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Consultation Paper on Assisted Living in British Columbia

Prepared by the Assisted Living Project Committee

November 2012

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

- the best in scholarly law reform research and writing; and
- the best in outreach relating to law reform.

This project was made possible with the financial support of the Notary Foundation of British Columbia and the Law Foundation of British Columbia. The Institute also gratefully acknowledges the sustaining financial support of the Law Foundation and the Ministry of Justice and Attorney General of British Columbia for its work.

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Suzanne Bell, former Executive Director, Residential Tenancy Branch, provided valuable input into tenancy and housing issues.

CALL FOR RESPONSES

We are interested in your response to this Consultation Paper. We encourage you to provide comments in addition to answering the Questions for Response.

The easiest way to respond is by using a response booklet that can be downloaded from <**http://www.bcli.org/ccel/projects/assisted-living-reform-project**> or obtained from us in paper format. You can save a downloaded version of the response booklet to your hard drive, enter and save your responses as a new file (with a distinguishing filename) and e-mail the new file back to us when finished, OR you can scan a copy with your responses and e-mail it, OR you can mail us a paper copy of the response booklet with your responses in it.

Responses in any form may be sent to us:

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For consideration by the Project Committee in preparing the final report, we must receive your response no later than **February 28, 2013.**

Your response will be used in connection with the Assisted Living BC Project. Your response may also be used as part of future law reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their names confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at <http://www.bcli.org/privacy>.

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1. INTRODUCTION BY CHAIR OF PROJECT COMMITTEE

In conjunction with a volunteer Project Committee of experts and volunteers experienced with assisted living issues, the British Columbia Law Institute (BCLI) and its division, the Canadian Centre for Elder Law (CCEL), have developed this consultation paper covering a broad range of assisted living issues. BCLI/CCEL and the Project Committee are seeking public input, comments and questions on its contents.

This consultation paper is published in connection with the Assisted Living BC Project. This BCLI/CCEL joint project, which began in 2009, is designed to review the legislative framework for assisted living in British Columbia and identify changes to the framework that would be beneficial as assisted living continues to develop in this province. The project focuses on the *Community Care and Assisted Living Act,* the principal Act that regulates assisted living in British Columbia, but touches on other applicable legislation and policy. The project was undertaken following 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 suggested a law reform project focusing on assisting living in British Columbia would be worthwhile.

The Assisted Living BC 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. The volunteer Project Committee held 30 meetings to review these issues and developed a series of tentative recommendations in each of these areas. Not every tentative recommendation is unanimous, but each represents the view of at least a majority of the members of the Project Committee.

This consultation paper summarizes the matters reviewed by the Project Committee and the thinking behind the tentative recommendations. The tentative recommendations have not been formally adopted by BCLI/CCEL's directors and are open to change in light of the responses to the consultation paper. Comment and input on the tentative recommendations is sought from all perspectives, including those of assisted living residents and their family members, operators of assisted living facilities, medical, nursing and legal practitioners working with assisted living residents, legal and policy specialists, and members of the public.

In February 2012, the BC Ombudsperson published Part 2 of her report *The Best of Care: Getting It Right for Seniors in British Columbia*, which deals with the broad spectrum of seniors' care, including some of the same issues relating to assisted living as are covered in the BCLI/CCEL project. This consultation paper refers to and discusses recommendations made by the Ombudsperson in the areas where her report and our project intersect. In some cases, the tentative recommendations of the Project Committee coincide with those of the Ombudsperson, and in others they diverge.

The legal research carried out for the purposes of the Assisted Living BC Project covered many jurisdictions, notably including all Canadian jurisdictions, many U.S. states, the U.K., Australia and New Zealand. To avoid undue length, much of the detail of the comparative research is omitted, or is referred to only in summary.

Based on public input and comment, the Project Committee and BCLI/CCEL Board of Directors will formulate final recommendations that will be incorporated in a final report on the legal framework for assisted living in British Columbia.

We welcome and encourage your views and comments, which can be provided to us in any manner convenient for you. A series of questions for readers' consideration is posed in each section and a complete list of the questions appears at the end of the consultation paper. The questions will assist you to provide responses on an issue-by-issue basis. Additional comments from readers are also invited. A convenient response booklet may be downloaded from the BCLI/CCEL website at <**http://www.bcli.org/ccel/projects/assisted-living-reform-project**>.

We appreciate your interest in reviewing this consultation paper and thank you, in advance, for your views and comments.

My special thanks to all of the members of the Project Committee who have generously provided many hours preparing for and participating in the Project Committee meetings.

The Assisted Living BC Project is generously funded by the BC Notary Foundation and the Law Foundation of BC. BCLI /CCEL gratefully acknowledges this support.

For the Project Committee

Jim Emmerton, Chair

2. NATURE OF ASSISTED LIVING

Current Definition and Description

Assisted living is a form of housing in which apartment-like dwelling is combined with hospitality (meals and light housekeeping) and certain prescribed services. It has been called "the middle option," because it lies between independent living and long-term residential care.

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* revealed a general sense that some increased oversight of this form of housing was needed, but 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* in November 2002. As its name implies, this Act governs both residential care (provided in "community care facilities") and assisted living under separate regimes.

The *Community Care and Assisted Living Act* imposed mandatory registration of facilities providing assisted living and created the position of the Assisted Living Registrar. The Registrar has authority under the *Community Care and Assisted Living Act* to:

- register facilities that meet the definition of an "assisted living residence" in the Act;
- 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;
- 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;
- apply conditions to registrations, vary conditions and suspend or cancel registrations.

The Registrar does not have authority to investigate complaints relating to tenancy matters or the quality of services unless a risk to residents' health and safety is involved.

The real key to understanding what "assisted living" is in British Columbia is the definition of "assisted living residence" in the *Community Care and Assisted Living Act*. Section 1 of the Act defines an "assisted living residence" as "a premises or part of a premises in which housing, hospitality services and at least one but not more than two prescribed services are provided … to three or more adults unrelated by blood or marriage to the operator..." In concept, an assisted living resident lives with substantial autonomy while being provided with the hospitality services and one or two "prescribed services."

"Hospitality services" are described as "meal services, housekeeping services, laundry services and recreational services and a 24 hour emergency response system."

The "prescribed services" are described in the *Community Care and Assisted Living Regulation* as:

(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.

Assisted living facilities are registered to provide the one or two prescribed services selected. Thus, an assisted living facility cannot, for example, provide two particular prescribed services to some of the residents and provide two different prescribed services to other residents. While operators of assisted living facilities are free to select which one or two of the prescribed services to provide, all have selected the first

two services: (a) regular assistance with activities of daily living, and (b) storage, distribution, administration and monitoring the taking of medications.

There are both private and public assisted living facilities in British Columbia. Public assisted living facilities are operated by regional health authorities. Private assisted living facilities may be operated by not-for-profit organizations or by business corporations. Privately owned and operated assisted living facilities may have at least some units that are occupied by residents whose stay in assisted living is subsidized by the regional health authority. Others are entirely private, with no residents whose stay is publicly subsidized.

In British Columbia there is no age restriction on who may be a resident of an assisted living facility. While most residents in assisted living are elderly, younger persons with disabilities who require some personal care services but not 24-hour care also reside in assisted living facilities.

A first principle of assisted living in British Columbia is that residents must be capable of making decisions on their own. The *Community Care and Assisted Living Act* describes this in a negative fashion, namely by stating that "persons who are unable to make decisions on their own behalf" cannot be housed in an assisted living facility. The Act provides two exceptions from this requirement. One exception is for persons on leave under section 37 of the *Mental Health Act*. The other exception applies if a resident's spouse is also housed in the assisted living facility and can make decisions on behalf of the resident.

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 by 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 that is used in the Act, namely "registrant."

Discussion

While the current model for assisted living is well-understood by operators and those working in this housing sector in British Columbia, assisted living could be defined in other ways. The Project Committee considered at length numerous issues connected with the present definition of "assisted living residence" in the *Commu-*

nity Care and Assisted Living Act. Ultimately the Project Committee did not reach a consensus to change that definition, but the views of readers are sought on whether, and how, the present definition of "assisted living residence" and other aspects of the current model for assisted living should be modified.

For a prospective resident approaching assisted living as a housing option in British Columbia, gaining an understanding of the system can be daunting and confusing. For example, the provision of meal services, housekeeping services, laundry services and recreational services, a 24 hour emergency response system, regular assistance with activities of daily living including eating, mobility, dressing, grooming, bathing or personal hygiene, central storage of medication, distribution of medication, administering medication or monitoring the taking of medication – are described as three services, being "hospitality services" and two "prescribed services." The term "prescribed services" adds to the confusion, because it could imply that the services so described are mandatory when, in fact, they are part of a list of six "prescribed services" from which the operator has selected two services to provide.

One issue in relation to the definition of assisted living is whether it is appropriate for the future to have greater flexibility in what services are provided to residents. In some American states, operators have more flexibility in the services that can be provided. In some jurisdictions, the services provided are defined by the arrangement agreed between the operator and resident rather than by legislation.

Situations arise where a resident requires more than the two prescribed services being provided at that assisted living facility. While this situation theoretically requires that the resident must leave, in practice there may be times when no alternate housing is available. In these circumstances, one or more additional services are sometimes obtained directly by a resident from a third-party provider.

The Project Committee considered whether the restriction in the current definition of "assisted living residence" capping the number of prescribed services that can be offered within a facility at no more than two should be changed. The Project Committee did not reach a consensus for removing the restriction, although some members were in favour of allowing operators to offer up to three prescribed services. An underlying theme in this discussion was the importance of maintaining a clear distinction between assisted living and residential care. There was a concern that if the cap on the number of prescribed services a facility could offer was raised or removed, it would become harder to distinguish between assisted living and residential care.

Noting that the current legislation now permits assisted living facilities to house diverse populations, such as persons with disabilities and persons in treatment for alcohol and drug addiction as well as the elderly, the Project Committee concluded (without endorsing the mixing of different populations and age groups within the same facility) that access to assisted living in BC should not be restricted on the basis of age.

The Project Committee reached a tentative recommendation that legislation should only regulate assisted living facilities that are owned and operated by someone other than the residents themselves, not housing owned by a resident. In other words, housing that is operated on a similar basis to assisted living but is owned by residents should not be governed by the *Community Care and Assisted Living Act* or new legislation that might replace the Act. A possible exception might be housing in which the residents hold life interests (e.g., life leases or, more improbably, life estate titles).

Another issue considered was whether the exceptions to the requirement that residents must have the mental capacity to make decisions on their own behalf should be widened. Currently there are two exceptions to this requirement. The first exception is for persons who are on leave under section 37 of the *Mental Health Act* after being involuntarily admitted to a designated mental health facility.

The second exception applies if a resident is housed in the same facility with a spouse who can make decisions for him or her. Unlike many other provincial Acts, the *Community Care and Assisted Living Act* does not define "spouse" to include unmarried persons (often referred to as "common law spouses" or "partners") living together in a marriage-like relationship. As a result, the exception technically may not apply when a resident who does not have the capacity to make decisions independently is living in the same assisted living facility as his or her "partner," even though the partner can make decisions for that person.

The Project Committee considered whether the second exception should be widened to refer to substitute decision-makers other than a spouse who are housed in the same assisted living facility as the resident in question, such as a brother or sister, or someone who is named as the resident's representative in a representation agreement. The Project Committee did not reach a consensus on widening the exception for persons residing with spouses, and it is one of the matters on which comment from readers of this consultation paper is invited.

