SUPREME COURT OF NOVA SCOTIA

Citation: Kairos Community Development Inc. v. Nova Scotia (Community Services), 2011 NSSC 490

Date: 20111230
Docket: Hfx.No. 265555
Registry: Halifax

Between:

Kairos Community Development Inc.

Plaintiff

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in the right of the Province of Nova Scotia (Department of Community Services)

Defendant

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	December 8, 9, 13, 14, 15, 2010, June 13, 14, 16, 21, 22, 23, 27, 29, 29, 30, 2011, in Halifax, Nova Scotia
Decision:	December 30, 2011
Counsel:	Grant Machum, for the plaintiff Mark Tector Tipper McEwan Aleta Cromwell, for the defendant Glenn Anderson, QC Kathryn Lo, A/C

By the Court:

BACKGROUND:

[1] The Plaintiff (Kairos) is a small for profit organization that provides support services to persons with disabilities. Since 1992 it has been providing these services in unlicensed supervised apartment settings. The purpose of these apartments is to facilitate independent living within the community as opposed to living in a licensed facility, such as a group home or a nursing home. The Defendant, the Provincial Department of Community Services (DCS), pays Kairos to provide those services.

[2] Prior to 1998 the provision of these services was the responsibility of the individual municipalities. The municipalities implemented unlicensed service agreements which bound the municipality, the service provider and the service recipient. In 1998 the Province of Nova Scotia assumed responsibility for social services through the Employment Support and Income Assistance Act, S.N.S. 2000, c.27. DCS was the department that administered these services on behalf of the Province of Nova Scotia.

[3] Subsequent to 1998 DCS implemented a protocol that required the service providers, including Kairos, to submit written proposals on behalf of their individual clients. These proposals included a plan of service for the client and the costs involved in providing those services. These service proposals were usually accepted as submitted, and continued indefinitely unless and until there was a change in the client's needs.

[4] This action seeks damages for the period 1998-2009. Kairos alleges for that period of time they were treated differently than other providers of similar services. Kairos claims that DCS paid them less than other providers. Kairos advances a claim for $1,725,228 plus interest of $488,230. Additionally there is a mileage adjustment claim of $28,800 and a claim for $100,000 in punitive damages. Kairos bases its claim in negligent misrepresentation and breach of contract.

[5] Kairos bases its negligent misrepresentation claim on assurances it alleges were made over the years by DCS employees. Kairos argues it was often told it was being paid the same as other providers. Kairos argues it was an explicit and/or implicit term of its proposals that it was being paid the same for service fees and rates as other service providers. It says it relied on these representations when

proposals were submitted and, as a result, suffered ongoing revenue losses. DCS denies that such representations were ever made.

[6] Somewhat related to this aspect of the claim is Kairos's suggestion that DCS invited/induced it into accepting clients into supervised apartments when, in fact, the client required a higher level of care. Kairos argue these placements resulted in lost service fee revenues.

[7] Kairos bases its breach of contract claim on a government directive termed the "Interim Standards." Between 1994 and 1998 DCS conducted a review of its support for persons with disability's program. In 1996 the Minister of Community Services wrote to all service providers stating as follows:

> "Today, I am pleased to announce the release of the "Interim Standards - Community Based Options Program." These interim standards are intended to provide potential and existing service providers with standards on which to base their operation and ensure the provision of quality service for individuals served through the program."

There is no dispute these Interim Standards applied to all "unlicenced" service providers, including Kairos. Notwithstanding the title, they continue to apply to this day.

[8] The preamble to the Interim Standards provides as follows:

> "The interim standards for the community based options program are intended to provide potential and existing service providers with standards on which to base their operation and ensure the provision of quality service for individuals served through the program."

These standards indicate that supervised apartments are part of the community based options program. They also define supervised apartments as follows:

> "Up to 3 persons with a mental disability or up to 3 persons with a mental handicap are provided with an opportunity to live in an apartment setting in the community. Staff may visit regularly or live-in, depending on the needs of the residents. There is an expectation that existing skills will be maintained."

