

# ACE NEWSLETTER

Advocacy Centre  
for the Elderly

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## PRIVACY ISSUES IN LONG-TERM CARE

By: Jane E. Meadus, Institutional Advocate & Staff Lawyer

***A long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.<sup>1</sup>***

All legislation, regulations and policies governing long-term care homes must comply with this fundamental principle. To adhere to this principle, a resident's privacy must be maintained wherever possible. Unfortunately, due to the medicalized nature of long-term care which is provided in a congregate care setting, true privacy may not exist. This article will explore the rules regarding privacy, focusing on the rights of residents respecting personal privacy, visitors and cameras.

### PERSONAL PRIVACY

The *Long-Term Care Homes Act* includes a Residents' Bill of Rights. Right number 8 states that "every resident has the right to be afforded privacy in treatment and in caring for his or her personal needs". This means that you are entitled to have medical treatments and personal care done in private.

This can be difficult in a long-term care home. For safety reasons, rooms in homes do not have locks. Sometimes fellow roommates, staff and visitors forget that this means they cannot simply barge into a room or leave doors



open. You have a right to have the door closed if you wish, whether you are dressing, visiting someone, sleeping, or just want to have some peace and quiet. This can be difficult if your roommate wants the opposite. Hopefully, you will be able to come to an agreement; if not, you can ask for a room change.

Staff and visitors should always knock or announce themselves **before** they enter the room. If there are curtains, they should not be flung open without asking your permission. Staff are often so busy that they forget to get your permission to enter.

*...continues on page 2*

<sup>1</sup> *Long-Term Care Homes Act, 2007, SO 2007, c 8, s 1.*

**June is seniors' month – a time to celebrate seniors**

# PRIVACY ISSUES

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You should gently remind them of your privacy rights and if this does not work, speak to the administration or your Residents' Council.

Because your room is open to everyone, it can be difficult to keep items safe. Although you may have a chest of drawers and a closet, these can be opened by anyone. You are entitled to ask for, and be given, a drawer with a lock so you can store personal or valuable items. Be sure that you have a way of safekeeping the key. Many residents wear their key on a chain around their neck or on a wrist-band.

## PRIVACY AND VISITORS

You are entitled to meet with visitors privately, if you choose. The home is not entitled to know what relationship you have to your visitor or why they are visiting. For example, when I visit a resident I will often be asked if I am the resident's daughter or her friend. As legal counsel, I must ensure that I keep information confidential, especially since the resident may be complaining about the home! I will only divulge that I'm a visitor – that's all.

Homes can ask visitors to sign in for two reasons. The first is so they know how many people are in the building in the event of an emergency. The second is to be able to track people if there is an outbreak of a communicable disease or illness. It is not to track your visitors.

Resident Right 21 entitles residents the right to meet with a spouse or other person in a room that assures privacy. For instance, you might go to a meeting room so that you can discuss your personal affairs in private. It might also be a private bedroom so you can have privacy with an intimate partner who lives in the community. It can be difficult to be intimate in a room that you share with three roommates and that has no lock!

## PERSONAL HEALTH INFORMATION

All of your health information must be protected pursuant to the *Personal Health Information*

*Protection Act*. This means that all of your health information must be kept private by the home and its staff unless the law expressly allows it. Resident Right 11(d) stresses that the home must comply with the *Personal Health Information Protection Act*.

When you are admitted, you will often be asked to sign a consent form which would allow the home to share your medical information with a hospital if you required medical treatment. Even if you are not asked to sign such a form, this information could still be shared if you were sent to hospital in an emergency, as the treatment team at the hospital would be regarded as part of the "circle of care" and sharing medical information would be allowed in order to properly treat you.

However, the home may not simply include every health care provider in this circle of care to avoid having to get consent to disclose. For example, if you saw a specialist, such as a psychiatrist, the home would have to get your consent to obtain any information from the psychiatrist, as you may not have any interest in sharing this information.

If you are mentally capable, you get to consent to the collection, use or disclosure of your own personal health information. Capacity is defined in the *Personal Health Information Protection Act* as follows:

An individual is capable of consenting to the collection, use or disclosure of personal health information if the individual is able,

- (a) to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure, as the case may be; and
- (b) to appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent.<sup>2</sup>

If you are not mentally capable, your substitute decision-maker will make this decision for you. Your substitute decision-maker is the person highest in the hierarchy set out in the *Health Care Consent Act* who meets the definition of substitute decision-maker and is willing to act.<sup>3</sup> This may be a person you have named in a power of attorney for personal care, a family member, and if there is no one else, the Public Guardian and Trustee. Personal health information cannot be collected, used or disclosed without your consent or the consent of your substitute.<sup>4</sup>

<sup>2</sup> *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, s 21 (PHIPA).

<sup>3</sup> *Health Care Consent Act, 1996*, SO 1996, c 2, Sched A, s 20.

<sup>4</sup> Other persons may be able to consent in specific situations: PHIPA, s 23.



The fact that you live in a long-term care home does **not** mean that you do not have control of your health information. As long as you are competent, you have this control. If you are incapable, your substitute decision-maker has control.

It is often reported to us by competent residents that long-term care home staff call their spouse or children to “report” incidents. In fact, staff sometimes will not even discuss the incident with the resident even though they are capable!

Resident Right 16 allows a resident to designate someone to be contacted if they are being transferred or admitted to hospital. This is not the same as authorizing the home to discuss all of your care with the designate(s) without your consent. While you may authorize the home to release information about your health and well-being to family members, for example, this is for information purposes only and does not allow them to take over your care.

A requirement of privacy under the *Personal Health Information Protection Act* includes privacy in treatment. The legislation is breached if you receive treatment in a public area, your treatments are discussed in a public area, or your information is available in a public area (e.g., your chart left open on a desk). It is fine for staff to provide you with your medication but not to announce details about the medication without getting your permission first. You control the flow of the information, not the home.

