**CITATION:** Retirement Homes Regulatory Authority v. In Touch Retirement Living for Vegetarians/Vegans Inc., 2019 ONSC 3401
**COURT FILE NO.:** CV-19-618012 & CV-19-620798
**DATE:** 20190603

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Retirement Homes Regulatory Authority, Applicant

**AND:**

In Touch Retirement Living for Vegetarians/Vegans Inc. and Elaine Lindo, Respondents

**BEFORE:** Nishikawa J.

**COUNSEL:** *Jordan Glick and Jordan Stone*, for the Applicant

*Oswald Barnwell*, for the Respondents

**HEARD:** May 31, 2019

## ENDORSEMENT

### Overview

[1] The Retirement Homes Regulatory Authority (the "RHRA") brings this Application (the "Application") on an urgent basis for an order directing the Respondents, In-Touch Retirement Living for Vegetarians/Vegans Inc. ("In-Touch") and Elaine Lindo (together, the "Respondents") to cease operating as an unlicensed retirement home.

[2] The Application is brought pursuant to s. 96.1 of the *Retirement Homes Act, 2010*, S.O. 2010, c. 11 (the "Act"). The RHRA alleges that the Respondents have failed to comply with the requirements of the Act and various orders made by the Registrar of the RHRA to cease operating. The RHRA has serious concerns about the safety and well-being of the residents of In-Touch, based on the Respondents' history of non-compliance and the upcoming sentencing of Ms. Lindo, as further detailed below.

[3] For the reasons that follow, I grant the RHRA's Application and order the requested relief.

### Preliminary Matters

[4] The Respondents have commenced a cross-application against the RHRA (Court File No. CV-19-620798) seeking a declaration that the enforcement of s. 89 of the Act on the facts of this case violates ss. 2(a) and (b) of the *Charter of Rights and Freedoms*, and an order requiring the RHRA to "reasonably consider" In-Touch's application for a licence (the "Cross-Application").

In support of its Cross-Application, and in opposition to the RHRA's Application, the Respondents seek to admit the affidavit and expert report of Dr. Gloria Fiati (the "Fiati Report").

[5] The RHRA objects on the basis that, among other things, it has not had the opportunity to respond, since the Cross-Application and the Fiati Report were not served until two days before the hearing of this Application, on May 29, 2019. A Notice of Constitutional Question was served on the Attorney General of Canada and the Attorney General of Ontario on the same date.

[6] The Respondents did not seek to adjourn the hearing of the Application but instead argued that both the Application and the Cross-Application ought to be heard. I heard the Respondents' arguments on both the Application and Cross-Application, but deferred my ruling on the issue.

**The Cross-Application**

[7] A Notice of Application must be served at least 10 days before the hearing of the application, and the application record must be filed with the court at least seven days before the hearing: rr. 38.06(3) and 38.09(1), *Rules of Civil Procedure*, R.R.O., Reg. 194 (the "Rules"). The Respondents have had notice of the Application since April 17, 2019, but did not serve the Cross-Application until two days before this hearing. The Respondents did not advise of their intention to bring a Cross-Application until May 25, 2019.

[8] The Respondents' Notice of Constitutional Question was not served on the Attorney General of Canada and the Attorney General of Ontario within the time required under s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Moreover, it was served and filed in the Application, when it should have been served and filed on the Cross-Application. While counsel for the Attorney General of Canada advised that they would not be taking a position, counsel for the Attorney General of Ontario has informed the parties that they do not yet have instructions.

[9] The timelines provided by the Rules and the *Courts of Justice Act* are not merely technical, but ensure that matters are adjudicated fairly and on their merits. This requires that all parties have sufficient time to respond. In this case, serving the Cross-Application and Notice of Constitutional Question two days before the hearing left little or no time for the RHRA and the Attorney General to respond. The Court has only one-sided evidence and submissions on the *Charter* issues raised by the Respondents.

[10] As the *Charter* argument was raised with insufficient notice to the Applicant and the Attorneys General, I would normally have adjourned the Cross-Application. Under the circumstances, however, given the urgency of the Application and the interest in addressing all issues raised by the Application and Cross-Application, I have considered it without the benefit of a responding record from the Applicant. I find that the *Charter* argument does not assist Ms. Lindo, and she is not entitled to the relief sought in the Cross-Application.

