

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

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"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 below.
- 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 below.
- 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 below.

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 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. 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. Of all the recourses discussed above, in our view, the most promising are the recourses under the LTC governing legislation and the *Human Rights Code*. These two recourses are not mutually exclusive and can be pursued either in sequence or in conjunction. They can also be pursued in collaboration with representatives of residents (for example members of the Residents Councils in the homes or with the Advocacy Centre for the Elderly). 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.

1. Introduction – 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 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

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

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

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 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.

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."

- 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. Nursing Homes and Homes for the Aged – Impacts of Policies/Practices

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

"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

"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.

3. Research Evidence re: Urinary Incontinence – Its Identification and Treatment

The practices revealed by many of the above-noted questionnaires do not meet the accepted standards for continence care established by extensive research evidence. This includes numerous independent research articles and documentation compiled by the Canadian Continence Foundation and the National Association For Continence. While the makers of incontinence products have given training sessions to LTC home staff assuring them of the appropriateness of the "75% rule", this legal opinion has relied on the independent research evidence set out below. It is possible there is other research evidence relied on by these companies which should be reviewed if it can be obtained.

a. What is Incontinence?

Urinary incontinence (UI) or loss of bladder control is "a major health problem" that affects many more women than men.⁵ Its incidence increases with age and with institutionalization. UI is a "stigmatized, under-reported, under diagnosed, under-treated condition that is erroneously thought to be just a normal part of aging."⁶ It is a symptom of another health problem rather than a disease itself. There are a broad range of conditions which can cause it including birth defects, surgery, neurological disorders, and degenerative changes associated with aging. When any part of the urinary system fails, incontinence can result.⁷ There are four main types of urinary incontinence: stress incontinence, urge incontinence, mixed incontinence and overflow incontinence. Nursing has been at the forefront of developments in the area of continence care, developing methods to ensure proper identification, training and treatment.⁸

Incontinence sufferers experience emotional as well as physical discomfort. Expert evidence has clearly established that UI is "associated with a decreased quality of life." The loss of bladder control is a serious psychological issue for the elderly who regard it as one of the last vestiges of their independence.⁹ Those afflicted: 1) are often "anxious, have lower self esteem, or feel socially isolated;" 2) have increased "risk

⁵ See "The Role of the Nurse in Community Continence Care: A systematic Review by M. F. M. T. Du Moulin, J. P. H. Hamers, A. Paulus, C. Berendsen, and R. Halfens, *International Journal of Nursing Studies*, 42, (2005) 479,-492. See also VON Study in conjunction with McMaster School of Nursing in 1998 and the Collaborative Continence Program at St. Joseph's Community Health Centre in Hamilton conducted study "Reducing Barriers in Accessing Continence Care" www.von.ca/english/continence/identifying/htm.

⁶ See National Association For Continence, NAFC, - www.nafc.org/statistics/index.htm.

⁷ See website, National Association for Continence, NAFC, www.nafc.org/about_incontinence.what_incontinence.

⁸ See Nursing Research and Continence Care - by Katherine N. Moore, Joyce Colling and Molly (Mickey) Dougherty, *Urology Nursing*, June 2002, Vo. 22 No. 3

⁹ *The Shaver Hospital v. Ontario Nurses Association*, arbitration decision of Jack Roberts, September 3, 1998.

of skin breakdown, recurrent urinary tract infections and falls, especially when they have symptoms of urgency”; and 3) often “isolate themselves for fear of ridicule and loss of self-esteem”.¹⁰

b. How do you diagnose and treat Incontinence?

Diagnosis of incontinence requires full testing for physical causes including bladder capacity, sphincter condition and urethral pressure. The method of treatment depends on the diagnostic results and the nature and degree of incontinence.

“Particular attention should be given to the frail elderly, as management strategies are important for preventing life-threatening skin infections, pressure ulcers, and bacteremia. Continence products are an adjunct to other management strategies and it is critical that all patients suffering from urinary incontinence receive a full assessment from a health care practitioner knowledgeable in the field.”¹¹

Studies show that nurses and other health care workers working with residents on treatment options can play a key role in caring for patients suffering from incontinence leading to improved health outcomes and patient satisfaction.¹² There are three major categories of treatments: behavioural, pharmacological, and surgical. Behavioural treatment includes: scheduled toileting, bladder retraining, pelvic muscle rehabilitation/exercises, change in diet and elimination of medications such as diuretics. Treatment can include a combination of medicines and collection devices and absorbent products.¹³ Research has shown that individual toileting or bladder control programmes can decrease urge incontinence. When it is not possible to use bladder retraining, some forms of incontinence can be contained by regular toileting. It is considered more respectful to help residents go to the bathroom as many residents feel like a baby in a “diaper”, especially when such pads are sometimes referred to as “diapers”.¹⁴

c. Incontinence Pads - Use and Misuse

The use of incontinence pads or briefs is the most common method of managing incontinence.¹⁵ While “they can contribute to social continence”, such pads “should not be a substitute for full assessment or treatment that is feasible, appropriate, and desired by patient and family nor should they foster dependency (American Medical Association, 1996).”¹⁶ Measures should be taken to try to control or prevent incontinence rather than just use incontinence pads to manage the incontinence and relieve

¹⁰ See “The Role of the Nurse in Community Continence Care: A systematic Review’ by M. F. M. T. Du Moulin, J. P. H. Hamers, A. Paulus, C. Berendsen, and R. Halfens, *supra* at 480.

¹¹ See Lekan-Rutledge, Deborah, Dorothy Doughty, Katherine N. Moore, and Leslie Woolidge, Promoting Social Continence: Products and Devices in the Management of Urinary Incontinence, *Urologic Nursing*, 23.65 (Dec. 2003)) 416(15)

¹² See “The Role of the Nurse in Community Continence Care: A systematic Review by M. F. M. T. Du Moulin, J. P. H. Hamers, A. Paulus, C. Berendsen, and R. Halfens, *supra* at 480.

