

DETENTION IN LONG-TERM CARE

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In 2010, the *Long-Term Care Homes Act, 2007*¹ (the “Act”) was proclaimed, and with it a comprehensive regulatory regime intended to ensure the rights of residents of long-term care facilities are respected. However, the implementation of the legislation failed to correct a fundamental issue within Ontario’s long-term care system: illegal detention. While the legislation contains sections which would assist in rectifying this problem, the government has failed to bring them into force, thus leaving a gap which affects the residents of Ontario’s long-term care homes.

Section 32 of the Act would have allowed homes to restrain a person by using “barriers, locks, or other devices” in some specific circumstances. The section set out strict requirements governing when detention is allowed, the assessment requirements of any detention, and when detention is to be discontinued. Further, the section provides that a resident cannot be detained without the consent of the resident or their substitute decision-maker (SDM) where the resident is incapable. Finally, if an SDM is making the decision, the resident must be notified of the decision, be visited by a rights advisor, and must have the right to challenge the SDM’s decision to detain before the Consent and Capacity Board.

The inclusion of section 32 was intended to ensure that the resident’s rights were protected and residents detained only in accordance with the law. These protections included consent, notification, and the ability to challenge the detention. Unfortunately, without having enacted this section, any detention in long-term care continues to be illegal.

Long-term care homes provide services to a large number of residents whose capacity is at issue. Some of these residents would be at risk if allowed to leave the facility unescorted.



All homes have mechanisms for locking the main entrances, and residents are routinely prevented from leaving. Homes may have units which are self-contained and locked or have mechanisms which prevent residents from

being able to leave (i.e. wander guards). While these measures may be necessary to prevent harm coming to the residents, this does not mean that these measures are legal.

In Canada, detention of a person cannot take place without lawful authority. Lawful authority comes either from the common law, or is set out in legislation.

¹ S.O. 2007, c. 8.

The common law allows detention only in limited circumstances. For example, in circumstances where immediate action is necessary to ensure the safety of the resident or third parties, and even then the detention can only last until the immediate danger has passed.²

In order to detain people for a lengthy or ongoing period of time, the detention must be in accordance with legislation. The Canadian *Charter of Rights and Freedoms* provides that:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right not to be arbitrarily detained or imprisoned.

...

10. Everyone has the right on arrest or detention:

(a) to be informed promptly of the reasons therefor

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful.

At present, ongoing detention in a long-term care home is contrary to the *Charter* as none of the requisite rights set out above are in place.

In the recent case of *PS v. Ontario*, the Court of Appeal struck down parts of the *Mental Health Act* as being unconstitutional after a deaf man was held for many years in a psychiatric facility. The Court held that the sections of the *Mental Health Act* pertaining to

involuntary detention were inadequate for lengthy detention periods. One can infer, therefore, that an absence of any process whatsoever would be found to be an even more egregious violation of the *Charter*.

Many people believe that a finding of incapacity to consent to admission to a long-term care home under the *Health Care Consent Act (HCCA)* allows the incapable person to be detained; however, this is not true. The *HCCA* presently only allows an SDM to consent to the admission. It does not give authority over detention. The *HCCA* also contains unproclaimed sections which, if proclaimed, would allow an SDM to consent to detention, again with legal protections as required.

SDMs themselves do not have inherent authority to detain. Detention authority is given under the *Substitute Decisions Act* only to attorneys for personal care under a special type of power of attorney called a “Ulysses contract”. These special powers of attorney require the inclusion of special sections and performing of assessments before they can be entered into: very few of these types of powers of attorney exist. Courts can also authorize detention authority as part of a guardianship order. Otherwise, those who are acting as SDMs under the *HCCA* at present have no legal authority to consent to ongoing detention.

Detention in long-term care, in the form of restriction of movement, is common. Many long-term care homes have an unwritten policy of detaining all residents. For example, it is not uncommon for homes to prohibit all residents from leaving unless they have someone with them who will agree to be “responsible” for them. Other homes require that the resident “prove” that they should be allowed out before “privileges” are granted. Neither of these “policies” are legal.

Many residents complain of being sequestered in the home, being forced to have escorts (often whom they must pay) for appointments, and being otherwise limited in their movements for no reason other than they are living in a long-term care home. On January 17, 2007,

² *R. v. Webers*, 1994 CanLII 7552 (ON SC).

ACE appeared before the Standing Committee on Social Policy as part of its hearings into Bill 140 (which became the *Long-Term Care Homes Act, 2007*). At that time, we spoke of Sandy Shook, a 51 year old woman who had been illegally detained in long-term care homes from 1997 until 2004. During that time, although competent, she was prevented from leaving because her guardian of property had so instructed the home. She was one of the lucky ones insofar as she was finally able to contact ACE who were able to have this restriction removed immediately, but she could only do this because she had a telephone. Most residents do not have this luxury, and visitors are specifically instructed not to allow them to leave.³ This means that their ability to access help is severely restricted, it not entirely prevented.

In fact, the presumption should be that all residents are free to come and go, unless there is a reason to believe otherwise. One must always start with the provision of liberty: only with evidence can this be curtailed.

Long-term care home operators will take the position that they are simply trying to protect the residents who have been placed in their care. While this may be true, this does not entitle them to ignore resident's fundamental rights.

It would appear that the necessary sections have not been enacted due to concerns about the potential burden on home staff to advise residents of their rights and to attend hearings as required. While this process will require some administrative time, any such considerations are far outweighed by the current situation where the fundamental rights of many residents who are currently being detained in long-term care are being violated.

It is time that the government finally enacts these sections of the Act and the *HCCA* and takes the necessary steps to ensure that long-term care residents are not being illegally detained. This will protect both homes, which are presently at risk both criminally and civilly due to the illegal nature of current detentions, as well as the residents that live there.

A truly democratic society must protect the rights of all citizens, and especially those most vulnerable. It is time to protect the rights of residents of long-term care in Ontario.



³ To see the full transcript from this hearing: "Committee Debates for the Standing Committee on Social Policy for January 17, 2007." SP040 - Wed 17 Jan 2007 / Mer 17 Jan 2007. January 17, 2007. Online: http://www.ontla.on.ca/committee-proceedings/transcripts/files_html/2007-01-17_SP040.htm.