DECISION **2024 NSUARB 168**
M11528

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE FIRE SAFETY ACT

- and -

IN THE MATTER OF AN APPEAL by **HAPPY TOTS PRESCHOOL AND NURSERY INCORPORATED** from an Order to Take Action dated January 11, 2024, issued by the Fire Inspector, in respect of a property located in the Halifax Regional Municipality, Nova Scotia

BEFORE:	Julia E. Clark, LL.B., Panel Chair Jennifer L. Nicholson, CPA, CA, Member Bruce F. Fisher, MPA, CPA, CMA, Member
APPELLANT:	**HAPPY TOTS PRESCHOOL AND NURSERY INCORPORATED** Louise Mullins Anna-Marie Young
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** Joshua Judah, Counsel Jim Jansen
HEARING DATE:	April 24-25, 2024
DECISION DATE:	**October 9, 2024**
DECISION:	The Order to Take Action is revoked.

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I SUMMARY

[1] Happy Tots Preschool and Nursery Incorporated (Happy Tots) is owned and operated by its Director, Louise Mullins. Anna-Marie Young, Mrs. Mullin's daughter, is the Assistant Director and presented Happy Tots' case at the hearing. The daycare centre is located at 89 Gordon Avenue, in the Halifax Regional Municipality (HRM). Happy Tots has operated the facility as a daycare, including infant care, since March 1985. It is licensed to provide care to infants, toddlers and pre-schoolers under the *Early Learning and Child Care Act.*

[2] On January 11, 2024, HRM Fire Inspector Cory Webb issued an Order to Take Action under section 25(1)(b) of the *Fire Safety Act* (*Act*), citing contraventions of the 2015 National Fire Code (Fire Code) and setting out multiple actions required to resolve them. The Order set the deadline for compliance by March 29, 2024.

[3] By the time of the hearing, the parties agreed that the only outstanding issue to be addressed was whether the Fire Code requires Happy Tots to install a sprinkler system. The contraventions are set out in Schedule "A" to the Order. The Order says:

> The presence of infants in this facility changes the use from an A2 assembly to B3 care facility.
>
> As per the National Building Code B3 facilities require a sprinkler system.
>
> Previous requests for documentation providing any previous exemption from this requirement were not satisfied, there is no documentation to review found by this office or provided by the owner of the daycare to show exemption from this requirement.
>
> A sprinkler system is to be installed in this facility.
>
> [Exhibit H-2, Schedule A]

[4] Happy Tots appealed to the Board under s. 41 of the *Act* on the grounds that past fire inspections did not identify a requirement for installed sprinklers for the building and, the daycare had been informed that sprinklers were not required.

Furthermore, the building has operated as a daycare in the same configuration, including services for infants, and without substantive renovations, since they took over ownership 39 years ago. Ms. Young testified that they cannot afford either the cost to install sprinklers or the time required to close the facility to install them. They would have to cease providing infant spaces or shut down if forced to undertake the required actions under the Order.

[5] The Fire Inspector determined that the presence of infants in the daycare means that Happy Tots should be classified as a “B3 Care Occupancy” building under the 2015 National Building Code (Building Code). As such, it is required to have sprinklers. Daycares without infants are classed as A2 Assembly Occupancies. HRM further argued that the Fire Code specifically requires daycares to conform to the 2015 Building Code, regardless of when they were built or whether they have been renovated or changed use. The Fire Inspector and Fire Marshal testified that sprinklers were a critical safety feature as infants cannot self-evacuate.

[6] The Board has given careful consideration to all the documentary evidence, testimony and arguments presented by the parties. After deliberation and review of the Building Code, the Fire Code, the *Fire Safety Act* and *Regulations*, past decisions and the applicable principles of statutory interpretation, the Board has concluded that:

- The plain wording of the code read in context can lead to one interpretation only: that the decision of the Fire Inspector to classify Happy Tots as a B3 Care Occupancy structure for the purpose of determining the Building Code requirements was not correct. As a day care facility with infants, Happy Tots is an A2 Assembly Occupancy under the Nova Scotia Building Code. It is not a B3 Care Occupancy because that classification is specifically limited to facilities providing care for residents with sleeping accommodations that have 24 hours of

consecutive care. Children cared for at Happy Tots do not reside at the center or receive 24-hour care. Happy Tots has not contravened the sprinkler requirements applicable to its classification under A2 Assembly Occupancy in the Building Code.

- Additionally, while s. 17 of the *Act* requires a building owner or occupant to take "every precaution that is reasonable in the circumstances" to achieve fire safety, s. 27 of the *Act* specifically excludes an order for alterations to a building that complied with the Building Code in effect at the time an occupancy permit was issued, unless required by the Fire Code. The "precaution" of installing sprinklers cannot be required where the *Act* disallows an order for such an alteration.
- Even if the Fire Inspector was correct in his classification as B3 Care Occupancy, the Board was not convinced that Article 2.10.1.1 of the Fire Code can be interpreted, in these circumstances, to require an existing facility to upgrade to the 2015 Building Code Standards. Section 27 of the *Act* applies, and neither the Fire Inspector nor the Board have the authority to order the installation of a sprinkler system in this building, in these circumstances.
- Furthermore, the Fire Inspector does not have the discretion to require upgrades to an existing building that are not required by the Building Code or the Fire Code.

[7] The Board agrees with the fire officials that a fire within a daycare could lead to a catastrophic tragedy. It also agrees that working sprinklers would help mitigate injury and property damage. The Board is concerned that additional precautions to achieve fire safety may be required to reduce the risk of injury and property damage in the event of a fire at the centre. Despite Happy Tots' existing fire safety plan and concern for the safety of the children in their care, the Board concurs with HRM that it is "hard to imagine or prepare for a smoke-filled environment where breathing and visibility are all but impossible." The Board is deeply concerned for the safety of infants, toddlers, other children, childcare workers, and first responders in the event of a fire and sees the inherent value of sprinklers.

[8] However, as administrative decision-makers, the Board and the fire service only have the authority set out in the applicable enactments. An Order to Take Action must be grounded in an inspector's lawful authority, based on the law as it is written, not as one might prefer that it be written. The Building Code says that a daycare of Happy Tots' height and area, which does not offer overnight hours or residential care, is not required to have sprinklers. Even if the Building Code did require it, the *Act* balances Happy Tots' fire safety obligations with restrictions on what changes or renovations can be ordered. In a sincere attempt to promote fire safety and protect the lives of young children, the fire service has nevertheless misinterpreted the provisions of the Building and Fire Codes and overreached their authority under the *Act*. Should responsible authorities wish to ensure that all daycares with infants in this Province have sprinklers, the proper approach to do so is to seek changes in the codes, or amendments to the applicable provincial enactments.

[9] In this case, the Board does not have sufficient evidence to determine what, if any, alternative actions may be required to achieve fire safety under s. 17 of the *Act.* Hence, this decision does not prevent a future order for other fire safety measures authorized under the regulatory scheme. The Order to Take Action is revoked.

II BACKGROUND AND EVIDENCE

[10] Louise Mullins bought the property at 89 Gordon Avenue in 1985 from the previous owner of the daycare, whom she worked with before purchasing the business. Mrs. Mullins and Ms. Young no longer own the facility but continue to rent it from its current owner under a long-term commercial lease. The building is configured as a four-

plex apartment building, with two units on the first floor, and two on the second. These units have been converted into classrooms and associated daycare space. It has a basement level with a small staff break area, storage, and laundry. The basement is not accessible to children at the center.

[11] Happy Tots is a full-day daycare facility that is licensed for 63 children. It currently cares for 11 infants aged three months to 18 months, 18 toddlers, 18 mixed-age group (no infants) and 16 preschoolers. There are 14 Early Childhood Educators at the facility, and they are required to maintain certain ratios of staff to children based on the age grouping. Some employees have been working there for more than 20 years and some since Mrs. Mullins took over the facility. Happy Tots is certified as part of the Atlantic Immigration Program, allowing its international employees to obtain work permits and permanent residency status.

[12] The facility was originally a four-unit apartment building and there have been no structural changes to the original apartments. Each apartment is used for a different age group of children at the daycare. The front unit on the main floor is for infants aged three to 18 months. The back unit on the main floor is for toddlers. The two units on the top floor are for preschoolers and a mixed-age group of older toddlers and preschoolers. The building sits on a large corner lot with two fenced areas, one for infants and toddlers and the other for older toddlers and preschoolers.

[13] Happy Tots had many fire inspections completed over its 39 years. Many minor deficiencies have been found during these inspections and corrected by Mrs. Mullins and Ms. Young. Happy Tots said they always fixed issues that came to their attention immediately. Inspector Corey Webb inspected the facility in September 2023

and noted several deficiencies that had not been identified in previous inspections. Inspector Webb ordered that the ceiling in the basement be modified to make it more fireproof. He also ordered that children's coats and a coat rack under a bulletin board be removed, and that installation of sprinklers is required in the infant room. Happy Tots complied with the Order and made all the required changes except for the addition of sprinklers. After another inspection confirming completion of those changes, Inspector Webb issued the January 11, 2024, Order to Take Action, which is the subject of this appeal.

[14] Happy Tots argued that sprinklers are not required because as long as the centre has been operating as a daycare, there have been no renovations or changes to the building. They said they have been "grandfathered" in with existing conditions, and they do not need to be compliant with the most recent legislation. Happy Tots did an extensive search of their records for documentation to support this claim. It also requested documentation from the Department of Education and Early Childhood Development and the Fire Marshal's office. Happy Tots provided evidence to the Board that past fire inspectors were aware that the building did not have sprinklers, yet still found it to be in compliance because it was agreed that "this is not a new license and changes have not been made to building or licenses … so the provisions for the installation of the residential sprinkler system shall not be enforced at this time." [Exhibit H-10, Tab #9 p. 3] Happy Tots could not, however, provide documentation that provided a specific exemption from installing sprinklers or an approval for a plan for "alternate compliance" which the fire service said would be required.

[15] Happy Tots also gave several other reasons why they felt they could not comply with the Order to install sprinklers. They rent the building, and the owner does not want sprinklers installed. The centre obtained a quote from Valley Sprinklers Incorporated, indicating the approximate cost to install the sprinklers in an older existing structure (excluding any additional water system connection) would be more than $125,000, which the business cannot afford. [Exhibit H-10, Tab #8] Even if they were able to raise the money to afford installation of sprinklers and the building owner approved it, Happy Tots would have to shut down for an extended period which would put 14 Early Childhood Educators out of work and leave 63 families with no childcare.

[16] Inspector Webb said that if Happy Tots discontinued its infant program, it would not have to install sprinklers. Happy Tots is not willing to leave the families of the 11 infants without licensed childcare and put the three Early Childhood Educators who work in that space out of work. Happy Tots also described what they called the ongoing daycare “crisis”, saying there was a desperate need for infant spaces in and it would be difficult, if not impossible, for the families to find alternative infant care.

