Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ONTARIO HEALTH COALITION and ADVOCACY CENTRE FOR THE ELDERLY

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, THE MINISTER OF HEALTH, and THE MINISTER OF LONG-TERM CARE

Respondents

APPLICATION under Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

NOTICE OF APPLICATION

TO THE RESPONDENT

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

THIS APPLICATION will come on for a hearing on a date to be determined at 393 University Avenue, Toronto, ON M5G 1E6.

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 applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, 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 applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

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

Date:_____ Issued by _____
Local Registrar

Address of Court office: 330 University Avenue
8th Floor
Toronto, ON M5G 1R7

TO: **THE ATTORNEY GENERAL OF ONTARIO**
Ministry of the Attorney General
Crown Law Office - Civil
720 Bay Street, 8th floor
Toronto, ON M7A 2S9

APPLICATION

THE APPLICANTS MAKE APPLICATION FOR:

1. A declaration that the following provisions and practices, which together, are referred to as "Bill 7", infringe on the rights of individuals subject to the challenged provisions, to life, liberty and security of person under s. 7 of the *Charter*, and that these deprivations are not in accordance with the principles of fundamental justice:

    (a) Sections 2, 3 and 9 of the *More Beds, Better Care Act, 2022*, S.O. 2022, c. 16 (*MBBCA*), which amends the *Fixing Long-Term Care Act, 2021*, S.O. 2021, c. 39, Sched. 1 (*FLTCA*) and the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A (*HCCA*);

    (b) Section 2 of O. Reg. 484/22: *General*, enacted under the *FLTCA*;

    (c) O. Reg. 485/22: *Hospital Management* and O. Reg. 486/22: *Hospital Management*, both enacted under the *Public Hospitals Act*, RSO 1990, c P.40; and

    (d) the administrative practices adopted to implement these legislative and regulatory amendments;

2. A declaration that Bill 7 infringes on the rights of other individuals subject to the challenged provisions to the equal protection and equal benefit of the law without discrimination based on age under s. 15 of the *Charter*;

3. A declaration that these violations of the *Charter* cannot be saved under s. 1 because the challenged provisions cannot be demonstrably justified as a reasonable limit in a free and democratic society;

4. A declaration that, insofar as the challenged provisions infringe on and deny the rights and freedoms guaranteed by s. 7 and s. 15 of the *Charter* and cannot be justified under s. 1 of the *Charter*, the provisions are invalid and of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*;

5. An order under s. 24(1) of the *Charter* requiring that all regulations, policies and other administrative actions or measures enacted or carried out under the authority of Bill 7 must be enacted or carried out in a manner that is consistent with *Charter* rights;

6. Their costs of this Application on a substantial indemnity basis; and

7. Such further and other relief as counsel may advise and this Honourable Court may deem just and appropriate.

THE GROUNDS OF THE APPLICATION ARE:

1. The Parties

(a) The Ontario Health Coalition (OHC)

8. OHC 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's members include: seniors' groups; patients' organizations; trade unions; nurses and health professional organizations; physicians; physician organizations; non-profit community agencies; ethnic and cultural organizations; residents' and family councils; retirees; poverty and equality-seeking groups; women's organizations, and others.

9. The OHC is a non-partisan public interest group led by a Board of Directors that includes physicians, the Ontario Nurses' Association, patient advocates, trade unions, academic experts in

health policy, and leaders of community organizations all of whom share a commitment to preserving and strengthening the policies and programs of Canada's publicly funded health care system committed to providing quality health care to all Canadians based on their needs, not their ability to pay.

10. 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, including for patients that are directly affected by Bill 7.

(b) The Advocacy Centre for the Elderly (ACE)

11. ACE is a specialty legal clinic incorporated under the *Legal Aid Services Act* as Holly Street Advocacy Centre for the Elderly Inc., which was established to provide a range of legal services to low-income seniors in Ontario. Its mission is to uphold the rights of low-income seniors, and its purpose is to improve the quality of life of seniors by providing legal services which include direct client assistance, public legal education, law reform, community development and community organizing. ACE has been operating since 1984.

