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ISSUES IN MENTAL HEALTH IN LONG-TERM CARE

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- This presentation and any material provided for this presentation is not legal advice but is only legal information for educational purposes
- Legal issues are FACT SPECIFIC and require factual information in order to provide legal advice to resolve an issue/problem/determine your rights
- If you require legal advice, please consult your own lawyer or legal advisor

Applicable Legislation

- *Long-Term Care Homes Act, 2007*
- *Health Care Consent Act*
- *Substitute Decisions Act*
- *Personal Health Information Protection Act*
- *Health Insurance Act*
- *Mental Health Act*

Long-Term Care Homes Act, 2007

- Came into force July 1, 2010
- New sections have recently been passed but not yet enacted
  - Specifically two sections regulating restraint and confinement (s. 30, 30.1)
- General Regulation - O. Reg. 79/10

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What Is A Long-Term Care Home?

- Part of health care system
- Homes may be for-profit, not-for-profit, charitable or municipal
- To resident, there should be no visible difference between these types of homes
- All are funded and regulated the same by the Ministry of Health and Long-Term Care
- Admission is governed legislation

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Long-Term Care Homes Act, 2007

- Includes more specified Resident's Rights (expanded from 19 to 27)
- Defines and regulates the use of:
  - Physical Restraints
  - "Personal Assistance Services Device" (PASD)
- Introduces requirements for:
  - consent to admission/transfer to a secure unit
  - notice provision, rights advice and right to apply to the CCB
  - these sections are not yet enacted
- Regulated documents

Admission Into A Long-Term Care Home

- Part III of the *LTCHA* – s. 39 – 55
- Part III of O. Reg. 79/10 – s. 152 - 210
- Consent and capacity to consent to admission is governed by Part III of the *Health Care Consent Act*

Admission Into Long-Term Care Home

- *HCCA c*alls them “care facilities”
- Defined as long-term care homes under the *LTCHA*
- **Does not** include admission to Retirement homes under the *Retirement Homes Act* or Care homes as defined in the *Residential Tenancies Act, 2006*
- **Does not** include admission to “transitional beds”

Role Of LHIN With Respect To Admission

- To get admitted persons must have assessed care needs and must consent to admission – cannot just choose to reside in a LTCH
- LHINs are gatekeepers to admission and are responsible for management of placement process
- Handles the application process
- Determines eligibility for admission
- Authorizes admission and makes bed offers
- Responsible for keeping waiting list for all LTCHs in a geographic area

Eligibility Criteria

- At least 18 years of age
- Is insured person under *Health Insurance Act*
- Requires
  - Nursing care to be available on site 24 hours/day
  - Assistance with activities of daily living at frequent intervals throughout the day
  - On-site supervision/monitoring to ensure safety or well-being at frequent intervals throughout the day
- Publicly funded community based services available to the person and other caregiving, support or companionship arrangements available to the person are not sufficient, in any combination, to meet the person's requirements; and
- Person's care requirements can be met in a LTCH

Who Assesses Capacity With Respect To Admission?

- "Evaluators" as defined in *HCCA*
- Members of College of:
  - Audiologist & Speech Language Pathologists
  - Dietitians
  - Nurses
  - Occupation Therapists
  - Physicians & Surgeons
  - Physiotherapists
  - Psychologists; and
  - Member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work

Evaluators and Capacity Assessors – NOT the Same

- Evaluators and Capacity Assessors are **not** the same
- Just because evaluation of capacity is required does not mean that a capacity assessor should be contacted
- Capacity assessors – cost money

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EVALUATORS

- No special training required
- Can be employee of LHIN, hospital, or in the community
- As long as is member of one of the defined Colleges
- Many LHINs are demanding that only their employees complete evaluations – for quality control purposes – but is not mandatory

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Capacity Assessors

- A person is qualified to do assessments if he or she
  - Successfully completes the qualifying course
  - Is a member of a particular College
  - Successfully completes continuing education courses
  - Completes a minimum annual number of assessments
  - is covered by professional liability insurance of not less than $1,000,000

Consent To Admission To a Long-Term Care Home

- Capable – person consents
- If incapable – substitute decision-maker consents

Elements Of Consent

- Consent must relate to the admission
- Consent must be informed
- Consent must be given voluntarily
- Consent must not be obtained through misrepresentation or fraud.