[9] The standards also address funding in the following manner:

> "Based on the client's assessed level of care/program needs, the per diem rates for individuals maintained in community based options shall be approved at a level comparable to the per diem range for a comparable level of care in a licensed facility under the Homes for Special Care Act."

Kairos advances the position this funding requirement establishes that DCS was, and continues to be obliged to pay it at a level comparable to other organizations providing supervised apartment services.

[10] DCS takes the position the Interim Standards do not provide for such equality in compensation. The Departments view is that the funding of such service providers is based on proposals submitted by the service providers. This includes a plan of service for the client and a projection of the estimated costs in delivering the service. In other words, they negotiate different arrangements for each client. Inherent in their argument is that the Interim Standards have more to do with quality assurance than a compensation template.

[11] Kairos relies on the expert report and testimony of W. Grant Thompson, FCA to establish its claim for damages. Mr. Thompson's opinion is based on the assumption the Interim Standards guarantee that service providers providing a comparable level of care be funded at a comparable level. To affect this comparison Kairos identified two other service providers whom they felt most mirrored Kairos's operation. (Operators A & C).

[12] The Defendant DCS retained Susan MacMillan, FCA, in order to provide an expert report and evidence. It was her task to test Mr. Thompson's assumptions. She stated at page 11 of her report:

> "We do not agree with Mr. Thompsons assumptions, explicit and implicit, underlying his approach and calculations, including:
>
> · The primary assumption that service providers participating in the supervised apartment program are entitled to consistency in billing rates, and
>
> · The assumption that monthly fees paid by the Department of Community Services to service providers can be compared without reference to specific client assessments that determine the client hours of support and ultimately drive Department of Community Services funding."

In light of the above, Ms. MacMillan concluded that "the losses calculated by Mr. Thompson are not reasonable."

THE BASIC SERVICE FEE:

[13] The most significant claim advanced by Kairos relates to the "service fee" that it negotiated with municipalities and then DCS. In addition to the service fee, Kairos billed the direct costs incurred on behalf of the client. These costs included rent, transportation, clothing, phones and flowed through Kairos's books. Kairos did not profit from these flow through payments. All revenues and profits were intended to be captured in the service fee.

[14] Kairos's clients were referred from a number of sources but primarily from the Halifax area. (Central Region). Upon referral, Kairos conducted an assessment to determine the individual needs of a client. These needs were then translated into a service fee and direct costs. The service fee was quantified within DCS's established funding protocol. It would appear funding requests were approved as submitted. The service fee remained constant unless the needs of the client changed.

[15] The basic service fee charged by Kairos was $400 a month which translates to a per diem rate of $23.09. This figure paid for four hours of support, per client, per week. Some clients required additional hours of support and DCS were usually prepared to increase these hours. The hourly rate remained the same regardless of the client's needs and hours of support. As noted earlier, all of Kairos's revenues were to be captured from the service fee. Kairos's damage claim is based on a comparison of its average monthly approved billing rate versus the average approved billing rate of other providers who provided the same level of care.

OTHER FUNDING INITIATIVES:

[16] Over the years DCS has offered all service providers the opportunity to participate in various funding initiatives. One of these programs involved annual increases for funding salaries and benefits (salary framework review). The purpose of this review was to standardize the wage rate for direct care staff who met minimum training qualifications. Service providers who participated in this review received increased funding for direct care wages and benefits. Kairos participated in this review and received increased funding for the period April 1, 1998 to March 31, 2002. Starting April 1, 2002 and continuing in each year, DCS provided cost of living adjustments for staff wages and benefits. Kairos is not claiming any damages arising from this initiative. All of these increases were designed to flow through to the employee and were not meant to capture revenue and profit.

[17] In 2004 DCS introduced funding for a basic health benefit plan and a pension plan for service provider employees. Participation was voluntary and Kairos declined to be involved. Kairos is not claiming any damages arising from this initiative.

