

LEGAL PROTECTIONS FOR RESIDENTS OF RETIREMENT HOMES IN ONTARIO

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INTRODUCTION

The regulation of retirement homes is undergoing a radical transition in Ontario. With the exception of some general provincial and municipal laws,¹ the only current area of substantial regulation unique to retirement homes pertains to landlord-tenant matters under the *Residential Tenancies Act, 2006 (RTA)*.² However, the *Retirement Homes Act, 2010 (RHA)* received royal assent on June 8, 2010.³ The *RHA* creates a regulatory authority with the power to license homes and conduct inspections, investigations and enforcement, in addition to developing mandatory care and safety standards. Certain sections of the *RHA* have already been proclaimed⁴ and it is expected that the remaining sections will come into effect in the spring of 2011.

Statistics indicate that there are over 700 retirement homes⁵ and 46,514 spaces⁶ in retirement homes in Ontario (although this number might be higher because many homes do not self-identify as retirement homes).

While many people may believe that only the affluent reside in retirement homes, this is not true. The average total monthly cost (including both rent and care) in Ontario is \$2,886 for a standard retirement space and \$3,966 for a heavy care space (1.5 hours or more of health care).⁷

Residents of retirement homes are a potentially vulnerable group as they are often dependent on the institution that provides their care and shelter, in addition to the fact that they are “out of sight” and sheltered from public scrutiny. While ACE is definitely not saying that all tenants at retirement homes are vulnerable, many are. Traditionally, retirement homes were designed for seniors who require minimal to moderate support with their daily living activities. It appears,

¹ For example, see the *Building Code Act, 1992*, S.O. 1992, c. 23; *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4; *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18; *Substitute Decisions Act, 1992*, S.O. 1992, c. 30; *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A; *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3; *Human Rights Code*, R.S.O. 1990, c. H.19; *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

² S.O. 2006, c. 17.

³ S.O. 2010, c. 11.

⁴ Parts 1 and 2 have been proclaimed as enacting these parts was necessary to allow for the establishment and implementation of the Retirement Homes Regulatory Authority.

⁵ Ontario Seniors' Secretariat, *Consultation Backgrounder for Ontario's Consultation on Regulating the Retirement Home Industry* (Winter 2006-2007) at 4, online:

<<http://www.culture.gov.on.ca/seniors/english/programs/rhc/docs/RHC.Backgrounder.pdf>>.

⁶ Canadian Housing Mortgage Corporation, *Seniors Housing Report: Ontario* (2010) at 5.

⁷ *Ibid.* at 6.

however, that the care levels provided in retirement homes are increasing due to demand and lack of available beds in long-term care homes. This trend will only continue as the *RHA* allows retirement homes to provide the same level of care provided at long-term care homes.

To protect the rights of individuals residing in retirement homes, an effective system of complaint mechanisms must exist in order to ensure access to justice.

This paper will be divided into three main sections. The first section will provide a definition of access to justice, in addition to reviewing the findings of a research project completed by the Advocacy Centre for the Elderly (ACE) in 2009 regarding access to justice for older adults residing in congregate settings. It is intended to underscore the problems inherent to the legal protections available to older adults. The remaining sections will review the complaint mechanisms available in Ontario under both the *RTA* and *RHA*, in addition to commentary about how to improve these complaints procedures.

ACCESS TO JUSTICE AND OLDER ADULTS

Definition of Access to Justice

Although the phrase “access to justice” is ubiquitous, there is little agreement about what it means. Common features of an accessible justice system include:

- Just results;
- Fair treatment;
- Reasonable cost;
- Reasonable speed;
- Capacity to be understood by its users;
- Responsiveness to needs;
- Certainty;
- Effectiveness;
- Being adequately resourced; and
- Being well-organized.⁸

ACE interprets “access to justice” in its broadest sense and supports Professor Reem Bahdi’s description:

Access to Justice Scholars have moved from a uni-dimensional focus on the procedural and cost barriers that prevent individuals from bringing their claims

⁸ Roderick MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass *et al.* eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Press, 2005) 19 at 23-24.

