SUPREME COURT OF NOVA SCOTIA
Citation: Gem Healthcare Group Ltd. v. Nova Scotia (Health and Wellness), 2017 NSSC 1

Date: 20170103
Docket: Hfx No. 442093
Registry: Halifax

Between:

Gem Healthcare Group Limited

Applicant

v.

The Attorney General of Nova Scotia,
Representing Her Majesty the Queen in Right of the Province of Nova Scotia,
on behalf of the Nova Scotia Department of Health and Wellness

Respondent

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 29 and June 3 & 17, 2016, in Halifax, Nova Scotia
Written Decision:	January 3, 2017
Counsel:	Aiden Meade and Daniel Wallace, on behalf of the Applicant Catherine Lunn, on behalf of the Respondent

By the Court:

Introduction

[1] The applicant, GEM Healthcare Group Limited, operates senior care facilities in Nova Scotia and other jurisdictions. From 1984 until 2012, GEM operated Glades Lodge, a licensed nursing home located at 25 Alton Drive in Halifax.

[2] In 2007, the Nova Scotia Department of Health and Wellness notified GEM of its decision to close nine residential care facilities including Glades Lodge. Glades would be replaced by two new facilities to be constructed and operated by GEM.

[3] Following the closure of Glades Lodge, GEM entered discussions with the Department, represented by the Attorney General of Nova Scotia as respondent, regarding the transfer of GEM's outstanding mortgage on Glades to the new facilities.

[4] On July 6, 2015, the Department issued its decision denying GEM's request. GEM seeks judicial review of that decision.

Background

[5] Pursuant to the *Homes for Special Care Act*, RSNS 1989, c 203, the Minister of Health and Wellness is responsible for the licensing and regulation of nursing homes and other residential care facilities in the Province. In addition to licensing, the Department of Health and Wellness provides funding for the operation of these facilities.

[6] The Department funded Glades Lodge. Each year, GEM provided the Department with a budget submission and a financial statement. The budget submission set out the various expenses for the preceding two years including expenses associated with administration, resident care, mortgage interest and environmental services.

[7] Following receipt of this information from GEM, the Department would issue a document entitled "Approved Budget." The Approved Budget included amounts

for salaries and benefits, operation and maintenance, and capital expenses. The capital expenses were further broken down into amounts for mortgage and loan interest, depreciation, and equipment costs.

[8] In addition to funding provided as part of the Approved Budget, service providers like GEM could also submit capital project requests to the Department for its consideration. GEM received financing from the Department for several upgrades and repairs at Glades Lodge.

[9] In 2007, the Department informed GEM that Glades Lodge was one of nine facilities it had chosen for replacement. The 124 nursing home beds at Glades were to be apportioned between two new facilities that would be built and operated by GEM. Construction would be funded by the Department.

[10] Prior to 2007, the Department did not have a policy for disposal of long term care facilities. On September 16, 2008, the Replaced Facility Disposal Policy was introduced.

[11] Under the Policy, a service provider has three options for disposing of a replaced facility: (1) retain the replaced facility; (2) sell the replaced facility; or (3) demolish the replaced facility.

[12] GEM proposed, and the Department agreed, that Glades Lodge would be demolished and the property sold. Section 5.7.6 and subsection 5.7.6.1 of the Policy deal with outstanding mortgages where a service provider elects to demolish the replaced facility:

> **5.7.6.** Any remaining financed balance on the Replaced Facility, if approved by the Department of Health, may be incorporated into the Approved Budget for the New Facility or such other financing arrangement acceptable to the Province.
>
> > **5.7.6.1.** The Department of Health will undertake a review of the complete transactional history of the financing for the Replaced Facility which the Service Provider must agree to provide. Any subsequent financing on the Replaced Facility that did not obtain Department of Health consent will not be incorporated into the Approved Budget for the New Facility. The Service Provider is responsible to pay for any financing that was not approved.

[13] Glades Lodge continued to operate and receive funding from the Department until August 2, 2012. At the time of closure, the outstanding balance of the Glades mortgage was $1,925,239.

[14] While it is not clear precisely when GEM and the Department began discussions concerning the outstanding mortgage balance, the issue was raised at a meeting between the parties on June 20, 2013.

[15] On August 29, 2013 the Department wrote to James Balcom, GEM's Director of Operations, informing him as follows:

> I understand you have been involved in ongoing discussions with DHW Finance representatives regarding the mortgage for Glades Lodge. In reviewing our documentation regarding the mortgage it is unclear as to what portion of the remaining balance relates to the DHW licensed nursing home beds. In examining the history of the mortgage balance and the total annual payments as presented in your annual financial statements, it would appear that the mortgage balance includes additional amounts not related to the DHW licensed nursing home beds. We will require a copy of the original documentation from the mortgage funding (the original commencement of the mortgage to the current balance to-date) as prepared by the TD Bank or the predecessor mortgage holder.