Project Committee Tentative Recommendations

There should be no age restriction for admission to an assisted living facility beyond the requirement that a resident be an adult (i.e., a person 19 or more years of age). Assisted living legislation should only regulate facilities that are owned and operated by someone other than the residents themselves. It should not apply to housing that resembles assisted living but in which residents own their units. A possible exception might be housing in which residents hold life leases or life estate titles to their individual units.

Questions for Response

1. Assisted living legislation should continue using the current definitions of services and the current limitations on the number of services an assisted living facility can provide.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

2. Assisted living legislation should adopt a more flexible system allowing operators and residents to negotiate what services will be provided from time to time.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

3. Assisted living legislation should maintain the current system of describing and limiting the provision of services but allow an operator to provide more than 2 prescribed services.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

4. Assisted living legislation should not contain an age restriction on admission to an assisted living facility beyond the requirement that residents be adults (i.e., persons 19 or over).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

5. Assisted living legislation should not apply to housing owned by residents themselves.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

6. Assisted living legislation should not apply to housing owned by residents themselves unless the residents own life leases, or life estate titles, in the premises.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

7. Assisted living legislation should allow a resident who does not have the mental capacity to make decisions on his or her own behalf to remain in a facility if he or she is housed in the facility with a substitute decision-maker capable of making decisions for the resident, including but not restricted to the spouse of the resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

3. HOUSING AND TENANCY

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, an assisted living arrangement is not currently governed by the *Residential Tenancy Act,* which governs rentals of living accommodation in British Columbia unless they are specifically excluded from the scope of the Act.

In 2006, the BC legislature passed the *Tenancy Statutes Amendment Act, 2006* (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 BC assisted living facilities either fall outside of the scope of residential tenancy legislation, or a grey area may exist as to whether or not residential tenancy law applies to the equivalent of assisted living.

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

Creation of an Assisted Living Tenancy: the Occupancy Agreement

Ordinary residential tenancies in BC must be formed by a written tenancy agreement. 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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that assisted living legislation should require the agreement between the operator and a resident governing a resident's occupancy of a unit to be in writing.

The written occupancy agreement could be combined with the agreement for services provided under the assisted living arrangement in a single document, although the occupancy and service agreements could also be separate documents.

The terms of the occupancy agreement should be expressly made subject to all legislative requirements (for example, regarding notices of termination).

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 rent. Should assisted living legislation provide the same? Are there reasons for or against a different approach?

Given that many assisted living residents are elderly persons living on fixed incomes, should there 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? For example, one regional health authority allows its contracted care providers to collect a security deposit from subsidized assisted living residents equivalent to half the amount that the resident pays per month (based on 70% of the resident's after-tax income), but only up to a maximum of $550.

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 believes that a security deposit in the amount of half the monthly charge for accommodation and services is reasonable in most cases.

No tentative recommendation is made regarding a maximum dollar amount for a security deposit, although comment is invited from readers on this.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that assisted living legislation should allow the operator-landlord to require a security deposit equal to one-half of one month's rent.

QUESTIONS FOR RESPONSE

8. Assisted living legislation should have the same provisions on security deposits as the BC *Residential Tenancy Act*, namely that the landlord can require one-half of one month's total charge for accommodation and services as a security deposit.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

9. A maximum dollar amount should be fixed by legislation or regulation for security deposits, regardless of the level of the monthly charge paid to the operator for accommodation and services.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

10. Assisted living legislation should not contain a provision addressing security deposits, so that assisted living operators and prospective residents would be able to agree as they see fit regarding security deposits.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Right of Undisturbed Use and Safety

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 sug-

gest, 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 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 Project Committee noted that the concept of "quiet enjoyment" is more complicated in assisted living, since assisted living involves the delivery of some services to the resident and the need to maintain a 24-hour emergency response system. The operator requires a right of entry to the assisted living facility to provide the required services. Assisted living is also semi-communal, involving use of common spaces as well as individual dwelling units. Legal issues can also arise in connection with the use of common spaces within an assisted living facility.

How should the operator's responsibility for the resident's health and safety be balanced against the resident's right to undisturbed use and privacy? In particular, does the landlord-operator need a wider right to enter a resident's unit than a landlord has under a standard residential tenancy?

Further discussion of this issue and tentative recommendations dealing with it are found later in the chapter on Privacy in Assisted Living.

Control of Rent and Service Charges

Introduction

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 HST 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.

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.

RENT CONTROL

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 to tenants 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.

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 tentative recommendations on rent control relate only to the private-pay sector.

Comparison of approaches to rent control

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

1. the scheme under the BC *Residential Tenancy Act*, which Bill 27 would have extended to rents paid in assisted living; and

2. the scheme adopted in the Ontario *Residential Tenancies Act, 2006*;

3. no rent controls on assisted living facilities.

Notice of rent increases and notice requirements

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

Frequency of rent increases

In both Ontario and BC, a landlord may increase rent only once every 12 months, subject to some exceptions described below.

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. In BC, landlords may increase the rent in accordance with guidelines based on the rate of general inflation measured by the Consumer Price Index plus 2%. 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:

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

Non-standard rent increases

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

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.

In British Columbia, the landlord may apply to the Residential Tenancy Branch for an increase above the guidelines 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.

As can be seen, the scope for non-standard rent increases is greater in British Columbia than under the Ontario legislation.

Rent reductions

In BC, the only requirement for a landlord to reduce the rent arises when the landlord terminates or restricts a service or facility. 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.

Discussion

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.

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 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 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 as a whole believes that rent control provisions similar to those applicable to standard residential tenancies under the BC *Residential Tenancy Act* should extend to private-pay assisted living units and residents.

A majority of the Project Committee believes that an operator should be able to apply for a rent increase above the guideline level based on any grounds that the decision-maker finds are sufficient to justify the non-standard increase, rather than only the closed list of grounds now provided under the *Residential Tenancy Act*. This is chiefly to take account of expenditures surrounding the provision of services that ordinary landlords do not have to incur and regulatory requirements they do not need 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 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.

A minority of the Project Committee maintains there is no need to give assisted living operators greater flexibility than other landlords have in terms of the grounds on which applications for larger rent increases may be based.

Project Committee Tentative Recommendation

Assisted living legislation should adopt rent control provisions for private-pay residents and units similar to those applicable to standard residential tenancies under the BC *Residential Tenancy Act*, except that in the view of the majority of the Project Committee, an operator should be able to apply for a rent increase above the guideline level based on any grounds that the decision-maker finds are sufficient to justify the non-standard increase.

Questions for Response

11. Assisted living legislation should adopt rent control provisions similar to those that were contained in the *Tenancy Statutes Amendment Act, 2006* (Bill 27). This would mean that:

(a) rent could be increased once within a 12-month period to a level no higher than the Consumer Price Index plus 2%;

(b) the landlord could apply for a larger increase if:

(i) the rent is lower than in comparable facilities;

(ii) significant repairs or renovations have been made;

(iii) the landlord has incurred a financial loss from an extraordinary increase in operating expenses;

(iv) the landlord has incurred a financial loss relating to unforeseen high financing costs of purchasing the property; or

in any other circumstances in which the decision-maker finds that an additional rent increase is justified; and

(c) rent could be reduced if the landlord terminates or restricts a service.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

12. Assisted living legislation should adopt provisions for rent control similar to those in Ontario's *Residential Tenancy Act*. This would mean that:

(a) rent could be increased once every 12 months based on the Consumer Price Index;

(b) the landlord could apply for other increases in circumstances if

(i) costs for municipal taxes, charges and other utilities have increased significantly,

(ii) major repairs or renovations have been done, or

(iii) the landlord has operating costs for security purposes performed by persons who are not employees of the landlord;

(c) rent must be reduced when

(i) 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 by a percentage fixed by regulation,

(ii) 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

(iii) the landlord reduces or terminates a service or facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

13. Assisted living legislation should not contain provisions for controls on rent increases.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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.

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;
> - 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.

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 sharply divided on whether service charges should be controlled (to the extent possible) in a manner similar to rent.

A minority of the members of the Project Committee favour expanding the scope of rent control to include service charges to private-pay residents and service charges to subsidized residents that are not covered by the client rate. Service providers would be permitted to increase service charges no more than once per year, with adequate notice.

The majority of the Project Committee believes 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.

Project Committee Tentative Recommendation

A majority of the Project Committee tentatively recommends that assisted living legislation should exclude charges for services from the scope of rent control.

Questions for Response

14. Assisted living legislation should include charges for services within the scope of "rent" for the purposes of rent control.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

15. Assisted living legislation should not include charges for services within the scope of "rent" for the purposes of rent control.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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 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 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.

Project Committee Tentative Recommendation

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

Questions for Response

16. Assisted living legislation should not have provisions on the keeping of pets.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

17. Assisted living legislation should provide that an operator cannot prohibit a resident from keeping a pet.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

18. Assisted living legislation should regulate the keeping of pets by residents by species, number, size, etc.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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 some tension between the values inherent in these provisions insofar as they relate to smoking.

The Assisted Living Registry (formerly known as the Office of the Assisted Living Registrar) 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," (Policy 4, Section 5.1.2) As an example of complying with this standard while mitigating 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* 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.

Project Committee Tentative Recommendations

The Project Committee tentatively recommends that assisted living legislation should expressly authorize, but not require, an operator to designate an indoor or outdoor smoking area meeting applicable regulatory requirements. Regulatory requirements for an outdoor smoking area should be reasonable with respect to:

(a) cost of compliance relative to the overall operating cost of the assisted living facility; and

(b) safety and comfort of the smoking and non-smoking residents.

Questions for Response

19. Assisted living legislation should not have special provisions on smoking in an assisted living facility. Instead, smoking in an assisted living facility should be left to general laws and regulations on the subject of smoking.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

21. Assisted living legislation should require operators to accommodate smokers by designating indoor smoking areas.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

22. Assisted living legislation should expressly require an operator to provide an indoor or outdoor smoking area, provided that regulatory requirements for an outdoor smoking area are reasonable with respect to:

(a) the cost of compliance relative to the overall operating cost of the assisted living facility; and

(b) the safety and comfort of the smoking and non-smoking residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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.

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 jeopardize the health and safety of other residents. Research nevertheless indicates that the rate of prescription drug addiction among older persons is significant and, after alcohol addiction, represents the most common form of substance abuse among British Columbia's older adults.

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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that proposed assisted living legislation should not contain provisions regulating alcohol and non-medicinal drug use by residents. As a consequence, non-medicinal drug and alcohol issues would be left to existing federal and provincial legislation, and the policies of individual assisted living facilities.

QUESTIONS FOR RESPONSE

23. Assisted living legislation should not contain provisions regulating alcohol and non-medicinal drug use by residents, so that drug and alcohol issues would be left to existing federal and provincial legislation, and the policies of individual assisted living facilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

24. Assisted living legislation should address non-medicinal drug and alcohol use by residents only in relation to illegal use (i.e., a provision stipulating that persons engaging in illegal drug and alcohol use are not permitted to reside within an assisted living facility).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

25. The non-medicinal use of drugs (other than tobacco and alcohol) should be regulated within assisted living only insofar as it affects the quiet enjoyment of the premises and the health and safety of other residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Inspections

The BC *Residential Tenancy Act* provides that the landlord is entitled to carry out inspections at the beginning and completion of a tenancy. 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. The landlord may also inspect the rented premises at other times if the tenant consents. Should the operator of an assisted living facility have similar or additional rights to enter the living unit of a resident to inspect it? 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. This includes maintaining safety and security in the facility; and

- the resident's right to substantial privacy and independence.