¹³ See www.nafc.org/about_incontinence/treatment.htm

¹⁴ Understanding Barriers to Continence Care in Institutions, by Cara Tannenbaum, Danielle Labrecque and Christiane Lepage, *Canadian Journal of Aging*, 24(2) : 151-160 at 156.

¹⁵ See Promoting Urinary Continence in Older People, *Nursing Older People*, April, Vol 18, No. 3, 2006.

¹⁶ See Lekan-Rutledge, Deborah, Dorothy Doughty, Katherine N. Moore, and Leslie Woolidge, Promoting Social Continence: Products and Devices in the Management of Urinary Incontinence, *Urologic Nursing*, 23.65 (Dec. 2003)) 416(15).

caregiver burden or costs.¹⁷ For example, where regular toileting or bladder training is possible, these methods should be used. "Avoiding the use of incontinent pads in this way can promote a positive body image and promote self-esteem."¹⁸

Where "treatment is not possible, residents should receive pads adapted to their personal needs and linkage volume" and since leakage patterns may change over time, such needs must be reassessed regularly.¹⁹ Incontinence products absorb and contain urine to prevent unwanted leakage. Disposable products generally have three layers: an absorbent core sandwiched between a water-proof polyethylene backing beneath and a water-permeable cover stock that is next to the user's skin. With recent innovations, the primary component of the absorbent core is generally super-absorbent polymer or absorbent gelling material which holds much more urine volume per weight than the previous fluff pulp.

According to the experts, "residents should be left feeling clean and comfortable" after pad is changed.²⁰ The incontinence products companies make claims that, up to the identified 75% or higher level, the incontinence pads do keep the person "comfortable" and keep the skin dry.²¹ One article supports the "wicking away" concept. "By design, urine is wicked away from the skin and is absorbed into the core material, leaving the top layer of the product and the skin dry."²² However, we did not find research which verified that the predetermined level of 75% full was a measure of when the pad became "wet" rather than dry and when it becomes uncomfortable or undignified or impedes independence.

The research however does reject the concept of using a pre-determined, one size fits all approach.

"In institutional settings, a "one-type-fits-all" approach for both mild and severe UI or for day and night time management is an inappropriate use of the products and may needlessly increase cost (Brazelli et al., 2002; Dunn et al., 2002; Fader et al., 2001). It is also recommended that a selection of pad and brief systems be available for different functional abilities, ease of use and levels of wetness."²³

"When comparing disposable and reusable absorbent products, product selection should consider the frequency, timing, mid volume of UI episodes; skin fragility; patient lifestyle; fit and comfort; ease of use; cost; and patient preference."²⁴

" Absorbent products are effective in increasing social continence and quality of life.

¹⁷ Nursing Research and Continence Care - by Katherine N. Moore, Joyce Colling and Molly (Mickey) Dougherty, *Urology Nursing*, June 2002, Vo. 22 No. 3 at 186.

¹⁸ See *"Promoting Urinary Continence in Older People, Nursing Older People"*, supra at 36.

¹⁹ See *"The Role of the Nurse in Community Continence Care: A Systematic Review"* by M. F. M. T. Du Moulin, J. P. H. Hamers, A. Paulus, C. Berendsen, and R. Halfens, supra at 480.

²⁰ See *Promoting Urinary Continence in Older People, Nursing Older People*, supra at 36.

²¹ See website information on for eg. Depend, (www.depend.com) and Tena, (www.tena.com)

²² Deborah Lekan-Rutledge, Dorothy Doughty, Katherine N. Moore, and Leslie Woolidge, *"Promoting Social Continence: Products and Devices in the Management of Urinary Incontinence"*, supra.

²³ See Deborah Lekan-Rutledge, Dorothy Doughty, Katherine N. Moore, and Leslie Woolidge, *"Promoting Social Continence: Products and Devices in the Management of Urinary Incontinence"*, supra.

²⁴ Ibid.

Selecting the best product for the amount and frequency of UI along with an appropriate skin care regimen will prevent adverse sequelae. When the individual is able to toilet, product selection should facilitate, not hinder, the toileting process. ²⁵

d. Adequate Staffing, Products, Training and Individualized Treatments

The research supports the conclusion that “adequate staffing and stable caseload assignments promote good continence care.”²⁶ Alternatively, inadequate staffing, funding and constantly changing caseload assignments do not. Implementing appropriate and individualized continence care standards requires the necessary resident/staffing ratio and a sufficient budget to cover the necessary incontinence products. Experts have identified a number of barriers to proper continence care in LTC institutions. These include: 1) over-reliance on incontinence products rather than incontinence treatments and prevention: “We get teaching from companies on new kinds of diapers and how to use them, but not really on how to make the incontinence better”; 2) insufficient staffing where workers have insufficient time to provide bladder training or toilet the residents;²⁷ 3) staff are not fully aware of all treatment possibilities or are not encouraged to follow other treatment options other than use of incontinence pads;²⁸ and 4) the absence of continence care skill development and education.

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| 4. MHLTC Long-Term Care Facility Program Manual and Service Agreement |
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a. Introduction

The above-noted research supporting individualized incontinence assessment and treatment and sufficient access to products as needed is consistent with the Ministry of Health and Long Term Care’s standards for addressing incontinence. These standards are contained in the Ministry’s Long Term Care Facility Program Manual. This Manual is binding on LTC homes as a result of the terms of the Long-Term Care Facility Service Agreement with the Ministry (Tab 9 of the Manual). It is intended to provide “clear, measurable and enforceable resident focussed standards, (s. 0901-01)”²⁹ including that “care and services must be provided in accordance with professional standards of practice.”

b. 2006 Continence Care Standards

The Manual was amended to include a detailed set of provisions relating to continence care (s. 0903-01) effective as of January 1, 2006. These standards include the following:

- a. Bladder assessment must be done to ensure the level of continence and ability to be continent, s. 0903-01. This assessment is done on admission and at least on a quarterly basis (B1.7, B1.9, B1.10, B. 1.11, B. 1.12).

