



ACE

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Issues Related to Accessing Residents in Long-Term Care Homes During the COVID-19 Pandemic

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*Disclaimer: Please be advised
that materials on visiting
requirements in long-term
care are frequently subject to
amendments. As a result, the
information in this article
may not be up-to-date in the
future.*

On March 13, 2020, in response to the COVID-19 pandemic, the Chief Medical Officer of Health issued a memorandum recommending that all long-term care (“LTC”) homes and other congregate care settings restrict visits to only ‘essential visitors’: persons visiting a resident who is dying or very ill. LTC homes were advised not to allow in family members and other visitors who were not deemed ‘essential’. This was subsequently upgraded to a directive, called “COVID-19

Inside this Issue

Issues Related to Accessing
Residents in Long-Term Care
Homes During the COVID-19
Pandemic..... 1

Legality of Detention in Long
-Term Care and Retirement
Homes During the COVID-19
Pandemic 6

Ontario Passes Bill that
Limits Liability of Long-Term
Care and Retirement Homes
during COVID-19... 15

Long-Term Care Home Fees:
No 2020-21 Rate Increase
..... 18

Seniors Who Have Not Filed
Taxes at Risk of Losing
Benefits 19

Ontario Government
Overhauls Home Care
Regime 20

Income Cut Off Amounts for
the Guaranteed Income
Supplement 22

Important Update for
Ontario Tenants ... 24

Directive #3 for Long-Term Care Homes under the *Long-Term Care Homes Act, 2007*.” During this time, individuals were advised to keep in touch with loved ones by phone or other technological means, which is problematic but beyond the scope of this article.

ACE received numerous calls from family members and other persons of significance to residents living in LTC homes across Ontario who were unable to see their loved ones for months. Prior to COVID-19, many of these individuals provided hours of unpaid direct care, support, stimulation and comfort to residents in LTC (herein referred to as “caregivers”). When the visitor restrictions came into effect, residents were cut off from receiving essential care that caregivers provided – care that they may not otherwise receive due to inadequate staffing levels in LTC among other factors. Additionally, for many vulnerable residents, caregivers acted as ‘whistleblowers’, identifying issues and advocating for residents’ safety and well-being in LTC. As a result, during the pandemic, many residents were without this additional support that caregivers may provide.

The Canadian Armed Forces Report (“Report”) dated May 14, 2020, highlights some of the atrocities that took place in five Ontario LTC homes during the COVID-19

pandemic.¹ The Report details residents left sitting in soiled incontinence products; “unstageable” pressure ulcers; residents not being fed or being force fed leading to audible choking (including one case where force feeding likely contributed to a resident’s death); and residents crying for help with no response.²

Although the concerns raised in the Report were startling to many, these were not new issues. The COVID-19 pandemic magnified many of the issues that were already well-known within the sector, particularly the chronic staffing shortage in LTC. While the need for more LTC beds and resident acuity have increased, staffing levels have not kept pace.³ Caregivers have ‘propped up’ the system for years, providing hours of unpaid direct care to LTC residents.

A report by the Canadian Foundation for Healthcare Improvement (2020) states that the presence of caregivers is associated with “benefits to care, experience, safety and outcomes” for residents (*e.g.* decreased anxiety, better medication compliance, maintenance of cognitive function, prevention of falls, improved accuracy and quality of information, and improved transitions) compared to when caregivers are not involved (*e.g.* increased anxiety and dissatisfaction, increased risk for medication errors and falls, inconsistent care, and

withholding of treatment in hospital).⁴ Furthermore, a report by the National Institute on Ageing (2020) notes that as a result of the visitor ban, many LTC residents “experienced severe and potentially irreversible function and cognitive declines, deteriorations in physical and mental health, severe loneliness and social isolation, worsening of responsive behaviours and increased use of psychotropic medications and physical restraints.”⁵ As well, many residents died alone without their families by their side.

Are the Visitor Restrictions Legal?

One of the most common questions ACE received during the COVID-19 pandemic has been, “are the visitor restrictions in LTC legal?” While we are not able to give a categorical 'yes' or 'no' answer, we do have significant concerns.

As discussed in our previous article, “Can I Visit Mom?”⁶ the fundamental principle of the *Long-Term Care Homes Act* (“*LTCHA*”) is that a LTC home is “primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.”⁷

The Residents’ Bill of Rights in the *LTCHA* confirms the right to “receive visitors of his or her choice . . . without interference” as

well as the right to live in a safe environment.⁸ Many LTC homes relied on the latter to justify restrictions on visitors and caregivers. Unfortunately, the *LTCHA* does not include any provisions to reconcile these competing rights.

To date, LTC visiting requirements/restrictions can be found in three separate documents: (1) the Chief Medical Officer of Health’s Directive #3 (“Directive #3”); (2) the Minister of Long-Term Care’s Directive (“Minster’s Directive”); and (3) the Ministry of Long-Term Care’s COVID-19 Visiting Policy (“Ministry’s Visiting Policy”).

1) Directive #3

The Chief Medical Officer of Health’s “COVID-19 Directive #3 for Long-Term Care Homes under the *Long-term Care Homes Act, 2007*” establishes requirements for visitors, including caregivers, to LTC homes (“Directive #3”). Directive #3 was issued under section 77.7 (1) of the *Health Protection and Promotion Act (HPPA)*.⁹ We have concerns about the legality of Directive #3 and whether or not the Chief Medical Officer of Health has authority to authorize LTC homes to restrict visitors and caregivers through a directive made under the *HPPA*, as opposed to an order.

2) Minister's Directive

The Minister of Long-Term Care's Directive entitled "COVID-19: Long-Term Care Home Surveillance Testing and Access to Homes" establishes requirements for LTC homes pertaining to testing of certain individuals, including visitors and caregivers, failing which LTC homes are advised not to permit them to enter the home ("Minister's Directive"). The Minister's Directive was issued under section 174.1 of the *LTCHA*, which gives the Minister authority to issue operational or policy directives for LTC homes where the Minister considers it to be in the public interest to do so. However, the *LTCHA* also states that where there is a conflict between a directive issued under this section and another requirement under the *LTCHA*, the latter prevails.¹⁰

3) Ministry's Visiting Policy

The Ministry of Long-Term Care's "COVID-19 Visiting Policy" ("Ministry Visiting Policy") is intended to supplement Directive #3 and the Minister's Directive and provide *support* to LTC homes in implementing Directive #3 and the Minister's Directive. We are not aware of what legal authority is being relied on for the issuance and enforcement of the Ministry's Visiting Policy.