[17] Happy Tots filed its Notice of Appeal with the Board, with a copy of the Order, on January 18, 2024. A preliminary hearing to set hearing and filing dates was held on February 2, 2024. Under s. 41(5) of the *Act,* filing an appeal acts as a stay of a Fire Inspector’s Order until the Board decides the appeal. The Fire Inspector did not ask the Board to lift the stay in this case.

[18] A Notice of Hearing was published and distributed. The Board held an in-person hearing at the Board’s offices in the Halifax Regional Municipality on April 24 and 25, 2024. Ms. Young testified and made all legal arguments on behalf of Happy Tots. Mrs.

Mullins provided additional background and factual information based on her long history as a former employee and then owner at the centre. Fire Inspector Corey Webb testified on behalf of HRM, represented at the hearing by counsel Joshua Judah. The Appellant sought to call Matt Covey, Division Chief of Fire Protection with Halifax Regional Fire and Emergency as a witness. With leave of the Board and consent of all parties, Mr. Covey provided answers to the Appellant and Board panel's questions by affidavit [Exhibit H-8].

[19] The Board received multiple letters of comment supporting Happy Tots [Exhibit H-3, H-9]. The Board did not receive any requests to speak from the public.

[20] Douglas MacKenzie, Fire Marshal, attended the hearing under subpoena by the Appellant. The Office of the Fire Marshal filed written legal arguments at the close of the hearing but did not otherwise participate. The Office of the Fire Marshal has standing as a party to any appeal of a Fire Inspector's Order under s. 43(1) of the *Act*.

[21] The Board panel members and Mr. Judah visited the daycare after the oral hearing adjourned on April 25, 2024. We arrived at approximately 3:00 pm and Ms. Young gave us a tour of the facility. Each unit was as described in evidence and the daycare was full of activity. There are two sets of stairs located at the front and rear of the building, leading to the second floor where the older children's classrooms are located. We viewed the basement area, laundry and storage room and staff room. Ms. Young pointed out the fire insulation in the basement ceiling that had been previously ordered after an earlier inspection.

[22] We saw many staff members caring for children in various capacities. Almost all the current infants in the infant room were walking and there were three Early Childhood Educators in the space with them. We saw fire protection measures in place,

including fire extinguishers, fire alarms, large windows at the front and back of the building, automatic closing fire-rated doors, a fire escape plan, the upgraded basement ceiling, emergency lighting, and a fire safety crib. The front door is next to the infant room with access to outside. The interior playrooms are separated from the coat and cubby area by solid low barrier gates that were somewhat awkward to navigate.

[23] The parties' factual evidence about the description of the property and the interactions between Happy Tots and the Municipality were largely consistent. They differed in their interpretation of how the Building and Fire Codes should have been applied.

1. Letters of Support

[24] The Board received 10 letters supporting the Appellant from parents and grandparents of children that currently attend Happy Tots [Exhibit H-3; H-9]. All letters addressed the challenges of finding alternative childcare if Happy Tots was forced to close due to the requirement to install sprinklers. The letters also stated that it is unfair to require sprinklers to be installed with limited notice and that the costs would be prohibitive for the Appellant to manage. The letters recommended that if sprinklers were considered necessary, the Appellant be given an extended period to obtain government funding or alternative sources of financing for the installation.

[25] The Hon. Patricia Arab, the MLA for Fairview Clayton Park, where Happy Tots is located, also sent a letter to the Minister of Education and Early Childhood Development expressing her support for Happy Tots' appeal. This letter was forwarded to Krystal Therien, Director of Early Learning and Childcare who responded on behalf of the Minister. She stated that they would await the decision of the Board in this appeal and

would assist Happy Tots with “support that ensures safety requirements are met while continuing to support the ongoing operation of Happy Tots and the needs of the children and families they care for.”

III ISSUES

[26] The main issue in this proceeding is whether the Appellant has established that the Fire Inspector’s Order was not properly issued and whether it should be revoked or varied. The Appellant’s primary argument is that Article 2.10.1.1 of the 2015 National Fire Code Division B does not apply to their facility. They say the centre has operated for 39 years and they have done no renovations during that time so they should not be compelled to make changes to meet the updated National Building Code.

[27] In reviewing whether there was a contravention of s. 25 of the *Fire Safety Act* justifying the Order and, in particular, whether Happy Tots is required to install sprinklers, the Board considered the following issues:

- Is Happy Tots, as a daycare with infants, properly classified as an Assembly Occupancy (A2) or a Care Occupancy (B3) under the Building Code?
- Could the Fire Inspector rely on s. 17 of the *Act* to require Happy Tots to install sprinklers as a “precaution that is reasonable in the circumstances to achieve fire safety”?
- If there was a contravention, would Happy Tots be required to upgrade to the current Building Code, or do the exemptions from an order for “alterations” under s. 27 of the *Act* apply?
- Does a Fire Inspector have the discretion to otherwise order the installation of sprinklers?

IV ANALYSIS AND FINDINGS

1. Legal Framework

[28] The Board is a statutory tribunal, not a court. It has only the authority granted to it under its enabling legislation, the *Utility and Review Board Act,* and, in this case, the *Fire Safety Act.* In determining its jurisdiction, the Board must read the *Act* as a whole and give it a broad and liberal interpretation to ensure its objectives are attained.

[29] The purpose of the *Act* is set out explicitly in Section 2:

> **2** The purpose of this Act is to educate and encourage persons and communities to apply the principles of fire safety so as to prevent fires, preserve human life and avoid unwarranted property loss due to the destructive forces of fire.

[30] Section 42 of the *Act* confers on the Board the following jurisdiction:

> **42** The Board has exclusive jurisdiction to determine all questions of:
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> (a) law respecting this Act, the regulations and the Fire Code;
>
> (b) fact; and
>
> (c) mixed law and fact, that may arise in any matter before it, and an order or decision of the Board is final and binding and not open to review except for an error of law or jurisdiction.

[31] The Board has jurisdiction to confirm, rescind or vary any decision or order under the *Act* and may "make any order or decision that the fire official making the original order or decision could have made" *(*s. 41(8)). There is no further direction in the *Act* on the standard the Board must apply in determining the appeal, and no limitations on its jurisdiction. In past cases (e.g. *Re Kwan*, 2012 NSUARB 42; *Subway Sandwich Stop*, 2011 NSUARB 36), after hearing the evidence the Board first determined whether there had been a contravention and then decided the appropriate remedy, in the manner of a de novo appeal. The Board has the same authority as the Fire Official under s. 25 of the *Act*, subject to any restrictions in the *Act*.

[32] Section 25(1) reads as follows:

> **25 (1)** Where the Fire Marshal … or a municipal fire inspector believes that there is a contravention on land or premises of this Act, the regulations, the Fire Code or an order made pursuant to this Act, the regulations or the Fire Code, the fire official may issue to an owner of the land or premises an order that
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> (a) is substantially in the form set out in subsections 26(1) and (2);
>
> (b) may direct the owner to do one or more of the following within the time limit set out in the order;
>
> (i) remedy the contravention, including do anything in relation to the land or premises that the fire official considers necessary to remedy the non-compliance,
>
> (ii) carry out repairs or alterations, […]

To summarize, if the official believes there is a contravention, they may order the owners to take any of the actions outlined in s. 25(1)(b), which include: remedying the contravention, carrying out repairs or alterations, discontinuing a certain use or occupancy of the land or premises, or an activity or practice that creates or poses a fire hazard or compromises fire safety, or doing "anything respecting arrangements for fire safety including but not limited to, fire prevention, the containment of a possible fire, egress, the operation of a fire protection system, …". There are restrictions on what actions can be ordered; in particular, alterations to existing buildings (s. 27). This will be reviewed later in the decision.

[33] Sections 38-41 of the *Act* set out the scope and manner of appeals of an order to the Board. On an appeal by a person affected by an order of a municipal fire inspector, the Board may confirm, revoke, or vary an order appealed from, or extend the time for compliance (s. 41(8)(a) and (b)). The Board may make "any order or decision that the fire official making the original order or decision could have made" (s. 41(8)(c)). The burden is on the Appellant to show that, on a balance of probabilities, a Fire Inspector's order should be revoked or varied. In making its decision, the Board is to

achieve the purpose of the *Act,* considering the *Act* as a whole. It must give the legislation a broad and liberal interpretation to ensure its objects are obtained, (*Interpretation Act,* 1989 R.S.N.S. c. 235, s. 6 and s. 9). The Board's decision is case-specific and depends on the issues and facts.

[34] The *Act* does not purport to provide the maximum standards or final word on fire safety. A municipality may make and enforce bylaws imposing higher or more stringent standards or requirements, (s. 5(1)) and nothing in the *Act* is intended to "affect the powers, obligations and duties of persons or bodies" to "comply with, carry out or enforce any other law of the Province" (s. 6(1)).

[35] The Province of Nova Scotia adopts construction standards for the Province, which are generally enforced by the municipalities. The National Building Code and National Fire Code are developed through the National Research Council of Canada. They are subject to consultation by the relevant provincial authorities and only become provincial law if they are adopted by that jurisdiction.

[36] The *Building Code Act,* R.S.N.S. 1989, c. 46, provides for the adoption of construction standards in regulations. At the time of the hearing, the *Nova Scotia Building Code Regulations* N.S. Reg. 116/2022 (the regulations applicable at the time of the Order) have adopted the 2015 version of the *National Building Code*, with such changes and modifications as required for the Province. Any differences from the *National Building Code* are set out in the text of the *Nova Scotia Building Code Regulations*. This complete set of rules becomes the "Nova Scotia Building Code." Similarly, the Province has adopted the *National Fire Code of Canada*, 2015 version, with the changes required for the Province set out in the *Fire Safety Regulations* made under the *Fire Safety Act*.

2. Principles of Statutory Interpretation

[37] The principles of statutory interpretation apply in determining the scope of the powers conferred in the *Fire Safety Act*. The "modern rule" of statutory interpretation has been affirmed many times in Nova Scotia. In *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, the Court of Appeal reviewed the law and added comments about the importance of the *Interpretation Act*, R.S.N.S 1989, c. 235 (*Interpretation Act*), as follows:

> [24] The Supreme Court of Canada has reminded us time and time again that we are to take a pragmatic approach to statutory interpretation. Our approach must be both purposive and contextual. For example, in *Bell ExpressVu Ltd. v. Rex*, 2022 SCC 42 (S.C.C.) at ¶ 26 Justice Iacobucci describes this "modern approach":
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> > [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
> >
> > > 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.
> >
> > Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretative settings: [cites omitted]
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> > …
>
> [27] As well, Section 9(5) of the *Nova Scotia Interpretation Act*, R.S., c. 235, s. 1, holds that all enactments shall be deemed remedial, and interpreted to ensure the attainment of their objects by considering among other matters:
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> > (a) the occasion and necessity for the enactment;
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> > (b) the circumstances existing at the time it was passed;
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> > (c) the mischief to be remedied;
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> > (d) the object to be attained;
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> > (e) the former law, including other enactments upon the same or similar subjects;
> >
> > (f) the consequences of a particular interpretation; and
> >
> > (g) the history of legislation on the subject.

