

EXECUTIVE SUMMARY

LEGAL OPINION RE: VALIDITY OF CONTINENCE CARE POLICIES AND PRACTICES IN LONG TERM CARE HOMES

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PREPARED BY: MARY CORNISH AND JO-ANNE PICKEL

Cavalluzzo Hayes Shilton McIntyre & Cornish LLP
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6
Telephone: 416-964-1115
Fax: 416-964-5895
www.cavalluzzo.com
mcornish@cavalluzzo.com;jpickel@cavalluzzo.com

"Wouldn't you want your Mother or Father clean and dry?" – CUPE Personal Support Worker, Nursing Home.

"We have diaper police....You wear your Depends until it is 75% wet....If it is not 75% wet, we are expected to take it off, wash them and put it back on. Would you ever consider doing that to a child? But we're doing it to our seniors. That is disgusting, absolutely disgusting.....The facility that I work in operates on 2.45 hours of nursing care per resident per day. This is simply not acceptable...Our government needs to realize that our seniors deserve to be given the privilege of the support, the dignity, respect and care they are so rightfully deserving of. It is time to care for those people who have taken care of others for so long, including each and ever one of you....There must be a benchmark that must be established to ensure a minimum amount of care... I implore you to amend Bill 140 to reflect the 3.5 hours of hand-on care per resident per day. " Cindy Ruddy, SEIU Health Care Worker, Presentation to the Legislative Committee Hearings concerning Bill 140.

"They actually went into the garbage and weighed all the diapers to ensure we weren't cheating and giving residents diapers before we were allowed. They are taking away the residents dignity and ours too. We aren't trained to treat people like this – just the opposite". Worker cited in Ontario Federation of Labour, October, 2005 Report, "Understaffed and Under Pressure - A Reality Check by Ontario Health Care Workers"

"These nursing homes, where our loved ones live out their final days, are going to be places where quality and dignity are enhanced. A new era of accountability is upon Long-term care." December, 2004, Toronto Star, Liberal Health Minister, George Smitherman.

Maybe it's time the labour laws and government funding officials interviewed and listen to the lower man on the pole, ones that do the physical labour and the best nursing providers. Not those that have never ever done the job in their lives." SEIU Health Care Aide, Nursing Home.

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Introduction

This opinion analyzes the legality of the continence care policies and/or practices of the homes caring for the over 75, 000 vulnerable elderly. It looks particularly at those who direct health care staff to ration incontinence products and to do change incontinence pads unless they are 75% or more soaked with urine. This opinion was prepared at the request of the Ontario Federation of Labour (OFL) and addresses the following issues:

1. Do these incontinence care policies or practices violate the new, yet to be proclaimed *Long-Term Care Homes Act, 2007*(Bill 140) or the trio of laws currently in place: *The Nursing Homes Act, Homes for the Aged and Rest Homes Act or Charitable Institutions Act*?
2. Do they violate the human rights of residents?
3. Do they violate the *Canadian Charter of Rights and Freedoms*?
4. Are there other legal remedies that could be pursued to address this situation?

In preparing this opinion, the following steps were taken to obtain a better understanding of the current continence care practices of Long Term Care (LTC) homes and retirement homes as well as the accepted professional and Government standards for the treatment of incontinence:

- a) A brief questionnaire was prepared and circulated by OFL health care sector unions in the winter of 2007 to their members working in LTC homes and retirement homes concerning the homes' incontinence care policies and practices. Three hundred and thirty-five completed questionnaires were returned by members of the Service Employees International Union, Canadian Union of Public Employees, United Steelworkers of America, United Food and Commercial Workers, International Association of Machinists and Aerospace Workers and the Ontario Nurses Association. A Compendium of Questionnaire Responses to OFL Survey re: Continence Care Policies and Practices was prepared setting out the questionnaire responses by Union, type of facility and question. A summary and analysis of these responses is set out in Section 2 of the Opinion.
- b) Expert research evidence and other documentation were reviewed and analyzed with respect to the medical and social problems caused by urinary incontinence, including causes and appropriate treatment. A summary and analysis of this research is set out in Section 3 of the Opinion.
- c) The standards contained in the Ministry of Health and Long-Term Care (MHLTC) Long Term Care Facility Program Manual pertaining to continence care and the terms in the Long-Term Care Facility Service Agreement between the MHLTC and LTC homes were reviewed as set out in Section 4 of the Opinion.