12. ACE is actively involved in providing public legal information about, and in advocating for reforms to Ontario's long-term care policies, laws and practices. It has responded to thousands of requests from individuals seeking summary advice or legal representation with respect to issues concerning long-term care in Ontario, whether from those seeking admission to a long-term care home or concerning the quality of care they receive and their rights as residents of such homes. Many of these individuals are directly affected by Bill 7.

2. Overview

13. The impugned provisions of the *More Beds, Better Care Act*, 2022, SO 2022, c 16, and its related regulations and practices (Bill 7) concern a particular group of hospital patients who are designated "alternative level of care" (ALC) and considered eligible for admission to a long-term care (LTC) home.

14. Each year, thousands of these patients are admitted to hospital because of a need for acute care often because of the failure of the health care system to provide the home and community care that could have prevented the need for the hospital admission. Many of these individuals are among nearly 40,000 Ontario residents waiting to be admitted to one of approximately 70,000 LTC home beds in Ontario.

15. These ALC patients typically suffer from various co-morbidities, including dementia, cancer, hypertension, chronic obstructive pulmonary disease (COPD), and other chronic conditions. Most of these patients are elderly, unable to care for themselves or be cared for in the community, and are among the most vulnerable members of our society. Many also do not have capacity to make decisions about their care and must rely on a substitute decision-maker (SDM) to do so. A significant number of these ALC patients are in the final months of their lives, and those who are ultimately admitted to an LTC home will join a population with a life expectancy of less than 2 years.

16. The majority of these ALC patients have no wish to remain in hospital. Most want to return home or to be admitted to an LTC home that is close to family and other supports, and that has a record of providing for the proper treatment, care, safety and well-being of their residents. Because of long waiting lists for such homes, many ALC patients may wait for weeks, and even

longer for admission to a LTC home that is capable of providing the treatment and care they require. As of January 2023 these older, ill and vulnerable patients occupy a little over 5% of Ontario's 30,980 in-patient hospital beds.

17. Through absolutely no fault of their own, these ALC patients find themselves the casualties of a health care system that is unable to provide the health care services they require because of the failures of Ontario governments to: provide the home care services that would reduce the need for hospital and long-term care; ensure the availability of properly staffed and resourced hospital services necessary to meet the needs of Ontario residents; and establish, fund and regulate LTC homes that can properly provide for the treatment, care, safety and well-being of Ontario residents who require such care.

18. Ostensibly put forward to address the problems of a health care system struggling to meet the demand for hospital care, the Legislature passed the *More Beds, Better Care Act, 2022* on August 31, 2022. Despite the putative claim of this title, it will do neither.

19. Instead Bill 7 singles out a particular cohort of older, ill and very vulnerable patients to be deprived of their right to informed consent about where they will live and the health care they receive. It authorizes the discharge from hospital of ALC patients, some of whom still require treatment in hospital, for admission to LTC homes that have not been willingly chosen or consented to, and that may not be capable of providing for their treatment, care and safety. It therefore results in needless physical and psychological suffering for, and will hasten the deaths of some ALC patients.

3. Proceeding to Have ALC Patients Admitted to LTC Homes Without their Consent

20. Under Bill 7, the designation of a patient as ALC may be made by any "clinician" (attending physician, registered nurse, or other named medical professional) when in their opinion the patient "does not require the intensity of resources or services provided in the hospital care setting". Approximately 60% of all patients so designated are unaffected by the impugned provisions of Bill 7 because they are waiting for further hospital or community care, not admission to a LTC home.

21. Once the ALC designation is made, and the clinician "reasonably believes that an ALC patient may be eligible for admission to a long-term care home", the clinician may request that a placement co-ordinator employed by Home and Community Support Services (HCCSS), an Ontario Crown agency, carry out certain actions with or without the consent of the ALC patient or their SDM, and the placement co-ordinator can proceed to do so even without a request from the attending clinician. These include actions to:

(a) determine the ALC patient's eligibility for admission to a long-term care home;

(b) select a long-term care home or homes for the ALC patient in accordance with the geographic restrictions that are prescribed by the regulations;

(c) provide to the licensee of a long-term care home the assessments and information set out in the regulations, which may include personal health information;

(d) authorize the ALC patient's admission to a LTC home; and

(e) transfer responsibility for the placement of the ALC patient to another placement co-ordinator.