In practice, the staff of an assisted living facility can often observe issues of health, safety and security while providing services to the resident in the living unit. The Project Committee concluded that an operator's powers of inspection with respect to an assisted living dwelling unit should be similar to those of a landlord under the BC *Residential Tenancy Act.*

Project Committee Tentative Recommendation

The Project Committee tentatively recommends that assisted living legislation should adopt the provisions in the *Residential Tenancy Act* with respect to inspections (i.e., on beginning and end of tenancy inspections and inspections during a tenancy).

Questions for Response

26. Assisted living legislation should entitle the operator to inspect a resident's living unit on the same basis as a landlord is entitled to inspect the rented premises under the BC *Residential Tenancy Act* (i.e., at the beginning and end of the tenancy, at a frequency of not more than once per month during the tenancy on 24 hours' written notice to the resident, specifying the reason for the inspection, and otherwise by consent of the resident).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

27. Assisted living legislation should not have a provision governing inspections (meaning inspections would be left purely as a matter of contract between an assisted living operator and resident).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

28. Assisted living legislation should include a provision for annual inspections, or more often as agreed between the resident and assisted living operator (e.g., every six months).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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 usually 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.)

There is a consensus in the Project Committee that in relation to 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 the Project Committee believes more explicit provisions dealing with the termination of the resident's tenancy are called for in the governing legislation.

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 require 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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATIONS

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

Categories	**RTA - Notice Provisions**	**Assisted Living – Tentatively Recommended Notice provisions**
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: (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

Categories	RTA - Notice Provisions	Assisted Living – Tentatively Recommended Notice provisions
		tenancy agreement.
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.)	1 month's written notice	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. 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: (a) not earlier than one month after the date the resident receives the notice; and (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.
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 in-	2 months' written notice	The operator must give the resident notice of termination effective on a date that: (a) is not earlier than four months after the date the resident receives the notice; and

Categories	RTA - Notice Provisions	Assisted Living – Tentatively Recommended Notice provisions
tends to demolish or renovate premises and has the required permits; or has agreed in good faith to sell premises on terms allowing purchaser to occupy premises		(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 tenancy agreement.
Landlord's notice – Transfer due to increased care needs (no RTA equivalent)	N/A	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: (a) a right for the resident to seek an independent assessment and reconsideration of the decision to terminate the tenancy; (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; (c) the independent assessment should be for advisory

Categories	RTA - Notice Provisions	Assisted Living – Tentatively Recommended Notice provisions
		purposes only; (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; (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; (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.
Tenant's notice—Voluntary Departure (RTA s. 45)	30 days' written notice	The resident must give the operator notice of termination effective on a date that: (a) is not earlier than one month after the date the opera-

Categories	RTA - Notice Provisions	Assisted Living – Tentatively Recommended Notice provisions
		tor 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 tenancy agreement.
Involuntary Departure Due to Death	Notice deemed to be given on the date of death	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. 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. (A minority view is that the operator should only be able to claim rent for 30 days following the date of death.)

QUESTIONS FOR RESPONSE

29. Assisted living legislation should provide that in order to terminate a tenancy of an assisted living resident for non-payment of rent there should initially be some form of process requiring the operator to speak to the resident (and, if applicable, his or her designated representative) to determine the reason for non-payment, and a time frame in which the rent must be paid. Subject to these requirements, the operator must give the resident notice to terminate the tenancy effective on a date that:

(a) is not earlier than one month after the date the resident receives the notice, and

(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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

30. Assisted living legislation should provide that in order for an operator to terminate an assisted living tenancy for behavioural issues (other than in an emergency situation) there should be an initial requirement for the operator to give the resident a written warning setting out the consequences of a repetition of, or a failure to correct, the offending conduct. If the warning is ignored and the operator gives a notice of termination of the resident's occupancy, the notice should be effective on a date that:

(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 tenancy agreement.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

31. Assisted living legislation should provide that in order for an operator to terminate a tenancy of an assisted living resident due to a change of use of the assisted living facility, the operator must give the resident notice effective on a date that:

(a) is not earlier than four months 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 tenancy agreement.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

32. Assisted living legislation should provide that in order for an operator 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, a process must be in place that includes:

(a) a right for the resident to seek an independent assessment and reconsideration of the decision to terminate the tenancy;

(b) the independent assessment of the resident's functional level of care needs should have to be conducted by an appropriately qualified health care professional, to be arranged by the resident and at the resident's expense;

(c) the independent assessment should be for advisory purposes only;

(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;

(e) if reconsideration does not lead the operator to reverse the termination of the tenancy, the operator should be entitled to terminate the 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. In that event, the notice period to terminate the tenancy should be conclusively deemed 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

33. Assisted living legislation should provide that where a resident wishes to terminate an assisted living tenancy, the resident must give the operator notice effective on a date that:

(a) is not earlier than one month after the date the operator 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 tenancy agreement.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Managing the Resident's Exit From Assisted Living

Part 3 of the *Community Care and Assisted Living Act* attempts to create a clear division between assisted living and residential care by limiting assisted living facilities to providing no more than two prescribed services. More importantly, it also prohibits assisted living facilities from housing persons who do not have the mental capacity to make decisions on their own behalf unless they live with spouses capable of making decisions for them. Currently there is no flexibility in the Act regarding these restrictions.

The clear division between assisted living and residential care that the Act attempts to create does not reflect reality. Often residents whose care needs have increased to a stage at which they can no longer be legally housed in an assisted living facility must remain where they are for some period of time until a residential care bed is available. There is no alternative except to evict them, which most people would agree is socially and politically unacceptable.

The Ombudsperson's Report *The Best of Care* confirms that there is a "grey area" populated by three overlapping classes of assisted living residents: those with care needs exceeding what an assisted living operator is authorized to provide, those who have lost their decision-making capacity and are not residing with a spouse having capacity, and those awaiting placement in residential care.

In response to this reality, 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. The Ombudsperson's Report recognizes that even though it is a reasonable response for assisted living facilities to continue housing residents waiting for residential care space, the Ministry of Health is acting outside the *Community Care and Assisted Living Act* in permitting them to do so. (See *The Best of Care*, vol. 1 at pp. 154-156, 169-70.)

The Ombudsperson comments that this situation calls for "a more flexible statutory framework" and recommends that operators be given legal authority to provide additional support to a resident during the exit process. An additional recommendation of the Ombudsperson is that the Ministry of Health should establish reasonable timeframes for completion of the exit from assisted living to a higher level of care. (See *The Best of Care*, vol. 1 at pp. 169-171.)

The Project Committee agrees with the Ombudsperson that operators must be given adequate legal authority to manage a resident's exit from assisted living. This should comprise, at a minimum, authority to provide care services additional to prescribed ones 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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that assisted living legislation be amended to allow the following pending the transfer of an individual resident out of the facility:

- providing care services to the resident in addition to the prescribed services for which the facility is registered on a temporary basis by or through the operator;

- 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.

QUESTIONS FOR RESPONSE

34. Assisted living legislation should authorize an operator to provide care services additional to the prescribed services for which the facility is registered to an individual resident who is awaiting transfer to a higher level of care.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

35. Assisted living legislation should authorize an operator to continue to house an individual resident who has ceased to have the capacity to make decisions on his or her own behalf until a transfer of the resident to appropriate accommodation can take place.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

4. CONSUMER RIGHTS

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 do not suit the taste of assisted living residents or are not what they were led to expect when they entered into a residency agreement, is this a legal issue or just unfortunate?

Under the *Community Care and Assisted Living Act* 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 (residency 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*. 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. But 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.

The two most important sets of general rules for assisted living are found in Part 2 of the Act, which addresses unfair practices. Of particular importance are the sections dealing with (1) deceptive acts or practices and (2) unconscionable acts or practices.

What the *Business Practices and Consumer Protection Act* calls a "deceptive act or practice" is based on the common law concept of misrepresentation. This concept is intended to guard against the use of untrue statements to induce a person to enter into a contract.

Misrepresentation in law is narrower than the everyday meaning of misrepresentation. Notably, it does not catch most sales talk and promotion, as these are typically statements of opinion rather than fact.

A consumer's rights are greater if the misrepresentation is fraudulent, or in other words dishonest. It can be much more difficult to obtain a remedy for a negligent or innocent misrepresentation.

Finally, non-disclosure is not misrepresentation under the common law. Only a statement of fact that is actually made is capable of being a misrepresentation.

The *Business Practices and Consumer Protection Act* expands on the common law concept of misrepresentation in several ways. First, the Act defines "representation" in a very lengthy and expansive way. It moves beyond the emphasis on statements of material facts to catch some types of statements of opinion. The Act relaxes the requirement that the misrepresentation must have induced the consumer into entering into the contract in order to serve as the basis for legal redress. It is also noteworthy that the legislation shifts the burden of proof in litigation: if a consumer alleges that a deceptive act or practice has occurred, it is up to the supplier to disprove it.

The provisions of the Act dealing with unconscionability are intended to guard against exploitation of a consumer's weaknesses to reach a one-sided contract. The Act directs courts to "consider all of the surrounding circumstances of which the supplier knew or ought to have known" in determining whether a transaction was unconscionable, including the following non-exhaustive list of factors:

- that the supplier subjected the consumer to undue pressure to enter into the consumer transaction;

- that the supplier took advantage of the consumer's inability or incapacity to reasonably protect his or her own interest because of the consumer's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

- that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

- that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

- that the terms or conditions were so harsh or adverse to the consumer as to be inequitable;

- other circumstances that may be prescribed by regulation.

As with deceptive acts or practices, the Act also goes on to shift the burden of proof from consumer to supplier where unconscionability is concerned, so that if a consumer alleges a transaction was unconscionable, the supplier has to prove that no unconscionable act or practice was committed.

The *Business Practices and Consumer Protection Act* provides two 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 would be 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.

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*. 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. 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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that assisted living legislation should require operators of assisted living facilities to give prospective residents advance disclosure about the facility. The advance disclosure should include:

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

- charges for the different types of accommodation and for the alternative packages of services;
- staffing, occupational categories, and qualifications of staff;
- details of the emergency response system;
- a list and fee schedule of the additional services available from the assisted living facility on a user-pay basis;
- internal procedures for dealing with complaints, including a statement as to whether residents have any right of appeal from an initial decision;
- the name, telephone number, and email address of the operator;
- the proposed contract of tenancy and services to be entered into by the operator and the resident;
- 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
- 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.

QUESTIONS FOR RESPONSE

36. Assisted living legislation should require operators of assisted living facilities to provide information to prospective residents in an advance-disclosure package that covers the items of information listed in the tentative recommendation immediately above on disclosure to prospective residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

37. Assisted living legislation should not impose a requirement for operators of assisted living facilities to give prospective residents advance disclosure about specific matters concerning the facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

38. Assisted living legislation should require operators of assisted living facilities to provide more information to prospective residents than what is covered in the tentative recommendation immediately above. (If you agree, please specify what further information you think assisted living operators should provide to prospective residents in your response.)