Based on this factual and expert evidence information and other research, this opinion then reviewed and analyzed the legal responsibilities with respect to incontinence care policies and practices, including the legal obligations arising from a) the homes' funding through the MHLTC; b) the new Bill 140, the *Long Term Care Homes Act, 2007* (not yet proclaimed); c) the previous trio of laws remain in place until the proclamation of Bill 140; d) the *Human Rights Code*; e) the *Canadian Charter of Rights and Freedoms*; f) collective agreements of homes with trade unions; and g) professional standards regulations under the *Regulation Health Professions Act*. Before any

legal action is considered with respect to a particular home, it would be necessary to verify the particular policy or practice in place in that home.

Executive Summary – Continence Care Policies and 75% Rule Violate Legal Obligations

a. Legal Opinion

It is our opinion that the policies and practices in many LTC homes outlined in this opinion which include rationing the amount of incontinent care products without regards to the needs of residents and requiring residents to sit, walk or lay in pads until they are 75% or more full of urine are unlawful. Such practices compromise the health, dignity and self-esteem of Ontario's vulnerable elderly and therefore:

- a. Violates the new *Long Term Care Homes Act, 2007* and the current trio of laws still in place until Bill 140 is proclaimed.
- b. Violates the contractual obligations of homes under the Service Agreement with the MHLTC;
- c. Violates the Bills of Rights of Residents;
- d. Violates the rights of residents under the *Human Rights Code*;
- e. Is subject to an arguable challenge under the *Canadian Charter of Rights and Freedoms*;
- f. May constitute an unreasonable work rule contrary to the collective agreement rights of the home's workers and their bargaining agents; and
- g. Subjects nursing management to potential professional discipline under the *Regulated Health Professions Act*.

Challenging these policies and practices as recommended in this opinion would further the rights of elderly residents to proper, sufficient and dignified care and the rights of health care workers to receive support and proper working conditions for providing such quality care.

b. Factual and Expert Evidence

The Questionnaire responses set out in the above-noted Compendium reveal that a significant number of LTC homes are directing staff to follow continence care procedures which fall well below the above-noted standards and obligations which are reviewed in Sections 3 to 8 of the opinion. Sections 1 and 2 ("Caring for Residents Disadvantaged by Age, Disability and Gender" and "Results of Winter, 2007 OFL Survey of Health Care Workers") of the Opinion are set out at the end of this summary for reference. These policies and practices appear to arise as a result of the limited \$1.20 per resident/per day MHLTC funding of incontinent products, the chronic understaffing of such homes; and the failure to have a fixed and appropriate standard for nursing care hours per resident. The LTC practice results in residents sitting in pads soaked with their own urine which

hinder their mobility and enjoyment of life. The 75% rule, over-reliance on incontinence pads over bladder training or toileting and failure to individualize treatment infringes on the dignity, self-esteem and independence of the elderly, ignores resident preference, can cause upset and agitation among residents and compromises their physical and emotional health. These rules are enforced through disciplinary or others actions against employees where breached. While a limited number of homes have more flexible policies and practices, it appears that most implement the “one size fits all” approach. This violates the homes’ obligation under the MHLTC LTC Manual to provide incontinence products to residents at no charge based on the individual residents’ needs. As well, the homes are clearly not making “every effort” to keep the residents “clean and dry”.

The questionnaires indicate that there does not appear to be the same extensive problem in retirement homes where residents incontinent products are changed on an as needed basis and the incontinent products are paid for by the residents. These results support the conclusion that the problem is related primarily to product costs and staff time.

c. Legal Obligations Not Met

Both continence care standards revealed in the research and professional literature and the LTC Manual mandate homes to implement continence care standards which require the initial and ongoing assessment of incontinence, the implementation of care protocols and the provision of incontinence products individualized to meet residents’ needs and to promote dignity, comfort and independence. Instead of providing care to accepted professional standards and protecting the residents, the policies and practices in question subject the residents to neglect, and arguably abuse, as the LTC Manual defines “abuse” as “deliberately failing to meet a resident’s needs” (s.0903-01). The policies appear to be designed to save money at the expense of the dignity, comfort, and independence of the residents while exposing them to health risks. These policies and practices also violate the new *Long Term Care Homes Act, 2007* as well as the current trio of laws still in place until its proclamation, namely the *Nursing Homes Act*, *Homes for the Aged Act* and the *Charitable Institutions Act*.

