

BILL 218

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Thomson, Rogers appreciates the opportunity to make submissions regarding the proposed Bill 218, Supporting Ontario's Recovery and Municipal Elections Act, 2020 ("Bill 218" or the "proposed legislation").

Thomson, Rogers is a law firm located in Toronto, Ontario. Since 1936, Thomson, Rogers has specialized in the areas of personal injury and institutional abuse. Our class action legal team was involved in the historic Indian Residential Schools class action and many other class action lawsuits where we represented vulnerable individuals and advocated on their behalf.

Thomson, Rogers represents many of the victims who died in for-profit long-term care homes, as well as their family members, due to the COVID-19 outbreaks at the following long term care homes: Altamont Care Community, Camilla Care Community, Woodbridge Vista Care Community, Weston Terrace Care Community, Carlingview Manor and Extendicare West End Villa.

Since the pandemic was declared in March of 2020, 2,013 of Ontario's seniors have died from contracting COVID-19 in Ontario's long-term care (LTC) homes. A tragedy has unfolded, before our eyes, in our LTC system.

Thomson, Rogers acknowledges the objective of Bill 218 to protect businesses and frontline workers from potential lawsuits arising from infection or exposure to COVID-19. However, the class action and civil lawsuits have not been commenced against frontline workers. The lawsuits are against the corporate owners and operators of the LTC homes where severe COVID-19 outbreaks have resulted in illness and death for thousands of Ontario seniors. The frontline workers are heroes and without their perseverance through substandard work conditions, it is possible many other vulnerable LTC residents would have suffered even greater neglect.

The residents of LTC homes are some of the most vulnerable citizens in Ontario. They are dependent on the LTC owners and operators to provide them with care and to ensure their safety. These LTC owners and operators are in many cases large, for-profit corporations. The class action and civil lawsuits allege that LTC operators failed to implement proper infection

prevention and control standards at the facilities, falling below the reasonable standard of care, which resulted in widespread, yet preventable, illness and death.

The proposed legislation and the immunity it provides to many LTC operators makes it difficult, if not impossible, for these lawsuits to continue.

As such, Thomson, Rogers recommends two alternatives to the proposed legislation:

1. Carve out LTC and retirement homes from protection from liability in the proposed legislation; or,
2. Remove the retrospective effect, as set out in sections 2(5) and 2(6) in the proposed legislation.

The Gross Negligence Standard

In order to understand why the above proposed alternatives are recommended, it is necessary to understand the difference between ‘ordinary’ negligence and ‘gross negligence’.

The proposed legislation introduces the requirement of gross negligence in order for a LTC resident to pursue a lawsuit against a LTC operator as a result of the resident being or potentially being infected with COVID-19 (see section 2(1)(b)).

LTC operators owe their vulnerable residents a duty of care pursuant to the *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8, as amended. This includes a duty to ensure the reasonable safety and well-being of residents. When a LTC operator falls below the standard of care, meaning they did not act reasonably in the circumstances and harm was caused, the resident may sue in negligence. This is the law in Ontario.

It is neither easy nor straightforward to establish a legal claim in ‘ordinary’ negligence. This is especially the case for vulnerable victims in LTC homes who suffer from dementia and serious health issues, which can make it difficult to elicit credible evidence establishing negligence.

Furthermore, a Defendant in a negligence claim can succeed in defending itself in a lawsuit by establishing that they acted with reasonable care or in accordance with the reasonable standard.

Every LTC operator has this defence available to them. If the LTC operator can show that they acted reasonably in the provision of care to the resident and in the context of the global pandemic, then they will not face liability in ordinary negligence.

Gross negligence is a higher legal bar than 'ordinary' negligence. It is rarely seen and not subject to a clear definition. It has been defined by our Courts with ambiguous words like "very great negligence".

This gross negligence standard is virtually non-existent in Canadian law. It is reserved for circumstances where the Government wishes to notify Courts that Defendants engaging in certain types of activities ought to be given less onerous responsibility. For example, it applies to municipal slip and fall cases, allegedly because of the frequency of these incidents on ice in Canadian winters. It is because of factors peculiar to that activity, that the imbalance is rationalised in favour of the Municipality to make it more difficult for a victim to show that a Municipality's conduct ought to result in legal liability.

However, a death in an LTC home is not a fall on an icy sidewalk. There should be nothing frequent or routine about acting negligently towards our seniors during a pandemic. Tilting the balance in favor of LTC operators makes it more difficult for victims of neglect and abuse to seek access to justice, accountability and a modification of negligent behaviour, as Premier Ford has repeatedly promised the people of Ontario.