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Cooling-Off Period

Should assisted living legislation provide assisted living residents with a cooling-off period during which an agreement could be rescinded?

It is common for consumer protection legislation to provide a cooling-off period for consumers who enter into a major transaction. The basic idea of a cooling-off period is to give the consumer some time for further consideration of the transaction after its completion date. This time is meant to allow the consumer to acquire more information about the transaction and to obtain independent advice. If the consumer decides against completing the transaction before the cooling-off period has run its course, the consumer may rescind the transaction by giving notice to the supplier. This means that 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.

Ontario's *Residential Tenancies Act, 2006* extends this concept to facilities that are approximate equivalents of BC assisted living facilities. Under the Ontario legislation, a resident has the right to cancel the "tenancy agreement" with the operator of the facility by written notice to the operator within 5 days after entering into the agreement. The agreement itself must contain a statement notifying the resident of this right and of the right to consult third parties about the agreement. 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. The downside of such a provision is that, from the operator's point of view, it would create a short period of some uncertainty after the agreement has been concluded, but before the cooling-off period elapses.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

A majority of the Project Committee tentatively recommends that assisted living legislation should allow assisted living residents to rescind an agreement with an operator for tenancy and services in an assisted living facility within five days after the agreement has been entered into.

QUESTION FOR RESPONSE

39. Assisted living legislation should allow assisted living residents to rescind an agreement for occupancy and services at an assisted living facility within five days after the agreement has been entered into.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

A Requirement for the Services Contract to be in Writing

Should assisted living legislation require that all services provided at an assisted living facility be described in and subject to a contract in writing?

The purpose of requiring an agreement to be in writing is to provide greater certainty to the consumer as to an agreement's terms. The general law of contracts does not require that a contract for services 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 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, at least, would typically have to be in writing anyway.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends assisted living legislation should require that all services provided to a resident at an assisted living facility be described in, and subject to, a contract in writing between the operator and the resident, which may be combined in one document with the occupancy agreement.

QUESTION FOR RESPONSE

40. Assisted living legislation should require that all services provided to a resident at an assisted living facility be described in, and subject to, a contract in writing.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Notice to Residents of Increase in Service Charges

Should operators of assisted living facilities give assisted living residents notice in writing of any 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. The passage of time creates the possibility that the information provided to the assisted living resident at the start of the relationship will become out of date. One way to ensure that residents are kept up to date is by requiring ongoing disclosure in some form.

A key aspect of the economic relationship between operators of assisted living facilities and residents is the cost of the services provided to residents. Ontario's legislation makes any increases to service charges subject to ongoing disclosure. The purpose of such an ongoing-disclosure requirement is twofold. First, it keeps assisted living residents informed about charges for services. Second, the long notice period required (90 days) potentially gives residents the opportunity to act if they are dissatisfied with an increase. 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 that would have applied aspects of this province's residential tenancy legislation to assisted living if they had been brought into force.

The only apparent disadvantage to a notice requirement of this kind is that it 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 a subsidized resident is to be notified of a cost increase that will take effect on January 1 of the next year, as is the normal practice.

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.

PROJECT COMMITTEE'S TENTATIVE RECOMMENDATION

The project committee tentatively recommends that assisted living legislation should provide that:

- if the resident is not receiving a public subsidy for rent and services at an assisted living facility, that 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;

- if the resident is receiving a public subsidy for rent and services at an assisted living facility, that 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.

QUESTION FOR RESPONSE

41. Assisted living legislation should provide that an assisted living resident must receive notice of the amount of any increase in the cost of services not less than two months before the effective date of the increase, whether or not the resident is receiving a public subsidy for rent and services.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Termination or Restriction of Services by Resident

Should assisted living legislation allow residents to stop receiving one or more services from operators of assisted living facilities on giving notice in writing?

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." 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.

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 to terminate services on 10 days' notice. 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. (Of course, the requirement of the *Community Care and Assisted Living Act* that an assisted living facility must remain able to

provide hospitality services and at least one and not more than two prescribed services in order to retain its registration is also relevant.) 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 runs the risk of seeing most residents (who will likely have less bargaining power than the operator) being saddled with unfavourable termination provisions.

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. For this purpose, the core group of services would be prescribed services for which the facility is registered and hospitality services, as those terms are defined in the *Community Care and Assisted Living Ac*t. "Optional services" would be any services provided by or through an operator of an assisted living facility to a resident that are neither prescribed services nor hospitality services.

This 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.

Project Committee's Tentative Recommendation

Assisted living legislation should allow assisted living residents to end 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 prescribed services as defined in the *Community Care and Assisted Living Ac*t.

Question for Response

42. Assisted living legislation should allow assisted living residents to end the provision of any optional services from operators of assisted living facilities on 10 days' notice in writing.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Access to External Service Providers

Should assisted living legislation prohibit operators of assisted living facilities from doing anything to prevent assisted living residents from obtaining services from external 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 in which a resident may wish or need to contract directly with another service provider. If legislation is silent on this issue, then the use of external service providers will be a matter of negotiation between the resident and the operator and will be governed by whatever agreement they reach.

One legislative approach would 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. . . ." 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. But in practice it could also entail a significant loss of control for operators over who provide services, and how they are provided.

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 to external providers (which may be in competition with the operator) for any additional services. But Ontario has 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."

Another option would be to leave this issue to negotiation between the resident and the operator. To achieve this result, the legislation need not say anything about this matter. This would give the resident and operator the maximum flexibility to structure their arrangement. But it wouldn't do anything to address the problem of une-

qual bargaining power that may result in residents being locked into disadvantageous service contracts with operators that they cannot terminate except on the operator's terms.

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that assisted living legislation should allow assisted living residents to obtain optional services (i.e., services that are not prescribed services or hospitality services) from external service providers.

QUESTION FOR RESPONSE

43. Assisted living legislation should allow assisted living residents to obtain optional services (i.e., services that are not housing, prescribed services or hospitality services) from external service providers.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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 basic 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 prescribed services, and that as a general rule, they require them. If this were not the case, they would remain in fully independent living. It is not really feasible to terminate or restrict hospitality and prescribed 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 additional services.

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.)

PROJECT COMMITTEE TENTATIVE RECOMMENDATION

The Project Committee tentatively recommends that assisted living legislation should provide:

- an operator may not restrict or terminate a service provided for in the service contract between the resident and the operator that is defined in the *Community Care and Assisted Living Act* to be:
  - a housing service,
  - a hospitality service, or
  - a prescribed service;

  and

- an optional service (a service other than a housing, hospitality, or prescribed service) may be restricted or terminated if 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, as of the effective date of the notice, reduces 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.

QUESTIONS FOR RESPONSE

44. Assisted living legislation should provide that an operator may restrict or terminate an optional service (a service other than a housing, hospitality service, or a prescribed service) on 60 days' written notice to the resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

45. Assisted living legislation should provide that an operator may not restrict or terminate a service to a resident that is covered by the resident's service contract without the agreement of the resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Management or Maintenance of Resident Property or Cash Resources

Should assisted living legislation provide rules for the protection of a resident's cash resources or property maintained or managed by the operator of an assisted living facility?

Under the *Community Care and Assisted Living Regulation*, one of the prescribed services that an operator of an assisted living facility may offer to an assisted living resident 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. The *Community Care and Assisted Living Act* caps the number of prescribed services that an assisted living facility may offer to its residents at two services. All operators of assisted living facilities in British Columbia offer the first two prescribed services from the list set out in the *Community Care and Assisted Living Regulation*, which relate to assistance with the activities of daily living and assistance with medication. In order to offer financial or property management or maintenance services to its residents, an operator would have to drop one of the first two prescribed services. It is understandable that operators are not currently making this trade-off.

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* 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, 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.

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. When it comes into force in July 2013, section 72 of the *Retirement Homes Act, 2010* will require 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, since it requires the establishment of a trust account, it implies that the operator will have the obligations of a trustee toward the resident.

This was confirmed when Ontario released its proposed regulations relating to this provision of the Act. The regulations can be summarized as follows:

- 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;

- 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.

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. 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 considers 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 considers 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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATIONS

The Project Committee tentatively recommends that assisted living facilities should be allowed to hold comfort funds in safekeeping as a convenience to residents on the following basis:

- 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);

- an operator must provide a resident receiving this service with a quarterly account relating to the resident's comfort fund;

- an operator providing this service should not be liable to pay interest to residents on their comfort funds.

The Project Committee also tentatively recommends that holding a resident's comfort fund in safekeeping on the above basis should be considered to be outside the scope of the prescribed service of "maintenance and management of the cash resources or other property of a resident."

QUESTIONS FOR RESPONSE

46. Assisted living legislation should not contain rules governing maintenance or management of resident cash resources and property by an operator of an assisted living facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

47. Assisted living legislation should allow operators of assisted living facilities to hold a resident's comfort fund in safekeeping as a convenience to the resident 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

48. Assisted living legislation should treat the safekeeping of a resident's comfort fund as being outside the scope of the prescribed service of maintenance or management of the cash resources and property of a resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

49. Assisted living legislation should not include maintenance or management of resident cash resources and property as one of the prescribed services that may be offered to a resident by an operator of an assisted living facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

50. Assisted living legislation should provide that, if the operator of an assisted living facility provides the prescribed service of maintenance or management of resident cash resources and property, then the operator (a) must hold that property in trust, (b) must deposit any resident money in a trust account, and (c) must meet requirements substantially similar to those set out in the regulations relating to section 72 of the Ontario *Retirement Homes Act, 2010* (described in the section above).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

51. Assisted living legislation should provide that, if the operator of an assisted living facility provides the prescribed service of maintenance or management of resident cash resources and property, then

(a) the cash resources or property (as the case may be) must be held for the resident's benefit and kept separate from the cash resources or property of the facility;

(b) the operator must provide to the resident and the resident's legal representative (meaning a representative under a representation agreement, a person appointed under an enduring power of attorney, or a committee (court-appointed guardian)), if any, a complete and verified statement of all cash resources and other property of the resident managed or maintained by the facility, detailing the amount and items received, together with their sources and disposition, on

(i) a quarterly basis; and

(ii) a resident's terminating his or her occupancy at the assisted living facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

5. A RESIDENTS' BILL OF RIGHTS

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.

In 2009, British Columbia added a list of rights for adults in residential care to the *Community Care and Assisted Living Act*. This list is now found in the Schedule to the Act. Lists of residents' rights are found in Ontario's *Retirement Homes Act, 2010,* in the New South Wales *Retirement Villages Act,* and in New Zealand's *Retirement Villages Act 2003*. Though the lists vary from jurisdiction to jurisdiction, common themes include labelling as a "bill," "charter" or "code" of residents' rights, and contents that 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, the British Columbia Ombudsperson published Part 1 of her report *The Best of Care: Getting It Right for Seniors in British Columbia.* While Part 1 of the report is directed to residential care, it sets out a rationale for a bill of rights that is also relevant to assisted living. The report summarizes the rationale for adopting a bill of rights as being that it 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.

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 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.

The Project Committee was divided on whether or not assisted living legislation should include a residents' bill of rights and seeks input through this consultation process.

QUESTIONS FOR RESPONSE

52. Assisted living legislation in British Columbia should contain a residents' bill of rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

53. Assisted living legislation in British Columbia should not contain a residents' bill of rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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

If there is a residents' bill of rights, should it create rights that are enforceable in law?