[18] In 2006 DCS initiated a review of management and administrative support salaries and benefits (management compensation review). Kairos chose not to participate. Kairos is not claiming any damages arising from this initiative.

[19] It is important to address these initiatives given the amount of trial time spent discussing them. Kairos's claim relates solely to the service fee. It should also be noted that the payments received by Kairos under the salary framework review came by way of retroactive payments. These payments cast a large shadow over this trial notwithstanding that the parties agree they were not to be a factor in calculating possible damages.

RETROACTIVE PAYMENTS:

[20] Given the amount of attention paid to these payments during the trial, I feel compelled to address them in this decision. The confusion surrounding these cheques led to an adjournment mid-trial. (2011 NSSC 8). It is common ground that in 2003-2004 Kairos received the following five retroactive payments:

- November 19, 2003 $46,760.42

- July 2, 2003 $87,237.00
- April 20, 2004 $147,941.00
- April , 2004 $5,000.00
- April , 2004 $24,000.00

It is now accepted these were legitimate payments that had nothing to do with service fees. The confusion arose from the fact that neither Kairos nor DCS had any idea how these numbers were determined, or what they represented.

[21] The issue of retroactive payments arose during the direct examination of Dr. Mary Lou LeRoy, Kairos's principal. She testified that she only received one cheque when in fact she received several. She later explained this was an oversight as she did not think the other cheques were relevant to her claim. DCS used this evidence to accuse her of fraudulent conduct and that led to the adjournment of the trial. When DCS chose not to amend its defence or pursue a counterclaim, the significance of these cheques was minimized. Once these payments were fully examined it was agreed that the issue of the retroactive cheques was to go to credibility only.

[22] The evidence of Dr. LeRoy on the issue of retroactive cheques does not impact on her overall credibility. I am satisfied with her explanation given the confusion and uncertainty of both parties on this point. It seemed to me that DCS could not say what these payments represented and Kairos could not fully say why it was entitled to them. I am not saying that Dr. LeRoy's overall credibility is fully intact. I am saying that the issue of the retroactive cheques does not detract from her credibility.

THE INTERIM STANDARDS:

[23] The interpretation of the 1996 Interim Standards is critical to the opinion of Kairos's expert, Grant Thompson. He testified that these standards represented a written commitment by DCS to fund Kairos at a level comparable to other similar providers. He relied on the following language in support of his position:

> "The per diem rates for individuals maintained in community based options shall be approved at a level comparable to the per diem range for a comparable level of care in a licensed facility under the Homes for Special Care Act."

[24] Kairos finds confirmation of its position in a January 7, 1997 conversation between Kairos's Dr. LeRoy and DCS's Janet Bray as well as other

communications with DCS staff. Kairos argues that these individuals confirmed to Dr. LeRoy that the above language relates to service fee compensation. DCS disputes these conclusions.

[25] At page 6 of his report Mr. Thompson sets forth his assumption with respect to the Interim Standards:

> "It is assumed the 1996 Interim Standards entitles care providers to consistency in billing rates for supplying the differing needs of clients. This is considered to be confirmed by the departmental description of a new method of funding care providers that deems to also employ consistency and fairness."

Mr. Thompson's evidence at trial confirmed this fundamental assumption.

[26] DCS argues that the interim standards in no way represent a guarantee to different service providers that they will be paid comparable service fees. The position of DCS is that these standards are meant to ensure that the service fee for one individual being cared for in a supervised apartment will not be more than the service fee for that individual in a licensed facility. DCS submits that service fees among providers differ because they are made up of various different components.

It is this interpretation that DCS' expert, Susan MacMillan, relies on for her report and testimony. She states at page 9 of her report as follows:

> "The interpretation ... is that costs related to supporting an individual in a community based option setting should not exceed the costs to maintain that same individual in a licensed residential facility."