Additionally, some LTC homes have begun unilaterally implementing their own visiting

policies that are stricter than what is permitted by the directives and visitor policies. Again, we are not aware what legal authority LTC homes are relying on to issue and enforce these policies.

Other Legal Concerns

Denying LTC residents access to visitors, including caregivers, may be a violation of sections 7 (life, liberty and security of person) and 15 (equality before and under law and equal protection and benefit of law) of the *Canadian Charter of Rights and Freedoms*. It may also constitute discrimination on the basis of family status, and the failure to accommodate, pursuant to sections 1 and 11 of the Ontario *Human Rights Code*. Additionally, barring caregivers may impede the legal responsibilities of substitute decision-makers ("SDMs"), persons authorized to give or refuse consent to treatment on behalf of a person who has been deemed incapable of making the decision.¹¹ These issues are currently the subject of litigation.

Conclusion

While many caregivers have finally been allowed into LTC homes after being unable to see their loved ones for months, they are still facing strict visitor requirements and, in some cases resistance by LTC homes, to be able to see their loved ones in LTC.

Additionally, the government has begun tightening restrictions on caregivers once again in LTC homes as a result of the second wave of COVID-19. Attention and thoughtful consideration needs to be put into determining how residents can safely interact with loved ones during the pandemic, one that respects the totality of residents' rights. One thing is certain: caregivers play an important role in Ontario's LTC system, one that cannot be understated.



¹ C JJ Mialkowski, Brigadier General, Commander, "OP Laser – JTFC Observations in Long Term Care Facilities in Ontario", Letter, (14 May 2020).

² *Ibid.*

³ Ontario Long-Term Care Staffing Study Advisory Group, *Long-Term Case Staffing Study*, Ministry of Long-Term Care, (2020), online: <<https://files.ontario.ca/mltc-long-term-care-staffing-study-en-2020-07-31.pdf>>.

⁴ Canadian Foundation for Healthcare Improvement, "Better Together: Re-Integration of Family Caregivers as Essential Partners in Care in a Time of COVID-19" (July 2020) online: <https://www.cfhi-fcass.ca/docs/default-source/itr/tools-and-resources/bt-re-integration-of-family-caregivers-as-essential-partners-covid-19-e.pdf?sfvrsn=5b3d8f3d_2>.

⁵ National Institute on Ageing, "Finding the Right Balance: An Evidence-Informed Guidance Document to Support the Re-Opening of Canadian Long-Term Care Homes to Family Caregivers and Visitors during the COVID-19 Pandemic" (July 2020) online: <<https://static1.squarespace.com/static/5c2fa7b03917eed9b5a436d8/t/5f0f2678f205304ab1e695be/1594828410565/27NIA+LTC+Visitor+Guidance+Document.pdf>>.

⁶ Jane Meadus, ACE Newsletter, Vol. 13, No. 1, Spring/Summer 2016 at p. 9.

⁷ *LTCHA*, S.O. 2007, c. 8, s. 1 (*LTCHA*).

⁸ *LTCHA*, s. 3 (1).

⁹ *HPPA*, R.S.O. 1990, c. H.7, s. 77.7(1).

¹⁰ *LTCHA*, s. 174.1.

¹¹ *HCCA*, 1996, S.O. 1996, c. 2, Sched. A, s. 9; *LTCHA*, s. 6(5).

Legality of Detention in Long-Term Care and Retirement Homes During the COVID-19 Pandemic

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Introduction

On March 22, 2020, long-term care homes (LTCHs) and retirement homes (RHs) in Ontario were essentially “locked down”, with residents being denied the ability to leave the premises. The stated purpose was to protect residents of these institutions from the ravages of the COVID-19 pandemic by restricting them from entering the community at large. This meant that approximately 72,000 LTCH residents and 60,000 RH tenants were detained in their homes, with countless group home residents and others living in congregate care settings facing the same restrictions.

It is clear that that COVID-19 has impacted residents of LTCHs more than any other sector of our community. As of November 18, 2020, out of the 3,152 deaths in Ontario that have been attributed to COVID-19, 2,174 were residents of LTCHs¹ and 277 of RHs.² As the second wave hits Ontario, it is clear that LTCH and RH residents continue to bear the brunt of the pandemic.



While it is understood that drastic measures must be taken to reduce the risk of COVID-19 to residents across Ontario, especially those living in congregate care settings, this does not give the government *carte blanche* authority to restrict the liberty of Ontario's citizens. Any restrictions must be carefully drafted and made in accordance with the rule of law.

We have had many calls from residents and their family members who believe that the resident is being illegally detained. Many of these detentions by LTCH and RH operators have been petty and capricious and, in ACE's opinion, unlawful. In fact, residents have had police called on them when they attempted to leave, despite there being no legal detention order for the police to enforce.

It is our position that detention of both LTCH and RH residents (as well as others in congregate settings) in its present configuration is not in accordance with the rule of law, and therefore illegal throughout the province of Ontario.

Long-Term Care Homes vs. Retirement Homes

Long-term care homes are health care facilities governed by the *Long-Term Care Homes Act (LTCHA)* and its regulations. The Ministry of Long-Term Care, which was created in June 2019, has authority to license and inspect LTCHs. All aspects of long-term care, including eligibility, admission, care, reporting and fees are governed by this legislation and overseen by the Ministry.

Retirement homes, on the other hand, are tenancies under the *Residential Tenancies Act (RTA)* and are not part of Ontario's healthcare system. Under the *RTA*, RHs are classified as "care homes", which are rental units that provide care services for a fee. Care home tenants have the same rights as other tenants under the *RTA*. Under the *Retirement Homes Act (RHA)*, RHs must also be licensed by the Retirement Home Regulatory Authority (RHRA), which has oversight over RHs, including licensing and inspection requirements.