You also have a right to see your medical chart

at no cost and to have copies at a reasonable cost.<sup>5</sup> The Office of the Information and Privacy Commissioner of Ontario publishes a fact sheet specifically about access to records in long-term care homes.<sup>6</sup> If you are prohibited from seeing your records, you should contact the Information and Privacy Commissioner or obtain legal advice.

## **CAMERAS**

### **Security Cameras Used by Long-Term Care Homes**

Many homes now have cameras in public areas for security reasons. These can be very helpful as they may allow monitoring of situations in many places at one time or enable the review of incidents that have been recorded.

However, there is a question about their legality. As the cameras capture residents of a health facility, it can be argued that this constitutes health information. If the camera captures the person receiving any treatment (e.g., being given medication in the hallway), it is definitely health information. Therefore, it could be argued that because the videotaping is not within the normal expectation of medical treatment, then specific consent must be obtained to both collect (record) and use the video. Homes should be cautious when considering using these cameras.

### **“Granny-Cams” Used by Residents/ Substitute Decision-Makers**

We often get asked if residents or their substitute decision-makers can put a camera in the resident’s room, especially if there are questions about the care being provided by staff. There have been several well-documented cases in the media where these “granny cams” have substantiated concerns which could not be proved otherwise. Since many residents have dementia and are unable to explain how they were bruised or why they are afraid, some families have turned to putting cameras in the resident’s room.

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<sup>5</sup> The Information and Privacy Commissioner of Ontario released an important decision that sets out their position on costs: Order HO-009 (2010), online: [http://www.ipc.on.ca/images/Findings/ho-009\\_1.pdf](http://www.ipc.on.ca/images/Findings/ho-009_1.pdf). Health information custodians may charge \$30 for the first 20 pages and 25 cents for each additional page.

<sup>6</sup> *Long-Term Care Homes: Consent and Access under the Personal Health Information Protection Act, 2004*, online: <http://www.ipc.on.ca/images/Resources/fact-09-e.pdf>.

Cameras cannot be used without the consent of the resident if they are competent. If the resident is not competent, only the resident's substitute decision-maker can consent to the use of the camera. Putting a camera in a person's bedroom is a very invasive process. The substitute decision-maker should carefully consider the advantages and disadvantages given the significant intrusion on the resident's dignity. The camera may pick up intimate care – is this what the person would really have wanted? Cameras should always be a last resort and only used when there are very serious concerns about abuse or neglect in care. There is also a potential risk of criminal prosecution under section 162 of the *Criminal Code* if the camera picks up nudity or sexual activity. While the defence of being in the “public good” is possible (e.g., prevention of abuse), it would be a question of law and fact in a court hearing.

Homes will often remove the cameras if they are found. We know of no authority that allows homes to remove such private property, unless it is a safety hazard. Staff sometimes refuse to enter a resident's room or cover cameras while providing care because they know they are being watched. Homes may claim that you cannot have a camera due to staff privacy concerns – ACE disagrees. We do not believe that staff have an expectation of privacy when providing care. However, there is a concern about roommates. Where possible, consent should be obtained for the use of a camera from the roommate or their substitute decision-maker. Cameras should strictly be limited to the space of the resident and not their roommate.

It is not recommended that “granny cams” have an audio function. It is an offence under the *Criminal Code* to record a private conversation without the consent of the party.<sup>7</sup> The audio component could potentially record a conversation between a roommate and their visitors or two staff members having a conversation in the room.

## OTHER PRIVACY ISSUES

Long-term care homes are allowed to disclose the fact that someone is a resident of the home, their general health status and their location (e.g., room number) in the facility. However, the home must give the person an opportunity to refuse to allow this



information to be provided.<sup>8</sup>

Homes often ask residents if their photos can be posted to celebrate birthdays or used in newsletters. This is good practice. There may be residents who, for a variety of reasons, do not want it known that they live in the home. This may be because they have been in an abusive relationship and do not want the abuser to know their location or they may have been a high profile member of the community and they do not want their residence to be widely known.

While Residents' or Family Councils are not bound by the same privacy legislation as homes, they should be respectful of the privacy of residents and try to adhere to these rules. Residents should be asked in advance that their names will be printed in meeting minutes and posted. If the Council publishes a newsletter, consent should be obtained to include pictures and names.

Under the *Long-Term Care Homes Act*, Family and Residents' Councils may bring issues of complaint management. The Council should always have the consent of the resident/family member before releasing the name of the complainant. Conversely, homes may never release information about residents/families or their complaints to the councils without their express consent.

Both the *Long-Term Care Homes Act* and the *Personal Health Information Protection Act* have exceptions for the provision of personal health information to the Ministry of Health and Long-Term Care. For example, homes are required to provide otherwise protected information about residents to the Ministry if there are complaints or critical incidents and during inspections.

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<sup>7</sup> *Criminal Code*, RSC, 1985, c C-46, ss 183.1 and 184.

<sup>8</sup> *PHIPA*, s 38(3).

# COMPLAINTS IN RETIREMENT HOMES

Conflicts may arise in any type of housing. Retirement homes are a type of housing which is subject to both the *Residential Tenancies Act (RTA)* and the *Retirement Homes Act (RHA)*. Retirement homes are typically occupied by persons 65 years of age who receive care services but they are still tenancies. This article is a brief explanation of common issues that may arise and how to address, and hopefully resolve, these complaints. Please note that this is only a general summary, not legal advice.

## RESIDENTIAL TENANCIES ACT PROBLEMS

Retirement homes are referred to as “care homes” under the *RTA*. The term “retirement home” is not found in this statute.