LTCHA s. 46

Informed Consent

- Person must receive information about matters that reasonable person in the same circumstances would require in order to make decision about admission
- Those matters are:
  - what admission entails
  - Expected advantages and disadvantages of the admission
  - Alternatives to the admission
  - Likely consequences of not being admission.
- Person must receive responses to requests for additional information about those matters.

Consent: Incapable Resident

- Evaluator finds person incapable with respect to admission.
- Consent required by law to admission.
- Consent may be given or refused by SDM
- Principles for giving or refusing consent: wishes, then best interests.
- Person may apply to CCB for review of finding of incapacity or to apply for representative.

Crisis Admission

- HCCA s. 47
  - Person found incapable in respect to admission by an evaluator
  - Admission may be authorized without consent if LHIN of opinion that;
    - Incapable person requires immediate admission as a result of crisis relating to that person AND
    - Not reasonably possible to obtain an immediate consent or refusal from SDM
  - If admission with out consent for this purpose, LHIN must make reasonable efforts to find SDM and obtain consent or refusal of consent to admission.

Admission to Long-Term Care Home from Hospital

- The admission process is the legal responsibility of the LHIN – NOT the hospital
- Applicant/SDM entitled to deal directly with LHIN case manager regarding placement into LTC and NOT Hospital Discharge Planner
- Hospital/LHIN may NOT have own “policy” about admission that deviates from the *HCCA/LTCHA (*short list, 5 homes, first available bed, etc.)

Chronic Care Co-Payment

- Hospitals not entitled to charge more than the “chronic care co-payment” for “ALC” patients
- Patient must meet all the criteria set out in the Regulations to be charged – just because one occupies a chronic care or ALC bed DOES NOT necessarily mean can be charged
- Psychiatric patients who become ALC to long-term care CANNOT be charged a co-payment under the *Health Insurance Act*
- Patients returning home, going to the community (retirement home) CANNOT be charged the co-payment
- Must be aware of ALL of the rate reductions – i.e.. for dependents

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Home First

- Not all patients can go home
- Cannot require a family member to care for, pay for care
- Behavioral/mental health issues are especially difficult when it comes to “home first”

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Transitional Care

- No one can be forced into “transitional care”
- Units may be in retirement homes, other less regulated care homes
- Not appropriate for behavioural/mental health issues

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Retirement Homes

- Are NOT equivalent to long-term care
- Are always optional
- Usually unsuited to serious behavioural/ mental health issues
- Are tenancies with purchased care
- No detention authority
- Governed by *Residential Tenancies Act* and *Retirement Homes Act*
- Oversight by the Retirement Home Regulatory Authority (RHRA)

Issues in Care Homes

- Consent required even though not under *HCCA*
- May not discriminate on basis of a mental disorder or other health-related issue (*Ontario Human Rights Code)*
- Cannot refuse “readmission” from hospital as they are tenancies under the *Residential Tenancies Act*
- Cannot require residents to purchase services other than base package

Approval of Admission to Long-Term Care Home

- After application sent to LTCH – home has five days to approve admission
- Only two valid reasons that it will not approve admission:
  - The home lacks the physical facilities to meet the person's care requirements
  - The staff of the home lack the nursing expertise necessary to meet the person's care requirements

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Refusals of Admission by Long-Term Care Home

- Homes often send the notice just stating one of the two reasons with no supporting facts
- Often used to refuse difficult residents, those with unusual health issues (i.e. Huntington's, early onset dementia), or those with behavioural/mental health issues
- While this is not legal, difficult to enforce this
- LHIN/MOH&LTC should be enforcing, but often do not, even when approached

Written Notice if Licensee Withholding Approval

- Ground(s) on which licensee is withholding approval
- Detailed explanation of the supporting facts, as they relate both to the home and to the person's condition and requirements for care;
- Explanation of how supporting facts justify the decision to withhold approval; and
- Contact information for the Director.