[16] GEM says it supplied the Department with all of the relevant documentation and financial information available. The parties engaged in intermittent discussions and exchanged correspondence over the following two years but the matter remained unresolved.

[17] On May 15, 2015 GEM brought an application for judicial review seeking an order for mandamus to compel the Department to make a decision under the Policy. The Attorney General of Nova Scotia filed a Notice of Participation on June 1, 2015.

[18] On July 6, 2015, before the judicial review could be heard, the Department issued its decision. The Department denied GEM's request and stated, in part:

> Your submission shows there were several incidents whereby Glades' mortgage principal was increased by $1,902,392 and did not have the Department's approval as part of the annual budgeting process. As such, Glades was not authorized to use any Department-provided funding to pay for these increases (neither principal nor interest).
>
> …
>
> If you would refer to the Department's Replaced Facility Disposal Policy, you will note subsection 5.7.6.1, which states:
>
> > The Department of Health will undertake a review of the complete transactional history of the financing for the Replaced Facility which the

> Service Provider must agree to provide. Any subsequent financing on the Replaced Facility that did not obtain Department of Health consent will not be incorporated into the Approved Budget for the New Facility. The Service Provider is responsible to pay for any financing that was not approved.

> Since the $1,902,392 in mortgage increases, and applicable interest, did not obtain the Department's consent, the Service Provider is responsible to pay for any financing that was not approved.

[19] GEM filed for judicial review of the Department's decision on August 10, 2015. The matter was heard before me over the course of three days, beginning on March 29, 2016, and concluding on June 17, 2016.

The Amount in Issue

[20] In 1993, Glades Lodge refinanced its mortgage, increasing it from $3,508,011 to $5,093,650. The increase occurred through three separate advances, one in each of 1993, 1994, and 1995.

[21] GEM obtained additional financing in 1999 and 2006. In 1999, GEM borrowed $24,847 in order to purchase a vehicle. GEM acknowledges that this amount should not be transferred to the new facilities. In 2006, GEM obtained a loan of $291,906 to finance three capital projects at Glades. Although this amount was initially included in GEM's claim, GEM now concedes that it received funding from the Department for these projects.

[22] When Glades closed its doors in 2012, the outstanding mortgage balance was $1,925,239. Refinancing charges accounted for $22,847 of that amount and are not part of GEM's claim. As a result, the portion of the outstanding mortgage balance GEM seeks to have incorporated into the Approved Budgets for the two new facilities amounts to $1,585,639.

Positions of the Parties

[23] GEM says the Department erred in its interpretation of the Policy in two ways. First, GEM says that the Department erred by interpreting section 5.7.6 and

subsection 5.7.6.1 of the Policy as having "retroactive" effect. According to GEM, any reference to "approved" or "consent" by the Department in the relevant provisions must be interpreted to mean approval or consent of refinancing obtained subsequent to the issuance of the Policy, or approval of financing obtained subsequent to the announcement that a facility will be closed. Second, GEM says that even if the Policy applies to the refinancing of Glades prior to the introduction of the Policy, the Department erred in determining that it never approved the additional financing.

[24] The Attorney General's position can also be broken down into two parts. First, it submits that the requirement for approval under the Replaced Facility Disposal Policy applies to refinancing obtained at any time in a replaced facility's history. Second, the Attorney General says that "approved" under the Policy refers to express approval, not implied, and there is no evidence that GEM was granted, or even requested, express approval from the Department for any increase to the Glades Lodge mortgage.

The Legislative Framework

[25] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9, explained the purpose of judicial review as follows:

> 28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> 29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers …

[26] In Brown and Evans' *Judicial Review of Administrative Action* (Looseleaf: Updated to 2016), the authors note at 13:1100:

> It is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority. … Neither individuals nor institutions have inherent powers by virtue of the fact that they perform governmental functions. And although it is not a requirement that the legal source of authority be specified on the face of an administrative order, if challenged, it must be possible to identify the supporting legal authorization.

[27] On a typical application for judicial review, the parties have no difficulty identifying for the court the particular section of legislation or regulation under which the impugned decision has been made. That is not the case here.

