date; and (b) the appellant would cooperate fully with all conditions attached to the license and cooperate fully with all continued monitoring by the respondent. The respondent subsequently applied to have the interim stay order cancelled on the basis that they perceived an increased risk to the health and safety of the children. The Appeal Board vacated (annulled) the stay on the basis of the new information put forward by the respondent: *Imagination Boulevard Learning Society v, Hoffman,* 2005 *BCCCALAB 6.*
See also: *KL v*. *Sellin,* 2006 *BCCCALAB* 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 *Act* 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.[26] 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.[27] 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 (in Form 1). 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

[26] See for example *SC v. Wagner,* 2004 BCCCALAB 2 where appeal conducted on the basis of written submissions by agreement of the parties.
[27] *Prassad v. Canada (Minister of Employment and Immigration)* (1989), 57 D.L.R. (4th) 663 (S.C.C.); *Richmond Square Development v. Middlesex Condominiums* (1993), 103 D.L.R. (4TH) 437 (Ont. Div. Ct.); *Siloh v. Canada (Minister of Employment and Immigration)* (1993), 10 Admin. L.R. (2nd) 285; *Atrani v. Canada (Minister of Employment and Immigration)* (1993), 14 Admin. L.R. 201.

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 that 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 with the board 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. Below 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 order. This is most often done in 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.

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).

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.[28]
- 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 it is 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.

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?*

[28] Giving evidence about the conclusions formed is not "opinion" evidence because it is simply explaining the basis for the action taken.

- *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.

Identifying and Preparing Witnesses

Licensing staff may wish to give the following instructions to the witnesses that they call to give evidence. This list of suggestions will assist in making the witness's testimony more effective.

Guidelines For Witnesses

- Dress conservatively and do not chew gum while giving evidence.
- When the panel chair or court reporter administers the oath, respond (swear or affirm to tell the truth) in an affirmative clear voice.
- 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 you give your evidence, direct your responses to the panel members who are the judges in the case. Speak clearly and loudly so all panel member can hear you.
- 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. Try to answer the question first and then explain, rather than explain before you answer.
- Answer directly and simply only the question that is asked of you and then stop. Do not volunteer information that is not actually asked for.
- If your answer is 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 your own opinions or conclusions.
- Try to avoid using the words "never" or "always"; the other side may come up with an exception. Similarly, try to 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 or 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 or panel member interrupts you or a party objects to what you say or the question that you have been asked. Do not try to sneak your answer in. 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 which 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 or 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.
- Do not "hedge" or argue with the other side. It is never proper for a witness to ask questions. Witnesses are there are answer questions.
- Do not nod your head for a "yes" or "no." You have to provide a verbal response as the proceeding is being transcribed.
- 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 previous question but 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 and 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 that you gave to the earlier 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[29] 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

[29] Case in chief is the portion of a trial whereby the party with the Burden of Proof in the case presents its evidence. The term differs from a rebuttal, whereby a party seeks to contradict the other party's evidence. Case in chief differs from "case" in that the latter term encompasses the evidence presented by both the party with the burden of proof and the party with the burden of rebutting that evidence.

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.

Guidelines For Preparing A Cross-Examination

- Focus on a few basic areas in your cross-examination which support your case.
- Use short focused leading 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.

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).

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 C*CALA* 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 license 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.*

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.

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.

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. e.g. *That now concludes the case for the respondent.*

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).

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.

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.

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.

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

[30] The term "public bodies" includes individuals who exercise statutory power for the purposes of this paper.

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.[31] 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
>
> (a) to serve and protect the public, and
> (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest. (Emphasis added)

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:

> 73(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
>
> (a) on public health issues, including health promotion and health protection,
> (b) on bylaws, policies and practices respecting those issues, and
> (c) 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.
>
> (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**

[31] That process is governed by the *Judicial Review Procedure Act.*

(d) consult with the provincial health officer and each authority and local government who may reasonably be affected by the intended report, and
(e) 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:*

> 14(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. (Emphasis added)

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:*

> 26(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. (Emphasis added)

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.
>
> (2) 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.
>
> (3) 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.
>
> (4) This section applies whether or not the office of a minister or public officer is vacant.

> (5) 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 *Act* 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 *Act* 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:

> 80 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):

> 86 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 socials) 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. In 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:

(a) 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.

(5) 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.

(c) 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).

(2) 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 *Act* 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 *Act* 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 functioning of licensing officers and should be considered as part of a balanced approach to the use of authority in carrying out licensing functions.

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 in licensing.

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.

PHILOSOPHY OF THE BC SOCIETY OF COMMUNITY CARE FACILITIES LICENSING OFFICERS

The Society of Community Care Facilities Licensing Officers 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 Facility 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 aspects of licensing. However, what most licensees would experience as a licensor's non-provocative use of authority may occasionally trigger an exaggerated reaction of anger or hurt from another licensee. Individuals have very different experiences of power and authority that may 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 all 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, he/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 his/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 licensing agency's 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
- influencing public opinion, e.g., 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 things such as "*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 him to monitor compliance between your own inspections. This should improve compliance and consumer protection.

Observe Both the Limits and the Latitude in the Rules**:** Licensing authority must always be used with complete fairness and objectively. If the rule is specific, it must be enforced (unless a formal variance has been granted). 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, anxious, upset, angry, 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: OTHER RESOURCES AND LINKS

- The Community Care Licensing program, Ministry of Health http://www.health.gov.bc.ca/ccf/
- British Columbia Legislation: http://www.bclaws.ca/
- Listing of licensing offices by health authority: http://www.hls.gov.bc.ca/ccf/licensing_offices.html
- Community Care and Assisted Living Appeal Board of British Columbia: http://www.ccalab.gov.bc.ca/
- British Columbia Branch of the Community Care Facilities Licensing Officers Association http://ccflobc.com/
- BC Council of Administrative Tribunals http://www.bccat.net/Default.asp
- Ministry of Children and Families http://www.gov.bc.ca/mcf/