Rules Purporting to Detain Residents

Directive #3

On March 22, 2020, the Chief Medical Officer of Health (CMOH) issued Directive #3 pursuant to his authority under section 77.7 of the *Health Protection and Promotion Act (HPPA)*. Under this section, the CMOH is

authorized to issue directives to health care providers or entities with respect to precautions and procedures where there is an outbreak of an infectious or communicable disease. The CMOH's authority is limited to directing the health care provider or entity, which must comply. As of November 18, 2020, the CMOH has issued five directives pursuant to this authority.³

Both LTCHs and RHs are entities subject to Directive #3. While RHs are not health care facilities, and would not normally be subject to such directives, a regulation was passed that required them to follow the same directives, guidance, advice or recommendations regarding COVID-19 as LTCHs had to follow.⁴

The first iteration of Directive #3 stated as follows:

*Residents of long-term care homes should not be permitted to leave the home for short-stay absences to visit family and friends. Instead, residents who wish to go outside the home should remain on the home's property and maintain safe social distancing from any family and friends who visit them.*⁵

Based upon this Directive, residents of LTCHs and RHs were prevented from leaving the premises, except for medical care. However, even in cases of medical appointments,

homes sometimes prevented residents from leaving, and when they did, residents were often put into a 14-day quarantine upon their return, despite this not being required.

On June 10, 2020, a revised version of Directive #3 was released that allowed RH residents to have short absences starting June 17, 2020 in accordance with the new policy.⁶ However, despite this change, many RHs refused to allow tenants to leave.

LTCH residents continued to be detained. It was not until August 28, 2020, that Directive #3 was amended to allow residents to leave the property for short absences, as follows:

Short stay absences:

Residents may leave the home's property for a short stay absence for health care-related, social, or other reasons. A short stay absence does not include an overnight stay, with the exception of single-night emergency room visits (see below). Upon return to the home, residents must be actively screened (refer to Active Screening of All Residents above) but are not required to be tested or self-isolate.

Residents must be provided with a medical mask to be worn at all times when outside of the home (if tolerated) and reminded about the importance of public health measures including physical distancing.

- *Outpatient medical visits are considered a short stay absence and residents do not require testing or self-isolation upon their return.*
- *Emergency room visits that take place over a single night (e.g. assessment and discharge from the emergency department spans one overnight period) should also be considered equivalent to an outpatient medical visit that does not require testing or self-isolation upon return. If the resident is admitted to the hospital at any point, or the emergency room visit takes place over two or more nights, homes should follow the steps outlined above under Re-Admissions.*

Temporary overnight absences of not more than 14 days were also allowed. The home was required to approve this type of absence, and the resident was to be isolated for 14 days on return. If the home denied the request, the home had to respond in writing to the requestor (resident or their substitute decision-maker) with the rationale for their refusal.

Unfortunately, that freedom was short-lived. On October 5, 2020, the CMOH amended Directive #3 and rescinded the freedom of residents in LTCHs to leave for short-absences without interference:

Absences

All non-medical absences need to be approved by the home. In the event of an outbreak in the home, all non-essential absences should be discontinued.

The resident or substitute decision maker must make an absence request to the home. Homes must review and approve all non-medical absence requests based on a case by case risk assessment considering, but not limited to, the following:

- *The home's ability to support self-isolation for 14 days upon the resident's return.*
- *Local disease transmission and activity.*
- *The risk associated with the planned activities that will be undertaken by the resident while out of the home.*
- *The resident's ability to comply with local and provincial policies/bylaws.*
- *Any further direction provided by the Ministry of Long-Term Care (MLTC).*

For homes located in public health unit jurisdictions where there is evidence of widespread community transmission as per provincial direction, absences are not permitted except for medical or compassionate reasons.

Types of Absences:

Short Term:

- *Defined as leaving the home's property for social or other reasons that does not include an overnight stay.*
- *A request must be submitted and approved by the home.*
- *Upon return to the home, residents must be actively screened (refer to Active Screening of All Residents above) but are not required to be tested or self-isolate.*
- *Residents must be provided with a medical mask to be worn when outside of the home (if tolerated) and reminded about the importance of public health measures including physical distancing and hand hygiene.⁷*

As of November 18, 2020, the October 5, 2020 version of Directive #3 is still in effect.

Ministry of Long-Term Care FAQs

On November 16, 2020, the Ministry of Long-Term Care issued a new "Frequently Asked Questions – Resident Absences from Long-Term Care Homes" document. In that document, the Ministry stated that as of that day "resident absences from long-term care homes are not permitted in local public health units in the Orange-Restrict, Red-Control or Lockdown levels. There is an exception for medical or compassionate reasons".⁸

The FAQ document also states that where LTCHs wish to impose additional requirements above and beyond those provided in the Directive, they should seek their own advice.

Medical Officers of Health

At a press conference held on November 16, 2020, Merrilee Fullerton, Minister of Long-Term Care, stated that local Medical Officers of Health could also choose to add more COVID-19-related restrictions on LTCHs. As of November 18, 2020, no such orders have been made so it is unclear pursuant to what authority they would attempt to make such restrictions.

Discussion

Under Canadian law, a person cannot be detained against their will without legal authority. This authority is given either by the government through legislation, or through the common law (judge-made law). While both the *LTCHA* and *RHA* refer to a “common law duty to of a caregiver to restrain or confine a person where immediate action is necessary to prevent serious bodily harm to the person or others”, that is not relevant to the mass detention during the pandemic and will not be discussed.⁹

Where legislation permits detention, the legislation has to specifically authorize the

detention and it must comply with the *Charter of Rights and Freedoms*. It must also not contravene the *Ontario Human Rights Code*. The authority presently being utilized to detain residents of LTCHs, RHs and other congregate care settings, does not meet these criteria.

Legality of Directive #3

As indicated above, residents of LTCHs and RHs are presently being detained through the purported authority of Directive #3, pursuant to section 77.7 of the *HPPA*. However, this section does not give such authority to the CMOH.

Section 77.7(1) states that where the CMOH “is of the opinion that there exists or there may exist an immediate risk to the health of persons anywhere in Ontario, he or she may issue a directive to any health care provider or health care entity respecting precautions and procedures to be followed to protect the health of persons anywhere in Ontario”. Nowhere in this section does it give the CMOH any authority to require a member of the public, such as a resident, to do or refrain from doing anything, nor does it give the CMOH any authority to detain or restrain anyone.

Directive #3 is in direct contravention of the *LTCHA*. Resident Right #13 states that “every resident has the right not to be restrained, except in the circumstances provided for

under this Act and subject to the requirements provided for under this Act”.¹⁰ Nothing in *HPPA* section 77.7 authorizes the CMOH to override the rights of residents guaranteed by the *LTCHA*. Nor does it authorize him to override the rights of tenants, nor Resident Right #6 under the *RHA* which guarantees the resident the right not to be restrained except in accordance with the common law.¹¹

Directive #3 violates the following provisions enshrined in the *Charter of Rights and Freedoms*.