[28] The *Homes for Special Care Act* governs the designation, licensing and regulation of residential care facilities. Neither the legislation nor the associated regulations address the funding of for-profit facilities like Glades Lodge. In other words, there is nothing in the *Homes for Special Care Act* granting the Minister the authority to make the decision being challenged in this proceeding. Counsel for the Department noted in her brief that, "[t]he policy under which the decision at review was made, although not directly part of the licensing aspect under [the *Homes for Special Care Act*], can best be described as part of the related funding framework used as a mechanism to provide funding to long term care facilities in this Province." This is insufficient. The court cannot determine whether a decision maker has overstepped its legal authority if that legal authority cannot be identified.

[29] The only other source of the Minister's authority to deal with residential care facilities is the *Public Service Act*, RSNS 1989, c 376. Sections 45 and 46 of the *Public Service Act* state:

> **45** The Department of Health and Wellness shall be presided over by the Minister of Health and Wellness who has the supervision, direction and control of all affairs and matters relating to the Department and who shall supervise the performance of the functions of the Department.
>
> **46** The Minister of Health and Wellness has, unless specifically assigned to another member of the Executive Council, the supervision, direction and control of all affairs and matters relating to
>
> (a) health, hospitals, insured health services, emergency health services, adult protection, home care, public health, addiction services and residential care facilities; …

[30] I am satisfied that these provisions are sufficiently broad to include the power to make decisions concerning the funding by the Department of residential care facilities including when to transfer outstanding mortgage balances on facilities designated for replacement.

The Nature of the Policy

[31] Before considering the standard of review, it is helpful to consider the nature of the Replaced Facility Disposal Policy. In *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] SCJ No 31, the Supreme Court of Canada considered whether certain government policies infringed s. 2(b) of the *Charter*. The Court noted that there are two types of government policies -- legislative and administrative:

> 58 Government policies come in many varieties. Oftentimes, even though they emanate from a government entity rather than from Parliament or a legislature, they are similar, in both form and substance, to statutes, regulations and other delegated legislation. Indeed, as a binding rule adopted pursuant to a government entity's statutory powers, a policy may have a legal effect similar to that of a municipal by-law or a law society's rules, both of which fall within the meaning of "law" for the purposes of s. 1. Other government policies are informal or strictly internal, and amount in substance merely to guidelines or interpretive aids as opposed to legal rules. The question that arises is this: does a given policy or rule emanating from a government entity satisfy the "prescribed by law" re-quirement? It can be seen from the case law that a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature.

[32] The Court described an administrative policy as follows:

> 63 … Administrative rules relate to the implementation of laws contained in a statutory scheme and are created for the purpose of administrative efficiency. The key question is thus whether the policies are focussed on "indoor" management. In such a case, they are meant for internal use and are often informal in nature; express statutory authority is not required to make them. Such rules or policies act as interpretive aids in the application of a statute or regulation. They cannot in and of themselves be viewed as "law" that prescribes a limit on a Charter right. An interpretive guideline or policy is not intended to establish individuals' rights and obligations or to create entitlements. Moreover, such documents are usually accessible only within the government entity and are therefore unhelpful to members of the public who are entitled to know what limits there are on their Charter rights. No matter how broadly the word "law" is defined for the purposes

> of s. 1, a policy that is administrative in nature does not fall within the definition, because it is not intended to be a legal basis for government action.

[33] A legislative policy, on the other hand, is enacted by a government entity pursuant to a rule-making authority, sets out a general norm or standard that is meant to be binding, and is sufficiently accessible and precise: *Greater Vancouver Transportation Authority*, at paras 64 and 65.

[34] In my view, the Replaced Facility Disposal Policy is a legislative policy. While the *Public Service Act* does not contain an explicit delegation of rule-making authority, I am satisfied that the grant of authority under ss. 45 and 46 of the *Act* is broad enough to include the power to issue policies or binding rules concerning funding of for-profit residential care facilities generally and, more specifically, how to deal with remaining financed balances on facilities designated for replacement.

[35] The Replaced Facility Disposal Policy is not meant strictly for internal use as an interpretive aid for rules set out in legislation. There are no rules in either the *Public Service Act* or the *Homes for Special Care Act* with respect to the funding of for-profit residential care facilities. Instead, the Policy sets the rules for how replaced facilities will be dealt with and establishes certain obligations on the part of the service providers. It is general in scope, as it applies to all service providers who operate facilities designated by the Department for replacement. The Policy is accessible to the service providers and, as evidenced by the Department's decision, it was relied upon as a legal basis for government action.

[36] Indeed, were I to conclude that the Policy was purely administrative, without the force of law and not requiring legislative authority for its creation, I query whether the mandatory direction or general rule set out in subsection 5.7.6.1 -- that any financing that was not approved by the Department would not be incorporated into the Approved Budget of a new facility -- would represent a fettering of the Minister's discretion.