…

> [31] All that said, at the end of the day, we should interpret legislation in a manner that is both reasonable and just. Ruth Sullivan in *Sullivan on the Construction of Statutes*, *supra*, explains at §2.9:
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> > At the end of the day, after taking into account all relevant and admissible considerations, the court must 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 promotions of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.** [Emphasis added in original]
>
> [32] This passage has been recently endorsed by a majority of the Supreme Court of Canada in *R. v. Alex*, 2017 SCC 37 (S.C.C.) ¶32…

[38] In *Sparks* v. *Holland*, 2019 NSCA 3, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation and stated the three questions it typically asks when applying the modern principle:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he 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 (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
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> [29] Ms. Sullivan's questions have been applied in several cases, including *Slauenwhite* v. *Keizer*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> > 1. What is the meaning of the legislative text?
> >
> > 2. What did the Legislature intend?
> >
> > 3. What are the consequences of adopting a proposed interpretation?

[39] These principles also apply to administrative decision makers to require that legislation be interpreted consistent with its text, context, and purpose. However, the form of analysis may look different than one undertaken by a court and may be enriched by the specialized expertise and the experience of the decision maker (*Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, paras. 117-121).

3. Evidentiary Issues

[40] The Board must consider the documentary and oral evidence provided. The Municipality filed an appeal record that included the documents gathered by the Fire Inspector in his investigations, and other relevant documents related to the property.

[41] Inspector Webb was qualified as an expert in fire safety, by agreement. It was the second time he was qualified as an expert before the Board. Inspector Webb provided oral testimony about his observations and actions as one of the attending Fire Inspectors. He also provided his opinion evidence on the application of the *Act,* the Fire Code and the appliable sections of the relevant building codes. The Board found Inspector Webb to be a credible witness who provided clear answers in a professional manner.

[42] The Appellant solicited testimony from Matt Covey, Division Chief of Fire Protection through an affidavit, as he was not available to attend the hearing in person. By consent, his testimony was provided in the form of affidavit responses to questions from the Appellant and the Board. Mr. Covey was not qualified as an expert witness. His affidavit contained some opinion evidence beyond what was solicited in the form of questions. The Board reviewed his evidence through the lens of his experience and knowledge of general practices of Halifax Regional Fire and Emergency and fire safety inspections. Because Inspector Webb and Fire Marshal MacKenzie were available for cross-examination at the hearing, the Board was not required to rely on Mr. Covey's evidence to any meaningful extent, although the panel gave some weight to his review of the conduct of this investigation and Inspector Webb's approach.

[43] The Fire Marshal appeared at the Hearing under a Board subpoena, which was requested by Ms. Young. He was cross-examined by Ms. Young and answered Board questions about the Building Code and the Fire Code.

[44] Ms. Young testified on behalf of Happy Tots and presented their legal arguments and submissions. Her presentations contained a mix of argument, lay opinion and evidence, as is common when lay litigants appear before the Board. Section 19 of the *Utility and Review Board Act,* R.S.N.S. 1992, c. 11 states that the Board is not bound by the strict rules of evidence, and may use its considerable experience to assess how much weight to give evidence in these presentations. Mrs. Mullins and Ms. Young gave affirmed evidence, and their statements (subject to considerations of weight and relevance) were treated as such regardless of the stage of the proceedings they were made. No objections were made to hearsay evidence, which was given, to some extent, by all witnesses. The Board was able to weigh the relevance and evidentiary value of those statements in the normal course.

4. Was there a contravention of the *Act,* the *Regulations*, or the Fire Code?

[45] Following a re-inspection of the property on January 10, 2024, Inspector Webb issued the Order to Take Action of January 11, 2024, which is the subject of this appeal. The Order notes one contravention of Article 2.10.1.1 of the *National Fire Code of Canada* 2015: “Daycare centres shall be constructed in accordance with the NBC.” It notes under required actions that “A sprinkler system is to be installed in this facility.”

[46] Under s. 41(8) of the *Act*, the Board may make any order or decision the fire official making the original order or decision could have made. However, this is an appeal of a specific order. The panel finds that neither the evidence provided in this case,

nor the scope and purpose of the appeal provisions, would allow it to undertake a complete de novo investigation or go on a search for new or different contraventions to justify this Order. The starting point of the appeal is Inspector Webb's opinion that the lack of a sprinkler system at Happy Tots contravened provisions of the Fire Code requiring compliance with requirements of the Building Code regarding the occupation and use of the premises for daycare services for infants.

a) Is Happy Tots an Assembly Occupancy (A2) or a Care Occupancy (B3) under the Building Code?

[47] This issue rests upon interpretation of the Building Code and the Fire Code, which interact with each other, and with the *Fire Safety Act*.

(i) The Building Code and Fire Code

[48] By their nature, the codes are detailed, lengthy and prescriptive. The Building Code for 2015 exceeds 1,400 pages while the 2015 Fire Code is 341 pages. To understand the key issues at play in this appeal, it is useful to first understand how the Building and Fire Codes operate.

[49] The Fire Marshal outlined the various regulations that apply to the fire safety standards in force in the Province. Both the National Building Code and National Fire Code are developed by the Canadian Commission on Building and Fire Codes, through the National Research Council. As noted earlier, the Codes are only effective in a jurisdiction once legally adopted and may be modified according to the local context. At the time of Mr. Webb's Order, Nova Scotia had adopted the *National Building Code of Canada, 2015* "with such changes as are required by the Province" set out in the *Nova Scotia Building Code Regulations* made under the *Building Code Act*. The Province had

also adopted the *National Fire Code of Canada, 2015* with such changes as are required by the Province set out in the *Fire Safety Regulations* made under the *Act*.

[50] The Building Code sets out provisions for the "design and construction of new buildings" and the "alteration, change of use and demolition of existing buildings." Its requirements are established to achieve five objectives: safety, health, accessibility, fire and structural protection of buildings, and the environment.

[51] The Building Code is a prescriptive document and contains a minimum of interpretative aids. It has numerous defined terms, additional notes, clarifications, and examples. However, much of the document is technical, and the purpose and context of individual sections, subsections, and articles are often not described. As such, much of the following interpretation relies on the specific text and cannot be examined against any preambles or statements of purpose.

[52] The Building Code's requirements are seen as a minimum. The Code is divided into three Divisions: 'A' includes Objectives and Functional Statements; 'B' lists "acceptable solutions;" and 'C' deals with administrative provisions. A property that conforms to the "acceptable solutions" in Division B is compliant with the Code. A proposal that conforms with the "minimum level of performance" under the objectives and functional statements, found in Division A, may be compliant as an "alternative solution."

[53] Division B of the Building Code sets out 13 "Major Occupancy" classifications for buildings. A major occupancy

> … means the principal occupancy for which a building or part thereof is used or intended to be used, and shall be deemed to include the subsidiary occupancies that are an integral part of the principal occupancy.
>
> [Exhibit H-12, p. Division A 1-9]

[54] Table 3.1.2.1 lists the major occupancy classifications of the code, and is broken down into Six Groups (A to F) and subdivided into divisions, which are numbered. For instance, before the issuance of this Order to Take Action, Happy Tots was classified as A2 [Responses of Matt Covey, Exhibit H-8, p. 3]. Following the Order to Take Action the Fire Inspector has asserted that it is B3 “Care Occupancy,” a newer classification first introduced in the 2010 Building Code.

Table 3.1.2.1.
Major Occupancy Classification
Forming Part of Sentences 3.1.2.1.(1) and 3.1.2.2.(1)

Group	Division	Description of *Major Occupancies*
A	1	*Assembly occupancies* intended for the production and viewing of the performing arts
A	2	*Assembly occupancies* not elsewhere classified in Group A
A	3	*Assembly occupancies* of the arena type
A	4	*Assembly occupancies* in which occupants are gathered in the open air
B	1	*Detention occupancies*
B	2	*Treatment occupancies*
B	3	*Care occupancies*
C	—	*Residential occupancies*
D	—	*Business and personal services occupancies*
E	—	*Mercantile occupancies*
F	1	*High-hazard industrial occupancies*
F	2	*Medium-hazard industrial occupancies*
F	3	*Low-hazard industrial occupancies*

[Exhibit H-12, p. Division B 3-2]

[55] Divisions are often broken down into further categories, based on building-specific features such as height, area, and other characteristics. Every building is categorized into a major occupancy and, in many cases a division and further sub-categories. This categorization results in the specific rules and requirements of the code for individual buildings.

[56] Assembly Occupancy is broken down into four divisions. The A2 Division is further broken down into six subcategories. Four of these require sprinklers while the other two subcategories do not. So, even if all daycares were classified as A2, they might

fall into different sub-categories with different code requirements. Some A2 daycares might require sprinklers while some might not.

[57] Both the Building and Fire Codes explain how the two codes relate to each other:

> The National Building Code (NBC) and National Fire Code (NFC) each contain provisions that deal with the safety of persons in buildings in the event of a fire and the protection of buildings from the effects of fire. These two National Model Codes are developed as complementary and coordinated documents to minimize the possibility of their containing conflicting provisions. It is expected that buildings comply with both the NBC and the NFC. The NBC generally applies at the time of construction and reconstruction while the NFC applies to the operation and maintenance of the fire-related features of buildings in use.
>
> The scope of each of these Codes with respect to fire safety and fire protection can be summarized as follows:
>
> > The National Building Code covers the fire safety and fire protection features that are required to be incorporated in a building at the time of its original construction. Building codes typically no longer apply once a building is occupied, unless the building is undergoing alteration or change of use, or being demolished.
> >
> > The National Fire Code includes provisions for:
> >
> > - the ongoing maintenance and use of the fire safety and fire protection features incorporated in buildings
> > - the conduct of activities that might cause fire hazards in and around buildings
> > - limitations on hazardous contents in and around buildings
> > - the establishment of fire safety plans
> > - fire safety at construction and demolition sites
>
> [Exhibit H-12, p. vii]

[58] The relationship between the two codes was discussed at the hearing with the Building Code being described as a construction code while the Fire Code was described as a maintenance code. Douglas MacKenzie, Fire Marshal, stated:

> So the Building Code tells us how the building is to be built for its design purpose and it is a construction document. The Fire Code is a maintenance document. It is how the building is maintained for its life, and within the Fire Code it allows for changes to that building over time.
>
> So if there's changes to the building that doesn't require a new building ... like a building permit, then the Fire Code could be utilised to enforce those upgrades and maintain those systems in place.
>
> [Transcript, p. 157]

[59] The Building Code, however, does provide some general guidance about its application to existing buildings:

> This Code is most often applied to existing or relocated buildings when an owner wishes to rehabilitate a building, change its use, or build an addition, or when an enforcement authority decrees that a building or class of buildings be altered for reasons of public safety. It is not intended that the NBC be used to enforce the retrospective application of new requirements to existing buildings or existing portions of relocated buildings, unless specifically required by local regulations or bylaws. For example, although the NFC could be interpreted to require the installation of fire alarm, standpipe and hose, and automatic sprinkler systems in an existing building for which there were no requirements at the time of construction, it is the intent of the CCBFC that the NFC not be applied in this manner to these buildings unless the authority having jurisdiction has determined that there is an inherent threat to occupant safety and has issued an order to eliminate the unsafe condition, or where substantial changes or additions are being made to an existing building or the occupancy has been changed.
>
> [Exhibit H-12, p. Division A 1-15]

[60] Having explained the basic structure of the Building Code, it is now useful to understand how the Happy Tots' facility fits into that structure.

