

Court File No. DC-24-00000007-00JR

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N :

**THE ONTARIO HEALTH COALITION and
CATHERINE PARKES**

Applicants

- and -

ONTARIO MINISTER OF LONG-TERM CARE

Respondent



APPLICATION UNDER Rules 14.05(2) and 68.01 of the *Rules of Civil Procedure*, RRO 1990,
Reg 194 and Section 2(1) of the *Judicial Review Procedure Act*, RSO 1990, c J.1

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicants. The applicants request that this application be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE

APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicants' application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date: January 3rd, 2024

Issue by _____
Local Registrar

Address of 130 Queen Street West
Court office: Toronto, ON M5H 2N6

TO: **ATTORNEY GENERAL OF ONTARIO**
Crown Law Office – Civil Law
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Served via email: cloc.reception@ontario.ca

MINISTRY OF LONG-TERM CARE
6th Flr, 400 University Ave
Toronto, ON M5G 1S5
Served via Attorney General of Ontario

AND TO: **CVH (NO. 6) LP BY ITS GENERAL PARTNERS, SOUTHBRIDGE HEALTH CARE GP INC. AND SOUTHBRIDGE CARE HOMES (A LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, SOUTHBRIDGE CARE HOMES INC.)**
Southbridge Capital Inc.
766 Hespeler Road, Suite 301 Cambridge, ON N3H 5L8
Email: rbell@southbridgecare.com

APPLICATION

1. The Applicants make an application for:
 - (a) an order in the nature of *certiorari* quashing and setting aside the decision, issued December 1, 2023, by the Director, as the term is defined in the *Fixing Long-Term Care Act, 2021*, S.O. 2021, c. 39, Sched. 1 (the “*Act*”), to approve a proposal by CVH (No. 6) LP by its general partners, Southbridge Health Care LP Inc. and Southbridge Care Homes (a limited partnership, by its general partner, Southbridge Care Homes Inc.) (“Southbridge”) to redevelop and expand the Orchard Villa long term care home (the “Proposal”);
 - (b) an order in the nature of *certiorari* quashing and setting aside the decision, issued December 1, 2023, by the Director, to provide an undertaking to issue a new 320-bed long-term care home licence for up to 30 years to Southbridge upon the completion of the redevelopment of the home at 1955 Valley Farm Road in Pickering, Ontario (the “undertaking”);
 - (c) an order in the nature of *certiorari* quashing and setting aside any Development Agreement, approval to construct, or funding commitment that were made in respect of the Proposal;
 - (d) an order prohibiting the Minister of Long-Term Care (the “Minister”) or the Director from taking any further steps or actions in respect of the Proposal, including but not limited to the negotiation or execution of development Agreement; approval to Construct; the provision of capital development funding; or issuance of a licence under Section 102 of the *Act*;
 - (e) a declaration that in approving and providing an undertaking to issue a licence to a Southbridge in respect of the Proposal, the Director acted unlawfully, unreasonably, improperly, disproportionately, arbitrarily, and without and in excess of his statutory discretion and authority under Section 103 of the *Act*;

- (f) a declaration that, in particular, the Director acted unlawfully, unreasonably, improperly, disproportionately, arbitrarily, and without and in excess of his statutory discretion and authority by:
 - (i) deciding that the Southbridge application for a licence in respect of the Proposal could be made in accordance with section 99 of the *Act*; and
 - (ii) by determining that Southbridge is eligible to be issued a licence for a long-term care home under section 101 of the *Act*;
- (g) a declaration that the Minister acted unlawfully, unreasonably, improperly, disproportionately, arbitrarily, and without and in excess of her statutory discretion by failing to restrict the issuance of a licence to Southbridge on the grounds that it would not be in the public interest to do so Section under 100 of the *Act*;
- (h) a declaration that the Director denied procedural fairness and violated the rules of natural justice in failing to notify and meaningfully consult the Applicants and/or potentially affected members of the public prior to announcing its decision in respect of the proposal or provide any reasons for the decision;
- (i) a declaration that Minister and/or Director denied procedural fairness and violated the rules of natural justice by failing to provide any notice to the Applicants and/or potentially affected members of the public of the impugned decisions or any reasons in support of them;
- (j) a declaration that in failing to provide the required procedural fairness and comply with the rules of natural justice, as set out in subsections 1(h) and 1(i) above, the Minister and/or Director failed to consider the *Charter* values that were relevant to the exercise of their discretion, most notably the right to an elevated level of procedural fairness where a decision can engage the rights to life, liberty or security of person under s. 7 of the *Charter*, and to proportionately balance these values with the government's interests;

- (k) an order, if required, abridging the time for service of any materials required for the hearing of this application;
- (l) costs of this application; and,
- (m) such further and other relief as counsel may advise and this Honourable Court may deem just.