to court to a more holistic assessment of all aspects of the legal system. Focus has widened from simply an emphasis on “access” to an examination of “justice” as well. The trend is towards thinking of access to justice as three distinct yet interdependent components: substantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy; procedural aspects which focus on the opportunities and barriers to getting ones claim into court (or other dispute resolution forum); and, the symbolic component of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment.⁹

Research Project: Access to Justice for Older Adults Residing in Congregate Settings

The Law Commission of Ontario (LCO) is currently undertaking a multi-year project to develop a framework to improve the appropriate application of the law to older adults. The LCO awarded ACE a grant to research one aspect of the law as it affects older adults, namely access to justice for older adults in congregate settings. ACE uses the phrase “congregate setting” to refer to those locations where older adults reside in a group setting (i.e., hospitals, retirement homes and long-term care homes) which have a health care component, where resources are shared (e.g., meals, rooms, programming) and where there is an inability to easily move to a different location. The type of congregate setting where an older adult resides can make an immense difference in one’s ability to access justice.

The methodology for our project consisted of two main parts. First, we conducted a literature review to determine what legal mechanisms are available to older adults living in congregate settings in selected provinces (British Columbia, Alberta, Nova Scotia and Newfoundland) and countries (Wales, Australia and the United States of America). Second, we held a series of focus groups and consultations with stakeholders, including residents of both retirement homes and long-term care homes.

Barriers to Access to Justice

Based on our experiences serving clients for 25 years and our research project, it was ACE’s opinion that Ontario’s legal structure was inadequate to meet the needs of older adults residing in congregate settings by failing to have their complaints heard and resolved in a timely and satisfactory manner. There were particularly few oversights in the area of hospitals and retirement homes.

⁹ Reem Bahdi, *Background Paper on Women’s Access to Justice in the MENA Region* (2007) at 3, online: <http://www.idrc.ca/uploads/user-S/12151851101Women's_access_to_justice_in_MENA-Bahdi_En.doc>.

Access to justice is a huge obstacle in the administration of both civil and criminal justice for older persons, especially tenants of retirement homes. Barriers include:

- Financial difficulties;
- The insufficient number of lawyers practicing elder law;
- Lengthy court proceedings;
- A lack of an established body of law respecting retirement home litigation;
- The minimal monetary awards in successful cases; and
- Evidentiary issues.¹⁰

These barriers result in “hollow rights.” While it may appear as if older adults have many legal rights and a large array of mechanisms available to them to enforce these rights, it becomes evident upon further examination that while these rights look good on paper, they are not truly effective.

Recommendations to Improve Access to Justice in Congregate Settings

The failure to respect, protect and promote the rights of older people residing in congregate settings occurs, in ACE’s opinion, due to three primary factors:

- The power imbalance between older adults and service providers;
- The limited awareness of legal rights by both older adults and service providers; and
- Ageism.

To overcome these barriers, ACE developed the following recommendations in the hopes of promoting access to justice:

1. Education about the applicable law is paramount to ensuring access to justice for adults residing in congregate settings. The enactment of legislation alone is insufficient: residents must be provided with the tools and assistance necessary to make it work. To this end, education of residents, families and service providers about residents’ rights is the first step.
2. Even if education is provided, residents in congregate settings often require assistance to implement their rights. We believe that the creation of an independent Health Care Commission, whose purpose is to provide both individual and systemic advocacy, is essential. Advocates would provide residents with the knowledge and support necessary to take their concerns to the appropriate entities. Further, the systemic advocacy function of

¹⁰ For a detailed discussion about barriers to justice for older adults, please see ACE’s report called *Congregate Living and the Law as it Affects Older Adults* (2009) which can be found at the website for both ACE (www.ancelaw.ca) and the Law Commission of Ontario (<http://www.lco-cdo.org/en/olderadultsresearchpapers.html>).

the Health Care Commission would be a positive force in the health care system to ensure that the rights of all, even those who cannot speak for themselves, are heard.