Examples exist of bills of rights that serve educational purposes only and expressly indicate that they do not create enforceable rights. For example, section 4 of the BC

Community Care and Assisted Living Act (relating to residential care) 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." (The Schedule relates only to persons in residential care, as mentioned earlier.) "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 BC assisted living residents could provide that "You have the right to the services and benefits provided in your occupancy agreement." 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 in the Schedule to the *Community Care and Assisted Living Act*, but would have a right to start a legal process based on a claim that the operator has breached the occupancy agreement, which is a legally enforceable contract.

While a non-enforceable bill of rights for assisted living residents would confer no real legal protection itself, it would correspond to 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 to an appropriate agency such as the Assisted Living Registrar and the Patient Care Quality Office of the regional health authority.

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 or 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 part of all occupancy agreements; 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*.

Finally, a bill of rights can also be 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.

While the Project Committee remained divided on whether or not to have a bill of rights, the majority of the members who supported the adoption of a bill of rights agreed that if one were adopted, it should be for educational purposes only, rather than creating enforceable legal rights.

QUESTIONS FOR RESPONSE

54. A residents' bill of rights should serve only an educational purpose and should not create legally enforceable rights for residents to sue or claim compensation for a breach of the rights it contains.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

55. Assisted living legislation should remain silent on whether the residents' bill of rights is enforceable in court.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

56. Assisted living legislation should encourage residents to use the least formal means to resolve disputes based on the residents' bill of rights, but should also affirm that nothing prevents a resident from making a complaint to an appropriate authority, or pursuing a claim in court, based on a breach of the residents' bill of rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

57. Assisted living legislation should provide that a residents' bill of rights is enforceable in court.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Limits on Individual Rights: Recognizing the Rights of Other Persons

Should a bill of rights also include statements about residents' responsibilities to provide balance between the respective rights and responsibilities of residents and

operators? Potential benefits of including statements of residents' responsibilities include that:

- 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.

Most of the provisions in a residents' bill of rights deal with specific rights. But it is important to bear in mind that these rights are being granted to residents living in a congregate setting. The exercise of a resident's rights could have an impact on other residents, the operator of the assisted living facility, and the operator's employees.

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.

Some residents' bills of rights from other jurisdictions include provisions that address the potential for a resident's exercise of individual rights to affect the rights of other persons. Two different legislative approaches stand out.

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 BC *Community Care and Assisted Living Act*, which is limited 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 would be 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*. 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 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.

A final option would be to avoid mentioning this subject at all in the residents' bill of rights. Ontario has taken this approach in section 52 of its *Retirement Homes Act, 2010*. This keeps the bill of rights, which is intended to be a short, accessible document, focused on the actual rights of residents.

Although the project committee remained divided on whether or not to have a bill of rights, comment is sought from readers on several options for recognition under a bill of rights of the rights of persons other than the individual resident.

QUESTIONS FOR RESPONSE

58. A residents' bill of rights should include an acknowledgment of limits placed on the scope of an individual resident's rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

59. A residents' bill of rights should include a statement of residents' responsibilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

60. A residents' bill of rights should include both an acknowledgement of limits placed on the scope of residents' rights and a statement of residents' responsibilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

61. A residents' bill of rights should include neither an acknowledgement of limits placed on the scope of residents' rights nor a statement of residents' responsibilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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* 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.

The Supreme Court of Canada has affirmed that 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. Unfortunately, the decided cases do not shed a great deal of 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 BC 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.

Although the Project Committee is divided on whether or not it is desirable for assisted living legislation to set out a residents' bill of rights, it 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 including 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.

While the Project Committee has not made a tentative recommendation to include an express provision in assisted living legislation dealing with physical and chemical restraints, comment from readers is invited on the question of whether assisted living legislation should expressly address the use of physical and chemical restraints.

QUESTIONS FOR RESPONSE

62. Assisted living legislation should not contain provisions on the use of restraints.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

63. Assisted living legislation should contain an express provision declaring that residents have a right not to be restrained.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

64. Assisted living legislation should contain an express provision declaring that residents have a right not to be restrained except in accordance with the common law duty and right of a health care provider to restrain a person under care to prevent harm to that person or a third party.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

6. PRIVACY

Introduction

A discussion of privacy in assisted living must be conducted in 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. However, there are significant differences between assisted living and fully independent living in a condominium or apartment complex:

- 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 "hospitality services" and "prescribed services" and need to enter the residents' dwelling units to do so;

- 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.

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. 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."

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." 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.

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 BC *Privacy Act*, which provides a right to sue for willful violation of one's privacy. 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.

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."

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.

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:

- 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.

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.

Confidentiality of residents' personal information is addressed to a large extent by other provincial legislation discussed below.

Project Committee Tentative Recommendations on Physical Privacy

The Project Committee tentatively recommends that assisted living legislation should include specific provisions dealing with the privacy of residents. The legislation should include provisions confirming a resident's right to privacy within the resident's individual dwelling unit, bodily privacy in relation to personal care services, and privacy in communications, to the greatest extent consistent with the operator's obligations and the rights of other residents. The provisions dealing with privacy within the resident's individual dwelling unit should resemble the terms of the British Columbia Seniors Living Association standard Resident Occupancy Agreement concerning entry of the unit by the operator and staff.

Questions for Response

65. Assisted living legislation should include specific provisions dealing with the privacy of residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

66. Assisted living legislation should address privacy with respect to the individual dwelling unit, bodily privacy in relation to provision of prescribed services (e.g., assistance with activities of daily living, medication management), and privacy in communications by regular mail or telephone and other electronic means, to the greatest extent consistent with the operator's obligation under law and regulatory policy and the rights of other residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

67. Assisted living legislation should restrict entry by an assisted-living operator into a resident's unit to entries made for the following reasons (as currently included in the British Columbia Seniors Living Association standard Resident Occupancy Agreement):

(a) regularly scheduled services;

(b) 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;

(c) 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;

(d) abandonment of the room by the resident;

(e) provision of additional services as contracted by the resident under ongoing health assessment.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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* and the *Personal Information Protection Act* 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 a specific purpose;
- 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);
- 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;

- 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.

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 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.

A majority of the Project Committee favours introducing a saving provision along these lines. A minority of the members of the Project Committee has reservations about this solution because the stricter requirements of the *Freedom of Information and Protection of Privacy Act* are seen by them as conferring a higher level of privacy protection for the resident.

Project Committee Tentative Recommendation on Privacy of Personal Information

The Project Committee tentatively recommends that assisted living legislation should affirm the right of residents to confidentiality of their personal information in accordance with applicable laws.

A majority of the Project Committee tentatively recommends that the 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 providing 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.

Questions for Response

68. Assisted living legislation should include a provision stating that personal information of an assisted living resident originally collected validly on the basis of either an express or deemed consent under the *Personal Information Protection Act*, is also deemed to have been validly collected under the *Freedom of Information and Protec-*

tion 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.**

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

7. HEALTH & SAFETY

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* 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 hospitals 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 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 10 in relation to the general regulatory approach.)

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." Sections 5 and 6 of the *Assisted Living Regulation* 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 and published in the *Assisted Living Registrant Handbook* (the *Registrant Handbook*). 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.

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.

The *Registrant Handbook* lists "outcomes" 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*. 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. The Assisted Living Registrar does not have the authority under British Columbia's "complaint-based" system to inspect facilities randomly or periodically to monitor compliance with the health and safety standards.

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:

- 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.

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

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).

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 governing health and safety in housing having characteristics similar to assisted living in BC: i.e., congregate housing with hospitality and some additional care services for adults who do not require 24-hour 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.

What Changes Are Needed or Desirable?

The Project Committee debated the question of 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 Project Committee concluded that the following additional matters should be included in health and safety standards for assisted living:

- a complaints procedure, which can form part of the general legislative or regulatory framework for assisted living and need not be limited to health and safety matters;

- 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;

- maximum temperature of flowing domestic water from a source that is accessible to a resident, i.e., 49° C.

The Project Committee also considered serious incident reporting in assisted living. One of the recommendations in the Ombudsperson's report *The Best of Care* (page 195) 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. 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 (page 195). The Ombudsperson had commented that the list of serious incidents reportable in assisted living is much smaller than the list applicable to residential care. In this case the Project Committee agreed that the list should be reviewed, but without necessarily taking the list of reportable incidents in residential care as a model.

Two items suggested by the Project Committee for addition to the list of reportable incidents were (i) incidents of aggression on the part of residents, and (ii) serious falls.

The Project Committee proposed a criterion for determining whether an incident is sufficiently "serious" and therefore one that should be reported to the Assisted Liv-

ing Registrar, namely whether the incident placed the health and safety of a resident at risk.

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 Ombudsperson in her report *The Best of Care* (page 175)? 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 operator 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 believes that fixed and specific standards should be imposed.

Project Committee Tentative Recommendations on Health and Safety Regulation

The Project Committee tentatively recommends as follows:

Health and safety standards for assisted living should cover the following in addition to those already established by the Assisted Living Registrar under Policy 4:

(a) a complaints procedure, which could form 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 water from a source that is accessible to a resident. The suggested maximum is 49° C.

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

QUESTIONS FOR RESPONSE

69. Health and safety standards for assisted living should cover the following in addition to what they now cover:

(a) a complaints procedure, which could form part of the general legislative or regulatory framework for assisted living and need not be limited to health and safety matters;

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

(b) ambient temperature by means of an outcome-based standard providing that the temperature within all common areas of an assisted living facility shall be maintained within a range that is safe and comfortable in relation to the ordinary uses of the room in question;

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

(c) maximum temperature of flowing domestic water from a source that is accessible to a resident, i.e., 49° C.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

71. The method of regulation for health and safety standards in assisted living should be one that imposes fixed, specific standards.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

8. POWERS OF THE ASSISTED LIVING REGISTRAR

Introduction

Currently the *Community Care and Assisted Living Act* empowers the Assisted Living Registrar to enter and inspect an assisted living facility only in response to a complaint. The Registrar has no power to conduct compliance audits on an ongoing basis. Most jurisdictions in Canada give the equivalent 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 so far 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.

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.

Expansion of the Registrar's Powers

Should the enforcement powers of the Assisted Living Registrar be expanded?

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 Direc-

tor of Licensing of community care facilities and to medical health officers in each of the various health authorities. The Director of Licensing can 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…" 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. 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."

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. They may also exercise other powers delegated to them by the Director of Licensing.

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.

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 prosecution.

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*.

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.

Project Committee Tentative Recommendations

The investigative powers of the Assisted Living Registrar should be expanded as follows:

(a) the Assisted Living Registrar's power to investigate a matter arising in connection with the operation of an assisted living facility should not be restricted to cases where there is a reason to believe that the health or safety of a resident is at risk; and

(b) the Assisted Living Registrar should have the power 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.

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 in preference to enforcement by fine or administrative monetary penalties.