2. The grounds for the application are:

Overview

- (a) Orchard Villa has not infrequently been described as the most notorious long-term care home in the province. Since being acquired by the Southbridge investment consortium in 2015, its record is one of chronic non-compliance with the Act and regulations and of causing untoward harm to the elderly and frail residents entrusted to its care. Its record during the pandemic, when at least 70 residents died just in early 2020, has consistently been described in the most critical terms by the *Ontario Long-Term Care COVID-19 Commission* (the “Commission”), the Canadian Armed Forces, Lakeridge Health, the Ontario Auditor General and the Ontario Ombudsman.
- (b) The decisions of the Minister and Director to reward Southbridge by authorizing a substantial expansion of its operations at the Orchard Villa site for the next thirty years cannot be reconciled with the licensing criteria of the Act, which are based on the past performance of Southbridge, and entirely confound the declared “fundamental principle” of the *Act* that:

a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.

The Applicants

- (c) Ontario Health Coalition is an unincorporated citizen-based coalition and non-governmental organization, which represents more than 500 member organizations

and a network of local health coalitions and individual members, which together include more than 750,000 Ontarians. OHC has a long history of public interest advocacy and engagement on matters of health care policy, programs and law with a key focus on the need to preserve and strengthen quality hospital and long-term care services for the people of Ontario.

- (d) Catherine Parkes is a resident of Pickering Ontario whose father died in Orchard Villa in early 2020. She was a member of the Family Council for Orchard Villa and a founding member of the “Families of Orchard Villa” – a group of families who bonded together because of the tragedy and trauma they suffered as a result of the deaths of their loved-ones at Orchard Villa. She has been actively engaged in advocating on behalf of its residents with the Commission, the Ministry for Long-Term Care and in the media.

CVH and Southbridge

- (e) Southbridge Care Homes LP is a property development firm that owns 27 long-term care (LTC) homes in Ontario, including the Orchard Villa LTC home located in Pickering, Ontario. Southbridge bought Orchard Villa from its previous owner in 2015, during the company’s “acquisition phase”. Southbridge currently operates Orchard Villa, which is licensed for 233 long-term care beds.
- (f) Southbridge did not have a history of operating LTC homes when it embarked in more a decade ago on a strategy of purchasing mostly small LTC homes with a plan to redevelop and expand them. Southbridge typically hired a management firm, Extendicare Canada Inc., “to manage the operations of our homes, both before and after redevelopment.” Extendicare is a for-profit LTC management company that trades on the TSX.

The Orchard Villa Long Term Care Home

- (g) In 2020, Orchard Villa gained widespread notoriety for its record during the COVID-19 pandemic. In Spring 2020, 206 of Orchard Villa's 233 residents contracted COVID-19. Orchard Villa had at least 70 resident deaths during the first

phase of the pandemic. At 30 deaths per 100 beds, Orchard Villa is reported to have had one of the highest mortality rates in any Ontario long-term care home.

- (h) Because of the virtual collapse of resident care at Orchard Villa, on April 21, 2020, Durham Region's Medical Officer of Health invoked s. 29.2 of the *Health Protection and Promotion Act* to order that the local hospital, Lakeridge Health, assume management of Orchard Villa. As described in the report of Commission, when Lakeridge staff arrived, they found staffing levels at the home to be 20-25% of the normal complement, garbage "everywhere", "very shocking" personal protective equipment (PPE) practices, and the absence of even rudimentary infection control measures. Just to "stabilize the situation," Orchard Villa required a deep clean costing almost \$500,000.
- (i) In April 2020, Orchard Villa was among the five Ontario LTC homes where the Canadian Forces were brought in to provide "humanitarian relief and medical support." The observation report released by the Canadian Forces documented a range of disturbing conditions in the home including:
- poor infection control practices, including improper use of PPE;
 - the presence of cockroaches, flies and rotting food;
 - such inadequate resident care that residents: were being left in soiled diapers; experienced falls without the post-fall assessments required by regulation; were the victims of medication administration errors; were not properly hydrated or sat up for meals (increasing their choking risk);
 - a broad lack of medical supplies, including limited and/or inaccessible wound care supplies, linens and soaker pads, or properly functioning oxygen generators and suction units;
 - residents being left on mattresses on the floor to prevent them from getting up and walking;

