

Report on

ASSISTED LIVING IN BRITISH COLUMBIA



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Report on Assisted Living in British Columbia

**A Report prepared for
the British Columbia Law Institute and
Canadian Centre for Elder Law
by the Members of the
Assisted Living Project Committee**

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EXECUTIVE SUMMARY

This report contains recommendations for the improvement and reinforcement of the legislative framework for assisted living in British Columbia. It is issued as the final publication in the Assisted Living BC Project, a joint project of the British Columbia Law Institute (BCLI) and its division, the Canadian Centre for Elder Law (CCEL). The membership of the Project Committee that developed the recommendations in the report represents a broad cross-section of stakeholder interests, bringing to bear the perspectives of residents, public and private providers of assisted living housing, and regional health authorities.

The report was preceded by a consultation paper that was distributed to all registered assisted living facilities in the province. The consultation paper engendered responses from residents and their relatives, operators and employees of assisted living facilities, staff of health authorities, and care providers' organizations. The responses were carefully considered in finalizing the recommendations in this report.

Assisted living is a form of housing intended for senior citizens and persons with disabilities in which apartment-like dwelling is combined with hospitality services (meals and light housekeeping) and certain personal care services. It lies on a continuum between independent living and long-term residential care. Assisted living is organized on a "social model," or in other words as a residential community in which residents have individual dwelling units and shared dining and recreational facilities.

The number of assisted living units has expanded markedly in British Columbia during the past decade. The occupancy of about two-thirds of assisted living residents is publicly subsidized by regional health authorities. These residents pay what is known as the "client rate," equivalent to 70 per cent of their after-tax income, with the balance of the cost of their accommodation and services being subsidized. The other approximately one-third of residents in assisted living pay the cost of their accommodation and services entirely from private means. They are referred to as "private-pay" residents.

The legislative framework for assisted living is found in Part 3 of the *Community Care and Assisted Living Act*. It is a skeletal framework. Part 3 says little about the respective rights and responsibilities of residents or the operation of an assisted living facility. It is mainly concerned with the establishment of a registration scheme for assisted living facilities. It creates the position of the Assisted Living Registrar, but gives the Registrar very few powers apart from those related to the registration scheme. The Registrar has no jurisdiction to investigate or otherwise deal with com-

plaints and disputes arising in assisted living facilities except in relation to matters involving danger to the health and safety of a resident.

The skeletal nature of Part 3 and the narrow jurisdiction it gives to the Registrar leave many areas of legal uncertainty, especially in relation to tenancy. Assisted living facilities are excluded from the scope of the *Residential Tenancy Act*, and Part 3 is silent with respect to the rights and liabilities of operators and residents as landlords and tenants, respectively. In order to meet operational necessities in this and other areas, reliance has been placed on administrative policies and *ad hoc* measures, some of which lack statutory authority. In some cases, the policies are inconsistent with the legislation, even though they represent rational attempts to meet operational realities. The Ombudsperson commented upon these inadequacies of the legislative framework extensively in her comprehensive report on seniors' care in British Columbia released in 2012 entitled *The Best of Care*, and recommended that they be addressed. After almost a decade of experience with the present legislation, it is time to fill in the gaps in the framework.

Chapter I of the report describes the Assisted Living BC Project, the composition of the Project Committee, and the consultation process that was undertaken during the project. Chapter I refers to administrative and policy changes surrounding the Assisted Living Registry that occurred at a late stage in the project, partly in response to the Ombudsperson's report on seniors' care. It explains that these recent changes have not addressed the deficiencies of the legislative framework itself, and the recommendations in this report therefore remain fully relevant.

Chapter II (Nature and Definition of Assisted Living) explains the statutory definition of assisted living and how it relates to eligibility to reside in an assisted living facility. The criteria for entry to, and mandatory exit from, assisted living and the existing exceptions to those criteria are discussed. The statutory prohibition on housing persons in assisted living who cannot "make decisions on their own behalf" is analyzed and found wanting as a practical entry and exit criterion. An amendment is recommended to substitute the more nuanced and practical "interpretation" of this provision that assisted living operators are now directed to apply as a matter of administrative policy.

Chapter II also contains recommendations to broaden the existing exception for persons who lack independent decision-making capacity if they are housed with a spouse capable and willing to act as a substitute decision-maker. The recommendations would recognize other familial relationships for the purpose of substitute decision-making in assisted living, as well as extending the meaning of "spouse" under

Part 3 of the *Community Care and Assisted Living Act* to include a person in a long-term marriage-like relationship with a resident.

Further recommendations are found in Chapter II dealing with the range of personal care services in assisted living. The range of personal care services is restricted by the *Community Care and Assisted Living Act* to no more than two services from a list of six prescribed services that may be provided by residential care facilities. The manner in which this restriction is currently imposed does not recognize operational realities, however, especially the management of a resident's transition from assisted living to a higher care level. The regulatory policy introduced in order to deal with this gap that purports to allow additional services in assisted living at a notional "support level" is inconsistent with the Act. The Ombudsperson identified this aspect of the current framework as one in which the need for legislative reform is particularly acute.

Recommendations in Chapter II would maintain a boundary between assisted living and long-term residential care in a more realistic way by focusing on the actual operational distinctions between assisted living and residential care, rather than on the number of services provided. The usual hallmarks of long-term residential care are 24-hour professional nursing supervision, and the housing of residents with complex medical needs that require this. Assisted living facilities would be authorized to provide services that are consistent with and can be safely provided in a supportive semi-independent living environment without 24-hour professional nursing supervision or monitoring. In this manner, operators of assisted living facilities would have adequate authority to manage a resident's exit phase and could adapt care services to the needs of their resident populations.

Chapter III (Housing and Tenancy) deals with numerous issues relating to tenancy in assisted living. The recommendations in Chapter III recognize that the provincial government no longer intends to bring assisted living tenancies under the *Residential Tenancy Act*. They would give assisted living tenants some of the protections enjoyed by other residential tenants, however. Notably, they call for introduction of a rent control regime similar to the one that applies to ordinary residential tenancies. Rent control would apply only to the charges made for accommodation and not to those for other services. Special provisions are recommended for notices to terminate an assisted living tenancy.

Recommendations are made to give operators statutory authority to properly manage a resident's exit from assisted living when the resident needs to be transferred to a higher level of care due to loss of mental capacity or increased care needs. The present lack of statutory authority to meet the operational necessity of continuing to

house such a resident temporarily and provide additional needed services pending transfer to residential care is a major deficiency in the present legislation.

Chapter IV (Consumer Rights) deals with contractual relations between residents and operators. It contains recommendations on pre-contractual disclosure, notice of increases in service charges, procurement and termination of optional services (i.e., services other than those the operator is legally required to provide), and other issues relating to consumer protection in assisted living.

Another recommendation in Chapter IV to protect assisted living residents calls for an amendment to extend sections 18(3), (4) and (5) of the *Community Care and Assisted Living Act* to assisted living facilities, their operators, and employees. These sections only apply now to licensees of residential care facilities and their staff. They prohibit licensees and their employees from inducing residents to confer financial benefits (e.g., gifts and legacies) on the licensee or a staff member, or a spouse, relative or friend of either. They also prohibit a licensee or an employee of a licensee from acting under a power of attorney or a representation agreement granted or made by a resident. Gifts, terms in wills, or powers of attorney and representation agreements that result from a violation of the prohibitions are legally void. It is thought that assisted living residents as well as persons in residential care should have the protection of these provisions.

Chapter V (Bill of Rights) considers the merits of placing a list of residents' rights in legislation. The *Community Care and Assisted Living Act* already contains a schedule setting out rights of adult persons in residential care. So-called "bills of rights" are common in the legislation of other jurisdictions that governs forms of housing analogous to assisted living, and may be accompanied by statements of responsibilities of residents toward each other. A difficult policy question addressed in Chapter V is whether the rights in such a list should be legally enforceable in the sense of creating private causes of action.

A list of residents' rights can serve a useful purpose even if it is not legally enforceable, as it can have educational value and assist in maintaining standards of care and respect for residents. The present schedule to the *Community Care and Assisted Living Act* applicable to residential care does not create a cause of action or right to compensation in the event that it is breached. The response to the consultation paper indicated a high level of support extending over all categories of respondents for inclusion in legislation of a list of rights and corresponding responsibilities of residents that would be educational only, and not legally enforceable. In keeping with that response, and as a broadly acceptable compromise, the report recommends inclusion of such a list in the legislation governing assisted living.

Chapter VI (Privacy) deals with privacy in the special context of assisted living, where the autonomy of residents must be balanced with the performance of the operator's obligations to exercise vigilance regarding their health and safety and provide personal care services to them. Recommendations are made for the legislative protection of residents' privacy in relation to the resident's dwelling unit, provision of personal care, and communications.

Chapter VII (Health and Safety) examines the outcome-based approach to the setting of health and safety standards for assisted living facilities. The majority view within the Project Committee was that this approach is generally satisfactory. In the area of serious incident reporting, however, a criterion for determining whether a potentially reportable incident is sufficiently serious to warrant reporting to the Assisted Living Registrar is lacking. The criterion recommended in Chapter VII as the threshold for reportability is whether the incident placed the health and safety of a resident at risk.

Chapter VIII (Powers of the Assisted Living Registrar) contrasts the minimal investigative and enforcement powers of the Registrar with those of the Director of Licensing in relation to facilities providing residential care ("community care facilities"). While there are justifications for a greater level of regulatory oversight in the case of residential care, the jurisdiction of the Assisted Living Registrar is far too limited. Currently the Registrar has no jurisdiction to investigate an operational matter or complaint other than one involving health and safety or a facility operating without being registered. The Registrar may inspect records, but has no power to require anyone to provide information about the operation of a facility.

A recommendation is made to empower the Registrar to investigate a matter arising in connection with the operation of an assisted living facility, regardless of whether health or safety is involved, and to require information from operators and staff of a facility. These recommendations correlate to those made in Chapter X regarding the role that the Assisted Living Registrar should have in a comprehensive complaint and dispute resolution process.

Chapter IX (Employment) contains recommendations on the training and certification of care aides in assisted living facilities. Separate tracking of injury rates among workers in assisted living facilities is urged in order to build up an accurate occupational health profile for the specific sector that is distinguishable from that of other non-acute care settings.

Chapter X (Complaint Process and Dispute Resolution) describes the fragmented picture of jurisdiction over complaints arising in assisted living, and illustrates the disadvantage experienced by private-pay residents in terms of avenues available to them to pursue a complaint. A multi-stage process focused on a single agency, the Assisted Living Registry, is recommended for the resolution of complaints and disputes that are not resolved through the internal complaint processes of the assisted living facilities where they arise. The single agency approach would level the playing field for private-pay and subsidized residents once a matter is pursued beyond the internal complaint process of an individual facility. It would also prevent inconsistent outcomes. This approach necessitates the Registrar having jurisdiction over tenancy disputes arising in assisted living, for which there is currently no legally binding process for resolution other than court litigation or consensual arbitration.

In Chapter XI the question is asked whether limited governmental oversight continues to be an appropriate regulatory approach for assisted living. After considering several variants of industry self-regulation and comprehensive regulation of the kind applied to residential care, the conclusion reached is that limited governmental regulation is the best alternative to allow assisted living to expand and flourish as a safe and desirable housing option. This will only be the case, however, if the exercise of even limited regulatory activity rests on an adequate and coherent legislative foundation.

CHAPTER I INTRODUCTION

A. General

Assisted living is a form of housing intended for senior citizens and persons with disabilities in which apartment-like dwelling is combined with hospitality (meals and light housekeeping) and certain personal care services. It has been called “the middle option,” because on a continuum of care it lies between independent living and long-term residential care. Within the past decade assisted living has expanded markedly in this province.¹

Until 2002, the growth of assisted living in British Columbia occurred in a context of very limited legal regulation. Public consultation at that time relating to amendments to the *Community Care Facility Act*² revealed a general sense that some increased oversight of this form of housing was needed, but also that the type of extensive regulation applied to residential care facilities was not appropriate to assisted living. This process culminated in the enactment of the *Community Care and Assisted Living Act*,³ which was passed in 2002 and came into force in 2004. As its name implies, this Act governs both residential care (provided in “community care facilities”) and assisted living under separate regimes.

Part 3 of the *Community Care and Assisted Living Act* provides the legal framework for regulation of facilities for assisted living in the province.⁴ It imposes mandatory registration of those facilities and also creates the position of the Assisted Living Registrar. The Registrar has authority to:

-
1. The number of assisted living dwelling units more than quadrupled between 2004 and 2011. Assisted living dwelling units increased from 1,786 in fiscal 2004/05 to 6,832 in fiscal 2010/11: Office of the Ombudsperson, *The Best of Care: Getting It Right for Seniors in British Columbia* (Part 2), vol. 1 at 142, citing statistics supplied by the former Office of the Assisted Living Registrar.
 2. R.S.B.C. 1996, c. 60.
 3. S.B.C. 2002, c. 75.
 4. The Act uses the term “assisted living residence” to denote a facility providing assisted living. Section 1 of the Act contains an important definition of “assisted living residence.” See Chapter II of this report.
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- register facilities that meet the definition of an “assisted living residence” in the Act;⁵
- enter and inspect any premises related to the operation of an assisted living residence where the Registrar has reason to believe that the health and safety of a resident is at risk or an unregistered assisted living residence is being operated;⁶
- inspect and make a copy of or extract from any book or record at the premises, or make a record of anything observed during an inspection;⁷
- apply conditions to registrations, vary conditions or suspend or cancel registrations if the Registrar is of the opinion that a registrant has not complied with the Act or a regulation, another relevant federal or provincial enactment, or a condition of the registration.⁸

The Registrar does not have authority to investigate or deal with tenancy matters, the quality of services, or any other aspect of the operation of an assisted living facility unless a risk to residents’ health and safety is involved.

Part 3 is mainly concerned with the mechanics of the registration process. It touches on the criteria for eligibility to reside in assisted living, but says relatively little about the respective rights and responsibilities of residents or the operation of an assisted living facility. In part, this reflects the novelty of assisted living as a form of housing in British Columbia at the time Part 3 was enacted. It also reflects a governmental choice at the time of enactment to put in place only the basic legislative authority to carve out a place for assisted living in the continuum of care, and allow the rest of the regulatory structure to be added principally through administrative policy as developed by the Registrar of Assisted Living.⁹ Part 3 gives the Registrar authority to set and enforce standards only with respect to health and safety, however, and very few powers.

5. *Ibid.*, s. 25(1).

6. *Ibid.*, s. 25(2)(a).

7. *Ibid.*, ss. 25(20)(b), (c).

8. *Ibid.*, s. 27.

9. See remarks by the Hon. Katharine Whittred, Minister of State for Long-term, Intermediate, and Home Care, during debate in committee on the *Community Care and Assisted Living Act: Debates of the Legislative Assembly*, 25 November 2002, p. 4639.

The skeletal nature of Part 3 of the *Community Care and Assisted Living Act*, coupled with the narrow jurisdiction that Part 3 gives to the Registrar, leave many areas of legal uncertainty. The most notable area of uncertainty is in relation to tenancy. Assisted living facilities are excluded from the scope of the *Residential Tenancy Act*,¹⁰ and Part 3 is silent with respect to the rights and liabilities of operators and residents as landlords and tenants, respectively. As a result, residents in assisted living do not have the statutory protections enjoyed by other residential tenants, and their relations with their landlord rest on an archaic body of common law.

Many other aspects of assisted living would benefit from a more solid legislative foundation. After almost a decade of experience with the present legislation, it is time to fill in the gaps.

B. The Assisted Living BC Project

This report is published in connection with the Assisted Living BC Project, a joint initiative of the British Columbia Law Institute (BCLI) and its division, the Canadian Centre for Elder Law (CCEL). The project was begun after the publication of *Assisted Living: Past, Present and Future Legal Trends in Canada*, a research study by CCEL that examined and compared the legal and regulatory frameworks for assisted living and its equivalents across Canada. That study pointed to various gaps and areas of uncertainty that led the Board of Directors of BCLI /CCEL to conclude that a project focusing on British Columbia's legislation would be worthwhile.

The Assisted Living BC Project began in late 2009. The project examines the legal framework for assisted living from various perspectives: the nature and legal definition of assisted living, housing and tenancy issues, consumer rights (including the relative merits of having a "resident's Bill of Rights"), privacy, health and safety, employment and labour relations, dispute resolution, and different regulatory approaches that could be employed.

C. The Project Committee

The Assisted Living BC Project was carried out with the aid of a Project Committee with great collective knowledge of the assisted living sector in addition to legal expertise. Its members represent a broad cross-section of the interests involved with

10. *Residential Tenancy Act*, S.B.C. 2002, c. 78, s. 4(g)(v). Amendments in the *Tenancy Statutes Amendment Act, 2006*, S.B.C. 2006, c. 35 that would have extended the *Residential Tenancy Act* to assisted living facilities with certain modifications have not been brought into force due to stakeholder dissatisfaction with their terms, and may be slated for repeal. See letter of 12 December 2011 from the Hon. Rich Coleman, Minister Responsible for Housing, to the Ombudsperson, *supra*, note 1, vol. 2 at 445.

assisted living: those of residents, public and private providers of assisted living, a regional health authority, and BC Housing. The Project Committee held in excess of 30 meetings over a three-year period to develop the recommendations contained in this report.

D. The Consultation Paper

In November 2012 BCLI / CCEL issued the *Consultation Paper on Assisted Living in British Columbia* to seek reaction to tentative recommendations of the Project Committee. The consultation paper was distributed to each registered assisted living facility in the province, and was also freely available on the internet. Response was facilitated by means of a response booklet that was available electronically and in print. Readers were encouraged to go beyond responding to the questions set out in the consultation paper and provide additional comments if they wished to do so. Readers were asked to respond by the end of February, 2013.

The consultation paper generated a substantial volume of response from residents, operators, staff of facilities, and health authority personnel. The responses were carefully analyzed and the Project Committee also considered them closely in developing the recommendations contained in this report.

E. Recent Changes in Administration and Policy

In the course of the project, the Office of the Ombudsperson issued *The Best of Care*,¹¹ a major report on seniors' care in British Columbia that contained numerous recommendations with respect to assisted living. Publication of the consultation paper coincided with a period of flux commencing in 2012 in which the Office of the Assisted Living Registrar underwent substantial reorganization, relocation, and integration into the Ministry of Health as the Assisted Living Registry. This process was accompanied by new policy initiatives within the Ministry of Health concerning the assisted living sector. The process of policy development is continuing in the Ministry at the present time.

These developments so far have not involved change to Part 3 of the *Community Care and Assisted Living Act* or the regulations governing assisted living, however. The recommendations in this report regarding the shortcomings of that legislative framework therefore retain their relevance, despite the reconstitution of the regulatory structure and policy departures that have occurred in the year prior to publication of this report.

11. *Supra*, note 1.

F. A Note on Terminology

In keeping with what we understand to be common usage, we generally use the term “assisted living facility” or simply “facility” in this consultation paper to refer to an “assisted living residence” as defined in the *Community Care and Assisted Living Act*. We also use the more common term “operator” to refer to the person or organization responsible for running an assisted living facility, instead of the term “registrant” that is used in the Act.

CHAPTER II NATURE AND DEFINITION OF ASSISTED LIVING

A. Assisted Living In British Columbia: The Present Model

1. THE THREE-PART LEGISLATIVE DEFINITION

The keys to understanding the present legislative framework underlying the present model of assisted living are the three interlinked definitions of “assisted living residence,” “hospital services,” and “prescribed services” in the *Community Care and Assisted Living Act*.¹²

(a) *What is an “assisted living residence”?*

Section 1 contains this definition of “assisted living residence”:

“assisted living residence” means a premises or part of a premises, other than a community care facility,

- (a) in which housing, hospitality services and at least one but not more than 2 prescribed services are provided by or through the operator to 3 or more adults who are not related by blood or marriage to the operator of the premises, or
- (b) designated by the Lieutenant Governor in Council to be an assisted living residence;

(b) *What are “hospitality services”?*

“Hospitality services” are also defined in section 1:

“hospitality services” means meal services, housekeeping services, laundry services, social and recreational opportunities and a 24 hour emergency response system;

12. *Supra*, note 3.

(c) What are “prescribed services”?

“Prescribed services” are defined simply as services prescribed under section 34 of the Act, which is the section that confers regulation-making powers. A single list of services is prescribed under section 34(4) for both residential care and assisted living, namely:

- (a) regular assistance with activities of daily living, including eating, mobility, dressing, grooming, bathing or personal hygiene;
- (b) central storage of medication, distribution of medication, administering medication or monitoring the taking of medication;
- (c) maintenance or management of the cash resources or other property of a resident or person in care;
- (d) monitoring of food intake or of adherence to therapeutic diets;
- (e) structured behaviour management and intervention;
- (f) psychosocial rehabilitative therapy or intensive physical rehabilitative therapy.¹³

Assisted living facilities are registered to provide the one or two prescribed services specified in the application for registration. An assisted living facility cannot, for example, provide two particular prescribed services to some of the residents and two different prescribed services to other residents.

Operators of assisted living facilities are free in theory to select which one or two of the prescribed services to provide. Until 2012, however, all selected the first two services, namely “regular assistance with activities of daily living” and “central storage of medication, distribution of medication, etc.” These are the two services mainly required by elderly residents, who make up the majority of the population in assisted living.

In 2012 the Assisted Living Registry began to register non-institutional housing for people with mental health problems and those in addiction recovery as “mental health and substance use residences” if the housing came within the definition of “assisted living residence.” Most of the mental health and substance use residences have registered in relation to only one prescribed service, namely “psychosocial re-

13. *Community Care and Assisted Living Regulation*, B.C. Reg. 217/2004, s. 2.

habilitative therapy, ” while a few are registered to provide “central storage, etc. of medications” in addition.¹⁴

2. ELIGIBILITY TO ENTER AND STAY IN ASSISTED LIVING

In order to be eligible to reside in an assisted living facility in British Columbia, a person must have the mental capacity to make decisions independently. Section 26(3) of the *Community Care and Assisted Living Act* states this in a negative fashion by prohibiting operators from housing persons who are unable to make decisions on their own behalf.

In practice, the requirement of independent decision-making capacity under section 26(3) is not applied to all kinds of personal decision-making. As a matter of regulatory policy, operators are directed to apply the section 26(3) requirement to “the range of decisions that allow people to function safely in the supportive semi-independent environment provided by an assisted living residence.”¹⁵

For example, persons who cannot find their own way between their dwelling units and the dining room, or find their way back to the facility if they went outside, would be ineligible to enter or remain in assisted living.¹⁶ Someone who can no longer manage his or her financial affairs, but who retains the capacity to function safely in

14. Information provided to BCLI staff by the Director of the Assisted Living Registry, June 2013.

15. Office of the Assisted Living Registrar, *Registrant Handbook: Seniors*, Policy 5, section 5.3. (The Assisted Living Registry has now issued separate handbooks for operators of “seniors’ residences” and “mental health and substance use residences.” All references in this report to the *Registrant Handbook* are to the handbook for operators of seniors’ residences unless otherwise indicated.) Policy 5, section 5.3 gives several examples of decision-making that assisted living residents must be able to carry out independently:

- (a) initiate activities to the extent necessary to function safely for the periods they are alone in their unit;
- (b) find their way within the assisted living residence given available cueing;
- (c) recognize the consequences of decisions or actions and that some actions may result in injury or harm to themselves or others;
- (d) recognize an emergency and summon help or follow directions;
- (e) find their way back to the residence independently;
- (f) participate in regular review of their service needs, that is, respond to questions about needs and services offered; and
- (g) seek assistance when they have a complaint about something happening at the residence, although family or friends may actually convey the matter to the Assisted Living Registrar.

16. *Ibid.*

the facility and intelligently discuss his or her service needs with staff, however, could be allowed to remain.¹⁷

The Act provides two exceptions from the requirement that a resident must have independent decision-making capacity. One exception is in relation to persons on leave under section 37 of the *Mental Health Act*¹⁸ from involuntary detention in a designated facility.¹⁹ The other exception applies if the spouse of a resident who lacks decision-making capacity is also housed in the same assisted living facility and can make decisions on behalf of that resident.²⁰

3. MIXED PUBLIC AND PRIVATE DELIVERY OF ASSISTED LIVING

(a) General

Both public and private assisted living facilities exist in British Columbia. Public assisted living facilities are operated under the auspices of regional health authorities, although the actual day-to-day operation of the facilities may be contracted out to a third party. Private assisted living facilities may be owned and operated either by a commercial enterprise or a not-for-profit organization. Privately owned and operated assisted living facilities frequently have some residents whose stay in assisted living is subsidized, although some facilities are entirely private. In 2011, approximately 64% of the tenancies in assisted living in British Columbia were publicly subsidized.²¹

(b) The “client rate” in subsidized care

Subsidized assisted living residents pay what is referred to as the “client rate” for their accommodation and services. The client rate is a monthly rate based on 70% of the resident’s after-tax income.²² The operator is compensated by the health authority (and in some cases also by BC Housing) for the balance of the cost of the resident’s stay in assisted living.

17. *Ibid.*

18. R.S.B.C. 1996, c. 288.

19. *Supra*, note 3, s. 26(4).

20. *Supra*, note 3, s. 26(6). The spouse does not have to be housed in the same dwelling unit within the facility in order for the exception to apply.

21. *Supra*, note 1 at 164.

22. Ministry of Health (B.C.), *Home and Community Care Manual*, section 7.B.2. There is a minimum rate of \$880.10 per month and a maximum level based on a combination of the market rate for the housing and hospitality services in the resident’s geographic area and the actual cost of the resident’s personal care services.

(c) Meaning of “private-pay”

The term “private-pay” is used by government, regional health authorities, and the care industry to refer to the unsubsidized sector of assisted living in which residents pay the monthly fees charged for accommodation and services entirely out of their own resources.

4. SUMMARY

The model of assisted living in British Columbia embodied in the *Community Care and Assisted Living Act* is one in which residents having full mental capacity live in rented suites in a registered facility where meals, housekeeping, laundry service, social and recreational opportunities, a 24-hour response, and not more than two of the services from the list of care services prescribed by regulation for both residential care and assisted living are provided by or through the operator of the facility.

There are both public and private providers of assisted living. While exclusively private assisted living facilities exist, the distinction between public and private delivery is not a sharp one. Subsidized and non-subsidized (private-pay) residents often live side by side.

B. Issues and Recommendations Surrounding The Present Model

1. GENERAL

For a prospective resident approaching assisted living as a housing option in British Columbia, gaining an understanding of what it can and cannot provide can be daunting and confusing. The present three-part legislative definition and classification of services are unnecessarily convoluted, but this is only one of numerous issues that arise in relation to the legislative framework.

2. THE REQUIREMENT OF INDEPENDENT DECISION-MAKING CAPACITY

(a) Opacity of section 26(3)

At face value, the prohibition under section 26(3) of the *Community Care and Assisted Living Act* on housing residents who are “unable to make decisions on their own behalf” makes it unlawful for an operator to admit persons who may need assistance with decision-making of any kind or allow them to remain as residents, re-

ardless of the extent of their cognitive impairment.²³ It is expressed in all-or-nothing terms, ignoring the reality that cognitive decline is often gradual.

The terms of section 26(3) also provide little guidance to operators with respect to the nature of the decision-making that is relevant, or in other words, how to apply the subsection to determine whether a person has the capacity it appears to require.

As noted earlier in this chapter, the Assisted Living Registrar attempts to meet these deficiencies through a regulatory policy that interprets section 26(3) as being limited to “the range of decisions that allow people to function safely in the supportive semi-independent environment” of assistive living.²⁴ Operators are directed to keep a “watchful eye” for signs of cognitive decline in their residents that may impair their independent decision-making ability without resorting to intrusive monitoring or testing.²⁵

(b) The “grey area”

Persons who have ceased to be eligible to enter or remain in assisted living because of section 26(3) do not become automatically eligible for residential care. For the purposes of admission to publicly subsidized residential care, health authorities are required to give priority to those with the greatest care needs.²⁶ The provincial needs assessment criteria for admission to publicly subsidized residential care extend to those having “severe behavioural problems on a continuous basis” or who “are cognitively impaired, ranging from moderate to severe.”²⁷ Persons with mild to moderate cognitive impairment that interferes with their ability to function independently to varying degrees, but who do not display hostile or continuously disruptive behaviour, may be in a “grey area” in which they could be legally ineligible to enter or remain in assisted living and also unable to get access to residential care.

