

WARNING

This is a case under the [Child, Youth and Family Services Act, 2017](#) and subject to subsections 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

87(8) *Prohibition re identifying child* — No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

(9) *Prohibition re identifying person charged* — The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

142(3) *Offences re publication* — A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(c) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

CITATION: Connor Homes v. Director, 2021 ONSC 3195
DIVISIONAL COURT FILE NO.: 510/20
DATE: 20210510

ONTARIO
 SUPERIOR COURT OF JUSTICE
 DIVISIONAL COURT

IN THE MATTER OF an appeal pursuant to sections 263 and 267 of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, C.14, Sched. 1

Aston, Backhouse, Favreau JJ.

BETWEEN:

1392644 Ontario Inc. o/a Connor Homes

Appellant

David Golden, Lisa Corrente and Marco Falco, for the Appellant

– and –

Director Under the *Child, Youth and Family Services Act, 2017*

Respondent

Vanessa Glassser and Tanya Jemec for the Respondent

Licence Appeal Tribunal

Intervenor

Valerie Crystal and Brian Blumenthal for the Intervenor

HEARD by videoconference: April 22, 2021

Backhouse, J.

Overview

- [1] The Appellant appeals the Order of the Licence Appeal Tribunal (“LAT”) made October 8, 2020, upholding the Proposal of the Director under the *Child, Youth and Family Services Act, 2017*¹ to refuse to renew the Appellant’s residential care (foster care) licence.

- [2] The Appellant operates foster care homes. Most of the children placed in the Appellant’s care require special care or treatment as opposed to regular foster care. In February 2017, one of such children deliberately set a fire at one of the Appellant’s homes referred to as Location A. The fire resulted in the death of a child resident in the home and a staff member, as well as serious injuries to another staff member. Investigations by the Ministry of Children and Youth Services (“the Ministry”) and other organizations including a licensing inspection ensued. In June 2017, the Director amended the Appellant’s licence and in December 2017, the Director renewed the licence for one year, in both cases with special conditions.

- [3] The inspections continued. On April 1, 2019 the Director issued a 200 page Notice of Proposal to Refuse to Renew the Appellant’s licence (“the Proposal”) pursuant to s. 262 of the *CYFSA*. The Appellant appealed the Proposal to the LAT.

- [4] The LAT heard the appeal over 18 days between June and August 2019. Extensive evidence was heard which included testimony from five witnesses called by the Director and eight witnesses called by the Appellant. On October 8, 2020, in an eighty-page Decision, the LAT concluded that it had grounds to refuse to renew the Appellant’s licence on the basis that the Appellant provided residential care in a manner prejudicial to the health, safety and welfare of its residents at Location A in relation to fire safety and because it failed to provide its residents appropriate care. Although the LAT found other regulatory non-compliance with respect to foster homes at Locations B to E, it was only in relation to Location A that the LAT found there was a basis to refuse to renew its licence.

- [5] At the beginning of the hearing, the Director brought motions to exclude the Appellant’s proposed expert reports and testimony on whether its operations complied with fire safety standards and met the standard of care for treatment foster care to high needs and clinically complex children. The LAT ruled that the evidence should be excluded on the basis that it was not necessary and on the basis of efficiency. The Appellant takes issue with this ruling. The Appellant also alleges an abuse of process because the LAT’s grounds for refusing to renew the licence differed from the Director’s, challenges numerous factual findings and submits that the non-compliance issues were insufficient to justify refusing the licence.

- [6] I have concluded that in the context of this proceeding, the excluded evidence was clearly relevant and central to the case. Excluding the Appellant’s expert reports and testimony amounted to an error in principle going to the core of the LAT’s decision. The decision

¹ S.O.2018, c.14, Sched.1.

must therefore be set aside and the matter remitted back to the LAT for a new hearing before a different panel.

- [7] The error in refusing to admit the evidence of the Appellant's experts is dispositive of the appeal. We therefore do not need to weigh the evidence from an 18 day hearing to address the Appellant's submission that the LAT misapprehended or ignored material evidence.
- [8] For the benefit of the panel rehearing this matter, I have considered the Appellant's argument that the LAT's decision is an abuse of process because its grounds for refusing to renew the licence differed from the Director's. I have found that this ground of appeal is without merit.
- [9] The reasons are set out below.

Background

- [10] Since 1975, the Appellant has been in the business of operating treatment foster homes and group homes for children affected by mental, behavioural and psychiatric disorders, often in combination with other special needs and often from disadvantaged Indigenous backgrounds. Until the fire in February, 2017, the Director acknowledged that the Appellant had a good compliance history. Its licence to operate foster homes was renewed annually without the imposition of conditions, other than the standard conditions applicable to all licensees.
- [11] Locations A and A-1A were two adjacent foster homes which the Appellant operated. FL, a foster child, had been placed in Location A by the Kawartha-Haliburton Children's Aid Society ("KHCAS") who was responsible for monitoring FL's foster care. FL had been previously diagnosed with fetal alcohol spectrum disorder, schizophrenia, oppositional defiance disorder and alcohol related neuro-development disorder. The fire at Location A was intentionally set by FL. After the fire, the Appellant closed Locations A and A-1A.
- [12] Following the fire and deaths at Location A in February 2017, KHCAS conducted a child-protection investigation into the fire. In its report, KHCAS opined that there were fire safety deficiencies at Location A which rendered the living environment unsafe, that FL was "under placed" with the Appellant (i.e. that FL was placed in an environment which did not meet FL's care needs), that FL's behaviours and mental health were deteriorating in the period leading up to the fire, that the Appellant did not adequately manage FL's behaviours, and that the Appellant did not access appropriate mental health care for FL.
- [13] In June 2017, in reliance upon the KHCAS report, the Director amended the Appellant's licence and imposed new terms and conditions, including terms preventing the Appellant from accepting new foster children and from opening new foster homes. The Appellant appealed those conditions to the LAT under the *Child and Family Services Act* ("CFSA")².

