February 5, 2018

# Court Dismisses Allegations that Long-Term Care Residents Subsidize Their Health Care Costs

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**Cases Commented On:** *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII) and *Elder Advocates of Alberta Society v Alberta*, 2018 ABQB 37 (CanLII)

Under provincial health insurance laws and the *Canada Health Act*, RSC 1985, c C-6, governments fund medically necessary hospital and physician care. There is also a patchwork of public programs (with varying eligibility criteria and co-payments) to subsidize services such as dental care, pharmaceuticals, home care, and long-term care. While the Alberta government pays for health services provided in long-term care facilities, residents pay accommodation charges. These charges, which cover such costs as housing, housekeeping, and meals, are borne by residents on the theory that they would incur such expenses if they were living in their homes in the community. The current accommodation charge ranges from $53.80 per day for a shared room to $65.50 per day for a private room.

In the *Elder Advocates of Alberta Society* cases, 12,500 long-term care residents initiated a class action against the Alberta government and the nine Regional Health Authorities (RHAs) that were in operation at the time. The plaintiffs alleged that the defendants inflated accommodation charges to subsidize the cost of health services that should have been publicly funded. In 2011, the Supreme Court of Canada struck allegations of bad faith, breach of fiduciary duty, and negligence from the plaintiffs' claim (2011 SCC 24 (CanLII)).

Although a bad faith exercise of discretion can ground an action for judicial review and bad faith is an element of the tort of misfeasance in public office, the Court concluded that "[t]he simple fact of bad faith is not independently actionable" (at para 78).

The Court also determined that the requisite undertaking necessary to give rise to a fiduciary duty was missing on these facts. Furthermore, the decision recognized the unique policy concerns with imposing fiduciary obligations on government, as such duties are "inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance" (at para 44). While fiduciary obligations may conflict with the public interest, as I discuss below, there are also countervailing policy concerns suggesting a need to enhance transparency and accountability in long-term care charges, which would also be in the public interest.

The parties also lacked the requisite proximate relationship to ground a duty of care, which is necessary for a negligence claim. In reaching this conclusion, the Court applied an approach to the duty of care test that Canadian judges have shifted away from—one that focuses primarily on

the statute as the source of proximity, with less emphasis on the interactions between the parties. In this regard, the Court found that "[i]n the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity…" (at para 72). The Court went on to conclude that "[a]bsent a statutory obligation to do the things that the plaintiffs claim were done negligently", there was no proximity (at para 73). The Court also would have struck the negligence claim due to a policy concern that the government would be exposed to "virtually unlimited" liability with a potential lawsuit by "any patient in the health care system with an entitlement to receive funding for health services" (at para 74). Given the small percentage of health services for which there is a co-payment, it is difficult to envision the types of claims contemplated by the Court, and thus this concern may be overblown.

The Supreme Court of Canada permitted allegations of unjust enrichment and breach of the *Charter* to proceed to trial. The Court of Queen's Bench recently addressed these arguments, along with claims against the RHAs (who had not been part of the appeal to the Supreme Court) (see 2018 ABQB 37 (CanLII)). The resolution of this case turned largely on the statutory interpretation of the phrase "accommodation charge" in the *Nursing Homes Operation Regulation*, Alta Reg 258/1985, s 3(1) and the *Hospitalization Benefits Regulation*, Alta Reg 244/1990, s 5(1)(d). The defendants argued that the "accommodation charge" referred to in the legislation is a maximum fee set out by the Minister that is unrelated to the cost of services. In contrast, the plaintiffs argued that accommodation charges must correspond to costs and cannot subsidize health care services.