Standard of Review

[37] GEM submits that the Department's decision is reviewable on a standard of correctness. GEM relies primarily on the lack of a privative clause in the Policy and related legislation and its submission that the court has greater interpretative expertise than the Department. In the alternative, if the applicable standard is

reasonableness, GEM says the Department's decision fails to meet even that standard.

[38] The Attorney General says that the appropriate standard of review is reasonableness. Counsel for the respondent emphasizes the discretionary nature of the Policy and highlights the Department's expertise with respect to the disposal of residential care facilities. She says decisions of this nature require consideration of numerous factors and an informed specialized knowledge of all aspects of the long term care programs operated by the Department across the Province.

[39] In order to perform a standard of review analysis, it is necessary to first identify the issues. In my view, there are two issues, and each attracts a reasonableness standard.

[40] The first issue concerns the temporal operation of the Policy. Did the Department err in its conclusion that the Replaced Facility Disposal Policy applies to financing obtained prior to September 16, 2008?

[41] Although the terms "retroactive" and "retrospective" were used interchangeably by both parties, these concepts must not be confused with each other. The distinction between retroactivity and retrospectivity is perhaps most clearly explained by Professor Driedger in his text, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at page 186:

> A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways; either is it stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions, as of a past time … A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. …
>
> A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. … A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future.

[42] Professor Driedger's definitions of retroactivity and retrospectivity have been approved and relied upon by the Supreme Court of Canada and our Court of Appeal: *Épiciers Unis Métro-Richelieu Inc, division "Économgros" v Collin*, 2004 SCC 59, [2004] 3 SCR 257, at para 46; *R v Nova Pharmaceutical Society*, [1991] NSJ No

169, at para 55; *Contours Ltd v IH Mathers & Sons Ltd*, [1993] NSJ No 229, 1993 CarswellNS 56 (NSCA), at para 19; *Hayward v Hayward*, 2011 NSCA 118, [2011] NSJ No 682, at para 22. They have also been adopted by Ruth Sullivan in *Sullivan on the Construction of Statutes, 6th ed* (Toronto: LexisNexis, 2014).

[43] If the relevant provisions are applied to financing obtained prior to September 16, 2008, the Replaced Facility Disposal Policy will have a retrospective effect. The Policy operates prospectively, in that it applies to *future* requests for the transfer or incorporation of outstanding mortgage balances but it looks *backwards* in that it attaches new, prejudicial consequences for the future to an event that took place before the Policy was enacted.

[44] The second issue is whether the Department erred in its determination that it did not approve the Glades Lodge mortgage increases as required by section 5.7.6 and subsection 5.7.6.1 of the Policy.

[45] The first step in the standard of review analysis is to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to the decision maker in question on the specific issues at hand: *Dunsmuir*, paras 57, 62. Both parties agree that there is no jurisprudence determining the standard of review to be applied to a decision of the Minister of Health and Wellness on whether to incorporate the outstanding mortgage balance of a replaced facility in the Approved Budget of a new facility.

[46] The Supreme Court of Canada has repeatedly stated that where an administrative decision maker interprets or applies its home statute or statutes closely connected to its function, there is a presumption that the standard of review applicable to its decision is reasonableness: *Commission scolaire de Laval c Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8, 2016 CarswellQue 1791, at para 32; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] SCJ No 61, at paras 39 and 41; *Dunsmuir*, at para 54.

[47] The presumption of reasonableness "is not carved in stone", and "certain categories of questions – even when they involve the interpretation of a home statute – warrant review on a correctness standard": *British Columbia (Securities Commission) v McLean*, 2013 SCC 67, 2013 CarswellBC 3618, at para 22. Those categories of questions include constitutional questions, true questions of jurisdiction, and questions of law of central importance to the legal system and outside the specialized expertise of the administrative decision maker: *McLean*, para

22; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, at para 30; *Dunsmuir*, at paras 58-61)

[48] While the Department's decision in this case involves its interpretation of a policy, not its home statute, I am satisfied that the rationale underlying the presumption of reasonableness review applies equally to administrative decision makers interpreting and applying policies of a legislative nature.

[49] The issues considered by the Department are not of a constitutional or jurisdictional nature. Nor can they be considered questions of general law of central importance to the legal system and outside the specialized expertise of the Department. Questions of this nature are rare: *Commission scolaire*, at para 34. In *McLean*, the Court explained the basis for the "questions of general law" exception:

> 27 The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in Dunsmuir, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

[50] The decision in *McLean* involved the judicial review of a decision by the British Columbia Securities Commission. The appellant argued, *inter alia*, that the Commission's interpretation of "the events" that trigger the six-year limitation period under the *Securities Act*, R.S.B.C. 1996, c. 418, fell within the "general question" exception and should be reviewed on a correctness standard.