² RSO 1990, c.C.11, now repealed and replaced by the *CYFSA*.

- [14] After the KHCAS child protection investigation was concluded, the Ministry commenced its own inspection of the Appellant's operations. An "Intensive Site Review Team" of Ministry inspectors was charged with completing an "in-depth" review into all the Appellant's foster homes.
- [15] In March 2017, the Appellant applied for the renewal of its foster care licence. In December 2017, the Director renewed the Appellant's licence for a one-year term, with the imposition of 25 special terms and conditions but which permitted the Appellant to accept new foster children and open new foster homes up to certain limits. The Appellant filed a second appeal with the LAT under the *CFS*A regarding the imposition of those additional conditions.
- [16] The licensing inspections continued for the next 15 months into the next licensing term (2018) and led to the Director on April 1, 2019 issuing a 200 page Proposal to refuse to renew the Appellant's licence and at the same time imposing conditions on the licence which again prevented the Appellant from accepting new foster children and opening additional foster homes.
- [17] On April 10, 2019, the Appellant appealed the Proposal and the imposition of the conditions on the licence to the LAT and the two prior appeals were withdrawn.

The Proposal

- [18] On April 1, 2019, the Director served a Notice of Proposal to Refuse to Renew the Licence pursuant to the following provisions of the *CYFSA*:
- a. s. 262(a): contravening statutory and regulatory requirements, as well as licence conditions;
 - b. s. 262(b): conduct provides grounds to believe person not competent or will not operate in accordance with applicable laws;
 - c. s. 262(d): providing residential care in a manner prejudicial to the children's health, safety or welfare; and
 - d. s. 262(e): making false statements in documents required to be furnished to the Ministry.³
- [19] Although it was regulatory contraventions at the Appellant's foster homes at Locations B to F which formed the basis of the Director's opinion to refuse to renew the Appellant's licence, the investigatory findings concerning Location A and A-1 were also raised in the Schedules to the Proposal.

³ Decision at para 7, Appeal Book and Compendium, Tab 2, CH-0025; Proposal, Appeal Book and Compendium, Tab 3, CH-0103; *CYFSA*, [s. 262](#).

- [20] With respect to fire safety standards, Schedule B of the Proposal alleged fire safety concerns and contained allegations of non-compliance in relation to several foster homes, including Location A:

“...one of the residences operating under this licence [Location A] was set on fire by a child residing there...The Kawartha Haliburton Children’s Aid Society (KHCAS) conducted a child protection investigation following the [Location A] fire and verified a number of significant concerns, some of which were specific to fire safety.”

Schedule E to the Proposal made specific allegations with respect to fire safety concerns both at Location A and with respect to “numerous fire safety concerns with other foster homes falling under this licence.”⁴

- [21] Schedule A to the Proposal entitled “Detailed Findings and Reasons for Decision to Propose to Refuse to Renew Licence” states in part:

1. During the 2017 licensing inspection, the ministry identified a number of concerns specific to the health, safety and welfare of children receiving care under this licence, including:

a. A fire that occurred at a residence operating under this licence (Location A (address redacted)), resulting in two fatalities (a child placed with the licensee and a staff person).

b. Verification of child protection concerns against the licensee by the Kawartha Haliburton Children’s Aid Society (KHCAS). In particular, KHCAS identified a number of concerns respecting this licensee and its operations, including: admission of extremely high needs children that the program was not capable of managing; poorly trained, qualified and supported staff; and, lack of clarity regarding reporting relationships within the Connor Homes organization.

c. Concerns that the licensee and its staff knew or ought to have known that they did not have the skills or programming necessary to meet the high needs of a child placed in its care (the child that started the fire) thereby putting the child and those around her at risk.

...⁵

Proposed Expert Evidence

- [22] In view of the allegations relating to the Appellant’s purported non-compliance with fire safety standards, the Appellant sought to introduce at the hearing the expert evidence of Vincent Rochon, a professional engineer with over 30 years of experience in fire protection

⁴Proposal, Schedule E, Appeal Book and Compendium, CH-0238.

⁵ Proposal, Schedule A, Appeal Book and Compendium, CH-0124.

who had been accepted on numerous occasions as an expert witness on fire-safety related issues.

- [23] Mr. Rochon was proposed as an expert to opine on fire safety standards applicable to foster homes under the *Fire Protection and Prevention Act*⁶, the policies, procedures and practices which exist at the Appellant's homes in relation to fire safety, the Appellant's compliance with applicable fire safety standards and whether the Appellant created an unsafe living environment for its foster children.

- [24] The Appellant also sought to call Robert Fulton as an expert witness at the hearing in relation to the allegation in the Proposal that the Appellant was unable to provide proper care to children with significant and complex needs. Mr. Fulton holds a Master of Social Work and has decades of experience working in the child welfare system, including specialized expertise in assessing risk, clinical needs and outcomes of foster children with mental and behavioural disorders. Mr. Fulton had previously been engaged by the Ministry to review its assessment tools for use in children's mental health centres for the purposes of risk and needs assessment, development of treatment plans, and evaluation of outcomes of intervention. He had received Ministry and other grants to research and report on best standards of practice in residential care, including matching child placements based on level of care and requirements to ensure quality of care. In addition, Mr. Fulton had been engaged as an expert by the province in the area of risk screening and needs assessment.

- [25] Mr. Fulton was proposed as an expert to opine on the following: whether FL was "under-placed" at Location A in view of [FL's] needs and the Appellant's treatment foster care program; the quality of the residential care and the adequacy of mental health and other supports provided by the Appellant to its high needs or medically fragile foster children, including FL; a contextual analysis of the treatment foster care system; the Appellant's competency to operate within that system in view of its compliance history; and the improved outcomes and quality of life for its foster children.