(ii) Classification of Daycares

[61] Mrs. Mullins purchased Happy Tots in 1985, hence its operations have spanned numerous updates to the Building Code. Before the Order issued in 2024, the daycare was classified as an Assembly Occupancy, A2, under the 2015 Building Code.

[62] Fire Inspector Webb made a distinction between daycares that have infants and those that do not have infants. He concluded that centres without infants fall into the Assembly Occupancy category, specifically, "Assembly Occupancy not otherwise classified" (A2), while those with infants are part of the Care Occupancy (B3), category. The status of infants in a centre is key to Inspector Webb's conclusions. For simplicity, we will first discuss his conclusions about daycares without infants, which he classified as A2 Assembly Occupancies.

[63] While Fire Marshal MacKenzie did not authorize the Order, he appeared as an expert witness. To the extent his testimony helps clarify the issues around A2 and B3 it is highlighted here.

[64] The Building Code defines Assembly Occupancy as

> the occupancy or the use of a building, or part thereof, by a gathering of persons for civic, political, travel, religious, social, educational, recreational or like purposes, or for the consumption of food or drink.
>
> [Exhibit H-12, p. Division A 1-4]

[65] Inspector Webb was questioned at the hearing about his conclusion that daycares are classified as A2, even though the definition does not mention daycares. Inspector Webb said:

> … an assembly use building covers a lot of different buildings. Like, you know, a large meeting room is an assembly use. There's a whole bunch of people gathered there. It's literally an assembly of persons.
>
> Schools are considered an assembly use. Like, you know, elementary schools and up. Universities are an assembly use. Bar is an assembly use. It's anywhere where there's a lot of people ... or a number of people gathered in one place.
>
> [Transcript, p. 287]

[66] Inspector Webb continued to explain that as daycares were not performing arts centres, arenas, or in the open air, they fell into A2 for “assembly occupancy not elsewhere classified in group A.” Inspector Webb agreed that the explanatory “Notes to Part 3” (Division B 3-207) do not include any references to daycares. He explained that these were examples, and that a complete list did not exist. He further suggested that schools (which are one of the examples in the notes) were similar to daycares, at least those that did not have infants.

[67] Within the A2 category there are six sub-categories. As mentioned, these categories rely on height, building area and on the number of streets on which a property has frontage. Two of these sub-categories do not require sprinklers. Inspector Webb confirmed that the Happy Tots building is a two-storey building facing on two streets with

an area less than 1,000 sq metres. Putting aside the issue of infants, he said that type of building falls under “Group A, Division 2, up to 2 Storeys,” found in Article 3.2.2.25 of the Building Code. When questioned, Inspector Webb agreed that “if you're division A2 and you're one storey, or you're a small two-storey, you do not need a sprinkler.” He clarified that:

> Yeah, if we take infants out of it there's ... I've been to a number of daycares that are, like, small buildings that fit in the box that doesn't require sprinklers, that do not have sprinklers because they do not have the requirement with the infants.
>
> Likewise, I've been to very small daycares that do have infants on site and have been required to have sprinklers.
>
> [Transcript, p. 293]

[68] Inspector Webb concluded that daycares that do care for infants fall into Group B for Care Occupancy. Chief Covey said he supported Inspector Webb’s finding and the fire service’s computer registry would be updated to classify Happy Tots as a B3 facility. Inspector Webb confirmed that an unlicensed private daycare may also be considered a B3 Care Occupancy required to have sprinklers, although he also stated that if “licensing isn't requiring them to have fire inspections, we may not even be on site.”

[69] Care Occupancy is defined in the Building Code as “the occupancy or use of a building or part thereof where care is provided to residents. (See Note A-1.4.1.2. (1).)”. When questioned as to how that definition applies to daycares with infants, Inspector Webb referred to the definition in the Building Code for Care:

> *Care* means the provision of **services** other than *treatment* by or through care facility management to **residents** who require these services because of **cognitive, physical or behavioural limitations**. [Emphasis added]
>
> [Exhibit H-12, p. Division A 1-5]

[70] Inspector Webb added that he could not “make an argument that an infant wouldn't have cognitive, physical, or behavioural limitations.” He acknowledged that toddlers or special needs children could have limitations similar to infants. However, his

interpretation used the definition of “infants,” as children younger than 18 months, from the *“Daycare Act.”* The name of the former *Daycare Act* was changed a few years ago, and the Board understands that Inspector Webb would have been referring to the definition of infants found in the *Early Learning and Child Care Regulations,* N.S. Reg. 193/2010, s. 2.

[71] In a similar vein, Fire Marshal MacKenzie also commented on infants and their limitations, stating that infants:

> … lack the ability to self-evacuate, to identify the dangers that are present. They are one of our more vulnerable population, and the probability of them not reacting in an emergency situation in a fashion that an able-bodied adult or child of a toddler age would be considered ... again, the codes are developed based on the science and the testing, and they have determined that the ... that daycares with infants require sprinklers in all new construction.
>
> We are trying to ensure the safety of all Nova Scotian toddlers ... or infants I should say.
>
> [Transcript, p. 183]

[72] Ms. Young disagreed with these limitations for infants and children, pointing out that, because many parents now take a full 12 months of parental leave, most of their infants are capable of walking, although some toddlers and special needs children cannot:

> My argument to that was why the infants were just being considered for sprinklers and not the rest of the building was because they can't walk ... my argument is we rarely - rarely - get an infant anymore before 12 to 18 months because of the maternity leave. So the majority of our infants are 12 months coming to us because everybody at least takes the year. Some are taking 18 months now.
>
> So it's very rare that we get an infant that's not walking. Okay? So his argument is kind of moot that they can't walk out, because they could. Because a toddler with special needs that we have across the hall is not walking at 18 months. They can't walk. But they're not required to have sprinklers. So we have special needs toddlers. Some of them don't walk until they're two. But that's not even a consideration.
>
> So that argument to me is not relevant because we have walking infants.
>
> [Transcript, p. 98]

[73] Inspector Webb was also questioned about whether children in daycares were “residents” as required by the definition of “care.” He argued that “for the nine hours they're there a day they are.” He also stated that that the children “sleep there during part

of the day," pointing out that they had a sleeping room and took naps, making them residents. The definition of "residential occupancy" was discussed:

> *Residential occupancy* means the *occupancy* or use of a *building* or part thereof by persons **for whom sleeping accommodation is provided** but who are not harboured for the purpose of receiving *care* or *treatment* and are not involuntarily detained. [Emphasis added]
>
> [Exhibit H-12, p. Division A 1-10]

[74] In its questioning the Board referred to Note A-1.4.1.2.(1), referenced in the preceding definition for Care Occupancy:

> Support services rendered by or through care facility management refer to services provided by the organization that is responsible for the care **for a period exceeding 24 consecutive hours**. They do not refer to services provided by residents of dwelling units or suites, or to services arranged directly by residents of dwelling units or suites with outside agencies.
>
> In the context of care occupancies, these services may include a daily assessment of the resident's functioning, awareness of their whereabouts, the making of appointments for residents and reminding them of those appointments, the ability and readiness to intervene if a crisis arises for a resident, supervision in areas of nutrition or medication, and provision of transient medical services. Services may also include activities of daily living such as bathing, dressing, feeding, and assistance in the use of washroom facilities, etc. No actual treatment is provided by or through care facility management. [Emphasis added]
>
> [H-12, p. Division A 1-18]

[75] We questioned Inspector Webb about Note A-1.4.1.2.(1), specifically the requirement for 24 consecutive hours of care. He responded that:

> Well, it's not speaking directly to a daycare. However, I think the reasoning ... or my opinion of the reasoning for the 24-hour is to cover sleeping times. If someone is there 24 hours obviously they're going to sleep part of the time they're there in the night, much like in a daycare. Even though it's not 24 hours, there is a period in the day that they are sleeping.
>
> Pretty much everything else in that section you could apply to an infant as far as assessment of awareness and whereabouts, the ability and readiness to intervene in a crisis for a resident. All that other part, I believe, you can make the argument it would apply to an infant. The fact that they're not there for 24 hours, I think that is based mostly on the sleeping portion of the day.
>
> [Transcript, pp. 303-304]

[76] When Fire Marshal MacKenzie was asked "if someone who attends a daycare is a resident" he said "No. They would be considered an occupant. A resident is

someone who lives within the facility." He continued that they are considered under care because they're "not able to take care of themselves." The Fire Marshal elaborated that:

> …the fire code coordinator and building code coordinator have been having ongoing discussions with other jurisdictions in Canada and the classification of B3 for an infant care ... daycare is the standard of what's being used, and while they are not residents, they are still under care while in the facility.
>
> [Transcript, p. 196]

[77] Inspector Webb was also questioned on the Notes to Part 3 setting out examples of Care Occupancies, B3. He admitted that daycares were not an example used in this part of the notes and suggested that group homes or children's custodial homes would be the closest examples to daycares in the B3 section. He was unable to provide "an example that's analogous to a daycare where people don't live there on a 24-hour basis."

[78] Our findings in this area turn on two main issues. First, are daycares, generally speaking, Assembly Occupancy and, second, can daycares with infants be classified as Care Occupancy.

(iii) Are Daycares an Assembly Occupancy?

[79] In the first issue, we considered the various major occupancy groups listed in the Building Code. The terms "daycare," "daycare centre," or "childcare" do not appear in the definitions or examples for any of the Major Groups. We considered the testimony of Inspector Webb on assemblies and his comments that assembly buildings are "anywhere where there's a lot of people ... or a number of people gathered in one place." We also considered the examples provided in the Building Code, including the school example pointed out by Inspector Webb.