²⁵ Ibid.

²⁶ See “Understanding Barriers to Continence Care in Institutions, by Cara Tannenbaum, Danielle Labrecque and Christiane Lepage, *supra* at 155.

²⁷ Ibid See also Identifying Barriers in Accessing Continence Care, www.von.ca/english/continence/identifying/htm.

²⁸ Understanding Barriers to Continence Care in Institutions, by Cara Tannenbaum, Danielle Labrecque and Christiane Lepage, *supra* at 156.

²⁹ See “Commitment to Care: A Plan for Long-term Care in Ontario, Report of MPP M. Smith to the Minister of Health, 2004.

- b. The LTC Operator must develop and implement
 - i. continence care protocols/procedures that address residents' individual needs (B1.8);
 - ii. an individualized program of continence care for each resident who has been identified as bladder or bowel incontinent.
- c. The continence care provisions in residents' plan of care are aimed at "promot[ing] comfort, maintenance of skin integrity and to prevent infections." (B2.9, B 2.10).
- d. Each resident shall be clean and dry with every effort made to maintain dignity, comfort and independence (B3.48).
- e. The LTC Operator shall provide comfortable continence care products that meet residents' care needs and promote their dignity and independence. These continence care products shall be provided at no charge to the residents who require them (B3.5).
- f. The frequency of changing a resident's continence care product shall be based on the resident's individual needs. [emphasis added] (B3.58).
- g. Feedback from residents and staff on the quality of care and the use of continence care products must be obtained (s. 0901-01).

In addition to these continence care standards, the Manual includes standards relating to individualized skin care (B3.40-B3.43 and B3.64) and hygiene (B3.52 and B3.62). It also provides examples of what would constitute abuse and neglect. Abuse includes physical, emotional and financial abuse. Neglect includes "deliberately failing to meet a dependent resident's needs". (s. 0903-01, p. 4).

c. Long Term Care Facility Agreement

LTC homes must sign a Long-Term Care Facility Agreement with the Ministry. This Agreement is a contract between the Ministry and the operator of the LTC home. It contains a description of the programs and services that are to be provided in the LTC home. In signing the agreement, the home agrees to provide care, programs and services in accordance with the applicable legislation as well as the standards and criteria contained in the Program Manual. These Agreements provide that the home must comply with all provincial laws and regulations which would include the *Human Rights Code* (Article 16.1(3) of the Service Agreement). They also provide that the Ministry may reduce or withhold funding payments where there is a breach of the agreement. (Article 8.1 of the Service Agreement).

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| 5. <i>Nursing Homes Act, Homes for the Aged and Rest Homes Act, and Charitable Institutions Act</i> |
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Until the proclamation of the *Long Term Care Homes Act, 2007*, the three main types of LTC homes are regulated as follows: 1) Nursing Homes, usually operated by private corporations, are governed by the *Nursing Homes Act*; 2) Municipal Homes for the Aged are owned and operated by municipal councils and governed by the *Homes for the Aged and Rest Homes Act*; and 3) Charitable Homes for the Aged are usually owned by non-profit corporations, such as faith, community, ethnic or cultural groups and are governed by the *Charitable Institutions Act*. All of these homes are funded through the MHLTC Long-Term Care Homes Branch. Bill 140, the *Long-term Care Homes Act, 2007* repeals these three laws and governs the regulation of all three types of homes. It is discussed in Section 6 below.

The legislative frameworks of the *Nursing Homes Act*, the *Homes for the Aged and Rest Homes Act*, and

the *Charitable Institutions Act* are substantially similar and include associated regulations. Each includes a Residents' Bill of Rights.³⁰ As set out below, these Bills of Rights require respectful, sufficient and individualized care free from neglect and abuse. The following rights, among others, were included in these Bills of Rights:

- a. Every resident has the right to be treated with courtesy and respect and in a way that fully recognizes the resident's dignity and individuality and to be free from mental and physical abuse;
- b. Every resident has the right to be properly sheltered, fed, clothed, groomed and cared for in a manner consistent with his or her needs;
- c. Every resident has the right to live in a safe and clean environment.

Each Bill of Rights stated that "A licensee...shall be deemed to have entered into a contract with each resident of the home, agreeing to respect and promote the rights of the resident set out in [the Bill of Rights]". As well, the Long-Term Care Facility Program Manual requires that the Residents' Bill of Rights be included in the admission agreement entered into with each resident. Plans of care are required for residents³¹ and, as described above, the Program Manual contains detailed standards and criteria relating to residents' plans of care, including continence care.

In addition, the *Nursing Homes Act* and its regulations included the following provisions:

- a. Duty to report harm to residents: a person who has reasonable grounds to suspect that a resident has suffered or may suffer harm as a result of unlawful conduct, improper or incompetent treatment or care or neglect has a duty to report the matter to the Director appointed by the Ministry: s. 25(1);
- b. Whistleblower protection: the Act provides that persons who report suspected harm to a resident cannot be dismissed, disciplined or penalized because they reported the harm: s. 25(2); and
- c. Resident Care: The Regulation to the statute provides that "the nursing staff shall ensure that proper and sufficient care of each resident's body is provided daily to safeguard the resident's health and to maintain personal hygiene": (s. 56(8)).