3. The jurisdiction of the provincial Ombudsman should be expanded into the health care sector. With many thousands of residents living in congregate care, costing billions of public dollars, such oversight is important to ensure that the needs of the users of the sector are met in an appropriate fashion.
4. In some instances, such as the retirement home sector, legislation is required to regulate the industry and to provide residents with the tools necessary to ensure they are receiving appropriate and adequate care. This sector continues to grow and to provide more care to a larger segment of our population who are frailer and in poorer health. [Please note that ACE's report was prepared before the provincial government introduced the *RHA*.]
5. In order for government to hear the voices of residents directly, as opposed to being filtered by representatives, there should be advisory councils whose composition includes residents of congregate settings. Residents should be consulted as they are the experts on the issues unique to congregate settings.
6. The law governing capacity should be amended to require health practitioners to provide more detailed information regulations to persons found incapable respecting treatment and admission to long-term care.
7. The transparency of the compliance and enforcement regime in long-term care homes needs to be improved by strengthening the education, skill-sets and qualifications of compliance advisors, in addition to making inspection reports readily available to the public. [This comment is now also applicable to the new inspection system under the *RHA*.]
8. To encourage meritorious litigation, the laws pertaining to damages in the civil system should be changed to permit actions without proving damages in the traditional context and allowing the court to award general damages.

RESIDENTIAL TENANCIES ACT, 2006

The *RTA* applies to most residential rental units, including retirement homes (known as care homes). Care homes are covered by most of the same rules that apply to other tenants but Part IX of the *RTA* has rules applicable to only care homes. The following sections will outline the most significant provisions pertaining to the rights of tenants, in addition to criticisms identified by ACE during its research study.

Definition of Care Homes and Care Services

At present, retirement homes are tenancies and described as “care homes” under the *RTA*:

“Care home” means a residential complex that is occupied or intended to be occupied by persons for the purpose of receiving care services, whether or not receiving the services is a primary purpose of the occupancy.¹¹

The *RTA* explicitly excludes says hospitals and long-term care homes are excluded from the legislation and are not considered care homes.¹²

Care services include health care services, rehabilitative/therapeutic services or assistance with the activities of daily living.¹³ Specific examples include: nursing care; supervised use of prescription medication; providing help in case of emergency; incontinence care; and assistance with eating, bathing, dressing and personal hygiene. While retirement homes may make available some care services pursuant to a contract with the tenant, the care services are not funded by the government.

Care homes may also offer meals, housekeeping and recreational facilities but there are not considered care services under the legislation.

Care Home Information Package (CHIP)

One of the protections enshrined in the *RTA* is the obligation on the landlord of the retirement home to give the new tenant a copy of a “care home information package” (also known as a CHIP) before entering into a tenancy agreement.¹⁴ The CHIP contains information about: the different types of accommodation provided at the home; charges for different services; minimum staffing levels and qualifications of staff; details about the emergency response system or a statement that there is no such system; a list and fee schedule for additional services and meals offered by the landlord; and a description about complaints procedures or a statement is there is no such procedure. If the landlord does not provide the CHIP, the landlord cannot increase the rent or any charges for meals or care services until the required information is given to the tenant.¹⁵

While it is laudable that landlords are required to provide a CHIP, it is logical to assume that if the residents are not given a CHIP, they would not be made aware of their rights under the law, such as the aforementioned abatement of rent application. Further, if the landlord does not

¹¹ *RTA*, s. 2(1).

¹² *RTA*, s. 5(e).

¹³ O. Reg. 516/06, s. 2.

¹⁴ *RTA*, s. 140(1).

¹⁵ *RTA*, s. 140(2).

comply with this simple legal requirement, one wonders whether they would be in compliance with others.

Written Tenancy Agreement Requirement

Landlords must enter into written tenancy agreements with tenants of care homes.¹⁶ The written agreement must list the care services and meals the landlord will provide to the resident, as well as the amounts for these items. It must also contain a statement saying that the tenant has the right to consult someone else about the agreement and the tenant can cancel the agreement within five days after it has been signed.¹⁷

If there is no written tenancy agreement, or if the agreement does not set out what has been agreed to for care services and meals, the tenant can file an application with the Landlord and Tenant Board for an abatement of rent.