- Section 2(d), which guarantees freedom of association;
- Section 7, which states that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;
- Section 9, which provides the right not to be arbitrarily detained or imprisoned;
- Section 10, which provides the right upon detention to be informed promptly of the reasons for the detention; to retain and instruct counsel without delay and to be informed of that right; and to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful;

- Section 12, which provides the right not to be subjected to any cruel and unusual treatment or punishment; and
- Section 15(1), which states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . age or mental or physical disability.

The detention ordered by the CMOH targets people who have a mental and/or physical disability, as well as those who are elderly. It is not an order under law, nor does it meet the requirements of section 10 of the *Charter*.

Further, the Directive purports to authorize the licensee of a LTCH or owner of a RH to make their own decisions about detention, enabling them to ‘decide’ when a person should be detained over and above what is ‘allowed’ in the Directive. Detention authority cannot be delegated, it can only be authorized by the person who has been given the legal authority and in accordance with the law. Neither is the case here.

Reference to homes being able to seek a legal opinion if they want to override the Directive is also problematic. Homes consistently indicate that they are ‘allowed’ to make their own rules, including with

respect to detention, as long as they have talked to a lawyer. Lawyers cannot 'authorize' homes to act on their own outside of the Directive. Like anyone, the homes are simply being advised to seek legal advice regarding the Directive and its application, and if they have issues, they can challenge the Directive through normal legal channels.

Finally, even if the CMOH had the authority to use Directive #3 to detain LTCH and RH residents, which he does not, the Directive is overly broad. As situations of those in congregate care across Ontario differ, both in the individual's situation, as well as the situation in the region in which they live, simply authorizing the detention of all 132,000 residents is outside the scope of this section.

Section 22 Orders

In order to detain or restrain a person, **specific** authority must be given in legislation. In the case of the CMOH or local Medical Officers of Health (MOH) this authority lies in section 22 of the *HPPA*. That section states that the CMOH or MOH may make an order as follows:

Order by M.O.H. re communicable disease

22 (1) A medical officer of health, in the circumstances mentioned in subsection (2),

by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease.

Condition precedent to order

(2) A medical officer of health may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

(a) that a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease in the health unit served by the medical officer of health;

(b) that the communicable disease presents a risk to the health of persons in the health unit served by the medical officer of health; and

(c) that the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease.

...

What may be included in order

(4) An order under this section may include, but is not limited to,

...

(h) ***requiring the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection.***” (Emphasis added)

The order may be made to a specific person, or to a class of persons.¹²

Should such an order be issued, the person who is subject to the order must be notified and the order must contain sufficient information for the person to understand who the order is directed to, the terms of the order, and where to direct any inquiries.¹³ Further, the person subject to such an order has a **right of review**, meaning if they disagree with all or part of the order, they can challenge it to the Health Services Appeal and Review Board pursuant to section 44 of the *HPPA*. Under a Directive, **no such right of review exists**.

Clearly, if the CMOH or MOH believe that anyone in Ontario should be detained due to the pandemic, they should be utilizing this section. Such decisions **cannot** be ‘downloaded’ to the LTCH or RH, as the decision to detain can only be made by the CMOH or MOH as stated in the *HPPA*. This is a principle of law known as *delegate potestas non potest delegari*, meaning that no delegated powers can be further delegated.

This authority is similar to detention in a psychiatric facility under the *Mental Health Act*, where an attending physician can authorize the detention of a psychiatric patient where they meet certain criteria under that Act. The attending physician must comply with the legal criteria set out in the legislation, and the patient has a right to challenge the detention. The attending physician cannot delegate the authority to detain to another person, for example a nurse: they must authorize the detention themselves.¹⁴

Legality

At present, the government is detaining residents of LTCHs and RHs by Directive and policy, instead of using the proper legal routes. It is not affording residents of these facilities the rights that are guaranteed under the *Charter*, or even the rights under the *HPPA*, nor are they respecting the rights of the resident as set out in the *LTCHA* or the *RHA*. The choice to detain in this way is a result of bias and discrimination against those living in LTCHs and RHs on the basis of age and mental or physical disability.

Retirement Homes and Other Congregate Living

It is concerning that RHs are included in the same category as LTCHs. RHs are not health facilities and the CMOH would have no

authority over them under *HPPA* section 77.7, except for the passing of a regulation to have RHs included. Retirement homes are tenancies, and it is inappropriate for landlords to be given authority to detain their tenants.

Other congregate living such as group homes have also prevented residents from leaving. We are not aware of any authority that group homes have to do so, as there have been no orders issued under *HPPA* section 22 or any other legislation that we have been able to find. Landlords and operators of these homes have no authority in law to detain or restrain anyone, as they are

tenancies and those living there have the same rights as any other tenant.

Conclusion

While COVID-19 is negatively affecting many LTCH, RH and other congregate living residents, it does not give the government the authority to override the rights of citizens because of their age and the fact that they may have a mental or physical disability. Should the CMOH believe that such detention is required, he must do so in accordance with the appropriate sections of the *HPPA*.

¹ *How Ontario is Responding to COVID-19*, Ontario, (18 November 2020) online: <https://www.ontario.ca/page/how-ontario-is-responding-covid-19>.

² *RHRA COVID-19 Dashboard*, Retirement Home Regulatory Authority, (18 November 2020) online: <https://www.rhra.ca/en/covid19dashboard/>.

³ *Orders, Directives, Memorandums and Other Resources*, Ontario (19 November 2020) online: http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/dir_mem_res.aspx

⁴ O. Reg. 68/20.

⁵ COVID-19 Directive #3 for Long-Term Care Homes under the *Long-Term Care Homes Act, 2007* Issued under Section 77.7 of the *Health Protection and Promotion Act (HPPA)*, R.S.O. 1990, c. H.7, March 22, 2020.

⁶ *Reopening Retirement Homes*, Ontario, (10 June 2020) online: www.ontario.ca/coronavirus.