- significant shortcomings concerning incident reporting and communication between all levels of staff; and
 - lack of training for staff and "[n]o accountability for staff in regards to upholding basic care needs or best practices".
- (j) Families of Orchard Villa residents testified before Ontario's Long-Term Care COVID-19 Commission, echoing the comments from Lakeridge hospital staff and the Canadian Forces. Long before the pandemic, families described dire understaffing, poor management, and the absence of infection control procedures at the home, conditions that resulted in extreme weight loss, bed sores, infections and other harms. As described by the families, things got much worse during the pandemic. These problems were only exacerbated when family members were excluded from the home – neither able to assist with resident care or reach anyone at the home over the phone to inquire about the status of their loved ones.
- (k) Orchard Villa's poor record prior to the pandemic is evidenced by the reports of inspections since Southbridge purchased the license in 2015, citing it well over a hundred times for failing to comply with regulations under the *Act*, and issuing 18 Orders concerning its repeated non-compliance with written notifications and voluntary plans of compliance. There have been literally hundreds of written notifications and voluntary plans for compliance given by inspectors to Southbridge for Orchard Villa.
- (l) A report by the Ontario Ombudsman in Sept 23 described the pervasive failures of the Ministry's staff to meet their mandate of regulatory oversight and control during the early stages of the Covid pandemic. That report singles out and includes several accounts of the horrific circumstances at Orchard Villa. As one example, the report states that:

In April 2020, according to a Ministry of Long-Term Care inspector, a staff person at the Orchard Villa home in Pickering called the Ministry to report that "...there is no staff to feed and care for residents, and that living conditions are like hell."

- (m) Orchard Villa's record of persistent non-compliance with the requirements of the Act and its regulations, and of resident neglect and improper care, is one that continues to this day. As noted by several Ministry inspection reports for 2022 and 2023, when the Covid-19 pandemic had subsided, Southbridge was given dozens of written notifications of non-compliance with regulations under the *Act*, including for:
- (i) failing to provide residents with proper care after serious falls;
 - (ii) failing to provide residents with proper care required to reduce pain, promote healing, and prevent infection,
 - (iii) failing to report numerous critical incidents involving resident harm;
 - (iv) failing to comply with infection prevent and control protocols, including those related to Covid 19; and
 - (v) for obstruction and non-compliance for altering documents regarding COVID-19 IPAC audits while the home was in outbreak.
- (n) These and other serious failures persisted even during the months following the extensive loss of residents' lives, when Southbridge was receiving *per diem* funding for beds that were no longer occupied. Despite that substantial increase of funding relative to the beds actually occupied at the home, Southbridge still failed to comply with its obligations under the *Act* or properly provide for the care and safety of residents.

The Minister and Ministry

- (o) These persistent chronic failures of Orchard are reflective of the Ministry's failure to exercise effective oversight and enforcement.

- (p) A report published by the Ontario Auditor General in December 2023 found that many of the problems of poor regulatory oversight that tragically came to light during the early stages of the pandemic continue to persist. The report concludes "that the Ministry, in conjunction with Ontario Health and long-term care homes, does not have fully effective systems and procedures to ensure that residents receive quality care and services." It further found that the ability of long-term care homes to provide competent and appropriate care that meets resident care needs continues to be constrained, and that many homes lack the resources and programs that are critical to residents' quality of life. Finally, the report concludes that neither the Ministry nor Ontario Health has developed targets to effectively measure the performance of long-term care homes in relation to quality of care and resident safety.
- (q) Not only did the Ministry fail to fine Southbridge for its record prior to and during the pandemic, it instead introduced legislation creating a liability shield to protect Southbridge and other LTC homes and contractors from liability claims arising from their negligence. Now it purports to effectively reward Southbridge with a 30-year licence to redevelop and expand a LTC home with a history of causing great harm, suffering and loss of life to dozens of vulnerable residents entrusted to and dependent on its care.
- (r) At a time when public confidence in LTC care homes has been severely shaken, it confounds not only the licensing criteria of the Act and the "fundamental principle" of ensuring the residents "may live with dignity and in security, safety and comfort," but also any notion of the public interest to reward Southbridge with license to substantially expand its operations at the Orchard Villa site.

