Elder Advocates and James Darwish 2008 Class Action Report

Introduction

This report provides a backgrounder describing the evolution of the funding and fees of Alberta's residential long term care facilities, and a summary of the issues discussed in the Court Decision.

In June, 2003, the Alberta Government announced that the residents' fees for long term care facilities would be increased by more than 40%; the fee for a semi-private room went from $30 a day to $42 ($1277 a month) and a private room from $32.60 to $48.30 ($1470 a month).

The Government News Release commented that the fees would cover "services like food and meals, housekeeping, bed linens and building maintenance"; it also noted that nearly 60% of the long term care residents would require financial assistance from the province to pay the fees.

In 2005, the Auditor General's Report on Seniors' Care and Programs noted that the Department does not obtain sufficient information from the Regional Health Authorities to make funding decisions, set accommodation rates, or assess policy changes, and 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. He repeated these concerns in his 2008 Annual Report.

The Elder Advocates of Alberta Society and Mr. James Darwish filed a law suit against the Government of Alberta and the Regional Health Authorities (RHAs), claiming that the 2003 fee increase involved charging residents for services that are insured under the Canada Health Act, instead of charging residents only for the costs of accommodation and meals. In a preliminary ruling on August 14, 2008, the Alberta Court of Queen's Bench certified the suit as a class action.[1]

The decision (Elder Advocates and James Darwish v Government of Alberta et all 2008) is a detailed review of the legislative and regulatory framework of long term care services, the affidavits and evidence provided by the parties, and the reasons for certifying the lawsuit as a class action. The matter will proceed to a trial unless the parties agree to a pre-trial resolution.

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The Statement of Claim (the document initiating the lawsuit) is available at http://elderadvocates.ca/about/lawsuit.php

The certification decision (ABQB 490) is available at http://www.continuingcarewatch.com/pdf/CQB%20Decision%20Elder%20Advocates%20and%20James%20Darwish%20v%20Government%20of%20Alberta%20et%20al%20August%202008.pdf

[1] Citation: Elder Advocates of Alberta Society v. Alberta, ABQB 490, Docket: 0503 13196
Certification decision at http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2008/2008abqb0490.pdf

Backgrounder

The costs of in-patient hospital services have been covered by the Canadian public health care insurance plans since the Canada Health Act was introduced in 1984 (and before that through the shared provincial/federal funding under the national hospital program). Until 1995, the provinces were required to report the purposes for which the federal share of health care funding (including the cost-sharing for Extended Health Care Services) were used.

The Canada Health Act does not permit user fees for "basic health services", which, relation to hospital services, include "accommodation and meals at the standard or public ward level" and services provided by persons who are paid by the hospital. Alberta legislation[2] governing nursing homes and auxiliary hospitals[3] does allow the Minister to make regulations to determine the amount of resident fees levied to cover "accommodation and meals".

During the late 1980s and early 1990s, Auxiliary Hospitals and Nursing Homes (which originally admitted different types of patients) were merged through a new funding formula, were renamed first "long term care" facilities, then "continuing care centres", and distanced from the administration of hospitals. Professional nursing staff was replaced by "care aides", and services previously covered by public health care insurance were reduced.

In 1994/95, Alberta reported to the federal Canada Health Act division that all continuing care centres (nursing homes and auxiliary hospitals) are *"funded for nursing care and personal care",* and *"government funding is also provided to cover the costs of facility administration, therapeutic services (physical, occupational and recreational therapy), support services (such as housekeeping and laundry), dietary, pharmacy and ambulance services."*[4] Nursing home residents were responsible for a co-payment (which at one time was set in relation to a resident's pension income) as the share of costs for accommodation and meals.

Two things changed the accountability for health care funding, including long term care services: the federal government replaced the funding system, and Alberta delegated the provision of health care services to the new Regional Health Authorities (RHAs).

During the early 1990s, resident accommodation fees were increased, and sent to the Alberta Treasury to help pay off the deficit.[5] In 2002, a percentage of the resident fee increase was put into the Seniors Benefit Program for fee subsidies for low income residents (i.e. higher income residents subsidising lower income residents).

The long term care resident fees were recorded in the Alberta Health and Wellness and RHA financial statements as "offset revenue". An Alberta Health document shows $170 million in continuing care resident fee revenue for the year 2004-2005; this money was then transferred to the Regional Health Authorities as part of the Government allocation and subsequently recorded in the RHA expenditure for continuing care facilities.

