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Natalie Mehra
15 Gervais Drive, Suite 201
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Graham Webb
Advocacy Centre for Elderly
2 Carlton Street, Suite 701
Toronto, Ontario, M5B 1J3

Dear Natalie:

Re: Charter Challenge to Bill 7, the More Beds, Better Care Act, 2022

We have previously provided you with our opinion about the merits of a constitutional challenge to Bill 7, which amends Ontario's long-term care legislation and the *Health Care Consent Act, 1996* for the purpose of 'facilitating' the transition of patients who require an "alternate level of care" from public hospitals to long-term care homes. The Bill has now been proclaimed as the *More Beds, Better Care Act, 2022, S.O. 2022, c. 16 - Bill 7* (herein "Bill 7"). You have asked for this summary of our opinion for the purpose of sharing it with the public.

SHORT ANSWER

In our view, Bill 7 represents an unprecedented and egregious deprivation of the *Charter* rights of alternate level of care (ALC) patients in respect of both their right to life, liberty and security of the person under s. 7, and of the right to equality under s. 15 of the *Charter*. We are confident that these deprivations can be established.

No doubt the government will argue that the denial of these *Charter* rights is justified to achieve the Bill's purpose of freeing-up hospital resources for the benefit of those who may also need them.

We believe that argument will fail for several reasons, including:

- the severity of the consequences for ALC patients of being deprived of the right to choose where they live and be cared for;
- the awful conditions in the long-term care homes most likely to have places for ALC patients;
- the marginal impact Bill 7 would have on the large and systemic shortfalls in hospital care;
- the existence of alternative less coercive solutions, and
- the permanent character of the deprivation of Charter rights the Bill seeks to put in place.

These factors clearly weigh very heavily against finding the Bill to be a justifiable trade-off between the competing demands for the necessary care that elderly, frail and vulnerable patients require.

SUMMARY OPINION

Government policies, inadequate funding, and the stresses of the pandemic have left Ontario's health care system under serious stress. There are too few hospital beds to meet current needs, and too few nurses and other staff to care for patients lucky enough to be placed in one. For Ontario residents who can no longer care for themselves but who do not require hospital care, there is a threadbare system of subsidized home support services, and far too few places in long-term care homes ("LTC"). There are even fewer beds in homes that anyone wants to be placed in because of the terrible records many homes have of failing to provide proper care.

As part of its response to these challenges the government has brought forward Bill 7, the *More Beds, Better Care Act, 2022*,¹ which amends the *Fixing Long-Term Care Act, 2021 (FLTCA)*.² It is designed to coerce certain hospital patients who are designated as needing an alternate level of care into accepting placements in LTC homes they do not want to live in, and by threatening them with a punitive \$400 a day hospital charge if they refuse.

While the Bill directs that efforts be made to first obtain their consent to the move, coerced consent is not true or informed consent. Hospital patients who cannot safely live alone because of their physical or mental frailty are an inherently vulnerable group, and all too likely to think that they have no real choice but to go where they are put. The fact that most are also elderly only increases their degree of vulnerability to threats of this nature.

Many ALC patients are already on long wait lists for placement in an LTC home, one of the five they are entitled to have chosen. This is because LTC facilities with good records are most likely to be full, while those with poor compliance records have empty beds. While the move to an LTC facility not of their choosing is ostensibly to be temporary, the reality is that most ALC patients will die in the homes they are transferred to. Moreover, under Bill 7 patients may be

¹ *More Beds, Better Care Act, 2022*, SO 2022, c 16 ["Bill 7"].

² *Fixing Long-Term Care Act, 2021*, SO 2021, c 39, Sched 1 [FLTCA].

placed in LTC homes far away from family, friends and other medical care they require, depriving them invaluable and often essential support, care, and comfort.

The fact that under Bill 7 an ALC patient's personal health information can also be broadly accessed and disseminated only serves to highlight the damaging implications of dispensing with their informed consent.

Given the consequences, in our view the power to coerce a frail and/or elderly ALC patient into going to live in a place they do not want, and to do so without their informed consent, is a deprivation of their right to life, liberty and security of the person under Section 7 of the *Charter*. Choosing where you will live, particularly where it is tied to the choice of medical and nursing care, is basic to an individual's autonomy and dignity, the essence of the rights protected under section 7.

Furthermore, the Bill targets a section of the population that is vulnerable and frail because of its members' physical or mental health issues and/or old age. People go to LTC facilities because they cannot live safely on their own, predominantly because of infirmities tied to age. For this reason, Bill 7 also infringes the right of an ALC patients to equality under Section 15 of the *Charter*.

We expect the government to do its best to support its claim that Bill 7 is needed. This is likely to include evidence describing the need to free-up scarce hospital resources for persons with serious or emergent health conditions. Of course, this scarcity is a direct consequence of the terrible policy and funding choices made by the provincial government that resulted in the current dearth of necessary care.

Moreover, on our understanding, the Bill 7 remedy for creating more spaces in hospitals will not address what is a large systemic problem of shortage. In any event, by forcing patients into LTC homes at great risk to their health and well-being, there is compelling argument that the harm Bill 7 will cause far outweighs any health care benefit for others and that other less restrictive solutions exist to the coercive measures adopted.

Sincerely,



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