The existence of this “grey area” between assisted living and residential care is referred to in the Ombudsperson’s report *The Best of Care*.²⁸ It is also confirmed by

23. The only two exceptions to this prohibition contained in the Act are narrow ones, applying to a resident who is on leave from a mental health institution or one whose spouse lives in the same facility and can act as a substitute decision-maker for the resident.

24. *Supra*, note 15.

25. *Ibid.*

26. *Supra*, note 22, section 6.D.

27. *Ibid.*, section 6.C.

28. *Supra*, note 1 at 153. Other classes of persons who find themselves in the “grey area” are residents whose medical needs exceed what an assisted living facility can provide and those awaiting

descriptions of individual cases in the comments of care personnel who responded to the consultation paper.

In several other provinces, persons with mild to moderate dementia or other cognitive impairments who do not qualify for long-term residential care may be housed in facilities that are approximate equivalents of assisted living in terms of the level of personal care they provide. For example, retirement homes in Ontario may house residents with dementia.²⁹ In Alberta, residents with varying degrees of dementia who do not present a risk to themselves or others may be accommodated in Supportive Living Level 4 (SL4), an environment that is broadly similar to assisted living in British Columbia but which provides personal care on a somewhat higher level.³⁰

(c) Reform

The Project Committee debated the advisability of repealing section 26(3) altogether so that persons with mild to moderate dementia who do not present risks to themselves or others would be eligible to enter or stay in assisted living if they could function safely in that environment. It was noted that this would require specially designed secure living facilities, or a secure area within a facility, in order to provide a safe environment for such residents. Operators could not admit residents with dementia otherwise, and would need to retain the ability to screen prospective residents for their ability to live safely in the physical environment of the facility in question and make a final decision in the interests of all concerned.

Ultimately, however, the Project Committee concluded that dementia care cannot be reconciled completely with a social model of care. The social model is not designed to be protective, as dementia care must be, but rather one in which residents retain autonomy. It is possible that mild to moderate dementia sufferers who do not have aggressive or unpredictable behaviours or complex medical needs may be capable of being accommodated safely in a non-institutional setting. This, however, would not be assisted living as it is conceived in British Columbia. In the view of the Project

placement in residential care: *ibid.* There is empirical evidence suggesting a significant portion of the assisted living population is affected to some degree by cognitive impairment. A recently published study of the subsidized resident population in assisted living between 2003/04 to 2007/08 found that 24 per cent of subsidized residents were diagnosed with dementia in the first year following their admission: Kim McGrail et al., *Who Uses Assisted Living in British Columbia? An Initial Exploration* (Vancouver: UBC Centre for Health Services and Policy Research, 2012) at 31.

29. See *Retirement Homes Act*, S.O. 2010, c. 8 and also O. Reg. 166/11, ss. 2, para. 4 and 41.

30. For example: tube feeding, two-person transfers and total assistance with mobility: see <http://www.albertahealthservices.ca/services.asp?pid=service&rid=7526>.

Committee, assisted living should continue to be housing intended for persons who can function safely in the privacy of their own dwelling units and direct their own care.

While the Project Committee concluded that section 26(3) should not be repealed and mental capacity for independent decision-making should still be a requirement for eligibility to reside in assisted living, it was also of the view that the provision should be amended in accordance with the interpretation contained in the policy direction given by the Assisted Living Registrar with respect to its application. This would add greater clarity to the entry and exit criteria for assisted living and provide a more pragmatic criterion for operators to apply in practice.

Recommendation 1

1. *Section 26(3) of the Community Care and Assisted Living Act should be amended to provide that persons are eligible to be housed in assisted living if they are capable of making decisions on their own behalf that are needed to function safely in the supportive semi-independent environment of an assisted living facility.*

3. THE SUBSTITUTE DECISION-MAKER EXCEPTION

(a) Only spouses count

As noted earlier, section 26(6) of the *Community Care and Assisted Living Act* allows a person who lacks independent decision-making capacity to live in an assisted living facility if the spouse of that person can make decisions on his or her behalf and lives in the same facility.

The exception under section 26(6) of the Act is restricted to spouses, but persons lacking mental capacity may be cared for by other family members or close friends. We are informed that siblings and close friends living in the same facility have been accepted as substitute decision-makers in practice. The Ombudsperson's report corroborates this information, but notes that there is no legal authority for making these exceptions.³¹ The exception under section 26(6) is unduly narrow. It does not take account of supportive relationships among siblings and collaterals that are common, particularly in later life.

(b) Why do only some spouses count?

Unlike many other provincial enactments, the *Community Care and Assisted Living Act* contains no extended definition of the term "spouse." The scope of the exception

31. *Supra*, note 1 at 164.

is therefore restricted to legally married spouses.³² While the exception is being applied in practice when a resident's long-term domestic partner also resides in the facility, this is being done without legal authority.

(c) Reform

The Ombudsperson's report recommended that the exception under section 26(6) be widened to recognize substitute decision-making relationships other than a spousal one. The responses to our consultation paper also indicated broad support for expanding the exception under section 26(6) to cover substitute decision-makers other than a spouse.

As long-term marriage-like relationships are now generally treated in the same way as legal marriages for many purposes, it would make sense to recognize them for the purposes of section 26(6) as well and bring the Act into line with actual practice. In many provincial statutes, including the recently enacted *Family Law Act*,³³ "spouse" is defined to include persons who have lived together in a marriage-like relationship for at least two years as well as legally married persons. It would make sense to define "spouse" in the same manner for the purpose of section 26(6) of the *Community Care and Assisted Living Act*.

Section 16(1) of the *Health Care (Consent) and Care Facility (Admission) Act* contains a list of relatives and others standing in a relationship to an incapacitated person. A health care provider may rely on a consent provided by a person on this list to provide care to an incapacitated person. These are (in descending order) a spouse, child, parent, brother or sister, grandparent, grandchild, anyone else related to the person by birth or adoption, a close friend, and a person related by marriage. The Project Committee concluded that the section 26(6) exception should be widened to apply where a person included in that list resides in the same facility and is capable of making, and willing to make, decisions on behalf of the resident concerned.

32. The term "spouse" appearing in legislation means a legally married spouse unless the legislation extends the definition of "spouse" to persons in a non-marital relationship: *Morgan v. Pengelly Estate*, 2011 BCSC 1114, at paras. 139-140; *Yates v. Air Canada and Daveluy*, 2004 BCSC 3, at para. 79.

33. S.B.C. 2011, c. 25, s. 3(1). The definition of "spouse" in the *Family Law Act* also includes persons who have had a child together. Mutual parental status is relevant for the purposes of the *Family Law Act*, because of the machinery it contains for the enforcement of support obligations. Co-parental status is not particularly relevant to the context of recognizing substitute decision-making relationships in assisted living. For the purposes of assisted living, the duration of a supportive relationship is more important in identifying a qualified substitute decision-maker.

Recommendation 2

Section 26(6) of the Community Care and Assisted Living Act should be amended to provide that section 26(3) does not apply to a person if the spouse of the person or anyone in the classes listed in section 16(1) of the Health Care (Consent) and Care Facility (Admission) Act will be housed in the assisted living facility with the person and is able to make decisions on behalf of that person.

Recommendation 3

The meaning of “spouse” of a resident in section 26(6) of the Community Care and Assisted Living Act should extend to a person who has lived in a marriage-like relationship with the resident for at least two years, in addition to a person legally married to the resident.

4. THE CAP OF TWO PRESCRIBED SERVICES

(a) The issue

One prominent issue in relation to the definition of assisted living is whether it is appropriate for operators to have greater flexibility regarding the range of services provided to residents.

The prescribed services that can be offered in assisted living were capped at two in order to create a boundary between assisted living and residential care. As a mechanism for maintaining the boundary, the cap fails to take account of the dual reality that the care needs of individual residents are not static and the resources of the care system do not always allow for an immediate solution when those needs change.

Situations arise where a resident requires more than the two prescribed services that can legally be provided at that assisted living facility. While this situation theoretically requires that the resident must leave, in practice there are times when residents must wait for a considerable time until they can be moved into residential care. In other cases, the care needs of a resident may exceed what can legally be provided in assisted living, but do not reach a level at which the resident qualifies for admission to residential care.³⁴ Residents in this category may be able to continue to live safely in assisted living with some additional services, and wish to do so.

34. The needs criteria for long-term residential care are found in section 6.C of the *Home and Community Care Policy Manual*, *supra*, note 22.

In these circumstances, one or more care additional services are sometimes obtained for an individual resident from a third-party provider.

Allowing additional care services through a third-party provider skirts the edge of the law. Even though it may be arguable that the additional care service is not being provided “by or through the operator,” it is equally arguable that more than two prescribed services are being provided in the facility, which means that the facility is providing care on a scale that requires it to be licensed as a community care facility.

The cap of two prescribed services is being circumvented in a manner that is more directly in conflict with the legislation by virtue of an official policy in place since 2007. The policy ostensibly allows operators to provide any of the six prescribed services at what is called the “support level” in addition to the two prescribed services for which the facility is registered.³⁵ The “support level” is described as being less intensive than the “prescribed level.”

The policy of allowing additional prescribed services to be provided at the “support level” in settings that are not licensed as “community care facilities” has no basis in law, as the Ombudsperson has pointed out:

The ministry’s desire to allow operators to provide a broader range of assisted living services may indicate the need for a more flexible statutory framework. However, a policy that distinguishes between services offered at the prescribed level and those offered at the support level has the effect of allowing facilities to offer more than two prescribed services, which contravenes the *Community Care and Assisted Living Regulation*. The ministry does not have the legal authority to expand the legislated definition of assisted living residence by creating new policy.³⁶

While the policy can be characterized as a pragmatic response to the realities faced by operators in attempting to meet the needs of their residents, it represents an acknowledgment by the Ministry of Health and Assisted Living Registry that the present cap of two prescribed services is unworkable. It also points to a need to amend the *Community Care and Assisted Living Act* to describe a more realistic model. The Ombudsperson has addressed the need for amendment in these terms:

The ministry’s decision to expand the number of services that operators can offer may indicate that the model of assisted living is not meeting the needs of residents, or that the needs of assisted living residents are changing, or both...If

35. *Registrant Handbook, supra*, note 15, Policy 6, section 6.2.

36. *Supra*, note 1 at 155-156.

the ministry decides to allow operators to provide more than two prescribed services to meet a wider range of care needs, the ministry should take steps to amend the Act's definition of an "assisted living residence" and enact legislated standards and requirements that are appropriate for the new level of care.³⁷

The responses to the consultation paper indicated support for greater flexibility in the provision of services. This support was evident to varying degrees across all categories of stakeholders, including operators, residents, staff, and employees of regional health authorities.

(b) Reform

The Project Committee examined the care parameters of the equivalents of assisted living in numerous Canadian and U.S. jurisdictions. In some of these, operators have considerably more flexibility than their British Columbia counterparts in relation to the services they can provide, as well as in relation to the characteristics of the populations they can house. In some jurisdictions, the services provided are defined almost entirely by the arrangement agreed between the operator and resident, rather than by legislation. No single jurisdiction provided a clearly superior model for British Columbia to adopt.

The current framework under Part 3 of the *Community Care and Assisted Living Act* is widely seen as unduly rigid in limiting an assisted living facility to making available only the one or two prescribed services for which the facility is registered, regardless of individual variation in residents' needs. The broad support for increased flexibility in services, as well as the lack of legal authority for the current policy that attempts to distinguish between "prescribed" and "support" levels of services, were acknowledged by the Project Committee. A countervailing theme tended to dominate the Project Committee's discussion of expanded services in assisted living, however.

The countervailing theme was the perception that a clear distinction needs to be maintained between assisted living and residential care. There is a definite tension between widening the scope of permissible care services in assisted living and maintaining a "bright line" boundary with residential care on the other. The justification for the lower level of regulatory oversight that Part 3 imposes in comparison to the licensing regime for residential care under Part 2 is that assisted living is not intended to address complex medical needs or involve continuous professional nurs-

37. *Ibid.*, at 155.

ing care. Expanding the permissible range of services in assisted living tends to erode the justification for the different levels of regulation.³⁸

In this regard, there is a concern to preserve the “social model of care” in assisted living. This is one that envisions a supportive, semi-independent residential community in which residents retain a high level of personal autonomy and have individual dwelling units that are treated as their homes, in contrast to the more protective, care-focused institutional setting typical of residential care. The greater the intensity and complexity of the personal care services provided, the more difficult it becomes to maintain a social model.

A major difference at the operational level between residential care and assisted living is that residential care generally involves 24-hour professional nursing supervision, while assisted living does not. This distinction could be incorporated into the expression of the legislative boundary between the two care levels. Assisted living facilities should not be empowered to admit persons who require 24-hour professional nursing supervision or monitoring, but otherwise should be free to provide care services consistent with a social model to residents who do not meet the needs criteria for residential care established from time to time.

The legislative definition of assisted living should correspond to the reality of how assisted living has actually taken shape in British Columbia. In practice, all registered assisted living facilities for seniors and younger persons with disabilities provide assistance with activities of daily living and storage and management of medication. All registered mental health and substance use facilities provide psychosocial rehabilitative therapy. As those services are universal characteristics, it is reasonable to incorporate them into the statutory definition. The effect of doing so would be to make them mandatory services for the category of facility in question, but this would only reflect the actual nature of assisted living as it now exists.³⁹

Recommendation 4:

Part 3 of the Community Care and Assisted Living Act should be amended to require:

38. *Supra*, note 1 at 155.

39. In the sense intended here, “mandatory services” are services that it would be mandatory for the facility to provide, but not ones that each resident must receive. The extent to which a mandatory service would be received by an individual resident, or whether it would be received, would depend on the needs of that resident. The distinction is important in relation to later recommendations, especially those in Chapter IV.

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- (a) *an assisted living facility for seniors and /or persons with disabilities to provide*
 - (i) *regular assistance with activities of daily living, including eating, mobility dressing, grooming, bathing or personal hygiene; and*
 - (ii) *central storage of medication, distribution of medication, administering medication or monitoring the taking of medication;*
- (b) *a mental health and substance use facility to provide psychosocial rehabilitative therapy.*

Recommendation 5

The Community Care and Assisted Living Act should be amended

- (a) *by deleting references to “prescribed services” in relation to assisted living facilities; and*
- (b) *substituting provisions to permit an assisted living facility to provide, in addition to the services required by Recommendation 4, personal care services to a resident that are consistent with, and can safely be provided in, a supportive semi-independent living environment without 24-hour professional nursing supervision or monitoring.*

5. SHOULD ACCESS TO ASSISTED LIVING BE RESTRICTED BY AGE?

While the majority of assisted living residents in British Columbia are seniors, assisted living is not exclusively seniors’ housing. Younger persons with disabilities and persons of any age in addiction rehabilitation or with a history of mental health problems also live in assisted living environments. Currently there is no legislated minimum age threshold for access to assisted living. The age of majority is a practical lower age limit in view of the fact that the accommodation and care needs of minors who need to live in a supportive environment are generally handled in other settings under various programs.

The Project Committee saw no reason to impose an age restriction on eligibility to enter assisted living, other than that residents should be adults. This is a reasonable restriction, because independence and individual responsibility are central to the concept of assisted living.⁴⁰ In addition, a prospective resident (or a substitute deci-

40. The *Registrants Handbook*, section 2.1, expresses the same proposition in these terms: “The philosophy of assisted living is to...enable residents to maintain an optimal level of independence...”

sion-maker who will be housed with the resident) needs to be able to enter into a binding contract with the operator for accommodation and services, and so must be above the age of majority.⁴¹ The responses to the consultation paper reflected general support for this position. It is accordingly reaffirmed here.

Recommendation 6

Access to assisted living should not be restricted by age, except that residents should be required to be above the age of majority.

6. HOUSING OWNED BY RESIDENTS

Assisted living as it now exists in British Columbia is a form of rental housing. A congregate living arrangement resembling assisted living, but in which residents own their dwelling units, would not be governed by the *Community Care and Assisted Living Act* because it would not come within the definition of “assisted living residence” in the Act. As noted earlier in this chapter, that definition requires that housing as well as services be supplied “by or through the operator.”

Congregate arrangements involving freehold dwelling units are not common in this province. The legal and economic relationship between residents and a service provider in such an arrangement would be quite different from the landlord-tenant relationship in a standard assisted living facility. The Project Committee did not see it as necessary or desirable to extend the legislative framework for assisted living to arrangements in which residents own their housing, with the possible exception of freehold life estates.

A freehold life estate is a right of ownership for the lifetime of the owner. It differs from a life lease because an owner of a life estate has an actual title to the property. As the owner of a life estate cannot deal with the property in a way that will detrimentally affect the interest of the subsequent owner (the so-called “remainderman”) who has the right to possession of the property after the end of the life estate, however, an owner of a life estate is in a position resembling that of a tenant under a life lease. For this reason, it may be justifiable to extend the assisted living framework to an arrangement in which residents hold freehold life estates in their units as if they occupied the units under long-term or life leases. We are not aware of any con-

The core principles of assisted living...derive from a recognition that adults, even when they need support and assistance in daily life, retain their ability and right to manage their own lives.”

41. A contract entered into by a minor is not enforceable against the minor except in accordance with the *Infants Act*, R.S.B.C. 1996, c. 223: *Wong v. Lok's Martial Arts Centre Inc.*, 2009 BCSC 1385.

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gregate housing organized on the basis of life estates in British Columbia, but such an arrangement is possible.

Recommendation 7

Assisted living legislation should not apply to housing in which residents own the dwelling units that they occupy, with the exception of housing in which residents hold freehold life estates in their dwelling units.

CHAPTER III HOUSING AND TENANCY

A. Introduction

An assisted living arrangement between a resident and the operator of the assisted living facility is a landlord and tenant relationship. Despite the tenancy relationship, assisted living arrangements are not currently governed by the *Residential Tenancy Act*,⁴² which governs most rentals of living accommodation in British Columbia.

In 2006, the BC legislature passed the *Tenancy Statutes Amendment Act, 2006*,⁴³ known as “Bill 27”, which would have extended the *Residential Tenancy Act* to assisted living with some modifications to take account of the special nature of this kind of housing. Bill 27 set out certain rights and responsibilities between operators and residents of assisted living facilities and contained a process for resolution by the Residential Tenancy Branch of disputes between operators and residents. The assisted living provisions of Bill 27 were not brought into force because of concerns raised by stakeholders, however.

The result of this situation is that assisted living arrangements are likely governed by common law rules relating to landlord-tenant relationships. Nowadays the common law landlord-tenant rules are not considered to be appropriate for residential tenancies. They developed in England long ago, primarily for the leasing of agricultural land.

A review of the legislation of other Canadian provinces reveals that only Ontario and Quebec extend their residential tenancy legislation to equivalents of assisted living. In other provinces, residential arrangements similar to British Columbia assisted living facilities either fall outside of the scope of residential tenancy legislation, or exist in a grey area of uncertainty as to whether residential tenancy law applies to them.

In considering the direction that landlord and tenant law relating to assisted living should take, it is necessary to keep in mind the question of the extent to which assisted living is, or should be, the same or different from other residential tenancy arrangements. The following sections of this chapter examine various aspects of assisted living tenancies that, in the view of the Project Committee, require special

42. *Supra*, note 10.

43. S.B.C. 2006, c. 35.

rules to govern the landlord-tenant relationship between the operator and a resident.

B. Creation of an Assisted Living Tenancy: the Occupancy Agreement

An ordinary residential tenancy agreement must in writing.⁴⁴ Currently there is no corresponding requirement for the terms of the landlord-tenant relationship between the operator and a resident of an assisted living facility to be set out in writing, although many operators use the standard Resident Occupancy Agreement developed by the British Columbia Seniors Living Association (BCSLA), which also covers services. There is likewise no requirement for an agreement concerning services to be in writing.

It is equally important for the terms on which an assisted living unit is occupied to be set out in writing as those of an ordinary residential tenancy. There should be an express legislative requirement for a written agreement between the operator and resident as to those terms. It should also be possible, and even encouraged, for the parties to enter into a single agreement covering occupancy and services. The agreement should expressly incorporate any applicable legislative requirements, such as those relating to notice of termination or rent increases, as terms of the agreement.

Recommendation 8

Legislation should require the agreement between the operator and a resident governing a resident's occupancy of an assisted living unit to be in writing and to expressly incorporate all applicable legislative requirements.

Recommendation 9

It should be permissible for an agreement between the operator and a resident governing a resident's occupancy of an assisted living unit to be contained in a single document with agreed terms concerning the provision of services to the resident.

C. Security Deposits

Under the British Columbia *Residential Tenancy Act*, landlords are permitted to require the tenant to provide a security deposit equal to one-half of one month's

44. *Supra*, note 10, s. 13(1).

rent.⁴⁵ The consultation paper contained a tentative recommendation for the same limit on security deposits in assisted living. This met with approval in the majority of responses to the consultation paper.

The consultation paper also canvassed the question whether there should be a fixed maximum dollar amount for security deposits in assisted living, regardless of the level of the monthly amount a resident pays for accommodation and services. The consultation paper cited the example of one regional health authority that allows its contracted care providers to collect a security deposit from subsidized assisted living residents equivalent to half the amount that residents pay per month (based on 70% of after-tax income), but only up to a maximum of \$550. Predictably, residents who responded to the consultation paper were in favour of a maximum dollar amount for security deposits, and operators were against.

Fixing an appropriate maximum dollar amount is complicated by considerable variation in the amount of rent paid by assisted living residents, depending on whether they are in subsidized or fully private-pay facilities or units. For some low-income subsidized residents, a security deposit in the amount of half the monthly rent may be a hardship, yet it may be excessively low from the standpoint of the operator in terms of what it may need to cover. If a maximum dollar amount is fixed by an Act or regulation, it is unlikely to be changed quickly enough to avoid becoming unrealistic in light of changing economic conditions. The Project Committee concluded that limiting a security deposit to half the monthly charge for accommodation and services, without imposing a maximum dollar amount limit, would be a balanced and broadly acceptable measure.

Recommendation 10

Legislation should allow the operator of an assisted living facility to require a security deposit from a prospective resident equal to one-half of the monthly charge for accommodation and services.

D. Safety and the Right of Undisturbed Use

In standard residential tenancies, the tenant has the right known as “quiet enjoyment.” The term “quiet enjoyment” does not refer to noise levels, as it might suggest, but means instead that the tenant is entitled to exclusive and undisturbed possession of the rented space. A tenant’s right to quiet enjoyment may be infringed by conduct of either the landlord or other tenants that interferes to a severe degree

45. *Supra*, note 10, s. 19(1).

with the tenant's possession and enjoyment of the rented premises. As the right to quiet enjoyment exists between the landlord and the tenant, however, the landlord can be liable for its breach regardless of whether the breach occurred through the landlord's own conduct or that of another tenant which the landlord fails to control.

The concept of "quiet enjoyment" is more complicated in assisted living, as assisted living involves the need to maintain a 24-hour emergency response system and also the delivery of some personal care services to the resident. The operator requires a right of entry to the assisted living facility to provide the required services. Clearly, the operator's responsibility for the resident's health and safety must be balanced against the resident's right to undisturbed use and privacy. Broader rights of entry are required by an operator of an assisted living facility than those required by an ordinary landlord.

Further discussion of this issue and recommendations dealing with it are found later in this report in the chapter on Privacy in Assisted Living (Chapter VI).

E. Control of Rent and Service Charges

1. GENERAL

Residents in private-pay assisted living typically pay a global monthly rate covering both accommodation and other services provided by the operator. There is no legal requirement that would prevent billing residents for accommodation and other services separately, although it could have the adverse effect for residents of potentially making GST payable on the charges for the other services.

Seniors whose stay in assisted living is publicly subsidized pay a global charge fixed by the *Continuing Care Fees Regulation* that is equivalent to 70% of their after-tax income.⁴⁶

In the discussion of rent and service charge control that follows, "rent" refers to the monthly rate, or portion of a global monthly rate, that is charged for accommodation. "Service charges" refers to the monthly rates, or the portion of a global monthly rate, charged for services other than accommodation. Control of rent is discussed below separately from control of service charges. One of the issues also discussed, however, is whether service charges should be treated as "rent" for the purpose of a rent control scheme.

46. B.C. Reg. 330/97, s. 7.

2. RENT CONTROL

(a) General

Should assisted living housing units be subject to rent control in the same way as standard residential tenancies, including limits on the amount and frequency of rental increases, and requirements for notice of rental increases?

Standard residential tenancies in British Columbia are subject to a form of rent control under which landlords may not raise rent beyond a maximum allowable percentage within a specified period of time. The maximum allowable rent increase is determined according to a formula linked to the rate of inflation as measured by the consumer price index.

In a standard residential tenancy, a landlord may increase rent once within a 12-month period by a percentage up to the rate of inflation plus 2%. Under certain circumstances, a landlord can apply to the Director of the Residential Tenancy Branch for a larger increase. The *Tenancy Statutes Amendment Act, 2006* (Bill 27) would have extended this rent control regime to assisted living facilities, if the relevant provisions had come into force.⁴⁷

The rent paid by subsidized assisted living residents is already controlled indirectly by a regulation that limits the global amount charged to the resident for accommodation, hospitality and prescribed services to a fixed percentage of the individual resident's after-tax income. A change to this system would require a change in Ministry of Health policy. Barring such a policy shift, a conventional scheme of rent control under which landlords are permitted to increase rents generally at periodic intervals up to a maximum percentage determined by reference to inflation and other specified factors is something that could only be applied in the private-pay sector of assisted living in British Columbia. The following discussion and recommendations on rent control therefore relate only to the private-pay sector.

(b) Comparison of approaches to rent control

The Project Committee considered three alternative approaches to rent control in relation to assisted living:

47. *Supra*, note 43, s. 80 (adding s. 57.11 to the *Residential Tenancy Act*, *supra*, note 10.)

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1. the scheme under the BC *Residential Tenancy Act*,⁴⁸ which Bill 27 would have extended to rents paid in assisted living; and
2. the scheme adopted in the Ontario *Residential Tenancies Act, 2006*;⁴⁹
3. no rent control.

(i) Notice of rent increases and notice requirements

The requirements for notice of rent increases in Ontario and British Columbia are similar with respect to both notice requirements and the frequency of allowable rent increases. Ontario requires 90 days' written notice,⁵⁰ compared to 3 months in British Columbia.⁵¹

(ii) Frequency of rent increases

In both Ontario⁵² and British Columbia,⁵³ a landlord may increase rent only once every 12 months, subject to some exceptions described below.

(iii) Ordinary allowable rent increases

Ontario allows landlords to increase rent in accordance with guidelines based on the rate of general inflation as measured by the Consumer Price Index.⁵⁴ In British Columbia, landlords may increase the rent in accordance with the rate of general inflation measured by the Consumer Price Index plus 2%.⁵⁵ The difference between the size of increases possible under the two formulas could be substantial over time.

For example, assume the average annual Consumer Price Index increase is 3% and the starting rent is \$1,000 per month. The table below shows the difference in the allowable increase in rent over time between the Ontario and British Columbia (Bill 27) formulas:

48. *Supra*, note 10, ss. 40-43. See also *Residential Tenancy Regulation*, B.C. Reg. 477/2003, ss. 22, 23.

49. S.O. 2006, c. 17.

50. *Ibid.*, s. 116(1).

51. *Supra*, note 10, s. 42(2)

52. *Supra*, note 49, s. 119(1).

53. *Supra*, note 10, s. 42(1).

54. *Supra*, note 49, ss. 120(1), (2).

55. *Residential Tenancy Regulation*, *supra*, note 48, s. 22(1), (2).

Monthly Rent

Year	1	2	4	6	8	10
Bill 27	1,000	1,050	1,158	1,276	1,407	1,551
Ontario	1,000	1,030	1,093	1,159	1,230	1,305

(iv) Additional rent increases

Both Ontario and British Columbia provide a process for the landlord to apply for increases larger than those ordinarily allowed.