Charges for Care Services and Meals

There is no limit to the amount that a landlord may charge for care services and meals, the amount of any increase in these charges or the number of times these charges are increased.

However, a landlord must give at least 90 days notice in writing to a tenant about any increase in charges for care services or meals.¹⁸ The tenant does not have to pay the increase if proper notice is not given.

Transferring a Tenant

Another requirement under this legislation which is unique to care homes is that residents can be “transferred” from a care home if they no longer need the care required or where their needs are higher than the level the home provides.¹⁹ The landlord cannot transfer a resident unilaterally: they must obtain an order from the Landlord and Tenant Board. If the landlord is applying to transfer the tenant because they require more services than the landlord can provide, the transfer will only be allowed if the landlord can prove that appropriate alternate accommodation for the tenant is available.

There have only been a small number of these applications – 12 since June 1998 – to the Board.²⁰ Regrettably, it is all too common for landlords to tell residents they have to leave, or to refuse to allow residents to return from hospital, telling them they have been “discharged”,

¹⁶ RTA, s. 139.

¹⁷ RTA, s. 141.

¹⁸ RTA, s. 150.

¹⁹ RTA, s. 148.

²⁰ Telephone conversation between Susan Bengier, Freedom of Information Coordinator, Landlord and Tenant Board and Lisa Romano, Research Lawyer, ACE (30 June 2009).

without going to the Board. Residents, as well as hospital staff and other professionals, are often unaware that care homes cannot simply refuse to have residents return, or that they cannot discharge without lawful authority, and therefore simply comply with whatever they are told.

The Landlord and Tenant Board

Residents are often intimidated by their landlord and fear that they will be viewed as a trouble-maker or asked to leave the retirement home if they challenge the landlord. They will therefore not attempt to enforce their rights as they are afraid of the possible implications if they do so. For instance, while retirement home residents cannot be evicted without due process, they are often led to believe they can be, and residents are sometimes threatened with immediate eviction or they witness the unlawful eviction of a fellow tenant.

Complaints Response and Information Service (CRIS Line)

The Ontario government provides funding to the Ontario Retirement Communities Association (ORCA), a voluntary trade organization that sets professional operating standards and accredits retirement residences, to maintain a hotline described as a "Complaints Response and Information Service" (otherwise known as the CRIS Line). Tenants may call to get information about retirement homes services and accommodation options and to obtain help resolving complaints about a retirement home. If complaints against particular homes are not resolved, the date of the complaint, the name of the home, and information as to the nature of the complaint may be posted on the ORCA website. It is ACE's understanding that since its inception on September 1, 2000, the CRIS line has not had any unresolved complaints.

While the funding for the CRIS Line requires it to attempt to resolve complaints about both ORCA and non-ORCA homes, ORCA does not have the authority to force non-member homes to change in response to complaints. Member homes may be threatened with loss of membership if they fail to comply with ORCA standards. Many older adults do not seem to know about the existence of the CRIS Line. For those who do and have used the CRIS Line, they have expressed concerns to ACE that it is not independent as it is operated by an industry organization.

RETIREMENT HOMES ACT, 2010

The regulation of retirement homes will be dramatically changed once the *RHA* is proclaimed in its entirety. This section of the paper will provide an overview of the new governance structure for retirement homes and the most salient provisions regarding residents' rights and complaints in order to determine whether the *RHA* will improve access to justice for older adults.

Please note that the government has not yet released the regulations for the *RHA*. Many details about residents' rights and complaint mechanisms will be found in the regulations. It is expected that draft regulations will be made available to the public for consultation in either December 2010 or January 2011.