Motions to Exclude Proposed Expert Evidence

- [26] The Director brought motions to exclude the expert evidence of Mr. Rochon and Mr. Fulton which were heard at the opening of the hearing.

- [27] On the motion to exclude Mr. Rochon's evidence, the Director submitted that his opinion was not relevant because it dealt with whether or not Location A was compliant with the Fire Code which was no longer in issue, given that all Fire Code charges against the Appellant had been withdrawn.

⁶ S.O.1997, c. 4.

- [28] On the motion to exclude Mr. Fulton’s evidence, the Director submitted that Mr. Fulton’s evidence should not be admitted because he was not an expert on residential licensing or effective regulation and his evidence was not necessary to the determination of the matter. The Director submitted:

32. Mr. Fulton has prepared two reports. His report dated October 12, 2018 is titled “Opinion regarding the placement of FL”. The report consists of a review of FL’s file, followed by Mr. Fulton’s opinion on the quality of care FL received during [FL’s] placement with the Appellant, and an opinion on whether conditions previously placed on the Appellant’s license were warranted.

33. Mr. Fulton’s opinion on the quality of care provided to FL is not relevant to the issues in this appeal. His report is exclusive to the care provided to FL. The tragedy involving FL precipitated and informed the Ministry’s license inspections, but the quality of [FL’s] care was far from the sole focus of the licensing inspection or the Director’s decision to propose not to renew the Appellant’s license. **The issue in this appeal is not whether or not FL received adequate quality of care.** (emphasis added)

Ruling to Exclude Expert Evidence

- [29] The LAT applied *R. v. Mohan*⁷, *White Burgess Langille Inman v. Abbott and Haliburton Co.*⁸ and *R. v. Abbey*⁹, and found that the evidence was not necessary for it to make a determination in this case as it could determine the matters in issue without the assistance of expert evidence. The LAT further held that the “anticipated limited probative value of the proposed expert evidence” was outweighed by “the need to ensure an efficient resolution of the matter on the merits.”¹⁰ The reasons for excluding the expert evidence were given orally and are set out below:

So let me describe how we anticipate this hearing will unfold from our perspective, which is we’re going to hear a lot from both sides about events, circumstances, situations and how they unfolded. We’ll hear from the respondent’s witnesses, there will be cross-examination, we’ll hear from the appellant’s witnesses, there will be cross-examination, and we’ll hear an awful lot. And for each of these events, circumstances or situations, we have to find—we have to decide what actually happened, and that becomes a found fact.

⁷ [1994] 2 SCR 9.

⁸ 2015 SCC 23

⁹ 2017 ONCA 640

¹⁰ Decision, para.27; Transcript of the LAT’s Decision on the Motion dated June 17, 2019, Appeal Book and Compendium, CH-1359, line 23 to CH-1361, line1.

This is what we're doing. We're finding facts. So the next step is, okay, we've found this fact, is it in compliance with—I never get this right—the CYFSA, the regulations or any other Ministry policy that is somehow binding on the appellants. So we find facts based on a lot of information, is it in compliance. If it's not in compliance, okay, we set that aside, and then at the end of that analysis of every event situation, we'll look at each of the, if I may call it, non-compliances that we find, and we will look at the cumulative effect of those and decide whether the Registrar's action is supported by those non-compliances.

And so we asked ourselves is there any chance that something might come out about these events or circumstances that we don't understand. And you know speaking for myself alone, I don't have a very vivid imagination, so, yeah, it's entirely possible that something may come out that I don't understand.

But it is—you know we would expect during this process of fact-finding to be referred to policies, procedures, regulatory requirements, to help us understand the significance. This sort of assistance of the trier of fact is a routine part of the hearing procedure. You know, it's not the province of experts.

We also asked ourselves, you know, assuming that we find something that is a non-compliance, is there any nuance around this that might not be immediately apparent to us. And again, we would expect this to be explained to us or have its significance explained to us through ordinary evidence. You know, there is perhaps an explanation for non-adherence or other circumstances. We would expect this to come out in other evidence. You know, why people did what they did is evidence that we expect to receive through the ordinary process.

So to sum up, you know, an expert report is kind of top-down, and we think the right process is bottom-up. Let's figure out what happened. Let's, you know, characterize it, and then let's decide, you know, whether cumulatively everything we have found has happened supports the decision of the Registrar to revoke the licence.

Said another way, you know this top-down versus bottom-up, knowing the best—as an example, knowing the best practices for running residential facilities for children and youth may be helpful and provide context, but it does not obviate the need for us to figure out what actually happened and whether it was compliant with the Act and other regulatory requirements.

We also thought about the fact that we haven't heard all the evidence yet. So, you know, it's not impossible in a small number of instances that a point arises about which one of the experts could assist the Tribunal, but, again,

assistance or helpfulness is not the Mohan test. The Mohan test says it must be necessary and, in fact, some iterations of the test say that it must be essential.

This is not the case. Assessing regulatory compliance is squarely within the expertise of this Tribunal. So we find that the expert evidence is not necessary for us to make a determination in this case. We do not feel that it is beyond the ability, our ability, to understand the evidence unaided.

Now, you know, having found that the proposed evidence fails on this criteria we don't think we need to talk about relevance and qualified experts but—and I think I'll expand on this in the written reasons, but the same principles apply which is in terms of qualifications there are—you know, neither of the experts, both agreed that they haven't actually had experience in matters relating to compliance with the CYFSA, and that was important to us. As well, the general relevance—I mean, certainly these reports are relevant in a general way, but again, we don't know that they meet the Mohan test of being necessary or relevant to the specific issues being decided.