Common landlord and tenant problems which can arise in a retirement home include the following:

- **Rent** – Landlords may increase rent once a year by giving 90 days notice.<sup>2</sup> The government sets out the maximum amount landlords may increase rent annually (although these rent control guidelines do not apply to new rental units occupied after November 1, 1991).<sup>2</sup> Issues arise if proper notice is not given or if unlawful fees are charged.
- **Tenancy agreements** – Landlords are required to give tenants of care homes a written tenancy agreement.<sup>3</sup> However, even where there is a written agreement, problems may still arise if that agreement includes terms that are not permitted.
- **Care home information packages (CHIP)** – Each tenant must be given a CHIP but this does not always occur.<sup>4</sup> Problems arise if the landlord has not provided a CHIP, the CHIP is incomplete or the landlord is not providing or not making available what is listed in the CHIP.
- **Increases in care services rates** – The rates charged for care services can be increased with 90 days notice.<sup>5</sup> Issues arise if notice

is not given in the proper form or at the appropriate time. Landlords cannot charge one tenant a higher rate for care services than other tenants and any increase to a rate must be the same for all tenants.

- **Eviction** – Landlords cannot evict a tenant due to a change in their health or block their return after a hospitalization. If a landlord wishes to evict someone on the basis of increased care needs, they must prove that specific conditions have been met and obtain an eviction order from the Landlord and Tenant Board.<sup>6</sup>

## RESOLVING RESIDENTIAL TENANCIES ACT COMPLAINTS

Tenants can get advice from a lawyer or community legal worker with expertise in landlord and tenant law. These individuals may advocate with landlords or assist with applications to the Landlord and Tenant Board, Small Claims Court or the Human Rights Tribunal of Ontario (whichever is appropriate) to get an order to address the problem.

The website for the Landlord and Tenant Board is <http://www.ltb.gov.on.ca>. The Board can be reached by phone at (416) 645-8080 or 1-888-332-3234.

## RETIREMENT HOME ACT PROBLEMS

The *RHA* created a regulatory body – the Retirement Homes Regulatory Authority – that has the power to license homes, conduct inspections and investigations, and enforce the legislation, in addition to developing mandatory care and safety standards.

Under the *RHA*, tenants of retirement homes are referred to as “residents” and the landlord is called a “licensee”. However, for the purposes of this article, the terms “tenant” and “landlord” will continue to be used to avoid confusion.

Retirement home problems may include:

- **Breach of the Residents’ Bill of Rights** – The Residents’ Bill of Rights is found in the *RHA* and sets out ten specific rights (e.g.,

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<sup>1</sup> *Residential Tenancies Act, 2006*, SO 2006, c 17, s 116 (*RTA*).

<sup>2</sup> *RTA*, s 137.

<sup>3</sup> *RTA*, s 6(2).

<sup>4</sup> *RTA*, s 140; O Reg 516/06, s 47.

<sup>5</sup> *RTA*, s 150.

<sup>6</sup> *RTA*, s 148.

protecting the privacy and lifestyle choices of tenants).<sup>6</sup> Unfortunately, ACE often hears that these rights are being violated.

- **Written agreements and information packages** – Landlords are required to provide a written agreement and information package, in addition to the written tenancy agreement and CHIP required by the *RTA*.<sup>7</sup> Issues arise if the landlord has not provided this agreement or the information is incomplete.
- **Care and safety standards** – Problems occur if landlords do not comply with a variety of care and safety standards (e.g., fire, safety, public health requirements) as set out in the legislation.<sup>8</sup>
- **Plan of care** – Landlords are required to ensure that a tenant's care needs are assessed and that a plan of care is developed based on that assessment.<sup>9</sup> Issues may arise if the tenant does not have a plan of care, if it was developed without their involvement or if the tenant disagrees with the plan of care.

## **RESOLVING RETIREMENT HOMES ACT COMPLAINTS**

### **Complaining within the Retirement Home**

At the start of a tenant's residency in a retirement home, the tenant or their substitute decision-maker must receive a copy of the home's complaints procedure.<sup>10</sup> The procedure should identify a specific process to follow and may contain a list of specific staff members to whom complaints are to be made and in which circumstances.

**Any** complaint made to the home about the care of the tenant or the operation of the home – whether verbal or written – must be investigated and resolved (where possible) within ten business days of receipt of the complaint.<sup>11</sup> This includes providing a response to the person who made the complaint.

If the complaint cannot be investigated and resolved within this ten-day timeframe, the landlord must acknowledge receipt of the complaint within ten business days and provide a date by which a

resolution can reasonably be expected. A follow-up response should be provided as soon as is reasonably possible.<sup>12</sup>

The person who made the complaint must receive a response which sets out the following:

- The steps the landlord has taken to resolve the complaint; or
- That the landlord believes the complaint is unfounded and the reasons for that belief.<sup>13</sup>

The landlord is required to keep a record of specific information regarding complaints, including:

- The nature of each verbal or written complaint;
- The date the complaint was received;
- The type of action taken to resolve the complaint (including the date of the action, time frames for action to be taken and any follow-up action required);
- The final resolution, if any;
- Every date on which any response was provided to the complainant and a description of the response; and
- Any additional response made by complainants after receiving the landlord's response.<sup>14</sup>

The landlord must also review and analyze the records for trends on at least a quarterly basis. These results must be considered to determine what improvements are required at the home. The landlord is required to keep a written record of each review and the improvements made in response. Where a verbal complaint is resolved within 24 hours of receipt, it does not have to be included in the written record or in the subsequent review.<sup>15</sup>

### **Mandatory Complaint Reporting**

Friends and family members of tenants may be concerned about the treatment of the tenant they know or of other tenants in the home. One should be aware that the *RHA* mandates immediate reporting to the Registrar (a senior official at the Retirement Homes Regulatory Authority) by **any person** (except a resident) where there are reasonable grounds to

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<sup>6</sup> *Retirement Homes Act, 2010*, SO 2010, c 11, s 51 (*RHA*).