Fundamental Principle

Part I sets out, as a fundamental principle for interpreting the *RHA* and its regulations, that a retirement home is to be operated as a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choices about their care options.²¹

Definition of a Retirement Home

The definition of retirement home is as follows:

“Retirement home” means a residential complex or the part of a residential complex,

(a) that is occupied primarily by persons who are 65 years of age or older,

(b) that is occupied or intended to be occupied by at least the prescribed number of persons who are not related to the operator of the home, and

(c) where the operator of the home makes at least two care services available, directly or indirectly, to the residents.²²

Care services in the *RHA* are similar to those contained in the *RTA* but also includes the provision of a meal and a prescribed health care serviced provided by a member of College as defined in the *Regulated Health Professions Act*.²³

A retirement home cannot include premises or parts of premises that are governed by or funded under various statutes including the *Developmental Services Act*, *Homes for Special Care Act*, *Long-Term Care Homes Act, 2007*, *Ministry of Community and Social Services Act*, *Private Hospitals Act*, *Public Hospitals Act* or *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, as well as those premises where emergency hostel services are provided under the *Ontario Works Act, 1997*.

²¹ *RHA*, s. 1.

²² *RHA*, s. 2(1).

²³ *RHA*, s. 2(1).

The definition of retirement home does not specify a minimum number of tenants required to qualify as a retirement home but instead leaves this decision to the regulations. Public statements by the government indicate that this number will be set at six. ACE does not understand why homes with fewer than six people should not receive the same attention or protection. Several court cases concerning assault and neglect of seniors have involved operators of small homes.

The Retirement Homes Regulatory Authority

The *RHA* creates a Retirement Homes Regulatory Authority (the Authority), a corporation without share capital, whose mandate is to administer the statute and its regulations.²⁴ The provincial government says the *RHA* creates an arms-length third-party authority but ACE contends that it is permitting a system of self-regulation by the retirement home industry and we find this extremely problematic.²⁵

The majority of the board of directors of the Authority will be appointed by the board itself.²⁶ Given that retirement homes are a multi-million dollar industry, having control of the Authority represents an incredible opportunity for retirement homes to protect its self-interests rather than those of consumers.

Self-regulation requires that tenants must be comfortable complaining and that they have the wherewithal to do so. Unfortunately, this ability is not universal. Even those who do know their rights are afraid to ask that they be enforced because they may experience retaliation. Residents cannot simply pack-up and leave when they are unhappy: most will continue to be reliant upon the operator and the services provided while they pursue their complaints.

Licenses

A person must have a license issued by the Registrar of the Authority in order to operate a retirement home.²⁷ The Registrar can conduct inquiries before issuing a license and can impose conditions on a license.²⁸ If the Registrar refuses to issue a license or imposes conditions, the applicant is entitled to make submissions to the Registrar.²⁹ An appeal is allowed to the License Appeal Tribunal.³⁰

²⁴ *RHA*, ss. 10 and 16.

²⁵ For more details, please ACE's *Submission to the Standing Committee on Social Policy: Bill 21, The Retirement Homes Act, 2010* available at www.ancelaw.ca.

²⁶ *RHA*, s. 12(5).

²⁷ *RHA*, s. 33.

²⁸ *RHA*, ss. 37 and 39.

²⁹ *RHA*, s. 40.

³⁰ *RHA*, s. 100.

The *RHA* allows for the regulations to issue different classes of licenses. The classes may specify the number of residents, the type of care services available to residents, the size of the home's buildings or premises or the location of the home.³¹ There is no indication at this point whether the regulations will create different classes of licenses.

Care and Safety Standards

Regulations made under the *RHA* can set out standards for care and safety (e.g., fire, safety, public health requirements, emergency evacuation plans).³²

Unfortunately, the *RHA* fails to stipulate any cap or limitations on the care that retirement homes can offer. ACE's fundamental critique of the *RHA* is its presumption that health care is a commodity that should be privatized. Although retirement homes essentially constitute a private relationship between the operator-as-landlord and the tenant, it is the health care aspect of the retirement home that gives it a public character. By permitting retirement homes to provide the same services available in long-term care homes, the government is creating a two-tiered health care system that primarily benefits the wealthy.