And again, not necessary, but you don't just—so you know, we thought about it, the second part of Mohan, which is the gatekeeper role, it's our view that the probative value of the expert evidence --because there's a very small universe we think of situations where it may be of assistance to us—is unlikely to outweigh the prejudicial effects of, you know, the efficiency of the Tribunal.

Now, so the other grounds that the appellants raised in this regard is prematurity and arguing that they should be made at the time the evidence is proffered. This suggests that the evidence needs to be heard before we can decide whether its relevant or not. And in fact, we had the reports and we looked at the reports in quite a lot of detail to help us make this decision.

So, in a sense it wasn't premature, there was an understanding of what the expert evidence was going to be. More importantly, though, is you've heard me banging on about it already, my old friend, efficiency.

We do not believe that there would be—there would be no advantage whatsoever in hearing the evidence of the experts and then deciding if it was going to be of assistance or not, particularly when the reports were in hand, so we do not find that the motions were premature. I think that's all that I planned to say about this, except that we order the four reports of the experts

and their testimony in this regard will not be admitted to these proceedings.¹¹

- [30] In the Decision on the merits, the LAT reiterated its ruling that efficiency prevailed over the limited probative value of the evidence:

...we were concerned about efficiency. On the first day of the hearing the parties indicated that the number of days required for the hearing had nearly doubled from when the matter had been set down. In exercising of our gatekeeper function, we weighed the anticipated limited probative value of the proposed expert evidence against the need to ensure an efficient resolution of the matter on the merits.¹²

Evidence at the hearing

- [31] At several points throughout the hearing, the LAT allowed opinion evidence to be proffered by the Director, Ministry inspectors and KHCAS with respect to fire safety standards and the care needs of medically complex foster children under the Appellant's care. These witnesses had no fire safety expertise and were not health professionals qualified to opine on children's mental or physical health nor did they consult with independent fire or care professionals in arriving at their opinion.

Decision on the Merits

- [32] On October 8, 2020, the LAT issued its Decision in which it found that there were the following grounds to refuse to renew the Licence:

- (i) [The Appellant's] actions and omissions in relation to fire safety at Location A amounted, cumulatively, to it providing residential care in a manner prejudicial to the health, safety and welfare of children, a ground to refuse to renew the Licence under s.262(d) of the *CYFSA*;
- (ii) The care provided to FL and the other children at Location A amounted to [the Appellant] providing residential care in a manner prejudicial to the health, safety and welfare of children, a ground to refuse to renew the Licence under s.262(d) of the *CYFSA*.¹³

- [33] The LAT also made findings of non-compliance at Locations B to E run by the Appellant (there were no findings of non-compliance with respect to Location F) but made no determination of whether those findings would, standing on their own, be sufficient to revoke the Appellant's licence. Rather, the LAT relied on the findings relative to Locations B to E to conclude that because of the Appellant's non-compliance after the fire, it would

¹¹ Transcript of the LAT's Ruling on the Motion dated June 17, 2019, Appeal Book and Compendium, CH-1357-1361.

¹² Decision, para.27.

¹³ Decision, paras. 12-15.

not be effective to impose further conditions on the Licence in order to bring the Appellant into compliance with the *CYFSA*.¹⁴

- [34] With respect to its conclusion that the Appellant's approach to fire safety at Location A was grounds to refuse to renew its licence, the LAT found that there was no clear fire safety plan, that the Appellant did not use the fire retrofit features installed at the home, that there was a failure to provide staff with adequate fire safety training and that the sealing of the sliding glass doors and the unbreakable bedroom window together with the prior operator's posted fire safety plan amounted to providing residential care prejudicial to the health, safety and welfare of the residents.¹⁵
- [35] The LAT also found that the Appellant's failure to provide adequate care to FL, a resident with extremely high needs, and the other residents of Location A was a ground to refuse to renew its licence. It found that with respect to FL, in some cases staff were not sufficiently skilled, not sufficiently trained or otherwise not able to appropriately manage and provide proper care. The LAT further found that the Appellant did not access appropriate mental health care for FL at a time when it was clear to its staff that FL was in crisis owing to a change in psychotropic medication.¹⁶
- [36] In support of its finding regarding FL, the LAT relied upon a report dated March 16, 2016 of Dr. Umesh Jain, Child and Adolescent Psychiatrist at the Hospital for Sick Children in Toronto, who treated FL through the Telepsychiatry Program.¹⁷ This report was contained in a document book marked as an exhibit for identification at the opening of the hearing on the basis that the documents therein would become part of the evidentiary record only if they were referred to in the evidentiary phase of the hearing. Dr. Jain was not consulted as part of the various investigations or the Director's inspection. He was not called as a witness at the hearing nor was his report or note put to any witness during the hearing.
- [37] Dr. Jain's report stated that he had not done a formal risk assessment. He stated that FL has strong risk factors for deterioration and in his opinion, it is dangerous for FL to be within the community setting.
- [38] The LAT relied upon Dr. Jain's report to conclude that FL's needs were extremely high, that FL was high risk, challenging, required significant resources and was at risk of deterioration.¹⁸ The LAT went on to conclude that the Appellant was not meeting these needs and referred to Dr. Jain's note that FL required firm control which the LAT found was absent in the approach of the Appellant's staff.¹⁹

Issues Raised on this Appeal

¹⁴ Decision, para.293.

¹⁵ *Ibid*, paras.12 and 100.

¹⁶ *Ibid*, para.153.

¹⁷ *Ibid*, paras.111-114.

¹⁸ *Ibid*, para.113.

¹⁹ *Ibid*, para.124.