<sup>7</sup> *RHA*, s 53.

<sup>8</sup> *RHA*, ss 60-75.

<sup>9</sup> *RHA*, s 62.

<sup>10</sup> *RHA*, s 73.

<sup>11</sup> O Reg 166/11, s 59(1)2.

<sup>12</sup> O Reg 166/11, s 59(1)3.

<sup>13</sup> O Reg 166/11, s 59(1)4.

<sup>14</sup> O Reg 166/11, s 59(2).

<sup>15</sup> O Reg 166/11, s 59(3).

suspect any of the following which result in either harm or a risk of harm to a resident:

- Improper or incompetent treatment or care;
- Abuse of a tenant by anyone;
- Neglect of a tenant by a landlord or retirement home staff;
- Unlawful conduct; and
- Misuse or misappropriation of a tenant's money (whether there is harm or a risk of harm).<sup>16</sup>

A mandatory report is made by calling the Retirement Homes Regulatory Authority at 1-855-ASK-RHRA (1-855-275-7472). An inspection of the retirement home by the Retirement Homes Regulatory Authority is triggered by this type of report.<sup>17</sup>

### **Allegations of Abuse or Neglect**

In addition to reporting to the Retirement Homes Regulatory Authority, the landlord is required to start an investigation **immediately** for every alleged, suspected or witnessed incident of the following:

- Abuse of a tenant by anyone; or
- Neglect of a tenant by the landlord or a staff member.<sup>18</sup>

The landlord is also required to do the following:

- Immediately notify the resident's substitute decision-maker, if any, of the incident where it has resulted in physical injury, pain or distress to the resident;
- Notify the resident's substitute decision-maker, if any, within 12 hours of any other incident of abuse or neglect;
- Notify the resident and/or their substitute decision-maker, if any, immediately upon its completion of the results of the investigation;
- Immediately notify the police of any alleged, suspected or witnessed incidence of abuse or neglect that may be a criminal offence; and
- Analyze and implement changes and improvements following such investigations in accordance with the regulations.<sup>19</sup>

### **Complaints to the Retirement Homes Regulatory Authority**

Complaints about alleged contraventions of the *RHA* may also be lodged with the Registrar of the Retirement Homes Regulatory Authority. In certain circumstances, the Registrar's response may be reviewed by a Complaints Review Officer (a person appointed by the Board of Directors of the Authority). A decision of the Complaints Review Officer is final and not subject to appeal.<sup>20</sup> Therefore, tenants cannot have their complaints assessed by anyone outside of the Authority.

While these provisions do not come into force until January 1, 2014, it is still advisable to make complaints to the Authority because the complaint may actually be an abuse or neglect matter or the complaint may be relevant to the continued licensing of the home.

### **Complaints to Residents' Council**

The Residents' Council may also be a good place to discuss complaints. The *RHA* grants several powers to the Residents' Council, such as:

- Informing residents of their rights and obligations under the *RHA*;
- Attempting to resolve disputes between the landlord and tenants;
- Advising the licensee of any concerns or recommendations the Council has about the operation of the home;
- Providing advice and recommendations to the landlord regarding what the residents would like to see done to improve care or the quality of life in the home; and
- Reporting any concerns and recommendations to the Registrar.<sup>21</sup>

Suggestions and complaints brought by the Residents' Council to the landlord about the operation of the home and improvements in care must be responded to in writing within ten days of receipt.<sup>22</sup>

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<sup>16</sup> *RHA*, s 75.

<sup>17</sup> *RHA*, s 75(5).

<sup>18</sup> *RHA*, s 74(a).

<sup>19</sup> O Reg 166/11, s 15(3).

<sup>20</sup> *RHA*, s 88.

<sup>21</sup> *RHA*, s 56(3).

<sup>22</sup> *RHA*, s 56(4).

## FEAR OF REPRISAL

Often, tenants and their families do not wish to make complaints, fearing reprisal from staff. The Residents' Bill of Rights includes the right of the tenant or someone on their behalf to raise concerns and make complaints without fear of coercion, discrimination or reprisal.<sup>23</sup>

Further, the *RHA* contains whistle-blowing protections. This means that homes may not discourage reporting or threaten or subject residents to discriminatory treatment because a complaint was made.<sup>24</sup> If this occurs, a report should be made immediately to the Registrar at the Retirement Homes Regulatory Authority.

The decision to make a complaint is always a personal choice for the tenant. Where a non-tenant believes there may have been harm to the tenant, the legislation contains a duty to report, as discussed above. However, when there is no such legal duty, it will be up to the individual to decide whether the act of making the complaint is worth the risk of perceived reprisals.

## COMPLAINTS TO THIRD PARTIES

Just because a person is a tenant of a retirement home does not mean that they have lost other basic civic rights. There are many other avenues of complaint available to tenants and families, such as:

- **Police:** If there is a suspected crime (such as assault or theft), the local police department should be contacted.
- **Professional Colleges:** If the complaint is about the action of a specific person who is a member of a professional college (e.g., doctor, nurse or social worker), a complaint

about that person can be brought to the College itself for investigation.

- **Information and Privacy Commissioner of Ontario:** Where the issue deals with privacy or access to health information, the Office of the Information and Privacy Commissioner of Ontario can be contacted for assistance. Common examples of privacy problems are where the tenant's privacy was breached (e.g., the home gave personal information to a third party without consent), or the home refused to allow the tenant or their substitute decision-maker access to the tenant's records.
- **Human Rights Tribunal of Ontario:** The Human Rights Code prohibits discrimination on several grounds, including age, disability, ethnic origin, race sexual orientation and religion. If there is discrimination or harassment, a tenant can apply to the Human Rights Tribunal of Ontario. **The Human Rights Legal Support Centre** provides legal advice and representation before this Tribunal.