⁷ COVID-19 Directive #3 for Long-Term Care Homes under the *Long-Term Care Homes Act, 2007* Issued under Section 77.7 of the *Health Protection Promotion Act (HPPA)*, R.S.O. 1990, c. H.7, October 5, 2020 (18 November 2020) online: http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/dir_mem_res.aspx

⁸ For information about the levels, please see *COVID-19 Response Framework: Keeping Ontario Safe and Open*, (13 November 2020) online: <https://www.ontario.ca/page/covid-19-response-framework-keeping-ontario-safe-and-open>.

⁹ *LTCHA* s. 36(1), s. 71(1).

¹⁰ *LTCHA*, s. 3(1)13.

¹¹ *RTA*, s. 51(1)6.

¹² *HPPA*, s. 22(5.0.1).

¹³ *HPPA*, ss. 22(5.0.2)-(5.0.5)

¹⁴ See *Mental Health Act*, s. 20.

Ontario Passes Bill that Limits Liability of Long-Term Care and Retirement Homes during COVID-19

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Bill 218 is very concerning to the Advocacy Centre for the Elderly (ACE), as it would permit long-term care and retirement home operators to avoid civil liability for certain negligent behaviour during the COVID-19 pandemic.

On November 16, 2020, the Ontario Government passed Bill 218, *Supporting Ontario's Recovery Act, 2020* ("Bill 218"), which bars legal proceedings for COVID-19 related claims against individuals, businesses and other organizations for negligent acts or omissions that cause exposure to or transmission of COVID-19.

Bill 218 provides immunity from civil action if, at the relevant time, a person acted or made a "good faith" effort to act in accordance with public health guidance and any federal, provincial or municipal law relating to COVID-19 that applied to the person; and the act or omission of the

person does not constitute "gross negligence".¹ Bill 218 defines a "good faith effort" to include an honest effort, whether or not that effort is reasonable.² Bill 218 is retroactive to March 17, 2020, and provides that any legal claims already brought are deemed to have been dismissed without costs.³

Bill 218 is very concerning to the Advocacy Centre for the Elderly (ACE), as it permits long-term care and retirement home operators to avoid civil liability for certain negligent behaviour during the COVID-19 pandemic.

The first wave of COVID-19 was devastating to residents and staff of long-term care homes. There is currently an independent commission investigating the spread of the COVID-19 virus within long-term care homes to determine the adequacy of measures taken by the province and other parties to protect residents. Although the commission's final report is due on April 30, 2021, an interim report notes that "[s]ome common characteristics among the most impacted homes were: location in communities with high infection rates; insufficient leadership capacity; pre-existing and COVID-19 related staffing shortages; and a lack of strong infection prevention and control measures . . .".⁴ ACE strongly believes that any negligent action by long-term care and retirement home operators must be actionable to ensure future deterrence, particularly as Ontario is in the midst of a second wave of the pandemic.

Accordingly, ACE made oral and written submissions to the Standing Committee on Justice Policy on November 4, 2020, advocating that Bill 218 should not apply to long-term care and retirement homes for the following reasons:⁵

The bar is already high enough:

The ordinary standard of negligence is sufficient to protect non-negligent long-

term care and retirement home operators from civil liability for COVID-19 related claims. Anyone bringing an action for negligence against a long-term care or retirement home must discharge a burden of proof, with evidence, to a balance of probabilities that meets several distinct legal tests.

The ordinary standard of negligence is already difficult for a long-term care or retirement home resident and their family to prove, and it provides many defences that are available to a defendant. No additional good faith defence and no higher standard of care such as gross negligence is needed to protect the rights of non-negligent long-term care and retirement home operators.

Negligent home operators would be protected:

Bill 218 protects long-term care and retirement home operators whose negligent acts or omissions led to otherwise actionable COVID-19 related claims. Bill 218 protects negligent long-term care and retirement home operators whose degree of negligence does not rise to the level of gross negligence. Negligent long-term care and retirement home operators should be held accountable for injury and damages caused by their negligence, even within the ordinary legal meaning of negligence.

The meaning of “gross negligence” is vague and uncertain:

The legal interpretation of gross negligence in the long-term care and retirement home context is vague and uncertain. There are no case precedents to rely on, and it is not yet known how courts will interpret the standard of gross negligence, giving rise to additional litigation risks and uncertainty for plaintiffs seeking civil redress against negligent and/or grossly negligent long-term care and retirement home operators.

There are significant power imbalances and other barriers to access to justice:

There are already significant power imbalances between long-term care and retirement homes and their residents. These power imbalances create barriers to access to justice for vulnerable long-term care and retirement home residents that would only be exacerbated by invoking a good-faith defence and a standard of gross negligence for civil liability.

Additionally, there are significant non-financial barriers to bringing litigation by a

long-term care or retirement home resident or their family. The injured resident and their family may be suffering from pain, grief and distress from the nature of their injuries and loss. They may not wish to relive the experiences that cause their harm and injury. It can be difficult and traumatic for them to bring civil claims for damages.

Home operators are in the business of providing high-quality care:

Long-term care and retirement home operators are in the business of providing high-quality care to their residents. Good public policy demands that they should be held accountable in damages when they cause harm or injury to their residents through their acts or omissions that amount to negligence and/or gross negligence.

Unfortunately, Bill 218 was passed without exclusions for long-term care or retirement homes. The barriers to access to justice for long-term care home and retirement home tenants are significant. Bill 218 only serves to tip the balance further in favour of long-term care home and retirement home operators.

¹ Bill 218, Schedule I, s. 2(1).

² *Ibid.*, s. 2(2).

³ *Ibid.*, s. 2(3).

⁴ Ontario's Long-Term Care COVID-19 Commission, Interim Recommendations (October 23, 2020), online: http://www.ltccommission-commissionsld.ca/ir/pdf/20201023_First_Interim_Letter_English.pdf

⁵ See the full text of ACE's written submissions to the Standing Committee on Justice Policy at www.ancelaw.ca

Long-Term Care Home Fees: No 2020-2021 Rate Increase

Jane Meadus

Staff Lawyer / Institutional Advocate

On November 27, 2020, the Ministry of Long-Term Care announced that long-term care accommodation fees paid by residents would not increase for the 2020-21 rate cycle. This was a change from the initial announcement that the rate would be increased on January 1, 2021.

During this time period, the Ministry of Long-Term Care will compensate homes for the lost revenue from the applicable increases for both basic and preferred accommodations.