[39] The Appellant raises the following issues on this appeal:

- (a) Did the LAT err in excluding the evidence of Mr. Rochon and Mr. Fulton at the hearing? If so, was that error compounded by the LAT's inappropriate decision to accept inadmissible evidence from unqualified witnesses?
- (b) Did the Decision result in an abuse of process given that the LAT refused to renew the Licence based on findings regarding Locations A, in respect of which the Director had not formed the opinion that renewal should be refused? and
- (c) Did LAT fundamentally misapprehend the evidence in determining that the Licence should not be renewed with conditions?

Grounds to Refuse to Renew Residential Care Licences under the *CYFSA*

[40] This appeal relates to a renewal of a residential care licence under Part IX of the *CYFSA*. Pursuant to s. 244 of the *CYFSA*, a licence is required in order to:

- 1. Operate a children's residence.
- 2. Provide residential care, directly or indirectly, in places that are not children's residences,
 - i. for three or more children not of common parentage, or
 - ii. in such circumstances as may be prescribed.

[41] An applicant is entitled to the renewal of a licence unless the Director under the *CYFSA* is of the opinion that there are grounds to refuse it. The grounds for refusing to renew a licence are set out in s. 262 of the *CFYSA*:

262. A Director may propose to revoke or refuse to renew a licence if, in the Director's opinion,

- (a) the licensee or an employee of the licensee, or where the licensee is a corporation, an officer or director of the corporation has contravened or has knowingly permitted a person under their control or direction or associated with them to contravene,
 - (i) this Act or the regulations,
 - (ii) any other applicable law, or
 - (iii) a condition of the licence;
- (b) the conduct of any person mentioned in clause (a) affords reasonable grounds to believe,

(i) that the person is not competent to operate a children's residence or to provide residential care in a responsible manner in accordance with this Act, the regulations or any other applicable law, or

(ii) that the children's residence or other place where residential care is provided is not being or will not be operated in accordance with this Act, the regulations or any other applicable law;

(c) the premises where the children's residence is located or the residential care is provided do not comply with the requirements of this Part, the regulations or any other applicable law;

(d) the operation of the children's residence or the provision of residential care is carried on in a manner that is prejudicial to the children's health, safety or welfare;

(e) any person has made a false statement in the application for the licence or for its renewal, or in a report or document required to be furnished by this Act or the regulations or any other applicable law;

(f) a change has occurred in the employees, officers or directors of the licensee that would, if the licensee were applying for the licence in the first instance, afford grounds under clause 261 (b) for refusing to issue the licence; or

(g) a ground exists that is prescribed as a ground for refusing to renew or for revoking a licence.

[42] Non-compliance with the legislation, Ministry policies and/or conditions on a licence will not automatically warrant a refusal to renew a licence. Rather, in the event of non-compliance, the Director has the discretion to determine an appropriate course of action which is less drastic than revocation.²⁰

[43] If the Director proposes to revoke or renew a licence under section 262 of the *CYFSA*, the Director is required to notify the applicant or licensee in writing and the notice of proposal shall set out the reasons for the proposed action.²¹

The LAT's Jurisdiction

[44] After receiving a notice of proposal, the applicant or licensee may request a hearing to the LAT. Pursuant to s. 265 of the *CYFSA*, after holding a hearing, the LAT may by order:

²⁰ *11449 v. Registrar Burial and Cremation Services Act, 2002*, 2019 CanLII 51329 (ON LAT) [11449] at para.170, appeal of the LAT decision dismissed 2019 ONSC 6091 (Div.Ct) , aff'd 2020 ONCA 771.

²¹ *CYFSA*, s.263.

265 5(a) in the case of a proposal to refuse to issue a licence or to revoke or refuse to renew a licence,

(i) direct the Director to carry out the proposal, or

(ii) direct the Director to take such other action as the Tribunal considers appropriate, in accordance with this Part and the regulations;

(b) in the case of the imposition or amendment of conditions on a licence,

(i) confirm any or all of the conditions,

(ii) strike out any or all of the conditions, or

(iii) impose such other conditions as the Tribunal considers appropriate;
or

(c) in the case of the suspension of a licence,

(i) confirm the suspension, or

(ii) direct the Director to take such other action as the Tribunal considers appropriate, in accordance with this Part and the regulations.

(6) In making an order under clause (5) (a) or (c), the Tribunal may substitute its opinion for that of the Director.

Court's Jurisdiction

[45] Subsection 267(1) of the *CYFSA* provides a right of appeal to this court from the LAT's licensing decisions under the *CYFSA*.

LAT's Discretion to Admit Evidence and Control its Process

[46] The LAT has broad discretion under s. 15 of the *Statutory Powers Procedure Act* ("SPPA") to admit evidence that is "relevant to the subject-matter of the proceeding" regardless of whether it would be admissible as evidence in a court, including hearsay evidence. The reliability of hearsay evidence is normally a question of weight.²² S. 15(1) provides:

15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

²² *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 15(1); *Sutton v. Patterson and Morrow*, 2021 ONSC 1403 at paras. 44-45 (Div. Ct.); *Murray v. Human Rights Tribunal of Ontario*, 2018 ONSC 2953 at para. 24 (Div. Ct.).

(a) any oral testimony; and

(b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[47] Expert testimony may be necessary to provide opinions in regard to matters that are likely to be beyond the fact-finder’s knowledge or experience.²³ This Court stated in *M.R. v. D.E.* that s. 15 of the *SPPA* provides “wide powers concerning the admission of evidence, including experts” and that while the factors in *Mohan* are relevant, tribunals are not bound by them.²⁴

[48] Rule 10 of the LAT’s *Rules of Practice and Procedure* provides the procedural requirements for expert witnesses. The Rules do not constrain the LAT’s discretion to admit expert evidence.