[27] Ms. MacMillan's evidence was that she did not agree with Mr. Thompson's "explicit and implicit" assumptions underlying his approach and calculations. She stated that the primary assumption service providers participating in the supervised apartment program were entitled to consistency in billing rates was flawed. She points out that the Interim Standards do not stipulate a specific per diem rate. Further, she noted that per diem rates for licensed facilities were determined by the minister "having regard to the best interests of the resident." Ms. MacMillan offered the following opinion at page 12 of her report:

> "In our opinion, the Thompson report's assumption is not reasonable or supportable. The Interim Standards refer specifically to a comparison between levels of care and community based options and licensed facilities and do not refer to consistency among potential service providers or their fees. The interpretation made by a number of DCS representatives, is that costs (to the Department) associated with supporting an individual with specific disabilities in the supervised apartment program should not exceed the costs of supporting that same individual within a licensed residential facility."

[28] Ms. MacMillan relied in part on the sworn discovery evidence of DCS's George Hudson and Tracy Embrett. She set forth their testimony at page 13 of her report:

> George Hudson (July 9, 2008 - p.14 & 15) - "My vague recollection of this is that the per diem here, this was a guideline to ensure that the costs outside of the licensed facility would not be exceeded. So it (Interim Guidelines) guidelines to say to a front-line worker "as part of your placement of a client in whatever community-based option," one of your reference points would be what would it cost to put this client in a licensed facility. So it's not "make it the same price." It's one benchmark or one checkpoint ..... if you're placing this client in a community-based option, one checkpoint against cost is what would it cost to put the client in a licensed facility."

> Tracey Embrett (March 29, 2010 - p. 27 & 28) "The basis of this paragraph (Interim Standards) relates back to de-institutionalize and the creation of small-option settings ... there would not be a placement in a small-option setting that would exceed the cost of care of a licensed institutional setting."

Ms. MacMillan concluded at page 14 of her report:

> "Further, as a result of using this incorrect primary assumption, we consider the Thompson Report's calculation of loss of $1,725,288 which compared monthly fees between Kairos and two other service providers, is therefore unreasonable and not a reflection of the loss, if any, that might have been sustained by Kairos."

[29] Dr. LeRoy testified that when the Interim Standards were released there was no process educating Kairos on their interpretation. She described their introduction as sudden and without consultation. She testified that there were no

automatic changes in service fees when the standards were introduced. It appears to me that Kairos assumed that the Interim Standards provided consistency of service fees for all supervised apartment providers. I am not able to find any basis for that assumption except for the Janet Bray conversation.

[30] The telephone conversation between Dr. LeRoy and Janet Bray took place in early 1997. Dr. LeRoy testified that she wrote down many questions in advance of that conversation. She stated that she wrote down Janet Bray's answers on the same pieces of paper during the conversation. Question and answer three is as follows:

> "Q. Per diems at a level comparable to PD range for comparable level of care - who determines?
>
> A. One pot of money - money set for client, follows _____ - all serv prov to get same for care ... depends on classification - finance doing review."

There is no other reference to service fees or per diems in the 38 questions and answers. The question above establishes that Dr. LeRoy was speaking about the Interim Standards. I do not conclude that the answer, if accepted as true,

establishes that the Interim Standards were a commitment to all service providers to the exact same level of service fee compensation.

[31] Carol Ann Brennan testified for DCS. She is the Executive Director of Regional Residential Services Society, a care provider. This organization serves adults with developmental disabilities in the Halifax Region. It has 500 employees, 177 clients and several facilities. Ms. Brennan has a long history with service agreements and the payment arrangements associated with those agreements.

[32] She testified that per diem rates are not the same for all providers of community based options. She stated that the number of support hours varies with the client.

[33] Ms. Brennan was familiar with the Interim Standards. It was her testimony they were not relevant in terms of putting together a proposal on behalf of a client. She stated that was because the standards were silent in terms of compensation. It was her evidence that service fees vary from provider to provider.

[34] Janet Bray testified in this trial. She was employed by DCS from 1979 to 2000. Prior to going on medical leave, she was the Director of Community Supports for adults. She was a DCS employee at the time the Interim Standards were introduced. In 1996 she participated in their drafting. She testified the purpose of the Interim Standards was to achieve uniformity in the provision of services to clients in community based options.