In Ontario, the landlord may apply to the Landlord and Tenant Board for an increase above the guidelines if:

- costs for municipal taxes, charges and other utilities have increased significantly;
- major repairs or renovations have been done; or
- the landlord has operating costs for security services performed by persons who are not employees of the landlord.⁵⁶

In British Columbia, the landlord may apply to the Residential Tenancy Branch for an additional rent increase if:

- the rent after the annual increase has been allowed is significantly lower than the rent payable for similar rental units in the same geographic area;
- the landlord has completed significant repairs or renovations to the property;
- the landlord has incurred a financial loss from an extraordinary increase in the operating expenses of the property; or
- the landlord has incurred a financial loss for the financing costs of purchasing the property, if the financing costs could not have been foreseen under reasonable circumstances.⁵⁷

56. *Supra*, note 49, s. 126(1).

57. *Residential Tenancy Regulation, supra*, note 48, s. 23(1).

As can be seen, the scope for additional rent increases above the annual allowable increase is greater in British Columbia than under the Ontario legislation.

(v) Rent reductions

In British Columbia, the only requirement for a landlord to reduce the rent arises when the landlord terminates or restricts a service or facility.⁵⁸ The Ontario legislation sets out a number of circumstances in which a landlord must reduce the rent:

- when a rent increase has been allowed as a result of an increase in the cost of utilities or municipal taxes and the cost of utilities, or the taxes later decrease more than a percentage fixed by regulation;
- when a rent increase has been allowed as a result of capital expenditures (for example, major renovations or improvements) and the same tenant continues to occupy the rental unit after the end of a period specified in the order allowing the increase; or
- when the landlord reduces or terminates a service or facility.

(c) Discussion and recommendation

The advantages and disadvantages of rent controls have been debated at length in various jurisdictions. On the one hand, it is argued that market forces will regulate rental rates appropriately – at the time of writing, there was a surplus of assisted living accommodation in British Columbia. On the other hand, the relative availability of rental housing will undoubtedly fluctuate over time and it is argued that tenants need some reassurance that their housing costs will not become prohibitively high. These arguments are made in regard to assisted living accommodation as well.

Respondents to the consultation paper were predictably divided on the issue of rent control. Residents were overwhelmingly against having no rent control. They favoured the Ontario rent control scheme, which is less favourable to landlords, over the British Columbia scheme. About half of the operators who responded indicated mild support for the British Columbia rent control scheme, with the rest opposing any form of rent control.

Operators argue that flexibility in rent increases is needed to allow them to manage extraordinary cost increases or to provide for major repairs and renovations. Residents, especially those on fixed incomes, undoubtedly desire predictability in the

58. *Supra*, note 10, s. 27(2)(b).

cost of their housing and would find it difficult to understand why they should have less protection against exorbitant rent increases than ordinary residential tenants.

The present situation in which there is no rent control in the private-pay sector of assisted living creates a structural inequity between subsidized and private-pay residents. Subsidized residents have somewhat greater predictability in their housing cost because it is fixed by a regulation, although it too is subject to change in response to a change in government policy. Rent control applied to the private-pay sector would tend to have an equalizing effect between the private-pay and subsidized sectors of assisted living in terms of the predictability of increases.

The Project Committee believes that rent control provisions similar to those applicable to standard residential tenancies under the British Columbia *Residential Tenancy Act* should extend to private-pay assisted living units and residents.

The Project Committee also believes, however, that an operator should be able to apply for an additional rent increase above the annually allowable increase based on any grounds that the decision-maker finds are sufficient, rather than only the closed list of grounds now provided under the *Residential Tenancy Regulation*.⁵⁹ This is to take account of expenditures surrounding the provision of services that ordinary landlords do not have to incur and compliance with regulatory requirements ordinary landlords do not have to meet. The cost structure of an assisted living facility is more complex and potentially more variable than that of an ordinary rental property. Extraordinary expenses may occasionally be necessary to meet evolving industry standards and to comply with changing regulatory requirements that may require upgrading and refits. Not all of these may qualify as “repairs or renovations,” because they may concern equipment and systems that do not form part of the structure of the facility.

Recommendation 11

Assisted living legislation should adopt rent control provisions for private-pay residents and units similar to those applicable to standard residential tenancies under the British Columbia Residential Tenancy Act, except that an operator should be able to apply for an additional rent increase based on grounds that the decision-maker finds are sufficient, including but not restricted to the grounds set out in section 23(1) of the Residential Tenancy Regulation.

59. *Supra*, note 48, s. 23(1).

3. CONTROL OF SERVICE CHARGES

Another important issue is whether service charges should be controlled in a manner similar to rents. While it would be advantageous for residents to know exactly what they will need to pay over an extended period of time, it is much more difficult to determine a reasonable increase in the cost of services by reference to usual standards like a market average than is the case with rent. Service costs are more closely tied than rents to the cost structure of individual facilities and are influenced by a greater number of factors. The fact that residents normally pay a global amount that is not broken down into charges for individual services adds to the difficulty of identifying a market average.

Another complication in arriving at a standard for an allowable increase in service charges is that service charge levels for subsidized residents are controlled by the “client rate” chargeable to a subsidized resident, which is set by regulation. As mentioned above, the client rate is limited to 70 per cent of the individual resident’s monthly after-tax income. Thus, the actual amounts paid for accommodation and services will vary even between subsidized residents.

In April 2011, the BC Ministry of Health established a policy (now found in section 5.B.3 of the Ministry’s *Home and Community Care Policy Manual*) on charges made by operators for services to residents living in publicly subsidized assisted living units.⁶⁰

The policy distinguishes between four different types of charges for assisted living services: *benefits* (for basic assisted living services like accommodation, meals, weekly housekeeping, laundry of towels and linens, 24-hour response and the prescribed services), *administrative fees* (prohibited for services covered by the resident’s care plan), *allowable charges* (damage deposit and hydro surcharge), and *chargeable items* (for optional additional services).

The policy sets out the responsibility of regional health authorities to limit the charges for services to subsidized assisted living residents as follows:

Health authorities must ensure that service providers:

- provide assisted living benefits to clients at no additional charge over and above the client rate;
- do not charge administrative fees for services or supplies required by the client’s care plan;

60. Ministry of Health, *Home and Community Care Policy Manual*, *supra*, note 22, section 5.B.3.

- apply allowable charges as part of the client’s residency agreement;
- that offer chargeable items do so at a reasonable cost, at or below market rates, and on an optional basis (purchase of chargeable items is at the discretion of the client); and
- explain fees for chargeable items to the client, and ensure the client has agreed in advance of any billing for chargeable items.⁶¹

The policy allows for changes to the cost of services in three ways: charges for benefits may change in accordance with a change in the resident’s after-tax income or in the rate structure established by regulation; allowable charges may change in accordance with the terms of a residency agreement between the resident and the operator; and chargeable items may change, within reason, after the increase is explained to the client and agreed upon, but must not be higher than market rates for the same services.

In the absence of policy changes affecting the practical restrictions imposed already on service charges for “benefits” in the subsidized sector, service charge controls could only be applied to the private-pay sector and to services provided to subsidized residents that are not covered by the “client rate.”

The Project Committee was initially divided on whether service charges should be controlled in private-pay assisted living, but ultimately concluded that service charges should be excluded from rent control. This approach would allow operators to charge private-pay residents for services on a scale in keeping with the actual costs of providing them, subject to the tentative recommendations on advance disclosure and notice requirements made in Chapter 4 on consumer protection.

Recommendation 12

Assisted living legislation should exclude charges for services from the scope of rent control.

F. Keeping a Pet

For a resident in assisted living, a pet can provide significant companionship and pleasure, substantially increasing the resident’s enjoyment of life and possibly also benefiting the resident’s health. The right of a resident to maintain a pet must be weighed nevertheless against the rights of other residents and staff and the potential effects on their health and safety. For example, if a number of residents have animal

61. *Ibid.*

allergies or other health problems, keeping a pet would not only infringe on their right of undisturbed enjoyment but could pose health risks.

In British Columbia, there is no legislative prohibition on keeping pets in rented residential premises, but tenancy agreements may contain terms prohibiting pets altogether or restricting the kind of pets a tenant may keep by species, number, size, etc. They may also specify obligations of a tenant in connection with keeping a pet.

This contrasts with the situation in Ontario, where a landlord cannot prohibit a tenant from keeping pets. This is because Ontario's *Residential Tenancies Act, 2006* makes any term in a tenancy agreement "prohibiting the presence of animals in or about the residential complex" unenforceable.⁶²

The Project Committee concluded that assisted living legislation should not regulate the keeping of pets in an assisted living facility. Instead, the subject of pets should be left open to contractual arrangements in the occupancy agreement between the operator and resident.

Recommendation 13

Assisted living legislation should not regulate the keeping of pets in an assisted living facility.

G. Smoking

In British Columbia, smoking in private and public spaces is extensively regulated. Legislation, regulation, and regulatory policies relating to smoking in assisted living have several aspects: residents' health and safety, legal protections against second-hand smoke exposure, occupational health, and human rights law. In a tenancy context, smoking represents potential breach of the right of other tenants to "quiet enjoyment," or right of undisturbed enjoyment of their premises.

Section 26(5) of the *Community Care and Assisted Living Act* requires that an assisted living facility be operated "in a manner that does not jeopardize the health or safety of its residents." In section 25(4), the Act also stipulates that for some purposes at least (entry and inspection), a resident's "personal residence" is a private single-family dwelling. There is tension between the values inherent in these provisions insofar as they relate to smoking.

62. *Supra*, note 49, s. 14.

The Assisted Living Registry has published standards that include the statement: “Registrants must respect the personal decision of residents and accommodate a resident’s right to take risks, as long as the risks do not place other residents or staff in jeopardy,”⁶³ As an example of compliance with this standard accompanied by mitigation of risk, the published standard refers to the operator negotiating “appropriate locations for residents to smoke.”

The combined effect of the legislation, regulations, and human rights case law appears to be the following:

1. Residents may smoke outdoors on the premises of the assisted living facility in an area that is located at least the minimum distance permitted by law from a doorway, window, or air intake of the building (3 metres unless a greater distance is prescribed by local bylaws).
2. An operator may, but is not required, to designate a room or rooms in an assisted living facility for “tobacco use” by residents, which must meet all applicable requirements for ventilation and protection against the escape of tobacco smoke from the designated room or rooms into the rest of the facility. Residents in assisted living are legally permitted to smoke indoors in such a designated room, but not otherwise.
3. If the operator does not designate any “room” in the assisted living facility for “tobacco use,” residents are not legally permitted to smoke indoors, even in their own living units.
4. An operator may be on unsafe ground in completely prohibiting residents from smoking anywhere on the premises of an assisted living facility, as this arguably would amount to discrimination against heavily addicted smokers under the provincial *Human Rights Code*⁶⁴ on the basis of physical disability in the provision of accommodation, services, or tenancy premises. At the same time, however, the operator and residents must comply with all applicable laws and regulations concerning protection against second-hand tobacco smoke.

The consultation paper contained a tentative recommendation that assisted living legislation should expressly authorize, but not require, an operator to designate an indoor or outdoor smoking area meeting applicable regulatory requirements. The tentative recommendation also urged that regulatory requirements for an outdoor

63. *Registrant Handbook*, *supra*, note 15, Policy 4, Standard 5, section 5.1.2.

64. R.S.B.C. 1996, c. 210.

smoking area be reasonable with respect to the cost of compliance relative to the overall operating cost of the assisted living facility and the safety and comfort of the smoking and non-smoking residents. This met with general support among respondents to the consultation paper, although a majority of the residents who responded would prefer the legislation to require operators to designate an indoor or outdoor smoking area, rather than merely authorizing them to do so.

The Project Committee did not see that an operator should be required to designate a smoking area in all cases. If, for example, none of the residents are smokers and wish to keep the facility a non-smoking one, it amounts to a needless regulatory burden to require a smoking area to be designated. After considering the responses, the Project Committee reaffirmed its earlier tentative recommendation on smoking.

Recommendation 14

Assisted living legislation should expressly authorize, but not require, an operator to designate an indoor or outdoor smoking area meeting applicable regulatory requirements.

Recommendation 15

Regulatory requirements for an outdoor smoking area should be reasonable with respect to the cost of compliance relative to the overall operating cost of the assisted living facility and the safety and comfort of the smoking and non-smoking residents.

H. Alcohol and Drugs

The use of drugs and alcohol is governed by general provincial and federal laws. There is no legislation specifically directed to non-medicinal use of drugs and the consumption of alcohol by residents in assisted living facilities. The policy of the Ministry of Health is that storage and consumption of alcohol by assisted living residents in their own dwelling units is a matter for residents' individual discretion. Under a policy directive of the BC Liquor Control and Licensing Branch issued in 2012, it is left to individual assisted living facilities whether to serve and sell alcoholic beverages in common areas to residents and their guests, subject to certain restrictions.⁶⁵

Assisted living residents maintain the right to live at risk so long as they have the mental ability to understand the consequences of their decisions and do not jeopard-

65 See Policy Directive No. 12:04, "Service of liquor in care facilities" dated 23 July 2012, online at <http://www.pssg.gov.bc.ca/lclb/docs-forms/policy-directive-2012-04.pdf>.

ize the health and safety of other residents. The challenge in approaching the issue of whether alcohol consumption and non-medicinal use of drugs by residents should be further regulated under assisted living legislation lies in balancing the right of adult residents to live freely within a facility and the operator's responsibility for the health and safety of all of the residents in the facility.

After extensive discussion, the Project Committee concluded that additional legislative action would not be desirable, and that the areas of non-medicinal drug use and alcohol should continue to be regulated by general laws and the policies of individual assisted living facilities.

Recommendation 16

Assisted living legislation should not regulate non-medicinal drug use or the consumption of alcohol.

I. Inspections

The *Residential Tenancy Act* provides that the landlord is entitled to carry out inspections at the beginning and completion of a tenancy.⁶⁶ The landlord is also entitled to make one inspection per month between 8 a.m. and 9 p.m., on giving 24 hours' written notice to the tenant, specifying the reason for the inspection.⁶⁷ The landlord may also inspect the rented premises at other times if the tenant consents.⁶⁸ Should the operator of an assisted living facility have similar or additional rights to inspect the dwelling unit of a resident?

The rights and responsibilities to be balanced here include:

- the operator's responsibility to operate the facility in a manner that does not jeopardize the health or safety of residents, a responsibility that includes the maintenance of safety and security in the facility;
- the resident's right to substantial privacy and independence.

In practice, it is usually possible for the staff of an assisted living facility to observe issues of health, safety and security while providing services to the resident in the living unit. For this reason, the Project Committee concluded that an operator does

66. *Supra*, note 10, ss. 23(1), 35(1).

67. *Ibid.*, ss. 24(1)(b)(ii), (2).

68. *Ibid.*, s. 29(1)(a).

not need greater powers of inspection than those conferred by the *Residential Tenancy Act* on ordinary residential landlords. The majority of respondents to the consultation paper also thought those inspection powers were sufficient.

Recommendation 17

Assisted living legislation should adopt the provisions of the Residential Tenancy Act with respect to inspections during the term, and at the beginning and end, of a tenancy.

J. Notice of Termination

The rights and responsibilities regarding notice of termination are essential features of any residential tenancy. This is also true of assisted living tenancies.

Notice periods for termination of a tenancy by the landlord that are longer than those in ordinary residential tenancies are seen as necessary in assisted living. It can take longer for assisted living residents to find suitable alternative accommodation. They may have restricted mobility and have to rely on others to help them locate it for this or for other reasons. The supply of assisted living accommodation is generally smaller than the supply of ordinary rental accommodation.

In many cases, the termination of an assisted living tenancy is connected with increased care needs, including loss of the capacity to make decisions on one's own behalf. The departing resident may have to wait for a place to become available in a higher care setting. Policy 5 of the Assisted Living Registrar (Resident Entry and Exit) requires operators to develop an exit plan when a resident is required to move out of a facility because the resident's care needs have increased beyond the level assisted living facilities can, or are permitted, to provide. This includes planning for additional services that may need to be in place for the resident's health and safety pending the transfer. (As discussed later in this chapter, however, the present assisted living legislation does not address this situation adequately.)

The Project Committee considered that for some of the grounds that could justify termination of an assisted living tenancy (i.e., changing care needs, disruptive or inappropriate behaviour, and non-payment of rent in particular), a process is needed rather than simply giving the notice and allowing the notice period to elapse. The Assisted Living Registrar's Policy 5 already reflects this need for an exit process to some extent, but in the opinion of the Project Committee, more explicit provisions dealing with the termination of the resident's tenancy are called for in the governing legislation.

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A majority of the Project Committee also believes, however, that there is a need in assisted living for an expedited termination procedure for emergency situations, as there is for ordinary residential tenancies under section 56 of the *Residential Tenancy Act*. This would require the operator to obtain an order from an appropriate authority for a shortened notice period or, in an extreme case, even requiring the resident to vacate immediately.

There is also a need to address the situation when a resident's tenancy comes to an end because of the resident's death. As the majority of assisted living residents are older adults, assisted living tenancies may end this way more frequently than ordinary residential tenancies. The practice varies regarding the amount of rent that is collected when occupancy ceases without formal notice to the operator due to the resident's death. This should be standardized by fixing a reasonable entitlement in legislation.

The table below sets out both the current notice requirements for tenants under the British Columbia *Residential Tenancy Act* (referred to as RTA in the chart) and notice of termination provisions that are recommended for assisted living:

Categories	RTA Notice Provision	Recommended Notice provision for Assisted Living
Financial – Landlord's notice – non-payment of rent (RTA s. 46)	10 days' written notice	A provision requiring the provider to initially speak to the resident and his or her designated representative to determine the reason for non-payment, and allow a time frame in which rent must be paid. Notice of termination given if rent remains unpaid to be effective on a termination date that: <ul style="list-style-type: none"> (a) is not earlier than one month after the date the resident receives the notice; and (b) is the day before the day in the month, or other period on which the tenancy is based, that rent is payable under the

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Categories	RTA Notice Provision	Recommended Notice provision for Assisted Living
		tenancy agreement.
<p>Behavioural - Landlord's notice for cause (RTA s. 47) (e.g., failure to comply with a material term in the tenancy agreement, jeopardizing health and safety of other residents/tenants. In assisted living, this may also include aggressive behaviour or substance addiction jeopardizing the safety of other residents.)</p>	1 month's written notice	<p>Other than in an emergency situation, the operator should initially provide a written warning to the resident specifying the offending conduct and stating the consequences that will flow from repetition of, or failure to correct, the offending conduct.</p> <p>If the warning is ignored and the operator gives notice to terminate the resident's occupancy, the notice must be effective on a termination date that is:</p> <p>(a) not earlier than one month after the date the resident receives the notice; and</p> <p>(b) the day before the day in the month, or other period on which the tenancy is based, that rent is payable under the tenancy agreement.</p>
<p>Landlord's notice - landlord's use of property (RTA s. 49) (e.g., landlord or close family member of landlord intends in good faith to occupy the premises; landlord intends to demolish or</p>	2 months' written notice	<p>The operator must give the resident notice of termination effective on a date that:</p> <p>(a) is not earlier than four months after the date the resident receives the notice; and</p> <p>(b) is the day before the day in</p>

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Categories	RTA Notice Provision	Recommended Notice provision for Assisted Living
renovate premises and has the required permits; or has agreed in good faith to sell premises on terms allowing purchaser to occupy premises		the month, or other period on which the tenancy is based, that rent is payable under the tenancy agreement.
Landlord's notice - Transfer due to increased care needs (no RTA equivalent)	N/A	<p>Assisted living legislation should provide that where an operator wishes to terminate the tenancy of an assisted living resident because the care needs of the resident have increased, resulting from either cognitive or physical impairment, there must be a process in place that includes these features:</p> <p>(a) a right for the resident to seek an independent assessment and reconsideration of the decision to terminate the tenancy;</p> <p>(b) the independent assessment of the resident's functional level of care needs should be conducted by an appropriately qualified health care professional, be arranged by the resident and be at the resident's expense;</p> <p>(c) the independent assessment should be for advisory purposes only;</p>

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Categories	RTA Notice Provision	Recommended Notice provision for Assisted Living
		<p>(d) the operator should be required to reconsider the termination of the tenancy, taking the conclusions reached in the independent assessment into account, but should not be bound by these conclusions;</p> <p>(e) subject to the outcome of the operator's reconsideration, the operator should be entitled to terminate the resident's tenancy if a bed becomes available for the resident in a residential care facility or other facility appropriate to the increased care needs of the resident;</p> <p>(f) in that event, the notice period to terminate the tenancy should be conclusively deemed by the legislation to be the period between the time that written notice of the operator's decision to terminate the tenancy was first given to the resident and the time at which the bed in the residential care facility becomes available.</p>
<p>Tenant's notice— Voluntary Departure (RTA s. 45)</p>	<p>30 days' written notice</p>	<p>The resident must give the operator notice of termination effective on a date that:</p> <p>(a) is not earlier than one month after the date the operator receives the notice, and</p> <p>(b) is the day before the day in</p>

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Categories	RTA Notice Provision	Recommended Notice provision for Assisted Living
		the month, or other period on which the tenancy is based, that rent is payable under the tenancy agreement.
Involuntary Departure Due to Death	Notice deemed to be given on the date of death	<p>Legislation should deem the tenant to have given notice to the operator on the date of death, effective one month after the date of death.</p> <p>Therefore, if death occurs after the first date of a month, the period for which the operator should be able to claim rent should include the month following the month in which death occurs.</p> <p>(A minority view is that the operator should only be able to claim rent for 30 days following the date of death.)</p>

Recommendation 18

A notice of termination of an assisted living tenancy should be governed by provisions corresponding to those set out in the table immediately above as being recommended for application to assisted living.

K. Managing the Resident's Exit From Assisted Living

Residents whose care needs have increased to a stage at which they can no longer be legally housed in an assisted living facility must often remain where they are for some period of time until a residential care bed is available. This is a reality that is readily acknowledged by care providers and health authorities. There is no alterna-

tive except eviction, which most people would agree is socially and politically unacceptable.

Residents awaiting transfer to residential care are one of the classes populating the “grey area” mentioned in the Ombudsperson’s report. The Ministry of Health has adopted a policy of allowing operators to continue to house “grey area” residents and supply additional services to them until they can be transferred to residential care. As the Ombudsperson observes in the report *The Best of Care*, however, the Ministry is acting outside the scope of its legal authority in permitting operators to do so.⁶⁹

The Ombudsperson has recommended that operators be given legal authority to provide additional support to a resident during the exit process. The Ombudsperson has also recommended that reasonable timeframes be established for completion of the exit from assisted living to a higher level of care.⁷⁰

The Project Committee agrees with the Ombudsperson that operators must be given adequate legal authority to manage a resident’s exit from assisted living. At a minimum, this should comprise authority to provide necessary care services on a temporary basis to an individual resident and to continue to house a resident until appropriate alternate accommodation is available despite the resident having ceased to meet the requirements to remain in assisted living.

The Project Committee supports the Ombudsperson’s recommendation that the Ministry of Health establish reasonable timelines for completion of a resident’s exit from assisted living to a higher care level. This support is qualified by a concern, however, that the legal authority operators should have to continue to house the resident and provide needed services during the exit phase should not be tied to a pre-set official timeline. In other words, the duration of the legal authority to house a resident in transition and provide needed services to the resident should persist until the transition is actually completed.

Recommendation 19

Assisted living legislation should allow the following pending the transfer of an individual resident out of an assisted living facility:

69. *Supra*, note 1 at 154-156, 169-170.

70. *Ibid.*, at 169-171.

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- (a) provision by or through the operator of care services to the resident as necessary on a temporary basis;*
- (b) continuing to house the resident until alternative appropriate accommodation is arranged, despite the resident having ceased to meet the eligibility criteria for admission to an assisted living facility.*

CHAPTER IV CONSUMER RIGHTS

A. Introduction

In assisted living, what can be done if the meals provided are below the standard described in the operator's advertising? What if hairdressing is below par or only made available at inconvenient times? If social events in the facility are not what they were led to expect when they entered into a residency agreement, should there be a means of redress?

Under the *Community Care and Assisted Living Act*⁷¹ as it currently stands, the Assisted Living Registrar is empowered only to deal with complaints involving the health and safety of residents. This leaves a wide range of potential disputes between residents and operators regarding the quality of accommodation and services outside the Registrar's jurisdiction. Subsidized residents can complain to their case managers in the health authority about the quality of services included in their care plans, but private-pay residents have no such option.

Consumer protection law safeguards the economic interests of individuals who purchase ("consume") goods or services for personal, family, or household purposes. Assisted living residents in British Columbia are "consumers" in the sense that they rent accommodation and purchase goods and services that they need for daily living from the operator of the facility. They enter into contracts (occupancy agreements) with the operator for this purpose. Like other consumers, they have recourse to general consumer protection laws that are intended to provide redress when consumers are deceived or fall victim to commercial or financial exploitation.

The principal consumer protection law in British Columbia is the *Business Practices and Consumer Protection Act*.⁷² This Act contains a mix of broad rules that apply generally and focused provisions that apply to specific industries, types of contracts, or activities. None of the Act's provisions are geared specifically to assisted living. As it does not apply to a lease of land, it is doubtful that it would afford any protection to a resident in relation to the terms of the occupancy agreement that relate to housing. Some of its general rules might come to the aid of an assisted living resident with a consumer-related complaint about the accommodation and services in the facility. This is an uncharted area, since there is as yet no judicial interpretation

71. *Supra*, note 3.

72. S.B.C. 2004, c. 2.

on the applicability of the *Business Practices and Consumer Protection Act* to an assisted living occupancy agreement covering rental of a dwelling unit as well as hospitality and care services.

The *Business Practices and Consumer Protection Act* provides helpful general consumer protection tools, but it is important to note that these tools are really geared toward the more extreme cases of systematic commercial and financial exploitation and intentionally deceptive advertising. They are essentially backward-looking, in that they provide court-based remedies to past wrongs. A consumer must either sue the supplier in order to obtain relief, or receive compensation ordered as a consequence of a conviction of a supplier for an offence under the Act. While these are valuable protections for consumers in situations where there will be no continuing relationship between the consumer and supplier, they are not practical solutions if a resident of an assisted living facility wishes to remain in the facility and maintain a good relationship with the operator.

Another approach to consumer protection is to provide assisted living residents with tools to avoid disputes or potential exploitation in the first place. If it is fair to say that assisted living residents are vulnerable because they often lack economic resources, options in the marketplace, and crucial information about the transactions they are undertaking, then the focus should be on requiring accurate information to be provided before binding agreements are entered into. With this approach in mind, the Project Committee considered several aspects of consumer protection in assisted living.

B. Advance Disclosure for Potential Assisted Living Residents

The law generally does not require a supplier of services to a consumer, such as an operator of an assisted living facility, to disclose information in advance of purchase to consumers of its services. Obviously, some disclosure is necessary in practice, if only to advertise or promote the services. But the nature and extent of this disclosure will vary from supplier to supplier. And its scope turns, in the end, on negotiations between the supplier and the consumer. In these negotiations the supplier is typically (if not always) the stronger party.

The idea behind advance-disclosure requirements is to provide consumers with a standardized package of factual information to inform their decision whether or not to purchase the services on offer. By making disclosure a legal requirement, transaction costs for consumers are reduced, as they are not required to expend time and effort bargaining with the supplier for the information. Standardizing the information disclosed also provides consumers with a simple way to compare the cost of the services being offered where choices exist between suppliers. Finally, disclosure

provisions tend to work hand-in-hand with general rules on deceptive acts or practices, such as those found in Part 2 of the *Business Practices and Consumer Protection Act*.⁷³ Those rules do not require disclosure of information, but they are available to provide a remedy if disclosure is made in a misleading or deceptive way.

Should assisted living legislation require operators of assisted living facilities to give prospective residents advance disclosure about the facility?

Ontario has adopted this concept for its equivalent of assisted living.⁷⁴ Its legislation requires an operator to provide a prospective resident with an “information package.” Twenty-nine American states also have some form of disclosure requirement.

