AdvantAge Ontario

Advancing Senior Care

Supporting Ontario's Recovery Act, 2020

Submission on Bill 218, Schedule 1, Section 2

November 2020

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Introduction

AdvantAge Ontario supports the intent of Bill 218 to provide liability protection for acts of 'good faith' relating to direct or indirect exposure to coronavirus (COVID-19) on or after March 17, 2020. This Bill proposes that no legal action should arise against any person[1] should they have acted in good faith in accordance with public health, federal, provincial and municipal laws relating to COVID-19. This Bill does not provide for this protection if the actions constitute gross negligence.

We are pleased that the liability protection we have advocated for will cover persons in long-term care (LTC) homes, Assisted living in Supportive Housing, retirement homes and life lease (senior care settings) and believe that this legislation will be extremely helpful. We suggest a few amendments to clarify and strengthen the proposed legislation, as well as additional measures to ensure that senior care settings can obtain insurance as well as pay for legal claims.

Background

As 2020 has unfolded, the landscape of infection prevention and control (IPAC) in congregate senior care settings has become a rapidly changing environment with the COVID-19 pandemic.

Despite following the best public health advice and directives, several class actions have been raised regarding the conduct of some LTC homes that had COVID-19 outbreaks, including some not-for-profit and municipal homes. While the sector is used to a small number of claims each year (most recently related to the LTC Public Inquiry), the magnitude of the pandemic has meant that the risk of lawsuits and litigation has had more profound and far reaching consequences for the viability of the entire LTC sector.

The Issue

While Bill 218 will be extremely helpful, it will not assist the more imminent issue of insurance. While insurance is a key requirement under the Long-Term Care Service Accountability Agreement (L-SAA) and Multi-Service Accountability Agreement (M-SAA) that LTC homes and home and community care providers respectively enter into with the LHIN, there are a relatively small number of insurers for senior care settings in Ontario and Canada.

The increased risk of liability related to COVID-19 has meant that LTC homes have either:

- had an increase to their premiums upon renewal (some homes reporting a 250% increase), or

[1] a person includes a reference to any individual, corporation or other entity, and includes the Crown in right of Ontario.

- had a reduction or exclusion of coverage (e.g., insurance coverage ceasing during an outbreak in 2020[2] or no coverage for Directors and Officers during outbreaks).[3]

It is important to also note that most insurers have also stopped taking any new business since March 2020, meaning that new operators are not able to obtain appropriate provisions.

This legislation will not stop insurance companies from limiting or refusing insurance in the short or medium term. Not least as this is provincial legislation while insurers operate nationally and some internationally and policies are not geographically specific. As such, the changes in insurance coverage for not-for-profit LTC homes (representing 20,000 beds or approximately 25% of the sector) and other senior care settings means exposure to governance risks. Without appropriate insurance coverage, gross negligence claims leave directors and officers and senior management of organizations exposed to personal losses if organizations can no longer indemnify them through insurance policies. As a result, directors and senior staff may resign or not renew, leaving homes without proper governance and thereby forced to cease operations. In addition, changes to insurance mean that senior care settings experience new financial risks as they may not be able to secure financing, renew existing financing agreements and meet the obligations of any current financing without proper insurance.

It is also not clear what, if any, substantive changes in insurance provision (reduction of coverage, omission of coverage in outbreaks, etc.) mean for direct funding agreements the MOLTC has with providers and operators via the LHINs.

Liability claims, regardless of whether they are successful, could generate millions in legal fees (which start from day 1), settlements and awards, exposing senior care settings to solvency risks. For those operators named in class actions with limited (or no) insurance for communicable diseases/pandemics/epidemics, they must also show the potential liability of a successful action on their balance sheet (until such time as it settles). This may place them in breach of their debt covenants and be a barrier to financing in general.

Inevitably this knock-on effect of liability may result in the closure of desperately needed LTC homes and other senior care settings.

Recommendations

We would like to offer comments and recommendations on the proposed legislation with the expectation that the Ministry consider these before adopting this legislation.

i) Retrospective Date

The proposed legislation provides protection on or after March 17, 2020 as this is the date the Province first declared a state of emergency. We would like to recommend that this date be January 1, 2020 or be removed entirely as "a person" would not have been able to put forward a "good faith effort" in the months leading up to this pandemic as there was no "public health guidance," "federal, provincial or municipal laws" relating to pandemic preparedness. At the beginning of the COVID-19 pandemic, LTC homes were guided only by the provincial outbreak protocols for routine outbreaks like influenza.