[35] Ms. Bray testified the standards moved all care providers to a per diem rate. Prior to the standards there were various cost sharing arrangements between the municipalities and the province. She was very clear that the Interim Standards did not determine service fees, let alone uniform service fees.

[36] Ms. Bray had no independent recollection of a January, 1997 conversation with Dr. LeRoy. She testified that she never told service providers they would all be paid the same, or that the Interim Standards provided for uniform per diem rates. She based this testimony on her then knowledge that the standards did not determine service fee compensation.

[37] Carol Shepard-Conrad testified for DCS. She is employed as a district manager in the services for persons with disabilities program at DCS. She is very familiar with the Interim Standards. She described their purpose as informing service providers on what is expected of them from an operational point of view. She stated that the Interim Standards represent an effort to standardize services. She testified that all billings were to be based on the rate approved by the province.

[38] Darren McPhee testified for DCS. He is a "care co-ordinator" for DCS and has worked in this area since 1992. He stated he is familiar with the Interim Standards. He testified that these are standards that DCS do not police. He said the standards were given to providers "a long time ago" to tell them what was expected of them. He stated that the standards were not something that one dealt with regularly. Finally, Mr. McPhee said that in his career he had never been required to enforce the Interim Standards.

[39] Greg Hodgson testified for DCS. He has been employed at DCS since 1999 and is presently the Director of Finance and Administration. He testified that it is not possible he told Dr. LeRoy that Kairos were being paid the same as other service providers or that the Interim Standards provided for such.

[40] I am satisfied, and so find, that the Interim Standards do not support Kairos's position that they establish equality of service fees in all supervised apartment settings. I conclude that the standards were meant to provide an element of quality control among the providers. This interpretation is supported by the DCS witnesses and by applying statutory interpretation principles. I do not accept Dr. LeRoy's evidence that DCS told her the standards meant that all supervised apartment providers would receive the same compensation. I do not find that the document purporting to be a record of a January, 1997 conversation between Dr. LeRoy and Janet Bray establishes such a commitment. The answers attributed to Janet Bray have been refuted by Ms. Bray. I found Ms. Bray to be a credible witness and I accept her testimony as truthful. This document was entirely in the control of Dr. LeRoy and is incapable of independent verification.

[41] I am satisfied that the standards were silent in terms of funding. I conclude that the purpose of the funding language was meant to ensure that moving clients from licensed to unlicensed facilities did not increase the cost of their care. I am satisfied that the cost factor was a major concern to the province. If per diem rates were to be standardized, I expect that specific language would have been used.

[42] Applying the principles of statutory interpretation leads me to the same conclusion. The Interim Standards were intended to provide potential and existing service providers with standards on which to base their operation and ensure the provision of quality service for individuals served through the program. This is the language that the Minister at the time used when introducing the standards.

[43] The law respecting statutory interpretation was fully canvassed in *Monsanto Canada Inc. v. Ontario (Superintendant of Financial Services)*, 2004 S.C.J. 51. Deschamps J. stated as follows:

> The established approach to statutory interpretation was recently reiterated by Iacobucci, J. In *Bell Express Vu Limited Partnership v. Rex*, [2002] 2. S.C.R. 559, 2002 SCC 42, at para. 26, citing E.A. Driedger, Construction of statutes (2nd ed,1983) at p87:
>
> > "Today there is only one principle or approach, namely, the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament."