## CONCLUSION

Although the *RTA* and *RHA* do not contain as many complaints mechanisms in favour of tenants as ACE feels necessary, some legal avenues are available to tenants. We encourage tenants and their representatives to bring issues and complaints to the attention of staff at the retirement home, the Retirement Homes Regulatory Authority and/or other parties, as appropriate. This should be done as soon as possible after the issue arises. If one does not try to resolve the problem, it may never be fixed.

<sup>23</sup> *RHA*, s 51(1)10.

<sup>24</sup> *RHA*, s 115.



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# RECENT CHANGES TO THE INTERIM FEDERAL HEALTH PROGRAM: LESS MEDICAL CARE FOR REFUGEE CLAIMANTS

*By: Mitchell Rattner, Law Student & Volunteer*

## **HISTORY AND MAJOR CHANGES**

The Interim Federal Health Program (IFHP) was established in 1957 to provide temporary coverage of medical costs for eligible refugee claimants while awaiting qualification for provincial coverage. Until June 29, 2012, IFHP services included: basic coverage (i.e., treatments normally covered by provincial health insurance plans), supplemental coverage (i.e., health care benefits similar to those provided through provincial social assistance plans, such as drugs and dental and vision care), and costs related to the Immigration Medical Examination.

As of June 30, 2012, an Order in Council called “Order Respecting the Interim Federal Health Program, 2012” came into force. On the same day, an “Interim Federal Health Program Policy” also came into effect and supplemental health-care benefits for refugee claimants were eliminated. These changes were made without any advance notice or consultation with the provinces or health and immigration stakeholders. According to Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, the changes were made to: stop providing benefits for refugees and protected persons that exceed the benefits that most Canadian citizens are entitled to; save the government a projected \$100 million over the next five years; and discourage applications for refugee status in Canada where the claim may be unfounded.

## **DESIGNATED COUNTRIES OF ORIGIN**

Some of the changes to the IFHP are dependent upon the government’s new Designated Countries of Origin (DCO) program. According to Citizenship and Immigration Canada’s website, DCOs are “countries that do not normally produce refugees, but do respect human rights and offer state protection”. Examples of DCOs include the United Kingdom,

USA, Mexico and Hungary. Refugee claims by persons from DCOs will be expedited, ensuring that those who need protection receive it quickly while those claimants with unfounded claims are returned to their country of origin. It is noteworthy that failed refugee claimants from a DCO no longer have access to the Refugee Appeal Division.

## **BENEFITS AVAILABLE TO REFUGEES**

Refugee claimants continue to have coverage for medical services but only if they are of an urgent or essential nature. They no longer receive coverage for vision care, dental care or prescription medications. Medications and vaccines will only be covered if they are needed to prevent or treat a disease that is a risk to public health or to treat a condition of safety concern.

Refugee claimants from DCOs receive no medical care at all, unless their condition poses a public health risk or security concern for Canadians (e.g., tuberculosis).

Refugee claimants whose claims have been rejected can only obtain medical care if their condition poses a public health or security concern. Even if the person cannot be removed from Canada due to a government-issued moratorium on removals to particularly dangerous countries (e.g., Afghanistan or Iraq), there is essentially no health coverage.

## **CHARTER CHALLENGE**

Canadian Doctors for Refugee Care (CDRC), the Canadian Association of Refugee Lawyers (CARL) and three individual patients launched a lawsuit on February 25, 2013, asking the Federal Court of Canada to declare that the cuts to refugee health care are unconstitutional and violate refugees’ fundamental human rights under the *Charter of Rights and Freedoms*.

# AN OVERVIEW OF THE *FUNERAL, BURIAL AND CREMATION SERVICES ACT*

By: Graham Webb, Staff Litigation Lawyer



The *Funeral, Burial and Cremation Services Act, 2002* came into effect on July 1, 2012, replacing the *Cemeteries Act* and the *Funeral Directors and Establishments Act*. It is the result of years of consultation with stakeholders.

Consumers in need of bereavement services are often vulnerable due to grief over the recent death of a loved one. As a result, the government of Ontario has strengthened the rights of consumers in this new legislation. It is interesting to note that the government chose not to create a model of self-regulation by the industry as it has done other areas, such as retirement homes.

This article will highlight some of the most significant rights available to consumers.

## **CONTRACT REQUIREMENTS**

Under the *Funeral, Burial and Cremation Services Act*, every contract for bereavement services made with a cemetery, crematorium, funeral establishment or transfer service must satisfy certain legal requirements. The contract will not be enforceable if these requirements are not met.

The contract must be in writing and signed by both parties. It must be written in plain language and legibly printed in 10 point or larger type. Any written materials must be provided in accessible formats, such as large print or audio, at no additional cost when needed to accommodate a person with disabilities.

All bereavement businesses must also give customers a detailed and current price list of the

supplies and services they sell. These must include any package prices, minimum prices and the range of prices for interment and scattering rights.

Interment rights refer to the right to place human or cremated remains in a grave, crypt or niche. Cemeteries do not sell the land that is a lot or plot, but only the rights to be buried in the lot or plot. Scattering rights include the right to direct the scattering of cremated human remains on the designated scattering grounds within a cemetery (if the cemetery offers this service).

The contract must include a statement if the bereavement provider is receiving a commission for recommending certain supplies or services.

The purchaser's cancellation rights under the *Funeral, Burial and Cremation Services Act* must be included in the contract.

### **RIGHT TO CANCEL CONTRACTS**

The new law also gives consumers a 30-day "cooling-off" period. Within 30 days of making a purchase, a consumer may cancel any purchase contract and receive a full refund on any funeral supplies and services that have not yet been provided. Within the 30-day cooling-off period, the operator may not charge any administrative fees or make any other deductions from any amounts already paid, which are to be refunded in full.