[11] When asked to particularize Ms. Lindo's ss. 2(a) and 2(b) *Charter* claims, her counsel was unable to articulate specifically how the enforcement of s. 89 of the Act infringes upon her *Charter* right to freedom of conscience and expression. Ms. Lindo's position is that she "followed her conscience that she was outside of the RHRA's mandate" and that she needed to continue to operate an unlicensed retirement home "to satisfy her soul." From this, I understand Ms. Lindo's position to be that her freedom of conscience, that takes the form of her deeply-held commitment

to assisting the homeless and other vulnerable individuals, protects her from strict compliance with the Act and the enforcement activities of the RHRA.

[12] The courts have held, in the context of s. 7 of the *Charter,* that there is no constitutional right to practise a profession unfettered by the applicable rules and standards which regulate that profession. Any infringement would be of an economic interest which is not protected by the *Charter*. *See, Mussani v. College of Physicians and Surgeons* (2004), 74 O.R. (3d) 1 (C.A.), at paras. 39-43. More recently, in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons*, 2019 ONCA 393, the Court of Appeal upheld, under s. 1 of the *Charter*, policies requiring physicians who object to providing certain medical procedures or pharmaceuticals on the basis of religion or conscience to provide the patient with an "effective referral." In doing so, the Court found that the physicians "had no common law, proprietary or constitutional right to practice medicine. As members of a regulated and publicly-funded profession, they are subject to requirements that focus on the public interest, rather than their interests." (at para. 187).

[13] Similarly, Ms. Lindo has no *Charter* protected right to continue to operate an unlicensed retirement home. The Respondents cite no authority to support their position that her freedom of conscience and religion would permit her to defy the licensing requirements of the Act, or the substantive provisions in place to protect the dignity, safety and well-being of the Residents.

[14] I note that the Respondents' Application Record on the Cross-Application, and its Notice of Constitutional Question bear the wrong court file number (CV-19-618012) and should be re-filed under the correct one (CV-19-620798).

**The Fiati Report**

[15] The Fiati Report is not admitted as evidence on this Application or the Cross-Application. The Fiati Report does not comply with the requirements for expert evidence under r. 53.03(2.1). The Report does not contain Dr. Fiati's employment and educational experience; the instructions provided to her in relation to the proceeding; or the nature of the opinion being sought and each issue in the proceeding to which the opinion relates: rr. 39.01(7) and 53.03(2.1). The Fiati Report is not admissible under s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23, which requires leave of the court and 10 days' notice to the parties.

[16] In addition, Dr. Fiati's affidavit was delivered after cross-examinations were conducted, contrary to r. 39.02(2), and the RHRA had no opportunity to cross-examine Dr. Fiati. Moreover, the consent timetable order of Firestone J. provided the dates by which affidavits were to be delivered. To admit the Fiati Report would unduly prejudice the RHRA, which has not had the opportunity to respond.

[17] In the event that I am mistaken, and if the Fiati Report were to be admitted as evidence, it would not alter my conclusions. The Fiati Report describes the impact of the RHRA's enforcement activities on Ms. Lindo and her personal motivation for her failure to comply with the Act. These matters are not relevant to the issue in the Application, which is whether the Respondents should be required to cease operating as a retirement home. Nor would the Fiati Report provide a basis to order the relief sought in the Cross-Application.

## Factual Background

### The Parties

[18] The Applicant, the RHRA, is the regulatory body with exclusive power to license and regulate retirement homes in Ontario under the Act and the regulations thereunder.

[19] The Respondent, In-Touch, is a corporation incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. In-Touch operates a two-floor brick house in Toronto and offers care and accommodation to approximately 10-15 persons, most of whom are over the age of 65.

[20] The Respondent, Elaine Lindo, is the President and sole director of In-Touch. Ms. Lindo was a licensed nurse in England for ten years before coming to Canada. In Ontario, Ms. Lindo has worked as a nurse's assistant, caregiver, and part-time teacher at the George Brown College School of Culinary Arts. For a number of years, Ms. Lindo has helped provide meals to the homeless on a weekly basis with her church group.