22. An ALC patient has no right to seek review of, or appeal from, the designation that they are ALC, or from any of the determinations and actions that can follow from that designation.

23. Bill 7 thus deprives ALC patients of protections for the collection, use and disclosure of personal health information provided for under the *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A (*PHIPA*), by allowing any placement co-ordinator or clinician to access and share an ALC's personal health information with any number of LTC homes to which admission is being sought and with other care providers as well.

24. Bill 7 similarly deprives ALC patients of the right to exercise informed consent, including by overriding the requirements for consent under the *FLTCA* and the *HCCA*, concerning where they will live and the health care they will receive. While Bill 7 requires that "reasonable efforts" be made to obtain such consent, those efforts must include informing the ALC patient or SDM that the failure to apply to a LTC home or homes which they do not consider capable of the meeting the ALC patient's needs will result in being excluded from the process of choosing a home, in deciding who may access their personal health information, and ultimately in being charged $400 for every day the ALC patient remains in hospital once their admission to a such a home is authorized.

25. Furthermore, the policy and field guidance documents published by Ontario Health (a government agency) and HCCSS encourage ALC patients or their SDMs to believe that all Ontario LTC homes provide the same quality of care and that admission to a LTC home they may have, under pressure, agreed to applying to will only be temporary as they await transfer to a home they consider able to meet their needs. Neither of these representations is accurate or true.

26. In fact, the quality of care varies greatly among LTC homes and even the best struggle to provide adequate care. Moreover, when an ALC patient agrees under pressure to a LTC home they would not otherwise choose, they lose their priority for a transfer to another LTC home and will almost certainly spend their final days in that 'temporary' home.

27. While Bill 7 does not permit the physical removal of an ALC patient from the hospital without their consent, the coercive measures and misrepresentations authorized under Bill 7 belie any claim that acquiescence by an ALC patient or SDM in the face of such pressures actually represents informed and willing consent.

28. There is no evidence that ALC patients or their SDMs behave unreasonably, or refuse to compromise when choosing LTC homes to which they will seek admission, apart from very exceptional cases. Nevertheless, Bill 7 fundamentally alters the consent-based approach generally applied to health care decisions, including the application and admission to LTC homes. For ALC patients, Bill 7 shifts the approach from one based on the right to informed consent and choice, which prioritizes the well-being of the patient, to a model that allows hospital staff and public officials to override these rights. Thus Bill 7 authorizes officials to coerce ALC patients with the threat of financial penalties and the deprivation of rights they would otherwise have, and further to apply for and accept admission to a LTC home that these ALC patients or their SDMs do not, for good reason, believe is capable of properly providing for their treatment, care, safety and well-being.

4. The Administration of Bill 7

29. Bill 7 empowers thousands of clinicians operating in disparate hospital settings to designate a hospital patient as no longer requiring "the intensity of resources or services provided

in the hospital care setting", but it does not establish any guidelines, criteria, or standards for making this determination. In consequence, the ALC designation has and continues to be arbitrarily, inconsistently, and improperly applied, including by mischaracterizing patients as ALC who then become subject to the deprivations of Bill 7 when in fact they still require hospital treatment.

30. According to a manual prepared by Cancer Care Ontario which provides guiding principles for designating a patient as requiring an alternate level of care, once a patient is designated ALC, the next step must be to determine the most appropriate discharge destination (MADD) for the patient. Contrary to this procedure, under Bill 7 an ALC patient need only be determined to be "eligible for admission to a long-term care home", not that LTC represents *an* appropriate, let alone the *most* appropriate discharge destination for the patient. Thus, under Bill 7 the process of discharging an ALC patient to a LTC home may be authorized without regard to whether other destinations, such as home care or complex continuing hospital care, might more appropriately meet their needs. In consequence, LTC homes have become the default destination for ALC patients but they may neither be appropriate to, nor even capable of providing for their treatment, care, safety and well-being.

31. Furthermore, as competition for hospital beds has become more intense, patients are increasingly being mischaracterized as ALC to expedite their discharge from hospital. Moreover, under amendments to *Public Hospitals Act* regulations, once admission to a LTC home has been authorized in accordance with section 60.1 of the FLTCA, the ALC patient "shall be discharged from the hospital" even in cases where the ALC patient may still be in need of further hospital treatment.