Questions for Response

72. The Assisted Living Registrar's power to investigate a matter arising in connection with the operation of an assisted living facility should not be restricted to cases where there is a reason to believe that the health or safety of a resident is at risk.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

73. The Assisted Living Registrar should have the power to require an operator to provide information relevant to the operation of an assisted living facility by the operator, and the operator should be legally obliged to provide the information.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

74. The Assisted Living Registrar should enforce compliance with Acts, regulations, and standards established under a written policy of the Registrar by attaching a condition to a facility's registration suspending further admissions to the facility pending correction of a breach of an Act or regulation, or a deficiency in compliance with a standard.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

75. Assisted living legislation should give the Assisted Living Registrar the power to levy administrative monetary penalties for breach of an Act or regulation, or a standard established under a written policy by the Assisted Living Registrar.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

76. Assisted living legislation should make breach of a condition attached to a registration of an assisted living facility a provincial offence, punishable by fine.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

9. EMPLOYMENT

Introduction

There is an extensive scheme for the regulation of employment and labour matters in British Columbia generally. This section 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.

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.

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 framework. In June 2012 the Minister of Health announced a review of the Registry and its operation.

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, and courses for care aides offered by the various educational institutions are not fully standardized.

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.

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

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 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. 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 consensus within the Project Committee is 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.

Project Committee Tentative Recommendations

The project committee tentatively recommends that:

- training programmes and opportunities to obtain training for care aides should be expanded in under-serviced areas;
- there should be a standard province-wide certification examination for new care aides;
- a process should be established with equivalency standards under which care aides with working experience could be exempted from the province-wide certification examination;
- planning for future workforce requirements in assisted living in B.C. should be done on a region-by-region basis.

Questions for Response

77. Training programs and opportunities to obtain training for care aides should be expanded outside the Lower Mainland.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

78. There should be a standard province-wide certification examination for new care aides.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

79. There should be a process with equivalency standards under which care aides with work experience could be exempted from the province-wide certification examination if they can demonstrate their competence.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

80. Planning for future workforce requirements in assisted living in B.C. should be done on a region-by-region basis.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Occupational Health and Safety

Direct information on occupational health and safety specific to assisted living does not appear to be 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.

Should the regulatory framework for assisted living address occupational health and safety in assisted living or leave the entire area to laws and regulations of general application? For example, legislation could require:

- safety training directed specifically to the assisted living environment; and
- separate tracking of injuries and injury rates in assisted living.

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.

PROJECT COMMITTEE TENTATIVE RECOMMENDATIONS

The Project Committee tentatively recommends that:

- work-related injury rates for workers in assisted living be tracked separately from that of other workers in non-acute care settings;
- 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;
- 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.

QUESTIONS FOR RESPONSE

81. Work-related injury rates for workers in assisted living should be tracked separately from that of other workers in non-acute care settings.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

82. 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

83. 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

10. COMPLAINT PROCESS AND DISPUTE RESOLUTION

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, housekeeping, 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. The Ombudsperson gave extensive consideration to the jurisdictionally fragmented complaint process in the section on assisted living in volume I of Part 2 of her recent report *The Best of Care: Getting It Right for Seniors in British Columbia*. Frequent references to the Ombudsperson's report are interspersed through this chapter. These should not be understood as implying acceptance or endorsement by the Project Committee of each comment and recommendation of the Ombudsperson that is mentioned here. The references are included in this chapter because they describe imperfections perceived in the current system and proposals for rectifying those imperfections that the government has already received.

At the end of the chapter the Project Committee's own tentative recommendations for a comprehensive complaint and dispute resolution process for assisted living in BC can be found.

Current System for Complaint and Dispute Resolution in Assisted Living

OVERVIEW

The recent Ombudsperson's report *The Best of Care* notes at page 179 that:

> 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.

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.

The Registrar has very limited investigative powers. 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 at page 176 of the Ombudsperson's recent report *The Best of Care* indicates who has the authority to deal with different types of complaints:

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 qualifty 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 *The Best of Care* 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.

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 avenues of redress if they believe the operator's or service provider's response to their complaints is unsatisfactory.

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 internal complaint process." As noted by the Ombudsperson (in *The Best of Care*, page 177), the policy does not provide guidance on what the internal complaints process should entail.

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 (page 178). 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 (at page 178):

> 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.

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 complain about the care and services they receive, including where to take complaints about services provided by contractors.
>
> (*The Best of Care*, Part 2, page 178)

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 (at page 179):

> 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.

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 (page 179).

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.

As mentioned above, the Office of Assisted Living Registrar responds to complaints about alleged violations of health and safety standards set out in the *Registrant Handbook*, continuing to house residents who are allegedly unable to make their own decisions, and the operation of unregistered assisted living facilities. The Registrar does not have 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 appears in the Ombudsperson's report *The Best of Care* (page 180). It shows that nearly half the complaints received by the Registrar between 2004 and 2011 were outside the Registrar's jurisdiction:

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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When the Assisted Living Registry receives a complaint that is outside its jurisdiction, it will refer the complainant to another agency that may have jurisdiction. The approach of the Registrar to complaint resolution is educational and remedial. If the Registrar 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. There is no report back to the complainant regarding the outcome of a complaint except upon request. If the complainant is not satisfied with how the Assisted Living Registry handled the complaint, the complainant may approach the Ombudsperson. However, as noted by the Ombudsperson, not everyone is told about or is aware of this option (page 181).

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 that subsidizes the unit. 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.

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. Patient Care Quality Review Boards review care quality complaints that have been addressed by the Patient Care Quality Office, but not resolved.

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 (page 184).

The Ombudsperson 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 means 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.
>
> (page 185)

The Ombudsperson also noted 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 authority (or its contractor operating the facility or providing services) or the complainant. 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.
>
> (page 185)

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.
>
> (page 186)

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.

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.

(pages 186-187)

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

The rights and responsibilities of tenants and landlords in ordinary residential accommodation, as well as the process for resolving disputes between them, are governed by the *Residential Tenancy Act*. Assisted living facilities are currently excluded from the *Residential Tenancy Act*. As noted above, the Assisted Living Registry has no authority to deal with complaints about tenancy matters. The Ombudsperson's report comments: "[This] gap in protection leaves assisted living residents, who are generally more vulnerable than other tenants, with fewer options for recourse when issues arise" (page 187).

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. However, the Ombudsperson points out that this is an informal process with no legal foundation. 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.
>
> (page 188)

As mentioned earlier in Chapter 3, the *Tenancy Statutes Amendment Act, 2006* (Bill 27) would have extended the scope of the *Residential Tenancy Act*, with some modifications, to assisted living facilities. Bill 27 would have required assisted living 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. 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.
>
> (*The Best of Care*, page 192)

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 must be incorporated into the design of a comprehensive complaint process for assisted living.

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. In some jurisdictions, this is a local or regional health authority while in others, such as 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.* 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. 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.

A New Complaints Process

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. (See *The Best of Care*, Part 2, pages 191-192.)

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 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. 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, because 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 will be established under the recently passed *Civil Resolution Tribunal Act* to handle strata property disputes and civil disputes that could also be decided by the Provincial Court under the *Small Claims Act*. While the Civil Resolution Tribunal is intended to be fast and inexpensive, it will not be expert in matters dealing with assisted living. Furthermore, a possible prerequisite to a hearing by the Civil Resolution Tribunal may be participating in 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.

The Project Committee believes that the Assisted Living Registry is best placed to deal with the full spectrum of complaints arising in assisted living. 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 Regis-

trar 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. The Ombudsperson has recommended that the government consider expanding the Registrar's jurisdiction in this manner. (See *The Best of Care*, Part 2, page 192.) The Project Committee concurs.

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.

PROPOSED COMPLAINT AND DISPUTE RESOLUTION PROCESS FOR ASSISTED LIVING

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.

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.

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.

(a) 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.

(b) 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;
- the complaint be referred to the Patient Care Quality Office of the health authority concerned, if the health authority is in the best position to resolve it; 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 is 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).

A complaint appropriate for referral to a Patient Care Quality Office would obviously be one within the jurisdiction of that Office. In other words, it would be one made by a subsidized resident. It would presumably also be one which the Patient Care Quality Office and the case manager are best situated to pursue and resolve quickly. The

Patient Care Quality Office should send a report on the outcome to the Registrar so that the Registry is able to fully track all complaints received.

Fourth Stage: Regulatory Enforcement or Mediation / Adjudication

(a) 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.

(b) 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.

Fifth Stage: Appeal

The Project Committee concurs 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 either to a court or to a board. One board that might serve as the appeal tribunal is the Community Care and Assisted Living Appeal Board. Currently this Board deals with appeals from the Assisted Living Registrar only in relation to the refusal, suspension, or cancellation of a registration, or the imposition, variation or refusal to vary conditions placed on a facility's registration, but its powers could be expanded to decide appeals from the proposed complaint process.

The Project Committee does not make a specific recommendation regarding the body that should serve as the appeal tribunal and invites input from readers on this question.

ROLE OF THE BC OMBUDSPERSON

Under the complaint and dispute resolution process described here, the BC Ombudsperson would have all the powers conferred by the *Ombudsperson Act* to investigate a matter on the complaint of a party dissatisfied with the ultimate result or the process leading to it, and to recommend remedial action to the appropriate public authorities on the basis of the investigation. The Ombudsperson would not have any added role in the process beyond the one already conferred by the *Ombudsperson Act*, however. In particular, the Ombudsperson would not be able to overturn a decision of the Registrar or the appeal tribunal.

PROJECT COMMITTEE TENTATIVE RECOMMENDATIONS

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

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.

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

- direct communication with the operator;
- approaching a residents' or family council; or
- (if the resident's occupancy is publicly subsidized and the matter concerns the resident's authorized services plan) approaching the case manager.

The Assisted Living Registrar should be given the power to receive, investigate, and 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.

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.

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

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.

QUESTIONS FOR RESPONSE

84. Assisted living legislation should provide for a dispute resolution process for all types of disputes that arise between operators and residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

85. Assisted living legislation should provide for a single body with the authority to respond to all assisted living complaints.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

86. If there is a single body with the authority to respond to all assisted living complaints, that body should be the Office of the Assisted Living Registrar.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

87. Assisted living legislation should divide jurisdiction over disputes in assisted living. For example, jurisdiction could be split between the Residential Tenancy Branch for tenancy related disputes, a specialized health-related body for health-related disputes, and the Office of the Assisted Living Registrar for all other disputes.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