[21] Based on the available information relating to the residents of In-Touch (the "Residents"), there are at least ten and likely eleven Residents over the age of 65. Several of the Residents have cognitive impairments, such as psychosis, schizophrenia or dementia, and many of them require assistance with their personal care. The Residents are not named as parties to this Application. Their interests are nonetheless central to the issues to be determined. Further to Firestone J.'s timetable order, the RHRA confirmed service of notice of the hearing on nine residents and six substitute decision-makers and/or family contacts. The son of one resident attended the hearing. The Public Guardian and Trustee was also provided with notice of the Application and hearing.

### The Regulatory Framework

[22] The overarching purpose of the *Act* and its regulations is reflected in the "fundamental principle" in s. 1 of the *Act*, which provides as follows:

> The fundamental principle to be applied in the interpretation of this Act and any regulation, order or other document made under this Act is that a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choice about their care options.

[23] The objects of the RHRA are set out in s. 16 of the *Act* and include administering the *Act* and the regulations, including overseeing their enforcement, for the purpose of ensuring that retirement homes are operated in accordance with the *Act* and the regulations.

[24] A "retirement home" is defined in s. 2(1) of the *Act* to mean a residential complex or the part of a residential complex:

(a) that is occupied primarily by persons who are 65 years of age or older;

(b) that is occupied or intended to be occupied by a prescribed number of persons who are not related to the operators of the home, which, pursuant to O. Reg. 166/11, s. 3(1) is six persons; and

(c) where the operator of the home makes at least two care services available, directly or indirectly, to the residents.

[25] The following services are defined as a "care service" under s. 2(1) of the *Act* or s. 2(1) of O. Reg 166/11:

(a) a prescribed health care service provided by a member of a College as defined in the *Regulated Health Professions Act, 1991*;

(b) administration of a drug, as defined in the *Drug and Pharmacies Regulation Act*, or another substance;

(c) assistance with feeding;

(d) assistance with bathing;

(e) continence care;

(f) assistance with dressing;

(g) assistance with personal hygiene;

(h) assistance with ambulation;

(i) provision of a meal;

(j) any service that a member of the College of Physicians and Surgeons of Ontario provides while engaging in the practice of medicine;

(k) any service that a member of the College of Nurses of Ontario provides while engaging in the practice of nursing;

(l) any service that a member of the Ontario College of Pharmacists provides while engaging in the practice of pharmacy;

(m) the provision of a dementia care program; and

(n) the provision of a skin and wound care program.

[26] The *Act* contains care and safety standards that apply to all licensees. These standards relate to areas such as training, prevention of abuse and neglect, risk of falls, emergency plans, and the control of dangerous resident behaviours. The *Act* also includes standards that apply to specific care services, for example, administration of drugs, skin and wound care, and dementia care. However, these requirements can only be enforced against licensed retirement homes.

[27] Subsection 33(1) prohibits the operation of a retirement home without a licence issued under the *Act*. When a person applies for a licence to operate a retirement home, the Registrar of the RHRA has a statutory duty to determine whether a licence should be granted in accordance with the criteria set forth in s. 35 of the *Act*. Where a licence is not granted, it is illegal to operate a retirement home as defined in the *Act*.

[28] There are four primary ways in which the *Act* allows the RHRA to seek to remedy non-compliance with respect to the operation of an unlicensed retirement home:

(i) Under s. 89 of the *Act*, the Registrar may order a person to apply for a licence and/or cease operating as a retirement home;

(ii) Under s. 93 of the *Act*, the Registrar may order a person who is believed to have contravened the *Act* to pay an administrative penalty;

(iii) Under ss. 98(2)(1) and 99(1) of the *Act*, it is an offence to operate an unlicensed home, and that offence may be prosecuted under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33; and,

(iv) Under s. 96.1 of the *Act*, the Registrar may apply to the Superior Court of Justice for an order directing a person to comply with the *Act*, regulations, or an order made under the *Act*.