Persons to Whom the Notice Must Be Given

- Applicant (or their SDM)
- Director
- LHIN placement coordinator
- Applicant/SDM is often not provided with the notice
- Notice must be the same to all three – cannot have different notice to applicant/SDM

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Specialized Units

- Upon recommendation of LHIN – MOHLTC can designate specialized unit within a home
- Right now – are behavioural units
- Has its own admission criteria and waiting list
- When person is admitted – they are a long-term resident of the home

Issues of Consent in Long-Term Care Homes (1)

- Rules of consent to treatment do not change because the person is in a LTCH
- Still must obtain informed consent from the person or their SDM PRIOR to treatment EXCEPT in emergency
- Cannot get “blanket” consents on admission
- Unfortunately, many issues arise in LTCHs where there is failure to obtain informed consent

Issues of Consent in Long-Term Care Homes (2)

- Is especially problematic in the area of psychiatric medication
  - More controversial, more risks, questionable benefits, government warnings against use in elderly
- Also see documents which purport to allow physicians to "consent" to treatment if SDM does not reply, where PGT is SDM of last resort
- Physicians **NEVER** consent

Capacity

- Person is capable if they have the:
  - ABILITY to understand the information that is relevant to the decision to be made

    AND

  - ABILITY to appreciate the reasonably foreseeable consequences of a decision or lack of decision
- Poor decision-making, refusal to make a decision, disagreeing with their health-care practitioner IS NOT incapacity

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Finding of Incapacity

- Up to HCP offering treatment (usually physician) to determine capacity
- If incapable, must provide information to patient per the HCP college guidelines
- Patient has right to apply to the CCB for determination of capacity/board appointed representation (if no Guardian or Attorney for personal care with authority)

Substitute Decision-Makers

- Must go to hierarchy and find first person on the list who meets the criteria to be SDM
- SDM must make decision in accordance with the legislation
  - Comply with known wish, or if not known
  - Best interest
- If not complying with these principles, HCP can make an application to CCB to determine if they are complying

Behavioural Contracts

- Adults who are capable are entitled to make their own decisions, even poor ones
- Generally unenforceable against residents or tenants
- We advise our clients to NEVER sign such documents
- If person is incapable, substitute consent may be obtained pursuant to *HCCA* Part IV – Personal Assistance Services (applies to long-term care homes and retirement homes ONLY)
- Includes requirement of finding of incapacity by an evaluator, right to apply to the CCB, hierarchy of SDMs, etc.

Restrictions on Legal Behaviour

- Just because one lives in congregate setting, does not give the home the authority to restrict legal behaviour
- LTCHs, Care Homes – no authority to restrict use of alcohol
- LTCHs may have policies related to storage
- Will be the same with recreational cannabis
- Physicians CANNOT restrict use of alcohol, recreational cannabis
- CANNOT include in treatment plan

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Detention in Long-Term Care Homes

- LTCHs do not have detention authority
- The *LTCHA* originally had “secure unit” sections which were never enacted
- Recent amendments to the *LTCHA* and *HCCA* included authority to detain with legislative scheme of appeal to CCB
- Not yet enacted – unknown whether this government will enact
- Only authority at present is if it meets common-law duty – which is on a case-by-case basis – i.e. EACH TIME person tries to leave

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Detention in Retirement Homes

- No authority to detain
- *RHA* has been amended to include some detention authority
- Controversial because it is a tenancy
- Not yet enacted – unknown whether this government will enact
- Only authority to detain would be under the common law duty

Other Care Homes

- No authority to detain
- Only common-law authority to detain applies

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Geriatric Behavioural Units

- Seeing more of these in hospitals
- Often used for the 60-day psychiatric assessment allowed for under the *LTCHA*
- These units may be in “Schedule 1” hospitals under the *Mental Health Act*
- Rarely treat patients as patients under the *MHA* even if they are brought to hospital under Form 1

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Patient's Rights in Geriatric Behavioural Units

- Patients usually detained
- Are being treated specifically for behavioural issues due to a mental disorder
- Legally should be under the *MHA*
- Failure to do so is illegal
- Contrary to the *MHA*, Charter
- Failing to ensure the protections available under the *MHA*
- Hospitals, HCPs, are opening themselves to litigation, College complaints

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