[51] Although the Court agreed that limitation periods, as a conceptual matter, are generally of central importance to the fair administration of justice, it did not accept that the Commission's interpretation of the specific limitation at issue required a correctness review. In the Court's view, "[t]he meaning of 'the events' in s. 159 is a nuts-and-bolts question of statutory interpretation confined to a particular context": para 28.

[52] The Court was equally unmoved by the argument that correctness review was warranted because reasonableness allowed for other provincial and territorial securities commissions to arrive at different interpretations of their own statutory limitation periods. According to the Court, this was not inherently problematic.

[53] Finally, the Court was not satisfied that the questions were outside the expertise of the Commission:

> 30 Third, and most significantly, the problem with the appellant's argument is her narrow view of the Commission's expertise. In particular, the appellant argues that limitation periods "are not in themselves part of substantive securities regulation, the area of the [Commission's] specialised expertise" (A.R.F., at para. 9). The argument presupposes a neat division between what one might call a "lawyer's question" and a "bureaucrat's question". The logic seems to be that because the meaning of "the events" in s. 159 cannot possibly require any great technical expertise -- there is, after all, no specialized "bureaucratese" to interpret -- why should the matter be left to the Commission?
>
> 31 While such a view may have carried some weight in the past, that is no longer the case. The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" *(National Corn Growers Assn. v. Canada (Import Tribunal),* [1990] 2 S.C.R. 1324, at p. 1336, per Wilson J.); see also *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 92; *Mowat*, at para. 25.

[54] In my view, questions about the temporal operation of a policy concerning replaced residential care facilities and the interpretation of the term “approved” used therein are not questions of general law requiring uniform and consistent answers. They are questions of interpretation confined to a particular context. Nor are the questions outside the Department’s expertise. For these reasons, I find that a reasonableness standard applies to both issues in this matter.

Temporal Operation of the Policy

[55] Although not addressed in its pre-hearing brief, GEM argued that the Policy should not be interpreted retrospectively against Glades Lodge. In other words, the Policy did not apply to the Glades mortgage increases. GEM provided no authorities on retrospectivity generally, or, more specifically, its application to government policies. Counsel for the Attorney General indicated that she was unable to find any authority addressing whether legislative presumptions like the presumption against retrospectivity apply to policies. Having concluded that the Replaced Facility Disposal Policy is legislative in nature, I am satisfied that the principles of statutory interpretation including legislative presumptions apply.

[56] There is a common law presumption that the Legislature does not intend legislation to be applied retrospectively unless the legislation is beneficial or was

enacted to protect the public. As Professor Driedger explains at page 198 of *Construction of Statutes*:

> … there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.

[57] It is not unlawful for the Legislature to enact retrospective legislation even where it attaches prejudicial consequences to a prior event. Where it intends to do so, however, it must make that intention clear in the statutory language. A presumption is simply meant to assist in determining legislative intent. Where the intent is plain from the words chosen, there is no need to resort to presumptions. As Oland, JA noted in *Hayward*:

> 48 Where, as here, the words are clear, the text of the enactment itself is sufficient to determine legislative intent. It is not necessary to search for guidance in the presumptions which assist statutory interpretation, nor in materials surrounding the enactment that might throw some light in the search for legislative intent.

[58] It is unclear from the Department's decision whether it turned its mind to the potential application of the presumption of retrospectivity. It is clear, however, that the Department applied the Policy retrospectively which means it either did not consider the issue or determined that the presumption, if it applied, was rebutted.

[59] The Replaced Facility Disposal Policy describes its objective as follows:

> **2.1** This Policy sets out the process for the disposal of a Replaced Facility. It further sets out the process for reconciling financial obligations of the Service Provider in the event that there is a mortgage or other financing in place with the Province of Nova Scotia for the Replaced Facility.

[60] The application of the Policy is addressed at section 4.1:

> **4.1** This Policy applies to each Long Term Care Facility, licensed under the *Homes for Special Care Act*, designated by the Department of Health for replacement.

[61] The term "Replaced Facility" is defined at section 3.0 as "a Facility licensed under the *Homes for Special Care Act* that is to be replaced and the property on which it is situated."

[62] Section 5.7.6 of the Policy states that any remaining financed balance on the Replaced Facility, if approved by the Department of Health, *may* be incorporated into the Approved Budget for the new facility. Subsection 5.7.6.1 of the Policy expands on this, and states:

> **5.7.6.1.** The Department of Health will undertake a review of the complete transactional history of the financing for the Replaced Facility which the Service Provider must agree to provide. Any subsequent financing on the Replaced Facility that did not obtain Department of Health consent will not be incorporated into the Approved Budget for the New Facility. The Service Provider is responsible to pay for any financing that was not approved.