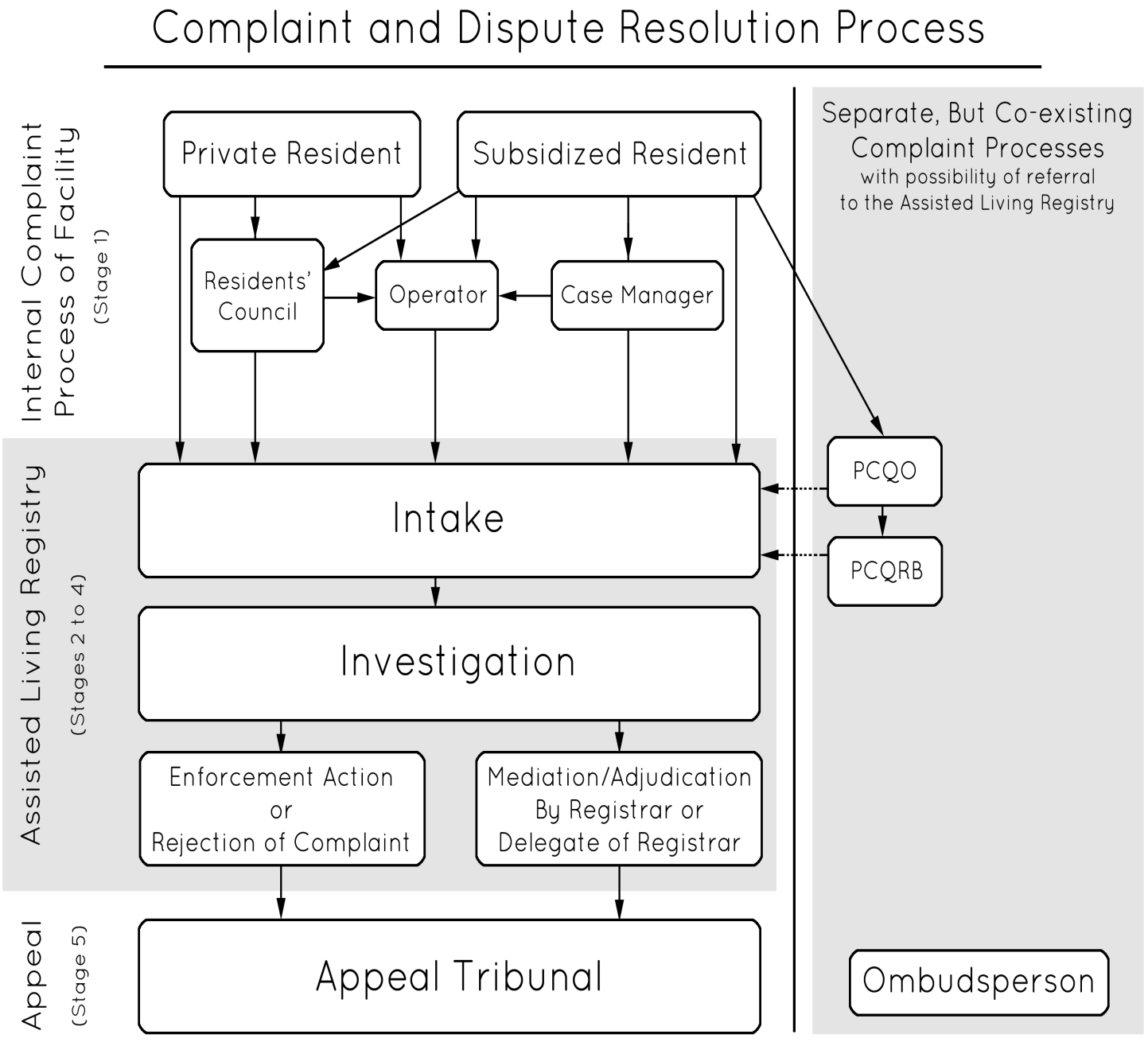
Complaint and Dispute Resolution Process
Internal Complaint Process of Facility
(Stage 1)
Private Resident
Subsidized Resident
Residents' Council
Operator
Case Manager
Assisted Living Registry
(Stages 2 to 4)
Intake
Investigation
Enforcement Action or Rejection of Complaint
Mediation/Adjudication By Registrar or Delegate of Registrar
Appeal
(Stage 5)
Appeal Tribunal
Separate, But Co-existing Complaint Processes
with possibility of referral to the Assisted Living Registry
PCQO
PCQRB
Ombudsperson

Diagram of Proposed Complaint and Dispute Resolution Process

The diagram on the opposite page represents the complaint and dispute resolution process tentatively recommended by the Project Committee. 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 One 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 they 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.

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 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.

The right side of the diagram indicates a parallel complaint process that a subsidized resident may also use involving the Patient Care Quality Office of the regional health authority and the Patient Care Quality Review Board if the complaint relates to care in an assisted living facility that is at least partly subsidized. These bodies have relatively limited powers, and the diagram indicates (by dotted lines) the possibility that they could refer a complaint by an assisted living resident about care to the Assisted Living Registry.

The Ombudsperson's Office also appears on the right side of the diagram because it can also receive complaints, but the proposed complaint and dispute resolution process would not confer any additional powers on the Ombudsperson. The Ombudsperson would not be able to reverse or alter a decision of the Registrar or the appeal tribunal.

11. General Approach to Regulation of Assisted Living

The current approach to regulation of assisted living in British Columbia is one of limited government regulation. Chapter 7 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.

What approach is appropriate for the future?

Alternative models of regulation can include:

- limited regulation similar to the present scheme;
- comprehensive regulation with a level of standardization similar to the regulation of residential care facilities, but geared to an environment of semi-independent living;
- various forms of self-regulation ranging from voluntary codes of conduct to mandatory membership in an industry-created governing body or agency.

Comparison with Other Jurisdictions

In British Columbia, the Assisted Living Registrar is currently given authority with respect to health and safety of residents, but is not empowered to deal with other important aspects of assisted living, such as tenancy, management and service quality.

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* and Alberta's *Social Care Facilities Licensing Act.* Both of these Acts are much more comprehensive than British Columbia's assisted living legislation, although the hous-

ing arrangements they govern are intended 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 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.

- New Zealand employs direct legislation to regulate its retirement villages.

- In England, "extra care housing" and "very sheltered housing" are regulated broadly under the *Care Standards Act, 2000*. 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.

Discussion

An underlying principle of assisted living is that it is a living arrangement designed to provide some needed assistance in daily living to residents while still characterized by as much resident independence and individual responsibility as possible. With that objective in mind, one might conclude that regulation of assisted living should be kept to a minimum, apart from having to meet basic health and safety standards required as a matter of general public policy in the housing and health care sectors.

Several advantages are often ascribed to self-regulation schemes. Self-regulation is said to be more flexible than state regulation, so that rules can quickly be changed to respond to changed circumstances, needs, and evolving concepts of appropriate standards. Self-regulation schemes can have fewer regulatory burdens attached as compared to governmental regulatory schemes. As self-regulation is done by industry leaders, there is more experience and expertise in the regulators than in government agencies who may lack comparable experience and expertise. 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 could over-regulate assisted living facilities to the detriment of assisted living residents seeking an alternative that should allow for significant resident 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.

There was general agreement within the Project Committee that its tentative recommendation would not be in favour of pure self-regulation without any governmental oversight. In earlier chapters, recommendations are made to broaden the authority of the Registrar in some areas.

The Project Committee did not reach a consensus on a particular model of regulation that would be optimal for the future. Readers' opinions are sought on this question.

Questions for Response

88. Assisted living in British Columbia should take a completely new direction and be regulated by a form of voluntary self-regulation, for example by an assisted living providers' association.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

89. Assisted living in British Columbia should be self-regulated by an industry agency empowered by statute.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

90. Assisted living in British Columbia should maintain the current general regulatory system, being one of limited regulation reflecting the notion that regulation should be limited to allow as much flexibility as reasonably practical to assisted living residents and operators.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

91. Assisted living in British Columbia should be comprehensively regulated similarly to or at the same level as long-term care.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

12. CONSOLIDATED LIST OF QUESTIONS FOR RESPONSE

Nature of Assisted Living

1. Assisted living legislation should continue using the current definitions of services and the current limitations on the number of services an assisted living facility can provide.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

2. Assisted living legislation should adopt a more flexible system allowing operators and residents to negotiate what services will be provided from time to time.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

3. Assisted living legislation should maintain the current system of describing and limiting the provision of services but allow an operator to provide more than 2 prescribed services.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

4. Assisted living legislation should not contain an age restriction on admission to an assisted living facility beyond the requirement that residents be adults (i.e., persons 19 or over).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

5. Assisted living legislation should not apply to housing owned by residents themselves.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

6. Assisted living legislation should not apply to housing owned by residents themselves unless the residents own life leases, or life estate titles, in the premises.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

7. Assisted living legislation should allow a resident who does not have the mental capacity to make decisions on his or her own behalf to remain in a facility if he or she is housed in the facility with a substitute decision-maker capable of making decisions for the resident, including but not restricted to the spouse of the resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Housing and Tenancy

8. Assisted living legislation should have the same provisions on security deposits as the BC *Residential Tenancy Act*, namely that the landlord can require one-half of one month's total charge for accommodation and services as a security deposit.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

9. A maximum dollar amount should be fixed by legislation or regulation for security deposits, regardless of the level of the monthly charge paid to the operator for accommodation and services.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

10. Assisted living legislation should not contain a provision addressing security deposits, so that assisted living operators and prospective residents would be able to agree as they see fit regarding security deposits.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

11. Assisted living legislation should adopt rent control provisions similar to those that were contained in the *Tenancy Statutes Amendment Act, 2006* (Bill 27). This would mean that:

(a) rent could be increased once within a 12-month period to a level no higher than the Consumer Price Index plus 2%;

(b) the landlord could apply for a larger increase if:

(i) the rent is lower than in comparable facilities;

(ii) significant repairs or renovations have been made;

(iii) the landlord has incurred a financial loss from an extraordinary increase in operating expenses;

(iv) the landlord has incurred a financial loss relating to unforeseen high financing costs of purchasing the property; or

in any other circumstances in which the decision-maker finds that an additional rent increase is justified; and

(c) rent could be reduced if the landlord terminates or restricts a service.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

12. Assisted living legislation should adopt provisions for rent control similar to those in Ontario's *Residential Tenancy Act*. This would mean that:

(a) rent could be increased once every 12 months based on the Consumer Price Index;

(b) the landlord could apply for other increases in circumstances if

(i) costs for municipal taxes, charges and other utilities have increased significantly,

(ii) major repairs or renovations have been done, or

(iii) the landlord has operating costs for security purposes performed by persons who are not employees of the landlord;

(c) rent must be reduced when

(i) 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 by a percentage fixed by regulation,

(ii) 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

(iii) the landlord reduces or terminates a service or facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

13. Assisted living legislation should not contain provisions for controls on rent increases.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

14. Assisted living legislation should include charges for services within the scope of "rent" for the purposes of rent control.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

15. Assisted living legislation should not include charges for services within the scope of "rent" for the purposes of rent control.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

16. Assisted living legislation should not have provisions on the keeping of pets.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

17. Assisted living legislation should provide that an operator cannot prohibit a resident from keeping a pet.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

18. Assisted living legislation should regulate the keeping of pets by residents by species, number, size, etc.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

19. Assisted living legislation should not have special provisions on smoking in an assisted living facility. Instead, smoking in an assisted living facility should be left to general laws and regulations on the subject of smoking.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

21. Assisted living legislation should require operators to accommodate smokers by designating indoor smoking areas.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

22. Assisted living legislation should expressly require an operator to provide an indoor or outdoor smoking area, provided that regulatory requirements for an outdoor smoking area are reasonable with respect to:

(a) the cost of compliance relative to the overall operating cost of the assisted living facility; and

(b) the safety and comfort of the smoking and non-smoking residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

23. Assisted living legislation should not contain provisions regulating alcohol and non-medicinal drug use by residents, so that drug and alcohol issues would be left to existing federal and provincial legislation, and the policies of individual assisted living facilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

24. Assisted living legislation should address non-medicinal drug and alcohol use by residents only in relation to illegal use (i.e., a provision stipulating that persons engaging in illegal drug and alcohol use are not permitted to reside within an assisted living facility).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

25. The non-medicinal use of drugs (other than tobacco and alcohol) should be regulated within assisted living only insofar as it effects the quiet enjoyment of the premises and the health and safety of other residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

26. Assisted living legislation should entitle the operator to inspect a resident's living unit on the same basis as a landlord is entitled to inspect the rented premises under the BC *Residential Tenancy Act* (i.e., at the beginning and end of the tenancy, at a frequency of not more than once per month during the tenancy on 24 hours' written notice to the resident, specifying the reason for the inspection, and otherwise by consent of the resident).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

27. Assisted living legislation should not have a provision governing inspections (meaning inspections would be left purely as a matter of contract between an assisted living operator and resident.)