[44] The Supreme Court of Canada revisited this approach in *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. 56. The following appears under the heading "General Principles of Interpretation":

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1993] 3 S.C.R., 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose of the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[45] In *Myers v. Mannette*, [2003] N.S.J. No. 197 Hamilton, J.A. referenced *Bishop-Beckwith Marsh Body v. Wolfville* (1996), 151 N.S.R. (2d) 333 (N.S.C.A.):

> 24 A starting point for interpreting this legislation is found in *Bishop-Beckwith Marsh Body v. Wolfville (Town)* (1996), 151 N.S.R. (2d) 333 (N.S.C.A.) At page 336 the court states:
>
> [13] In the forward to Driedger on the **Construction of Statutes** (3rd Ed., 1994), by Ruth Sullivan, the author states:
>
> "I share Driedger's conviction that statutory interpretation is not a rule-governed activity, but rather an activity in which rules are used either effectively or ineffectively."
>
> [14] At p. 131 Professor Sullivan sets out the modern rule of interpretation which, in my opinion, is applicable as it implicitly recognizes the ordinary meaning rule as well as the purposive approach to statutory interpretation. She states at p. 131:

> "There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretation, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

[46] The authorities establish there is a presumption in favour of applying an ordinary, non-technical approach to the interpretation of legislation. While the Interim Standards may not technically be a statute, it is a product of statute and I see no reason why statutory interpretation principles should not apply. This presumption stands unless there is a clear indication of a more technical meaning.

[47] Professor Ruth Sullivan (Sullivan on Construction of Statutes) (5th Ed) 2008 states at page 49:

> "When words are ambiguous in the sense that they could bear either a technical or a non-technical meaning in the context in which they appear, there is a presumption that the ordinary, non-technical meaning was intended. In the words of Pollock B. In Grenfell v. Commissioners of Inland Revenue, if a statute contains language that is capable of being construed in a popular sense, it ... is not to be construed according to the strict or technical meaning of the language contained in it, but ... is to be construed in its popular sense; meaning, of course,

> by the words “popular sense” that sense which people conversant with the subject matter with which the statute is dealing would attribute to it.
>
> As Marceau J. explains in Deputy Minister of National Revenue, Customs and Excise v. Hydro-Quebec, “the rule is a semantic one ... and is based on the simple idea that the representatives of the people normally express themselves in the language of the people.”

[48] The choice between the ordinary and the technical meanings of a word or expression does not turn on the subject matter of the legislation. Even when dealing with technical matters, the legislature is presumed to use words in their ordinary sense. *Pfizer Co. v. Deputy Minister of National Revenue, Customs and Excise*, [1977] 1 S.C.R. 456 (S.C.C.).

[49] The ordinary meaning of the Interim Standards funding language is that when transferring clients from licensed to unlicensed facilities, the cost of the new cannot exceed the cost of the existing program. They do not mean all service providers are entitled to comparable service fees.

THE COMPARITORS - OPERATORS A & C:

[50] I am of the view that this decision could end here given Kairos's reliance on its interpretation of the Interim Standards. However much evidence has been called regarding Kairos's method of calculating its alleged losses and I feel compelled to address that evidence. The approach used by Kairos was to identify other providers of supervised apartment services in the central region of the Province and to compare them to Kairos. There are a number of problems with this approach.

[51] The first problem lies in the fact that the comparitors were chosen by Dr. LeRoy. Pursuant to an order of Hood J., DCS provided Kairos with ten boxes of records pertaining to several other service providers. Dr. LeRoy testified that she selected Operators A and C as she perceived them to be operations similar to Kairos. Obviously, there was a subjective assessment at play. These choices were never independently verified and Grant Thompson accepted them as appropriate comparitors without any further verification.

[52] I find Dr. LeRoy's evidence did not establish that Operators A and C were comparable to Kairos. She provided the notes she made when going through the

boxes. The notes and her testimony focused on the payment arrangements rather than why she believed Operators A and C were comparable to Kairos.

[53] Dr. LeRoy made the following notes in relation to Operator A:

> Conclusion/Summary
>
> Service fees are consistently higher than ours, dating back to 1998.
>
> Very often there is a service fee or a case management fee plus attendant care fee or wages and benefits costs.
>
> We have only ever gotten the one fee.

[54] Dr. LeRoy made the following notes in relation to Operator C:

> Per diem is now 38.55
>
> Mike Robar still submitting bills
>
> Conclusion:
>
> Consistent increases in rates, to present 38.55 per diem.