As of 2007, there will be no public accounting for the resident fees; they will go directly to the facility operators.

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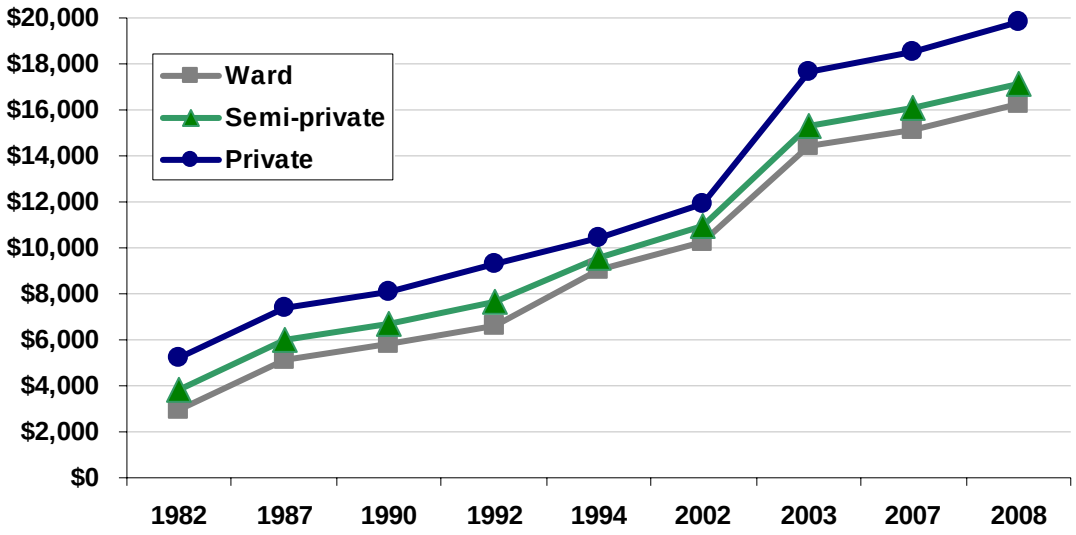
[2] Alberta Health Care Insurance Act and the Alberta Nursing Homes Act, and relevant Regulations.
[3] Alberta Hospitalization Benefits Regulation
[4] 1994/95 report by Alberta to Canada Health Act Division under Extended Health Care Services,
[5] Eldercare – On the Auction Block Consumers' Association of Canada (Alberta), 2002

Alberta Monthly Resident Fees for Basic Long Term Care Facility Accommodation			
	Standard ward (2 or more beds)	Semi-private room	Private room
1982	$243	$319	$433
1987	$426	$502	$616
1990	$487	$563	$677
1992	$548	$640	$776
1994	$753	$798	$870
2002	$858	$910	$992
2003	**$1,205**	**$1,278**	**$1,469**
2007	$1,262	$1,338	$1,544
2008	$1,354	$1,430	$1,650

Sources – various Government of Alberta publications.

Notes: Most of the facility beds are semi-private or private rooms. There has been a concerted effort to replace the older 3 and 4-bed wards with private rooms.
More than half the ~12,500 seniors in facilities qualify for Alberta Seniors Benefit cash subsidies, so they can pay the resident fees.

Alberta Annual Resident Cost for Basic Long Term Care Facility



Sources: various Alberta Government publications, 1982- 2008

Summary of the Decision

Long term care facilities [consisting of government approved and regulated nursing homes and auxiliary hospitals] are funded from two major sources: global allocations for health care services from the government to the Regional Health Authorities (RHAs) which in turn distribute funds at their discretion to individual long term care facilities, and the resident "accommodation" fees which are determined and legislated by the province.

Section 2 of the Alberta Nursing Home Act/Regulations specify that nursing homes "must provide

(a) accommodation and meals;
(b) facilities services;
(c) necessary nursing services;
(d) personal services;
(e) therapeutic and special diets as required;
(f) drugs and medicine specified by the Minister for use on a routine or emergency basis as prescribed by a physician;
(g) routine dressings as required; and
(h) life enrichment services".

The Regulation specifies that the Minister may make recommendations concerning the "accommodation charge", in respect of accommodation and meals. There are no definitions of the terms "accommodation and meals", or "facility services".

The Plaintiffs take the position that "accommodation and meals" means the cost of rent for personal space and the cost of food (but not of meal preparation), and that the Government (and the RHAs) are responsible for paying for all other items listed in s. 2 of the *Nursing Homes General Regulation*.