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

28. Assisted living legislation should include a provision for annual inspections, or more often as agreed between the resident and assisted living operator. (e.g., every six months).

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

29. Assisted living legislation should provide that in order to terminate a tenancy of an assisted living resident for non-payment of rent there should initially be some form of process requiring the operator to speak to the resident (and, if applicable, his or her designated representative) to determine the reason for non-payment, and a time frame in which the rent must be paid. Subject to these requirements, the operator must give the resident notice to terminate the tenancy effective on a date that:

(a) is not earlier than one month after the date the resident receives the notice, and

(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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

30. Assisted living legislation should provide that in order for an operator to terminate an assisted living tenancy for behavioural issues (other than in an emergency situation) there should be an initial requirement for the operator to give the resident a written warning setting out the consequences of a repetition of, or a failure to correct, the offending conduct. If the warning is ignored and the operator gives a notice of termination of the resident's occupancy, the notice should be effective on a date that:

(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 tenancy agreement.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

31. Assisted living legislation should provide that in order for an operator to terminate a tenancy of an assisted living resident due to a change of use of the assisted living facility, the operator must give the resident notice effective on a date that:

(a) is not earlier than four months 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 tenancy agreement.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

32. Assisted living legislation should provide that in order for an operator 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, a process must be in place that includes:

(a) a right for the resident to seek an independent assessment and reconsideration of the decision to terminate the tenancy;

(b) the independent assessment of the resident's functional level of care needs should have to be conducted by an appropriately qualified health care professional, to be arranged by the resident and at the resident's expense;

(c) the independent assessment should be for advisory purposes only;

(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;

(e) if reconsideration does not lead the operator to reverse the termination of the tenancy, the operator should be entitled to terminate the 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. In that event, the notice period to terminate the tenancy should be conclusively deemed 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

33. Assisted living legislation should provide that where a resident wishes to terminate an assisted living tenancy, the resident must give the operator notice effective on a date that:

(a) is not earlier than one month after the date the operator 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 tenancy agreement.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

34. Assisted living legislation should authorize an operator to provide care services additional to the prescribed services for which the facility is registered to an individual resident who is awaiting transfer to a higher level of care.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

35. Assisted living legislation should authorize an operator to continue to house an individual resident who has ceased to have the capacity to make decisions on his or her own behalf until a transfer of the resident to appropriate accommodation can take place.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Consumer Rights

36. Assisted living legislation should require operators of assisted living facilities to provide information to prospective residents in an advance-disclosure package that covers the items of information listed in the tentative recommendation on disclosure to prospective residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

37. Assisted living legislation should not impose a requirement for operators of assisted living facilities to give prospective residents advance disclosure about specific matters concerning the facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

38. Assisted living legislation should require operators of assisted living facilities to provide more information to prospective residents than what is covered in the tentative recommendation on disclosure to prospective residents. (If you agree, please specify what further information you think assisted living operators should provide to prospective residents in your response.)

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

39. Assisted living legislation should allow assisted living residents to rescind an agreement for occupancy and services at an assisted living facility within five days after the agreement has been entered into.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

40. Assisted living legislation should require that all services provided to a resident at an assisted living facility be described in, and subject to, a contract in writing.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

41. Assisted living legislation should provide that an assisted living resident must receive notice of the amount of any increase in the cost of services not less than two months before the effective date of the increase, whether or not the resident is receiving a public subsidy for rent and services.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

42. Assisted living legislation should allow assisted living residents to end the provision of any optional services from operators of assisted living facilities on 10 days' notice in writing.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

43. Assisted living legislation should allow assisted living residents to obtain optional services (i.e., services that are not housing, prescribed services or hospitality services) from external service providers.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

44. Assisted living legislation should provide that an operator may restrict or terminate an optional service (a service that is not a housing, hospitality service, or a prescribed service) on 60 days' written notice to the resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

45. Assisted living legislation should provide that an operator may not restrict or terminate a service to a resident that is covered by the resident's service contract without the agreement of the resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

46. Assisted living legislation should not contain rules governing maintenance or management of resident cash resources and property by an operator of an assisted living facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

47. Assisted living legislation should allow operators of assisted living facilities to hold a resident's comfort fund in safekeeping as a convenience to the resident 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

48. Assisted living legislation should treat the safekeeping of a resident's comfort fund as being outside the scope of the prescribed service of maintenance or management of the cash resources and property of a resident.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

49. Assisted living legislation should not include maintenance or management of resident cash resources and property as one of the prescribed services that may be offered to a resident by an operator of an assisted living facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

50. Assisted living legislation should provide that, if the operator of an assisted living facility provides the prescribed service of maintenance or management of resident cash resources and property, then the operator (a) must hold that property in trust, (b) must deposit any resident money in a trust account, and (c) must meet requirements substantially similar to those set out in the regulations relating to section 72 of the Ontario *Retirement Homes Act, 2010*.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

51. Assisted living legislation should provide that, if the operator of an assisted living facility provides the prescribed service of maintenance or management of resident cash resources and property, then

(a) the cash resources or property (as the case may be) must be held for the resident's benefit and kept separate from the cash resources or property of the facility;

(b) the operator must provide to the resident and the resident's legal representative (meaning a representative under a representation agreement, a person appointed under an enduring power of attorney, or a committee (court-appointed guardian)), if any, a complete and verified statement of all cash resources and other property of the resident managed or maintained by the facility, detailing the amount and items received, together with their sources and disposition, on

(i) a quarterly basis; and

(ii) a resident's terminating his or her occupancy at the assisted living facility.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

A Residents' Bill of Rights

52. Assisted living legislation in British Columbia should contain a residents' bill of rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

53. Assisted living legislation in British Columbia should not contain a residents' bill of rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

54. A residents' bill of rights should serve only an educational purpose and should not create legally enforceable rights for residents to sue or claim compensation for a breach of the rights it contains.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

55. Assisted living legislation should remain silent on whether the residents' bill of rights is enforceable in court.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

56. Assisted living legislation should encourage residents to use the least formal means to resolve disputes based on the residents' bill of rights, but should also affirm that nothing prevents a resident from making a complaint to an appropriate authority, or pursuing a claim in court, based on a breach of the residents' bill of rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

57. Assisted living legislation should provide that a residents' bill of rights is enforceable in court.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

58. A residents' bill of rights should include an acknowledgment of limits placed on the scope of an individual resident's rights.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

59. A residents' bill of rights should include a statement of residents' responsibilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

60. A residents' bill of rights should include both an acknowledgement of limits placed on the scope of residents' rights and a statement of residents' responsibilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

61. A residents' bill of rights should include neither an acknowledgement of limits placed on the scope of residents' rights nor a statement of residents' responsibilities.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

62. Assisted living legislation should not contain provisions on the use of restraints.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

63. Assisted living legislation should contain an express provision declaring that residents have a right not to be restrained.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

64. Assisted living legislation should contain an express provision declaring 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Privacy

65. Assisted living legislation should include specific provisions dealing with the privacy of residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

66. Assisted living legislation should address privacy with respect to the individual dwelling unit, bodily privacy in relation to provision of prescribed services (e.g., assistance with activities of daily living, medication management), and privacy in communications by regular mail or telephone and other electronic means, to the greatest extent consistent with the operator's obligation under law and regulatory policy and the rights of other residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

67. Assisted living legislation should restrict entry by an assisted-living operator into a resident's unit to entries made for the following reasons (as currently included in the British Columbia Seniors Living Association standard Resident Occupancy Agreement):

(a) regularly scheduled services;

(b) 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;

(c) 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;

(d) abandonment of the room by the resident;

(e) provision of additional services as contracted by the resident under ongoing health assessment.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

68. Assisted living legislation should include a provision stating that personal information of an assisted living resident originally collected validly on the basis of either an express or deemed consent under 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Health and Safety

69. Health and safety standards for assisted living should cover the following in addition to what they now cover:

(a) a complaints procedure, which could form part of the general legislative or regulatory framework for assisted living and need not be limited to health and safety matters;

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

(b) ambient temperature by means of an outcome-based standard providing that the temperature within all common areas of an assisted living facility shall be maintained within a range that is safe and comfortable in relation to the ordinary uses of the room in question;

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

(c) maximum temperature of flowing domestic water from a source that is accessible to a resident, i.e., 49° C.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

71. The method of regulation for health and safety standards in assisted living should be one that imposes fixed, specific standards.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Powers of the Assisted Living Registrar

72. The Assisted Living Registrar's power to investigate a matter arising in connection with the operation of an assisted living facility should not be restricted to cases where there is a reason to believe that the health or safety of a resident is at risk.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

73. The Assisted Living Registrar should have the power to require an operator to provide information relevant to the operation of an assisted living facility by the operator, and the operator should be legally obliged to provide the information.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

74. The Assisted Living Registrar should enforce compliance with Acts, regulations, and standards established under a written policy of the Registrar by attaching a condition to a facility's registration suspending further admissions to the facility pending correction of a breach of an Act or regulation, or a deficiency in compliance with a standard.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

75. Assisted living legislation should give the Assisted Living Registrar the power to levy administrative monetary penalties for breach of an Act or regulation, or a standard established under a written policy by the Assisted Living Registrar.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

76. Assisted living legislation should make breach of a condition attached to a registration of an assisted living facility a provincial offence, punishable by fine.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Employment

77. Training programs and opportunities to obtain training for care aides should be expanded outside the Lower Mainland.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

78. There should be a standard province-wide certification examination for new care aides.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

79. There should be a process with equivalency standards under which care aides with work experience could be exempted from the province-wide certification examination if they can demonstrate their competence.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

80. Planning for future workforce requirements in assisted living in B.C. should be done on a region-by-region basis.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

81. Work-related injury rates for workers in assisted living should be tracked separately from that of other workers in non-acute care settings.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

82. 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

83. 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.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

Complaint Process and Dispute Resolution

84. Assisted living legislation should provide for a dispute resolution process for all types of disputes that arise between operators and residents.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

85. Assisted living legislation should provide for a single body with the authority to respond to all assisted living complaints.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

86. If there is a single body with the authority to respond to all assisted living complaints, that body should be the Office of the Assisted Living Registrar.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

87. Assisted living legislation should divide jurisdiction over disputes in assisted living. For example, jurisdiction could be split between the Residential Tenancy Branch for tenancy related disputes, a specialized health-related body for health-related disputes, and the Office of the Assisted Living Registrar for all other disputes.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

General Approach to Regulation of Assisted Living

88. Assisted living in British Columbia should take a completely new direction and be regulated by a form of voluntary self-regulation, for example by an assisted living providers' association.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

89. Assisted living in British Columbia should be self-regulated by an industry agency empowered by statute.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

90. Assisted living in British Columbia should maintain the current general regulatory system, being one of limited regulation reflecting the notion that regulation should be limited to allow as much flexibility as reasonably practical to assisted living residents and operators.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

91. Assisted living in British Columbia should be comprehensively regulated similarly to or at the same level as long-term care.

1. Disagree 2. Somewhat disagree 3. Agree 4. Strongly agree

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