Many older adults cannot afford to live in retirement homes. We expect that retirement homes will raise their rates because they will be able to provide a significantly higher level of care to those eager to pay top dollar for extra health care services. On the other hand, homes that purport to provide care at rates affordable to those on the lowest fixed income (government pensions) cannot possibly provide the care that many of the residents actually need.

ACE believes it is illogical to have the government stringently regulate long-term care homes if retirement homes providing the same level of care and services are subject to different rules and regulation. The weaker regulatory system for retirement homes and increased opportunity for profits will likely persuade some long-term care homes to convert to retirement homes.³³ Instead of viewing retirement homes as part of the continuum of accommodation options available to older adults, the government is encouraging a parallel, unfunded system. ACE supports a system of graduated licensing where the holder of the highest level of license would be subject to the *Long-Term Care Homes Act*.

Fees

The Authority has the ability to set, collect and use fees collected from retirement homes to carry out the objects of the Authority. The government has indicated that it will fund the

³¹ *RHA*, s. 121(4).

³² *RHA*, s. 60.

³³ Section 308(4)(b) of O. Reg. 70/10 to the *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8 requires a licensee to give five years notice to the Ministry of Health and Long-Term Care of an intent to close a home although it is not clear what, if any, penalty would be levied on a licensee who fails to provide the requisite notice.

Authority for the first two years. There has been no public commitment from the government about the amount of money it plans to allocate to the Authority, nor is there any information about the fees to be paid by retirement homes.

To be truly effective, the Authority must have adequate resources. The cost of enforcing merely the basic requirements of the *RHA* indicates that regulation will be expensive. Nobody can accurately predict how many non-annual inspections will need to be conducted or how many resident complaints will be made to the Authority. If the Authority is under-resourced, the rights afforded to tenants will be hollow as they will not be adequately enforced.

It is fair to suggest that the costs for operators of retirement homes will increase with the passage of the proposed legislation. Therefore, it is logical to presume that these costs will be passed onto tenants in the form of higher prices.

Residents' Bill of Rights

The *RHA* creates a Bill of Rights for retirement home tenants.³⁴ These rights are an important element of this legislation as it enshrines many of the rights that are essential to the day-to-day quality of life of retirement home tenants. One of the problems associated with bills of rights, however, is the belief that if a right is not written down and included within the bill of rights, the person does not have or loses this legal right. We have consistently seen this problem in long-term care.

It must be understood that generally, the rights set out in the Bill of Rights are simply reiterations of rights that the residents already possess. Unfortunately, when people enter into care situations, there is often an assumption that they lose some, if not the most basic, societal rights. For this reason, Bills' of Rights have been statutorily enshrined to ensure that operators and residents are clear that residents continue to have rights despite living in care settings.

The *RHA* also says that the licensee is deemed to have entered into a contract with each tenant of the home, agrees to respect and promote the rights of the tenant.³⁵ Tenants may "enforce" their rights but, regrettably, there are no concrete enforcement mechanisms available to tenants to do so in the legislation.

Information for Residents

Similar to the care home information package (CHIP) under the *RTA*, licensees of retirement homes are required to provide residents with a package of information.³⁶ It contains information about several topics, including: the residents' bill of rights; the home's zero

³⁴ *RHA*, s. 51(1).

³⁵ *RHA*, s. 51(3).

³⁶ *RHA*, s. 54.

tolerance policy respecting abuse and neglect; the home's complaints procedure; information about the Authority; information about the Residents' Council; a list of the different types of accommodation and care services offered by the home; information about the licensee's process for assisting a resident transition to a long-term care home or other place of residence; and information about staffing levels and qualifications.

Residents' Councils

Residents of retirement homes are allowed to establish a Residents' Councils under the *RHA*. The Residents' Council has various legislated powers, including:

- Advising residents respecting their rights and obligations under the *RHA*, as well as those of the licensee;
- Attempting to mediate and resolve disputes between residents and a licensee;
- Providing advice and recommendations to the licensee regarding what the residents would like to see done to improve care or the quality of life in the home; and
- Reporting to the Registrar any concerns and recommendations that in the Council's opinion ought to be brought to the Registrar's attention.³⁷

The power and success of a Council is dependent upon several factors, including the level of engagement of its members and the willingness of the home to listen. Residents Councils are also dependent upon the staff that assist them.