**In-Touch's Operations**

[29] In 2006, Ms. Lindo purchased a rooming house at 64 King Street, Toronto in 2006 (the "Property"). She began to operate it through In-Touch as a residence for seniors and homeless people.

[30] On July 3, 2012, In-Touch applied for a licence to operate a retirement home. On July 17, 2013, the Registrar issued a Notice of Decision to Refuse a Licence for In-Touch, concluding that the Respondents did not meet the licensing criteria in s. 35 of the Act.

[31] In-Touch appealed the Registrar's decision to the Licence Appeals Tribunal (the "LAT"). The LAT affirmed the Registrar's decision to refuse a licence to In-Touch. In doing so, the LAT found neglect of one resident and a lack of fire and training policies, among other things.

[32] After the LAT decision, In-Touch, through its counsel, advised the RHRA that it would be converting the Property into a rooming house. The RHRA subsequently requested information from In-Touch about the steps being taken to cease operating as a retirement home, but no information was provided.

**Ms. Lindo is Charged Under the Act**

[33] On April 2, 2014, RHRA investigators executed a search warrant at In-Touch and concluded that Ms. Lindo was continuing to operate In-Touch as a retirement home. On May 15, 2014, Ms. Lindo was charged with the offence of operating a retirement home without a licence, in breach of s. 33 of the Act. On March 15, 2015, Ms. Lindo was found guilty of operating a

retirement home without a licence and was sentenced to 15 days imprisonment, a fine of $2,500 and a two-year probation order. The probation order required, among other things, that Ms. Lindo not commit the same offence or any related or similar offence, not admit anyone over the age of 65 to In-Touch and to provide the RHRA with monthly reports setting out information with respect to In-Touch.

[34] On December 1, 2016, RHRA investigators executed a search warrant and found that In Touch continued to operate an unlicensed retirement home. On December 12, 2016, the RHRA again charged the Respondents for operating without a licence and with three counts of breach of probation. On January 24, 2019, Ms. Lindo was found guilty of operating an unlicensed retirement home and three counts of breach of probation. The sentencing was adjourned to June 10, 2019.

[35] One of the reasons for the RHRA's urgent application is the concern that Ms. Lindo may face a term of imprisonment when she is sentenced on June 10, 2019. On cross-examination, Ms. Lindo would state only that there are two managers and five personal support workers at In-Touch and that the residents would be "well taken care of" if she is incarcerated. She refused to answer questions about In-Touch's finances and whether anyone would be able to access In-Touch's bank accounts to continue to care for the residents.

**The Registrar Issues Orders Under the Act**

[36] In the meantime, as a result of the various inspections, the Registrar also served Ms. Lindo and In-Touch with various orders under the Act. The RHRA's orders are listed below, with any appeal or outcome noted in parentheses:

- November 7, 2014 order under s. 89 of the Act requiring In-Touch to cease operating as a retirement home (no appeal);
- December 10, 2014 order under s. 93 of the Act requiring that Ms. Lindo and In-Touch pay a $10,000 administrative penalty for operating without a licence (appeal withdrawn);
- December 9, 2016 order under s. 89 of the Act to cease to operating as a retirement home (no appeal);
- December 9, 2016 order under s. 93 of the Act to pay a $10,000 administrative penalty for operating an unlicensed retirement home (paid after writ of seizure and sale registered on the Property);
- July 18, 2017 order under s. 93 of the Act to pay a $10,000 administrative penalty for operating an unlicensed retirement home (paid after writ of seizure and sale registered on the Property);
- September 21, 2018 order to cease operating the Property as an unlicensed retirement home (appeal to the LAT withdrawn).

[37] Between November 2015 and April 2019, In-Touch has been inspected by the RHRA eighteen times. On each occasion, RHRA inspectors concluded that In-Touch was operating as an unlicensed retirement home as defined by the Act.

[38] At a further inspection conducted on April 3, 2019, RHRA inspectors confirmed that In-Touch had at least ten residents over the age of 65. At that time, Ms. Lindo informed the RHRA inspector that In-Touch has fourteen residents, eleven of whom were over the age of 65. RHRA inspectors further confirmed that well over two care services were being provided to residents, including provision of a meal; administration of a drug; continence care; assistance with dressing, ambulation and bathing; and a prescribed healthcare service provided by a member of a College, as defined in the *Regulated Health Professions Act, 1991,* S.O. 1991, c. 18.