It is difficult to see a downside to adopting an advance-disclosure rule for assisted living in British Columbia. Perhaps the only disadvantage is that it would make the process of obtaining assisted living accommodation and services somewhat more rigid and rule-bound. This did not appear to be a concern for correspondents to the consultation paper, who overwhelmingly endorsed the recommendation that appears immediately below.

Recommendation 20

Assisted living legislation should require operators of assisted living facilities to give prospective residents advance disclosure about the facility before entering into an occupancy agreement. The advance disclosure should include:

- (a) a list of the different types of accommodation provided and the alternative packages of services available as part of the total charge;*
- (b) charges for the different types of accommodation and for the alternative packages of services;*
- (c) policies on staffing, occupational categories, and qualifications of staff;*
- (d) details of the emergency response system;*
- (e) a list and fee schedule of the additional services available from the assisted living facility on a user-pay basis;*

73. *Ibid.*

74. *Retirement Homes Act, 2010*, S.O. 2010, c. 11, s. 54(1), (2).

- (f) *internal procedures for dealing with complaints, including a statement as to whether residents have any right of appeal from an initial decision;*
- (g) *the name, telephone number, and email address of the operator;*
- (h) *the proposed contract of tenancy and services to be entered into by the operator and the resident;*
- (i) *a statement that an operator of an assisted living facility must not house persons who are unable to make decisions on their own behalf; and*
- (j) *information about criteria for residency in the assisted living facility and the operator's process to assist a resident who is transferring to residential care or another place of residence.*

C. Cooling-Off Period

Another common feature of consumer protection legislation is to provide a “cooling-off period” following a major transaction with a supplier of goods or services during which the consumer may rescind the transaction by notice to the supplier. If the consumer does so, the transaction is ineffective in law and the consumer and supplier are returned to their respective positions before the transaction, as if nothing had happened. The cooling-off period is to protect consumers against high-pressure sales tactics by giving the consumer some time for reflection about the transaction, acquire more information, and obtain independent advice.⁷⁵

Should assisted living legislation provide for a cooling-off period during which a prospective resident could back out of an occupancy and services agreement with an operator? There is no cooling-off period under an ordinary residential tenancy agreement in British Columbia, but prospective assistive living residents generally have fewer alternatives and greater needs than ordinary tenants. The greater pressure and anxiety they inevitably face as a result when searching for appropriate housing arguably justifies greater protection.

Ontario's *Residential Tenancies Act, 2006* extends to facilities (“care homes” in the terminology of the Act) that include retirement homes, the approximate equivalents

75. The *Business Practices and Consumer Protection Act*, allows a 10-day cooling-off period in relation to “direct sales contracts” (ones that a consumer enters into at a location somewhere other than the supplier's place of business) and to certain other types of consumer contracts designated by regulation that call for services to be provided over an extended period: *supra*, note 72, ss. 21(1), 25(1). See also *Consumer Contracts Regulation*, B.C. Reg. 272/2004, s. 2(1).

of British Columbia assisted living facilities. The Act gives a care home resident the right to cancel a tenancy agreement with the operator of the facility by written notice to the operator within 5 days after entering into the agreement.⁷⁶ The agreement itself must contain a statement notifying the resident of this right and of the right to consult third parties about the agreement.⁷⁷ Similar requirements are found in some American states.

A cooling-off period would clearly benefit a new resident by giving the resident more time to find out about the assisted living facility and to obtain advice, particularly if the occupancy agreement has been entered into hurriedly out of fear that other accommodation will not be available. From the operator's point of view, a cooling-off period results in uncertainty as to whether a unit will be occupied going forward, or must be re-let within a short space of time, and whether a deposit must be returned.

The consultation paper contained a tentative recommendation for a five-day window after an occupancy agreement was signed in which the prospective resident could rescind the agreement without liability. The tentative recommendation received an equivocal response, suggesting it was not seen as a major concern by residents or operators. As a result, the Project Committee decided not to make any recommendation concerning a cooling-off period.

D. A Requirement for the Services Contract to be in Writing

A requirement that a contract for services at an assisted living facility or the equivalent must be in writing is quite common in legislation in American states and is also found in the Ontario *Residential Tenancies Act, 2006*. This may be due in part to a requirement for a written contract being seen as a basic consumer protection measure. It may also be due to the fact that, in practice, the contract of services is often combined with the tenancy agreement—and the latter would generally have to be in writing. There was almost universal approval among all categories of respondents to the consultation paper for a requirement that the contract with the operator for services be in writing.

Recommendation 21

Assisted living legislation should:

76. S.O. 2006, c. 17, s. 141(2).

77. *Ibid.*, s. 141(1).

- (a) *require an agreement between the operator of an assisted living facility and a resident concerning services the resident will receive to be in writing; and*
- (b) *permit the terms governing occupancy of a dwelling unit by the resident and those governing services to the resident to be combined in a single written agreement.*

E. Notice to Residents of Increase in Service Charges

The typical consumer transaction is a discrete, one-time matter. But some consumer transactions place the consumer and the supplier in a relationship that persists for some time. The contract for services between an assisted living resident and an operator of an assisted living facility falls into the latter category. As information provided to the assisted living resident at the start of the relationship will become out of date, ongoing disclosure in some form is called for.

Ontario's legislation requires 90 days' notice of any increases to service charges.⁷⁸ The long notice period potentially gives residents the opportunity to act in their own interests if they are dissatisfied with an increase or cannot absorb it. A similar provision with a three-month notice period was included among the provisions in British Columbia's Bill 27 discussed in the previous chapter, which would have applied aspects of this province's residential tenancy legislation to assisted living if they had been brought into force.⁷⁹

A lengthy notice requirement of this kind would result in the loss of some administrative flexibility for operators of assisted living facilities. The length of any notice period chosen is somewhat arbitrary in nature.

There is somewhat less flexibility in the timing of notices of service cost increases for subsidized residents because of the manner in which their stay in assisted living is financed. As noted earlier, the amounts charged to subsidized residents are based on their after-tax income. As the financial information on which the Ministry of Health bases the amounts charged against the income of each client in assisted living is not available until late in the year, there is a practical limit to how long the notice period can be if, as is the normal practice, a subsidized resident is to be notified of a cost increase that will take effect on January 1 of the next year.

78. *Ibid.*, s. 150(1).

79. *Supra*, note 43, s. 80 (adding s. 57.21 to the *Residential Tenancy Act*, S.B.C. 2002, c. 78).

The Project Committee concluded that a single notice period for service costs increase that could be met in both the subsidized and private-pay sector residents was preferable to having a three-month notice period for private-pay residents and a shorter one for those whose residency is publicly subsidized. A two-month notice period was considered to be manageable in each sector.

Recommendation 22

Assisted living legislation should provide that:

- (a) if a resident is not receiving a public subsidy for rent and services at an assisted living facility, the operator of the assisted living facility must give the assisted living resident notice of the amount of any increase in the cost of services not less than two months before the effective date of the increase;*
- (b) if a resident is receiving a public subsidy for rent and services at an assisted living facility, the minister must give the assisted living resident notice of the amount of any increase in the cost of services not less than two months before the effective date of the increase.*

F. Termination or Restriction of Services by Resident

Should a resident be able to stop receiving a service or restrict the extent to which the resident receives the service? If so, what amount of notice should residents have to give to the operator in such a case?

Under the present regulatory structure, assisted living is not separable from the provision of services in addition to housing. The *Community Care and Assisted Living Act* defines “assisted living residence” in part by referring to “hospitality services and at least one but not more than 2 prescribed services [being] provided by or through the operator.”⁸⁰ This legislation makes the provision of a defined group of services by the operator (or by third-party contractors engaged by the operator) a fundamental part of the definition of assisted living in British Columbia.

In the absence of legislation, when and how an assisted living resident may terminate the provision of any services offered by an assisted living facility would be a matter of contract between the resident and the operator. Depending on the agreement between a resident and an operator of an assisted living facility, the terms governing termination of services may be more or less favourable to residents.

80. *Supra*, note 3, s. 1(1) (definition of “assisted living residence”).

Legislation could give residents a more favourable rule for termination of particular services than they likely could obtain in negotiations. For example, Ontario allows residents in the equivalent of assisted living to terminate services on 10 days' notice.⁸¹ The scope of Ontario's provision is very limited, however. It only applies if the resident has already given notice to terminate his or her tenancy at the assisted living facility. Such a rule is probably meant to guard against the possibility of a resident still being liable to pay for services even after the resident has terminated the tenancy and moved out, on the basis that the contract for services is expressed as having a fixed term that does not terminate automatically at the end of the tenancy. It could also conceivably cover cases in which the resident has moved out of the facility in advance of the formal termination date of the tenancy (which would in most cases be at the end of a calendar month).

Should a resident's ability to terminate a service be expanded to situations other than the end of the resident's tenancy? Extending to assisted living residents the right to terminate a service at any time on 10 days' written notice, for example, would allow full freedom of choice for residents who wish, say, to make all their own meals or carry out their own light housekeeping.

Such a rule could create significant administrative difficulties for facilities, however. If too many residents opt out of one or more services and demand a reduction in their monthly fees as a result, it may quickly become financially impossible for the operator to continue providing them. This may be more acute for purely private operators, but the need for cost management and planning on a larger scale in the publicly subsidized assisted living sector means there may be even less flexibility to accommodate individual preferences of residents.

A third option would be to leave the legislation silent on this issue. Disputes over the termination of services would be resolved on the basis of the contract between the resident and the operator, as at present.⁸² This approach has the advantage of allowing individual residents and operators to structure termination provisions that make sense in the context of their ongoing relationship. But it also leaves open the risk of the majority of residents, who will have less bargaining power than the operator, being saddled with unfavourable termination provisions.

81. *Supra*, note 74, s. 145(2).

82. An assisted living facility would of course have to remain capable of providing hospitality services and personal care services in order to retain its registration, despite any arrangement made with an individual resident for curtailment of the services provided.

A fourth option would be to distinguish between a core group of services that could not be discontinued by the resident other than by terminating the tenancy and moving out of the facility, and optional services from which a resident could opt out at will. For this purpose, the core group of services would be the mandatory care services under Recommendation 4 and hospitality services, as those terms are defined in the *Community Care and Assisted Living Act*. “Optional services” would be any services provided by or through an operator of an assisted living facility to a resident that are neither mandatory nor hospitality services.

The fourth option would serve to maintain the financial viability of the facility with respect to services that it is required to provide in order to remain registered, but respect the resident’s freedom of choice to take advantage of optional services offered by the facility like hair styling or foot care, or decline them at any point in time while they remain living in the facility. The Project Committee saw this as a reasonable approach. It was supported as well by the majority of respondents to the consultation paper.

Recommendation 23

Assisted living legislation should provide that a resident may terminate the provision of any optional services from operators of assisted living facilities on 10 days’ notice in writing. “Optional services” for this purpose should be understood as meaning services that are neither hospitality services nor the services that an assisted living facility of the type in question is required to provide under Recommendation 4.

G. Access to External Service Providers

Operators of assisted living facilities, and any third-party contractors the operators may engage, will provide most services to assisted living residents. Yet there are situations (chiefly arising in private-pay assisted living) in which a resident may wish or need to contract directly with another service provider.

If legislation is completely silent on this issue, the use of external service providers would be left to negotiation between the resident and the operator and would be governed by whatever agreement they reach. This is essentially the status quo. It gives the resident and operator the maximum flexibility to structure their private arrangements. It would not do anything to address unequal bargaining power that could result in imposition of terms prohibiting residents from obtaining services from third party providers, and being locked into disadvantageous service contracts with operators that they cannot terminate except on the operator’s terms.

One legislative approach could be to prevent assisted living facilities from doing anything (including negotiating prohibitory contract terms) to prevent residents from obtaining services from external providers. Illinois legislation requires all contracts for services between assisted living residents and operators of assisted living facilities to contain a term “affirming the resident’s freedom to receive services from service providers with whom the [operator] does not have a contractual arrangement. . . .”⁸³ Such a rule (coupled with a liberal rule for terminating services) gives residents the power to seek better deals elsewhere, if they are dissatisfied with the services at an assisted living facility. In theory, this should give residents more options, which should allow them to better protect their financial interests. In practice, it could also entail a significant loss of control for operators over who provides services, and how they are provided. This is not only a health and safety concern. It has the potential to also undermine the economic viability of the facility by reducing the revenue per resident needed to sustain the facility’s operations.

It is possible to take a more measured and limited approach. Before July 2012, Ontario’s *Residential Tenancies Act* operated in this manner, only restricting operators of assisted living facilities from “preventing” or “interfering with” a resident obtaining “additional” services from an external provider. Under this approach, the operator would always be in the position of providing a core group of services to the resident, but the resident would always be free to look for any additional services to external providers, who may be in competition with the operator. But Ontario has recently moved in the direction taken by Illinois. A provision of the Ontario *Retirement Homes Act, 2010* that came into force in July 2012 provides that “a licensee of a retirement home shall not prevent a resident of the home from applying for care services from an external care provider of the resident’s choosing.”⁸⁴

The consultation paper contained a tentative recommendation that resembled the Ontario approach before the change that took effect in 2012, namely one that guaranteed to residents an unrestricted ability to seek services from external providers if the services were additional to those the operator is required to make available as a condition of registration. In the consultation paper and this report, we refer to these as “optional” services. This approach would tend to preserve the economic base for the provision of mandatory services in the facility, but also allow substantial freedom of action for residents in choosing their own providers for services that are not mandatory. It met with general approval from respondents to the consultation paper. Essentially the same recommendation is made immediately below.

83. *Assisted Living and Shared Housing Act*, 210 ICLS 9/85.

84. *Supra*, note 74, s. 67(2).

Recommendation 24

Assisted living legislation should expressly permit residents to obtain optional services (i.e., services that are not hospitality services or mandatory services required by Recommendation 4) from external service providers.

H. Termination or Restriction of Services by Operators

If residents are limited in their ability to opt out of services provided in an assisted living facility, should the ability of operators of assisted living facilities to terminate or restrict services be limited as well?

The *Tenancy Statutes Amendment Act, 2006* (Bill 27) would have made any proposal by an assisted living facility to terminate or restrict a service offered to a resident subject to section 27 of the *BC Residential Tenancy Act*. In brief, the combination of section 27 of the *Residential Tenancy Act* and Bill 27 would place the following limits on the restriction or termination of a service:

- the service could not be restricted or terminated if it was
 - “essential to the [resident’s] use of the rental unit as living accommodation,” or
 - providing the service was “a material term of the [service] agreement”;
- the service could be restricted or terminated if the operator of an assisted living facility
 - gave 60 days’ written notice of the termination or restriction, and
 - reduced the amount payable under the contract for services for the service “in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service.”

The purpose of these rules would be to provide additional safeguards to assisted living residents. They are intended to ensure that the key terms in a contract for services will continue unchanged throughout the course of a resident’s residency. They would also provide an orderly framework for any changes in services. These limitations are essentially the same as limitations placed on residential landlords that offer services to tenants. (The only real difference is the longer notice period.)

Ontario's *Retirement Homes Act, 2010* provides that an operator of a retirement home (comparable to an assisted living facility) must "not reduce the care services that the [operator] makes available in the [facility], directly or indirectly, to the residents" unless:

- the operator gives written notice to the resident of the date on which the reduction will take effect;
- the operator also gives the notice to the resident's substitute decision-maker (if any);
- if the resident wishes to continue living in the facility, the operator takes reasonable steps to facilitate access to an external service provider;
- if the resident wishes to move out of the facility, the operator takes reasonable steps to find alternative accommodation for the resident.

The Ontario provision is intended to foster consumer choice. It does this by providing for advance notice and, if the resident decides to remain in the facility, by requiring an operator to support a resident's choice to retain an external service provider. In this respect, Ontario's proposal goes hand-in-hand with other provisions designed to ensure that residents are able to choose whether they will receive their services from the operator or from an external provider. The policy choice underlying this proposal is that competition in the marketplace can ensure that residents get the best value for their expenditure on services. Operators will not attempt to raise the cost of services beyond what the market can bear because residents will have the option to go to another service provider. The disadvantage of this approach is that it does little to bring about the competitive marketplace on which it relies to provide protection to residents. If there are actually few or no other service providers for residents to turn to, these provisions will do little to help a resident facing a large increase in service charges.

The downside of both these proposals is that they curtail administrative flexibility for operators of assisted living facilities. A one-size-fits all process will have to be followed if an operator wishes to terminate or restrict a service. Further, in some cases operators may not be allowed to restrict or terminate a service.

There is a need for continuity in the provision of services throughout a resident's stay in an assisted living facility. It can be assumed that residents enter assisted living in order to benefit from the hospitality and personal care services, and that as a general rule, they require them to varying degrees. It is not really feasible to termi-

nate or restrict hospitality and personal care services without removing the basis for the majority of residents to remain in assisted living.

Operators may offer optional services to increase the amenities available to residents or because they may cater to a resident population having special needs or preferences. Over the course of time, the resident population may change and their needs and preferences may evolve. If changes like this take place, demand for a particular service like a bus to transport residents to and from a shopping mall at scheduled intervals may decline and it may become uneconomical to continue providing it. Retaining staff that are able to provide the particular service may not always be possible. In some cases it may not be possible to retain enough qualified staff to meet demand, and as a result the operator may have to limit the frequency of the service or the number of residents receiving it. Operators must therefore have some flexibility in terminating or restricting optional services.

A 60-day notice period is equivalent to the notice that Bill 27 would have required, and is likely adequate in the case of optional services. It gives a resident a significant window of time to arrange to obtain the service from another source, or initiate a move elsewhere if the resident so chooses.

Some residents may need the assistance of a supporter in obtaining a service from an alternate provider if the service is terminated or restricted. For this reason, if a resident has a designated legal representative and the operator is aware of the legal representative's identity, that person should receive notice of an operator's intention to terminate or restrict a service as well as the resident.

For this purpose, a legal representative could be a representative appointed under a representation agreement, a person holding an enduring power of attorney from the resident, or a committee. (A committee is a court-appointed guardian for a person who is mentally incapable of managing himself or herself, or his or her affairs. While persons without the capacity to make decisions on their own behalf are not eligible to remain in assisted living, it is not uncommon for an assisted living resident to have a committee whose authority is restricted by the terms of the court appointment to managing the resident's financial affairs.)

Recommendation 25

Assisted living legislation should provide that an operator may restrict or terminate an optional service if

- (a) *the operator gives 60 days' written notice of the restriction or termination to the resident and to the resident's attorney, representative, or committee (if any); and*
- (b) *reduces, as of the effective date of the notice, the amount payable by the resident under the resident's service contract by an amount that is equivalent to the incremental charge formerly payable by the resident for the service being terminated or restricted.*

I. Management or Maintenance of Resident Property or Cash Resources

As explained in Chapter II, one of the prescribed services that an operator of an assisted living facility may offer is the “maintenance or management of the cash resources or other property of a resident.” As an example of what this service might entail, the *Registrant Handbook* suggests “managing comfort funds for residents.” (In the care industry small amounts of cash held in safekeeping for residents to meet day-to-day expenses are called “comfort funds.”) Of course, the section is not limited to this type of arrangement. Its key terms—“cash resources” and “property”—are broad in scope. Similarly, the use of “maintenance” and “management” shows that, in its design, this provision contemplates a wide range of situations, spanning the passive holding of an item of property to the active management of property or investments.

In practice, this service is not being offered. No assisted living facility is registered to provide it. If an operator of an assisted living facility did provide this financial or property management or maintenance service to residents, it is not immediately clear what the residents' rights and the operator's obligations would be. Neither the *Community Care and Assisted Living Act*⁸⁵ nor any other piece of British Columbia legislation provides a detailed set of legal rules governing this service.

Common law rules would apply to the arrangement and the applicable rules would vary according to the property at issue. For example, if a resident gives tangible personal property to an operator for safekeeping, such as jewelry, this arrangement would likely be governed by the law of bailment. A resident who gives a fund of “cash resources” to an operator for management and investment purposes would likely create a debtor-creditor relationship (as is the case between a bank and its customer), or possibly a trust. The particular facts of each arrangement, and what was communicated between the resident and operator, would determine the nature of the rights and obligations that would flow from it.

85. *Supra*, note 3.

The current uncertainty about how this service could be administered, and its legal implications, provide a possibility for financial abuse of older adults. But even in a case in which no one acts abusively, leaving this area to the common law can present problems for both residents and operators. Ordinary (unsecured) creditors are typically faced with significant losses if their debtors become insolvent. This scenario could unfold for a resident who gives money or other property to an operator for management or maintenance, and the operator later becomes insolvent. There is no general obligation on operators in these circumstances to segregate such funds in a separate account unless, possibly, the dealings between the operator and resident had the effect of creating a trust of the funds. Further, there is no general obligation to provide regular statements of account to residents in these cases. But the current law does not necessarily benefit operators. The law of bailment, in particular, can be quite complex, with many traps for the unwary. If the operator found itself in the position of a trustee of the resident's funds and/or other property, the operator's obligations towards the resident would be fiduciary in nature, implying a duty of absolute loyalty to the resident.

In view of these concerns, some other jurisdictions have put statutory rules in place to govern this type of service. One of these jurisdictions is Ontario. Section 72 of the Ontario *Retirement Homes Act, 2010*⁸⁶ requires an operator of a retirement home offering this service to establish a trust account for money of a resident entrusted to the care of the operator. There are two points to note about this provision. First, it is narrower than what British Columbia's current law allows an operator to manage for a resident: it only applies to money, not to cash resources and other property. Second, it implies that the operator will have the obligations of a trustee toward the resident, as it requires the establishment of a trust account.

The Ontario regulations provide further:

- the operator of a retirement home that offers this service must establish and maintain "at least one non-interest bearing trust account at a financial institution" in which the operator must deposit all resident money entrusted to it;
- the operator cannot commingle its funds with residents' funds, and can charge "a reasonable service fee" so long as it is not a withdrawal or transaction fee;

86. *Supra*, note 74.

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- the operator cannot hold more than \$10,000 for any resident and cannot allow the balance of its trust account to exceed the amount insured through the Canada Deposit Insurance Corporation or an equivalent program;
- the operator must keep separate ledgers and books of account for the trust account, maintain these records for a period of not less than seven years, and provide receipts and quarterly itemized statements to residents;
- the operator must maintain a petty cash fund at the retirement home, made up of funds from the trust account, “sufficient to meet the daily cash needs of residents who have money deposited in a trust account for them”;
- the Ontario Retirement Homes Regulatory Authority would have the power to order an audit of a trust account.⁸⁷

Similar provisions are in force in some U.S. states.

Given an apparent lack of demand for the prescribed service of “maintenance and management of residents’ cash resources and property” and the lack of interest among assisted living operators in providing this service, it is questionable whether this should continue to remain on the list of prescribed services applicable to assisted living if Recommendation 4 is not implemented and such a list remains in effect. Ethical operators understandably do not wish to be bankers for their residents. Some residents may nevertheless find it convenient to have a small amount of cash held in safekeeping on the premises of the facility. The Project Committee considered that operators willing and equipped to hold comfort funds up to a specified maximum size should be allowed to do so as a convenience for residents, without having this considered to be a prescribed service.

The Project Committee also considered that comfort funds should be limited to \$300 in order to curb the potential for financial abuse of residents by unscrupulous staff and to limit the potential liability of operators for loss.

A significant majority of the responses to the consultation paper were in favour of abolishing “maintenance and management of residents’ cash resources and property” as a prescribed service. No significant disagreement was expressed with regard to the Project Committee’s position on comfort funds. The earlier tentative recommendations are therefore reaffirmed here.

87. O. Reg 166/11, s. 57.

Recommendation 26

“Maintenance and management of the cash resources or other property of a resident” should be deleted from the current list of prescribed services for an assisted living facility, regardless of whether the prescribed list is superseded by Recommendation 4.

Recommendation 27

Assisted living facilities should be allowed to hold comfort funds in safekeeping as a convenience to residents on the following basis:

- (a) the amount of a comfort fund for a resident that an operator may hold at any time must not exceed an amount established by regulation (to be initially set at \$300);*
- (b) an operator must provide a resident receiving this service with a quarterly account relating to the resident’s comfort fund;*
- (c) an operator providing this service should not be liable to pay interest to residents on their comfort funds.*

J. Prohibition on Inducement of Legacies, Gifts, Etc. to the Facility or Staff

Section 18(3) of the *Community Care and Assisted Living Act* prohibits a licensee of a community care facility or the licensee’s employees from attempting to persuade or induce a resident to make or alter a will, make a gift, provide a benefit to the licensee or to the licensee’s spouse, relative, or friend, or requiring that the resident make any payment or donation as a condition of admission to the facility other than as specified in a written contract. Section 18(3) also prohibits a licensee or employee of the facility from acting under a power of attorney or a representation agreement granted or made by a resident, or as the resident’s personal representative or committee (court-appointed guardian). Under sections 18(4) and (5), a gift, a term or alteration of a will or other instrument conferring a benefit, or a power of attorney, that is granted by a resident in care to, or made in favour of, the licensee or a spouse, relative, friend, or employee of the licensee is legally void unless the Public Guardian and Trustee has consented to it in writing.

At the present time section 18 only applies to licensees of community care facilities, and their officers, directors, agents, designates, and employees. While assisted living residents should have mental capacity to govern their own affairs and may be thought of as less vulnerable than persons in residential care, they can still be at risk

of economic or psychological pressure from caregivers for many reasons. Even with reasonable diligence, operators are unable to monitor every communication and interaction that their staff members have with residents for the purpose of detecting whether improper pressures are exerted by individual staff members. Sections 18(3), (4), and (5) of the *Community Care and Assisted Living Act* not only protect residents, but are of assistance to ethical operators in curbing unethical conduct by individual staff members. They should apply to assisted living as well as to residential care.

Recommendation 28

The Community Care and Assisted Living Act should be amended to extend sections 18(3), (4), and (5) to apply to operators of assisted living facilities, and their officers, directors, agents, designates and employees.

CHAPTER V A RESIDENTS' BILL OF RIGHTS

A. Introduction

It is increasingly common for legislation regulating service industries to include a list of rights benefiting the clients of the industries. These so-called bills of rights are modelled in some ways on constitutional bills of rights but also differ significantly from them. Residents' bills of rights for assisted living and equivalent forms of housing tend principally to be educational tools intended to provide residents with a simple, plain-language document that enumerates their rights under assisted living legislation and other laws. In some jurisdictions, however, they create binding legal rights in addition to having other purposes, and could be used by residents to enforce key protections.

While the lists of rights vary from jurisdiction to jurisdiction, common themes include labelling them as a "bill," "charter" or "code" of residents' rights. Their contents can vary dramatically in scope from restatements of details that would typically be found in an occupancy agreement, such as the right to receive and communicate with visitors in private, to broad statements such as the right to live in dignity and respect.

In 2009, British Columbia added a list of rights for adults in residential care to the *Community Care and Assisted Living Act* at the urging of the Ombudsperson.⁸⁸ This list is now found in the Schedule to the Act. Part 1 of the Ombudsperson's report *The Best of Care* was published later that year. While directed to residential care, Part 1 sets out a rationale for a bill of rights that is arguably relevant to assisted living, namely that a bill of rights would:

- clarify and help to promote the rights of older adults;
- "reduce misunderstandings and miscommunications and facilitate consistency of expectations and service delivery";
- assist in the early recognition and resolution of complaints.⁸⁹

88. See *Health Statutes (Residents' Bill of Rights) Amendment Act, 2009*, S.B.C. 2009, c. 30.

89. Office of the Ombudsperson, *The Best of Care: Getting it Right for Seniors in British Columbia (Part 1)* (Victoria: Ombudsperson, 2009) at 28-29.

An additional reason to adopt a bill of rights for assisted living is that it would result in harmonization with rights guaranteed to persons in residential care under British Columbia's legislation.

On the other hand, assisted living strives to the extent practical to be similar to independent living, where individual rights are maintained and exercised without reliance on a legislative "bill of rights." Bills of rights applicable to assisted living and its equivalents in other jurisdictions tend to emphasize certain specific rights, which may leave the mistaken impression that other rights of residents, and residents' obligations, are less important or are absent.