Once the 30-day cooling-off period has expired, a consumer may still cancel any funeral services contract and receive a refund for any unused funeral supplies and services, minus a cancellation fee. The amount of the cancellation fee is limited to 10% of the contract price to a maximum of \$350.

A funeral services operator is not obliged to give any refund whatsoever on funeral supplies and services that have already been used, whether before or after the expiry of the 30-day cooling-off period.

### **GUARANTEED CONTRACTS**

Many people prepay their funeral because they want to ease the burden on their family and friends, both emotionally and financially. The *Funeral, Burial and Cremation Services Act* says that all prepaid contracts must be guaranteed. Once a consumer has paid for all funeral supplies and services as set out in a contract, the operator cannot charge any more than the contracted amount, even if prices have increased. However, provincial and/or federal taxes are not guaranteed and will be charged if there has been an

increase since the signing of the prepaid contract. Any extra services or supplies that were not included in the prepaid contract will also have to be paid by the consumer.

### **NO PASS-THROUGH OF OTHER CHARGES**

All cemeteries and crematoriums must be licensed, and their sales representatives must also be licensed. In the past, some operators may have included licensing fees in consumer contract or invoices. Under the new law, consumers can only be charged for supplies and services. The payment of licensing fees and license renewal fees are the responsibility of the funeral services operators, and these costs cannot be passed on as a separate charge to the consumer.

### **RESALE OF UNUSED INTERMENT AND SCATTERING RIGHTS**

Interment and scattering rights holders may now resell these rights on the open market, unless the cemetery has enacted a by-law that specifically prohibits the transfer of these rights.

If a cemetery prohibits the sale of interment and scattering rights to a third party, then in addition to any other rights of cancellation, the rights holder may give the cemetery operator written notice requiring the operator to repurchase the interment and scattering rights. A repurchase of rights by the cemetery can be more valuable than the cancellation of a contract to the rights holder because the cemetery operator must pay back either all money that was received by the operator under the contract, or the market value of the interment and scattering rights, whichever amount is greater, minus the amount of the operator's contribution to the cemetery's care and maintenance fund under the contract being cancelled.

If, at the time of repurchase, the price for the interment and scattering rights is not set out on the operator's price list, their market value is deemed to be equal to the value of interment and scattering rights of an equivalent or better lot located in the cemetery to which the cancelled contract relates. Or, if there is no equivalent or better lot in that cemetery, it is valued against another cemetery within the same geographic location that is similar in terms of size, religious or ethnic affiliation and for-profit or not-for-profit operation.

The maximum price that can be charged on a resale of interment or scattering rights is the amount shown for those rights on the cemetery's price list. Any resale

***...continues on page 13***

# OLD AGE SECURITY BENEFITS AND LEGAL AID ONTARIO CERTIFICATES

By: Graham Webb, Staff Litigation Lawyer

Many low-income Ontarians believe that if they are ever in legal trouble, they will qualify to be represented by a private lawyer through a Legal Aid Certificate. Unfortunately, this is not true.

Anyone in Ontario who receives an Old Age Security (OAS) benefit will not qualify financially for a Legal Aid certificate to obtain legal advice and representation by a private lawyer.

Legal Aid certificates are issued in criminal matters to help clients pay for a lawyer's services in the most serious and complex cases.

Legal Aid certificates can also be issued for eligible low income Ontarians in family law matters such as restraining orders and the division of property under the *Family Law Act*.

People appearing in mental health court on a criminal matter are usually assisted by duty counsel at their first appearance. Afterward, he or she can apply for representation by a lawyer in private practice under a Legal Aid certificate.

Regrettably, an older adult receiving an OAS pension would not qualify for a Legal Aid certificate in any of these cases based on Legal Aid's income criteria.

Legal Aid Ontario has strict financial eligibility guidelines. A single person with an annual income of more than \$12,500 will not qualify for a certificate. Similarly, a person applying for Legal Aid who lives in a two-person household will not qualify if the combined household income is more than \$22,500.

In Ontario, the guaranteed income for an OAS recipient is \$16,434 per year for a single person or \$26,890 per year for a qualified couple. These are the amounts that an Ontario resident who is at least 65 years of age, qualifies for an OAS

pension, and has no other income will receive from the OAS, Guaranteed Income Supplement (GIS) and Guaranteed Annual Income System (GAINS) programs.

For the benefit period April 1, 2013 to June 30, 2013, the maximum monthly OAS, GIS and GAINS benefits are as follows:

Benefit Program:	Per Single Person	Per Qualified Couple
OAS	\$546.07	\$1,092.14
GIS	\$740.44	\$981.92
GAINS	\$83.00	\$166.00
Total Monthly Income	\$1,369.51	\$2,240.06
<b>Guaranteed Annual Income</b>	<b>\$16,434.12</b>	<b>\$26,890.32</b>

Therefore, the guaranteed annual income for a single person exceeds the Legal Aid income guideline of \$12,500 by \$3,934 per year, and the guaranteed annual income for a qualified couple exceeds the Legal Aid income guideline for a two-person household of \$22,500 by \$4,390 per year.

As Legal Aid staff does not have any discretion to issue a Legal Aid certificate where the applicant's income exceeds the guideline amount, an OAS recipient could never receive a certificate for representation in criminal, family, or mental health matters because of Legal Aid's very restrictive income criteria.

However, Legal Aid Ontario does offer other legal services that low income seniors can take advantage of, such as:

- **Criminal, family, mental health and tenant duty counsel** available at Ontario courthouses.
- Free legal assistance and information on family law issues from a **Family Law Information Centre (FLIC)** at many Ontario courthouses.