Further, the practices and policies also violate the homes’ Service Agreement with the Ministry and therefore subject ultimately, if no corrective action is taken, to a possible reduction or elimination of funding and removal of their license. The above-noted policies and practices also breach the homes’ statutory and contractual obligation to residents to meet the standard in the Residents’ Bill of Rights whether under the trio of legislation or under the new Bill 140. This is because they result in treatment which fails to “fully recognize the resident’s dignity and individuality” and right to “be free from physical and mental abuse” and to be cared for in a manner which is sufficient to meet their needs.

The policies and practices also violate the human rights of the residents by providing them with a service which discriminates against them because of their age and disability and aggravates the disadvantage that incontinent individuals experience because they are predominantly women. The 75% full of urine standard and the rationing of incontinence products discriminates against incontinent elderly persons directly because it imposes harmful, disrespectful and undignified effects on them as a result of the fact that they are incontinent, elderly and dependent on care.

d. Inadequate Ministry Funding and Home Cost-Cutting

While the MHLTC Manual standards provide for a high level of continence care, the funding provided by the Ministry to homes for carrying out these standards does not reflect the necessary product funding or staffing required to properly implement these standards, leaving staff to cope with the impact of this on residents. Even apart from the continence care issue, the labour movement has identified that there is inadequate staffing and funding in the homes.

Until recently, the cost of the incontinent products was funded out of the nursing/personal care envelope which appears to have led homes to further limit access to the product and to constantly warn staff that providing further product to residents might lead to staffing cuts. While the Ministry has now changed this to a separate \$1.20 per resident/per day allocation for incontinent products, this works out to about one change of product per shift which is wholly inadequate. Homes are permitted to use money from the nursing and personal care envelope for incontinent products if the \$1.20 allocation is not sufficient and so the problem continues. With Ontario having no fixed standard of nursing/personal care hours, homes are operating significantly short of the necessary staff to meet residents' needs. However, the MHLTC Manual makes it very clear that the LTC home has the mandatory obligation to keep the residents "clean and dry" and to change incontinence products based on "the resident's individual needs". Failure to do so is a violation.

e. Available Legal Recourses

After having reviewed the applicable law, we conclude as set out in Sections 9-14 of the opinion that the following legal recourses would be available to challenge any continence care protocols that include rationing or a 75% or more full of urine requirement. In the words of workers responding to the questionnaires, the policy should be "keep residents dry and comfortable". "Change when needed – they deserve it".

i. Recourses Under LTC Care Laws: Complaints to the Ministry and to Administrators of LTC homes. (Section 9 of opinion)

The primary recourse under the new *Long-Term Care Homes Act, 2007* is to make a report to the MHLTC charging that, as a result of inadequate continence care protocols, particular LTC homes are: 1) neglecting and/or abusing residents; 2) providing improper care which has the risk of, or is, harming residents; and/or 3) failing to meet the standards regarding resident care required by their Service Agreements with the Ministry.

As an alternative, or in addition to the above recourse, a complaint could be filed with the administrators of individual nursing homes, or municipal or charitable homes for the aged alleging that, due to improper continence care, the home is: a) neglecting residents; b) providing improper care which is harming residents; and/or c) failing to meet the standards required in the home's Service Agreement with the Ministry. Such a complaint would require homes to investigate and justify their policies, and may provide more detailed information for a complaint directly to the Ministry if the home fails to take action to satisfactorily resolve the situation.

ii. Human Rights Recourses: Complaint under the *Human Rights Code* or request for Ontario Human Rights Commission to file a complaint or conduct an inquiry (Section 11 of opinion)

