

Risks and Issues relating to COVID-19: Long-term care facilities

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Meet our speakers



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Overview of the health care systems in Canada

Philippe Couillard, Health Policy

Context

- Changing demography and accelerated change
- Society has not fully adapted to not only old age, but very old age, 90-95
- Dependency: physical and cognitive
- Families are often fragmented



Points of view

The person/patient

- Delay as much as possible moving into an institution (retirement then nursing homes)
- A trend that will continue to be supported by governments

The healthcare system

- Well aligned with this goal, as it makes more economic sense
- Deployment of technology (remote care and monitoring for HC and homes)
- Has been progressively drawn to intervene in the operations of retirement homes on health and safety concerns:
 - Safety equipment (sprinklers)
 - Staffing ratios
 - Post COVID: stability of teams
- Will also intervene to ensure/verify pandemic preparedness by operators :
 - Standardized procedures
 - Drills
 - Storage of PPE

Government perspective

- Public inquiries (already announced in Ontario)
- More rigorous legislation/regulation/standards
- This will include pandemic preparedness
- Development of new funding models
- More financial assistance to low income seniors with stay at home incentives
- TBD: cost/risk sharing with operators

Trends for operators

- Because of demography, obviously a growing market
- More pressures on safety, staffing, pandemic preparedness will mean a higher barrier to entry
- Public finances will be tight during the next years
 - Impact on “cost transfers”
- Important “capacity gap” between large/urban and small/rural operators
 - Compensated by government?

How are long-term care facilities regulated?

Rose Carter, Health Regulatory and Litigation

Government Concerns

- Safety and well being of residents
- Public's perception-is Government enforcing the law
- Are current laws, regulations and standards adequate

Examples of Regulatory Requirements

- Adequate staffing
- Safety and security
- Spacing
- Cleaning
- Prevention of abuse
- Continuity of service
- Insurance and the adequacy of it

Moving forward, what can LTCF/Assisted Living Facilities do now?

- Being proactive may be best
- Staff updates on governing laws, regulations and standards
- Review and update policies and procedures
- Preparing for the worse-public/fatality inquiries/litigation

Litigation preparedness

Public Inquiries and Commissions

Lorena Harris, Litigation and Dispute Resolution

What to expect

The purpose of inquiries

Generally to make factual inquiries and then recommendations about what changes could be made in order to avoid similar deaths in the future.

- Notice will be given to the operators of long term care facilities of an authorities' intention to conduct an inquiry. These operators must consider if they wish to participate
 - The criteria for whether someone is an interested party is contained within the governing legislation.
 - Once the facility has been granted standing, then what? The person presiding over such an inquiry generally has all of the powers granted to a court within a province or Canada – can summon witnesses, compel the production of documents, and generally determine how the inquiry is to be held.

Preparation is paramount

The long term care facility must take steps as soon as possible to gather evidence that it determines will be helpful in presenting its case to the inquiry.

- Gathering and preserving documentary evidence, identifying and interviewing potential witnesses, and giving some thought to the “story” that the facility wishes to tell to the inquiry and the public.
- Steps should be considered early on in the process in order to preserve the best evidence available.

Public nature of such inquiries

- Any member of the public may attend and observe proceedings
- They may be reported on by the media
- Only exception is when the inquiry is directed to be private, or closed
 - This rarely occurs
 - Parties generally must apply for an inquiry to be closed to the public, and certain criteria must be met before this is directed

Litigation preparedness

Class Actions

Margaret Weltrowska, Litigation and Dispute Resolution

Class actions overview

7 Covid-19 related multi-million class actions filed in April and May 2020

Québec: 3 class actions

- *Conseil pour la protection des malades (CPM) v CISSS de la Montérégie-Centre et al.* (filed in July 2018)
 - All Quebecers who have resided in a CHSLD since July 11 2015, in conditions that are contrary to the *Act Respecting Health Services and Social Services*.
 - Class action in damages authorized in September 2019, claim for punitive damages was dismissed.
 - Class action will likely be amended to include damages related to the mismanagement of the Covid-19 outbreak.
- *Daubois v CHSLD Ste-Dorothée* (filed in April 2020)
 - 150 cases (78%) of infected residents between March 26, 2020 and April 16, 2020, 56 deaths, 79 cases among personnel.
- *Schneider v CHSLD Herron* (filed in April 2020)
 - 31 of 130 residents died between March 26 and April 11, 2020.

Class actions overview

7 Covid-19 related class actions filed in April and May 2020

Ontario: 4 class actions

- *McCarroll v Responsive Group Inc. et als.* (filed in April 2020)
 - 71 residents of Responsive facilities had died as of April 23 2020 (10% of Covid-19 related deaths in Ontario).
- *Bobyk v Lundy Manor (Oxford Living)* (filed in May 2020)
 - 18 residents have died between April 2 and May 12 2020.
- *Masucci v Revera* (filed in May 2020)
 - 150 residents and 51 staff were infected, and over 35 residents have died.
- *Chartwell Retirement Residences Class Action* (filed in May 2020)

Alberta: 1 class action

- *Revera Class Action (McKenzie Towne)* (filed in May 2020)
 - 62 residents and 44 staff were infected, 21 McKenzie Towne residents have died.