[39] The evidence of the RHRA inspectors is that at each inspection, Ms. Lindo denied operating a retirement home. She refused to provide requested information to the inspectors. When the inspectors attempted to speak to residents of In-Touch, Ms. Lindo interrupted or remained present, and the residents would not speak to the inspectors.

[40] Since the commencement of this Application, Ms. Lindo now appears to acknowledge that she is operating a retirement home and has included an application for a licence under the Act as an exhibit to her affidavit.

## Issues

[41] The Application raises the following issues:

(i) Should a compliance order be granted?

(ii) Should this Court order further ancillary relief requested by the Applicant?

## Analysis

### Should A Compliance Order Be Granted?

#### *The Test for a Compliance Order*

[42] Section 96.1 of the Act states:

> The Registrar may apply to the Superior Court of Justice for an order directing a person to comply with a provision of this Act or the regulations or an order made under this Act and, upon the application, the court may make any order that the court thinks fit.

[43] Counsel for the RHRA advises that the only order granted under this provision since it came into force in December 2017 was on consent. As a result, this is a matter of first impression.

[44] The RHRA submits that this Court can look to analogous provisions in similar regulatory statutes for guidance as to the appropriate test to apply. For example, s. 87 of the *Health*

*Professions Procedural Code*, Sched. 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the "Code"), provides:

> The College may apply to the Superior Court of Justice for an order directing a person to comply with a provision of the health profession act, this Code, the *Regulated Health Professions Act*, the regulations under those Acts or the by-laws...

[45] This Court has held that under s. 87, a College must establish that: (a) there has been a continued breach of the statute by the person against whom the relief is sought; and (b) the statute permits the Court to make an order against that person: *College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Traditional Chinese Medicine Association*, 2015 ONSC 661, at para. 67; *College of Physicians and Surgeons of Ontario*, 2018 ONSC 4815, at para. 39.

[46] Based on the similarity between the provisions above, and the fact that the Act is public welfare legislation, as evidenced by the fundamental principle in s. 1 of the Act, I agree that it would be appropriate to apply the test articulated and applied by this Court in relation to the *Regulated Health Professions Act*.

[47] Moreover, where an injunction is authorized by statute, different considerations apply than where an injunction is sought at common law. Where a statutory injunction is sought:

(a) The Court's discretion is more fettered, and the factors considered by a court when considering equitable relief will have more limited application;

(b) An applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused;

(c) Proof of damages or proof of harm to the public is not an element of the legal test;

(d) There is no need for other enforcement remedies to have been pursued;

(e) The Court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable; and

(f) It remains more difficult to obtain a mandatory injunction.

*CPSO*, at paras. 41-42.

[48] As stated by Perell J. in *CPSO*, at para. 43:

> Where a public authority applies to the court to enforce legislation, and a clear breach of the legislation is established, only in exceptional circumstances will the court refuse an injunction to restrain the continued breach. The onus to raise the exceptional circumstances lies with the respondent, and those circumstances are

limited; for example, to where there was a right that pre-existed the enactment contravened or where the events do not give rise to the mischief the enactment was intended to preclude.

[49] Further, in *College of Opticians of Ontario v. City Optical Inc.*, [2009] O.J. No. 2200 (S.C.), at para. 55, Roberts J. (as she then was) held that it is no defence for a person who is not lawfully authorized to perform a controlled act to argue that they are equally competent or capable as a person who is authorized to do so.

***Has the RHRA Met the Test for a Compliance Order?***

[50] Based on the evidence before me, there is no question that there has been a continued breach of the Act by the Respondents. The Respondents have continuously operated a retirement home over the past six years without a licence.

[51] Since it was refused a licence, In-Touch has continued to operate illegally. Multiple inspections by the RHRA have revealed that, despite Ms. Lindo's denials, In-Touch was operating as a retirement home within the definition of the Act. The inspections have led to three orders to cease operating and fines totaling $30,000. Ms. Lindo was convicted twice for operating an unlicensed retirement home. The Respondents now concede that they have been operating a retirement home, in breach of the Act.