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| 6. Long-Term Care Homes Act, 2007- Bill 140 |
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a. Introduction

There is no indication yet when Bill 140, the Long Term Care Homes Act, 2007 will be proclaimed. A number of key issues have been left to be dealt with by Regulation which may be a factor in the delay as these are developed. Bill 140 includes provisions aimed at significantly enhancing resident care standards, preventing abuse and neglect, ensuring greater enforcement of standards, and ensuring better accountability by LTC homes. The Bill provides that the fundamental principle to be applied in interpreting the requirements of the law is that LTC homes are "primarily the home of its residents and is to be

³⁰ s. 2 *Nursing Homes Act*; s. 1.1 *Homes for the Aged and Rest Homes Act*; s. 3.1 *Charitable Institutions Act*.

³¹ Section 20.10 of *Nursing Homes Act*, Regulation ss. 126-27; 19.5 *Homes for the Aged Act and Rest Homes Act*, ss. 67 and 68 of Reg; s. 9.15 *Charitable Institutions Act*, ss. 57-58 of Reg..

operated so that it is a place where residents may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met” (s. 1).

b. Plans of Care

Bill 140 contains more detailed provisions dealing with required plans of care (ss. 6-16). Plans of care are required to cover all aspects of care including “personal support services” which are defined to include personal hygiene services and would include the use of incontinence pads (s. 7(2)). The Bill provides that plans of care must comply with any standards and requirements provided in the *Act’s* Regulations. Given the focus on residents’ rights in the new Bill, it is likely that the standards set out in the MHLTC Program Manual (discussed above) will be incorporated by reference into the Regulations or that similar standards will be included in the Regulations once drafted.

c. Enhanced Residents’ Bill of Rights

Bill 140 contains an enhanced Residents’ Bill of Rights (section 3) which includes the following provisions:

- a. Every resident has the right to be treated with courtesy and respect and in a way that fully recognizes the resident's individuality and respects the resident's dignity.
- b. Every resident has the right to be protected from abuse.
- c. Every resident has the right not to be neglected by the licensee or staff.
- d. Every resident has the right to be properly sheltered, fed, clothed, groomed and cared for in a manner consistent with his or her needs.

As with the existing statutes, Bill 140 provides that a resident may enforce the Residents' Bill of Rights against the licensee (operator) of the home as though the resident and the licensee had entered into a contract under which the licensee had agreed to fully respect and promote all of the rights set out in the Residents' Bill of Rights (s. 3(3)).

d. Prevention of Abuse and Neglect - Enforcement and Funding

The Bill contains provisions specifically aimed at preventing abuse and neglect:

- a. Every licensee of a home will have a duty to protect residents from abuse by anyone and neglect by the licensee or a staff member (s. 17);
- b. Licensees will have a duty to put in place a zero tolerance policy regarding the abuse and neglect of residents, as well as a duty to investigate, respond and act on complaints (s. 18-21);
- c. There is a duty on any person who has reasonable grounds to suspect improper treatment or care of residents or the abuse or neglect of residents to report the matter to the Director appointed by the Ministry. Staff members are listed as persons who will be found guilty of an offence under the Act if they do not report improper treatment causing harm, abuse or neglect of a resident (s. 22(5));
- d. The Bill includes “whistle-blower” protections similar to those found in the current *Nursing Homes Act* that prohibit retaliation against any person who reports abuse or neglect (s. 24);

- e. A large part of the definition of what will constitute “abuse” and “neglect” will be defined in the Regulations to the Act once passed. The Act defines “abuse” as “physical, sexual, emotional, verbal, financial abuse, as defined in the regulations” (s. 2(1)). The Act provides the Government with the power to define “neglect” by Regulation.

The Bill makes clear that the Minister may attach conditions to funding of LTC homes and that funding will be subject to any conditions, rules and restrictions that may be provided in the Regulations (s. 88). As well, the Bill provides for improved enforcement to ensure compliance, including:

- a) A duty on the Director appointed by the Ministry to appoint an inspector to investigate
 - iii. any reports of abuse, neglect, improper or incompetent treatment or care of a resident that resulted in harm or a risk of harm to the resident;
 - iv. a failure to comply with the Regulations; and
 - v. a failure to comply with “a requirement under this Act” which includes a condition of a licence or a condition to which funding is subject (this includes compliance with the standards set out in the Program Manual): (ss. 23, 2(1), 88, 99).
- b) A requirement that the Ministry conduct unannounced annual inspections of homes (ss. 139-142).
- c) An inspector must take one of the following actions if a licensee has not complied with a requirement under the Act:
 - issue a written notification;
 - request that the licensee prepare a written plan of correction to be implemented voluntarily;
 - make a compliance or work order; or
 - issue a written notification to the licensee and refer the matter to the Director for further action (s. 149);
- d) There are several provisions making it an offence to prevent anyone from providing information to the Director or an inspector as required or permitted by the Act (s. 26) or to obstruct an inspector from carrying out his/her inspection duties under the Act. (s. 148).
- e) A new Office of the Long-Term Care Homes Resident and Family Adviser will be created to assist and provide information to residents, their families and others, and to advise the Minister on matters and issues concerning the interests of residents (s. 35).

7. Human Rights Obligations of LTC Homes

a. Human Rights Code

In addition to the above-noted legal obligations, LTC homes have a legislative and contractual obligation to provide various types of services, including continence care. As such they have a duty to provide these services in a non-discriminatory manner pursuant to section 1 of the *Human Rights Code* which provides as follows:

“Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or

receipt of public assistance.”