However, eligibility for rate reductions in basic accommodation still ended on June 30, 2020. This means that residents are required to re-apply for rate reductions using their 2019 notice of assessment, or other methods where applicable (such as ODSP recipients or those under guardianship of the Public Guardian and Trustee). These applications had to be received by the home by September 28, 2020 in order to be automatically applied back to July 1, 2020.

Where residents were not able to apply for the rate reduction by September 28, 2020, for example if their 2019 notice of

assessment was delayed due to the pandemic, residents may still apply for the rate reduction. In these cases, it will be up to the Ministry of Long-Term Care to approve the backdating to July 1 based on the reason for the delay. Rate reductions cannot be assessed back more than one year.

This does not mean that no resident fees will increase. In cases where residents have had a change of income that changes their eligibility for the rate reduction, their accommodation fee will be based upon their 2019 notice of assessment and will be applicable for July 1, based on the 2019 room rate. Examples of this could be:

- Resident turned 65 and income changed from ODSP to OAS, GIS, and GAINS.
- Resident cashed an RRSP in 2019 for a non-approved item while in the home. The RRSP becomes income; therefore, the rate reduction is based on the higher 2019 income.

Accordingly, if you had an increase in your income during 2019, your rate would increase, but would go no higher than the maximum rate for 2019.

Seniors Who Have Not Filed Taxes at Risk of Losing Benefits

Karen Steward

Staff Litigation Lawyer

The federal government estimates that 63,000 seniors risk having their Guaranteed Income Support (GIS) benefits suspended because they have not yet filed their income tax. It is important for everyone, especially seniors, to understand that failing to file their income on time tax may result in the suspension of benefits they would otherwise be entitled to receive.

The GIS is a monthly payment available to low-income Old Age Security pensioners. It is calculated based on income for the past calendar year. Seniors must file their taxes on time every year in order to avoid disruptions to GIS payments. Seniors Minister Deb Schulte states that Service Canada has sent reminders to the affected seniors, advising them to file their returns as soon as possible, or at least to provide Service Canada with their income information. Service Canada can be reached at 1-800-277-9914.

Income tax returns must usually be filed in April, but the deadline was extended this year to October 2020 due to the COVID-19 pandemic.



If you have a modest income and simple tax situation, volunteers at a free tax clinic may be able to complete your tax return for you. Virtual tax clinics are also available this year. To find out if you are eligible or to find a tax clinic in your area, check Canada Revenue Agency's free tax clinic directory: <https://www.canada.ca/en/revenue-agency/campaigns/free-tax-help.html>. The Canada Revenue Agency can be contacted by phone at 1-800-959-8281.

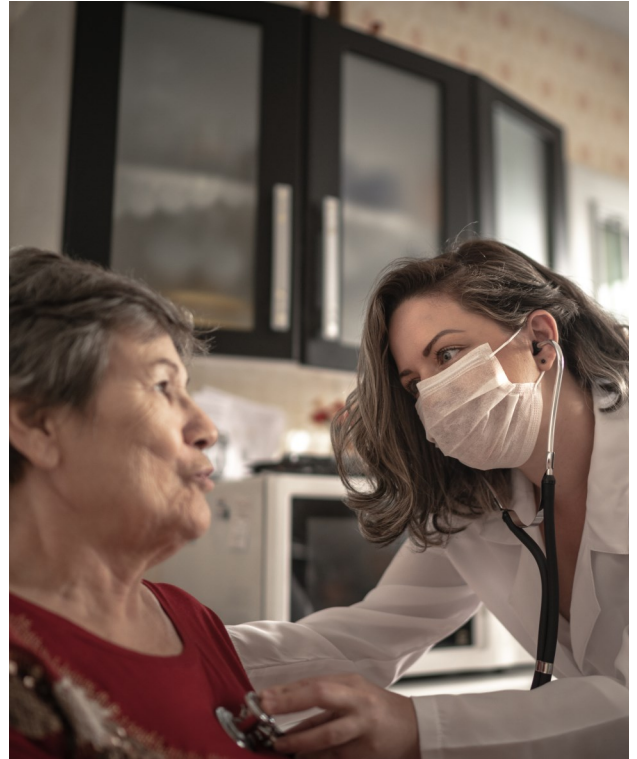
Benefit	Your Situation	Max Monthly	Max Annual
OAS	Regardless of Marital Status	\$614.14	\$128,149
GIS	If you're single, widowed or divorced pensioner	\$917.29	\$18,624 (individual income)
GIS	If your spouse receives full OAS pension	\$552.18	\$24,576 (combined income)
GIS	If your spouse does not receive full OAS pension	\$917.29	\$44,640 (combined income)
GIS	If your spouse receives the Allowance	\$522.18	\$44,640 (combined income)

Ontario Government Overhauls Home Care Regime

Karen Steward

Staff Litigation Lawyer

In June 2020, the Advocacy Centre for the Elderly (ACE) made oral and written submissions to the Standing Committee on the Legislative Assembly in respect of Bill 175, *Connecting People to Home and Community Care Act, 2020* (“Bill 175”).



“ACE expressed significant concerns about the impact these changes will have on the more than 700,000 people who rely on home care, most of whom are seniors ”

Bill 175, which has since become law in Ontario, and its related regulations will fundamentally change the home care system in Ontario. ACE expressed significant concerns about the impact these changes will have on the more than 700,000 people who rely on home care, most of whom are seniors.

Alarmingly, Bill 175 moved the Home Care Bill of Rights from statute to regulation. Unlike statutes, regulations can be changed by cabinet without full public consultation. The Bill of Rights contains substantive rights for people who use home care in Ontario, including:

- the right to be dealt with by the service provider in a courteous and respectful manner and to be free from mental, physical and financial abuse by the service provider;
- the right to give or refuse consent to the provision of any community service;
- the right to be dealt with by the service provider in a manner that respects the person’s dignity and privacy and that promotes the person’s autonomy; and
- the right to be dealt with by the service provider in a manner that recognizes the person’s individuality and that is sensitive

to and responds to the person's needs and preferences, including preferences based on ethnic, spiritual, linguistic, familial and cultural factors.

ACE believes that Ontarians receiving home care deserve to know that their rights are not subject to change or elimination without meaningful consultation, and are enshrined in statute.

Similarly, Bill 175 moved the process for complaints and appeals respecting home care from statute to regulation. Again, ACE believes this is an alarming change that risks the variation or elimination of these important provisions by successive cabinets without having to be brought before the entire legislature.