Negligent LTC Homes will be Protected from Liability

Despite the complexity of establishing an ordinary negligence claim, the Government proposes to raise the bar with legislation that will immunize negligent operators. Under the proposed legislation, negligent LTC homes will be protected from lawsuits.

In simple terms, this proposed legislation allows LTC operators to act negligently when caring for our vulnerable seniors without legal consequences. This is not what Premier Ford has expressed as the intention of this legislation and it is contrary to the promise he made that negligent LTC operators will be held accountable for the COVID-19 outbreaks and resulting deaths.

The proposed legislation also states that victims' rights are extinguished retroactively without costs (Section 2(6)). The impact is that the victims' negligence lawsuits vanish. This is unfair for the victims and their families who are already involved in litigation and had the expectation that if they were treated negligently, they could seek recourse in a civil lawsuit to recover their losses.

This retroactive effect of the proposed legislation shields negligent actors from responsibility for past actions and omissions. This is contrary to the presumption that the law in place when the action is issued applies to the action. It is unfair to the LTC residents to change the law retrospectively to decrease the standard of care to their detriment. Much like it would be unfair to LTC operators to increase the applicable standard retroactively.

Strain on the Judicial System

The standard of gross negligence is not subject to a clear definition. The lack of a clear definition creates significant uncertainty, which correspondingly means that it will fall on Ontario's Courts to grapple with the ambiguous language for years to come. Litigants will bring motions and appeals in an effort to help interpret and define this standard. The LTC operators and insurers will use this high bar to delay existing actions and force many to trial.

Although raising the negligence standard to gross negligence indisputably makes legal claims more difficult, the class action and civil lawsuits against LTC homes will continue. Rather, the consequence will be that litigation and judicial costs will increase for all parties given the uncertainty and complexity of the gross negligence standard.

This will result in delay for the victims and will clog up our justice system. This is contrary to Attorney General Doug Downey's intention that the proposed legislation will avoid clogging our justice system with lawsuits.

The Government's Concerns are Unfounded

The government's suggestion that the proposed legislation is required to protect frontline workers is not justified. As mentioned above, the class action lawsuits against the LTC operators do not include the frontline workers. Furthermore, there are alternatives to the proposed

legislation that would serve to protect “mom and pop” small businesses and frontline workers, while still holding LTC operators accountable. This will be discussed further below.

The suggestion that LTC operators will not be able to get insurance without this legislation is also unproven and unfounded. The purpose of insurance is to respond to such allegations and findings of negligence. It is what companies, such as LTC operators, pay monthly premiums to insurance companies for. This proposed legislation not only serves to protect the LTC operators, but also the insurance companies, who will avoid having to pay compensation for the negligence they insured. We should not be protecting LTC operators and insurance companies over our seniors.

Proposed Alternatives

Thomson, Rogers recommends that LTC and retirement home operators be excluded from protection from liability in the proposed legislation. This would ensure that LTC operators who acted negligently are held accountable by our judicial system. Furthermore, it would ensure that other frontline operations such as our grocery stores, hospitals, pharmacies and sports leagues are protected from liability if their act or omission does not constitute gross negligence.

LTC operators can effectively be excluded from the proposed legislation by either adding a subsection to section 2:

- (1.1) Subsection (1) does not apply to any long-term care home, as defined in the *Long Term Care Homes Act, 2007*, S.O. 2007, c. 8, as amended, or any retirement home, as defined in the *Retirement Homes Act, 2010*, S.O. 2010, c. 11, as amended.

Or by adding a separate section to the proposed legislation:

Non-application, long-term care and retirement homes

- 2.1.** Section 2 does not apply with respect to any long-term care home, as defined in the *Long Term Care Homes Act, 2007*, S.O. 2007, c. 8, as amended, or any retirement home, as defined in the *Retirement Homes Act, 2010*, S.O. 2010, c. 11, as amended.

In the alternative to the above recommendation, Thomson, Rogers recommends that the retroactive provisions, section 2(5) and section 2(6), be removed. This would enable any proceeding which has already been issued to proceed. It is unfair to the victims and class members who have already issued a class action to now have their legal rights removed or limited retroactively.

Conclusion

The proposed legislation will immunize negligent LTC operators from negligence. This is unjustified, unprecedented and an insult to those families who have already been victimized. This is also contrary to the intention voiced by the Provincial Government and Premier Ford. The simple solution, which is consistent with what Premier Ford has promised the citizens of Ontario, is that LTC operators be carved out of the proposed legislation. This will ensure that negligent LTC operators are held accountable for the tragic COVID-19 outbreaks and resulting illness and deaths at Ontario's LTC homes.