SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE POLICY

Regarding

BILL 218 - AN ACT TO ENACT THE SUPPORTING ONTARIO'S RECOVERY ACT, 2020

November 2, 2020

Dr. Patricia Spindel for Seniors For Social Action Ontario
https://www.seniorsactionontario.com/

SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE POLICY

Regarding

BILL 218 - AN ACT TO ENACT THE SUPPORTING ONTARIO'S RECOVERY ACT, 2020

As of September 10, 2020 there were 5965 resident cases and 1817 resident deaths in Ontario LTC facilities - something that has occurred in no other sector. Infection rates in Ontario long term care facilities were several times higher than in British Columbia (Liu et al, September 30, 2020). Clearly something was amiss in this sector, consequently the government has a responsibility to eliminate it from the protections offered by this Act.

Seniors For Social Action Ontario is, therefore, asking that long term care companies and facilities be removed from the protections offered by Bill 218.

What This Act Does

This Act provides broad protections to individuals and corporations as well as the Ontario government from COVID-19 exposure-related lawsuits and alleged negligence.

It raises the bar requiring anyone suing a person or company to prove gross negligence – a much higher standard than simple negligence. Gross negligence generally refers to a higher level of misconduct and has been defined by the Supreme Court of Canada as involving a significant departure from any subscribed standard of care. Therefore a person or company would have to demonstrate very great negligence rather than having simply taken insufficient measures to prevent infection spread in order to be found grossly negligent.

This Act is also retroactive to March 17, 2020 before many of the class actions and mass torts alleging negligence were filed against long term care companies and the government.

The Government's Stated Rationale

The Ford government's publicly stated rationale for introducing this Bill is to afford liability protection to workers and businesses in a number of sectors that are making an honest effort to follow public health guidelines and laws. However, many of these sectors did not stand out as having caused high infection and death rates alleged to be due to negligence. Long term care is the only sector where families of dead loved ones have, in large numbers, joined mass torts and class action filings against long term care facilities, companies, and the government.

What The Bill Actually Does

The Act actually says that it prevents "cause of action against any person as a direct or indirect result of an individual being or potentially being infected with or exposed to coronavirus (COVID-19) on or after March 17, 2020 as a direct or indirect result of an act or omission of the person" if the person acted "in good faith" in accordance with public health guidance and the law. This guidance broadly covers any recommendations, directives, instructions or advice irrespective of how it was given from the government, health officials, and regulators.

Good faith effort is covered irrespective of whether or not it was reasonable.

What this means is that any proceeding filed on or after that date that relates to the protections under Section 2 will be deemed to have been dismissed without costs as soon as Bill 218 is signed into law.

Underlying Rationale For Bill 218?

To significantly raise the bar to gross negligence, especially for families seeking legal remedies for the harm and death suffered by their loved ones is unconscionable enough. But to introduce a Bill of this nature to protect long term care companies, their facilities and staff from liability in order to make it easier for them to obtain insurance coverage, which many of them have lost (Casey, October 20, 2020), is even more unconscionable, but it appears that this may be part of the underlying reason for this Bill. It provides broad protections, thereby likely making potential insurers more comfortable with offering liability insurance to long term care facilities - something they have been increasingly reluctant to do. The Ontario Long Term Care Association which represents these companies and facilities said as much in its testimony to the COVID-19 Long Term Care Commission (OLTCA, September 30, 2020).

Because of the high infection and death rates in many of these facilities, insurers were increasingly unlikely to want to provide insurance, and these facilities are not supposed to operate without it. So once again the government has come to the aid of a sector that has shown itself to be incapable of staffing itself, of being prepared for a pandemic, of providing care to its residents, and even of obtaining insurance coverage without government, public sector, military, public health, and Red Cross assistance.

Why Bill 218 Should Not Cover Long Term Care Companies and Facilities

The government's own inspection reports have detailed short staffing and an inability to provide a reasonable standard of care in long term care facilities for years, long before COVID-19. All the pandemic did was bring to light the serious inadequacies of this sector.

To retroactively protect it from lawsuits from families, when these conditions have persisted for years and been made worse by the pandemic is a blatant act of protecting perpetrators of wrong against those who have been wronged.

It is also an obvious conflict of interest for the government to move to protect itself from having failed in its duty to protect residents by having eliminated comprehensive inspections in the year before the pandemic hit (Pedersen et al, April 15, 2020) and for failing to act expeditiously to take over facilities where infection and death rates were rising in both phase one and two of the pandemic. Instead Medical Officers of Health ordered in hospital teams to Orchard Villa, Pickering in phase one, and West End Villa and Laurier Manor in Ottawa in phase two of the pandemic (Durham Region, April 22, 2020; Payne, September 22, 2020). At the time, Orchard Villa had the highest death rate in the province.

To extend protections to long term care companies and facilities under Bill 218 flies in the face of natural justice – the rule against bias and the right to a fair hearing for those who have been wronged by the actions and lack of action in the long term sector and by the government of Ontario.

REFERENCES

Casey, L. (October 20, 2020). Some Ontario long term care homes can't get insurance, could be forced to close: Association. https://globalnews.ca/news/7407929/ontario-long-term-care-homes-liability-insurance/

Durham Region. (April 22, 2020). Durham Region Medical Officer of Health issues order to Orchard Villa and to Lakeridge Health to address COVID-19 outbreak. https://www.durham.ca/en/news/durham-region-medical-officer-of-health-issues-an-order-to-orchard-villa-and-to-lakeridge-health-to-.aspx

Michael Liu, M., Maxwell, C.J., Armstrong, P., Schwandt, M., Moser, A., McGregor, M.J., Bronskill, S.E., Dhalla, I.A. (September 30, 2020). COVID-10 in long term care homes in Ontario and British Columbia. https://www.cmaj.ca/content/cmaj/early/2020/09/29/cmaj.201860.full.pdf

OLTCA. (September 30, 2020). Testimony to COVID-19 Long Term Care Commission by Ontario Long Term Care Association. http://www.ltccommission-commissionsld.ca/transcripts/pdf/Ontario_Long_Term_Care_Association_Transcript_September_30_2020.pdf

Payne, E. (September 22, 2020). Public health orders hospital to take over management of long term care homes. https://ottawacitizen.com/news/local-news/public-health-orders-hospital-to-take-over-management-of-long-term-care-homes

Pedersen, K., Mancini, M. Common, D. (April 15, 2020). Ontario scaled back comprehensive, annual inspections of nursing homes to only a handful last year. https://www.cbc.ca/news/canada/seniors-homes-inspections-1.5532585