[63] In my view, if the Department intended for the Replaced Facility Disposal Policy to apply to facilities designated for replacement prior to the introduction of the Policy, like Glades Lodge, it failed to make that intention clear in sections 2.1, 3.0, and 4.1.

[64] The ambiguity is not resolved by subsection 5.7.6.1. To say that the provision is unclear would be an understatement. The reference to "subsequent financing" is perplexing. Subsequent to what? GEM suggests "subsequent to the introduction of the Policy" or "subsequent to a facility's designation as a 'Replaced Facility'", while the Department's position is that "subsequent financing" refers to any financing obtained after the original mortgage. Reading the subsection in isolation, one would assume that "subsequent" refers back to the review of the transactional history mentioned in the preceding sentence but this is unlikely to have been the Department's intention.

[65] It would have been relatively easy for the Department to draft the Replaced Facility Disposal Policy in a manner that eliminated any doubt as to the scope of its application. For example, "Replaced Facility" could have been defined to include facilities designated for replacement prior to the introduction of the Policy. Or instead of referring to the ambiguous "subsequent financing," subsection 5.7.6.1 could have referred to any re-financing obtained after a certain fixed date.

[66] Although the standard of reasonableness applies to the Department's conclusion that the Policy applied to Glades Lodge, the Supreme Court of Canada in *McLean* acknowledged that there will be cases where only a single interpretation is reasonable:

> 38 It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead

> to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.

[67] In my view, this is one of those cases. There is nothing in the language of the Policy that clearly indicates an intention on the part of the Department that the Policy apply retrospectively.

[68] I find that as a consequence of the Department's failure to clearly express its intention, the presumption against retrospectivity is not rebutted and the Replaced Facility Disposal Policy, including section 5.7.6 and subsection 5.7.6.1, does not apply to Glades Lodge. The Department's decision to the contrary is not reasonable.

[69] Although GEM has requested an order directing the Department to incorporate the outstanding Glades mortgage balance into the Approved Budgets for the two new facilities, I am not satisfied that this relief is appropriate in the circumstances. It does not follow from my conclusion that the Replaced Facility Disposal Policy should not have been applied to Glades Lodge that the Department must incorporate the outstanding Glades balance. Without the Replaced Facility Disposal Policy, the decision whether to incorporate the outstanding mortgage balance on a replaced facility is entirely discretionary, as it was prior to the introduction of the Policy.

[70] I am prepared to return the decision to the Department for reconsideration, with one important direction. In the absence of the Replaced Facility Disposal Policy, there is no requirement for approval of re-financing that the Department can retrospectively apply against GEM in order to deny the request to transfer the outstanding mortgage balance. Prior to the Policy, the Department never communicated to service providers that they must obtain approval of additional financing if, in the event that their facilities were eventually designated for replacement, they planned to ask the Department to transfer an outstanding mortgage balance. Any decision to deny GEM's request on this basis would constitute an unreasonable exercise of discretion.

[71] In the event that I am wrong in finding that the Policy does not apply to Glades Lodge, I will go on to consider whether the Department erred in its conclusion that it did not approve of the mortgage increases.

The Meaning of "Approved"

[72] GEM argues that the word "approved", as used in section 5.7.6 and subsection 5.7.6.1 of the Replaced Facility Disposal Policy, should be interpreted to include implied approval which GEM says it received from the Department. In the alternative, GEM says that even if express approval is required, the Department erred in finding that it did not approve the increases to the Glades mortgage.

[73] The Attorney General says that the approval contemplated by section 5.7.6 and subsection 5.7.6.1 is limited to express approval. In other words, re-financing cannot be "approved" without an official acceptance or agreement. The Attorney General argues that GEM cannot point to anything in the evidentiary record where the Department explicitly said it approved of the mortgage increase.

[74] Section 5.7.6 and subsection 5.7.6.1 refer to financing being "approved", but neither provision specifies the nature of the required approval or the process by which the approval is to be obtained. As a result, both interpretations suggested by the parties are reasonable. In *McLean*, the Supreme Court of Canada explained that where two reasonable interpretations of a provision exist, the reviewing court must defer to the interpretation chosen by the decision maker:

> 32 In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations (*Dunsmuir*, at para. 47; see also *Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405 (S.C.C.)). Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is who gets to decide among these competing reasonable interpretations?
>
> 33 The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker — not the courts — to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

[75] The Court went on to recognize that "[j]udicial deference in such instances is itself a principle of modern statutory interpretation": para 40.