The Approval

- (s) Under s. 103(1) of the Act, the Director may give an undertaking to issue a licence to operate a long-term care home to a person on the condition that the person agrees to satisfy the specified conditions set out in the undertaking. The Director is only authorized to give this undertaking where:

- (i) the Minister has determined that there should be a long-term care home in the area under s. 99;
 - (ii) the Minister has not imposed restrictions on who may be issued a license based on the public interest under s. 100, which would prohibit the undertaking at issue; and
 - (iii) the Director has determined that the person is eligible to be issued a license for a long-term care home, under s. 101 of the Act.
- (t) Section 101 of the Act provides, *inter alia*, as follows:

A person is only eligible to be issued a licence for a long-term care home if, in the Director's opinion,

(a) the home and its operation would comply with this Act and the regulations and any other applicable Act, regulation or municipal by-law;

...

(c) the past conduct relating to the operation of a long-term care home or any other matter or business of the following affords reasonable grounds to believe that the home will be operated in accordance with the law and with honesty and integrity ...

...

(d) it has been demonstrated by the person that the person or, where the person is a corporation, its officers and directors and the persons with a controlling interest in it, is competent to operate a long-term care home in a responsible manner in accordance with this Act and the regulations and is in a position to furnish or provide the required services;

(e) the past conduct relating to the operation of a long-term care home or any other matter or business of the following affords reasonable grounds to believe that the home will not be operated in a manner that is prejudicial to the health, safety or welfare of its residents ...

- (u) The focus of s. 101 is backward-looking and is almost entirely concerned with the past conduct and record of the person applying for the license. Moreover, the person, and any related corporation, officers and directors, must meet *all* of the

criteria under s. 101 in order to be eligible to receive a license to operate a long-term care home. The extensive record of Southbridge operations at Orchard Villa clearly demonstrates that its patent failure to meet any of the criteria necessary for it to be considered eligible for a long-term care home license and under s. 101.

Breach of Procedural Fairness and Natural Justice

- (v) In addition to failing to exercise their authority in a manner at all consistent with the licensing criteria of the *Act*, the Ministry and Director also failed to accord the Applicants, and Orchard Villa residents and their families with procedural fairness or fundamental justice.
- (w) To begin with, as part of the public consultation mandated under s. 109 of the *Act*, the Ministry held a teleconference public meeting on July 15, 2021 in respect of the Southbridge Proposal. During the question period, Ministry officials repeatedly restricted questions or comments about Southbridge's record in operating the home and caring for residents. In other words, many participants in the consultation were directed to limit their comments to Southbridge's present plans, not its past practices or performance as the owner of Orchard Villa.
- (x) Due to a change in the corporate identity of the licensee, a further consultation by way of an invitation to make written submissions was held in October 2022.
- (y) At neither purported consultation were the Applicants provided with the Southbridge application or supporting materials, or more than the most perfunctory description of the Proposal.
- (z) Because of the Ministry's practice of providing no notice or reasons for a Director's determination of an application to develop a LTC home, including to those who participate in the consultation process, counsel for the Applicants wrote to the Director, on Sept. 27, 2021 expressing the Applicants' ongoing interest in the Ministry's consideration of the Proposal and requesting that

the Director indicate the current status of this application. Most importantly, we also ask that you advise us directly of any determination you may make in respect of the application, and do so as soon as a decision is made.

No response from the Director was received and no notice was given.

- (aa) In consequence, Counsel for the Applicants has for over two years monitored on a daily basis the Ministry website which it believes is the only source of public information about the status of Southbridge OV applications.
- (bb) However, in the absence of any change in the posted status of the Orchard Villa application, during the summer of 2023, Ministry officials appear to have effectively approved the Proposal and were taking steps to facilitate its implementation. Because of the lack of transparency surrounding these actions, these steps are unknown to the Applicants, but the following facts are matters of public record:
- On June 9, and pursuant to a request by Southbridge which was unanimously opposed by the City of Pickering, a Minister's Zoning Order (MZO) was issued to authorize the construction of three high rise towers on the site now used only by Orchard Villa. That approval permitted the establishment of facilities to house 832 long-term care beds and a retirement home with 670 units.
 - Southbridge stated at the time that an enhanced MZO was needed so that it could meet the applicable timelines of the Ministry, which required the proposed long-term care home to be ready for construction by August 31, 2023, and ready for occupancy by June 2025.
- (cc) Southbridge subsequently posted a tender for the construction with a closing date of August 24, 2023 and subsequently posted the following to the Merx website:

Southbridge Care Homes (CVH (No. 2) LP) has retained Traugott Building Contractors Inc. (TBCI) to be their Construction Manager to construct their new Long Term Care Residences & Senior Living Apartments located at 1955 Valley Farm Road, Pickering, Ontario. This Development will consist

of two (2) 275,126 Square Foot, 15-storey Long-Term Care (LTC) Buildings and one (1) 196,845 square foot, 15-storey apartment building

- (dd) On or about Dec.1, 2023 that the following notice appeared on the Ministry's web-site:

Decision

The Director under the Fixing Long-Term Care Act, 2021 has reviewed the Southbridge Pickering proposal and has made a decision. The proposal related to Southbridge Pickering has been approved and has such the Director has provided an undertaking to issue a new 320-bed long-term care home licence for up to 30 years to CVH (No. 6) LP by its general partners, Southbridge Health Care LP Inc. and Southbridge Care Homes (a limited partnership, by its general partner, Southbridge Care Homes Inc.) upon the completion of the redevelopment of the home.

- (ee) Despite their assiduous efforts to remain apprised of the status of the Southbridge OV application, and the request of their counsel noted above, it was only on December 1, 2023 that the Applicants learned of the Decision. To this date, neither the Applicants nor to their knowledge any other participant in the consultations referred to above have been given direct notice of the Director's decision, nor have they been given any indication of:
- (i) whether or when the Minister may have made a determination to approve the Proposal under s. 99;
 - (ii) whether or when the Director may have determined that the Proposal was consistent with Ministry policy under s. 99;
 - (iii) whether or when the Director formulated an opinion that Southbridge was eligible to be given a license under section 101; or
 - (iv) what its reasons for any such determinations may have been.
- (ff) Furthermore, the effective approval of the Proposal substantially in advance of posting the decision publicly, denied the Applicants their right to seek a timely review of the Director and Minister's decision.

- (gg) The *Fixing Long-Term Care Act*, SO 2021, c 39, sch 1, Preamble, ss. 1, 2, 3, Part VIII: Licensing, and all other applicable provisions;
 - (hh) The *Judicial Review Procedure Act*, RSO 1990, c J.1, ss. 2, 5, 6, 10, and all other applicable provisions;
 - (ii) The *Courts of Justice Act*, RSO, c C.43;
 - (jj) The *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 14.05, 38, 68, and all other applicable Rules; and
 - (kk) Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The Affidavit of Catherine Parkes, to be sworn;
 - (b) The Affidavit of Natalie Mehra, to be sworn;
 - (c) The Affidavit of Professor Patricia Armstrong, to be sworn;
 - (d) Further affidavits, to be determined; and
 - (e) Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

December 28, 2023

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2
Fax: 416-591-7333

Steven Shrybman (LSO 20774B)
Tel: 613-858-6842
sshyrbman@goldblattpartners.com

GOLDBLATT PARTNERS LLP

500-30 Metcalfe street
Ottawa, ON K1P 5L4
Fax: 613-235-3041

Benjamin Piper (LSO No. 58122B)

Tel: 613-482-2464

bpiper@goldblattpartners.com

Lawyers for the Applicants

1416-2430-2089, v. 1

THE ONTARIO HEALTH COALITION et al **ONTARIO MINISTER OF LONG TERM CARE**

Court File No.

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ONTARIO
SUPERIOR COURT OF JUSTICE
Divisional Court

PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPLICATION

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2
Fax: 416-591-7333

Steven Shrybman (LSO 20774B)
Tel: 613-858-6842
sshrybman@goldblattpartners.com

GOLDBLATT PARTNERS LLP
500-30 Metcalfe street
Ottawa, ON K1P 5L4
Fax: 613-235-3041

Benjamin Piper (LSO No. 58122B)
Tel: 613-482-2464
bpiper@goldblattpartners.com

Lawyers for the Applicants