A second set of legal recourses is to pursue the matter under the *Human Rights Code* amended

by Bill 107 (once proclaimed). Reasonably strong arguments can be made that any continence care policy that establishes a fixed requirement that incontinence pads can only be changed when 75% full of urine discriminates against elderly incontinent residents on the basis of disability and/or the intersecting grounds of age and disability. Two recourses would be available to challenge this discrimination: first, under the new Bill 107 (to be proclaimed June 30, 2008) a complaint to the Human Rights Tribunal on behalf of residents if the residents consented (or in conjunction with a group of residents). Second, a request to the Ontario Human Rights Commission to conduct research into the matter, which is possible both currently but also more effectively pursuant to its new power under Bill 107 to initiate reviews, conduct inquiries and make recommendations regarding conditions in a community, institution, industry or sector.

iii. Claim Under the *Canadian Charter of Rights and Freedoms* (Section 12 of opinion)

Although there are reasonable arguments which would involve the use of the *Canadian Charter of Rights of Freedoms*, this type of claim is legally complex and expensive. Since many of the same remedies that would be sought in a *Charter* challenge could be sought through the legislative and human rights recourses listed above, it is our view that those other recourses would be more promising to pursue. However, the *Charter*-based argument briefly outlined in this opinion does provide supporting rationales for any actions taken through the other recourses noted above.

iv. Policy Grievance (Section 13 of opinion)

Depending on the circumstances in a particular home, a union may have a basis for a policy grievance alleging that a LTC home's continence care protocol constitutes an unreasonable work rule in violation of the employer's responsibilities under its collective agreement with the union.

v. Sanctioning Nursing Home Management (Section 14 of opinion)

Another possible recourse would be to file a professional discipline complaint against an Administrator or Nursing Director in a particular home. While this may be appropriate in a situation where such a professional refuses to correct the issue, in our view, the other options reviewed in this opinion provide more promising options to address the systemic problems relating to continence care policies in LTC homes.

Conclusion

For the reasons set out above, it is our opinion that the policies and practices outlined in Section 2 of the opinion are unlawful and inappropriate on a number of grounds and there are a variety of steps as outlined above which can be taken to challenge them. We note that, regardless of the legal recourse chosen, there would need to be continuing lobbying for adequate staffing and funding of resident care in LTC homes. Any change in the continence care protocols that increases the frequency with which continence pads are changed may only increase the pressure on workers unless accompanied by adequate funds and staffing.

SECTIONS 1 AND 2 FROM FULL SEPTEMBER 12, 2007 CHSMC OPINION

1. Caring for Residents Disadvantaged by Age, Disability and Gender

“These residents are people who deserve our respect. Please do not use the word diaper. These are adults who by having to wear these products have lost their dignity. Add to that the fact that they must sit, walk or lay in this product until it is at least 80% full. Most of these products hold 1000cc of urine so they have at least 800 cc (over 3 cups) in them. By this time, it has begun to smell, weighs approximately 3-4 pounds as the super polymer lining has turned it to gel and the lining has begun to separate. It can't be comfortable to sit or lay on and it is difficult to walk with this hanging between their legs . Another added bonus is that everyone around them is talking about their diaper, not their incontinent product. We talk to each other about the blue line, indicator of wetness, not how comfortable are they. We comment on the odour but can't change it because its not 80% full.

For a number of years, increasing concerns have been raised about the practice in most Long Term Care homes that health care workers are instructed not to change residents' incontinence pads until they are at least 75% or more full of urine. Concerns have also been raised that these homes inappropriately ration residents' access to incontinence care products. For example, workers have advised that they are required to put a pad soaked with urine back on after a bath if the “blue line” - the 75% marker has not been reached. These concerns were initially highlighted in the OFL's October, 2005 Report, “Understaffed and Under Pressure - A Reality Check by Ontario Health Care Workers” which stated:

“Employers continue their profit taking at the expense of residents. In particular, the disgraceful rationing of incontinent pads has propelled many workers to take matters into their own hands and risk discipline or firing.”