This obligation has been interpreted to require service providers to ensure that their policies and practices are designed from the outset to be inclusive, free of barriers (subject to claim of undue hardship) and to promote the full participation of the disadvantaged group in society.³² This provision of the *Code* would also be a contractual requirement as a result of the Service Agreement requiring that the home comply with all applicable laws.

b. Canadian Charter of Rights and Freedoms

There is also a possible argument that the LTC homes, in their provision of care services to elderly residents, are subject to the *Canadian Charter of Rights and Freedom* as a result of their being an integral part of Ontario Government’s health care system. This argument would rely on the reasoning which led the Supreme Court of Canada in the *Eldridge v British Columbia (Attorney General)* decision to find that hospitals, who are otherwise not government actors, are engaged in government action when they provide medical services and fail to provide translation services for a hearing impaired patient.³³ See sections 11 and 12 below for a further discussion of these obligations.

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| 8. Continence Care Policies and 75% Rule Violate Legal Obligations |
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The Questionnaire responses set out in the Compendium and reviewed in Section 2 above, reveal that a significant number of LTC homes are directing staff to follow continence care procedures which fall well below the standards and obligations highlighted in Sections 3 to 7 above.

- a. There are policies and practices in many LTC homes which require workers to treat incontinent residents, regardless of their individual circumstances, by providing them with a predetermined number of pads per shift, often just one, or requiring them to wear the pads until 75% or more full of urine. 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 to provide the 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”.
- b. The rule results in residents sitting in soaked pads filled with urine and hinders their mobility and comfort;
- c. The rule, over-reliance on incontinence pads and failure to individualize treatment infringes on the dignity, self-esteem and independence of the elderly, ignores resident preference and can cause upset and agitation among residents;
- d. The rule does not take into account the individual circumstances and needs of residents, including the degree of their bladder capacity, the frequency, timing and extent of their urine release, their skin fragility, and mobility, all of which compromises their physical and emotional health.
- e. While homes appear to rely on the claims of the incontinence product companies (such as Tena and Attends) that the pads are absorbent enough to be left on until 75% or more

³² [1999] 3 S.C.R. 3

³³ (1997) 3 S.C.R. 624

full, these rules appear to be primarily created as part of an effort to reduce the home's product and staffing costs;

- f. These rules are intentionally aimed at preventing the individualized care legally required by the residents' "plans of care" and needs, with workers being subject to discipline, if they try to change residents more frequently than the rules allow;
- g. There are insufficient staff and resources provided both by the Government and the LTC homes to implement timely and effective bladder training or to provide sufficient toileting. The funding envelope does not provide sufficient funds for the purchase of enough incontinent products to meet the residents' needs and the legal requirements. As a result, there appears to be an over-reliance on incontinence pads which are being used to manage incontinence when the incontinence could potentially be prevented or better treated. Similarly, insufficient funds are allocated for providing incontinence products as needed.

Accordingly, it is our opinion that the above-noted policies and practices are unlawful and breach contractual obligations for a number of reasons:

- a. 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. The homes are required by the Manual to keep residents "clean and dry" and to provide incontinence products at no charge as needed. The Residents' Bill of Rights both currently and under Bill 140 require the homes to provide respectful, dignified, sufficient and individualized care. Bill 140 provides that homes must have a "zero tolerance" policy for abuse and neglect.
- b. The policies do not comply with the requirements of Bill 140 which require the LTC home to operate to provide primarily a "home" environment which "is a place where residents may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met." 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 would also violate the trio of laws still in place, the *Nursing Homes Act*, *Homes for the Aged Act* and the *Charitable Institutions Act*.
- c. By failing to meet accepted professional standards for continence care and the specific continence care standards set out in the LTC Facility Manual, the homes are also in breach of their Service Agreement with the Ministry and therefore subject ultimately, if no corrective action is taken, to a reduction or elimination of funding and removal of their license.
- d. 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 current 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.

- e. The policies and practices 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.
 - i. The 75% full standard and limit on pads discriminates against incontinent elderly persons directly because it imposes harmful and undignified effects on them as a result of the fact that they are incontinent, elderly and dependent on care. Where there is an over-reliance on pads, residents are treated as “babies” when such pads may not even be required if other procedures are followed, e.g. toileting, bladder training.
 - ii. The rule is not respectful of the humanity of residents and devalues the importance to the elderly and disabled resident of having a dignified, independent and comfortable life in an LTC facility which is their “home” as a result of their age and disability.
- f. Requiring health care staff to carry out such rules (subject to discipline) for non-compliance is an unreasonable work rule and subject to being overturned by a policy grievance under a collective agreement.
- g. By violating professional standards of care, these policies and practices were developed and applied by management nurses could expose them to possible sanction by the College of Nurses.

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| 9. Remedies under Bill 140 and Current Laws |
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It is our view that the best remedy initially is to take action under the legislative frameworks which govern LTC homes, the *Long Term Care Homes Act, 2007*. There are three main ways to enforce the legal obligations set out in that *Act*.

a. Report the Homes to the Ministry

A complaint about the practice of one or many LTC homes can be made to the Director in the MHLTC which could allege improper care and treatment as well as neglect and abuse of residents. The complaint could charge that the homes’ continence care policies and practices are:

- a. failing to meet the “clean and dry” and individualized continence care standards contained in the Long-Term Care Facility Program Manual that homes are legally required to meet as a result of their Service Agreements with the Ministry;
- b. failing to provide the incontinence products required to meet the individualized needs of the residents;
- c. failing to take the necessary steps to ensure incontinence is diagnosed and appropriate treatments provided, including bladder training and toileting care;
- d. failing to provide adequate staff to ensure appropriate continence care protocols can be implemented.
- e. threatening or taking disciplinary action against staff for trying to meet the individualized

continence care needs of residents.

- f. failing to provide a “home” for residents where every effort is made to respect their dignity, independence and comfort.