- A range of legal resources and support for family matters at **Family Law Service Centres**, which are available in Brampton, Chatham, Newmarket, Sarnia, Toronto, North York and Windsor.
- **Family Law Offices** staffed with family law lawyers and paralegals that can assist clients with retaining a lawyer on restraining orders, equalization claims and property division at all levels of courts, including trial and appeal work, which are available in Sarnia, Ottawa and Thunder Bay.
- The **Family Law Information Program (FLIP)**, which is a free online resource for families, former spouses and partners about to enter the justice system that provides online information about child custody, support payments, shared parenting and property settlements using audio and text in clear simple language.

Legal Aid Ontario services are very dynamic and are subject to change. Current information about Legal Aid services can be found online at [www.legalaid.on.ca](http://www.legalaid.on.ca) or by telephone at 1-800-668-8258 or 416-979-1446.

The Ontario Legal Aid Plan, which was the predecessor to Legal Aid Ontario, was created in 1967 and delivered legal services mainly through the private bar under a Legal Aid certificate program as well as a network of specialty and general-service community legal clinics. Legal Aid Ontario was created in 1998 as an independent, publicly funded agency to replace the Ontario Legal Aid Plan in administering Ontario's legal aid programs. Ontario's legal clinics, such as ACE, have continued to provide legal services in all of the areas of law that they had previously served.

However, community legal clinics, including ACE, do not normally provide legal advice and representation in the areas of criminal law and family law. If an OAS pensioner can afford to do so, retaining a lawyer in private practice at his or her own expense is the only way he or she can obtain legal advice and representation from a lawyer of choice. Where an OAS recipient cannot afford to hire a lawyer privately, he or she will have to consider utilizing the other legal services noted above.

*...continued from page 11*

and transfer of interment and scattering rights to a third party must be carried out through the cemetery operator who will verify that the transferor has ownership of the rights being sold. A cemetery operator may charge an administrative fee for issuing a new interment and scattering rights certificate, and for providing additional copies of the cemetery by-laws, if they are required.

No person shall purchase interment rights or scattering rights for the sole or primary purpose of reselling the rights with a view to making a profit.

## REMEDIES

Depending on the type of operator, complaints are made to either the Board of Funeral Services or the Cemeteries Regulation Unit. The Board of Funeral Services oversees funeral directors, funeral homes and transfer services. The Cemeteries Regulation Unit, which is part of the Ministry of Consumer Services, oversees cemetery and crematorium operators.

These two bodies have the authority to:

- Require providers to respond to complaints;
- Attempt to mediate or resolve complaints;
- Give the provider a written warning;
- Require the provider to attend educational programs;
- Refer the matter in whole or in part to a discipline committee;
- Revoke or refuse to renew a license; and
- Take such further action as is appropriate.

Consumers with a complaint should send their written complaint to the Board or Unit, along with their contact information, an explanation of the problem(s) and copies of any supporting documentation.

## CONCLUSIONS

The *Funeral, Burial and Cremation Services Act* should make the law governing funeral services more accessible and understandable. It also provides important new consumer protections that give greater certainty of the cost of funeral services. Furthermore, if a person has already purchased a cemetery plot, but should at some later time change his or her mind, the new law provides much needed flexibility in disposing of funeral and interment services that are no longer wanted.

# NEWS AND ANNOUNCEMENTS

## JUDITH WAHL – DIAMOND JUBILEE MEDAL RECIPIENT

ACE is proud to announce that Judith Wahl, Executive Director, was awarded the prestigious Diamond Jubilee Medal.



Alex Henderson (Vice-Chair, Board of Directors at ACE),  
Judith Wahl and The Honourable Alice Wong.

Created in 2012 to commemorate the 60th anniversary of Her Majesty Queen Elizabeth II's accession to the Throne as Queen of Canada, the Queen Elizabeth II Diamond Jubilee Medal is a way for Canada to honour Her Majesty for her service to this country. This medal also honours significant contributions and achievements by Canadians.

Judith was chosen to be a recipient for her service to seniors in Canada, for her role in establishing ACE and her role in the development of elder law as an area of practice.

The Honourable Alice Wong, Minister of State (Seniors), presented the Diamond Jubilee Medal to Ms. Wahl at ACE's office on January 24, 2013. Congratulations Judith!

## BILL C-36: AN ACT TO AMEND THE CRIMINAL CODE (ELDER ABUSE) – NEW SENTENCING PROVISION NOW IN EFFECT

The *Criminal Code* was recently amended to add a new sentencing provision that is intended to result in tougher sentences for perpetrators of elder abuse.

There are no specific offences of elder abuse in the *Criminal Code*. According to a government press release, Bill C-36: *An Act to Amend the Criminal Code (Elder Abuse)* was introduced in order to “help ensure that sentencing for crimes against elderly Canadians reflects the significant impact that crime has on their lives”.

Section 718.2(a) of the *Criminal Code* sets out several aggravating factors (relevant facts and circumstances that increase the severity of a criminal act) that courts must consider when sentencing offenders.

Bill C-36 received Royal Assent on December 14, 2012 amending section 718.2(a)(iii.1) which now states:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.**

It will be left to the courts to decide how these new factors will affect sentencing outcomes.

## INTEREST RATE ISSUES IN LONG-TERM CARE HOMES

Under the *Long-Term Care Homes Act*, homes may charge a “reasonable” interest rate for missed, incomplete or late payments. The interest rate must be set out in agreements relating to basic or

preferred accommodation, as well as agreements for allowable charges other than accommodation (often called unfunded services).<sup>1</sup> The accommodation agreement<sup>2</sup> must state that the licensee is prohibited from charging interest on missed, incomplete or late payments where the resident has applied for a rate reduction, until such time as the Director approves the maximum accommodation rate.<sup>3</sup>

It has come to our attention, however, that some homes are listing rates that are illegal under the *Criminal Code*.<sup>4</sup> The rate being included in the agreement is a monthly rate but when it is converted to an annual rate, it is illegal. For example, if the rate is 6% monthly, this translates into an annual non-compounded rate of 72.24% or a compounded rate of 101.22%. Any rate of 60% or more is a criminal rate according to the *Criminal Code*. Anyone entering into an agreement to receive such a rate, or who receives payment or partial payment at the criminal rate, is guilty of an

indictable offence and liable to imprisonment for a term not exceeding five years, or guilty of an offence punishable on summary conviction and liable to a fine not exceeding \$25,000 or to imprisonment not exceeding six months, or both.