Standard of Review

[49] The Supreme Court of Canada held in *Vavilov* that appellate standards of review are to be applied on a statutory appeal from a decision of an administrative tribunal, namely correctness on questions of law, and palpable and overriding error on questions of fact and mixed fact and law, subject to any extricable questions of law.²⁵

[50] The distinction between questions of law, fact, and mixed fact and law was explained in *Canada (Director of Investigation & Research) v. Southam Inc.* as follows:

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.²⁶

[51] The Appellant argues that the LAT’s decision not to admit the expert evidence is a violation of procedural fairness. There is no standard of review on issues of procedural fairness.

Test on Admission of Expert Evidence

[52] The oft-cited *Mohan* test for the admission of expert evidence depends on the application of the following threshold criteria:

(a) relevance;

²³ *British Columbia Lottery Corp. v. Skelton*, [2013] B.C.J. No. 12 (S.C.) at para. 55.

²⁴ *M.R. v D.E.*, 2016 ONSC 1542 at para. 21 (Div. Ct.).

²⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37.

²⁶ *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35.

- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.²⁷

Mohan also underlined the important role of trial judges (or as in the case here, the tribunal) in assessing whether otherwise admissible expert evidence should be excluded because its probative value is overborne by its prejudicial effect—a residual discretion to exclude evidence based on a cost-benefit analysis.²⁸

- [53] The Respondent concedes that on this appeal, only two aspects of the LAT’s application of the *Mohan* test are at issue: (1) whether the expert evidence was necessary; and (2) the application of the gatekeeping balancing test.²⁹
- [54] The determination of whether to admit expert evidence under the test in *Mohan*³⁰, as modified by *White Burgess Langille Inman v. Abbott and Haliburton Co.*³¹, is highly fact dependent. As recently explained by the Court of Appeal in *R. v. Abdullahi*³²:

The application of the *Mohan* requirements in any proceeding is case-specific. In each case, the trial judge determines issues of relevance and necessity within the factual matrix of the trial in which he or she is presiding. The inquiry is very much a function of the other evidence and issues in the case being tried: *R. v. Shafia*, 2016 ONCA 812, [2016] O.J. No. 5627, at para. 229. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 23-24.

Deference on Discretionary Decisions

- [55] Deference is owed at both stages of the *Mohan/White Burgess* analysis. At the first step of determining whether the proposed evidence meets the threshold admissibility requirements (here necessity and the application of the LAT gatekeeping role), appellate interference is justified only where the finding is “clearly unreasonable, contaminated by an error in principle, or reflective of a material misapprehension of evidence.”³³
- [56] At the second step, discretionary gatekeeping, the decision maker must determine whether the benefits of admitting the evidence outweigh the “consumption of time, prejudice and confusion”. The Court of Appeal has stated that this balancing is “equally case-specific” and “involves the exercise of judicial discretion, not the application of a bright line rule.”

²⁷ *Supra* at FN 7, pp.20-25.

²⁸ *Ibid*, p.21

²⁹ Respondent’s Factum, para.49.

³⁰ *Supra* at FN 7.

³¹ *Supra* at FN 8.

³² 2021 ONCA 82 at para.35.

³³ *Supra* at FN 32, para. 36; See also: *R. v. Shafia*, 2016 ONCA 812 at para. 230.

The determination at the gatekeeper stage is entitled to deference “absent an error of law or of principle, or a material misapprehension of the evidence.”³⁴

- [57] The Supreme Court of Canada set out the standard of review for reversing a judge’s exercise of discretion in *Penner v. Niagara (Regional Police Services Board)* at paragraph 27:

A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court’s discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.³⁵

Appellant’s Submissions on Ruling to Exclude Expert Evidence

- [58] The Appellant submits that the LAT’s ruling to exclude the expert evidence is a breach of procedural fairness for the following reasons:

- (1) The LAT made the decision to exclude the expert evidence at the opening of the hearing and not when the evidence was being proffered.
- (2) The proposed evidence was proper expert evidence under s.15(1) of the *SPPA* and the LAT’s own *Rules of Practice and Procedure*.
- (3) The proposed evidence of the experts met the requirements of *White Burgess*³⁶, following *Mohan*³⁷, of relevance and necessity given the issues to be decided.
- (4) The LAT placed undue emphasis on efficiency over the Appellant’s rights to make full answer and defence, particularly given that the Appellant was facing the loss of its business. The LAT permitted 18 days of hearing, including allowing the Respondent to introduce evidence in relation to new allegations not contained in the Proposal (in regard to which the LAT made no findings), which added two days to the hearing.
- (5) Despite rejecting the expert evidence at the outset, the LAT went on to consider and admit unqualified evidence including on the issue of fire safety, rely upon an opinion of Dr. Jain in a report not properly part of the evidence and rely on opinions from other witnesses who were never qualified as experts, over the objections of counsel for the Appellant.

³⁴ *Supra* at FN 8, para. 24; *R. v. Shafia*, *supra* at FN 33, paras. 231, 234; *Supra* at FN 32, para. 36.

³⁵ 2013 SCC 19 at para. 27.

³⁶ *Supra* at FN 8.

³⁷ *Supra* at FN 7.

- (6) The LAT lacked the expertise with respect to fire safety and has no expertise in children's mental health, associated behaviours and risks or in assessing the adequacy of care and resulting outcomes.

Respondent's Submissions on Ruling to Exclude Expert Evidence

[59] The Respondent submits:

1. As the LAT may control its own processes and procedures, it was within its authority to consider the admissibility of the expert evidence at the beginning of the hearing. In any event, the Appellant did not subsequently request that the LAT revisit its decision on the admission of its expert evidence after the evidence-in-chief had been led.
2. The LAT has specialized expertise in substantively related licensing issues across the various regulatory schemes implemented by the Legislature which includes the *CYFSA*.
3. There was a plethora of evidence that the Appellant provided residential care in a manner prejudicial to the health, safety and welfare of some of its residents.
4. The LAT properly considered the test for the admissibility of expert evidence.
5. In considering the admissibility of expert evidence, the LAT had discretion to balance necessity against prejudice to the statutory requirement for efficiency.
6. The LAT's findings were highly factual and the Appellant has not identified an obvious error or flawed finding by LAT attributable to refusing to admit the expert evidence.