Home care is currently administered by the province's 14 Local Health Integration Networks (LHINs) (and prior to that by Community Care Access Centres, or the CCACs). The LHINs contract out for the provision of home care services with both for-profit and non-profit providers. The LHINs also provide some limited direct services, such as placement and care coordination.

Under the new regime, a multitude of groups (called Health Service Providers¹) will be responsible for care coordination. Among other things, ACE raised a significant

concern that care coordination will not be provided in a uniform and consistent manner. Furthermore, Health Service Providers lack the oversight and accountability of LHINs, which are Crown agencies governed by their own board of directors appointed by the Province. As Health Service Providers are not Crown agencies, they will not be subject to review by the Ombudsman of Ontario or the Auditor General of Ontario. Accordingly, the ability to address and correct systemic problems in home care will be limited.

Finally, Bill 175 and its proposed regulations will allow a Health Service Provider, Ontario Health Team or contracted provider, to be both a care coordinator and a service provider. ACE believes that this is a conflict of interest. The separation of these entities is fundamental to allow for proper oversight. For example, at present, if a person receiving home care wants to complain about a reduction of home care hours, a personal support worker not showing up, poor quality of service or concerns about violations to their privacy by a home care worker, the LHIN care coordinator can be contacted to discuss the issue and may also assist in resolving the problem. The present separation of care coordination from direct service provision provides a layer of oversight and accountability, which will be absent if both roles are provided by the

same source.

Bill 175 does not remedy the problems so often encountered by seniors with respect to home care, including PSW shortages, and lack of resources to provide needed home care. In addition, the lack of long-term care beds in Ontario forces many people to stay in their home with inadequate levels of care. Furthermore, hospital often pressure people to go home to wait for long-term care despite the fact that home care cannot meet their needs. Nothing in this Bill changes these ongoing and serious problems.

¹ “Health Service Provider” is a term that is defined at section 1(2) of the Connecting Care Act, 2019, S.O. 2019, c. 5, Sched. 1. It is a lengthy definition that includes a person or entity that operates a hospital within the meaning of the Public Hospitals Act or a private hospital within the meaning of the Private Hospitals Act; a licensee within the meaning of the Long-Term Care Homes Act, 2007; a not-for-profit entity that operates a community health centre, a family health team or Aboriginal health access centre; a not-for-profit entity that provides community mental health and addiction services; a person or entity that provides primary care nursing services, maternal care or inter-professional primary care programs and services; not-for-profit entity that provides palliative care services, including a hospice; a person or entity that provides physiotherapy services in a clinic setting that is not otherwise a health service provider.

Income Cut Off Amounts for the Guaranteed Income Supplement

Rita Chrolavicius

Staff Litigation Lawyer

Low income seniors who are in receipt of the Old Age Security (OAS) pension may be eligible to receive the Guaranteed Income Supplement (GIS benefit). The GIS is a monthly payment that is not considered taxable income.

To apply for the GIS benefit, you can apply online through your My Service Canada account or through a paper application.

The GIS benefit applications are for the periods commencing July 1 of each year to June 30 of the following year. The forms may be obtained by telephoning Service Canada at 1-800-277-9914, or by downloading the forms from the internet. Service Canada office hours are from 8:30 a.m. to 4:30 p.m. They are generally less busy in the early morning than in the afternoon. To download the application form from the internet, search for the form “ISP 3550” or “Application for the Guaranteed Income Supplement.”

The GIS benefit tables set out the amounts that individuals may receive, depending on their income from all sources other than OAS pension and the GIS benefit. The tables are available online at: <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/payments.html>.

The maximum retroactivity for any OAS, GIS benefit of the Canada Pension Plan benefit is the month of the application and the previous eleven months. To maximize the retroactivity, it is important to submit the application form within the current month and before the end of the month, even if the form is not fully completed or the required documentation provided. Documentation may be submitted after the application for the pension benefits has been filed.

Government pension benefits may be adjusted on a quarterly basis, to take into account the rate of inflation.

The present income cut off amounts for the last period of 2020 are as follows:

- Single Person: \$18,624.00 from non-OAS, GIS sources;
- Married or Common-Law partners: both receiving full OAS: \$24,976.00 combined income from non-OAS and GIS sources;
- Individual receives full OAS, spouse is

under 60 and receives no OAS pension: \$44,640 combined income from non-OAS and GIS sources;

- Individual receives full OAS, Spouse is between age 60 and 64 years of age: \$34,416.00 combined income from non-OAS and GIS sources;
- Surviving spouse age 60 to 64 who has not remarried or entered another common law relationship: \$25,080.00 from non-OAS and GIS sources.

In order to qualify for and avoid disruption to the GIS benefit, seniors should file their income tax returns each year. The GIS benefit is only payable to individuals who are resident in Canada. If individuals move out of Canada, the eligibility for GIS benefits ceases six months after they move out of Canada.

Service Canada may be contacted at 1-800-277-9914 if individuals have any questions about what OAS, GIS or CPP benefits they are receiving, or to request forms.



Important Update for Ontario Tenants

Clara McGregor

Staff Litigation Lawyer

The *Residential Tenancies Act, 2006* (the “RTA”) is the primary law governing the relationships between Ontario residential tenants and their landlords. This law applies to care home tenants, retirement home tenants (which are a kind of care home), and most other renters in the province. The RTA does not apply to people living in long-term care homes. Many of our clinic members and clients are tenants under this Ontario law.

Pursuant to Bill 184, the *Protecting Tenants and Strengthening Community Housing Act, 2020*, the Ontario legislature enacted significant amendments to the RTA in July 2020. Despite the name of the bill, some of these new changes in fact decrease the protections and increase housing insecurity for tenants in our province. We outline some of the key changes below.

Repayment plans and the new faster eviction process

Some Ontario tenants are unable to afford their monthly rent this year due to changes in their financial circumstances during the COVID-19 pandemic. In an effort to avoid evictions due to rent arrears, some tenants have entered into rent repayment

agreements with their landlords that set out a repayment schedule for overdue rent. Under the new section 78(1)2 of the RTA, if a tenant breaches the terms of such an agreement, their landlord can seek an eviction order from the Landlord and Tenant Board (the “LTB”) without a hearing and without providing notice to the tenant. Tenants are notified of these eviction orders by mail, and have only ten days to file a motion to set aside the order. Tenants can file a Form S2, Motion to Set Aside an Ex Parte Order, available at <https://tribunalsontario.ca/ltb/forms/#landlord-forms> or by calling the LTB at 1-888-332-3234.