We recommend that every resident or their substitute decision-maker carefully review the admission agreement and ask whether the rate is actually a monthly or annual rate and to ensure that the annual rate is not charged on a monthly basis. It is also important to remember that that no penalties can be charged where an application for a rate reduction is pending.

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<sup>1</sup> O Reg 79/10, s 227(3)4.

<sup>2</sup> Please see s 80 of the *Long-Term Care Homes Act* and s 227 of O Reg 79/10 for the rules regarding “regulated documents”, including admission agreements.

<sup>3</sup> O Reg 79/10, s 254.

<sup>4</sup> *Criminal Code*, RSC, 1985, c C-46, s 347.

## TRIBUTE TO CHARLOTTE MAHER – A WELL-LIVED LIFE

Charlotte Maher was a friend and long time community advocate who passed away on March 5, 2013. ACE staff knew Charlotte through SPRINT (Senior Peoples Resources in North Toronto), Central Eglinton Community Centre and Carewatch.

Below are excerpts of her obituary that appeared in the Toronto Star on March 9, 2013:

*Active and independent until the end, Charlotte left us peacefully on March 5, 2013.*

*She was a fearless and tenacious advocate for social justice and her commitment to community building helped improve the lives of many people. She worked with kids, with women, newcomers to Canada, people with disabilities and older adults. Never one to stand on the sidelines, and believing in the value of active citizenship, Charlotte joined the political process and served as a school trustee for eight years. After this she continued to work in various capacities in a wide variety of social service agencies.*

*She took on leadership roles, often as an interim executive director, she participated in program planning and service provision, wrote newsletters and pamphlets, conducted research and administered*

*grants, mentored staff and students - she stuffed envelopes and kept lists. Charlotte sat on countless steering committees, boards of directors and task forces. She advised city leaders and provincial politicians whenever she saw the need - which was often. Much of this Charlotte did as a volunteer.*

*Early on, Charlotte was instrumental in founding a number of important organizations in Toronto including POINT (People and Organizations in North Toronto), SPRINT (Senior Peoples Resources in North Toronto) and Central Eglinton Community Centre.*

*Over the past two decades Charlotte, primarily devoted her energies to Care Watch, a volunteer-run seniors' group advocating for the right of older people to live in their own homes and communities with dignity and independence. All of Charlotte's work was informed by the belief that individuals counted. She encouraged people to be educated and engaged consumers of social services and to demand the right to influence policies and practices that affected their lives.*

Charlotte will be missed. We are a better community because of her.

## LEGISLATIVE VICTORY: MANDATORY SPRINKLERS IN CARE HOMES

On May 9, 2013, the Ontario government announced changes to the *Fire Code* and *Building Code* which will make it mandatory for all retirement homes and long-term care homes to have automatic sprinklers. Other changes include requirements for self-closing doors, enhanced fire inspections, increased fire safety training for staff and annual validation of fire safety plans.

The new regulations will take effect on January 1, 2014. All retirement homes and most private care facilities will have up to 5 years, or by 2019, to install sprinklers. Long-term care homes must install sprinklers within 11 years, or by 2025.

Since 1980, 44 older adults have tragically died in fire-related deaths in care homes. ACE has advocated for mandatory sprinklers in retirement homes and long-term care homes for many years in order to prevent unnecessary injuries and deaths of residents. We are pleased with these long overdue changes.

## COMMENTS FOR THE EDITOR

Comments about this newsletter may be sent to the editor, Lisa Romano, via regular mail or email at [romanol@lao.on.ca](mailto:romanol@lao.on.ca).

## ELECTRONIC NEWSLETTERS

To receive a copy of this and future newsletters electronically, please send an email to [gillardt@lao.on.ca](mailto:gillardt@lao.on.ca).



# APPLICATION FOR MEMBERSHIP

Advocacy Centre for the Elderly\*

2 Carlton Street, Suite 701, Toronto, Ontario M5B 1J3 • Phone: 416-598-2656 • Fax: 416-598-7924

[www.ancelaw.ca](http://www.ancelaw.ca)

*Please feel free to photocopy this page and send it to ACE to become a member!*

Name (Individual/Corporate): \_\_\_\_\_

Corporate Contact (if applicable): \_\_\_\_\_

Address: \_\_\_\_\_ Apt.: \_\_\_\_\_

City: \_\_\_\_\_ Postal Code: \_\_\_\_\_

Telephone (Home): \_\_\_\_\_ Business: \_\_\_\_\_

Email: \_\_\_\_\_

MEMBERSHIP FEE (check one)  Individual (\$10.00 enclosed)  Corporate (\$25.00 enclosed)

In addition to my membership fee, a donation of \$ \_\_\_\_\_ is enclosed.\*\*

**Your membership is important.** If the fee presents financial difficulties, please feel free to join anyway.

Committee Membership:

I am interested in seniors' issues and would consider membership on an ACE Committee.  Yes  No

*Membership Expiry Date: Annual General Meeting, Fall 2013*

By-Law No.1, 14.9 states: No owner or management official of a long term care facility, or employee of any organization representing long term care facilities shall be eligible to be elected to the Board of Directors of the Advocacy Centre for the Elderly.

\* ACE is incorporated as a non-profit corporation under the name "Holly Street Advocacy Centre for the Elderly Inc."

\*\* A tax receipt will be issued for donations over \$10.00.