The complaint could also allege that the Ministry is not providing sufficient funds to ensure Government standards can be properly implemented. This complaint to the Director would list the homes with improper practices and request that an Inspector be sent immediately to all the homes to investigate and make the appropriate order to ensure proper continence care compliance. The Inspector has investigative powers under Bill 140 and it is an offence to obstruct an inspector or penalize anyone for giving information to the Director or the Inspector. The complaint could request that the Inspector issue the following orders under Bill 140 as appropriate:

- a. a compliance or work order directing the home to:
 - i. revoke the 75% rule and the rule limiting the supply of incontinence pads;
 - ii. comply with the LTC Program Manual Continence Care Standards and other applicable professional standards as appropriate, including changing residents’ incontinence pads as needed and providing the necessary identification and treatment of residents’ continence care needs, including bladder training, toileting and other measures where appropriate (See Section 4b above).
- b. If action is not taken promptly to correct the problem, issue a written notification to the licensee and refer the matter to the Director for further action. The Director has the power to issue conditions on the homes’ funding and license and ultimately to terminate the license for non-compliance.

It is important to note that, both under the previous *Nursing Homes Act* and under Bill 140, workers have a duty to report to the Ministry’s Director any harm or improper treatment of residents. As noted above, nursing staff have even higher obligations to take steps to provide proper and sufficient care and to report improper care and advocate for residents. Accordingly, if workers in a particular home believe the continence care practices are leading to mistreatment, neglect or abuse, they should report it.

Even though the *Nursing Homes Act* and now Bill 140 provide “whistleblower” protection for those who make complaints, it would likely still be better for workers’ representatives, the Union to report the harm, abuse or neglect on behalf of the worker.

b. Filing a Complaint with the LTC Homes

As an alternative, or in addition to the above recourse, workers, their unions, residents or family members could file a complaint with the administrators of individual LTC homes with respect to their failure to follow professional standards, the LTC Manual, the legislative requirements and to ensure a zero tolerance policy regarding the abuse and neglect of residents. Under Bill 140, the home has a duty to investigate, respond and act on complaints. Accordingly, a complaint to a home would have the dual effect of registering a report of mistreatment and of forcing the home to investigate and justify its policies. A complaint to the administrator of the home could be copied to the Director in the MHLTC to signal that there is a problem that the Complainant is trying to resolve first with the home. This would also ensure that the conduct is reported to the Ministry’s Director as required by Bill 140. Homes could be informed that further complaints would be filed with the Ministry if the continence care policies and practices were not changed promptly. The new Bill 140 Office of the Long Term Care Homes Resident and Family Adviser once it is in place, could also be involved. This person advises the Minister on issues concerning residents’ interests.

10. Legal Action Under the Bills of Rights

Another recourse available would be for residents to take legal action against particular homes for breach of contract: for failing to meet certain of the rights listed above that are found in the Residents' Bill of Rights. This Bill of Rights is enforceable by residents against the home as a deemed contract. Given that the policies and practices in question likely do not comply with the LTC Program Manual, this may well be sufficient for a court to find that they violate the Bills of Rights as falling below an acceptable standard of care. We would recommend that challenges start first with the complaints/reports under the above-noted laws. It may be that organizations which represent the elderly generally, such as the Advocacy Resource Centre for the Elderly might wish to pursue this remedy separately. Advocacy groups might want to communicate with the homes that legal action might be taken if a change is not forthcoming voluntarily. Where a resident could prove specific damages as a result of the policy or practice, this would be the route to take. This type of claim by residents could potentially also be pursued as a class action. However, it should be noted that such an action likely would be legally complex.

11. Remedies Under the Ontario *Human Rights Code*

a. Establishing Discrimination

In our view, a solid argument could be made that continence care protocols that prohibit the changing of pads until they are 75% full and the limit on the number of pads per resident constitutes discrimination in services against the incontinent elderly contrary to section 1 of the *Code* on the intersecting grounds of age and disability. As the policies also exacerbate the disadvantage many residents experience because they are predominantly women, gender could also be added as a ground of discrimination. A union or worker would be entitled to bring such a claim on behalf of one or more residents (with their consent) once the recently passed amendments to the *Human Rights Code* (Bill 107) are brought into force (s. 34(5)). The Government has announced a proclamation date of June 30, 2007. In order to make out a claim to discrimination, the following would have to be established: a) that the continence care protocols discriminate against certain residents on one or more protected grounds; and b) that the policies are not a "*bona fide* requirement", including that the LTC homes have not met their duty to accommodate residents.

In our view incontinence likely would be considered a disability under the *Code* as would the illnesses which cause the symptom. Due to the combination of their age and their disability, incontinent elderly persons are put in a particularly vulnerable position; they are dependent on others to care for them and control over toileting is one of the last vestiges of independence. In some cases, due to cognitive impairments, these persons may not even be in a position to voice discomfort or dissatisfaction with their care. The discrimination argument could be made as follows:

- a. All residents of LTC homes have a right to be treated with dignity and respect and to have their various personal and health needs cared for. In order to reach the same standard of care as others, incontinent persons require certain services such as proper continence care. In failing to provide proper continence care by imposing these fixed standards, the homes are discriminating against these persons.
- b. The 75% full standard and limit on pads discriminates against incontinent elderly persons directly because it imposes harmful and undignified effects on them as a result of the fact that they are incontinent, elderly and dependent on care. Where there is an over-reliance on pads, residents are treated as "babies" when such pads may not even be required if other procedures are followed, e.g. toileting, bladder training.
- c. The rules are not based on an individual assessment of the needs of the residents but are

imposed on them based on a pre-determined fixed rule;

- d. The rules constitute an unlawful and discriminatory barrier to elderly residents fully participating in all aspects society, including their ability to walk and participate in home and family activities;
- e. The rule is not respectful, of the humanity of residents and devalues the importance to the elderly and disabled resident of having a dignified, independent and comfortable life in an LTC facility which is their “home” as a result of their age and disability.

b. *Bona fide Requirement and the Duty to Accommodate*

Once a *prima facie* case of discrimination has been made out, the following test established by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin)* case³⁴ would be applied to determine whether these rules could nevertheless be justified as a *bona fide* requirement:

- a. whether the 75% or more full standard and limit on pads were adopted for a purpose rationally connected to the resident care, programs, and services provided by a LTC home;
- b. whether the 75% or more full standard and limit on pads were adopted in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose; and
- c. whether the 75% or more full standard and limit on pads are reasonably necessary to the accomplishment of that legitimate purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate residents without imposing undue hardship upon a LTC homes.