As the existence of a bill of rights implies that residents need to be protected from operators of the facilities they live in, operators may regard the statements in a bill of rights as contributing to an adversarial atmosphere, frustrating efforts to maintain a co-operative relationship in a facility between residents and the operator. A bill of rights could fail to accomplish its purposes if it tends to create acrimony between operators and residents.

B. Residents' Bill of Rights: Legally Enforceable or Merely Educational?

Examples exist of bills of rights that serve educational purposes only and expressly indicate that they do not create enforceable rights. For example, the *Community Care and Assisted Living Act* provides, "no right of action lies, and no right of compensation exists, by reason only of a violation of a right set out in this Schedule."⁹⁰ (The Schedule, as mentioned earlier, relates only to persons in residential care.) "No right of action lies" means "no right to sue exists." The words "by reason only of a violation of a right" are also significant as they mean that the bill of rights does not detract from any other right that a person in care may have under other legislation or at common law.

For example, a bill of rights for assisted living residents could provide that "You have the right to the services and benefits provided in your occupancy agreement." If the bill of rights was based on the same model as the present Schedule applicable to residential care, a resident who believed that the operator had breached a term of the agreement would not have a right to sue on the basis that the operator has violated the bill of rights. Instead, the resident would have to rely on the right to sue for breach of the occupancy agreement, which is a legally enforceable contract.

90. *Supra*, note 3, s. 4.

While a non-enforceable bill of rights for assisted living residents would confer no real legal protection itself, it would be on the same plane as the one provided for persons in residential care in the Schedule to the *Community Care and Assisted Living Act*. It could serve an educational function in making residents aware of their right to make a complaint and of how to make it.

A second approach would be to provide that a resident has a right to sue in court (or make use of an alternative dispute resolution process) based directly on a claim that a section of the bill of rights has been violated – whether or not there is another legal remedy, such as a claim based on a breach of the occupancy agreement. This could be accomplished by legislation:

- deeming the terms of the bill of rights to be a part of any occupancy agreement; or
- providing that the terms of the bill of rights are directly enforceable on a stand-alone basis.

An independent right to sue based on the bill of rights would heighten protections for assisted living residents and provide clarity about the legal consequences of a breach of a term in the residents' bill of rights. This is the approach taken in the Ontario *Retirement Homes Act, 2010*.⁹¹

Finally, a bill of rights could be merely silent as to whether or not its provisions may be enforced as stand-alone rights. This allows flexibility for a court to deal with a novel claim where fairness suggests that there should be a remedy, but other laws or the occupancy agreement do not provide one. It also leaves more uncertainty than either of the two other approaches.

C. Limits on Individual Rights: Recognizing the Rights of Other Persons

It is important to bear in mind that the rights that a residents' bill of rights would accord are granted to persons living in a congregate setting. The exercise of a resident's rights can have an impact on other residents, the operator of the assisted living facility, and the operator's employees. It is therefore reasonable to consider whether a legislative statement of residents' rights should be balanced with a statement of their responsibilities towards others in the residential community contained in the facility.

91. *Supra*, note 74, s. 51(3).

Potential benefits of including statements of residents' responsibilities include the following:

- it would clarify that successful assisted living requires both operators and residents to do, or refrain from doing, certain activities; and
- by declaring rights and obligations of both operators and residents, the bill of rights would impart a sense of balance between the parties.

The educational purpose of a bill of rights would be greater if the bill of rights took into account the potential for the exercise of a resident's individual rights to affect the rights of others. It is unlikely that, in practice, a resident would ever be able to exercise rights set out in a bill of rights to their maximum limits. Acknowledging this fact would serve a useful purpose. Recognizing this expressly in the bill of rights could also support the purpose of promoting the early resolution of disputes.

Two different legislative approaches stand out in provisions that address the potential for a resident's exercise of individual rights to affect the rights of other persons. The first is to acknowledge limits on the rights provided in the residents' bill of rights. This is the approach taken in the Schedule to the *Community Care and Assisted Living Act* relating to persons in residential care. The Schedule states that the rights in it are subject to:

- what is reasonably practical given the physical, mental and emotional circumstances of the person in care;
- the need to protect and promote the health and safety of the person in care or another person in care; and
- the rights of other persons in care.

The second approach is to go a step further and describe the resident as having responsibilities in addition to rights. An example is found in New Zealand's *Retirement Villages Act 2003*.⁹² This Act's code of residents' rights provides as follows:

Your obligations to others

Your rights exist alongside the rights of other residents and the rights of the operator, the people who work at the village, and the people who provide services at the

92. 2003, No. 112.

village. In the same way that these people are expected to respect your rights, it is expected that you in return will respect their rights and treat them with courtesy.⁹³

D. Right to Be Free from Physical or Chemical Restraints

In a health care setting, it is sometimes necessary to restrain a mentally agitated or overwrought person on an emergency basis to prevent serious bodily harm to that individual or someone else. This may take the form of physically restricting a person's freedom of movement (physical restraint) or medicating the person to reduce agitation and control dangerous or disruptive behaviour (chemical restraint).

Legislation and regulations dealing with hospitals, mental health, and residential care of older adults all touch on the use of restraints. British Columbia's minimal legislative framework for assisted living does not have anything to say on restraints. Yet the community within any form of congregate housing for older adults has to face the reality that some residents may suffer from varying degrees of cognitive decline. It is true that persons who have lost independent decision-making ability are not legally eligible to remain in assisted living unless they are on leave under section 37 of the *Mental Health Act*⁹⁴ or are housed with a spouse having the capacity to make decisions for them. In practice, however, some residents whose decision-making ability has become impaired may remain in an assisted living facility until they can be relocated to a more suitable care setting. In some cases, people experiencing cognitive changes or mental health issues may occasionally have episodes of disruptive and/or aggressive behaviour.

The question of whether, and to what extent, restraints can ever be legitimately used in assisted living cannot be avoided. How the current law applies to the restraint of a resident at an assisted living facility is not a simple question. As a starting point, the general proposition is that one person cannot restrain another person without legal justification. A person who does so without legal justification would potentially face civil liability and/or criminal penalties.

A health care provider has a duty and a right at common law to restrain a person under care to prevent harm to that person or a third party. The Ontario *Retirement Homes Act, 2010* contains a provision that residents have a right "not to be restrained except in accordance with the common law."⁹⁵ This is not an especially illuminating provision. Unfortunately, the decided cases do not shed a great deal of

93. *Ibid.*, Schedule 4.

94. *Supra*, note 18.

95. *Supra*, note 74, s. 51(1), para. 7.

light on the scope of this common law duty and right. There is no court decision definitively holding that the common law duty and right applies to operators and staff of assisted living facilities in British Columbia or that it does not.

The safe use of restraints in a clear emergency to prevent bodily harm may be fairly non-controversial. Experience in other care settings and other jurisdictions shows, however, that there is room for legitimate concern that a practice may develop of using restraints more routinely for reasons of institutional convenience, or as a form of disciplining residents who are perceived to be overly self-assertive, non-compliant, or disruptive. Apart from posing health risks, unnecessary use of restraints undermines the dignity of adults.

As the *Assisted Living Registrant Handbook* explains, “[t]he core principles of assisted living—choice, privacy, independence, dignity and respect—derive from a recognition that adults, even when they need support and assistance in daily life, retain the ability and right to manage their own lives.” Authority to restrain residents does not easily fit within these core principles, and possibly not at all.

But here it is important to note that operators of assisted living facilities have responsibilities toward residents that do not apply to residential landlords. The *Registrant Handbook* also states: “[A]ssisted living operators have a duty to keep a ‘watchful eye’ over residents,” and so “if a registrant notices a problem in relation to a resident’s health or safety, the registrant has a responsibility to follow up on the matter with the resident and/or their designated contact person.” This duty can be seen to put assisted living facilities somewhere on a continuum between independent living in the community and institutionalized care. Furthermore, assisted living facilities are authorized to house persons on leave from involuntary detention in a mental health institution. The possibility that staff of an assisted living facility might have to control sudden disruptive or dangerous conduct at some point is not entirely outlandish.

The Project Committee considered the merits of including a distinct provision banning physical or chemical restraints in assisted living altogether, or alternatively one declaring that restraints cannot be used for purposes of pacifying self-assertive residents or for the convenience of staff and others.

The Project Committee decided against recommending a provision of either kind. A provision in legislation expressly banning restraints altogether could conceivably deprive assisted living facilities of a means of protecting their residents’ safety and that of their staff in an extreme emergency. A provision declaring they must not be used for the convenience of staff or discipline of residents might be understood as

suggesting that restraints could be used for those purposes if the provision were not enacted, or that routine use for other purposes was permissible. This would be a misconception.

E. Conclusion and Recommendations

As the Project Committee was initially divided on the merits of having a residents' bill of rights, the consultation paper did not contain a tentative recommendation on whether there should be a residents' bill of rights set out in legislation governing assisted living, nor on whether such a bill of rights should be legally enforceable or merely educational. Likewise, the consultation paper contained no tentative recommendation on physical and chemical restraints. Instead, the alternatives discussed above were presented and the reactions of readers were sought.

By large majorities, almost all categories of respondents to the consultation paper favoured including a bill of residents' rights in legislation that would have only an educational purpose and not create enforceable legal rights. They also favoured balancing this with a declaration that the rights are subject to reasonable limits, and with a statement of residents' responsibilities. Having taken the responses into account, the Project Committee concluded that the legislative framework for assisted living should include a statement of residents' rights and responsibilities that would not in itself create legal rights.

The views of residents and operators diverged somewhat on the subject of restraints. A clear majority of operators preferred that the legislation should remain silent, and a majority of residents favoured a strong statement in legislation that residents have a right not to be restrained. A majority of both operators and residents also indicated agreement nevertheless with proposed inclusion of a declaration that "residents have a right not to be restrained except in accordance with the common law duty of a health care provider to restrain a person under care to prevent harm to that person or a third party." A declaration in those terms could therefore be seen as a broadly acceptable compromise.

Recommendation 29

Assisted living legislation should contain a statement of rights and responsibilities of residents that

- (a) does not create a right of action or right to compensation by reason only of a breach of its terms;*
- (b) declares that the rights set out in it are subject to reasonable limits: and*

(c) includes a declaration that residents have a right not to be restrained except in accordance with the common law duty of a health care provider to restrain a person under care to prevent harm to that person or a third party.

CHAPTER VI PRIVACY

A. Introduction

A discussion of privacy in assisted living must take place in full recognition of the complex circumstances of assisted living. Residents have their own dwelling unit within a facility, and preserve their independence to the greatest extent practicable in light of the services that they require. There are significant differences between assisted living and fully independent living in a condominium or apartment complex, however:

- the operator in an assisted living facility has greater obligations regarding the health and safety of residents than a landlord has in an independent apartment building;
- the staff in an assisted living facility must provide services to residents that can require them to enter the residents' dwelling units, such as housekeeping and assistance with activities of daily living;
- services provided to residents requiring assistance with activities of daily living can involve bodily contact.

It is not surprising that rights, obligations and liabilities surrounding privacy in assisted living are governed by a complex web of policy and legislation.

B. Present Protections for Privacy in Assisted Living

Policy 8 established by the Assisted Living Registrar treats the "invasion or denial of privacy" of a resident as amounting to abuse.⁹⁶ Policy 2 (Operating an Assisted Living Residence) describes privacy as one of the "core principles" of assisted living, ranking together with choice, independence, individuality, dignity and respect. Policy 2 continues to provide that "residents maintain their privacy by living independently in their own lockable personal space and they maintain their dignity by making choices about their daily activities, based on their personal preferences and lifestyles."⁹⁷

96. *Registrant Handbook, supra*, note 15, Policy 8, para. 8.2.

97. *Ibid.*, Policy 2, para. 2.1.

At the same time, the policy recognizes that assisted living is a “*semi-independent form of living.*” (Italics added.) In recognition of this, Policy 2 requires operators and their staff to “when requested... provide assistance that is least intrusive and supports residents to live as independently as possible.”⁹⁸ The Assisted Living Registry itself follows the policy of taking the least intrusive action that is appropriate as a guiding principle in carrying out its own regulatory role.

Under the *Community Care and Assisted Living Act*, the Assisted Living Registrar’s powers of entry and inspection may only be exercised in relation to an individual resident’s dwelling unit with the consent of the resident or under the authority of a warrant issued by a justice.⁹⁹

The regulatory framework nevertheless places some limitations on privacy. The *Community Care and Assisted Living Act* requires that the facility be operated so as not to jeopardize the health and safety of its residents. An operator may need to make decisions from an institutional standpoint that could conflict with privacy to some extent in order to fulfill the health and safety obligation. An example would be the enforcement of non-smoking rules. Second, an operator must not house a person who is unable to make decisions on his or her own behalf. This obligation requires the operator and staff to keep a “watchful eye” to monitor the physical and mental health of residents to a degree that is not wholly compatible with privacy in a setting of fully independent living. Similarly, Policy 7 of the Assisted Living Registrar requires the operator to monitor residents’ abilities to manage their own medications and notify the resident’s pharmacy of any negative reaction to medication.

Other provincial laws concerning privacy apply in the context of assisted living as they do to all other social and commercial contexts. One of those laws is the British Columbia *Privacy Act*, which provides a right to sue for willful violation of one’s privacy.¹⁰⁰ For the purposes of this Act, “privacy” has been held to mean the “right to be let alone” or be “free from unwarranted publicity” and “to withhold oneself from public scrutiny if one chooses.” There is some tension between this Act and the duty of the operator to keep a “watchful eye” on the health and safety of residents. Overzealous efforts to fulfil that duty could give rise to privacy violations.

98. *Ibid.*

99. *Supra*, note 3, ss. 9(7), (25)(3), (4).

100. R.S.B.C. 1996, c. 737.

C. Is Greater Protection for Residents' Privacy Needed?

Is there a need for greater protection for privacy in assisted living to be spelled out in legislation in BC?

One view may be that as assisted living residents live in an environment that is intrinsically less private than independent living, they must accept lower expectations of privacy and so no special privacy protections are needed.

Conversely, assisted living residents may require special legal protections for their privacy precisely because they live in a semi-independent environment and may not have a realistic alternative. By way of comparison, the Schedule to the *Community Care and Assisted living Act* expressly addresses the privacy of persons in residential care as the right to “[have] his or her personal privacy respected, including in relation to his or her records, bedroom, belongings and storage spaces.”¹⁰¹

Legislation governing assisted living or its equivalents in some other provinces and U.S. states contain provisions on residents' privacy that tend to be fairly similar across the jurisdictions. They tend to emphasize entitlement of residents to:

- a basic right to privacy in individual dwelling units;
- a right to be treated in a manner respecting individual dignity, particularly in relation to personal care services;
- private communications: to send and receive mail unopened, have private use of a telephone, and meet in private with visitors;
- confidentiality of personal information.

Confidentiality of residents' personal information is addressed to a large extent by other provincial legislation discussed later in this chapter.

With respect to privacy within the individual dwelling unit, the relevant clause of the British Columbia Seniors Living Association standard *Resident Occupancy Agreement* might be taken as a guide for a legislative provision. It declares that a resident's dwelling unit is the resident's home and that the resident is entitled to privacy and quiet enjoyment of it. It also declares that the operator and its staff may only enter the resident's dwelling unit for the following reasons:

101. *Supra*, note 3, Schedule, s. 2(d).

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- regularly scheduled services, e.g., housekeeping, personal care, maintenance of the unit;
- entry pursuant to written notice stating the reason why entry is necessary, provided the time of entry stated in the notice is not less than 24 hours nor more than 72 hours from the time notice is given;
- real or perceived emergency in the judgment of the operator, or if the operator has a reasonable fear that the resident's health or physical well-being or property may be at risk;
- abandonment of the room by the resident;
- additional services arranged for a resident awaiting a move to a more appropriate care setting because of increased care needs.

These cover most of the situations in which the operator would require access to a resident's dwelling unit. To these might be added unscheduled services as agreed between the operator and resident, and entry on a specific occasion with the resident's consent.

With respect to bodily privacy, the interest to be protected is to have any personal care services provided in a respectful manner that preserves the resident's dignity.

Residents should also have a right to communicate freely with other persons inside and outside the facility in a non-disruptive manner by voice, conventional mail, telephone, or other electronic means, without fear of interference or interception.

Recommendation 30

Assisted living legislation should include provisions confirming a resident's right to privacy

(a) within the resident's individual dwelling unit,

(b) in relation to personal care services, and

(c) in communications,

to the greatest extent consistent with the operator's obligations and the rights of other residents.

Recommendation 31

Assisted living legislation should provide that the operator and its staff may enter the resident's dwelling unit only for the following reasons:

- (a) regularly scheduled services, e.g., housekeeping, personal care, maintenance of the unit;*
- (b) unscheduled services as may be agreed between the operator and the resident;*
- (c) pursuant to written notice stating the reason why entry is necessary, provided the time of entry stated in the notice is not less than 24 hours nor more than 72 hours from the time notice is given;*
- (d) real or perceived emergency in the judgment of the operator, or if the operator has a reasonable fear that the resident's health or physical well-being or property may be at risk;*
- (e) abandonment of the dwelling unit by the resident;*
- (f) additional services arranged for a resident awaiting a move to a more appropriate care setting because of increased care needs;*
- (g) with the consent of the resident given on a specific occasion.*

D. Privacy Regarding Personal Information

The semi-independent nature of assisted living and the responsibilities placed on the operator of an assisted living facility require that a considerable amount of information about individual residents ("personal information") come into the operator's hands, notably information about the residents' health and care needs. Residents have a legitimate interest in having their personal information handled carefully and in confidence.

Extensive legislative protection for personal information is already in place in British Columbia in both the public and private sectors, and these general enactments apply to the operation of assisted living facilities.

The *Freedom of Information and Protection of Privacy Act*¹⁰² and the *Personal Information Protection Act*¹⁰³ are two important Acts that govern the collection, retention, use, and disclosure of personal information. (As its title implies, the *Freedom of Information and Protection of Privacy Act* also regulates public rights of access to information held by a public body.) Either of these Acts may apply to personal information related to residents in assisted living, depending on the nature of the body collecting and using the personal information, and whether the resident receives accommodation and services on a fully private-pay or subsidized basis.

The *Personal Information Protection Act* applies to private organizations that are subject to provincial legislative jurisdiction, including private organizations (companies or societies) that operate assisted living facilities.

The *Freedom of Information and Protection of Privacy Act* applies generally to “public bodies” as defined in the Act, including provincial government ministries, agencies, boards and commissions and other emanations of the provincial and local governments. The *Freedom of Information and Protection of Privacy Act* also applies to the collection, storage, use and disclosure of personal information by a “service provider” as well as by public bodies themselves. A “service provider” for the purposes of the *Freedom of Information and Protection of Privacy Act* is someone who provides services to a public body, such as a regional health authority.

An operator who owns an assisted living facility in which the regional health authority subsidizes the occupancy of at least some of the residents would likely be a “service provider” under the *Freedom of Information and Protection of Privacy Act*. As a result, the operator would become bound by that Act in connection with its use of personal information relating to residents in performing its contract. With respect to dealings with personal information of the facility’s private-pay residents, the *Personal Information Protection Act* would govern. The operator would be bound by both Acts simultaneously.

Both the *Personal Information Protection Act* and the *Freedom of Information and Protection of Privacy Act* impose similar constraints on handling personal information of residents. Except for some specific exceptions, both Acts:

- permit collection of personal information only for specific purposes;¹⁰⁴

102. R.S.B.C. 1996, c. 165.

103. S.B.C. 2003, c. 63.

104. *Supra*, note 102, s. 26; note 103, s. 14.

- require consent to the collection by the person to whom the information relates. (The purpose of the collection must be disclosed to that person in order for the consent to be valid);¹⁰⁵
- allow personal information to be used only in a manner consistent with the purpose for which it was collected, unless there is specific consent to its use for a different purpose;¹⁰⁶
- prohibit disclosure of personal information within the control of the organization (*Personal Information Protection Act*), or within the custody or control of the public body (*Freedom of Information and Protection of Privacy Act*) for a purpose other than the purpose for which it was collected, unless the person to whom the personal information relates has consented to the disclosure.¹⁰⁷

The *Personal Information and Protection of Privacy Act* and the *Freedom of Information and Protection of Privacy Act* differ in how the consent of a person to the collection, use, or disclosure of his or her personal information may be obtained. Under the *Personal Information Protection Act*, the consent can be “deemed” to have been given if certain conditions are met. The *Freedom of Information and Protection of Privacy Act* requires a person’s express consent.

Given the legal restrictions on the collection, retention and use of personal information already in place under existing enactments, the Project Committee does not believe that additional ones are needed to ensure that personal information of assisted living residents is handled with appropriate care. There is a concern, however, that operators could unintentionally run afoul of shifting application of the two Acts. As assisted living facilities often house both fully private-pay and publicly subsidized residents and the status of individual residents may change, the question of whether the *Personal Information Protection Act* or the *Freedom of Information and Protection of Privacy Act* applies to the handling of personal information concerning individual residents at any given point in time may be a complicated one.

If a resident enters assisted living on a private-pay basis, the collection and use of personal information by the operator for the benefit of the resident would be governed by the *Personal Information Protection Act*. If the resident’s status changes

105. *Supra*, note 102, s. 27(2); note 103, ss. 6(1), (2), 10.

106. *Supra*, note 102, s. 32; note 103, s. 14.

107. *Supra*, note 102, s. 33; note 103, s. 17.

later to one of being a subsidized resident within the same facility, the operator would thereupon become a “service provider” in relation to that resident within the meaning of the *Freedom of Information and Protection of Privacy Act*. The retention and use of the resident’s personal information by the operator and staff from that moment forward would be governed by that Act. If personal information of the resident was originally collected when the resident was first admitted purely on the basis of a deemed consent complying with the *Personal Information Protection Act*, but no express consent was obtained at that time that complied with the *Freedom of Information and Protection of Privacy Act*, the operator could no longer rely on the deemed consent and would technically be in breach of the latter Act by continuing to retain and use the resident’s personal information, even for the benefit of the resident.

This is a matter that may be easily overlooked, but one which could create problems as time passes. The operation of these Acts in the context of assisted living can and should be rationalized in a manner that would protect operators and their staff from inadvertently violating the *Freedom of Information and Protection of Privacy Act* as a result of a change in a resident’s status.

This could be done by including a “saving provision” in assisted living legislation, stating that personal information of an assisted living resident originally collected validly on the basis of either an express or deemed consent in compliance with the *Personal Information Protection Act* is also deemed to have been validly collected under the *Freedom of Information and Protection of Privacy Act* if the operator should subsequently become a service provider in relation to that resident while the resident remains in the facility. Responses to the consultation paper were in favour of adding such a saving provision to the legislative framework.

Recommendation 32

Assisted living legislation should affirm the right of residents to confidentiality of their personal information in accordance with applicable laws.

Recommendation 33

Application of the Freedom of Information and Protection of Privacy Act and the Personal Information Protection Act should be rationalized in the context of assisted living by enactment of a provision that personal information of an assisted living resident originally collected validly on the basis of either an express or deemed consent in compliance with the Personal Information Protection Act is also deemed to have been validly collected under the Freedom of Information and Protection of Privacy Act, if the

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operator should subsequently become a “service provider” for the purposes of the latter Act in relation to that resident while the resident remains in the facility.

CHAPTER VII HEALTH & SAFETY

A. Introduction

Health and safety figure prominently in the present legal framework for assisted living in British Columbia. Registration of a facility is possible only if the Assisted Living Registrar is satisfied that the operator and the facility are capable of delivering the accommodation, hospitality services and prescribed services in a manner that will not jeopardize the health and safety of residents. The Registrar's limited powers of entry and inspection may only be exercised in two kinds of situations, the first being where there is reason to believe an unregistered assisted living facility is being operated, and the second is where there is reason to believe the health or safety of a resident is at risk.

Few health and safety standards are laid down specifically for the operation of assisted living facilities, however. There is a marked difference between the extent of legislatively prescribed health and safety requirements in residential care and those in assisted living. For example, the *Residential Care Regulation*¹⁰⁸ prescribes precise, legally enforceable standards for community care facilities in relation to such matters as the width of hallways, bedroom floor space and how it is calculated, bathroom fixtures, maximum domestic water temperature, emergency equipment and first aid certifications of staff. By contrast, most of the legally prescribed standards applicable to assisted living are not specific to that form of housing, but are ones of general application: provincial fire and building codes, local bylaws, etc. The health and safety standards that do relate specifically to assisted living in British Columbia are predominantly set by administrative policy, rather than being imposed by law. They are also generally non-prescriptive – that is, they do not prescribe what an operator *must* do, but rather state an outcome that must be achieved. They leave the means of achieving the outcome to the operator.

These differences are possibly explainable on the basis of the different natures of assisted living and residential care. Persons in residential care generally require 24-hour care and supervision. Much of residential care is carried out in the public sector or with public funding. It is provided in hospital settings as well as community care facilities, so hospital-like standards and levels of regulation are not out of place. Assisted living could be described instead as individual housing within a staffed multi-dwelling complex accompanied by certain services provided by the in-house

108. B.C. Reg. 96/2009.

staff. The private sector plays a proportionally larger role in providing assisted living than in residential care.

The fact that personal care, medication management, and food service all form a part of assisted living nevertheless requires adequate means of maintaining standards and monitoring compliance. The Project Committee reviewed the present framework for maintaining health and safety standards in assisted living in BC with a view to determining if changes were needed or desirable, and whether the current outcome-based method of regulation in assisted living is appropriate for health and safety standards. (See also Chapter XI in relation to the general regulatory approach.)

B. Current BC Framework for Health and Safety Standards in Assisted Living

The *Community Care and Assisted Living Act* allows the making of regulations for “health and safety standards in the delivery of services at an assisted living residence.”¹⁰⁹ Sections 5 and 6 of the *Assisted Living Regulation*¹¹⁰ under the *Community Care and Assisted Living Act* require operators to follow certain procedures in relation to the storage and administration of medication, respectively. Section 6(3) requires any medication errors requiring emergency intervention or transfer of a resident to a hospital to be reported to the Assisted Living Registrar.

For the most part, however, health and safety standards are imposed through policies set by the Assisted Living Registrar. The policies are not equivalent to regulations and do not have legal force in themselves. They derive their force indirectly through the Assisted Living Registrar’s powers under section 27 of the Act to suspend, cancel, or impose conditions on a registration if a breach of the policies gives reason to believe that the health or safety of residents are at risk.

Under the Assisted Living Registrar’s Policy 4, the following six health and safety standards have been established:

1. Registrants must provide a safe, secure and sanitary environment for residents.
2. Registrants must ensure hospitality services do not place the health or safety of residents at risk.

109. *Supra*, note 3, s. 34(3)(e).

110. B.C. Reg. 218/2004.

3. Registrants must ensure sufficient staff is available to meet the service needs of residents and that staff has the knowledge and ability to perform their assigned tasks.
4. Registrants must ensure residents are safely accommodated in their assisted living facility, given its design and available hospitality and prescribed services.
5. Registrants must develop and maintain personal services plans that reflect each resident's needs, risks, service requests and service plan.
6. Registrants must ensure personal assistance services are provided in a manner that does not place the health or safety of residents at risk.¹¹¹

“Outcomes” are associated with each of the six standards. Operators are obliged to achieve the outcomes. As noted earlier, the means by which the outcomes are achieved are left to individual operators.

Policy 7, “Medication Services” contains some specific requirements for the documentation of medication handling and distribution procedures additional to those imposed by sections 5 and 6 of the *Assisted Living Regulation*.¹¹² Policy 7 indicates the extent to which non-professional staff may physically assist a resident in taking medication.

The Assisted Living Registrar's powers of entry and inspection of a registered assisted living facility may be exercised only if the Registrar has reason to believe that a resident's health or safety is at risk. Under the “complaint-based” system, the Assisted Living Registrar does not have the authority to inspect facilities randomly or periodically to monitor compliance with the health and safety standards.

C. Reporting Requirements

Policy 8 (Serious Incident Reporting) requires an operator to maintain a record of “incidents” that occur within the facility. Operators must report “serious incidents” to the Assisted Living Registry by the end of the next business day following their occurrence. The policy states that “serious incident” includes:

111. *Supra*, note 15, Policy 4.