Inspections

The Registrar shall appoint inspectors to enter and inspect a retirement home with or without a warrant.³⁸ Unless the regulations say otherwise, homes must be inspected at least once a year.³⁹ An immediate inspection of the home shall also take place if the Registrar receives information indicating: improper or incompetent care of a resident that resulted in harm or a risk of harm; abuse of a resident by anyone or neglect of a resident by the licensee or staff of the home that resulted in harm or a risk of harm to the resident; contravention of a requirement of the legislation or other unlawful conduct that resulted in harm or risk of harm to a resident; or any other matter specified in the regulations.⁴⁰

The *RHA* is silent concerning the qualifications of inspectors. Due to the importance of this position, it is imperative that inspectors have the appropriate skills-set necessary for the job.

³⁷ *RHA*, s. 56(3).

³⁸ *RHA*, Part V.

³⁹ *RHA*, s. 77(3).

⁴⁰ *RHA*, s. 85.

ACE believes the Authority should employ individuals from a variety of different backgrounds, especially those with investigative experience.

Protection against Abuse and Neglect

Every licensee is required to protect residents of a retirement home from abuse by anyone, in addition to ensuring that the licensee and staff of the home do not neglect the residents. The licensee must also have a written policy to promote zero tolerance of abuse and neglect.⁴¹

Complaints to the Registrar

Every licensee of a retirement home shall ensure that there is a written procedure for a person to complain to the licensee about the operation of the home and for the way in which the licensee is required to deal with the complaint.⁴²

Complaints about alleged contraventions of the *RHA* may also be lodged with the Registrar of the Authority.⁴³ In certain circumstances, the Registrar's response may be reviewed by a Complaints Review Officer (a person appointed by the board of directors of the Authority).⁴⁴

The legislation does not include a requirement for the Registrar or the Complaints Review Officer to provide a copy of any inspection report to a complainant.⁴⁵ It simply says that the Registrar will notify the complainant in writing of its decision and any action taken.

It is important that persons who make complaints be provided with a copy of any report created as a result of the investigation. Without a copy of the report, complainants cannot be assured that their complaint (which can trigger an inspection of a home) was properly reviewed. Absent this essential communication with complainants, the compliance process is not transparent.

A decision of the Complaints Review Officer is final and not subject to appeal. Therefore, tenants cannot have their complaints assessed by anyone outside of the Authority. This process should be contrasted with certain appeals brought by operators of retirement homes against the Registrar. Operators can appeal to the License Appeal Tribunal (an independent quasi-judicial administrative tribunal), as well as the Divisional Court. ACE believes tenants of retirement homes should have recourse to a fair and impartial adjudicator who is not affiliated with the body governing retirement homes.

⁴¹ *RHA*, s. 67.

⁴² *RHA*, s. 73(1).

⁴³ *RHA*, s. 82.

⁴⁴ *RHA*, s. 88.

⁴⁵ *RHA*, ss. 87 and 88(9).

Restraints and Confinement to Secure Units

The *RHA* contains a general prohibition against the use of restraint but allows restraint in certain circumstances.⁴⁶ It also permits licensees to confine tenants to a secure unit if certain requirements are satisfied.⁴⁷

In Canada, no one may be detained or restrained against their will except by process of law. Under the common law, persons can only be restrained in an emergency where immediate action is required to prevent serious bodily harm to the person or to others, and only for so long as the emergency continues. Restraint can only be utilized in non-emergency situations where allowed by legislation, and only then in accordance with the *Charter of Rights and Freedoms*. There is no common law duty to detain as detention goes beyond an emergency situation.