The homes will likely argue that the rules are based on the claims of the incontinence care products companies’ claims as to the absorbency capacity of the pads. However, it is also clear that the homes have known that many staff do not approve of the policy and at times take steps to avoid the rule and care for residents by hiding pads and filling them up with water to reach 75% line.

In our view, even if LTC homes were able to meet the first two branches of the *Meiorin* test, it would be difficult for them to show that it is impossible to accommodate residents without undue hardship. A solid argument could be made that accommodating elderly incontinent persons by allowing pads to be changed more frequently would not impose undue hardship on LTC homes as it would only require relatively modest expenditures to cover additional staff time required to change pads more frequently and the cost of additional pads. It could be argued that this cost would not amount to undue hardship, especially when measured against the benefits of a more individualized protocol. This argument could be supported with reference to the standard contained in the Program Manual which establishes a “clean and dry” standard to be implemented through an individualized program of continence care. It can be argued that the standard set out in the Program Manual is precisely the standard the homes need to meet in order to discharge their duty to accommodate under the *Human Rights Code*.

Two recourses would be available under the *Human Rights Code* to challenge this discrimination:

- a. First, a complaint could be made to the Human Rights Tribunal once Bill 107 is in force by the OFL and/or a union on behalf of residents with their consent (or in conjunction with a group of residents). Under the current *Code*, a complaint would need to be filed by a

³⁴

[1999] 3 S.C.R. 3

resident or by the Commission itself. Accordingly, to proceed with the complaint now, a request could be made to the Chief Commissioner, Barbara Hall to ask for the Commission to file the complaint under the current *Code*.

- b. Second, once the new *Code* provisions are brought into force, a union could request that the Ontario Human Rights Commission conduct research into the matter pursuant to its new power under the *Code* to initiate reviews, conduct inquiries and make recommendations regarding conditions in a community, institution, industry or sector (s. 29(e) of the *Code*). Even under the current *Code*, the Commission has the power under section 29 (g) to initiate investigations in the community where there is a problem based on a prohibited ground of discrimination and encourage and co-ordinate plans to prevent the problem. Based on the preliminary research set out in this opinion, it appears that continence care protocols in the LTC sector have harmful effects on the health and human dignity of vulnerable residents and that this is precisely the kind of systemic issue that the Human Rights Commission is mandated to address.

12. Recourse under *Canadian Charter of Rights and Freedoms*

Given that the Ministry's Manual continence care appears to provide for a reasonable standard of continence care and the LTC laws, either current or proposed, do not authorize the 75% rule or a fixed limit on pads, there does not appear to be a valid claim that the Government's continence care laws or policies violate the *Charter*. While the Government does not appear to be adequately enforcing its standards, their standards do not appear to violate the *Charter*. This opinion does not address whether the Government's funding policies might contravene the *Charter*.

Another possible argument under the *Charter* is make an argument that the *Charter* applies to the nursing homes' continence care protocols directly, as a result of the nursing home's provision of an essential service of the Ontario Government's health care system. However, this is a very complicated claim and it is our view that the human rights and other matters at stake could more simply and cost-effectively be addressed by the other remedies we have reviewed above. We note, however, that a violation of the *Charter* equality rights of residents would be a helpful argument to support complaints filed through the legislative recourses outlined above.

In our view, a *Charter* challenge against the homes would involve addresses a number of complex legal issues, including the following.

a. Application of *Charter* and Standing to Advance Claim

It is a complex issue whether the *Charter* would apply to the resident care policies of LTC homes. The *Charter* applies to government action. The Supreme Court of Canada has found in the that the *Charter* can also apply to a non-governmental institution (1) if there is sufficient government control over the institution that it can be said to be a part of government or (2) if the institution is implementing a specific governmental policy or program.³⁵ In our view, there is some basis for arguing that, due to the extensive regulation of LTC homes, these homes are either a part of government health care system or, in the alternative, that they are implementing a specific government policy or program. This issue has never been squarely raised in the courts with respect to such homes. The issue of standing might also have to be addressed.(i.e. legal status) to bring a claim on behalf of residents alleging a violation of their *Charter* rights. An organization, such as the OFL and/or a union might also seek formal status as an intervener in the claim or could support a resident or group of residents in advancing the claim

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Eldridge v. British Columbia (Attorney General), (1997) 3 S.C. R. 624.

b. Establishing Violation of a *Charter* Right and Section 1

In our view, it could be argued along the lines set out in the previous section dealing with the *Human Rights Code* that the continence care policies protocols violate the equality rights of residents on the ground of disability or the intersecting grounds of disability and age. The other *Charter* rights that could be engaged in cases of resident abuse and neglect are the rights to life, liberty and security of the person guaranteed under s. 7 of the *Charter*. Courts have interpreted “security of the person” to extend beyond physical security to encompass psychological integrity. However, a court would be more likely to find a violation of this right in cases where significant physical or psychological harm results from a particular LTC home policy. A violation of this right might also be alleged in respect of other LTC home policies (e.g. policies on the use of restraints) if it can be shown that these policies have harmful physical and psychological effects on residents.