Justice Ross rejected the plaintiff's argument on several grounds. First, the legislation does not specify that accommodation charges must correspond to cost recovery (unlike hospital regulations that, in contrast to nursing home regulations, do just that)(at para 158-169). She noted that had the legislature intended this nexus, they would have addressed various issues not contemplated in the legislation, such as how to determine the cost of accommodation and food and whether for-profit facilities can only profit from the government's payments for health services and not from accommodation charges paid by residents (at paras 204-227). The legislation uses the word "charges" rather than "cost" and, according to Justice Ross, only the latter word indicates an exact sum or a sum linked to an expense (at paras 170-181). Although she dismissed the argument that accommodation charges must have a reasonable nexus to their cost (at paras 229-244), Justice Ross found that such a nexus did exist (albeit in the face of conflicting expert evidence limited by the available data)(at paras 246-313).

Because the charges bore a nexus to the cost and were justified, the plaintiffs did not suffer an unjustified deprivation and the defendants were not correspondingly enriched, thus the unjust enrichment claim failed (at paras 316-327). Justice Ross similarly found that the claims against the RHAs, which were not addressed by the Supreme Court, must be dismissed. There was no implied contractual term that accommodation charges would only be used for accommodations and meals (at paras 328-330). Finally, because the legislation did not require the defendants to ensure the accommodation charges were used for particular expenses, Justice Ross concluded that the claims in negligence and bad faith could not succeed (at paras 331-332). The *Charter* claim, which also failed, will be discussed in a later blog post.

Apart from the legal issues, this case raises important policy questions regarding transparency and accountability in health decision-making, the appropriate role for private providers of health care services, and how to fund long-term care.

As the limited empirical evidence in this case and several reports illustrate, there is a lack of transparency around the actual costs relating to accommodation and who is subsidizing whom. For example, a 2005 Auditor General report found that the Alberta government "does not have a policy on the portion of accommodation costs that are the responsibility of the resident, what accommodation costs should consist of, or how to calculate the accommodation rate" (at 37). The government must provide sufficient data for taxpayers and long-term care residents to understand what they are paying for. In order for the government to be accountable for its policies, the public must understand whether they are subsidizing accommodation expenses that residents would incur if they lived in the community, whether residents are paying health care costs that should be publicly funded, or whether the charges are fair. Given that some residents do not pay accommodation charges (due, for example, to income), other residents may be subsidizing their costs. Progressive tax policy would arguably have the government, rather than other residents, paying these costs.

This case also raises the issue of the appropriate role for private providers in a public health care system. Most of Alberta's long-term care facilities are run on a private, for-profit basis. Although in the aggregate, there may be a nexus between accommodation charges and costs, there are significant differences across facilities. For example, Justice Ross cited evidence that the total cost per resident was $64.71 per day in private facilities versus $70.20 in public facilities (at para 268). The government should consider whether to increase the percentage of public beds, where accommodation charges may bear a closer relationship with actual costs (instead of being a means of generating profit). Unsurprisingly, evidence also suggests that quality of care is lower in for-profit facilities.

Accommodation charges are part of a broader problem, whereby governments must do more to plan for the future of long-term care, given the increasing demands that will be placed on facilities by the aging population and the increasing prevalence of chronic illnesses. Currently, Canada spends less per capita on long-term care than most Western European countries. Given that most individuals tend to under-save for their future long-term care needs, several economic analyses propose universal public insurance, which would align with the policies of several European countries. In addition to planning for future costs, governments must also increase long-term care capacity. If they do not open more public beds, the percentage of for-profit facilities may increase, as will the already long wait times. The Alberta government recently reported that only 44% of patients are placed in a continuing care bed within 30 days of their assessment. Economist Herb Emery estimates that the 600 Alberta hospital beds occupied each day by patients waiting for placement represents $175 million per year. He estimates that the difference between $800 per day in a hospital bed versus $130 per day in a long-term care bed adds up to $147 million per year, which would allow the government to fund the cost of 3000 additional long-term care beds.

This post may be cited as: Lorian Hardcastle “Court Dismisses Allegations that Long-Term Care Residents Subsidize Their Health Care Costs” (5 February, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/02/Blog_LH_LTC.pdf

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