Based on our extensive experience working with residents in the long-term care sector, ACE is acutely aware of the problems facing residents who are improperly restrained or detained. Continued issues regarding restraint and detention in long-term care homes have taught us that their use is fraught with problems and should only be allowed under the most strictly controlled situations. Since its inception, the Geriatric and Long-Term Care Review Committee to the Chief Coroner of Ontario has reviewed and expressed concern over the use of restraints in long-term care. It has been consistent in its view that restraint should be strictly controlled and utilized only on a limited basis. These concerns were the impetus for the *Long-Term Care Homes Act* to limit the use of restraint and detention. By expanding the use of restraint and detention into retirement home settings would be contrary to current practices to severely restrict their use.

ACE is unequivocal in its opinion that retirement homes should never be allowed to restrain or detain tenants, except in accordance with the common law; to allow them to do so is analogous to allowing a superintendent to lock tenants in their apartments if they deem it to be appropriate.

Although the legislation gives tenants a right to challenge decisions made by their substitute decision-makers consenting to detention on secure units, there are very few details about this important safeguard; these sections merely say tenants are entitled to a review conducted by a prescribed person or entity in accordance with the regulations.⁴⁸ ACE does not understand why this review would not be conducted by the Consent and Capacity Board as it already hears applications concerning involuntary detention under the *Mental Health Act* and it will soon adjudicate applications about admission to secure units in long-term care homes under the *Long-Term Care Homes Act*.

⁴⁶ *RHA*, s. 68(1).

⁴⁷ *RHA*, s. 68(2).

⁴⁸ *RHA*, ss. 70(6) and (7).

The *RHA* does not provide comprehensive rights advice to incapable tenants whose substitute decision-makers have consented to their confinement to a secure unit. Instead, the *RHA* merely requires licensees to inform the tenant of a right to “consult” with a rights adviser in accordance with the process set out in the regulations.⁴⁹

Rights advice is a legal process whereby an individual is informed of their rights by a rights adviser shortly after their legal status has changed. There are currently eight mandatory rights advice situations, most of which only affect patients in psychiatric facilities.⁵⁰ The rights adviser cannot be a person involved in the direct clinical care of the person to whom the rights advice is given. The rights adviser has the responsibility to explain the significance of the legal situation to the individual. If requested to do so, the rights adviser will assist the person to: apply for a hearing to challenge the finding before the Consent and Capacity Board; retain a lawyer; and apply for financial assistance from Legal Aid Ontario. Under the *RHA*, however, the onus is shifted to the tenant to make a request to “consult” and it is unclear if this entails a telephone conversation, a personal meeting or something entirely different. ACE believes tenants should be afforded full rights advice which represents a higher standard of advice commensurate with the significance of being detained. In other words, once a substitute decision-maker consents to confinement, the legislation should oblige licensees to notify a rights adviser forthwith to physically meet with the person at the retirement home to explain their rights and options. The rights adviser must be independent of the retirement homes in order to maintain neutrality and credibility.

CONCLUSION

Lessons learned from ACE’s research report into congregate settings indicated that older adults are not able to effectively access justice. While many people are heralding the *Retirement Homes Act* as a huge advancement for retirement home residents, it remains to be seen if this is true. ACE welcomes regulation of retirement homes but we have many concerns about the *RHA*. For instance, there are many unanswered questions about both the operation of the Retirement Homes Regulatory Authority and resident complaint mechanisms. As the Authority will wield an enormous amount of power, we urge the government to create regulations which are mindful of the principles underlying the concept of access to justice. We also hope the Authority will develop rules and policies that respect and promote the legal rights of residents. It is also imperative that the Authority abide by its mandate to educate retirement home ownership, staff, residents and their friends and families, as well as the public, about the new legislation so people understand their rights and how to exercise them.

⁴⁹ *RHA*, s. 70(9).

⁵⁰ *Mental Health Act*, R.S.O. 1990, c. M.7 and R.R.O. 1990, Reg. 741, ss. 14-16. The *Long-Term Care Homes Act* also contains requirements for rights advice when a person is admitted or transferred to a secure unit. Although the majority of the *Long-Term Care Homes Act* was proclaimed on July 1, 2010, there is no proclamation date for the sections pertaining to secure units and rights advice and no regulations have yet been drafted for this section.