32. These same pressures have resulted in HCCSS staff authorizing the admission of ALC patients to LTC homes that are unable to provide for their proper treatment, care, safety and well-being. In addition to depriving such patients of needed care, this has resulted in LTC homes increasingly refusing to admit them.

33. In effect, LTC homes have become the default destination for patients designated ALC who cannot properly be cared for in an already underfunded and overwhelmed long-term care sector. Furthermore, because of the inability of LTC homes to care for a resident population of ever-increasing acuity, it is not uncommon for LTC residents to require readmission to hospital, and many make more than one such 'round-trip'. Not only does this undermine the goal of reducing competition for hospital beds, but it leaves the health care needs of these patients and residents unmet and leads to an increase in their suffering and a hastening of their deaths.

34. Another way in which the ostensible goal of freeing up hospital beds is undermined arises from giving ALC patients priority access to scarce LTC home beds over those seeking admission to a LTC home from the community who may in fact have similar or more urgent need for such care. This effectively forecloses access to a LTC home for those waiting at home or in the community, resulting in their further deterioration until a crisis arises requiring their admission to hospital and serving only to increase the demand for hospital beds.

5. The Consequences of Depriving ALC of the Right to Choose a LTC Home

35. Most ALC patients or their SDMs readily exercise their right to choose several LTC homes to which admission is being sought, and many have done so before entering the hospital. Invariably, they choose LTC homes that are close to family and other care supports; that have a

reputation for providing better quality care; and that are suited to their culture, language, or religion.

36. Placing ALC patients, with or without their consent, in homes that do not meet their criteria may deprive them of required treatment and care, result in needless suffering and hasten their deaths. These harms are more likely to result when the ALC patient is placed in a LTC home that:

(a) is too distant from family and other supports, as this will often deprive an ALC patient of critical assistance making the transition to the LTC home, in communicating with LTC home staff, and with their basic care needs, often on a daily basis. This assistance also allows overworked staff in the LTC home more time to care for other residents;

(b) is discordant with the language, culture and religion of the ALC patient, which can result in increased feelings of loneliness and isolation and prevent the ALC patient from communicating their needs to LTC staff;

(c) has a poor record of regulatory compliance and/or patient care, or

(d) that is unable to provide the specialized or other care the ALC patient requires.

37. Therefore, in addition to depriving these ALC patients of their right to choose where they will likely spend their final days, what health care they will receive, and who may be privy to their personal health information, Bill 7 will do little, if anything, to resolve the health care system problems it ostensibly has been established to address and may only serve to exacerbate them.

6. The Alternatives

38. There are many things that the provincial government can do to reduce competing demands for acute care hospital beds while improving the quality of care for patients, including those designated ALC. These include:

(a) providing sufficient and reliable home and community care services, including palliative care, that would allow individuals to remain in their homes and obviate their need to seek hospital admission, or admission to a LTC home. The absence of sufficient and reliable home care has also meant that admission to LTC homes has become the default option for ALC patients who could otherwise have returned home;

(b) increasing funding for, and the capacity, suitability and effective organization of hospital services to better meet the needs of ALC patients that cannot be properly provided for either at home, in the community, or in a LTC home. These are services hospitals have historically provided, but that have suffered from successive funding constraints even while the need has increased. Instead, such ALC patients are being discharged to LTC homes that are neither funded nor capable of providing these former hospital services, including rehabilitative, convalescent, palliative, psychiatric, and complex continuing care;

(c) increasing the funding for and oversight of LTC beds to ensure that Ontario LTC homes provide quality of care for all Ontario residents that require such care; and

(d) directing HCCSS to make use of existing remedies to resolve the very rare cases where ALC patients or SDMs are being unreasonable.

7. Bill 7 Violates s. 7 of the *Charter*

39. Bill 7 violates the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, as guaranteed under s. 7 of the *Charter*.

40. The guarantee of the right to life includes protection against government measures that have the effect of leading to premature death or a risk of premature death as a result of lack of access to health medical care or insufficient health care. For the reasons set out in paragraphs 15-17, 19-23 and 31-32, the *More Beds, Better Care Act 2022* and the regulations and administrative measures defined here as Bill 7 will result in ALC patients being transferred to LTC homes where they will be less likely to receive the treatment and care they require, and in consequence they will experience increased suffering and a hastening of death.