[2] Outbreaks not being limited to COVID-19 but also including other viral outbreaks like influenza
[3] Director and Officer coverage includes board members as well as executive/operational senior management staff

Recommendation 1: That the province amend the date of March 17, 2020 to January 1, 2020 or remove it entirely as it relates to the start date of the provisions preventing action arising from the COVID-19 pandemic.

ii) Definition of Gross Negligence

Section 2 (1) (b), requires that the protection extends to circumstances where the act or omission of the person does not constitute "gross negligence." Although this is preferable to an ordinary 'negligence' standard or acts of 'bad faith,' this provision will be the source of considerable litigation. Gross negligence is not an absolute legal term and any act can be framed as gross negligence, leaving operators to defend their actions and prove that they aren't gross negligence. As it is difficult to conceive of circumstances in which a person satisfies the requirements in section 2 (1) (a) to employ "good faith efforts", but nevertheless have acted with "gross negligence," we would like to recommend that the government provide a definition of gross negligence within the Bill which creates a very strict test, including the concept that it involves a reckless disregard for the health of the person infected or exposed to COVID-19.

Recommendation 2: That the province provide a definition of the term 'gross negligence' used in Section 2 (1) (b).

iii) Severability of 'person'

In Bill 218, a person includes a reference to any individual, corporation or other entity, and includes the Crown in right of Ontario. However, it is not clear whether each 'person' (meaning individual) is granted immunity as long as they acted in good faith following appropriate guidance or whether the 'corporation' (e.g., meaning a LTC home) could still be vicariously liable for the acts of their employee(s), even though the employee may not have been following the corporations procedures which adhere to good faith efforts following appropriate guidance. We recommend that the legislation provides this clarity regarding the acts of 'persons' under a 'corporation' or other entity.

Recommendation 3: That the province provide clarity in Bill 218 with respect to the severability of actions by a person, organization or other entity.

iv) Definition of Guidance

We would like to recommend that the definition of "public health guidance" be expanded to include advice or guidance provided by physicians and nurses. This is particularly important in view of the extensive involvement by public hospitals in IPAC measures and in some cases the operations of LTC homes during the pandemic. In this way, consideration should also be given to making the Medical Director position a 'defacto' officer position so that they are also covered by a LTC homes Director and Officer coverage. The Physicians insurance plan or CMPA, does not cover their liabilities as Medical Directors.

Recommendation 4: That the province expand the definition of 'public health guidance' in Section 2 (1) (a) (i) to include other health professionals that may have been acting in an official capacity (directly or indirectly) at the direction of the person.

v) Timing of Efforts

In section 2 (1) (a) (ii), we would like to recommend that the words "in effect at the relevant time, as understood by that person using good faith effort" be inserted after "any federal, provincial or municipal law relating to coronavirus (COVID-19)." It is important that claims made against a person are taken in the context of the advice that was available and provided for at a set time.

Recommendation 5: That the province add the words "in effect at the relevant time, as understood by that person using good faith effort" after "any federal, provincial or municipal law relating to coronavirus (COVID-19)" in section 2 (1) (a) (ii).

vi) Inclusion of Persons Not Covered by WSIB

There is a further exception for persons who during their employment may contract COVID-19 from a home or its staff. In this way, it seems that Bill 218 assumes that all workers are under WSIB in some way, but this is not the case. Many suppliers to LTC homes are exempt from WSIB, which would again leave LTC home operators to defend legal actions from individuals in this case. We recommend that provisions are made to protect good faith efforts of persons from legal actions by third parties who are not covered by WSIB.

Recommendation 6: That the province makes provisions in Bill 218 to protect the good faith efforts of persons from third parties who are not covered by WSIB.

vii) Immunity for Variants

The proposed legislation is for COVID-19. However, most insurance exclusions are generally for COVID-19, its variants, pandemic/epidemic or viral outbreaks of other kinds (including influenza). While immunity legislation for this current pandemic (COVID-19) is vital, it is also limiting the ability of senior care settings (particularly LTC homes) to operate in the long-term without coverage for these types of similar situations. We would like to recommend that this Bill is amended to include viral outbreaks that may or may not be of a pandemic/epidemic magnitude.

Recommendation 7: That the province expand the coverage of Bill 218 to include all good faith efforts carried out by a person during any viral outbreaks (regardless of whether they are identified as part of a pandemic or epidemic).

viii) Ongoing Implications

As Ontario experiences the second wave of COVID-19, the ongoing implications of this legislation need to be considered. While protection from liability may minimize the number of claims that are successful, it will not (nor should it) stop claims from being raised impact the availability of insurance for the senior care market.

Recommendation 8: That the province consider a legal fee support fund for not-for-profit senior care operators that off-sets the additional financial burden of an operator defending itself against any claims.

Recommendation 9: That the province consider providing an insurance 'back-stop' that ensures appropriate coverage is available, affordable and comprehensive for senior care settings

in the short-term so that operators are not left unable to provide services and system capacity is maintained.

Recommendation 10: That the province provide education and training to operators in the senior care sector with regards to insurance and liabilities and their respective funding agreements to ensure that operators have the appropriate tools and resources to show due diligence and proper governance.

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About AdvantAge Ontario

AdvantAge Ontario has been the trusted voice for senior care for 100 years. We are community-based, not-for-profit organizations dedicated to supporting the best possible aging experience. We are the only provincial association representing the full spectrum of the seniors' care continuum. Our nearly 400 members are located across the province and include not-for-profit, charitable, and municipal long-term care (LTC) homes, seniors' housing, supportive housing and community service agencies.