This rationing of incontinence care products is just one of a number of practices that have led the labour movement and other concerned communities to push for reforms to Ontario's long term care system so that it is adequately funded, staffed and regulated. Inadequate care in this sector is particularly problematic as it furthers the already pre-existing disadvantages experienced by residents of LTC homes who “are the elderly, persons with disabilities and people who have chronic or prolonged illnesses.”¹ They also are predominantly women. With an average age of 82.1 years, these homes serve exclusively those who are among the frailest, most impaired segment of the population.²

“Residents in LTC facilities are, because of their poor cognitive and physical health status, extremely vulnerable to and dependent on their caregivers. That vulnerability is exacerbated by the fact that the majority of the LTC population is old and female, a combination that is highly correlated with disadvantage. Other factors that heighten the vulnerability are language barriers and cognitive impairments, both of which can

¹ Long Term Care Facility Program Manual, Ministry of Health and Long Term Care, p. 1, 0401-01

² See Ontario Long-term Care Facilities: What Incentives Facilitate Quality Care by Lisa Minuk, http://www.law.utoronto.ca/healthlaw/docs/student_Minuk-LongTermCare.pdf

interfere with the residents' ability to communicate their experiences or care or any of their problems that they may have.”³

There are four classes of homes where the elderly reside and health care workers provide care with respect to incontinence: Retirement Homes, Nursing Homes, Homes for the Aged and Charitable Institutions for the Aged. (With the exception of Retirement Homes, the other homes are referred to as Long-term Care Homes, receive government funding from the Ministry of Health and Long Term Care (“MHLTC”), and are subject to government regulation with respect to the care they provide. Retirement Homes are designed for seniors who “need minimal to moderate support with their daily living activities” and except for public health and tenancy issues are not regulated and receive no government funding.⁴

2. Results of Winter, 2007 OFL Survey of Health Care Workers

“Give our residents what they need. Give our staff the products and trust them to use them.” – SEIU Personal Support Worker, Nursing Home

As noted above, 335 completed questionnaires were completed by personal support workers, health care aides and nurses who are members of SEIU, CUPE, USWA, UFCW, IAMAW and ONA. The Compendium of Questionnaire Responses to OFL Survey re: Continence Care Policies and Practices includes a set of Charts breaking down the responses by Union, types of facility and by survey question.

a. Retirement Homes

The Retirement Homes' questionnaires indicated that incontinence products were generally distributed as needed by residents. These results support the conclusion that incontinence products are likely generally changed as needed in Retirement Homes where continence care and products are paid for by the residents. This seems to confirm that the problem is related primarily to product costs and staff time.

b. Nursing Homes and Homes for the Aged – Policies/Practices

According to the responses received and other interviews, it appears that facilities have a variety of continence care policies and that there is no uniform policy or fixed practice within all facilities. Nevertheless, the following general rules and practices were in place in a large number of homes:

- a. staff are generally told not to change the incontinence pad of a resident unless the

³ See Ontario Long-term Care Facilities: What Incentives Facilitate Quality Care by Lisa Minuk at pp.3-4.

⁴ Services in retirement homes are determined by the terms of the private contract between the Home and the resident. There is an informal industry wide supervision through The Ontario Residential Care Association, (ORCA), a voluntary membership organization which does set standards and has a complaint procedure to enforce those standards. ORCA's Code of Ethics binds accredited members to “at all times maintain a high standard of professional conduct”; “will take reasonable and appropriate measures to safeguard the well being of our residents” and will subscribe to the principle that “we believe in the quality of life for all residents that encompasses their right to dignity, respect, privacy and autonomy.”

pad has reached the “blue” line or other marker indicating that it is 75% or more full. Some surveys indicated a higher percentage figure. This rule applies usually but not always even if the resident has been bathed, leading the worker to reapply a pad filled with less than 75% of urine to a recently bathed resident if it has not reached the marker. Where there has been a bowel movement, workers are generally directed to change the product;

- b. many homes have a policy which limits the number of pads per shift, with some allowing only one per shift. This policy is based at least in part on the claims of incontinence products companies that pads have at least an 8 hour absorbency;
- c. many homes have representatives from incontinence products companies come to the home to explain to staff their products and the 75% rule;
- d. the workers of at least one home reported that one incontinence product company Tena gives a pizza party for workers who use fewer products and keep within the budget; UFCW Health Care Worker, Nursing Home.
- e. incontinence pads are counted and often locked up and must be signed out where allowed;
- f. many homes conduct audits to determine whether pads have been appropriately used in accordance with the policy and whether workers are hiding the pads;

c. Impact of Policies/Practices on Residents and Workers

As a result of the above-noted policies, workers noted the following impacts:

on residents

- a. “this means residents have to stay in extremely wet pads for long periods of time”. “sometimes residents have to remain totally soaked”. SEIU Personal Support Worker, Nursing Home.
- b. it “compromises residents’ health and agitates them and agitates the staff too.” SEIU Personal Support Worker, Nursing Home.