41. The guarantee of the right to liberty includes the right to autonomy in medical decision-making and to make fundamental personal choices free from state interference. This includes the medical treatment an ALC patient may receive in a particular LTC home. It is essential to the *Charter* right to liberty that an ALC patient or their SDM not be deprived of the right to exercise informed consent in respect of that treatment, or to decide who may access their personal health information. Moreover, because the location of an LTC home may have a profound effect on the treatment, care, safety, and on the mental and physical well-being of an ALC patient, the *Charter* also ensures the right of the ALC patient to choose where they will live and likely spend their finals days Therefore, Bill 7 violates the right to liberty by:

(a) permitting the discharge of ALC patients from hospital, when they are still in need of treatment in the hospital;

(b) depriving or fundamentally interfering with the right of ALC patients or their SDMs to exercise informed consent about the treatment that the patient may receive or not receive, as described in paragraphs 19 and 30-32;

(c) fundamentally interfering with ALC patients' choice of where to live, limiting access to spouses, family and personal and medical supports, as described in paragraphs 30-31; and

(d) allowing, without the consent of ALC patients or their SDM for the broad dissemination of the patient's personal health information, as described in paragraph 18.

42. The guarantee of the right to security of person includes the right of control over one's bodily integrity free from state interference, which includes the right to informed consent, as well as the right to be protected from serious physical and psychological harm caused by the state action that goes beyond the ordinary stress and anxiety that a person might suffer as a result of state action. Bill 7 interferes with the right to security of person by:

(a) fundamentally interfering with the right of ALC patients or their SDMs to exercise informed consent and to control their bodily integrity free from state interference, as described in paragraphs 15-17, 19-23 and 31-32; and

(b) causing significant psychological harm to ALC patients by coercing their transfer to a LTC home the ALC patient has not willingly chosen, and that may separate the patient from their spouse, family or community supports or be discordant to their cultural, linguistic of religious affinities; and

(c) causing increased suffering and hastening the death of ALC patients who are placed in LTC homes that are unable to provide for their proper care.

43. Any ‘choice’ that ALC patients or their SDMs ostensibly have under Bill 7 is illusory. While ALC patients or their SDMs can refuse to participate in the process of seeking admission to a LTC home they believe will cause them harm, and can refuse to be *physically* transferred to such a home, they are warned that doing so could result in such admission being sought and approved without their consent, and a mandatory daily charge of $400 for every day they remain in hospital.

44. Bill 7 directly caused the deprivations of life, liberty and security of person described above.

45. The deprivations described above are not carried out in accordance with the procedural principles of fundamental justice, including the right to procedural fairness. Given the severity of the consequences involved, ALC patients or their SDMs should be entitled to procedural fairness and to appeal from or seek review of the process or decisions made under Bill 7. Yet no such fair procedures, appeal or review is permitted to question the process or decisions made to seek and authorize the admission of an ALC patient to a LTC home without their informed consent.

46. The deprivations of life, liberty and security of person are equally not carried out in accordance with the substantive principles of fundamental justice.

47. The impugned provisions are arbitrary, as there is no rational connection between the object of the provisions and the limits they impose on life, liberty and security of the person. In presenting Bill 7 in the Legislature, the government chose neither to include a purpose provision specific to those amendments nor to hold public hearings. Therefore, the purpose of Bill 7 must be interpreted and determined in accordance with the purposes of the *FLTCA* and the *HCCA*, which include:

(a) ensuring the right to consent to treatment in all settings (HCCA s. 1(a));

(b) enhancing the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services (HCCA, s. 1(c));

(c) ensuring a significant role for supportive family members when a person lacks the capacity to make a decision about a treatment, admission to a care facility or a personal assistance service (HCCA, s. 1(d));

(d) ensuring 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 (FLTCA, s. 1);

(e) ensuring that long-term care services and care must respect resident diversity and diversity in communities (FLTCA, preamble);