> Receiving “supervision fee” “program assistant visits” which is essentially staff wages and benefits “care manager visits fee” “extra supervision fee”
>
> Have received regular increased in fees. Documents show regular “retro” payments ... 1999.
>
> Supervision fee in 1998 was 40% higher than ours now.

I have reviewed Dr. LeRoy’s other notes surrounding the above conclusions, as well as her testimony, and I am not persuaded that Operators A and C are appropriate comparitors. Even if the evidence established that Operators A and C were comparable operations, I would still have no confidence that individual per diem rates covered the same packages of services.

[55] Susan MacMillan addresses the comparitors in both her report and testimony. She attributes the following assumption to Mr. Thompson:

> “It is assumed that the per diem billing rates for Kairos, operator A, and operator C, do not contain a provision for client expenses. This was checked by reviewing the providers invoices to the department, that showed a separation of providers per diem rate from client expenses.”

[56] The following represents Ms. MacMillan’s response to that assumption:

> The Thompson report made the assumption that the per diem and monthly fees billed by the three service providers do not include client expenses, and are otherwise comparable. However, apart from client expenses, which appear to be all or partially segregated on the invoices, it is not conclusive that the remaining components encompassed in the monthly fees are or would be the same for each of the three service providers. Overall, we do not agree with the Thompson report's approach that compares service providers' monthly fees, without a critical consideration of the varied components within those monthly fees. Our review of invoices related to seven service providers indicated a broad range of components included in the service providers' management fees.

I agree with Ms. MacMillan's opinion that Mr. Thompson's report has referred to client expenses in the per diem billing rates, but has not addressed other differences which may exist in the per diem rates of service providers.

[57] Ms. MacMillan further stated at page 15 of her report:

> To compare Kairos to Operators A and C, the Thompson report has simply divided total monthly DCS funding to each service provider by the number of clients supported in supervised apartments. There was no consideration of the required hours of support for each individual client. The Thompson report did indicate that hours of client support were not available from Operators A and C for comparison purposes, but the absence of this information, does not justify the use of information that may provide misleading results. Without this information (support hours), a meaningful comparison cannot be made.

This conclusion finds support in the testimony of DCS witnesses.

[58] Carol Ann Brennan has been employed in this industry since 1984 as a front line worker. She testified that per diem rates are not the same for all supervised apartments because of their size and the services they provide. She stated that in apartment settings the hours of support varies with the client. She testified that she knows other support providers in the central region who provide services similar to Kairos. However, she does not know how their rates compare because they vary from home to home and are based on the number of clients sharing the facility.

[59] The comparison of monthly rates averaged by client is not an accurate reflection of whether or not fees are comparable. The only accurate approach requires a comparison of total support hours billed. The monthly service fee per client depends on how many hours of support a client receives from the service provider. Looking at the amount of total monthly billings without knowing how many hours of support this amount represents is misleading. Clients in supervised apartment settings may be receiving very different hours of support from a provider. Clients who have family, friends and other programs to help support them may receive fewer support hours. Kairos does not dispute that comparing what service fee is received per hour of support per client would be better than

taking the monthly service fees for all clients and dividing them by the number of clients.

[60] It is my conclusion that DCS is correct on the comparitor issue. I find that without knowing how many support hours are being given to clients, it is not possible to say that clients for the different providers are receiving the same amount of care. The reason providers cannot be compared to each other is because service fees approved by DCS are approved on a client by client basis. Each fee is individual to each provider because it is built up from a number of components that are particular to that provider and the needs of their clients. I do not accept Kairos view that factors such as size, operational costs and the profit/non-profit factor are immaterial to the development of service fees.

CONCLUSION:

[61] A number of other issues arose during this lengthy and difficult trial. However, it is not now necessary to decide these issues in order to decide the case. For the reasons set out in this decision, I dismiss Kairos's claim in its entirety. I will hear the parties on costs should that be necessary.

J.