112. *Supra*, note 110.

- attempted suicide by a resident;
- unexpected deaths reported to the Coroner;
- abuse or neglect by staff reported to the local abuse and neglect Designated Agency or the Public Guardian and Trustee;
- medication error by staff that requires emergency care by a physician or transfer to hospital; and
- fire that caused personal injury or building damage.¹¹³

Recently, the Serious Incident Reporting form has been changed to add floods, missing persons, and a call to police as serious incidents.

This list is not closed, but as the policy does not have a definition of “serious incident,” it is a matter of judgment on the part of the operator whether an incident in the facility other than one in the listed categories should be reported.

D. Disease Control

Policy 12, entitled “Prevention and Control of Infectious Diseases” requires operators to have written policies on, and implement procedures for, the maintenance of hygiene and control of the spread of infection. It requires operators to report changes from normal conditions to public health authorities. If there are publicly subsidized units in the facility, the operator must also inform and consult with the case manager for the regional health authority. Operators are required to train staff in hygiene and infection control procedures. Compliance with Policy 12 is required in order to meet Standard 1 (a safe, secure and sanitary environment for residents).

E. Comparison with Health and Safety Standards for Assisted Living Equivalents Elsewhere in Canada

The Project Committee reviewed the health and safety requirements for the closest equivalent to assisted living in other provinces and territories and compared them with the BC framework described above. Comparisons of this kind between jurisdictions are difficult, because there is no standard classification across Canada of the categories of congregate housing for older persons and persons with disabilities. The Project Committee nevertheless found a high degree of similarity across the country in terms of the subject-matter covered by legislation or regulations govern-

113. *Supra*, note 15, Policy 8, para. 8.2.

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ing health and safety in housing having characteristics similar to assisted living in British Columbia, namely congregate housing with hospitality and some additional care services for adults who do not require 24-hour professional nursing care and supervision.

The requirements that other provinces and territories typically impose cover:

- individual care plans and their periodic review and updating;
- compliance with applicable building and fire safety codes, and other construction standards applicable to multi-dwelling residential structures;
- design features, including specifications for floor space per resident in bedrooms, dining and lounge areas;
- social and recreational spaces and activities as elements of resident health;
- housekeeping and cleanliness of premises, supplies and equipment;
- maintenance of facilities and equipment. (A number of Canadian jurisdictions prescribe specific standards for ambient air temperature and the maximum (sometimes also minimum) temperature of flowing domestic water supply);
- security of premises;
- nutrition and food services;
- emergency preparedness, including evacuation plans;
- infection prevention and control;
- prevention of abuse of residents;
- medication storage and distribution;
- laundry service;
- staff qualifications, including good character (demonstrated by initial and periodic criminal record checks);
- staff training;

- staffing levels.

Most of these areas are addressed in Policies 4, 7 and 12 established by the Assisted Living Registrar, though at a higher level of generality than in most of the other provinces because of the outcome-based approach to regulation that has been followed in British Columbia for the assisted living sector. The majority of other provinces employ a more prescriptive approach and tend to impose fixed and specific health and safety standards that in form and content resemble the ones that apply to residential care in British Columbia.

F. What Changes Are Needed or Desirable?

1. HEALTH AND SAFETY STANDARDS

(a) General

The Project Committee considered at length whether the existing health and safety standards adequately cover all the aspects of health and safety in an assisted living facility that require regulation or standardization of practice. The outcome of that debate is reflected in the recommendation immediately below.

Recommendation 34

The following additional matters should be included in health and safety standards for assisted living:

- (a) a complaints procedure, which could be part of the general legislative or regulatory framework for assisted living and need not be limited to health and safety matters;*
- (b) ambient temperature control by means of an outcome-based standard providing that the temperature within all common areas of an assisted living facility must be maintained within a range that is safe and comfortable in relation to the ordinary uses of the room in question;*
- (c) maximum temperature of flowing domestic water from a source that is accessible to a resident, i.e., 49° C.*

(b) Staffing in campuses of care – prohibition on staff crossover

In “campuses of care” that include both residential (licensed) care and assisted living (non-licensed) facilities, a policy often enforced by licensing officials requires that staff assigned to the licensed section may not be deployed in a non-licensed care section. This is to ensure that an appropriate level of staffing is maintained at all times in the licensed section of the campus of care to meet the greater care needs of the residents in that section and to carry out the closer observation of residents required.

Rigid application of the prohibition on staff crossover can lead to inefficiencies. For example, if a resident in assisted living falls and cannot get up immediately, a registered nurse on duty in the residential care section cannot be called over to assess the resident’s condition. Instead, the resident must be sent to hospital in an ambulance for assessment. The Project Committee urges that the the policy prohibiting staff crossover in campuses of care be reviewed and, in particular, relaxed in the event of an emergency.

Recommendation 35

The Ministry of Health should review the policy developed by licensing authorities that prohibits staff assigned to the licensed care section of a campus of care from being deployed in a non-licensed section. In the event of an emergency in the non-licensed section, the prohibition should be relaxed.

2. REPORTING OF SERIOUS INCIDENTS

The Project Committee also considered serious incident reporting in assisted living. One of the recommendations in the Ombudsperson’s report *The Best of Care* is that assisted living operators should be under a legal requirement to report serious incidents, instead of being required to do so only under a policy set by the Assisted Living Registrar that does not have the force of law.¹¹⁴ The Project Committee was divided on this point.

Another recommendation of the Ombudsperson is that the current list of serious incidents reportable by assisted living operators should be reviewed and expanded.¹¹⁵

The Project Committee did not reach a consensus on whether the list of reportable incidents in assisted living should be expanded. The Project Committee saw the lack

114. *Supra*, note 1, at 195.

115. *Ibid.*

of a criterion to determine whether an incident is sufficiently “serious” and therefore reportable was seen as a problem in the existing policy, however. A consensus formed that the criterion should be whether the incident placed the health and safety of a resident at risk.

Recommendation 36

The criterion for determining whether an incident in an assisted living facility is reportable to the Assisted Living Registrar should be whether the incident placed the health and safety of a resident at risk.

G. Method of Regulation for Health and Safety Matters

How should health and safety be regulated under an ideal legislative and regulatory framework for assisted living?

If health and safety are not policed to any degree, even under a regime of limited oversight, the field of assisted living might as well be left entirely unregulated. The public policy choice to have a statutory registration scheme and limited regulatory oversight was made a decade ago, however, so complete self-regulation by operators is no longer a practical option.

If full self-regulation is not appropriate, should the standards that are imposed be ones that are fixed and specific (prescriptive), as recommended by the Ombuds-person?¹¹⁶ Or should they be outcome-based (non-prescriptive) as they are now in British Columbia, leaving it to the operator to determine how to comply so as to achieve the specified outcome?

One advantage of a fixed standard is that the regulated body is in a better position to know how to comply. For example, a notable difference between the British Columbia health and safety standards and those of a number of other provinces is the absence of specified staffing levels or staff-to-resident ratios. Policy 4, Standard #3, outcome 3.2.1 leaves staffing levels to the judgment of the operator, provided that the residents’ needs for hospitality and personal assistance services are met. It states: “Registrants must ensure staffing levels are sufficient to meet the hospitality service needs of residents and deliver the personal assistance services offered.” The operator must exercise independent judgment in attempting to comply with this standard. By contrast, in provinces that have imposed fixed staffing levels the op-

116. *Supra*, note 1, at 175.

erator will be in full compliance by adhering to those levels, even if it should turn out they are actually inadequate.

The advantage of fixed standards for the regulator lies in the ability to enforce them more readily and possibly resolve disputes more easily. Difficulties lie in the way of enforcing outcome-based standards because they are inherently subjective.

A counter-argument against fixed standards is that compliance with a fixed safety standard does not necessarily equate with safety, even though it will prevent prosecution or loss of a licence. Fixed standards can become out of date and cease to represent a general public consensus of what a healthy and safe environment is. They can also discourage innovation and variety in the provision of products and services. Outcome-based standards are less likely to bring these disadvantages over the course of time, because the way they are applied can evolve with changing conditions and prevailing norms.

Prescriptive and outcome-based standards are capable of coexisting as well within the same scheme of regulation. Some matters may be better suited to fixed and specific standards. The more fundamental a matter is to the preservation of life and health, the more fixity may be appropriate. For example, having a sprinkler system and heat and smoke detectors might be things suited to a mandatory, specific requirement for an assisted living facility to become registered and continue in operation. So might adherence to basic nutritional principles set out in the Canadian Food Guide in the provision of meal services. The length of the menu rotation cycle, on the other hand, might be better adapted to an outcome-based standard.

The majority of the members of the Project Committee concluded that the method of regulation for health and safety standards in assisted living should remain primarily outcome-based. A minority favours a change to fixed and specific standards. The response to the consultation paper was inconclusive on this issue.

Recommendation 37

The method of regulation for health and safety standards in assisted living should remain primarily outcome-based.

CHAPTER VIII POWERS OF THE ASSISTED LIVING REGISTRAR

A. Introduction

Currently the *Community Care and Assisted Living Act* empowers the Assisted Living Registrar to enter and inspect an assisted living facility only if there is reason to believe that an unregistered assisted living facility is being operated, or that the health or safety of a resident is at risk.¹¹⁷ The Registrar has no power to conduct compliance audits on an ongoing basis. Most jurisdictions in Canada give the equivalent of official or agency the power to conduct random and/or periodic inspections to monitor compliance with health and safety standards and other operating requirements. The annual renewal of the registration of a facility does not require re-inspection.

The *Community Care and Assisted Living Act* does not expressly give the Assisted Living Registrar the power to investigate in any other manner than by entry and inspection, such as by making inquiries and requiring information. While the Registrar has indicated that its investigations have met with a good level of co-operation, operators, employees, and residents can legally refuse to answer any inquiries of the Registrar and refuse to co-operate in an investigation, although they cannot obstruct the Registrar's entry into the facility, or the inspection and copying of records.

The only sanctions the Registrar is able to impose for a contravention of the Act or regulation are suspension or cancellation of a registration, attaching conditions to the registration, or varying conditions already attached.¹¹⁸

Attaching conditions to the registration of a facility can only be effective as a means of enforcement if there is a realistic prospect of the conditions being enforced themselves. If other enforcement powers are weak, conditions have little meaning.

The powers of suspension and cancellation are essentially ineffectual as a means of compelling the correction of a breach of policies and standards or an imposed condition because they can seldom be used due to the drastic effect they would have on the residents, who would have to move out.

117. *Supra*, note 3, s. 25(2).

118. *Ibid.*, s. 27.

B. Expansion of the Registrar's Powers

The limitations on the Registrar's powers contrast greatly with the investigatory powers that Part 2 of the *Community Care and Assisted Living Act* gives to the Director of Licensing of community care facilities and to medical health officers in each of the various health authorities. The Director of Licensing or a medical health officer may enter a community care facility at any time and "inquire into and inspect all matters concerning the community care facility, its operations, employees and persons in care..."¹¹⁹ The Director of Licensing also has full power to investigate a reportable incident or a matter affecting the health or safety of a person in care, or require a health authority to conduct an investigation and provide the results.¹²⁰ The Director may also make orders that he or she "considers necessary for the proper operation of a community care facility or for the health and safety of persons in care."¹²¹

Among the powers medical health officers have under the Act are the authority to inspect community care facilities in the areas for which they are appointed and investigate every complaint that a community care facility is not complying with the Act and the regulations under it, or a term of its licence.¹²² They may also exercise other powers delegated to them by the Director of Licensing.¹²³

Some might defend the difference between the investigatory and enforcement powers of the Director of Licensing and medical health officers with those of the Assisted Living Registrar on the ground that persons in residential care require greater protection than those in assisted living. Assisted living residents can exercise freedom of choice to move elsewhere. Persons in residential care are generally not in a position to do so. In addition, the complex care provided in a residential care facility is much more intensive than the personal care provided in assisted living, and accordingly requires more regulatory oversight.

Of course, the Assisted Living Registrar is not the only authority exercising a regulatory jurisdiction over assisted living facilities. As operating businesses, as establishments providing food service, as building owners, and as providers of multi-unit

119. *Ibid.*, s. 9(1)(c).

120. *Ibid.*, s. 4(1)(a), (d).

121. *Ibid.*, s. 4(1)(f).

122. *Ibid.*, s. 15(1)(b), (c).

123. *Ibid.*, s. 15(1)(d).

residential housing, assisted living facilities are subject to many different enactments, bylaws, regulations, and standards. Regional health authorities exercise considerable influence over assisted living facilities that house subsidized residents through quality assurance requirements in funding contracts.

The contrast in the range and effectiveness of the regulatory powers that the *Community Care and Assisted Living Act* gives to the Director of Licensing and medical health officers on one hand, and to the Assisted Living Registrar on the other, is still very great. Even if the argument for giving narrower powers to the Assisted Living Registrar on the basis of the greater level of self-sufficiency of assisted living residents is valid, it is hard to justify denying to the Assisted Living Registrar more effective means of enforcing the Act and standards established for assisted living.

The Project Committee discussed various alternatives for strengthening the authority of the Assisted Living Registrar. One of these would be to make the breach of a condition of a registration a provincial offence, as is the breach of a condition of a licence to operate a community care facility under section 33(1) of the *Community Care and Assisted Living Act*. The condition could then be enforced by fine. This would likely be done only as a last resort where there was a pattern of repeated or continuing breaches, because of the inevitable delay and cost associated with court proceedings.

Another alternative would be to confer the power on the Registrar to levy administrative monetary penalties, as the Director of the Residential Tenancy Branch is empowered to do in some circumstances under the *Residential Tenancy Act*.¹²⁴

Yet another type of sanction would be for the Registrar to invoke the power under section 27 of the *Community Care and Assisted Living Act* to attach a condition to the registration of a facility that would induce correction of a breach of an Act or regulation, or a deficiency in meeting a standard established by the Assisted Living Registrar. For example, a condition could be attached suspending further admissions pending correction of the breach or deficiency. The Project Committee believes that action of this kind is more in keeping with a remedial approach to regulation than quasi-criminal prosecution or an administrative penalty scheme. It would not cause the dislocation of existing residents and would not require resort to the courts. It would serve, however, as a powerful economic inducement to bring about compliance with regulatory requirements.

124. Under Part 6, Division 2.1 of the *Residential Tenancy Act, supra*, note the Director may impose an administrative penalty for a contravention of the Residential Tenancy Act as an alternative to charging an offence. If an administrative penalty is levied, a prosecution cannot proceed in respect of the same contravention: *ibid.*, s. 94.11(2).

Recommendation 38

The investigative powers of the Assisted Living Registrar should be expanded by enabling the Assisted Living Registrar:

- (a) to investigate a matter arising in connection with the operation of an assisted living facility, whether or not there is a reason to believe that the health or safety of a resident is at risk; and*
- (b) to require an operator to provide information relevant to the operation of an assisted living facility by that operator, and the operator should be legally obliged to provide it.*

Recommendation 39

The Registrar's power to attach conditions to registration pending correction of a breach of an Act or regulation, or of a standard established under a written policy of the Registrar, should be employed as a sanction to induce compliance with the Community Care and Assisted Living Act and regulations or existing conditions of a registration, in preference to enforcement by fine or the introduction of monetary administrative penalties.

CHAPTER IX EMPLOYMENT

A. General

There is an extensive scheme for the regulation of employment and labour matters in British Columbia generally. This chapter identifies and examines a few areas and issues that are unique to assisted living.

Workers in assisted living provide a range of services such as food preparation, grooming, bathing, dressing, table preparation and clearing, laundry assistance, assistance with medication, security, emergency first-response, etc. Further, where a facility is a “campus-of-care” the services provided in the assisted living area of the facility may be similar to or vary from those provided in the residential care area, depending on the needs of the resident population in each.

Policy 4, Standard 3 established by the Assisted Living Registrar requires that staff providing personal assistance services (i.e., assistance with activities of daily living, medication management, therapies and dietary management, or cash resources management) have home support or care aide certification from an accredited educational institution or an equivalent combination of education and experience.¹²⁵

Policy 4, Standard 1, indicates that staff training in techniques to prevent and control the spread of infectious diseases is considered necessary in order for the operator to comply with the required standard of providing a safe, secure and sanitary environment for residents.¹²⁶

While older workers in assisted living may not have had formal training, those entering the field are required to have completed a training course.

In addition, registration in the BC Care Aide and Community Health Worker Registry is required for care aides to work in assisted living facilities in British Columbia that receive public funding. Anyone applying for registration after 29 June 2010 must provide proof of completion of a recognized training program in Canada or equivalent training. At the present time, the BC Care Aide and Community Health Worker Registry operates by virtue of an arrangement between the Ministry of Health and the care providers who employ care aides rather than under a legislative frame-

125. *Registrant Handbook, supra*, note 15.

126. *Ibid.*

work. The Registry underwent an independent review in 2012-2013 ordered by the Minister of Health. One of the recommendations of the resulting report, issued in February 2013, was to extend the scope of the Registry's operations to the private care sector.¹²⁷

Many British Columbia public and private post-secondary educational institutions offer training for health care assistants (care aides) and licensed practical nurses, the two types of trained health care workers commonly employed in assisted living. There is no province-wide certification process for care aides, however, and courses for care aides offered by the various educational institutions are not fully standardized.

B. Training and Certification

Information gathered during the course of the Project Committee's discussions indicates that:

- assisted living operators find it a challenge to recruit and retain workers with the necessary training and experience needed; and
- prospective workers in some areas of the province are challenged to obtain the appropriate training and experience needed.

In particular, it appears more difficult for operators to obtain trained workers in rural and remote areas.

Despite the many institutions in the province offering health care aide training programs, operators experience a shortage of trained workers outside major urban centres. The shortage of personnel will become more acute with the growth in assisted living facilities. The BC Care Providers Association has launched BC Cares, a province-wide initiative to expand and encourage training of care aides.

It is possible that insufficient capacity (number of places) may be an obstacle to obtaining training. Conversely, there may be insufficient uptake of the space available in some cases due to the cost of tuition or because the training is not available locally. Relocation to the Lower Mainland or the capital region to take training would

127. Ministry of Health, *Review of the BC Care Aide and Community Health Worker Registry: An Action Plan*, (Feb. 2013), online at <http://www.health.gov.bc.ca/library/publications/year/2013/hlth-review-action-plan.pdf>.

be prohibitively expensive for many potential care workers in rural areas. There appears to be a need for care aide training to be offered in smaller centres. A respondent to the consultation paper made the point that distance education could be used for this purpose, especially to enable care aides working in less populated areas to upgrade their training while remaining in full-time employment.

If planning by the Ministries of Health and Education, the care industry, and educational institutions for future demand for training and labour requirements were carried out on a region by region basis, this may help to eliminate or reduce imbalances in work force supply and demand between regions of the province.

The Project Committee considered that it would be beneficial to introduce a province-wide certification examination for care aides to create a uniform standard of training and competence. In order that operators could retain their experienced personnel and avoid excessive turnover of staff, care aides already working in the field at the time province-wide certification is introduced should not necessarily be required to re-train or re-qualify to meet certification requirements. The Project Committee does not endorse blanket exemption of the existing work force, however. Instead, the Ministry of Health and the care industry should jointly establish equivalency standards and a process whereby care aides with work experience could demonstrate their competence for the purpose of being exempted from the certification examination.

Recommendation 40

The following measures should be undertaken in relation to employment and staff development in assisted living:

- (a) training programs and opportunities to obtain training for care aides should be expanded in under-serviced areas;*
- (b) distance education should be used where feasible to facilitate training programs referred to paragraph (a);*
- (c) there should be a standard province-wide certification examination for new care aides;*
- (d) a process should be established with equivalency standards under which care aides with working experience could be exempted from the province-wide certification examination;*

(e) planning for future workforce requirements in assisted living in B.C. should be done on a region-by-region basis.

C. Occupational Health and Safety

Information on occupational health and safety that is specific to assisted living does not appear to be directly available, as workers in assisted living are grouped with health workers in residential care and other non-acute care settings for the purpose of tracking workplace injuries.

Workers in assisted living tend to perform more varied tasks than those in acute care or residential care. They are not called upon to lift and move residents to the extent that residential care or acute care workers are required to do because the assisted living population is generally healthier and more independently mobile than the population in residential or acute care. Assisted living workers are therefore not as likely to be exposed to the same level of risk of back and muscular injury with the same frequency as residential care and acute care workers.

The view of the Project Committee is that workplace injury rates and injury patterns in assisted living should be tracked distinctly from other non-acute care settings in order to create a realistic picture of occupational risk in this sector.

The Project Committee also favoured the development of a comprehensive occupational health and safety program for the assisted living sector. This program should draw upon the best practices and the best examples of safety training modules from within British Columbia and other jurisdictions. Implementation of such a program should be reviewed regularly on a facility-by-facility basis.

Recommendation 41

The following measures should be undertaken in relation to occupational health and safety in assisted living:

- (a) work-related injury rates for workers in assisted living should be tracked separately from those of other workers in non-acute care settings;*
- (b) a comprehensive occupational health and safety program should be developed for the assisted living sector, incorporating best practice modules from within the province and from other jurisdictions;*

(c) regular reviews of facilities should take place to monitor implementation of an occupational health and safety program for assisted living and promote improvements in health and safety practices.

CHAPTER X COMPLAINT PROCESS AND DISPUTE RESOLUTION

A. Introduction

Disputes inevitably arise between residents and operators of assisted living facilities and between residents, as they do in other settings where accommodation is rented. The disputes may involve virtually any matter that can be the subject of a resident's complaint: e.g., admission and exit decisions, wait lists, personal care, food, house-keeping, rent increases, evictions and other tenancy-related issues.

The current system for dealing with residents' complaints and resolving operator-resident disputes associated with them is fragmented. There is no single agency that deals with all complaints about assisted living. Instead, there are several agencies that may receive residents' complaints. The extent to which one or more of the agencies can deal with a complaint depends on the specific issue and whether the complainant resides in a subsidized or non-subsidized assisted living facility or unit.

This chapter describes the current system for dealing with complaints by assisted living residents. Throughout this chapter there are references to the 2012 Ombudsperson report *The Best of Care*, which was a comprehensive evaluation of seniors' care in British Columbia.¹²⁸ That report includes a section on complaints and dispute resolution processes available in assisted living, which describes the difficulties that the Office of the Ombudsperson identified in the current system and on which the Ombudsperson made recommendations for resolving those problems. While the Project Committee did not necessarily accept or endorse all the comments and recommendations made in *The Best of Care*, it found that report very useful in developing its own recommendations for a comprehensive complaint and dispute resolution process for assisted living which can be found at the end of this chapter.

B. Current System for Complaint and Dispute Resolution in Assisted Living

1. OVERVIEW

The recent Ombudsperson's report *The Best of Care* notes that:

128. *Supra*, note 1.

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Unlike oversight in residential care settings, oversight of assisted living is mainly reactive and carried out in response to complaints, rather than on an ongoing and routine basis.¹²⁹

Under the *Community Care and Assisted Living Act*, however, the Registrar's actual jurisdiction is limited to addressing only three types of complaints: (a) a risk to residents' health and safety; (b) operation of an unregistered assisted living facility; (c) a resident is alleged to be unable to make decisions on his or her own behalf.¹³⁰

The Registrar has very limited investigative powers, as explained in Chapter VIII. If the Registrar has reason to believe that an unregistered assisted living facility is being operated or that the health or safety of a resident is at risk, the Registrar may enter and inspect the premises related to an assisted living facility, inspect and make a copy of any records at the premises, or make a record of anything observed during an inspection. These powers may not be exercised for any other reason, and beyond being able to inspect records, the Registrar has no power to demand information from anyone.

Currently, the Assisted Living Registry encourages residents and their families to first approach the operator directly to resolve concerns or complaints. If the concern is not resolved, residents and their families can complain to the Registrar. As mentioned above, however, there are several routes for complaints depending on the type of complaint and whether the resident's stay in assisted living is publicly subsidized. This can cause confusion for residents and their families when trying to determine which agency has the authority to resolve a particular issue.

The following table that appears in the Ombudsperson's recent report *The Best of Care* indicates who has the authority to deal with different types of complaints:¹³¹

129. *Supra*, note 1 at 179.

130. *Supra*, note 3, ss. 25(2), 26(1), (3), (5).

131. *Supra*, note 1, Table 19, p. 176.

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Types of Complaints and Who Receives Them

Complainant	Informal Complaints	Complaints about health and safety	Complaints about quality of care	Complaints about placement and transfer issues
Resident in a subsidized unit	Facility operator or contracted service provider	Office of the Assisted Living Registrar	Regional patient care quality office and patient care quality review board	Health authority case manager
Resident in a non-subsidized unit	Facility operator or contracted service provider	Office of the Assisted Living Registrar	Facility operator or contracted service provider	Not applicable

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The Ombudsperson's report emphasizes at page 186 that the current situation involving several agencies responsible for responding to complaints arising in assisted living:

[leads] to confusion, gaps in the complaint process, and overlapping jurisdiction in certain areas. It also means that no single agency is able to monitor all assisted living complaints to ensure that they are handled appropriately and to identify facility-specific or systemic issues that may arise. This type of monitoring is essential to identify problems before injuries or deaths occur.¹³²

As well as creating confusion, it is evident from the above table that the current system creates a divide between non-subsidized residents and subsidized ones in terms of their avenues of redress if they believe the operator's or service provider's response to their complaints is unsatisfactory.

2. COMPLAINTS TO OPERATORS

Policy 9 of the *Registrant Handbook* issued by the Assisted Living Registry indicates in paragraph 9.1 that registered operators of assisted living facilities "should establish and make residents and those who care about them aware of a clear, written in-

132. *Supra*, note 1 at 186.

ternal complaint process.” As noted by the Ombudsperson, the policy does not provide guidance on what the internal complaints process should entail.¹³³

The Ombudsperson also suggests that in some cases, confusion about where to direct complaints may result from the way subsidized assisted living services are delivered.¹³⁴ For example, in the model used by the Fraser, Interior and Vancouver Coastal health authorities, the operator is responsible for delivering housing, hospitality and prescribed services. Therefore, it is clear that the operator is responsible for handling complaints related to these services.

In the model used by Vancouver Island Health Authority and Northern Health, the operator is responsible for delivering housing and hospitality services, and the health authority is responsible for the delivery of support with the activities of daily living or personal care. Determining who is responsible for dealing with complaints about personal care in the latter model is more difficult. There may be additional contractors and subcontractors involved in the delivery of services in assisted living facilities. This would add to the confusion that residents and/or their families may experience in trying to determine where to direct their concerns. The Ombudsperson’s report comments:

Given that assisted living services may be delivered by a variety of agencies, it is especially important for residents and their families to have clear information about who is providing the services they are receiving, and where they can bring concerns about those services.¹³⁵

The Ombudsperson made the following two recommendations aimed at achieving greater clarity with respect to the internal complaint process within assisted living facilities:

R72. The Ministry of Health take the necessary steps to establish a legal requirement for assisted living operators to have a process for responding to complaints, and to establish specific standards for that process.

R73. The health authorities ensure that by September 30, 2012, all assisted living operators are providing residents with clear and comprehensive information on how to

133. *Ibid.*, at 177.

134. *Ibid.*, at 178.

135. *Ibid.*

complain about the care and services they receive, including where to take complaints about services provided by contractors.¹³⁶

3. COMPLAINTS TO CASE MANAGERS

In the publicly subsidized sector, case managers (also referred to by the Ministry of Health as “health professionals”) have the responsibility for determining the eligibility of applicants to enter assisted living and the fees the applicant will pay for subsidized services. Residents in subsidized assisted living may complain about their care delivered under their care plans, access to services, and fees to a case manager. The Ombudsperson’s report nevertheless states:

While all the health authorities said that they inform assisted living applicants and residents that they can bring their complaints to case managers, none have an established process for responding to complaints at this level.¹³⁷

The Ombudsperson commented further that there is value in maintaining this informal system for dealing with complaints, but also noted that complaints dealt with by case managers were not being tracked systematically. The Ombudsperson emphasized that tracking of complaints was important for the purpose of identifying recurring problems, and recommended that health authorities develop and implement a process for tracking complaints received by case managers.¹³⁸

4. COMPLAINTS TO THE OFFICE OF ASSISTED LIVING REGISTRAR

Any person can make a complaint directly to the Registrar. The Registrar encourages individuals to first approach their operators with concerns, but will receive and act upon complaints that have not been brought to the operator first if the complaint raises the possibility of an imminent risk to health and safety.