[52] Section 96.1 allows this Court to make an "order directing a person to comply with a provision of this Act or the regulations or an order made under this Act." The RHRA seeks an order directing the Respondents to comply with s. 33 of the Act, which states that no person shall operate a retirement home unless the person is licensed under the Act to operate that specific home. The RHRA also seeks an order directing the Respondents to comply with the Registrar's orders that the Respondents cease operating the Property as an unlicensed retirement home, made under s. 89 of the Act.

[53] As noted above, the Applicant need not demonstrate harm to the public or to specific persons to obtain the order sought. In any event, there is ample evidence of harm and a risk of further harm if the Respondents are permitted to continue to operate. The following is a summary of the factual circumstances that give rise to serious concerns about the safety and welfare of the Residents:

- A resident of In-Touch who suffered from dementia wandered off in March 2019 and was reported missing to the police by Ms. Lindo. The resident was found dead several days later. The same individual had wandered from the Property on two previous occasions. While Ms. Lindo explains that the resident left In-Touch accompanied by friends who were supposed to bring him back to In-Touch, the incident is indicative of an absence of the necessary safeguards for residents suffering from dementia or similar impairments;

- Complaints were made in March 2019 by an In-Touch resident of verbal abuse by Ms. Lindo and a refusal to provide meals;

- There is currently a bed bug infestation at In-Touch, although Ms. Lindo states that it is being addressed;

- Toronto Fire Services have issued an order requiring the installation of a sprinkler system by May 13, 2019, and Ms. Lindo acknowledges that work is necessary to fix faulty electrical work; and

- Ms. Lindo claims to be impecunious and will be sentenced on June 10, 2019, and there is no evidence of a contingency plan for the continued care of the Residents.

[54] As Roberts J. found in *City Optical*, the Respondents' failure to recognize that their practices and procedures were not in compliance with the statutory framework, "created exactly the risk of harm to the public envisaged by" the statutory framework: at para. 56. Here as well, the Respondents' record of non-compliance with the requirements of the Act raise concerns about both the Respondents' competence and willingness to operate in a lawful manner, and their understanding of the serious consequences to the Residents of their failure to do so.

***Have The Respondents Demonstrated Exceptional Circumstances?***

[55] The Respondents have failed to demonstrate exceptional circumstances that would justify this Court refusing to restrain the Respondents' continued breach of the Act. As noted above, the exceptional circumstances are limited, and hardship to the Respondents does not outweigh the public interest in having the law obeyed.

[56] The Respondents' main argument is that the RHRA targeted In-Touch and treated Ms. Lindo in an unfair and heavy-handed manner. The Respondents submit that at no time did the RHRA "sit Ms. Lindo down" and tell her what to do to come into compliance with the Act. First, the Respondents have not identified any such obligation on the part of the RHRA in the Act, nor does one exist. A person or entity that conducts business in a regulated field, such as operating a retirement home, must inform themselves about the requirements of the Act and applicable regulations and ensure that they comply. Second, the evidence demonstrates that Ms. Lindo repeatedly challenged the RHRA's authority over In-Touch on the basis that she was not operating a retirement home. With the exception of In-Touch's initial unsuccessful application, it was only after this proceeding was commenced that Ms. Lindo acknowledged that she needs to obtain a licence to operate a retirement home. For the past six years, she has disregarded the requirements of the Act and defied numerous orders against her. Third, based on Ms. Lindo's non-cooperation and refusals to provide information requested by the RHRA, the inspectors had no reason to believe that "sitting her down" was a realistic option.

[57] The Respondents' factum submits that the RHRA discriminated against Ms. Lindo on the basis of her race. This argument was not raised in oral argument, and I note that there is no mention of racist or discriminatory treatment in Ms. Lindo's affidavit in opposition to the Application. Moreover, the Respondents have adduced no evidence of the RHRA's treatment of other unlicensed retirement home operators. Other than to allege discriminatory treatment, the Respondents have failed to adduce any evidence to support the claim that Ms. Lindo has been treated differently from other unlicensed retirement home operators based on her race.