Even if a law or action is found to violate a *Charter* right or freedom, it may nevertheless be upheld under section 1 of the *Charter*. This provision allows violations to be justified if they are found to be reasonable limits in a free and democratic society. In other words, no *Charter* right or freedom is absolute, but must be balanced against certain other factors. In applying section 1, a court would consider the objectives of the impugned policy, whether the policy impairs *Charter* rights as little as possible, and whether there is proportionality between the *Charter* violation and the benefits associated with the policy. What this means is that, in addition to showing that a continence care policy violated the *Charter* rights of residents, it would be necessary to show that the policy was not justified under section 1.

It is our view that if a violation of a right could be made out, a reasonable argument could be made that the violation is not justified under section 1. In particular, there is a solid basis on which to argue that any fixed 75% or more full requirement would not minimally impair the rights of residents and that any benefits associated with the policies (e.g. redeployment of personal care workers to other resident care tasks) are outweighed by the negative effects on residents’ rights. However, we note that the results of section 1 analyses are always difficult to predict and this uncertainty should be factored into any consideration of pursuing a *Charter*-based strategy.

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| 13. Grievance under Collective Agreement |
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Policy grievances could be filed alleging that a LTC home’s continence care policies and practices constitute unreasonable work rules. In order to be valid work rules must meet the following criteria set out in *KVP Co. (1965)*, 16 L.A.C. 73:

- a. It must not be inconsistent with the collective agreement;
- b. It must not be unreasonable;
- c. It must be clear and unequivocal;
- d. It must be brought to the attention of the employee affected before the company can act on it;
- e. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge; and
- f. Such rule should have been consistently enforced by the company from the time it was introduced.

In addition, the grievance could argue that the policies and practices violate the LTC Program Manual, the legislative requirements set out in Sections 5 & 6 above, the *Human Rights Code* and the *Charter*. Since a worker has a duty to report harm under the *Nursing Homes Act* and Bill 140, presumably the worker should not engage in such harmful conduct. If a management order is “unlawful”, then it is not a reasonable order.

In applying the standard of reasonableness to the incontinence care protocols, an arbitrator would assess

the extent to which the 75% full standard and fixed limit of pads is necessary to protect the employer's interests in operating a home in a reasonably safe, efficient and orderly manner. An arbitrator would then weigh this against the impact of the 75% full standard upon the employees' interests. In order to assess the likelihood of success of any particular grievance, you would need to review the particular circumstances at that home. A possible difficulty with this recourse is that it is residents who suffer most of the harmful effects of the protocol. However, employees find implementing the rules distasteful and they are subjected to discipline. In the event that an employee were disciplined for failing to comply with the policies, the rule could be challenged as unreasonable and therefore invalid.

14. Professional Misconduct Complaint Against Administrator/Nursing Director

In an appropriate case, a professional misconduct complaint could be filed against an Administrator or Director of Nursing in a particular home for directing staff to follow the fixed 75% rule and for limiting pads.

The College of Nurses of Ontario (CNO) has established certain professional standards pursuant to the *Registered Health Professions Act* which include standards relating to proper patient care. Nurses who are Administrators have the obligation to ensure that their administrative actions do not compromise their nursing responsibilities. The CNO professional standards and ethical framework clearly state that the nurse in an administrator role should create environments that are conducive to meeting professional standards and ensure resources are used efficiently and effectively to protect the consumer interest.³⁶ The CNO Standards also stipulate that "nurses advocate practice environments that have organizational and human support systems and the resource allocation necessary for the safe, competent and ethical nursing care."³⁶

In at least one case, the Discipline Committee of the College of Nurses has cautioned a Nurse Manager for failing to advocate on the behalf of patients to seek revisions to hospital policies restricting the use of continence pads.³⁷ The decision was overturned on reconsideration as the Nurse Manager provided additional evidence that she had in fact taken certain steps to advocate for changes to the Policy. Nevertheless, the principle remains that Nurses Managers have a professional duty pursuant to the College of Nurses' Professional Standards to advocate for changes in policies that are detrimental to proper patient care, including policies restricting the use of continence pads.

In another case, the Health Professions Appeal and Review Board found that a Nurse Manager had taken appropriate steps to question and address the home policy of restricting the supply of incontinence products, including the greater use of bladder function tests, referral to an incontinence clinic, changing the patient more frequently and using more pads than allocated per patient.³⁸ It also found that the nurses had responsibility for monitoring when patients needed changing. The original Committee had found that the policy restricting use of products had to have exceptions for those residents who require changing on a more frequent basis.

In our opinion, a complaint to the College of Nurses should only be considered in circumstances where an Administrator or Director of Nursing has engaged in conduct in a way that clearly shows a disregard for the care and well-being of residents. This could include failing to revise a policy after complaints are filed. In our view the other recourses listed above should be preferred over this one as they target the real source of the problem – the nursing homes themselves. As well, the remedy that could be achieved by filing a complaint with the College of Nurses may be of limited value in changing the continence care

³⁶ File #5845 - Health Professions Appeal and Review Board, Complaint re: J. Gagnon, Decision dated June 27, 2001.

³⁷ File No. 5845 decision, *supra*.

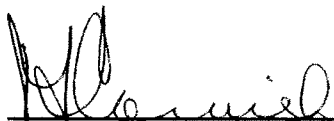
³⁸ H. A. Loughheed and A. Raeburn-Cyrus and A. Nikoras (File # 4846 & 4856 dated Dec.30, 1999).

protocols in LTC homes.

Conclusion

For the reasons set out above, we believe that the policies and practices outlined in Section 2 of this 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. Such challenges would further the rights of elderly residents to proper, sufficient and dignified care and the rights of health care workers to receive support for providing such quality care.

Dated at Toronto, this 12th day of September, 2007



Mary Cornish



Jo-Anne Pickel