The approach of the Registry to complaint resolution is educational and remedial. If the Registry determines that a complaint is within its jurisdiction, its response is usually to confirm whether the operator is following health and safety policies, and if not, the Registrar will instruct the operator on how to comply.

In 2012 the Assisted Living Registry was reorganized and integrated more closely into the Ministry of Health. An investigator was designated for each of the two cate-

136. *Ibid.*

137. *Ibid.*, at 179.

138. *Ibid.*

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gories of assisted living facility recognized to date.¹³⁹ Procedures for handling complaints were assimilated with a newly established Ministry protocol calling for an initial response to a complaint to be made within two working days.¹⁴⁰ It appears this was done at least in part in response to the Ombudsperson's report *The Best of Care*.¹⁴¹

The statutory jurisdiction of the Registrar remains the same as before the reorganization, however. As mentioned above, the Registrar responds to complaints about alleged violations of health and safety standards established for assisted living, continuing to house residents who are allegedly unable to make their own decisions, and the operation of unregistered assisted living facilities. The Registrar has no jurisdiction to deal with complaints about tenancy issues. The Registrar has authority to respond to service quality or operational complaints only if the Registrar has determined that they concern a risk to the health and safety of residents.

The following table from the Ombudsperson's report shows that nearly half the complaints received by the Registrar between 2004 and 2011 were outside the Registrar's jurisdiction:¹⁴²

Complaints to the Office of the Assisted Living Registrar, 2004/05 to 2010/11

Fiscal year	Number of assisted living residences	Number of assisted living units	Complaints received	Non-jurisdictional complaints	Jurisdictional complaints	Complaints that resulted in inspection
2004/05	54	1,786	58	44	14	1
2005/06	96	3,367	42	27	15	4
2006/07	117	4,231	67	45	22	5
2007/08	150	5,235	89	32	57	7
2008/09	184	6,187	68	22	46	8
2009/10	196	6,685	84	12	72	6
2010/11	194	6,832	75	8	67	4
Total complaints			483	190	293	35

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139. *ALR News* (digital newsletter issued by the Assisted Living Registry), Winter 2013.

140. Letter from Deputy Ministry of Health to Ombudsperson, 17 April 2013, p. 3.

141. *Supra*, note 1.

142. *Ibid.*, at 180.

5. COMPLAINTS TO THE PATIENT CARE QUALITY OFFICE AND PATIENT CARE AND QUALITY REVIEW BOARD

A resident whose occupancy of a unit in an assisted living facility is subsidized has the alternative of directing a complaint about a health and safety issue to the Patient Care Quality Office of the regional health authority in question. The *Patient Care Quality Review Board Act*, passed in 2008, requires each regional health authority to have a Patient Care Quality Office to receive, and respond to, patient concerns in publicly funded facilities.¹⁴³

The Act also requires each health authority to have a Patient Care Quality Review Board, which is responsible to the Minister of Health rather than to the management of the health authority.¹⁴⁴ Among other functions, Patient Care Quality Review Boards review complaints that have been addressed by the Patient Care Quality Office, but not resolved.¹⁴⁵

The Ombudsperson's report found inconsistency among the health authorities in determining whether health and safety complaints about assisted living matters should be referred to the Assisted Living Registrar or to one of the Patient Care Quality Offices.¹⁴⁶ The Ombudsperson also raised the concern that the overlapping jurisdiction of the Registrar and the Patient Care Quality Offices, coupled with the lack of a requirement for Patient Care Quality Offices to inform the Registrar of complaints and outcomes, meant that:

[the Registrar] can no longer accurately track all the health and safety complaints about assisted living, which makes it difficult to effectively identify and respond to trends.¹⁴⁷

The Ombudsperson also observed that the Patient Care Quality Offices have fewer and weaker investigative and enforcement powers than the Registrar (page 185). They are limited to resolving complaints based on information provided by a health

143. S.B.C. 2008, c. 35, s. 2.

144. *Ibid.*, s. 8.

145. *Ibid.*, ss. 13(1), (3)(a). Patient Care Quality Review Boards may also be directed by the Minister of Health to carry out various investigations, whether or not the matter in question has been handled by a Patient Care Quality Office: see *ibid.*, ss. 12(2), (3)(b), (c).

146. *Supra*, note 1 at 184.

147. *Ibid.*, at 185.

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authority (or its contractor operating the facility or providing services) or the complainant.¹⁴⁸ The Ombudsperson commented on these facts as follows:

[This] is different from the approach the provincial government has taken to residential care, where the PCQOs [Patient Care Quality Offices] and review boards are able to consider complaints about services in all residential care facilities, including those that are not subsidized.

Excluding non-subsidized assisted living services from the jurisdiction of the PCQOs and review boards creates confusion for seniors, their families and the health authorities. Residence staff do not always know whether an assisted living unit is subsidized or not. As a result, they may be unable to properly advise residents or their families on how to direct concerns.¹⁴⁹

The Ombudsperson's report goes on to state that :

[it] would be far more effective and fair to have a single, consistent and clearly communicated complaints process available to all assisted living residents, regardless of how they pay for services.¹⁵⁰

Based on this conclusion, the Ombudsperson made several recommendations aimed at rationalizing the relationship between the Assisted Living Registry and the Patient Care Quality Offices by making the Assisted Living Registry the central agency or "clearing office" to deal with complaints by assisted living residents. These recommendations were as follows:

- R78. The Ministry of Health take the steps necessary to expand the power of the Office of the Assisted Living Registrar so that it has the authority to respond to complaints about all aspects of care in assisted living from all residents.
- R79. The Ministry of Health review the structure of the Office of the Assisted Living Registrar with the goal of ensuring that it has the necessary support to fulfill this expanded role.
- R80. The Ministry of Health take the necessary steps to ensure that the patient care quality offices refer all complaints about assisted living to the Office of the Assisted Living Registrar.

148. *Ibid.*

149. *Ibid.*

150. *Ibid.*, at 186.

- R81. The Ministry of Health establish a mechanism that allows the Office of the Assisted Living Registrar to share the results of its complaints with the home and community care sections of the health authorities on a timely basis.¹⁵¹

While the structure and resources of the Assisted Living Registry have undergone review, the Ministry of Health also appears to have responded by placing a greater emphasis on the Patient Care Quality Offices as being central clearing houses for all care-related complaints. In an April 2013 letter to the Ombudsperson, the Deputy Minister of Health states that the Ministry will work with the health authorities to “ensure that the PCQ office is seen as *the single point of entry* for all client and patient complaints, and communicate this to all stakeholders.”¹⁵² (Italics added.) The letter goes on to state:

[I]f there is a more appropriate body to handle the concerns than the PCQ office, it will help to connect the complainant with the best resource to address their concerns. This includes a stronger coordination between the PCQ office...and the assisted living registry for complaints and investigations in publicly subsidized assisted living residences...¹⁵³

It is not clear from the reference in the letter to “stronger coordination” whether the Patient Care Quality Offices would be expected to systematically refer complaints arising in assisted living to the Assisted Living Registry for handling as recommended by the Ombudsperson, or whether referral is intended only to be a discretionary option. It is also unclear what assisted living facilities come within the term “publicly subsidized assisted living residence” as used in the letter, because many privately owned assisted living facilities have subsidized and private-pay residents living side by side. The Patient Care Quality Office cannot be the single point of entry for a complaint by a private-pay resident, because it has no jurisdiction over such a complaint. The scheme outlined in the Deputy Minister’s letter appears to apply only to subsidized residents.

C. Dispute Resolution and Tenancy Issues in Assisted Living

Security of tenure, namely the legal right to remain in rented premises, is obviously a matter of key concern for assisted living residents as it is for all tenants. Mecha-

151. *Ibid.*, at 186-187.

152. Letter from Deputy Minister to Ombudsperson dated 17 April 2013, p. 6, online at: http://www2.gov.bc.ca/assets/gov/topic/AE132538BBF7FAA2EF5129B860EFAA4E/pdf/972708_moh_letter_to_ombudsperson_april_17_2013.pdf

153. *Ibid.*

nisms to protect this right and govern its application in assisted living are currently weak in British Columbia.

The exclusion of assisted living facilities from the *Residential Tenancy Act*,¹⁵⁴ and the fact that the Assisted Living Registrar has no authority to deal with tenancy matters, leaves a large and serious gap in the law. The Ombudsperson comments in *The Best of Care*: “[This] gap in protection leaves assisted living residents, who are generally more vulnerable than other tenants, with fewer options for recourse when issues arise.”¹⁵⁵

When the Assisted Living Registry receives tenancy complaints (including complaints about rent increases, ending tenancy agreements, changes to/termination of services, security deposits), it may refer them to the Residential Tenancy Branch of the Ministry Responsible for Housing. The Residential Tenancy Branch likewise has no legal jurisdiction over assisted living tenancies, however. In 2004, the Residential Tenancy Branch established an informal dispute resolution process to deal with tenancy disputes referred to it by the Assisted Living Registrar. If the complainant consents, the Residential Tenancy Branch may contact the other party to provide information and assist the parties to resolve the dispute. As the Ombudsperson has pointed out, however, this is an informal process with no legal foundation. The Residential Tenancy Branch cannot make an enforceable order to resolve a dispute that arises in assisted living if the parties do not come to an agreement. The Ombudsperson’s Report states:

[it] is unreasonable to rely upon a process that requires people to contact an organization that explicitly states that it does not deal with tenancy issues in order to resolve tenancy complaints. Relying upon the Residential Tenancy Branch, an organization that has no mandate and no dedicated resources to deal with tenancy complaints made by assisted living residents, is equally problematic. This is not a reliable or transparent process, and does not ensure assisted living residents the right to have their tenancy-related complaints heard and addressed in a prescribed manner.¹⁵⁶

As mentioned earlier in Chapter 3, the *Tenancy Statutes Amendment Act, 2006*¹⁵⁷ (Bill 27) would have extended the scope of the *Residential Tenancy Act*,¹⁵⁸ with some modifications, to assisted living facilities. Bill 27 would have required assisted living

154. *Supra*, note 10.

155. *Supra*, note 1 at 187.

156. *Ibid.*, at 188.

157. *Supra*, note 43.

158. *Supra*, note 10.

residents and operators to enter into written tenancy and service agreements. The amendments concerning assisted living contained provisions dealing with rent and fees for hospitality and personal care services, security deposits, condition inspections, repairs, terminating or restricting services, assignment and subletting, occupants and guests, locks and access, and ending the tenancy. They would have given residents and operators access to the formal dispute resolution process under the *Residential Tenancy Act* and in addition provided for an informal alternative involving a process agreed upon by the parties.

The assisted living portions of Bill 27 were not well-received by some stakeholders, however, and they were not brought into force. To date no alternate legislative initiative regarding assisted living tenancies has been announced. In December 2011 the Minister Responsible for Housing indicated that the informal arrangement with the Residential Tenancy Branch would continue for the foreseeable future.¹⁵⁹ The Ombudsperson made several recommendations urging the provincial government to put a legally binding regime for assisted living tenancies in place:

- R82 The Ministry Responsible for Housing take the steps necessary to better protect assisted living residents by bringing the unproclaimed sections of the *Residential Tenancy Act* into force by January 1, 2013, or by developing another legally binding process to provide equal or greater protection by the same date.
- R83 The Ministry of Health, in consultation with the Ministry Responsible for Housing, consider whether to expand the jurisdiction of the Office of the Assisted Living Registrar to deal with complaints and disputes about tenancy issues in assisted living.
- R84 If the Ministry of Health decides not to include complaints about tenancy within the jurisdiction of the Office of the Assisted Living Registrar, the ministry require the Office of the Assisted Living Registrar to automatically refer tenancy issues to the agency that has the power to resolve them.¹⁶⁰

Clearly, there is a need to give assisted living tenants at least the same degree of protection that residential tenants have. There is also a need for operators and residents alike to have access to an expedient and efficient means of resolving tenancy-related disputes. These features must be incorporated into the design of a comprehensive complaint process for assisted living.

159. Letter from the Hon. Rich Coleman, Minister Responsible for Housing to the Ombudsperson, 12 December 2011, p. 2, reproduced in Office of the Ombudsperson, *The Best of Care, supra*, note 1, vol. 2 at 445-446.

160. *Supra*, note 1 at 192.

D. Dispute Resolution in Assisted Living or Equivalents in Other Jurisdictions

Dispute resolution in assisted living or similar residential arrangements varies considerably between jurisdictions. Different approaches are summarized below:

- Some jurisdictions have established an authority to receive all complaints arising in their closest equivalents to assisted living. This is sometimes a local or regional health authority while elsewhere, such as in Saskatchewan, there is a designated consultant who deals with complaints.
- Some jurisdictions have adopted a more comprehensive approach, as in Ontario's *Retirement Homes Act, 2010*.¹⁶¹ A statutory authority is established with extensive powers to monitor compliance with standards, inspect, make enquiries, receive complaints and also attempt to resolve disputes. Quebec has a similar regulatory authority, and both jurisdictions provide for resolution of tenancy issues in the equivalent of assisted living facilities under their tenancy statutes. This is in contrast to British Columbia where, as noted, the Residential Tenancy Branch has no formal authority to resolve assisted living tenancy disputes.
- Some jurisdictions have “Bills of Rights” that are enforceable as if the rights were part of a contract between the resident and the operator.
- The United States has a federal long-term care ombudsman program established under the federal *Older Americans Act* of 1965.¹⁶² Each state has a long-term care ombudsman with some powers that are mandated by the federal Act. The specific role of the long-term care ombudsman can vary from state to state. The long-term care ombudsman will investigate a resident's complaint and attempt to resolve it through discussion and negotiation with the operator of the care facility, as this is part of the authority mandated by the federal Act. The ombudsman can also recommend action by government and legislatures. In some states, but not in others, the ombudsman may have additional authority to bring legal proceedings on behalf of a resident if a complaint is not resolved otherwise.

161. *Supra*, note 74.

162. 79 Stat. 218.

E. A New Complaints Process

1. GENERAL

Solutions to disputes that are arrived at by the parties themselves are usually more satisfactory than ones that require outside intervention. This is as likely to be the case in assisted living as in other settings. When operators and residents are unable to reach a mutually acceptable resolution under the facility's internal complaint process, however, they must be able to resort to a workable and expedient process involving an impartial decision-maker who is thoroughly familiar with the assisted living environment. The design of a process for complaints and dispute resolution in assisted living needs to take account of the realities faced by the parties and their relative bargaining power.

The relationship between an operator and a resident resembles that of landlord and tenant, but assisted living residents are generally more dependent on their operator-landlord than ordinary residential tenants. This greater level of dependency can result from:

- the need to rely on the operator for services on a continuing basis;
- reduced physical or mental health and stamina of the resident, due to age or disability, as compared to the average residential tenant;
- lack of substantial financial resources;
- fewer options for suitable alternative accommodation than ordinary residential tenants would usually have.

The greater level of dependency of residents in assisted living places them at a somewhat greater disadvantage in a dispute with their landlord than ordinary residential tenants usually face. As the Ombudsperson has pointed out, this makes it more imperative that assisted living residents be given a level of protection and means of redress that are at least equivalent to the ones that residential tenants currently have.¹⁶³

The assisted living environment is more complex than a standard residential tenancy, however. While tenancy matters could be dealt with by extending the dispute resolution procedures under the *Residential Tenancy Act* to assisted living facilities, as Bill 27 would have done, tenancy issues will not always be easily separable from

163. *Supra*, note 1 at 191-192.

issues of service quality, health, and safety in disputes between residents and operators.

For example, a resident may make a complaint that the quality of the food being served in the facility is substandard, that the operator is keeping common areas at too low a temperature to save on heating costs, and also claim a reduction of monthly fees because the resident maintains these are breaches of the resident's occupancy agreement. A multifaceted complaint such as this raises issues of health and safety, service quality, and tenancy simultaneously.

If investigation revealed the complaint to be justified on a factual level, the health aspects of this complaint (inadequate nutrition and heating) would be ones requiring enforcement steps by the Registrar to enforce established standards and the requirement of the *Community Care and Assisted Living Act* that facilities be operated in a manner that does not endanger residents' health and safety.¹⁶⁴ The tenancy aspects (breach of landlord's obligation to maintain adequate heating, and possible entitlement to an abatement of rent) would require a binding decision to be made based on the interpretation of the occupancy agreement and the facts. The degree to which the service quality and tenancy issues are intertwined in a multifaceted complaint such as this make it impractical for them to be resolved by different agencies.

A court or a private arbitrator could deal with all issues wrapped up in a multifaceted complaint, but regular civil litigation and private arbitration are generally not well-adapted to resolving disputes between residents and operators. The expense associated with them would put these processes beyond the reach of many residents. Operators too would likely prefer faster and less expensive means of dispute resolution.

A Civil Resolution Tribunal is in the process of being established under the recently passed *Civil Resolution Tribunal Act*¹⁶⁵ to handle strata property disputes and civil disputes that could also be decided by the Provincial Court under the *Small Claims Act*.¹⁶⁶ While the Civil Resolution Tribunal is intended to be fast and inexpensive, it will not be expert in matters dealing with assisted living. Furthermore, the Civil Resolution Tribunal will emphasize online dispute resolution. This would be unsuited to elderly assisted living residents, many of whom would not have the level of familiarity and comfort with computers that younger persons can be expected to have.

164. *Supra*, note 3, s. 26(5).

165. S.B.C. 2012., c. 35.

166. R.S.B.C. 1996, c. 430.

The Project Committee believes that the Assisted Living Registry should be the “single window” for complaints arising in assisted living, whether they relate to a subsidized or private-pay resident. Unlike a Patient Care Quality Office, which has jurisdiction only with respect to facilities, programs, and clients that are funded by the health authority of which it is a component, the Registry’s jurisdiction extends to all assisted living facilities in the province, regardless of how their resident population is funded. Registry staff will normally have greater expertise about the particular context of assisted living than the staff of a Patient Care Quality Office. For these reasons, if a Patient Care Quality Office receives a complaint about the operation of an assisted living facility, it should refer the matter to the Assisted Living Registry for resolution, as well as for tracking or statistical purposes.

To fulfil this role, the Assisted Living Registry would require wider statutory powers and greater resources than it now has. In particular, the Assisted Living Registrar’s jurisdiction would need to be extended to deal with complaints regarding tenancy-related matters, services, and all aspects of care provided in an assisted living facility. The Registrar would require powers similar to the ones that the *Residential Tenancy Act* gives to the Director of the Residential Tenancy Branch in order to resolve tenancy issues arising in assisted living.¹⁶⁷ The Ombudsperson has recommended that the government consider expanding the Registrar’s jurisdiction in this manner.¹⁶⁸ The Project Committee agrees.

The Project Committee envisions a multi-stage process that would begin with the facility’s complaint process and potentially culminate in an appeal from a decision of the Registrar. The process is outlined below.

167. Under Part 5, Division 1 of the *Residential Tenancy Act*, *supra*, note 10, the Director may hear and determine disputes between landlords and tenants with respect to rights under the Act or a tenancy agreement: ss. 58(1), 62(1). The Director may determine any question of law or fact necessary or relating to the dispute and make an order to give effect to the rights, obligations, and prohibitions under the Act, including an order to comply with the Act, regulations, or a tenancy agreement: ss. 62(2), (3). The Director may also act in a mediator capacity: s. 64(1). If the parties settle their dispute with the Director’s assistance, the Director may record the settlement in the form of a decision or order: s. 64(2). Sections 65-78 contain various other powers of the Director incidental to resolving disputes and enforcing the Act.

168. *Supra*, note 1 at 192.

2. PROPOSED COMPLAINT AND DISPUTE RESOLUTION PROCESS FOR ASSISTED LIVING

(a) First stage: The facility's internal complaint procedure

Ideally, a complaint should be resolved at the level of the assisted living facility wherever possible through the facility's internal procedure for dealing with residents' complaints.

Residents' councils within facilities have a role to play in resolving some disputes, particularly if the complaint underlying the dispute concerns more than one resident or the entire resident population of the facility. Where a residents' council exists, a resident should have the alternative of approaching it with a complaint rather than approaching the operator directly. The internal complaint process of the facility should be capable of being initiated by either the individual complainant or by a residents' council (or a family council if that is the model used by the facility).

Residents whose stay in assisted living is publicly subsidized have the additional option at the present time of raising a complaint with a case manager, who could take up the matter initially with the operator and attempt to resolve it through informal communications. This option should also remain available for initiating the internal complaint process.

In keeping with the "single point of contact" concept mentioned earlier, a resident should be able to contact the Assisted Living Registry directly at any time about a complaint, but if the facility's internal complaint process has not been exhausted, in most cases the Registry would presumably encourage the resident to pursue that process first.

Exceptions to the usual expectation that residents should first exhaust their rights under the facility's internal complaint procedure before taking the complaint to the next stage might be cases in which the resident fears repercussions, or a complaint is received from a third party on behalf of such a resident, or the circumstances call for urgent intervention of a regulatory nature to deal with a situation placing health or safety of residents at risk. In such cases the Registrar might not insist that the complainant invoke the facility's internal complaint procedure, and exercise discretion to let the complaint proceed directly to the second stage outlined below.

(b) Second stage: intake of complaints by the Assisted Living Registry

If a complaint is not resolved successfully under the assisted living facility's internal complaints procedure, the complainant could seek the help of the Assisted Living Registry as a second stage. The designated intake personnel of the Registry would

interview the complainant and gather information on the factual background. The intake officer would inform the operator of the complaint and, in order to obtain a balanced picture, interview the operator's on-site personnel with personal knowledge of the facts. The intake officer would request relevant documents from both parties.

Having completed initial interviews of the parties and having made the requests for documents, the intake officer would turn over the complaint file to a more senior official in the Assisted Living Registry for investigation and/or recommendation on further action.

(c) Third stage: investigation and recommendation on further action

After the complaint file is assembled and requested documents are supplied, an intermediate official ("the investigator") would consider whether the matter required more detailed investigation and analyze the issues covered by a complaint to determine the appropriate means of resolution.

(i) If further investigation not required

If the investigator concluded further investigation was not required, the investigator would:

- attempt to reach a resolution through informal mediation with the parties;
- recommend particular issues be referred to mediation and, failing successful mediation, to legally binding adjudication; or
- recommend to the Registrar that the complaint be rejected in whole or in part if the investigator concluded the complaint lacked substance.

(ii) If further investigation required

If the investigator decided that further investigation was needed, the investigator would proceed to carry it out and, after completing the investigation, make a recommendation on how to deal with any unresolved aspects of the complaint. The investigator could recommend that:

- enforcement action be taken;
- particular issues be referred to mediation and, failing successful mediation, to legally binding adjudication; or

- the complaint be rejected in whole or in part.

Matters that would require direct enforcement action would in most cases be ones relating to health and safety, or ones where there has been a clear breach of an established regulatory requirement, standard or policy.

Matters directed to mediation and potential binding adjudication would most likely be ones arising from a genuine difference of opinion between the resident and operator about conditions in the facility or what the resident is entitled to expect from the operator. Complaints of this kind are likely to arise from disputed facts or differing interpretations of an occupancy or service agreement. Tenancy-related matters (for example, a dispute about the validity of a notice given by the operator to terminate a resident's occupancy) would typically come within this category.

If the investigator makes a recommendation that an issue or issues be resolved through mediation and possible adjudication, only the recommendation should be provided to the Registrar and not the investigator's findings leading to it. This would be to preserve the ability of the Registrar to adjudicate the matter, if necessary, without creating a reasonable apprehension of bias (a concern on the part of a reasonable observer that the decision-maker may have prejudged a matter).

(d) Fourth stage: regulatory enforcement or mediation / adjudication

(i) General

After the investigator's report is made, the Registrar or a senior official delegated by the Registrar would decide on the appropriate response and take action accordingly.

If the appropriate response is to place the matter on the track potentially leading to binding adjudication instead of direct enforcement action, it is essential for reasons of procedural fairness that the ultimate decision-maker be someone without prior involvement in the handling of the complaint and who has not seen the basis for the investigator's recommendation. (This would not prevent mediation efforts and adjudication from being consecutive phases of a single hearing, however.)

If the decision-maker is an official of the Assisted Living Registry, the duties of the official should ideally be confined to adjudications, but this may not be feasible in terms of the resources of the Assisted Living Registry, or the relatively limited number of adjudications that may need to be made.

Basic legal standards of procedural fairness nevertheless require separation between investigatory personnel and the adjudicator in order to prevent a reasonable apprehension of bias on the part of the adjudicator. This separation can be difficult to achieve in small agencies. Confining the adjudicatory function to the Registrar acting personally (where the Registrar has had no other involvement in the matter) or to a delegate of the Registrar without any prior involvement whatsoever in the handling of the complaint would help to separate the investigatory and adjudicative roles.

Another and probably better way of separating the investigatory and adjudicatory roles would be for the Registrar to appoint an independent adjudicator as the need arose. For this purpose, the Registrar might maintain a roster of adjudicators with knowledge of the assisted living environment and the applicable laws, regulations, and policies. If outside adjudicators were used, however, matters of qualifications and cost would need to be addressed.

(ii) Expedited adjudication when necessary

In a rare case, a decision may be needed on an expedited basis. An example might be a situation in which a complaint is made against an operator's attempt to end the tenancy immediately of a resident who is behaving aggressively towards other residents and staff. The operator or the resident might request an immediate binding decision. In emergencies or near-emergencies, the Registrar should be able to bypass the usual intake and investigatory stages, conduct any hearing that may be necessary on an informal basis (subject to basic standards of fairness) and issue a binding decision as quickly as the circumstances require.

(e) Fifth stage: appeal

The Project Committee agrees with the Ombudsperson that there should be a right of appeal from a decision or action of the Assisted Living Registrar (or the Registrar's delegate) with respect to a complaint. In the Project Committee's view, this should be a broad right of appeal, extending to all questions of law and fact. The appeal should also be final. The purpose would be to bring a dispute to a definite end and prevent re-opening of issues.

The appeal could be to either a court or a board. One board that might serve as the appeal tribunal is the Community Care and Assisted Living Appeal Board constituted under Part 4 of the *Community Care and Assisted Living Act*.¹⁶⁹ Currently this Board deals with appeals from the Assisted Living Registrar only in relation to decisions

169. *Supra*, note 3, s. 29(1).

concerning registration of facilities and conditions imposed on registrations, but its powers could be expanded to decide appeals from the proposed complaint process.

3. ROLE OF THE OMBUDSPERSON

Under the complaint and dispute resolution process described here, a party dissatisfied with the ultimate result or the process leading to it could complain to the Office of the Ombudsperson at various points during the process. The Ombudsperson can exercise the powers conferred by the *Ombudsperson Act*¹⁷⁰ to investigate and recommend remedial action to the Registrar or the Chair of the Appeal Tribunal as well as the Chairs of the Patient Care Quality Review Boards, Chairs of Health Authorities and the Minister of Health. In addition, the Ombudsperson can make a report to the Lieutenant Governor in Council, the Legislative Assembly and the public if she believes the response of the agency to her recommendation is inadequate or inappropriate.

4. RECOMMENDATIONS

Recommendation 42

A dispute resolution process for assisted living should comprise successive stages.

Recommendation 43

While a resident should have the right at all times to submit a complaint directly to the Assisted Living Registry, an attempt should be made initially to resolve a complaint at the level of the individual assisted living facility through the facility's internal complaint process.

Recommendation 44

A resident should have the options of initiating a complaint process internal to the facility by:

- (a) direct communication with the operator;*
- (b) approaching a residents' or family council; or*

170. R.S.B.C. 1996, c. 340.

(c) (if the resident's occupancy is publicly subsidized and the matter concerns the resident's authorized services plan) approaching the case manager.