[80] Leaving aside Care Occupancy for the moment, we looked not just at Assembly Occupancy but all the major groups. There are 13 groups listed in Table 3.1.2.1

(shown previously) and we considered the defined terms in the Building Code for each. There is no reasonable argument for daycares being included in the majority of the groups. Hence, we excluded groups that were based on such things as residential occupancy, treatment, detention, or industrial processes. We did consider whether daycares might fall into Group D - Business and Personal Services occupancies or in Group A as Assembly Occupancies. While Inspector Webb had commented that you "could probably make an argument for [Business and Personal Services]," as a possible classification, we rejected it as significantly less analogous than Assembly Occupancy. Assembly is defined to mean "a gathering of persons" whereas Business and Personal Services was focused on "the transaction of business or the rendering or receiving of professional or personal services."

[81] The examples provided for Assembly Occupancy in A-3.1.2.1.(1) are for structures such as clubs, churches, libraries and schools – all buildings with potential for larger gatherings of people. Business and Personal Services includes banks, dental offices and self-service laundries. We agree with Inspector Webb that the assembly of individuals, similar to a school, is the situation that is most like daycares. We also agree with Inspector Webb that A2 (Assembly Occupancies not elsewhere classified in Group A) is the most likely category. The other three categories A1 – (Performing Arts), A3 – (Arenas), and A4 – (gatherings in the open air) are not applicable. We find that, setting aside the issue of infants, daycares are most likely an Assembly Occupancy, specifically A2 - Assembly Occupancies not elsewhere classified in Group A.

(iv) Are Daycares a Care Occupancy (B3)?

[82] We then turned our minds to reviewing the arguments for why a daycare might be considered a Care Occupancy, and whether the presence of infants would

switch the major occupancy from A2 - Assembly Occupancy to B3 - Care Occupancy. We considered the specific definition of “Care Occupancy” in the Building Code. This definition is included in three separate places within the Building Code. First, the “Terms and Abbreviations” section (1.4) has a list of defined terms including both “care occupancy” and “care.” Secondly, the “Notes to Part 1” in Division A has a further list of defined terms including Note A-1.4.1.2.(1) on “Care Occupancy.” This note is specifically referenced in the first definition for Care Occupancy that appears in the Terms and Abbreviations section. We interpret its inclusion in the first definition as meaning that it is not simply an interpretative aid but that it forms a part of the basic definition and should be read together with the first definition, especially (as we will discuss further) as it relates to the definition of “care.” Lastly, the “Notes to Part 3” provide “examples of the major occupancy classifications described” in the Building Code, which provided context to our interpretation of the definition.

[83] In reviewing the term Care Occupancy, it is worthwhile to outline how the definitions of “Care Occupancy” and “care” are connected in the Building Code. Care Occupancy means the “occupancy or use of a building or part thereof where care is provided to residents.” We see two critical sub-definitions: care and residents.

[84] Care is defined under the Building Code as:

> … the provision of services other than treatment by or through care facility management to residents who require these services because of cognitive, physical or behavioural limitations. [Emphasis added]
>
> [Exhibit H-12, p. Division A 1-5]

[85] Hence care (similar to Care Occupancy) can be seen as being for residents. It is based on three linked conditions: the provision of “<u>services</u>” to “<u>residents</u>” that are

required due to "limitations." Care, and hence Care Occupancy, requires all three of these conditions to be fulfilled.

[86] The services are described in Note A-1.4.1.2.(1) on "Care Occupancy":

> Support services rendered by or through care facility management refer to services provided by the organization that is responsible for the care for a period exceeding 24 consecutive hours. They do not refer to services provided by residents of dwelling units or suites, or to services arranged directly by residents of dwelling units or suites with outside agencies.
>
> In the context of care occupancies, these services may include a daily assessment of the resident's functioning, awareness of their whereabouts, the making of appointments for residents and reminding them of those appointments, the ability and readiness to intervene if a crisis arises for a resident, supervision in areas of nutrition or medication, and provision of transient medical services. Services may also include activities of daily living such as bathing, dressing, feeding, and assistance in the use of washroom facilities, etc. No actual treatment is provided by or through care facility management. [Emphasis added]
>
> [Exhibit H-12, p. Division A 1-18]

[87] This section describes seven possible services that "may" be provided by care facility management. When asked about the examples of services, Inspector Webb stated that one could apply pretty "much everything … to an infant as far as assessment of awareness and whereabouts, the ability and readiness to intervene in a crisis for a resident…". In reviewing these examples, the Board notes that at least two examples (the making of appointments and transient medical services) are unlikely to be applied to a daycare. While the other services may appear to have been written more for institutional care such as nursing homes, the Board agrees that they could be applied to daycares. These are examples of services that "may" be provided.

[88] More importantly, the notes indicate that support services be provided by an organization responsible for the care "for a period exceeding 24 consecutive hours." Happy Tots is not operated overnight. Ms. Young also explained that there are limits in

the applicable regulations on the number of hours of consecutive care in a licensed facility. When questioned, Inspector Webb elaborated that:

> Well, it's not speaking directly to a daycare. However, I think the reasoning ... or my opinion of the reasoning for the 24-hour is to cover sleeping times. If someone is there 24 hours obviously they're going to sleep part of the time they're there in the night, much like in a daycare. Even though it's not 24 hours, there is a period in the day that they are sleeping.
>
> [Transcript, p. 303]

[89] The Board cannot accept this inference. The language of the definition cannot bear it. While sometimes context clues are required to find the meaning of a particular section, and to interpret it within the broader scope of the legislation, this language is specific. It does not say “around 24 hours” or “about 24 hours” or even “overnight.” It says, “exceeding 24 consecutive hours.” The phrase, and the use of the word “exceeding,” makes it clear that care must be provided on a full-time basis, both daytime and nighttime, without stops or interruptions. Essentially, individuals receiving care would live at a facility or have live-in care. This type of care would be typical of an institution such as a nursing home. It is not a pattern that would be typical of most (if any) daycares where children might be present for a substantial portion of the daytime, and might have a nap time or rest period, but would not reside at the daycare or stay there overnight.

[90] The second linked condition is that services must be required due to “cognitive, physical or behavioural limitations.” As discussed, both Inspector Webb and Fire Marshal MacKenzie felt that infants had such limitations. The *Early Learning and Child Care Regulations* simply defines infants as those 18 months of age and younger. It does not discuss the cognitive, physical or behavioural limitations of infants compared to toddlers, or special needs children. Based on the evidence and the argument, the Board does not see any clear connection between the *Early Learning and Child Care Act* and

the definition of “care” in the Building Code. Rather, it seems that fire inspectors used the infant definition in the *Early Learning and Childcare Regulations* as a proxy for the “cognitive, physical or behavioural limitations” referenced in the Care definition. That aside, we accept that infants do have such limitations, as would most young toddlers and many special needs children, making it more difficult for them to evacuate a burning building. We do not see a clear line dividing infants from toddlers or other young children.

[91] The third condition of the definition is residency. Having agreed that infants may have cognitive, physical or behavioural limitations, we cannot accept that children in daycare, whether infants, toddlers or special needs children, are residents or more analogous to residents than occupants of a school or camp.

[92] Inspector Webb argued that “for the nine hours they're there a day, they are [residents].” The term resident is not defined in the Building Code. However, part of the definition of Residential Occupancy (Group C) refers to “persons for whom sleeping accommodation is provided.” As Happy Tots has a nap or sleeping room for the babies, Inspector Webb felt this indicated they were residents. Ms. Young stated that while they use the term “nap time” it is really a quiet-time, and children are not required to nap. Like most daycares in the Province, Happy Tots does not take children for overnight care. A child’s time at the centre is limited to 9.5 hours a day at most. As Fire Marshal MacKenzie stated, “a resident is someone who lives within the facility.” He said that the children at Happy Tots were occupants, not residents.

[93] The term “resident” is not defined in the Building Code, nor can we find any clear guidance within that Code as to its technical meaning. However, Article 1.4.1.2. says that undefined terms “shall have the meanings that are commonly assigned to them in

the context in which they are used….” As such, we agree with Fire Marshal MacKenzie. Children in daycares do not reside or live in the daycare. The fact that they may sleep or have quiet time in the daycare does not make them residents. Residents would normally reside in a building full-time, not just Monday to Friday during the daytime.

(v) Findings on Building Code Classification

[94] Having worked through the text of the Building Code, the Board found general patterns in the Major Occupancy groups. Assembly Occupancy is designed for the gathering of modest to large numbers of individuals in structures ranging from rinks to schools. Individuals use the facilities but do not reside in them. Care Occupancy (and Residential Occupancy) however is largely for residents who live and sleep in these buildings on a permanent basis. Other major groupings are for business or industrial types of structures.

[95] The Building Code does not outline the purpose of the Major Occupancy groups. Thus, we must rely on what the text says within the context of the Code rather than compare it with a purpose statement. Unfortunately, the text of the Building Code is generally silent on daycares. One of the three mentions of daycare in the 1400 pages of the Building Code is the context of a requirement for a Fire Alarm System (Article 3.2.4.1) in a building that is not sprinklered, where it groups “a school, college or child*care* facility, including a daycare facility, with an occupant load of more than 40.” Another case, addressing “Water Closets for Assembly Occupancy,” 3.2.4.1 requires a certain number of water closets “for primary schools and daycare centres.” The Code does not classify daycares into any of the major occupancy groupings but does address them in other provisions related to assembly occupancies. Thus, we must interpret where daycares fit

based on the defined terms and the normal usage of the words “assigned to them” by context.

[96] We agree with Inspector Webb that the *A2 - Assembly Occupancies not elsewhere classified in Group A* is appropriate for daycares. We disagree that *B3 - Care Occupancies* can be used for daycares. Care Occupancy requires three linked conditions: the provision of “services” to “residents” due to “limitations.” The Fire Marshal argued that the B3 classification applies to daycare facilities with infants because of the increased care required when there are infants present. The Fire Marshal, Inspector Webb, and Division Chief Covey all highlighted the unique vulnerability and increased need for care of infants, particularly during an emergency. We accept those differences and vulnerabilities. We agree that infants, and most toddlers and special needs children, generally have “cognitive, physical or behavioural limitations.” Some of the care services provided by a daycare are like the examples listed in the defined terms of the Building Code. However, under those defined terms, the services must be “for a period exceeding 24 consecutive hours.” Most daycares do not provide 24-hour care. We do not accept the argument that the intent of using the term “resident” can be stretched to all situations where a person’s vulnerability means they are unable to respond as quickly as otherwise to the signs of fire, or they are briefly sleeping, rather than to distinguish circumstances where people live full time. Additionally, the building requirements for a B3 facility differ more substantively than simply a requirement for sprinkler systems. The children in daycares are not residents of those facilities and, despite their vulnerability, we also do not find their circumstances are analogous to residents of nursing homes and other care occupancies.