[76] According to the Court in *McLean*, an applicant on judicial review must satisfy the reviewing court of two things: (1) the applicant's proposed interpretation is reasonable, and (2) the decision maker's chosen interpretation is *unreasonable*: para 41.

[77] The applicant has not satisfied me that the interpretation chosen and applied by the Department in this case is unreasonable. As a result, I defer to the interpretation chosen and applied by the Department.

[78] Having concluded that some form of express or official approval is required under the Policy, I will proceed to consider GEM's argument that it received approval of that nature for the Glades Lodge mortgage increases.

[79] As previously mentioned, the Glades Lodge mortgage amount was increased from $3,508,011 to $5,093,650, with advances being made in 1993, 1994, and 1995.

[80] The first document relied on by GEM is a letter dated February 24, 1995, from Syed Hussain of Glades Lodge to Art Rice, an employee of the Department. In the letter, Mr. Hussain describes the past practice at Glades whenever a deficiency was cited by a government department or when GEM felt an improvement was necessary for the well-being and safety of the residents:

> As I have mentioned, in the past, after informing the department concerned, we have just gone ahead, either by borrowing the money or by spending from the budget to look after the deficiency. If we have borrowed, we have shown the interest cost in the following years budget. The prime example, as you have seen, is the interest given in the budget for 1992/93, 1993/94.

[81] On the next page of the letter, Mr. Hussain discusses the new financing package in which Glades received a lower interest rate:

> As we discussed regarding the new financing package in which we received the lower interest rate, there is a cost associated with the lower interest rate which is as follows:
>
> | | |
> |---|---|
> | Brokerage Fee | $50,000.00 |
> | CMHC Fee | $20,000.00 |
> | CMHC Underwriting Fee | $6,000.00 |
> | Legal Fee | $5,000.00 |
> | Appraisal Fee | $2,200.00 |
> | Environmental Studies* | $3,455.00 |

*(A condition of the mortgage.)

All these figures have to be added into the mortgage to arrive at a realistic presentation of the lower interest rate.

I am also enclosing my 1995, 1996 projections of the budget. …

[82] The next document is what GEM describes as the official Glades Lodge Approved Budget as issued by the Department for 1994/95. That document includes the following:

Total Mortgage is	:	5,093,650
Less CMHC Holdback :		711,448

		4,382,202
		711,448 – 5,093,650 = 14%
Total Interest		353,811
	Deduct 14%	49,534

		304,277

[83] GEM says that this is a direct and express acknowledgement by the Department of the increased mortgage amount and, unless the Department allocates its funding arbitrarily, it relied on this information when issuing the Approved Budget.

[84] The Attorney General says that GEM is mistaken and this document is not an Approved Budget issued by the Department but is instead a document prepared by GEM that was included as an enclosure to the letter from Mr. Hussain to Art Rice. The Attorney General says the full six pages of the document package sent by Mr. Hussain, including the alleged Approved Budget, appear at exhibit 6 to the affidavit of Barry Burke, Director of Finance, Health Authorities, Continuing Care, and other Programs.

[85] Having reviewed other examples of Approved Budgets issued by the Department, I find that the document relied on by GEM is not a true copy of the Glades Lodge Approved Budget 1994/95 as issued by the Department. To clarify, I do not find that GEM intentionally misrepresented the nature of the document to the

court. I believe instead that the document was prepared by Mr. Hussain and Mr. Balcom, the affiant, was mistaken as to its nature.

[86] GEM refers to the next set of documents, the 1998/1999 Budget Submission prepared by GEM, and the corresponding Approved Budget 1998/99 issued by the Department, as "key" to its argument that the Department gave express approval to the mortgage increases. Form 3 of the Budget Submission, under the heading "Mortgage Details," notes that the balance of the mortgage at last renewal is $5,093,650, and the interest rate at last renewal was 7.125. It states that the term remaining at last renewal is five years and the next renewal date is December 1998. At the bottom of the page, the "1998-99 Forecast" for "Interest Expense" is $320,000.

[87] The Approved Budget for Glades Lodge was issued on October 19, 1998, with an effective date of April 1, 1998. It was accompanied by a covering letter from Robert St. Laurent, Interim Head, Integrated Services Delivery Branch. In the letter, Mr. St. Laurent sets out a number of adjustments that have been made to the Approved Budget from the prior year. He then states:

> Also effective April 1, 1998 your budget is increased by $73,018 to cover increased mortgage costs.

[88] The Approved Budget lists the Mortgage/Loan Interest funding amount as $320,000, up from $246,982 the previous year, amounting to an increase of $73,018 as noted in the letter.