Recommendation 45

The Assisted Living Registry should be empowered to receive, investigate, and attempt to resolve complaints relating to the operation of an assisted living facility or arising from relations between residents and the operator, regardless of the subject-matter of the complaint.

Recommendation 46

The Assisted Living Registrar should receive powers analogous to those of the Director of the Residential Tenancy Branch under the Residential Tenancy Act to hear and decide disputes in relation to a tenancy in a dwelling unit in an assisted living facility.

Recommendation 47

The Assisted Living Registrar should have the power to issue a binding decision on an expedited basis if a party so requests and the circumstances require an urgent resolution.

Recommendation 48

The Assisted Living Registry should have sufficient staff and resources to perform the role contemplated by Recommendations 41 to 46 inclusive, and to sufficiently separate investigative from adjudicative functions so as to avoid a reasonable apprehension of institutional bias.

Recommendation 49

There should be a right of appeal from a decision of the Assisted Living Registry respecting a resident's complaint. The appeal tribunal should be empowered to entertain appeals on all questions of law or fact decided by the Assisted Living Registrar, and to substitute its own decision for the decision appealed from. The appeal should be final.

(See diagram on page 124)

Complaint and Dispute Resolution Process

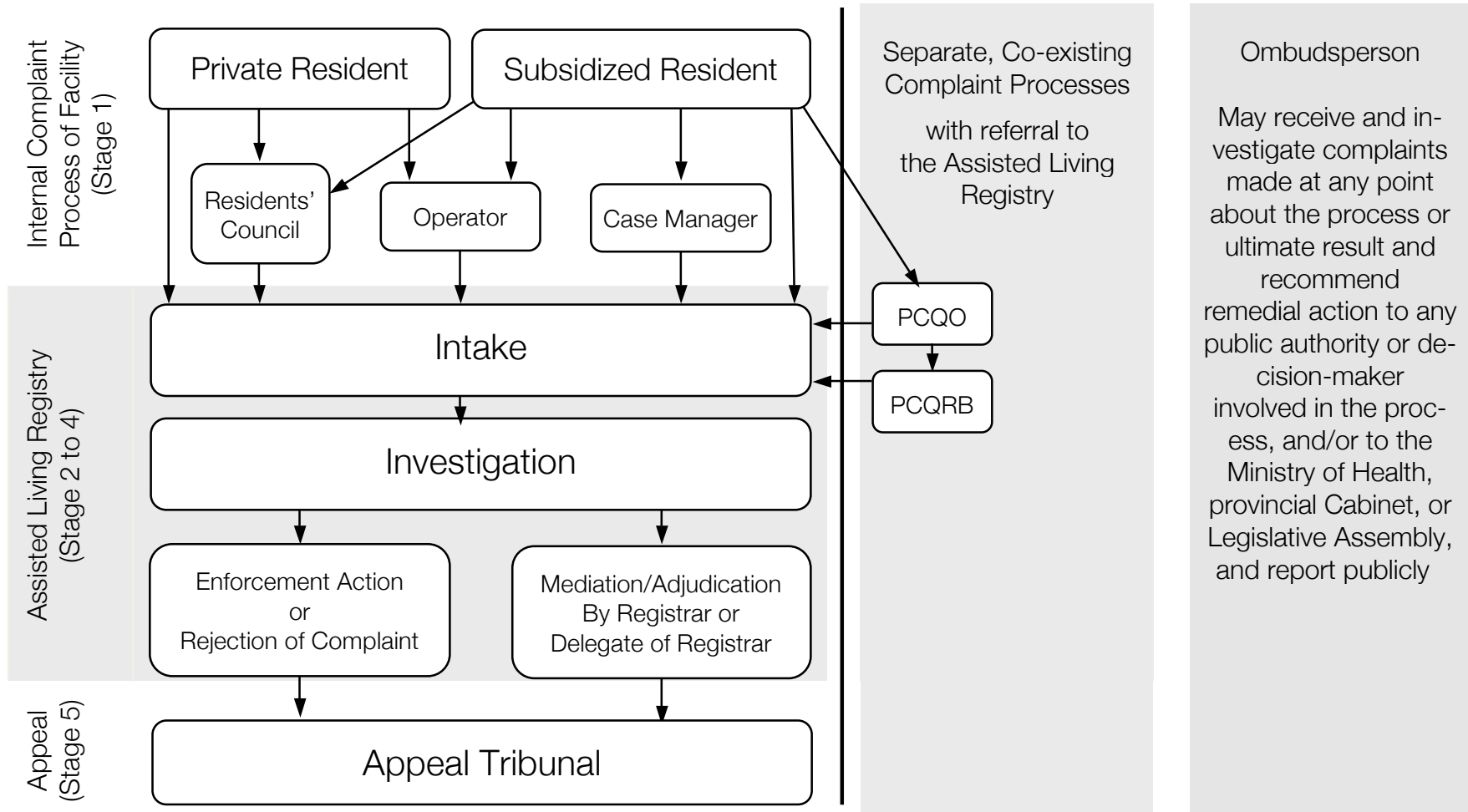


Diagram of Proposed Complaint and Dispute Resolution Process

The diagram on the previous page represents the complaint and dispute resolution process outlined in this chapter. The arrows represent the route a particular complaint could take. A complaint moves to a higher stage only if it is not resolved at a lower one.

Stage 1 indicates the various routes by which a complaint may reach an operator and be dealt with at the level of the assisted living facility through the internal complaint process of the facility. All residents may present a complaint directly to the operator or through a residents' council. Subsidized residents have the additional option of raising a complaint relating to care with their case manager, who could pursue it with the operator.

The vertical arrows leading directly from the private and subsidized residents to the Assisted Living Registry Intake rectangle indicate that residents would always be able to contact the Assisted Living Registry about any complaint. If residents have not already made use of the facility's internal complaints process, however, the Registry would encourage them to do so in most cases.

Stages 2 to 4 involve the Assisted Living Registry.

Stage 2 (Intake) would involve initial interviewing and basic fact-gathering concerning the nature of the complaint.

A complaint could also move to Stage 2 via a parallel complaint process that a subsidized resident may invoke by making a complaint to the Patient Care Quality Office (PCQO) of the regional health authority. A subsidized resident unsatisfied with the handling of the complaint by the PCQO could complain further under this parallel process to the Patient Care Quality Review Board (PCQRB). Under the process contemplated by Chapter X of this report, however, a PCQO or PCQRB should refer a complaint related to assisted living to the Assisted Living Registry for resolution.

Stage 3 (Investigation) represents a more detailed process of fact-gathering to determine if there is a valid basis for the complaint. It could also involve informal mediation in an effort to bring the complainant and operator to an agreement. Stage 3 would end with a recommendation to the Registrar on appropriate steps to deal with the complaint. Depending on the nature of the complaint and surrounding dispute, these could be:

- action to enforce a regulatory standard or policy;
- mediation, followed by binding adjudication if mediation is unsuccessful;
- rejection of the complaint, if investigation shows it is not well-founded.

Stage 4 (Enforcement or Mediation/Adjudication) would consist either of regulatory enforcement action, or alternatively a process conducted by the Registrar or a delegate of the

Report on Assisted Living in British Columbia

Registrar that would commence with mediation. If mediation does not lead to agreement between the complainant and the operator, the Registrar or the delegate would make a decision binding on the parties.

If the complaint is rejected by the Registrar at the end of Stage 3 on the recommendation of the investigator, nothing further would be done in Stage 4, but the rejection would be an appealable decision.

Stage 5 would be an appeal to a tribunal empowered to hear appeals from the Registrar. The decision of the appeal tribunal would be final in the sense of not being open to further appeal, although review by the Ombudsperson could generate recommendations that could lead in turn to governmental or legislative action having the effect of varying or reversing it.

The right-hand column labelled “Ombudsperson” indicates that a party dissatisfied with the ultimate result or the process leading to it could complain to the Office of the Ombudsperson at various points during the process. The Ombudsperson can exercise the powers conferred by the *Ombudsperson Act* to investigate and recommend remedial action to the Registrar or the Chair of the Appeal Tribunal as well as the Chairs of the PCQRs, Chairs of health authorities and the Minister of Health. In addition, the Ombudsperson can make a report to the Lieutenant Governor in Council, the Legislative Assembly and the public if she believes the response of the agency to her recommendation is inadequate or inappropriate.

CHAPTER XI APPROACH TO REGULATION OF ASSISTED LIVING

A. General

The current approach to regulation of assisted living in British Columbia is one of limited government regulation. Chapter VII mentions that some level of governmental oversight is seen as inevitable in relation to health and safety in assisted living, and that chapter discusses alternative methods of setting standards in that area. This chapter deals with the overall approach to regulation of assisted living in all its aspects as an evolving form of housing, a living arrangement, and an economic enterprise.

B. Comparison with Other Jurisdictions

The structure of regulatory schemes for assisted living or its approximate equivalents varies considerably from jurisdiction to jurisdiction.

- In Canada, the notable legislative and regulatory schemes other than British Columbia's are the new *Ontario Retirement Homes Act, 2010*¹⁷¹ and Alberta's *Supportive Living Accommodation Licensing Act*.¹⁷² Both of these Acts are much more comprehensive than British Columbia's assisted living legislation and considerably more prescriptive. The housing arrangements they govern are intended, however, to cater to a greater range of care needs than assisted living as it is known in this province.
- At the state level in Australia, "retirement villages" are regulated primarily through direct government regulation with each state having its own legislation. At the national level, there is a degree of self-regulation, as the Retirement Villages Association has a national accreditation system for industry members. The Association, which is voluntary, sets out minimum standards for management practices, services and amenities.

171. *Supra*, note 49.

172. S.A. 2009, c. S-23.5.

- New Zealand has a detailed Act that regulates directly the operation of retirement villages.¹⁷³
- In England, “extra care housing” and “very sheltered housing” are regulated broadly under the *Care Standards Act, 2000*.¹⁷⁴ In addition, there is an element of self-regulation through the Centre for Housing and Support which has devised a Code of Practice providing for an externally assessed seal of approval designed to raise and monitor standards of practice in the industry.
- In the United States, regulation occurs solely at the state level. Each state has its own legislative scheme to regulate the equivalent of assisted living.

C. Discussion

1. GENERAL

What regulatory approach is appropriate for the future of assisted living in British Columbia?

Alternative models could include:

- limited governmental regulation similar to the present scheme;
- comprehensive regulation with a level of standardization similar to the regulation of residential care facilities, but oriented to an environment of semi-independent living rather than institutional care;
- various forms of industry self-regulation.

2. LIMITED GOVERNMENTAL REGULATION

The concept of assisted living is one of a *semi-independent* living arrangement in which residents receive certain services necessary to their well-being, but otherwise retain independence and individual responsibility. This concept might suggest that the appropriate level of regulation is the least regulation. That is the premise on which Part 3 of the *Community Care and Assisted Living Act* appears to be predicated in giving the Registrar a narrow regulatory jurisdiction over matters of health and safety alone. The previous chapters have shown, however, that the existing scheme

173. See *Retirement Villages Act 2003*, *supra*, note 92.

174. 2000, c. 14.

has serious deficiencies, especially in relation to tenancy and the ability of the Registrar to enforce compliance with the Act and established standards.

The responses to the consultation paper indicated awareness on the part of stakeholders of some of the deficiencies of the present framework, but the majority of respondents clearly preferred a model of limited regulatory oversight by government over other alternatives.

3. COMPREHENSIVE REGULATION

More comprehensive governmental regulation, such as exists with respect to Ontario retirement homes, could help to maintain high standards of safety and quality. That model would certainly detract from the concept of assisted living as a semi-independent residential community, however, and bring it closer to the level of oversight associated in British Columbia with residential care. It would also tend to standardize the assisted living environment, with the consequence of preventing or discouraging innovation and choice in the housing and service options available to seniors and others who require a moderately supportive living arrangement.

The Project Committee did not see comprehensive regulation in the style of the Ontario retirement home legislation as being suited to assisted living as it has evolved in British Columbia. The responses to the consultation paper indicated strong resistance, running across the gamut of stakeholder categories, to the suggestion that assisted living might become more rule-bound and assimilated to a greater degree with residential care.

4. INDUSTRY SELF-REGULATION

An alternative to governmental regulation is self-regulation by the care industry. Self-regulation may take various forms, ranging from voluntary codes of conduct to mandatory membership in an industry-created governing body or agency, or to an industry-operated governing body created by legislation like the governing bodies of professions.

Several advantages are often ascribed to self-regulation schemes. They are said to be more flexible than state regulation, so that rules can quickly be changed to respond to changed circumstances, market demands and evolving concepts of appropriate standards. As self-regulation is carried out by industry leaders, the regulators may have more relevant expertise and experience than would a governmental agency. Industry organizations are able to develop accreditation programs to set and maintain standards. Self-regulatory schemes may experience better compliance as operators feel greater “buy-in” to standards established by peers rather than ones

imposed by government. And finally, self-regulation allows government to influence an industry without becoming too close to it. Government costs may be lower and public sentiment may be more positively disposed to it than to state regulation.

It is also possible to identify a number of potential disadvantages of self-regulation. Some critics may conclude that self-regulation by the assisted living industry would not sufficiently take broader public interests into account. The public may be critical of a system which appears to have the industry “fox guarding the hen-house.” Self-regulation in assisted living could result in under-regulation to the detriment of residents. Similarly, an over-zealous industry organization obsessed with risk management and sustaining favourable rates of insurance for its members could over-regulate assisted living facilities to the detriment of assisted living residents seeking a living arrangement that should allow for significant personal autonomy. Finally, while self-regulation may save on government costs, the result could be that assisted living residents alone would be required to contribute through their fees towards the cost of maintaining an industry body substituting for a governmental one, which arguably is a cost that should be shared in the public interest.

While a minority of the operators who responded to the consultation paper would support self-regulation by an industry organization, most of the operators as well as other respondents did not favour it. There was general agreement as well within the Project Committee that pure self-regulation is not a feasible model, particularly in light of the fact that nearly two-thirds of assisted living occupancies are publicly funded.¹⁷⁵ This extent of subsidization naturally gives rise to an expectation that a public authority will be involved in standard-setting to at least some degree.

5. CONCLUSION AND RECOMMENDATION

Ultimately the Project Committee reached the conclusion, consistent with the position of the majority of respondents to the consultation paper, that retaining a model of limited governmental regulation was the best alternative to allow assisted living to expand and flourish as a safe and desirable housing option.

Recommendation 50

A model of limited governmental regulation should be retained for assisted living in British Columbia.

175. *Supra*, note 1 at 164.

CHAPTER XII LIST OF RECOMMENDATIONS

1. *Section 26(3) of the Community Care and Assisted Living Act should be amended to provide that persons are eligible to be housed in assisted living if they are capable of making decisions on their own behalf that are needed to function safely in the supportive semi-independent environment of an assisted living facility.*

(p. 14)

2. *Section 26(6) of the Community Care and Assisted Living Act should be amended to provide that section 26(3) does not apply to a person if the spouse of the person or anyone in the classes listed in section 16(1) of the Health Care (Consent) and Care Facility (Admission) Act will be housed in the assisted living facility with the person and is able to make decisions on behalf of that person.*

(p. 16)

3. *The meaning of “spouse” of a resident in section 26(6) of the Community Care and Assisted Living Act should extend to a person who has lived in a marriage-like relationship with the resident for at least two years, in addition to a person legally married to the resident.*

(p. 16)

4. *Part 3 of the Community Care and Assisted Living Act should be amended to require:*

(a) an assisted living facility for seniors and /or persons with disabilities to provide

(i) regular assistance with activities of daily living, including eating, mobility dressing, grooming, bathing or personal hygiene; and

(ii) central storage of medication, distribution of medication, administering medication or monitoring the taking of medication;

(b) a mental health and substance use facility to provide psychosocial rehabilitative therapy.

(pp. 19-20)

5. *The Community Care and Assisted Living Act should be amended*

- (a) by deleting references to “prescribed services” in relation to assisted living facilities; and*
- (b) substituting provisions to permit an assisted living facility to provide, in addition to the services required by Recommendation 4, personal care services to a resident that are consistent with, and can safely be provided in, a supportive semi-independent living environment without 24-hour professional nursing supervision or monitoring.*

(p. 20)

6. *Access to assisted living should not be restricted by age, except that residents should be required to be above the age of majority.*

(p. 21)

7. *Assisted living legislation should not apply to housing in which residents own the dwelling units that they occupy, with the exception of housing in which residents hold freehold life estates in their dwelling units.*

(p. 22)

8. *Legislation should require the agreement between the operator and a resident governing a resident’s occupancy of an assisted living unit to be in writing and to expressly incorporate all applicable legislative requirements.*

(p. 24)

9. *It should be permissible for an agreement between the operator and a resident governing a resident’s occupancy of an assisted living unit to be contained in a single document with agreed terms concerning the provision of services to the resident.*

(p. 24)

10. *Legislation should allow the operator of an assisted living facility to require a security deposit from a prospective resident equal to one-half of the monthly charge for accommodation and services.*

(p. 25)

11. *Assisted living legislation should adopt rent control provisions for private-pay residents and units similar to those applicable to standard residential tenancies under the British Columbia Residential Tenancy Act, except that an operator should be able to apply for an additional rent increase based on grounds that the decision-maker finds are sufficient, including but not restricted to the grounds set out in section 23(1) of the Residential Tenancy Regulation.*

(p. 31)

12. *Assisted living legislation should exclude charges for services from the scope of rent control.*

(p. 33)

13. *Assisted living legislation should not regulate the keeping of pets in an assisted living facility.*

(p. 34)

14. *Assisted living legislation should expressly authorize, but not require, an operator to designate an indoor or outdoor smoking area meeting applicable regulatory requirements.*

(p. 36)

15. *Regulatory requirements for an outdoor smoking area should be reasonable with respect to the cost of compliance relative to the overall operating cost of the assisted living facility and the safety and comfort of the smoking and non-smoking residents.*

(p. 36)

16. *Assisted living legislation should not regulate non-medicinal drug use or the consumption of alcohol.*

(p. 37)

17. *Assisted living legislation should adopt the provisions of the Residential Tenancy Act with respect to inspections during the term, and at the beginning and end, of a tenancy.*

(p. 38)

18. *A notice of termination of an assisted living tenancy should be governed by provisions corresponding to those set out in the table [on pages 39-43] as being recommended for application to assisted living.*

(p. 43)

19. *Assisted living legislation should allow the following pending the transfer of an individual resident out of an assisted living facility:*

(a) *provision by or through the operator of care services to the resident as necessary on a temporary basis;*

(b) *continuing to house the resident until alternative appropriate accommodation is arranged, despite the resident having ceased to meet the eligibility criteria for admission to an assisted living facility.*

(pp. 44-45)

20. *Assisted living legislation should require operators of assisted living facilities to give prospective residents advance disclosure about the facility before entering into an occupancy agreement. The advance disclosure should include:*

(a) *a list of the different types of accommodation provided and the alternative packages of services available as part of the total charge;*

(b) *charges for the different types of accommodation and for the alternative packages of services;*

(c) *policies on staffing, occupational categories, and qualifications of staff;*

(d) *details of the emergency response system;*

(e) *a list and fee schedule of the additional services available from the assisted living facility on a user-pay basis;*

(f) *internal procedures for dealing with complaints, including a statement as to whether residents have any right of appeal from an initial decision;*

(g) *the name, telephone number, and email address of the operator;*

(h) *the proposed contract of tenancy and services to be entered into by the operator and the resident;*

- (i) *a statement that an operator of an assisted living facility must not house persons who are unable to make decisions on their own behalf; and*
- (j) *information about criteria for residency in the assisted living facility and the operator's process to assist a resident who is transferring to residential care or another place of residence.*

(pp. 49-50)

21. *Assisted living legislation should:*

- (a) *require an agreement between the operator of an assisted living facility and a resident concerning services the resident will receive to be in writing; and*
- (b) *permit the terms governing occupancy of a dwelling unit by the resident and those governing services to the resident to be combined in a single written agreement.*

(pp. 51-52)

22. *Assisted living legislation should provide that:*

- (a) *if a resident is not receiving a public subsidy for rent and services at an assisted living facility, the operator of the assisted living facility must give the assisted living resident notice of the amount of any increase in the cost of services not less than two months before the effective date of the increase;*
- (b) *if a resident is receiving a public subsidy for rent and services at an assisted living facility, the minister must give the assisted living resident notice of the amount of any increase in the cost of services not less than two months before the effective date of the increase.*

(p. 53)

23. *Assisted living legislation should provide that a resident may terminate the provision of any optional services from operators of assisted living facilities on 10 days' notice in writing. "Optional services" for this purpose should be understood as meaning services that are neither hospitality services nor the services that an assisted living facility of the type in question is required to provide under Recommendation 4.*

(p. 55)

24. *Assisted living legislation should expressly permit residents to obtain optional services (i.e., services that are not hospitality services or mandatory services required by Recommendation 4) from external service providers.*

(p. 57)

25. *Assisted living legislation should provide that an operator may restrict or terminate an optional service if*

- (a) the operator gives 60 days' written notice of the restriction or termination to the resident and to the resident's attorney, representative, or committee (if any); and*
- (b) reduces, as of the effective date of the notice, the amount payable by the resident under the resident's service contract by an amount that is equivalent to the incremental charge formerly payable by the resident for the service being terminated or restricted.*

(pp. 59-60)

26. *"Maintenance and management of the cash resources or other property of a resident" should be deleted from the current list of prescribed services for an assisted living facility, regardless of whether the prescribed list is superseded by Recommendation 4.*

(p. 63)

27. *Assisted living facilities should be allowed to hold comfort funds in safekeeping as a convenience to residents on the following basis:*

- (a) the amount of a comfort fund for a resident that an operator may hold at any time must not exceed an amount established by regulation (to be initially set at \$300);*
- (b) an operator must provide a resident receiving this service with a quarterly account relating to the resident's comfort fund;*
- (c) an operator providing this service should not be liable to pay interest to residents on their comfort funds.*

(p. 63)

28. *The Community Care and Assisted Living Act should be amended to extend sections 18(3), (4), and (5) to apply to operators of assisted living facilities, and their officers, directors, agents, designates and employees.*

(p. 64)

29. *Assisted living legislation should contain a statement of rights and responsibilities of residents that*

(a) does not create a right of action or right to compensation by reason only of a breach of its terms;

(b) declares that the rights set out in it are subject to reasonable limits: and

(c) includes a declaration that residents have a right not to be restrained except in accordance with the common law duty of a health care provider to restrain a person under care to prevent harm to that person or a third party.

(p. 71-72)

30. *Assisted living legislation should include provisions confirming a resident's right to privacy*

(a) within the resident's individual dwelling unit,

(b) in relation to personal care services, and

(c) in communications,

to the greatest extent consistent with the operator's obligations and the rights of other residents.

(pp. 76-77)

31. *Assisted living legislation should provide that the operator and its staff may enter the resident's dwelling unit only for the following reasons:*

(a) regularly scheduled services, e.g., housekeeping, personal care, maintenance of the unit;

(b) unscheduled services as may be agreed between the operator and the resident;

- (c) pursuant to written notice stating the reason why entry is necessary, provided the time of entry stated in the notice is not less than 24 hours nor more than 72 hours from the time notice is given;*
- (d) real or perceived emergency in the judgment of the operator, or if the operator has a reasonable fear that the resident's health or physical well-being or property may be at risk;*
- (e) abandonment of the dwelling unit by the resident;*
- (f) additional services arranged for a resident awaiting a move to a more appropriate care setting because of increased care needs;*
- (g) with the consent of the resident given on a specific occasion.*

(p. 77)

32. *Assisted living legislation should affirm the right of residents to confidentiality of their personal information in accordance with applicable laws.*

(p. 80)

33. *Application of the Freedom of Information and Protection of Privacy Act and the Personal Information Protection Act should be rationalized in the context of assisted living by enactment of a provision that personal information of an assisted living resident originally collected validly on the basis of either an express or deemed consent in compliance with the Personal Information Protection Act is also deemed to have been validly collected under the Freedom of Information and Protection of Privacy Act, if the operator should subsequently become a "service provider" for the purposes of the latter Act in relation to that resident while the resident remains in the facility.*

(pp. 80-81)

34. *The following additional matters should be included in health and safety standards for assisted living:*

- (a) a complaints procedure, which could be part of the general legislative or regulatory framework for assisted living and need not be limited to health and safety matters;*

(b) *ambient temperature control by means of an outcome-based standard providing that the temperature within all common areas of an assisted living facility must be maintained within a range that is safe and comfortable in relation to the ordinary uses of the room in question;*

(c) *maximum temperature of flowing domestic water from a source that is accessible to a resident, i.e., 49° C.*

(p. 88)

35. *The Ministry of Health should review the policy developed by licensing authorities that prohibits staff assigned to the licensed care section of a campus of care from being deployed in a non-licensed section. In the event of an emergency in the non-licensed section, the prohibition should be relaxed.*

(p. 89)

36. *The criterion for determining whether an incident in an assisted living facility is reportable to the Assisted Living Registrar should be whether the incident placed the health and safety of a resident at risk.*

(p. 90)

37. *The method of regulation for health and safety standards in assisted living should remain primarily outcome-based.*

(p. 91)

38. *The investigative powers of the Assisted Living Registrar should be expanded by enabling the Assisted Living Registrar:*

(a) *to investigate a matter arising in connection with the operation of an assisted living facility, whether or not there is a reason to believe that the health or safety of a resident is at risk; and*

(b) *to require an operator to provide information relevant to the operation of an assisted living facility by that operator, and the operator should be legally obliged to provide it.*

(p. 96)

39. *The Registrar's power to attach conditions to registration pending correction of a breach of an Act or regulation, or of a standard established under a written policy of the Registrar, should be employed as a sanction to induce compliance with the Community Care and Assisted Living Act and regulations or existing conditions of a registration, in preference to enforcement by fine or the introduction of monetary administrative penalties.*

(p. 96)

40. *The following measures should be undertaken in relation to employment and staff development in assisted living:*

- (a) training programs and opportunities to obtain training for care aides should be expanded in under-serviced areas;*
- (b) distance education should be used where feasible to facilitate training programs referred to paragraph (a);*
- (c) there should be a standard province-wide certification examination for new care aides;*
- (d) a process should be established with equivalency standards under which care aides with working experience could be exempted from the province-wide certification examination;*
- (e) planning for future workforce requirements in assisted living in B.C. should be done on a region-by-region basis.*

(pp. 99-100)

41. *The following measures should be undertaken in relation to occupational health and safety in assisted living:*

- (a) work-related injury rates for workers in assisted living should be tracked separately from those of other workers in non-acute care settings;*
- (b) a comprehensive occupational health and safety program should be developed for the assisted living sector, incorporating best practice modules from within the province and from other jurisdictions;*

(c) regular reviews of facilities should take place to monitor implementation of an occupational health and safety program for assisted living and promote improvements in health and safety practices.

(pp. 100-101)

42. *A dispute resolution process for assisted living should comprise successive stages.*

(p. 122)

43. *While a resident should have the right at all times to submit a complaint directly to the Assisted Living Registry, an attempt should be made initially to resolve a complaint at the level of the individual assisted living facility through the facility's internal complaint process.*

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46. *The Assisted Living Registrar should receive powers analogous to those of the Director of the Residential Tenancy Branch under the Residential Tenancy Act to hear*

and decide disputes in relation to a tenancy in a dwelling unit in an assisted living facility.

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48. *The Assisted Living Registry should have sufficient staff and resources to perform the role contemplated by Recommendations 41 to 46 inclusive, and to sufficiently separate investigative from adjudicative functions so as to avoid a reasonable apprehension of institutional bias.*

(p. 123)

49. *There should be a right of appeal from a decision of the Assisted Living Registry respecting a resident's complaint. The appeal tribunal should be empowered to entertain appeals on all questions of law or fact decided by the Assisted Living Registrar, and to substitute its own decision for the decision appealed from. The appeal should be final.*

(p. 123)

50. *A model of limited governmental regulation should be retained for assisted living in British Columbia.*

(p. 130)

PRINCIPAL FUNDERS IN 2012

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- The Law Foundation of British Columbia;
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- Boughton Law Corporation.

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