Analysis

- [60] While the refusal to admit the expert evidence does not rise to the level of being a denial of procedural fairness for the reasons set out below, I find that the LAT made several errors that cumulatively mean that its exclusion of the expert evidence was a palpable and overriding error. I find that the excluded evidence was central to the case and clearly relevant. I am satisfied that if the evidence had been admitted, it may have affected the result. Accordingly, the matter should be remitted back to the LAT for a new hearing before a different panel.

Prematurity of Motion/Absence of evidentiary context

- [61] The LAT misdirected itself in finding that the motions were not premature because it had read the expert reports and had an understanding of what the expert evidence was going to be. The Director's motions at the outset of the hearing were premature because the issues had not yet crystallized.
- [62] The LAT's finding that the expert evidence had "anticipated limited probative value" was made in the absence of an evidentiary context for assessing the relevance and necessity of the evidence. The LAT apparently thought that the issues before it had to do with assessing regulatory compliance with *CYFSA* rules and regulations or failures to report and document

things i.e. “licensing failures”. Clearly it did not understand at that time of its ruling that the quality of care of FL and the other residents received at Location A would be a central issue because the Director had submitted that that was not in issue. But as the hearing unfolded, it is evident that the issues were broader than whether the Appellant was in compliance with specific rules and regulations. This is evident from the LAT’s conclusion that the grounds that formed the basis for the refusal to renew the licence were that the fire safety measures and the quality of care provided at Location A posed a risk to the health and safety of the children and not just that there was a breach of specific rules or regulations.

The LAT’s Expertise

- [63] The LAT hears appeals under 34 statutes and has expertise in adjudicating licensing matters. However, its ruling that it could determine the matters in issue without the assistance of expert evidence misapprehended the extent of the issues and what was to form the crux of its decision. The LAT cannot be said to have expertise in children’s mental health, associated behaviours and risks or in assessing the adequacy of care and resulting outcomes. It also arguably did not have expertise in the areas of fire safety that it found constituted providing residential care in a manner prejudicial to the children’s health, safety or welfare.

Relevance of experts’ evidence

- [64] Rather than Mr. Rochon’s opinion not being relevant as the LAT found, his report opined on some of the very matters the LAT relied on in its Decision as the basis for grounds to refuse to renew the Appellant’s licence. That included fire safety at Location A in regard to the retrofitted door, means of egress, the sliding glass doors, the dormer windows, emergency planning and inspections and drills.
- [65] Before hearing any evidence from the Director’s witnesses, the LAT found that Mr. Fulton’s opinion on the quality of care provided to FL was “not necessary or relevant to the specific issues being decided” and should be excluded.³⁸ In its Decision, the LAT concluded that the Appellant failed to provide adequate care to FL and that staff was not sufficiently skilled, not sufficiently trained and otherwise not able to appropriately manage and provide proper care to FL, which it relied upon as the basis for grounds to refuse to renew the Appellant’s licence. As in the case of Mr. Rochon, some of the very matters the LAT relied upon in its decision as grounds to refuse to renew the Appellant’s licence were matters that Mr. Fulton had opined on in his report - that the Appellant and its foster parent and staff were capable of managing FL’s needs, that the care that FL received from the Appellant met the best practice standards, and that FL’s caregivers responded to her risk behaviours using best practice techniques.

Reliance on opinions from witnesses not qualified as experts

³⁸ Transcript of the LAT’s Ruling on the Motion, dated June 17, 2019, Appeal Book and Compendium, CH-1360.

- [66] The Appellant characterizes evidence the LAT relied upon as “inadmissible evidence from unqualified witnesses.” The LAT has broad discretion to admit evidence regardless of whether it would be admissible as evidence in a court. However, the problem of excluding the expert evidence was compounded by the LAT’s reliance on opinions from witnesses who were not qualified as experts over the objections of counsel for the Appellant.
- [67] In addition, the LAT relied upon a report of Dr. Jain made approximately a year prior to the fire to draw conclusions about FL’s level of need, the inappropriateness of FL’s placement with the Appellant and the Appellant’s inability to manage FL’s behaviours. KHCAS placed FL with the Appellant after the date of Dr. Jain’s report and was responsible for monitoring FL’s foster care. Dr. Jain was not consulted by KHCAS or the Director as part of their investigation/inspections nor did he testify at the hearing.
- [68] Dr. Jain’s report and clinical note were in a document book marked for identification only and not referred to during the evidentiary phase of the hearing and were not properly part of the evidentiary record.
- [69] The LAT relied upon the opinion contained in Dr. Jain’s report and note, after having excluded expert evidence proposed by the Appellant on the very same issues, on the basis that the expert evidence was not necessary. The LAT’s reliance upon Dr. Jain’s report, buried in 10,000 pages of documents, to conclude that the Appellant was providing residential care in a manner prejudicial to the health, safety and welfare of the residents of Location A, increases the concern over the exclusion of the expert evidence.

Efficiency

- [70] With respect to the LAT’s ruling that the expert evidence should not be allowed on the ground of efficiency, it was understandably concerned over the number of hearing days having nearly doubled from when the matter was set down. However, excluding the Appellant’s experts was not the place to draw the line, particularly in light of the LAT’s decision to allow the Director to introduce fresh allegations not included in the Proposal (allegations on which LAT ultimately made no findings³⁹). The hearing took place over 18 hearing days during which extensive evidence was heard. The addition of a few days to the hearing in order to hear necessary expert evidence would not have prevented an efficient resolution of the case. Concern about ensuring an efficient resolution of the matter is also undermined by the fact that the LAT’s decision was not released until 14 months after the hearing.