Tenants who are having trouble paying rent on time and in full should seek legal advice and proceed with caution before entering into any repayment plan with their landlord, or else face a possible fast-tracked eviction.

It is important to remember that an Ontario landlord cannot lawfully evict a tenant without first following a legal eviction process (the process is different depending on the circumstances) and obtaining an eviction order from the LTB. Only then can a landlord ask the Sheriff to evict a tenant. Though eviction orders can now be obtained by landlords more quickly and easily in some cases, it is still the Sheriff, and not landlords

themselves, who has the legal authority to enforce an eviction order.

The moratorium on Ontario evictions that was in place in the spring and summer of this year has now been lifted.

Landlords can now bring former tenants to the Landlord and Tenant Board

Prior to July 2020, landlords seeking repayment from former tenants for rental arrears or other alleged debts could only do so in the Small Claims Court, which has strict rules about timelines, notifying other parties, and the service of legal documents. Since the passing of Bill 184, landlords can now bring applications to the LTB against former tenants for up to twelve months after the tenant vacates the unit. This is concerning from a tenants' rights perspective because the rules about notifying a former tenant of a proceeding are not as strict in the LTB as they are in the Small Claims Court. It is now more likely that a former tenant may not know about a proceeding commenced against them by a former landlord, potentially resulting in an order issued by the LTB in the tenant's absence and without an opportunity to respond.



Compensation for tenants when purchaser requires possession

Prior to the enactment of Bill 184, a selling landlord could serve a notice¹ to evict a tenant when a purchaser required the rental unit for their personal use² without providing any compensation to that tenant.

The new section 49.1 of the *RTA* requires a landlord to compensate a tenant who is asked to vacate for the purchaser's own use in an amount equal to one month's rent, or to offer the tenant another rental unit that is acceptable to the tenant. While current landlords who require a unit for their own use have been required to compensate tenants in the equivalent amount for several

years, compensation was not required if an incoming purchaser wanted the unit, until now. While this is a relatively modest victory for Ontario tenants, we are pleased to see that more tenants who are forced to move will be entitled to some compensation.

Rent Freeze for 2021

On October 1, 2020, the Government of Ontario passed legislation called Bill 204, *Helping Tenants and Small Businesses Act, 2020* to prohibit rent increases between

January 1, 2021, and December 31, 2021.

This means that most tenants will not have their rent increased in 2021.

If a landlord has not increased the rent of a tenant for twelve months or more, they can still do so before December 31, 2020, provided they have given the required minimum 90 days' written notice of the increase and the amount is not higher than the 2020 guideline of 2.2%. Similarly, landlords are permitted to give written notice of a rent increase in 2021 so long as the increase does not take effect until January 2022 or later. Unfortunately, this law will not impact all tenants equally. Those who typically see their rent increased later in the calendar year will likely have a shorter reprieve from lawful rent increases. For example, those who are subject to a lawful increase on December 1, 2020, may be again subject to a lawful increase on January 1, 2022, and therefore will only benefit from a one month rent freeze.

It is important to note that landlords may be granted above-guideline rent increases of up to 3% in 2021, if they can demonstrate to the LTB that they have incurred eligible capital expenditures or operating costs related to security services. Above-guideline increases for extraordinary municipal tax and fee increases (which are usually eligible under section 126 of the *RTA*) will not be

permitted in 2021. The 2022 guideline increase will not be announced until later in 2021.

More information about tenants' rights, including how to know whether or not you are a tenant under Ontario law, are available through the Steps to Justice webpage, linked here: <https://stepstojustice.ca/legal-topic/housing-law>.

Information about visitor policies and tenant rights in retirement homes during COVID-19

The Retirement Homes Regulatory Authority (the "RHRA") maintains updated information about the COVID-19 pandemic for retirement home tenants and their loved ones. The RHRA COVID-19 FAQ is available online at: <https://www.rhra.ca/en/covid-19-coronavirus-update-families-residents/covid-19-faqs-for-families-residents/>. This link includes information about COVID-19 visiting policies, updated as the rules are amended.

At ACE, we are concerned about the legality of the restrictions being placed on some tenants in Ontario retirement homes. Retirement homes are required to develop their own policies around COVID-19 safety and the development and enforcement of these policies differs from home to home. Policies must change depending on whether there are any active COVID-19 cases in the home.

If you live in a retirement home in Ontario and are concerned about new rules and restrictions arising from the COVID-19 pandemic, feel free to visit the link above by the RHRA or by phone at 1-855-275-7472, or contact our office for more information.

¹ Form N12 from the LTB, now amended,

² Defined in sections 49(1) and (2) of the RTA

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If you are not already a member of ACE, please consider joining. Benefits of membership include the ACE Newsletter (published twice a year) and voting privileges at the Annual General Meeting.

ADVOCACY CENTRE FOR THE ELDERLY: MEMBERSHIP APPLICATION

Name: _____

Address: _____ Apt: _____

City: _____ Postal Code: _____

Telephone: (Home) _____ (Business) _____

Membership Fee: Individual _____ \$ 10.00 is enclosed

In addition to my membership fee, a donation of _____ \$ _____ is enclosed**

** Holly Street Advocacy Centre for the Elderly Inc.*

*** A tax receipt will be issued for donations over \$10.00.*

Your membership is important.

If the fee presents financial difficulties, please feel free to join anyway at **no cost**.

Committee Membership:

☐ YES

I am interested in seniors' issues and would consider membership on an ACE Committee.

☐ NO

Membership Expiry Date: **Annual General Meeting, Fall 2021.**

Conflict of Interest Declaration

I confirm that neither I nor my spouse, if I have a spouse, nor the Corporation/Partnership/ Organization I represent, have an interest in a proposed or current contract, piece of litigation, client case, law reform, or any other activity or transaction of ACE that would place me in conflict with ACE. I also agree to abide by the conflict of interest guidelines in the ACE bylaw during the period of time I am a member of ACE.

Signature

ACE Bylaw - Conflict of Interest Guidelines - Summary or full text of the conflict of interest sections will be provided on request made to the

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or visit our website: www.ancelaw.ca

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