“I also believe that because the products are left on for long periods our incidence of skin breakdown have increased (excuriations, redness, open sores) SEIU Registered Nurse, Nursing Home

“Cleanliness prevents breakdown, eliminates odours and residents remain comfortable. In my opinion we are experiencing more urinary track infections, more lab costs, more doctor fees, more antibiotics. Is this a healthy environment? NO--more skin breakdowns or conditions are showing up. SEIU Health Care Aide, Nursing Home.

- c. some urine has a particularly bad odour, and needs to be changed more often;

“Residents do not like too damp or wet. They feel bad enough that they wet themselves or the bed. I do not know what happens at other facilities, but I hope it would not be like ours. Many (some) residents need more than we can supply, some are lucky enough to have families that will supply some for their family member. Many more are not this lucky to have family do this for them.” SEIU Health Care Worker, Nursing Home

- d. the policy disproportionately affects those who are unable themselves or have no family to advocate for them:

“There is a difference in the application of the policy if the resident is cognitive enough to be their own advocate or if family makes a request. This leaves the residents with no family voice or who are cognitively impaired at a disadvantage. We have always been their advocate but now feel that our hands are tied.” SEIU Health Care Worker, Nursing Home.

“If a family members asks for an extra pad we are not supposed to tell them they cannot have one. We are to find one and give it to them” SEIU Personal Support Worker, Nursing Home (for profit)

“Residents with involved families get more per shift” CUPE Personal Support Worker, Nursing Home.

- e. where residents are walking, the weight of the full pad pulls pants down and inhibits walking ability;

on workers

- a. some workers, out of interest for the residents, wet them more from taps to make them appear saturated as sometimes urine odour is strong.” SEIU Personal Support Worker, Nursing Home;
- b. some workers “hide” pads in order to have them available when residents need them; SEIU Personal Supports Workers, Health Care Aides, Registered Practical Nurses, Nursing Homes.
- c. workers are reprimanded if they fail to follow the policies and/or subject to discipline or firing;

We deal with management telling us that we are wasting the product, and by that I mean making the resident comfortable and odour free. We deal with threats of cut hours, products being locked up and of only 1 product per shift per resident if we continue to be over budget on products.” SEIU Health Care Worker, Nursing Home

- d. many try to avoid the rule and change the resident if needed. “Most PSWs have a conscience”. SEIU Personal Support Worker, Nursing Home.

d. Relationship between Policies/Practices and Inadequate Staffing and Funding

- a. many identified that shortages of staff made the problem more difficult and also led to less toileting and bladder training.

“We are constantly told the government only covers so much of the incontinent product budget and if we go over, the extra pads comes out of the nursing budget so we’re cutting our own budget.” SEIU Personal Service Worker, Nursing Home.

“not enough staff to toilet residents - only 4 to 6 staff to 60 residents, SEIU Personal Support Worker, Nursing Home.”

- b. it appears that “theoretically bladder training is available but there is no time to make effective or timely”; SEIU Personal Support Worker, Nursing Home.
- c. “it is not possible or practical” to toilet residents as much as appropriate. SEIU Personal Support Worker, SEIU.

e. Recommendations of Workers

Most workers recommended that the policy should be that pads are changed as needed, keeping in mind the issue of skin integrity, odour control, wetness and comfort: For example:

- a. “I think if a resident is wet or soiled, the PSW should be able to decide if they need to be changed - not someone sitting in an office”. SEIU Personal Support Workers, Nursing Home.

“Incontinent products should be used as needed when the resident require them, so there is no skin breakdown.” SEIU Personal Support Worker, Nursing Home

- b. “Everyone is different and has different needs.” SEIU Personal Support Workers, Nursing Home.

- c. “Keep residents dry and comfortable.” SEIU Health Care Aide, Nursing Home.

- d. “hire proper staff and give them better hours so that the workload would be better distributed and residents would receive better quality care”. “you need to hire full timers and not depend on part timers, casuals & agencies.” SEIU Personal Support Worker, Nursing Home.