Fundamental Error

- [71] It is regrettable, particularly in the tragic circumstances of this case, to have to send this matter back for a rehearing. However, there is no assurance that if the expert evidence had been allowed, the LAT would have reached the same decision on the merits. The fact that the LAT’s findings were highly factual and that there is no particular erroneous finding that can be pointed to as flowing from the refusal to admit the expert evidence does not

³⁹ See Excerpt from June 20, 2019 transcript re Linda Galvin, Appellant’s Reply Factum, page 29.

lessen that concern. Although the regulatory contraventions which the LAT found at the Appellant's foster homes at Locations B to E could support licence conditions, LAT specifically made no determination of whether the events and circumstances relating to the Appellant's other foster homes would, standing on their own, be sufficient to support the refusal to renew the licence. If the Appellant had been given an opportunity to present this "balancing" or mitigating evidence, those breaches may not have resulted in a refusal to renew the licence.

- [72] The refusal to admit expert evidence does not rise to the level of a breach of procedural fairness because the Appellant could have asked the LAT to revisit its ruling after the Director's case had gone in. That, however, does not end the matter. The Appellant objected throughout the hearing to the opinion evidence of lay witnesses called by the Respondent when it had been denied the right to call expert evidence in rebuttal without any indication from the LAT that it would favourably consider revisiting its ruling to exclude the expert evidence.
- [73] While a high degree of deference is to be afforded to this kind of decision, given the gravity of a permanent license revocation to the Appellant, it was clearly unreasonable not to be afforded some latitude on what it regarded as fundamental to its defence. The Appellant ought not to have been prevented from calling expert evidence to rebut the opinions of the Respondent's witnesses on whether its operations complied with fire safety standards and were adequate in the provision of treatment foster care to high needs and clinically complex children meeting the standard of care expected of treatment foster homes at the time. The LAT's decision to deny the Appellant the right to call expert evidence was a fundamental error in principle amounting to a palpable and overriding error.

Errors with respect to Factual Findings

- [74] The Appellant submits that the LAT made fundamental errors with respect to its factual findings about fire safety and the adequacy of the care provided to FL and other children at Location A as well as with respect to the findings relative to Locations B to E. Given our conclusion that the LAT misdirected itself in excluding the evidence of the Appellant's proposed experts that is dispositive of the appeal, it is not necessary that findings be made in regard to this other than to say that had the expert evidence been allowed, some of the findings at the core of its Decision may well have been different.

Abuse of Process

- [75] For the assistance of the panel rehearing this matter, I have considered the Appellant's argument that the LAT's decision is an abuse of process because it found that the issues at Location A amounted to sufficient grounds to refuse to renew its licence when the Director had not formed that opinion as a ground in the Proposal. The Appellant points out that after receiving the KHCAS child-protection investigation report into the fire and the findings from the Ministry inspection, the Director renewed the Licence in December 2017 with conditions which permitted the Appellant to accept new foster children and open new foster homes up to certain limits.

- [76] As stated above, although it was regulatory contraventions at the Appellant's foster homes at Locations B to F that were the basis for the Director's Proposal not to renew the licence, the investigatory findings concerning Locations A and A-1 were also raised. The Appellant therefore had notice of that issues concerning Locations A and A-1 would be raised at the hearing. Indeed, the Appellant's own proposed expert evidence dealt with Location A.
- [77] The LAT is entitled to substitute its opinion for that of the Director when making an order on whether to refuse to renew a licence pursuant to s. 265 (6) of the *CYFSA*. A licensing hearing before the LAT allows a full examination *de novo* of the factual basis underlying the Director's opinion.⁴⁰ Accordingly, the Appellant's argument that the LAT's Decision was an abuse of process because it formed a different opinion than that of the Director is without merit.

⁴⁰ *Sharon Latham, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario under the name of Reista's Place v. Director, CFSA* (February 2005), Tab 5, Respondent's book of Authorities; *Pioneer Youth Services Toronto Inc. (Re)* (October 2007), Tab 6 Respondent's Book of Authorities; *Terrace Youth Residential Services Toronto Inc. o/a Maple Road Residence v. Director under the Child, Youth and Family Services Act, 2017*, 2019 CarswellOnt 11733 at para.53.

Conclusion

- [78] In the result, the Appellant's expert reports and testimony are clearly central to the case and necessary to the Appellant's defence of the case. The LAT's ruling excluding that evidence prejudiced the Appellant's ability to make full answer and defence. It is an error in principle going to the core of the LAT's decision and creating a substantial unfairness. The decision must therefore be set aside and the matter remitted to the LAT for a new hearing by a different panel.
- [79] The Appellant's ground of appeal that the LAT's decision resulted in an abuse of process is dismissed.
- [80] As agreed by the parties, costs in the all-inclusive amount of \$30,000 shall be paid by the Respondent to the Appellant.

I agree

Backhouse, J.

Aston, J.

I agree

Favreau, J.

Released: May 10, 2021

CITATION: Connor Homes v. Director, 2021 ONSC 3195
DIVISIONAL COURT FILE NO.: 510/20
DATE: 20210510

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

IN THE MATTER OF an appeal pursuant to
sections 263 and 267 of the *Child, Youth and Family*
Services Act, 2017, S.O. 2017, C.14, Sched. 1

Aston, Backhouse, Favreau JJ.

BETWEEN:

1392644 Ontario Inc. o/a Connor Homes

Appellant

– and –

Director Under the Child, Youth and Family Services
Act, 2017

Respondent

Licence Appeal Tribunal

Intervenor

REASONS FOR JUDGMENT

Backhouse J.

Released: May 10, 2021