Commentary on Toronto Star article: "Use of antipsychotics soaring at Ontario nursing homes", April 15, 2014[i]

By: Jane Meadus (Staff Lawyer and Institutional Advocate) and
Brendan Gray (Staff Litigation and Research Lawyer)
Advocacy Centre for the Elderly ("ACE")

In a recent Toronto Star article, David Bruser, Jesse McLean and Andrew Bailey reported on the increasing use of powerful antipsychotic medications in Ontario long-term care homes (often referred to as nursing homes). This is a very important issue, and we welcome the Toronto Star bringing it to the public's attention.

In our legal practice representing and advising low-income seniors in Ontario, ACE frequently encounters the use of antipsychotic medications to chemically restrain "difficult" patients in long-term care homes. In ACE's experience, the prescription and administration of these medications to long-term care residents, especially when done "off-label" is often unlawful. In this short commentary, we hope to explain our legal concerns around the use antipsychotic medications in long-term care homes.[ii]

WHAT IS "OFF-LABEL"?

The phrase "off-label" refers to the fact that a drug is being prescribed beyond the criteria set out by Health Canada when the drug was approved. The illnesses for which a drug has been approved for use are set out in the label for each drug (and the label itself is regulated by health Canada). Where a drug is prescribed to treat illnesses not set out on the label, it is being used "off-label". [iii]

INFORMED CONSENT

Under the *Health Care Consent Act,* which is the Ontario legislation governing consent to treatment, it is the responsibility of health practitioners (which includes doctors, nurses, dentists and any other medical practitioner who belongs to a regulatory college) to propose medications or other treatments to patients. These treatments *cannot* be administered *until* informed consent has been obtained. This requirement applies to every person in Ontario, and includes all residents in long-term care homes Even where a resident is mentally incapable of giving or refusing consent to a particular medication, health practitioners must still obtain a valid informed consent from the resident's substitute decision-maker prior to the commencement of treatment.[iv] The requirement to obtain an informed consent is not a mere formality. Informed consent is rooted in the concepts of bodily integrity and patient autonomy. Fundamentally, it is not for health practitioners to decide what happens to their patient's bodies.[v]

To obtain a valid informed consent, health practitioners must first determine if the resident is mentally capable. This is a determination made by the health practitioner offering the treatment: no capacity assessor[vi] or psychiatric assessment is required. If the person is capable, then they make the decision, even if they have prepared a written power of attorney for personal care. If the health practitioner finds that the resident is mentally incapable, they must advise the resident of this finding and of their right to apply to the Consent and Capacity Board for a review of this finding. If the person applies to the Board for a review, no treatment can be started until all legal proceedings are resolved, unless an order is obtained.

To obtain informed consent, the health practitioner must advise the resident (or their substitute decision-maker if the resident has been found incapable) of the nature of the treatment, the risks and benefits of the proposed treatment, side effects, alternative courses of action, and consequences of not having the treatment. This would include advising the resident that the medication is an antipsychotic being used "off-label", and the material risks inherent in its "off-label" use.

In ACE's experience, consent to treatment with antipsychotic medications is frequently not sought from residents in long-term care homes (or their substitute decision-makers). Even where "consent" is sought, it is often not informed – meaning that health practitioners do not advise the resident or substitute of the material risks of such medications. In either case, no valid consent has been obtained and administering antipsychotic medications is unlawful. It is up to the health practitioner proposing the treatment (i.e. prescribing the medication) to ensure that informed consent is obtained prior to treatment being started.

The *Long-Term Care Homes Act* reiterates this requirement for consent to treatment in its *Resident's Rights,* which require that legal consent be obtained for all treatments in a long-term care home. The *Long-Term Care Homes Act* also states that any written consent is a "regulated document", which must meet specific standards, and must be certified as such by a lawyer. No person can be threatened with discharge or refused admission for refusing to consent to treatment.

<u>NEGLIGENCE</u>

Even where a resident (or substitute decision-maker if the resident is mentally incapable) has provided a valid informed consent, the prescription of antipsychotic medications may still be unlawful. All health practitioners are required to meet the standard of care when prescribing and administering medications. Where health practitioners fail to meet the standard of care, and thereby cause harm to their patients, they are negligent and may be sued in Court. While ACE is staffed by legal professionals (and does not have clinical expertise in the prescription of medications), we are concerned that the use of

many of the antipsychotic medications mentioned in the Toronto Star article may be in breach of the standard of care (meaning that they should not have been proposed for the resident by the health practitioner in the first place).

CONCLUSION

While long-term care homes may argue that the prescription of antipsychotic medications is necessary to control aggressive behaviour, this does not trump the requirement to obtain informed consent. Rather than using antipsychotic medications unlawfully, long-term care homes must seek alternative methods to manage difficult behaviours. These may include:

- offering specialized programming and activities
- providing resident-based care
- offering specialized care
- seeking outside expertise through programmes offered by Behaviour Support Ontario, the Alzheimer Society and other expert groups
- properly staff homes to be able to monitor behaviours of all residents
- train staff in managing dementia and other illnesses which may have related behaviours.

The use of antipsychotics should never be the primary method to manage difficult behaviours in long-term care residents, and should only be considered as a last result, given the warnings against their use in the elderly. Finally, even when antipsychotics are prescribed by the physician, they may never be given without first obtaining informed consent from the resident or their substituted decision-maker in accordance with Ontario law.

[i] http://www.thestar.com/news/canada/2014/04/15/use_of_antipsychotics_soaring_at_ontario_nursing_homes.html#

[ii] While this article primarily discusses the use of antipsychotics in long-term care homes, this is part of a broader problem for seniors in all settings. The law of consent is the same no matter what the setting (home, hospital, retirement home, long-term care home, etc.).

[iii] See the Report of the Standing Senate Committee on Social Affairs, Science and Technology, *Prescription Parmaceuticals in Canada,: Off-Label Use*, p. 3. Online: http://www.parl.gc.ca/Content/SEN/Committee/412/soci/rep/rep05jan14-e.pdf

[iv] There is an exception to the requirement to obtain an informed consent where a resident is experiencing an emergency. However, this emergency exception is unlikely to apply to the prescription and administration of antipsychotic medications to residents of long-term care homes.

[v] *Allan v. New Mount Sinai Hospital* (1980), 109 D.L.R. (3d) 634, 28 O.R. (2d) 356 (H.C.J.) at para. 34, rev'd on other grounds (1981), 125 D.L.R. (3d) 276 (Ont. C.A.); *Cuthbertson v. Rasouli*, 2013 SCC 53 at paras. 18-21

[vi] A capacity assessor is someone who has been qualified and designated under the *Substitute Decisions Act* to determine whether an individual is mentally capable of making particular types of decisions. Capacity assessors are regulated health professionals and social workers who have completed specialized training. There is a misconception in Ontario that capacity assessors have the exclusive authority to make capacity determinations. This is not correct. For all treatment decisions under the *Health Care Consent Act*, it is the health practitioner proposing treatment who must determine the patient's capacity. See also the Capacity Assessment Office website: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp#assessor