[97] Fire Marshal MacKenzie stated that B3 is the standard other jurisdictions in Canada are using for infant care. However, the Board was not provided with helpful case law on this issue and a search for jurisprudence was not particularly fruitful. All jurisdictions may have different Building Code requirements depending on the variations they have adopted in their adopting legislative scheme. While not determinative for this Board, and not treated as persuasive, we note that the British Columbia Building Code Appeal Board also determined, in a decision dated March 20, 2014, *BCAB #1743 – Re. Classification of Infant Daycare Facility, Sentence 3.1.2.1(1),* that an infant day care facility (in that case for children 3 years old and younger) did not provide services to residents as stipulated in the B3 definition, and was appropriately classified as a Group A Division 2 major occupancy.

[98] The parsing of each of the defined terms in this case should not be misinterpreted as the Board's "overly legalistic" or limited review of one section without a view to the overall context of the legislative scheme. In our view, the plain wording of the Code read in context can lead to one interpretation only, that daycares are *A2 – Assembly Occupancy*. Individual daycares may be classified differently into the six sub-categories within A2 depending on the property, but their classification is not dependent on the age of the children they serve. Based on the evidence, however, Happy Tots is properly classified under Article 3.2.2.25. The Board finds that the decision of the Fire Inspector to classify Happy Tots as a B3 Care Occupancy structure, for the purpose of determining the Building Code requirements was incorrect. Unless other parts of the two codes, the *Act*, relevant legislation, or regulations direct otherwise in other circumstances, or circumstances change, Happy Tots should be properly classified under Article 3.2.2.25

as belonging to *Group A, Division 2, up to 2 Storeys*. That classification does not require the installation of sprinklers.

b) Other Arguments on Requiring the Installation of Sprinklers

[99] In the Board's view, the finding on this first issue would be sufficient to revoke the Order. Inspector Webb said that the basis for the contravention in his Order was the failure of Happy Tots, if classified as a B3 Care Occupancy facility, to have installed sprinklers. It otherwise complies with the Building Code requirements.

[100] However, HRM and the Fire Inspector argued that even if the Board were not satisfied that Happy Tots is a B3 Care Occupancy, it is still required to install a sprinkler system "because of the specific fire safety circumstances in those premises." For the reasons that follow, even if the Board's findings on the matter of the contravention were to be found to be incorrect, we find that, in this case, an order for Happy Tots to complete alterations of its premises to install a sprinkler system is not among the required actions permitted by the *Act.*

(i) Application of Section 17 of the *Act:* Has every "precaution that is reasonable in the circumstances" been taken to achieve Fire Safety?

[101] Counsel for the Fire Marshal argued that fire officials are entitled to exercise their discretion in determining what is necessary to achieve a minimum acceptable level of fire safety in a building. In Nova Scotia, every property owner, which includes a person "in control of land or premises," is required under s. 17 of the *Act* to take "every precaution that is reasonable in the circumstances" to carry out the requirements of the *Act* and Fire Code and "achieve fire safety":

> 17 Unless this Act or the regulations otherwise prescribe, every owner of land or premises, or a part thereof, and every person shall take every precaution that is reasonable in the circumstances to achieve fire safety and to carry out the provisions of this Act, the regulations and the Fire Code. [Emphasis added]

The Board interprets the first clause of the provision "Unless … otherwise prescribe(d)," to identify that this obligation is subject to exemptions or other applicable limitations within other provisions of the *Act* and *Regulations.*

[102] The concept of "achieving fire safety" is elaborated in s. 16 of the *Act*:

> **16** Fire safety is achieved when the circumstances at land or premises are such that, through a combination of
>
> (a) compliance with enactments having an impact on the protection of persons and property from the occurrence or consequences of a fire;
>
> (b) behaviour, training and informing of persons in relation to
>
> i. the prevention of fire, and
>
> ii. measures to lessen its consequences, including the egress from, or protection of persons at, the land or premises in the event of a fire;
>
> (c) fire-protection systems and measures for confining fire and smoke and delaying the progress of a fire;
>
> (d) physical arrangements for egress or a place of safe refuge for persons to use in the event of a fire; and
>
> (e) emergency preparedness,
>
> a well-informed person, taking into account the nature of the occupancy at the land or premises and the capacity of the fire department and available fire-suppression services to deal with an emergency, would have reasonable grounds to believe that
>
> (f) a fire that would harm a person or cause unwarranted damage to property is not likely to occur;
>
> (g) where a fire does occur, a person threatened by the fire, including a firefighter, will be able to survive the occurrence without physical harm, unless the person is harmed immediately by the initiation of the fire due to the person's proximity to the point of initiation; and
>
> (h) where a fire does occur, it will not cause unwarranted damage to property.

[103] This is a complex provision that leads to a difficult interpretive exercise. The interaction of Sections 16 and 17 of the *Act* essentially creates a scenario where (paraphrased) Happy Tots must take every reasonable precaution to ensure that the premises meet a standard of a "well informed person" having "reasonable grounds to believe" that fire that would harm a person or cause unwarranted damage "is not likely to

occur" and, where fire does occur, a person, including a firefighter, "will be able to survive the occurrence without physical harm" and the fire "will not cause unwarranted damage to property." This standard is to be achieved through a combination of compliance with relevant enactments, behaviour and training on fire prevention, safe egress and protection of persons from fire, fire-protection systems and measures for confining fire and smoke and delaying fire progress, fire exits and safe refuge, and emergency preparedness. The evaluation must take into account the occupancy use and capacity of the fire department and fire suppression services to deal with an emergency.

[104] Happy Tots highlighted the numerous active and passive fire prevention and fire safety systems it has in place, including: large scale windows for first-floor egress, fire extinguishers, a Fire Alarm Panel with direct communication to Fire Department, Emergency Lighting and Fire Exit signs, monthly fire drills, automated fire-rated doors, emergency power, regular testing and inspections, posted fire escape plans, location of infant room next to the main exit on the first floor, and a fire escape crib. Inspector Webb acknowledged these aspects; however, he said the missing pieces were the "fire suppression" elements like a sprinkler that would slow down a fire without fire department involvement and allow people more time to evacuate.

[105] Inspectors Webb and Division Chief Covey said that the lack of a sprinkler system creates additional risk that smoke and fire will spread throughout the building and may hinder the evacuation of children. Smoke and fire can create a heightened level of panic and risk that fire drill processes may fall apart, or could disable a responsible person, leaving infants in a smoke-filled environment. Infants are vulnerable when it comes to fire safety because they are unable to self-evacuate. They may hide from

firefighters in an emergency or be missed because of smoke and fire. The potential consequences are terrible to contemplate.

[106] HRM points to Happy Tots' evacuation plan, of which one component is to put the infants into the evacuation crib and take them outside. It argued that "Cribs are not intended for that purpose but have been accepted in the past where buildings have additional fire protection measures such as a sprinkler system." [Exhibit H-4, Tab 4, p. 8] Ms. Young showed the Panel members the crib during the site visit. It was smaller than a typical crib, with locking wheels. HRM's submissions seemed to point to the crib as the only contemplated method of evacuation, but we accept the evidence that it is but one of the components of Happy Tots' fire safety plan that has been in place and accepted by past fire inspectors. The Board accepts that, at least in the past, the rolling crib was accepted for centres other than those with sprinkler systems, including Happy Tots. The Board also finds from the evidence that the crib is not the only measure Happy Tots' staff has to rely on if evacuation is necessary. While not directly at ground level, the large windows can be opened from the inside and an infant could be passed outside to a person standing at the window. The staff ratios allow for multiple children to be carried out. One of the principal egress doors is located directly off the infant room.

[107] Nevertheless, the testimony from Inspector Webb, Fire Marshal MacKenzie, and Director Covey all indicated that the lack of sprinklers creates additional risk, and installing a sprinkler system would provide "extra protection and time." It would "limit the severity of effects from fire and explosion on the building and limit the probability of any person in the building being exposed to an unacceptable risk of injury." [Exhibit H-4, Tab 4, p. 8; Transcript, p. 335] HRM pointed out the aspects of the building configuration that

presented a risk to safe egress and firefighter safety, which were exacerbated by the lack of fire suppression to slow the progression of fire. These include the number of levels, narrow hallways, low barriers caused by the child gates between cubby areas and playrooms, the kitchen facilities and the combustible materials used in its 1970s era construction.

[108] If the Board had found that Happy Tots was properly classified as a B3 Care Occupancy, the *National Fire Code* would allow for an “alternate solution” that meets the objectives and functional statements of the *National Fire Code*. That means a solution that would achieve the desired purposes of a sprinkler system in terms of fire suppression capabilities. Happy Tots did not provide any potential alternate solutions, other than their existing precautions, and Inspector Webb felt there was no suitable alternative to a sprinkler system in the circumstances.

[109] Inspector Webb concluded that the lack of sprinkler systems at the Happy Tots facility amounted to a violation of the Fire Code. HRM and the Fire Marshal says that it is also a violation of s. 17 of the *Act* because fire safety is not being achieved without sprinklers.

[110] HRM indicated in its final submissions that the “Appellant must prove that Inspector Webb was mistaken that a sprinkler would enhance the safety of the daycare.” The Board does not accept that this is the standard under s. 17 of the *Act*, given the complexity of that provision. Anyone applying the legislation must assume that the drafters chose its language purposefully. The test the Board must apply is that a well-informed person would have reasonable grounds to believe, considering Happy Tots’ use of the building as a daycare with infants and the capacity of the fire department and fire

suppression services, that in the event of a fire, a person including a firefighter would survive without physical harm, and there would not be unwarranted damage to property.

[111] The Board has consistently found that fire safety is paramount. The Board recognizes the serious risks of fire and the vital role the regulatory scheme including investigations and building standards, plays in enhancing public safety. However, an interpretation of the *Act* that a person must take “every precaution” that could enhance fire safety would be an overstatement. “Achieving fire safety” is given a particular meaning under s. 16 of the *Act* that must be considered. There is a balance in this legislative scheme between measures to enhance public safety and what is a reasonable regulatory burden.

[112] On review of the evidence submitted in this case, the Board is not convinced, on a balance of probabilities, that the standard of “achieving fire safety” has been met by Happy Tots as the occupant responsible for fire safety. The Board accepts the opinion of Inspector Covey that the configuration of this building – its age, material and layout, the number of children and infants being cared for, and the capacity for fire suppression prior to active involvement of the fire department, create a real risk that, in the event of a fire, a person, child or firefighter could face physical harm or not survive. A well-informed person, particularly a person hearing the evidence of Inspector Webb and Fire Marshal MacKenzie, without expert evidence to the contrary, is not likely to find grounds to believe the opposite.