The Government and the RHAs submit that "accommodation charge" should be given the broadest possible interpretation.

Mr. Darwish, whose mother was in a nursing home, noted that the facility operator provided him with a statement that the care component of the $1,260 resident fee [for a 30-day month] was $834; this amount was the cost of medical expenses for income tax purposes[6], and did not include the cost of food, personal space rent, or common area costs. Mr. Darwish concluded that the difference of $426 was the cost of accommodation and meals, and that the representations made by the Government concerning the costs of "accommodation and meals" were not true. Mr. Darwish asserted that from 2002 to 2005, Government funding to the Regional Health Authorities for the continuing care facilities either remained flat or decreased, although overall funding to the regions had increased.

In an affidavit on behalf of the Government, "facility services" were defined as housekeeping, institutional laundry and linen services, preventative maintenance, paint and carpet renewal, and other building-related services that "would go to keeping the lights on, the heat on and the building in a good state of repair." The Government acknowledged they did not have any system to assess the space occupied, the utilities used, or the food consumed by the residents on an individual basis, or on an average or province-wide basis. The Government funding was

[6] Bulletin IT-519R2, ¶ 23, 29, 30 http://www.cra-arc.gc.ca/E/pub/tp/it519r2-consolid/it519r2-consolid-e.html

provided for the basic care defined in items (b) through (h) of the Nursing Homes General Regulation,

A letter sent to the residents in June 2003 advised that the “accommodation fee” paid for food; nutritional supplements; meal preparation and meal service; extra baths when required; incontinence supplies including disposable diapers when required; wander guard bracelet with batteries; cable television connection to room; housekeeping services; utilities; routine maintenance; and improvements to facility décor. Persons admitted to long term care facilities for palliative or sub-acute care are exempt from the “accommodation and meals” charges, and persons admitted for respite care pay a per diem fee which may be lower than the resident charge. The affidavit also noted that in 2005, 70% of the long term care residents received government subsidies for the fees.

Affidavits and evidence from the Regional Health Authorities confirmed that they do not have any kind of analysis, review or audit to determine who was paying for basic facility services, defined by the Government as housekeeping, laundry and linen services, and preventative maintenance. Although the fee increases were described as the maximum that could be charged, no facility charged less than the maximum amount; all acknowledged that the cost of providing care can vary a great deal depending on location, the care needs of the residents, and other factors.

All asserted that the resident fees do not cover the accommodation costs for long term care; none could offer evidence that they had determined the costs for resident rooms, common areas, or meals.

The evidence from the Calgary Health Region indicated that reports submitted to Alberta Seniors following the 2003 fee increase showed that much of the increase paid for improvements to capital projects, such as the replacement of equipment, renovations and upgrades to electrical and ventilation systems.

East Central Health Region testified that housekeeping, plant operation, plaint maintenance, laundry and linen services, patient food services, and building depreciation, as well as a share of administrative costs, are considered to be housing expenses, and that the resident fees do not pay for all housing related expenses.

The Chinook Health Region affirmed that they had not determined the costs for the resident rooms and common areas as opposed to the facility as a whole, and they do not track housekeeping or laundry expenses to ensure that they are paid from RHA funding and not from the resident fees.

The Northern Lights Health Region asserted that bed linens, towels and costs associated with facility management and administration were paid by the RHA out of its budget, and not from the resident fees.

Capital Health testified that some of the 2003 fee increases paid for the purchase and replacement of equipment and furniture, renovations, and improvements to meals and housekeeping services, and that prior to this increase, and in order to maintain services with available resources, the Capital Care Group (a subsidiary of Capital Health) had reduced management, cut service hours of staff and delayed routine maintenance. Capital Health is unable to check whether the Accommodation Charges accord with actual accommodation expenses.

The Aspen Health Region noted that the subcategories under the heading “Support/Housing Services” include food services, laundry/linen services, housekeeping services, plant maintenance and operation, rent, and utilities. Some of these subcategories are in dispute in terms of whether they fall under the statutory definition of “accommodation and meals.”

The David Thompson Health Region asserted that various capital and equipment expenses are met through fundraisers; federal grants; provincial funding; the equipment reserve; the special purpose funds; a charitable foundation; and private donations. Long term care residents benefit from the general resources of the health region, independent from the accommodation charges, and are subsidized, in capital terms, by funding available to the health region outside the Government block funding. The facility operators roll the Accommodation Charges into general revenue and do not specifically track expenses.

Summary prepared by Carol Wodak, September 2008