Class actions overview

Allegations and claims against the Respondents:

- Breach of their **obligations** under the applicable provincial legislation and public health guidelines issued in relation to Covid-19:
 - to safeguard the life, health, dignity and well-being of the Residents, in accordance with articles 5, 83 and 100 of the *Act respecting health services and social services*, CQLR c S-4.2.
 - to provide the Residents with health and social services that were adequate from a scientific, human and social standpoint, with continuity and in a personalized and safe manner, in accordance with articles 5, 83 and 100 of the *Act respecting health services and social services*, CQLR c S-4.2.
 - to maintain care for the Residents, implement proper sanitary protocols or provide adequate personal protective equipment;
 - to ensure that the environment was sanitary and that mitigation measures were in place.
- Violation of the **Residents' rights** to personal security and dignity under the Quebec *Charter of Human Rights and Freedoms*, RLRQ c C-12
- Breach of their **contractual obligations to provide adequate care and safety** to the Residents
- Breach of their **obligation to take reasonable steps** to ensure the safety, well-being, health and dignity of the Residents.
- Breach of the **duty of care** owed to the Residents with respect to the management of the Homes.
- Breach of the **fiduciary duty owed to the Residents**, that included a duty to care for and protect them and to act in their best interests at all times.

Class actions overview

What can you do to mitigate your risk and exposure?

- Your actions will be analysed through the prism of “**reasonable means**” - LTCFs should not be responsible for not having foreseen or prevented the spread of the pandemic within their facilities, but can be held liable for an inadequate management of the situation.
- What is the **adequate** and **reasonable** standard of care that can be expected during a pandemic?
 - Exceptional circumstances militate for exceptional protective measures and a heightened degree of the standard of care.
 - Specific public health guidance, directives and requirements issued by the Provincial and Federal government : visitor, supplier and service personnel screening, resident isolation and testing, employee testing and screening, supply, use and access to personal protective equipment, adequate infection outbreak planning such as the set up of “hot” and “cold” zones, etc.
- Ability to demonstrate immediate and strict adherence to the standards, recommendations, guidelines and orders issued by Public Health authorities will be a key factor in defending Covid-19 related claims.
- Performing an internal risk analysis and implementing measures to address and/or mitigate the risks identified, such as a pandemic/crisis plan.

Class actions overview

What can you do to mitigate your risk and exposure?

- Adopt employee policies and guidelines which would accompany measures taken to address COVID-19 (i.e. reviewing and updating employee safety standards and protocols, implementing COVID-19 specific policies).
- Adopt clear internal guidelines on how to deal with complaints of employees and clients or residents that may arise during COVID-19, and each complaint and response should be recorded and filed.
- The courts will give importance to the decisional process of the establishment
 - Decisions made in good faith, supported by reasonable arguments should not be reconsidered.
- The unavailability of material, financial or human resources defense under the Quebec *Act respecting health and social services* (s.13).

Labour Issues in Unprecedented Times

Craig Lawrence, Employment and Labour

Labour Issues in Unprecedented Times

Ontario Labour Relations

- ***Ontario Nurses Association v Rykka Care Centres*** (April 23 2020)
 - Union successfully obtains injunction through Ontario Superior Court against Rykka Care Centres.
 - Court acknowledges that the dispute arises under the terms of a collective agreement; this would ordinarily attract the exclusive jurisdiction of a labour arbitrator.
 - Dispute essentially turns on employer complying with various Directives issued by the Chief Medical Officer of Health for Ontario:
 - Nurses must be provided access to fitted N95 facial respirators and other appropriate PPE when assessed by a nurse at the point of care to be appropriate and required; and,
 - Employer must implement administrative controls such as isolating and cohorting of residents and staff.

Labour Issues in Unprecedented Times

Ontario Government Actions

- ***Emergency Orders and Regulations***
 - April 24: amendments to prior Emergency Order under EMCPA
 - In March, LTC employers were granted broad authority to take all steps reasonably necessary to staff and redeploy as needed to deal with the pandemic. This included steps that might otherwise breach the terms of a collective agreement.
 - Following the ONA decision, the government expanded those powers in unprecedented ways.
 - Effective April 24, health service providers to provide assistance and staffing to licensees and long term care homes, including municipal homes for the aged, including:
 - Assessments of prevention and control programs;
 - Clinical supervision; and,
 - Nursing and personal support staff to residents of a LTC home.

Labour Issues in Unprecedented Times

Ontario Government Response

- *Emergency Orders and Regulations*
 - May 13: new Order under EMCPA
 - Allows the Director under the *Long Term Care Homes Act* to take immediate action where needed to support the management of LTC homes in COVID-19 response.
 - Issuance of mandatory management order for any LTC that is struggling to manage a COVID-19 outbreak.
 - The Director can name any person, including a corporation or hospital, to provide management assistance to a LTC that is facing significant challenges caused by COVID-19.

Labour Issues in Unprecedented Times

Return to Work Principles

- Refusal to return to work
- Work refusals on the job
- Mental Health in the workplace
- Return to Work Toolkit

Questions?



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