[113] However, the Order did not include s. 17 among the contraventions listed. There was no prior notice to the Appellant that the fire service might argue for the Board to consider different violations to justify the Order for sprinklers. Evidence wasn’t filed

based on answering these arguments. Happy Tots must have a fair opportunity to know the case they have to meet. Further, in the full context of a purported contravention of this section, the Board also must review at what "precautions reasonable in the circumstances" Happy Tots is required to take that the fire official says they are refusing to take. The only action the Board is aware of that Happy Tots has refused is the installation of a sprinkler system as required by the Order. There may be other precautions that a fire official could recommend that would diminish the risk, but in this case the Board was not directed to any.

(ii) Do reasonable precautions to achieve fire safety include "alterations" if Happy Tots complied with the Building Code "of the day"?

[114] Notwithstanding that the Fire Inspector may have been justified in finding that fire safety was not achieved, which indicates a potential violation of Happy Tots' obligations under s. 17 of the *Act*, the Board must still consider whether reasonable precautions include the installation of sprinklers, and if the required actions under the Order were authorized under the *Act*. For the reasons that follow, the Board finds that the required actions in the Order, insofar as they require alterations to the building to install a fire suppression/sprinkler system, are not among the "precaution(s) reasonable in the circumstances" that the Fire Inspector was permitted to order under the *Fire Safety Act*.

[115] Happy Tots has been operating for nearly 40 years. There is no debate that it has offered services to infants throughout that time and Ms. Young said it has always had the same configuration of rooms. Although they now rent rather than own the building, their use and occupancy of the building have not changed. Happy Tots has continued to meet the requirements of the *Early Learning and Child Care Act.* They were led to believe that because they held their licence prior to changes to the regulations, they were not

compelled to meet the Building Code requirements that would be required in a new venture, and this was communicated by fire officials before the province adopted the current version of the Fire Code.

[116] Section 27 of the *Act* forms the basis for Happy Tots' arguments that "the code of the day" forms the regulatory framework for the inspection. They argue that they have a pre-existing or 'legacied' exemption because they met the prior Building Code requirements in effect at the time of their occupancy permit in the 1980s. Section 27 reads as follows:

> **27 (1)** No order made pursuant to Section 25 shall require that alterations be made to a building that, at the time an occupancy permit was issued for the building, complied with
>
> (a) the Building Code then established under the Building Code Act;
>
> (b) a municipal by-law then in force that adopted an edition of the National Building Code of Canada issued by the National Research Council of Canada; or
>
> (c) where no municipal by-law or Building Code Act was then in force, an edition of the National Building Code of Canada issued by the National Research Council of Canada that was current at the time of construction,
>
> and is in compliance with that code, unless the order is necessary to
>
> (d) respond to a requirement of the Fire Code; or
>
> (e) ensure compliance with regulations made pursuant to this or any enactment relating to the retrofitting of existing buildings for fire safety.
>
> **(2)** Notwithstanding subsection (1), where a building, at the time of its construction or occupancy, was constructed or occupied in violation of a regulation made pursuant to this Act or the former Act, an order may be made pursuant to Section 25 requiring alterations to the building. [Emphasis added]

[117] Inspector Webb recognized that s. 27 allows an exemption for buildings from current Building Code requirements where the buildings were permitted and legally constructed in compliance with an older building code and are still compliant with those requirements. This is the limitation on compelling alterations to existing structures in the *Fire Safety Act.* Inspector Webb did not consider its application in Happy Tots' case

because of his finding that the Order was necessary to respond to Article 2.10.1.1. of the Fire Code and the lack of a “written exemption” from a past authority having jurisdiction over the Code.

[118] As an existing use in an existing building, the Board considered whether s. 27 applies to the Order to Take Action against the daycare, and what impact it may have on our decision. Section 27 limits the scope of an Order to Take Action. It does not exempt an owner from complying with the provisions of the *Fire Safety Act* or Fire Code if they are subject to those requirements. It holds that an order under s. 25 must not require “that alterations be made to a building” when that element is met. The *Fire Safety Act* adopts the definition of “alteration” from the *Building Code Regulations,* which incorporate, by reference, the National Building Code definition of the term:

> *Alteration* means a change or extension to any matter or thing or to any occupancy regulated by this Code.

The parties agreed that, while there were different types of systems to choose from, the installation of a sprinkler system at the centre would require alterations to the building.

[119] One of the key components of s. 27 is that a building must, at the time an occupancy permit was issued, comply with “the Building Code then established under the *Building Code Act*.” HRM argued that the burden to prove this compliance is on Happy Tots, noting that no occupancy permit for the change of use from an apartment building to a daycare had been provided in evidence.

[120] As noted in *Bennett Holdings Ltd. (Re)* 2024 NSUARB 22*,* though the Board would consider a lawfully granted occupancy permit as *prima facie* evidence of compliance with the effective Building Code, documentary evidence or “physical proof” is not the only evidence the Board could accept. The standard of proof is on the balance of

probabilities that Happy Tots complied with the Building Code at the time it was issued an occupancy permit. The burden is on Happy Tots. As stated in *Bennett Holdings,* at paragraph 34:

> Obtaining access to municipal archival records can be difficult. Many [buildings] in Nova Scotia were built or modified before the record-keeping safeguards that exist today. Physical proof of the age of the building or a particular configuration need not be the "gold standard." An oral history or other evidence could suffice.

[121] Happy Tots has operated under provincial regulation as a daycare for nearly 40 years. As testified by Ms. Young and Mrs. Mullins, it is subject to frequent inspections by licensing officers for the Department of Education and Early Childhood Development and, previously, the Department of Community Services, as well as fire inspections. Section 8(3)(a) of the *Early Learning and Childcare Regulations,* requires that an applicant for a licence must present proof that the facility complies with "(a) the regulations, orders and directions of the appropriate authorities respecting fire prevention, safety, health and sanitary requirements; and (b) any municipal bylaws." Unlike in previous cases including *Riddell* and *Bennett Holdings*, the Board has no evidence that there was any requirement for sprinklers in the building when Happy Tots commenced operation, or that its layout or occupancy would not have complied with previous codes throughout its history. Had the building undergone renovations, it may have required upgrading to newer standards under the Building Code. However, Happy Tots' evidence, which HRM accepted in final submissions, was clear that "the building has not been renovated."

[122] Ms. Young's understanding is that they were always classified as A2 occupancy previously. Chief Covey confirmed this. Before the latest inspection that resulted in this Order, Happy Tots was considered under the A-2 Assembly Occupation

classification and, on the question of sprinklers, was never found to be non-compliant on that issue.

[123] Because of the many requirements in place for daycares, in the circumstances of this case it is reasonable to conclude that Happy Tots, on a balance of probabilities, complied with the requirements of the Building Code in effect at the relevant time its occupation and use of the building began. Sprinklers were not required.

[124] Even if Happy Tots had provided explicit evidence to Inspector Webb at the time of the Order that it complied with the "code of the day," he would not have accepted that s. 27 applied in this case. He said s. 27 would allow an order for alterations if "necessary to respond to a requirement of the Fire Code" or "to ensure compliance with regulations ... related to the retrofitting of existing buildings for fire safety." As discussed earlier, in the fire officials' view, Article 2.10.1.1 of the Fire Code created a requirement for daycares to meet the requirements of the 2015 National Building Code. Article 2.10.1.1 states:

> **2.10.1.1 Construction**
>
> **1)** Daycare centres shall be constructed in conformance with the NBC.

Section 2.10 is the one section of the Fire Code that addresses "Daycare Centres." The other specifications in that section applicable to daycares address requirements for the supervision of children (2.10.2), combustible materials attached to walls (2.10.3), and monthly fire prevention inspections (2.10.4.1). These are not at issue in this case.

[125] In Inspector Webb's rationale, Article 2.10.1.1 of the Fire Code would compel daycare centres to conform to the 2015 version of the National Building Code, which is listed in the Division B definitions section, Table 1.3.1.2., as the applicable code

for Article 2.10.1.1. The heading instructions for that table state that “Where documents are referenced in this Code, they shall be the editions designated in Table 1.3.1.2.”

[126] Even if the Board is wrong in its assessment that a daycare does not meet the criteria for a B3 Care Occupancy classification, as discussed earlier, the Board would not accept that Article 2.10.1.1 sets out a “requirement of the Fire Code” that would override the exception in s. 27 of the *Act* prohibiting an order for alterations where a property owner has demonstrated compliance with the provisions of the Building Code in force when its occupancy was authorized.

[127] The Board also notes that s. 15(3) of the *Fire Safety Act* states that:

> (3) Unless otherwise provided in the regulations, a reference in the Fire Code to the National Building Code of Canada, issued by the National Research Council of Canada, shall be read as a reference to the Nova Scotia Building Code adopted pursuant to the Building Code Act and regulations. 2002, c. 6, s. 15.

[128] The *Fire Safety Regulations* adopt a definition of Building Code that means the “National Building Code of Canada” as adopted and modified under the *Building Code Act* and the *Nova Scotia Building Code Regulations,* (i.e., the Nova Scotia Building Code). For the purposes of the *Act*, any reference in the Fire Code to the “National Building Code of Canada” is a reference to the version adopted by Nova Scotia. This definition must be applied pragmatically. For example, if there was a reference in the Fire Code to the first National Building Code ever adopted, it would be clear from the context that the intent was not to refer to the current Nova Scotia Building Code adopted in the regulations. However, there are dozens of references in the Fire Code where Table 1.3.1.2 would read in a reference to a particular version of the National Building Code, whether or not that version had ever been incorporated in the Nova Scotia Building Code.

[129] The Board considered the application of s. 27 in *Kwan (Re)* 2012 NSUARB 42, and the more recent cases of *Riddell (Re)* 2023 NSUARB 17 and *Bennett Holdings*. In *Kwan,* the position of the Fire Marshal at the time was that if the Fire Code directs compliance with the Nova Scotia Building Code, under s. 27(1), the Fire Inspector must consider the Building Code in existence "at the time of the issuance of the occupancy permit." If the feature complies with the "code of the day," no alterations are required. The Board disagreed with the Fire Marshal's position on s. 27(1)(d) when he argued that, because the Fire Code referenced the current Building Code, the terms of the current Building Code must always apply. The Board found this argument contrary to the intent of s. 27(1) as well as s. 15(3) of the *Act,* because it would render the first three subparagraphs of s. 27(1) meaningless. The Board in *Riddell* and *Bennett Holdings* did not have to address the second stage of analysis under s. 27(1)(d) because the construction did not conform to the code of the day either at the likely date of the occupancy permit nor the date of the Order. In essence, the Board concluded that for "a requirement of the Fire Code" under s. 27(d) to be utilized to order an alteration in exception to the first three subparagraphs of s. 27(1), it must use intentional language, rather than incorporating references to a particular version of the National Building Code or using imprecise language such as in 2.10.1.1.