[89] GEM says this letter and the associated Approved Budget constitutes an express approval of the mortgage increases. GEM points out that Mr. St. Laurent described the increase as being intended to "cover increased mortgage costs." Since the interest rate had not changed from the previous year, GEM reasons that any "increased mortgage costs" were as a result of the increased principal. GEM says this letter is conclusive evidence that the refinancing was accepted and approved by the Department.

[90] The Attorney General argues that knowledge by the Department of the mortgage balance and increases does not amount to approval. Furthermore, the evidence of Barry Burke and Department employee Paula Langille is that the Department funding amount is not linked to the balance of outstanding mortgage debt on residential care facilities. The subsidy for mortgage/loan interest is intended to provide funding assistance toward, not reimbursement of, a facility's mortgage

principal and interest payments. The Attorney General says that the annual allocation for mortgage/loan interest will never match the principal and interest incurred and paid in that particular year.

[91] The word "express" is defined in *Black's Law Dictionary,* 10th ed (St. Paul, MN: Thomson Reuters, 2014) as follows:

> **express**, adj. (14c) Clearly and unmistakably communicated; stated with directness and clarity.

[92] In my view, if Mr. St. Laurent had given express approval of the mortgage increases, any comparison of the projected mortgage/loan interest amount set out in the Budget Submission to the funding provided in the Approved Budget would be unnecessary. There would be no need to make inferences as to the meaning of the phrase "increased mortgage costs." Express approval of the mortgage increases would be plain and unmistakable.

[93] The letter from Mr. St. Laurent and the corresponding Approved Budget, when considered with the other evidence, constitute implied, not express, approval of the mortgage increases. The Attorney General's argument that funding amounts for mortgage/loan interest are not linked in any way to the projected or actual expenses incurred by the facility is difficult to accept when reviewing the funding amounts provided from 1998 onward. Prior to 1998, the funding provided was, at times, significantly less than the actual costs. From 1998 until 2012, the amounts either met or exceeded the actual costs incurred by Glades Lodge.

[94] These are the facts:

- The intention of the Policy was to ensure that public funds were not used to reimburse service providers for mortgage increases that had not been approved by the Department.

- Based on the correspondence exchanged in 2013, approval would not be given where the mortgage increases were unrelated to the Department nursing home beds.

- The Department was provided with details of the mortgage increases.

- At no time between 1993 and 2012 did the Department request further information as to the reason for the mortgage increases.

- From 1998 onward, the Department provided annual funding for mortgage/loan interest that met or exceeded the actual mortgage and interest costs.

[95] The only reasonable inference from the foregoing is that, prior to the introduction of the Replaced Facility Disposal Policy in 2008, and for four years *after* its introduction, the Department was satisfied that taxpayer dollars -- in the form of funding for mortgage/interest costs -- were not being used to pay expenses that were unrelated to the licensed nursing home beds. In other words, the Department approved the mortgage increases.

[96] The inference remains when one considers what would have occurred if Glades Lodge had not been designated for replacement. Absent unexpected budgetary constraints, the Department would have continued to fund the mortgage/loan interest costs until the entire mortgage balance was paid off – the same costs it now says were not approved.

[97] That said, the Department interpreted the Policy as requiring express approval, and I have concluded that this was reasonable based on the wording of the Policy. As a result, I find that the Department did not err in its conclusion that it did not provide approval for the mortgage increases as required under the Policy.

Conclusion

[98] I have found that the Department's conclusion that the Replaced Facility Disposal Policy applied to the Glades Lodge mortgage increases was unreasonable. The request by GEM for incorporation of the outstanding Glades Lodge mortgage into the Approved Budgets for the two new facilities will be returned to the Department for reconsideration.

[99] There is nothing inherently unreasonable about introducing a Policy requiring express approval of the re-financing of residential care facilities, and the wording of the provisions can support this interpretation. Indeed, GEM admitted that creating a Policy requiring approval for financing increases was entirely reasonable. The true nature of GEM's grievance, in my view, is not with the Department's interpretation of the provisions but with the unfairness that results from the retrospective application of them. As a consequence of my finding on the first issue, however, a decision will be made on GEMs request without the imposition of a retrospective requirement for approval.

[100] I am confident that the Department will carefully review the relevant documentation, along with this decision, and exercise its discretion in a fair and reasonable manner. I order that the Department issue its decision within 60 calendar days of the release of this decision.

[101] I will leave the issue of costs to the parties to try to resolve by agreement, failing which I ask for their written submissions within 45 calendar days of the date of release of this decision.

McDougall, J.