***The Residents***

[58] As noted above, Robert Emerson, the son of one of the Residents, was present at the hearing. As none of the Residents responded or appeared on the Application, I allowed Mr. Barnwell, with Mr. Emerson's consent, to read an email sent by Mr. Emerson to both parties' counsel earlier in the day. Mr. Emerson expressed his view that public resources would be better spent helping In-Touch comply with the Act rather than prosecuting Ms. Lindo and shutting In-Touch down. Mr. Emerson sees Ms. Lindo as someone who should not be punished for trying to do a public good. I acknowledge this perspective. However, I find that it does not give rise to exceptional circumstances that would justify refusing to grant an order under the Act.

**The Respondents' *Charter* Argument**

[59] Finally, the Respondents argued that Ms. Lindo's conduct was motivated by her spiritual beliefs and values, and that she did not intend to violate the Act, but was driven by her higher cause of helping the homeless. The Respondents' position is that the application of the Act must be consistent with *Charter* values. The record is bereft of any mention that it was Ms. Lindo's religious convictions that led her to repeatedly and unrelentingly fail to comply with the Act. At no time did Ms. Lindo raise her religious beliefs or seek accommodation based on religious grounds during any of the inspections or in any of the proceedings to date, including the POA proceedings that had penal consequences. Ms. Lindo has been represented by a succession of no fewer than six lawyers. The Respondents' position is that this issue did not crystallize until after the delivery of the Fiati Report.

[60] With respect, the last-minute *Charter* argument strikes me as the latest in a succession of unconvincing, after-the-fact excuses to justify a history of non-compliance and disregard of the applicable law. The first line of defence was to deny that In-Touch was a retirement home. The next was to state that Ms. Lindo misunderstood the requirements of the Act, including the application form where she inaccurately stated that she had never been charged with an offence. This confusion and misunderstanding were also used to justify Ms. Lindo's breach of the clear terms of her probation order, which prohibited her from taking residents over the age of 65. The Respondents' continue to try to justify this by claiming that the Community Care Access Centre required that In-Touch take residents over 65 years old. More recently, the Applicant alleges, without evidence, that she was targeted on the basis of race by the RHRA. Ms. Lindo now seeks to invoke her freedom of conscience and religion to argue that "it was a matter of conscience that she did not fall under the RHRA's mandate."

[61] In the Cross-Application, the Respondents seek an order that the RHRA reasonably consider their May 7, 2019 application for a licence and provide time to comply. However, the Respondents have operated an unlicensed retirement home for six years without any indication that they would comply with the legal requirements that are in place to ensure the safety and well-being of the Residents. Circumstances at In-Touch have come to the point that their safety and well-being are at serious risk. The order requiring the installation of a sprinkler system by May 13, 2019 has not been complied with. By Ms. Lindo's own admission, this will cost $100,000. In-Touch does not have $5,000 to pay the licence application fee under the Act. Ms. Lindo will soon be sentenced and may face a term of imprisonment. There is no evidence of a plan or system to manage In-Touch in her absence.

[62] Moreover, on cross-examination, it became clear that certain statements in the Respondents' application are inaccurate. For example, the Respondents answered "No" in response to the question, "Has the applicant been subject to any order, tickets, or charges under the *Fire Protection and Prevention Act,* 1997?" despite the order to install a sprinkler system. Ms. Lindo also answered "No" to the questions relating to charges and convictions under the *Criminal Code.* This too is inaccurate.

[63] This is similar to the Respondents' first application for a licence in 2013, in which Ms. Lindo indicated that she had not previously been charged or convicted with a criminal offence. However, Ms. Lindo had been charged and found not guilty of assault, and was convicted for failing to comply with a recognizance order. Ms. Lindo has variously attempted to justify this inaccurate statement on the basis that someone else completed the application, that she misunderstood the difference between a charge and a conviction, and that her lawyer told her to plead guilty. The LAT found that Ms. Lindo had attempted to mislead the RHRA about her criminal conviction, and continued to attempt to mislead the LAT in her testimony about it. The evidence does not support Ms. Lindo's position that she ought to be given time to comply, rather, it shows a continued defiance of applicable rules and requirements.