[130] The Board understands that Inspector Webb interpreted the intent of Article 2.10.1.1 of the Fire Code to create a "requirement" that daycares must be retrofitted to the specifications of the 2015 National Building Code. The Board does not accept either this interpretation or that this definition of "NBC" in the Fire Code overrules the intent of s. 27 and s. 15(3) of the *Act*.

[131] The Fire Code provision states and intends for daycares to "*be constructed"* meeting the requirements of the National Building Code. In contrast, the Board notes that Section 8.1.1 of the *Fire Safety Regulations* specifically addresses "*retrofits"* of Boarding, Lodging and Rooming Houses. These regulations include specific construction requirements for fire separations, means of egress, and acceptable exits. This is but one demonstration of a suite of requirements for a particular occupancy use that are given specific treatment in the *Regulations.* Similarly, the Fire Code*,* s. 2.11.1 includes the following direction on the Boarding and Lodging Houses:

> **2.11.1.1 Construction**
>
> **1)** *Buildings* altered or occupied for purposes of providing accommodation for boarders, lodgers or roomers shall conform to the NBC. [Emphasis added]

[132] It is notable that this section, immediately following s. 2.10.1 dealing with daycares, uses different, more intentional language requiring conformity with the NBC when *occupied* for purposes of boarding, lodging, or rooming. It would be open to either the Code drafters or for the Province in its *Regulations* to specify in 2.10.1.1 that not only must daycares "be constructed" in conformance with the National Building Code, but that they must be upgraded and retrofitted to conform to the current requirements. Counsel for HRM argued that Article 2.10.1.1 would have "no use or meaning if it simply directed that Daycare Centres should be built in conformance" with the Building Code, as that is the basic standard. The phrasing of 2.10.1.1, however, cannot bear the interpretation that Inspector Webb asserts it does.

[133] The Board must assume that the difference is deliberate. Generally, the intent of the *Nova Scotia Building Act* and the National Building Code, as demonstrated in its statements of objectives, is to set standards for the construction and alteration of

buildings. Section 2.11.1 overcomes this presumption and compels conformance with the Code when a building is *altered* or *occupied* for use as a boarding, lodging, or rooming house. The same conclusion does not hold for daycare centres.

[134] The Inspector's conclusions and opinion both stretched the authority allowed in the *Act* and attempted to piece together or force an interpretation that would allow the department's desired outcome – i.e., that all daycares, but especially those with infants, should have sprinklers no matter when they were approved for that occupancy. However, when we looked at the entirety of the scheme, the Board finds that it cannot be reasonably interpreted to support that view.

(iii) Does a Fire Inspector have the authority to otherwise order the installation of sprinklers?

[135] The Board examined several other suggestions as to the legal authority for fire inspectors to order the installation of sprinklers, especially for existing buildings.

[136] Fire Marshal MacKenzie was not involved in the Order to Take Action against Happy Tots but provided testimony on the two codes and the *Act* after he was subpoenaed by the Appellant. He pointed out that Article 2.1.1.1 of the Fire Code provides for "the installation and maintenance of certain life safety systems in buildings." In his opinion, this section allowed a fire inspector "to require the installation of a fire and life safety system based on the risk that they observe." The Board has examined this argument and does not find any wording in this part of the Fire Code that would constitute a requirement for alterations or otherwise authorize an inspector to require a sprinkler system to be installed in an existing building.

[137] The Fire Marshal also suggested that daycares might be considered analogous to "children's custodial homes." The Board reviewed this definition but found

that such homes are residential occupancy with sleeping accommodations for less than ten persons. For the same reasons as have been discussed with respect to “care occupancy,” the Board rejects this argument. The over 60 children that attend Happy Tots do not reside in the building nor do they “live as a single housekeeping unit.”

[138] Lastly, it was implied that Fire Inspectors should have broad discretion to require sprinklers in an existing building because of their experience and mandate to promote fire safety. This discussion occurred not only around certain sections of the *Fire Safety Act* (as previously discussed) but also several broad policy statements that can be found in the Building and Fire Codes. For instance, both codes include a note on compliance, each cross-referenced to the other. The Building Code in A-1.1.1.1.(1) states:

> This Code is most often applied to existing or relocated buildings when an owner wishes to rehabilitate a building, change its use, or build an addition, or when an enforcement authority decrees that a building or class of buildings be altered for reasons of public safety. It is not intended that the NBC be used to enforce the retrospective application of new requirements to existing buildings or existing portions of relocated buildings, unless specifically required by local regulations or bylaws. For example, although the NFC could be interpreted to require the installation of fire alarm, standpipe and hose, and automatic sprinkler systems in an existing building for which there were no requirements at the time of construction, it is the intent of the CCBFC that the NFC not be applied in this manner to these buildings unless the authority having jurisdiction has determined that there is an inherent threat to occupant safety and has issued an order to eliminate the unsafe condition, or where substantial changes or additions are being made to an existing building or the occupancy has been changed. (See also Note A-1.1.1.1.(1) of Division A of the NFC.) [Emphasis added]

[139] Likewise, in A-1.1.1.1.(1) the Fire Code states:

> … Some NBC requirements are most readily applied to new buildings and their retroactive application to existing situations as prescribed by this Code could result in some difficulty in achieving compliance. It is the intent of the NFC that an equivalent level of safety be achieved rather than necessarily achieving strict conformance to the NBC. The application of this Code to the upgrading of existing facilities should be based on the judgment of the enforcement authority, who must deal with each case on its own merits.
>
> The NFC states that the owner or the owner's authorized agent is responsible for carrying out the provisions of the Code (see Article 2.2.1.1. of Division C). However, the owner is expected to communicate with the authority having jurisdiction, who is in a position to assess the relative significance of variances from the NBC requirements. Such authority may then determine that upgrading measures are not necessary, on the basis that the

> existing arrangement represents an equivalent level of fire and life safety. The NFC presumes that the adopting legislation provides for the exercise of the necessary discretionary judgment on the part of the enforcing officials, along with appropriate rights to appeal (see Note A-2.2. of Division C). See also Note A-2.1.3.1.(1) of Division B and Note A-1.1.1.1.(1) of Division A of the NBC. [Emphasis added]

[140] It is important that statements such as these not be interpreted in isolation but be read within the full context of the paragraph and any related context or material in the Codes, and the requirements of the *Act*. The statement in the Fire Code that "upgrading of existing facilities should be based on the judgment of the enforcement authority, who must deal with each case on its own merits" does not, in the Board's interpretation, grant broad discretionary power to a Fire Inspector to require what is otherwise not in the code. The principal source of the Fire Inspector's powers is found in the *Act*. Furthermore, the surrounding context refers to owners having "difficulty in achieving compliance," and suggests an Inspector consider an "equivalent level of fire and life safety" assuming the "adopting legislation" allows for such "discretionary judgment."

[141] Similarly, the Building Code states that its purpose is not to "enforce the retrospective application of new requirements to existing buildings." Referring to "sprinkler systems in an existing building for which there were no requirements at the time of construction," it clarifies that its intent is to not require such upgrades unless there have been changes to the building or occupancy; or, "there is an inherent threat to occupant safety." Fire Marshal MacKenzie stated that whether or not there is an inherent threat came down to an inspector's risk assessment. He said that any daycare with infants and no sprinklers constituted such a threat. Inspector Webb added in his testimony that "the safety of the children in all daycares ... needs to be protected equally." The Code gives little guidance as to what constitutes an inherent threat, and the Board finds we do not

have sufficient evidence supporting an interpretation that inherent threat applies to all daycares offering infant care, without sprinklers. This would amount to a *de facto* alteration to the Building Code and, for reasons already discussed, is contrary to s. 27 of the *Act*. Given its earlier determination, the Board is not required to make any findings on this argument.

V CONCLUSION

[142] The *Fire Safety Act* has the laudable purpose of educating and encouraging people to "apply the principles of fire safety so as to prevent fires, preserve human life, and avoid unwarranted property loss." The *Act* and the enforcement powers within it are crucial tools in the Province's efforts to promote fire safety and protect public safety. Nevertheless, it is a regulatory scheme, and the powers of the officers tasked with enforcing it are constrained by the limits established by the legislature.

[143] The Board does not doubt the sincerity of the Inspector's belief that additional measures are required to improve the fire suppression capacity for daycares, particularly those with infants, where vulnerable children may require more time for evacuation. However, this legislation includes provisions that appear to seek a balance between implementing the ideal standard and resulting hardship to property owners who met the legal standards required when their premises were approved for their occupancy use.

[144] The *Early Learning and Child Care Act* does not address fire safety standards for daycare buildings. The Fire Code sets out specific requirements directly in the code for certain types of uses but, for daycares, it refers only to their construction in

conformance with the Building Code, which also has no dedicated provisions that reference the specific requirements of construction or occupancy.

[145] The Board concludes that the Order to Take Action was improperly issued. The Board finds that the daycare, whether or not it offers services for infants, does not meet the criteria for classification as a B3 Care Occupancy under the Building Code. That classification is specifically limited to facilities providing care for residents with sleeping accommodations that have more than 24 hours of consecutive care. Children cared for at Happy Tots do not reside at the center or receive 24-hour care. Nor did Happy Tots violate Article 2.10.1.1 as identified in the Order. Even if the Board is wrong on this point, we found on a balance of probabilities that Happy Tots' legal occupancy of their building predates the provisions of the 2015 Building Code. The requirement for sprinklers is not necessary to respond to the "requirement of the Fire Code*,"* it is a Building Code standard. The Order to install a sprinkler system would require that alterations be made to a building that the Board finds, on a balance of probabilities, would have met and still meets the Building Code then in effect, contrary to s. 27 of the *Fire Safety Act.* Therefore, this action cannot be ordered.

[146] The Board is concerned about fire safety at Happy Tots. A sprinkler or other active fire suppression system would improve the chances for all staff, children and firefighters to escape without harm in the event of a fast-moving fire. However, given the Board's finding on the application of s. 27, it cannot be considered among the "precautions reasonable in the circumstances" to require an alteration contrary to that section. The respective legal authorities of the Board, the Fire Inspector, and Fire Marshal are necessarily limited by the legislation under which we operate. In this case, despite good

intentions, the Fire Inspector went beyond that authority and the Board must grant the appeal.

[147] The Fire Inspector's Order to Take Action dated January 11, 2024, is revoked.

[148] The Board's Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 9th day of October, 2024.

Julia E. Clark

Jennifer L. Nicholson

Bruce H. Fisher