[64] There is simply no legal or factual basis upon which the Cross-Application could succeed. It is therefore dismissed.

**Should Ancillary Relief Be Ordered?**

[65] The RHRA seeks a range of orders to protect the Residents and ensure compliance with the Act. Section 96.1 provides the court with broad authority to "make any order that the court thinks fit[.]"

[66] This Court has interpreted a similar provision of the *Drug and Pharmacies Regulation Act*, 1990, c. H.4 as providing the authority to make orders ancillary to a compliance order: see *Ontario College of Pharmacists v. Nguyen*, 2016 ONSC 7639. In that case, the court found that it had the authority to make an ancillary order permitting the College of Pharmacists to enter the respondent's pharmacy and seize all drugs on the premises.

[67] In addition, the Court of Appeal has held that a general order to comply with a statute does not provide sufficient specificity to ensure that the legislation will be complied with: *Law Society of Upper Canada v. Chiarelli*, 2014 ONCA 391, at para. 34.

[68] In this case, the RHRA seeks an order that In-Touch be closed and its residents transferred to alternative accommodations. I agree with the RHRA's position that the *Residential Tenancies Act, 2006,* S.O. 2006, c. 17 (the "*RTA*"), does not preclude this Court from making an order to close In-Touch. As held by Shaw J. in *Kenora (City) v. Eikre Holdings Ltd.*, 2018 ONSC 7635, the *RTA* regulates the relationship between landlords and tenants, and cannot oust the jurisdiction of the Court to make orders under public interest statutes enacted to protect and promote health and safety: at paras. 63-70.

[69] The Act gives the Registrar the power to order an unlicensed retirement home to cease operating because of the public safety concerns raised by an unlicensed retirement home. The alternative, to order the Respondents to cease providing services to the Residents, is not an option,

since the evidence clearly demonstrates that many Residents of In-Touch are in need of significant care services.

[70] The RHRA has provided evidence that it has had to vacate much larger retirement homes on short notice in the past, and that in those cases, families and community partners have stepped in to find new accommodations for residents. The RHRA has contacted the Local Health Integration Network and other community partners to assist in relocating the Residents. This would be a more orderly process than if In-Touch had to be suddenly vacated because Ms. Lindo is sentenced to a term of imprisonment on June 10, 2019.

[71] The RHRA seeks other ancillary relief, including that information regarding the Residents be transferred from the Respondents to the RHRA to ensure that they continue to receive the care services that they require. I am persuaded that this relief is necessary to ensure that In-Touch cease operating as a retirement home in a manner that protects the health and safety of the Residents.

**Conclusion**

[72] Based on the foregoing, I grant the RHRA's Application and the orders requested by the RHRA to ensure that it is able to transfer the Residents safely and efficiently, and to ensure that the Residents continue to be provided with the necessary care services. The order is attached as Appendix 'A' to this endorsement. I will remain seized of this matter for the purposes of implementation only.

**Costs**

[73] Counsel for both parties submitted costs outlines at the hearing. Counsel for the RHRA's costs total $24,929.66 on a partial indemnity basis, including disbursements and HST. Counsel for the Respondents' costs total $33,540.00 on a partial indemnity basis, including disbursements and HST.

[74] Pursuant to the *Courts of Justice Act*, s. 131(1), the Court has broad discretion when determining the issue of costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.). Rule 57.01(1) of the Rules sets out the factors to be considered by the Court when determining the issue of costs.

[75] I have considered these factors, as well as the principle of proportionality in r. 1.01(1.1) of the Rules, while keeping in mind that the Court should seek to balance the indemnity principle with the fundamental objective of access to justice. The Application raised novel and important issues and required a thorough record. The Application proceeded on an expedited basis and was complicated by the Respondents' last minute service of the Cross-Application and Fiati Report. I am cognizant of the Respondents' position that Ms. Lindo is impecunious and that the Application raises matters of public importance.

[76] Based on the foregoing, I fix costs of the Application on a partial indemnity basis at $20,000.00, inclusive of disbursements and HST, payable by the Respondents.

Nishikawa J.

**Date:** June 3, 2019