(f) ensuring that long-term care residents have diverse and complex physical and mental health needs that require individual, proactive, efficient, and effective supports (FLTCA, preamble);

(g) a commitment to resident-directed, safe, quality care that responds to a resident's physical, psychological, emotional, social, spiritual and cultural goals and needs and is respectful of every resident's individual identity and history (FLTCA, preamble);

(h) a commitment to providing and promoting high quality accommodation in a safe, comfortable, home-like environment where every long-term care resident has an

ability to enjoy life, and pursue the relationships, activities and interests that are meaningful to them (FLTCA, preamble);

(i) acknowledging that a resident's health and quality of life depend on integration and collaboration between an ecosystem of people, including fellow residents, family members, caregivers, long-term care home staff, volunteers, service providers, community and government (FLTCA, preamble);

(j) recognizing the importance of caregivers in supporting a resident's physical, mental, social and emotional well-being and quality of life (FLTCA, preamble);

(k) ensuring residents and their families have trust and confidence in their long-term care home (FLTCA, preamble);

(l) ensuring that the rights of residents of LTC homes are fully respected and promoted; and

(m) ensuring the right to treatment for those admitted to a public hospital.

48. Bill 7 is patently incompatible with, and indeed entirely antithetical to, the purposes of the *FLTCA*, the *HCCA* and the *Public Hospitals Act*, and as such is arbitrary.

49. In the alternative, if the purpose of Bill 7 is to address a shortage in hospital and LTC beds, it will do nothing to address that problem, as neither shortage is the consequence of a purported failure by LTC patients to consent to being transferred to a LTC home able to provide for their treatment, care, safety and well-being. In any event, there is no evidence that ALC patients are refusing such transfers. The majority of all ALC patient waiting in acute care hospital beds are not waiting for long-term care and will be unaffected by Bill 7. Moreover, for these reasons and those noted in paragraphs 26-29 and 33, by seeking to expedite the transition of ALC patients from a hospital bed to one in a LTC home, Bill 7 will do little if anything to

reduce the competing demands for hospital beds. The impugned provisions and practices are therefore arbitrary for this reason as well.

50. Bill 7 is also overly broad, as it goes well beyond any valid purpose the respondents might put forward as the justification for it, because it denies the rights of some individuals in a manner that bears no relation to such a purpose. Under Bill 7, the designation of ALC patients is arbitrary, unregulated, inconsistent and often incorrect. As a result, some patients are designated ALC and subject to the deprivations under Bill 7 when they are actually in need of care and treatment in hospital as described in paragraphs 24-29, above. Moreover, ALC patients are seeking admission to a LTC home that is able to properly provide for their treatment, care, safety and well-being. If in fact there are any patients or SDMs who are acting unreasonably in choosing a LTC home they are seeking admission to, they represent only a very small minority of such patients and SDMs, and existing remedies are available to address such recalcitrance by either the patient or SDM. As such, the application of Bill 7 to all ALC patients is clearly overbroad.

51. Finally, the impact of Bill 7 on the life, liberty and security of person of ALC patients is grossly disproportionate to its purpose. The potential impacts of Bill 7 on ALC patients are described above in paragraphs 15-17, 19-23 and 31-32, and are grave. These impacts stem in large measure from actions by Ontario governments that have failed to fund or properly regulate the home, community, hospital, and long-term care services necessary to provide for the treatment, care, safety and well-being of individuals who are no longer capable of caring for themselves, as described in paragraphs 20-21, 28-29 and 33. In light of the failure to take action to address these systemic problems, the significant harms caused by Bill to ALC patients heavily

outweigh any marginal benefit that might result from overruling the consent of ALC patients in order to expedite their discharge from hospital.

8. The Impugned Provisions Violate s. 15(1) of the *Charter*

52. Section 15(1) of the *Charter* guarantees the right to equal protection and equal benefit of the law without discrimination based on age. Bill 7 is discriminatory under s. 15(1), as it creates a distinction based on age, and it perpetuates, reinforces and exacerbates existing disadvantages faced by predominantly elderly ALC patients.

53. Bill 7 draw distinctions based on both age and disability. ALC patients are a unique patient group, who suffer from multiple comorbidities and are overwhelmingly elderly and near the end of their lives. The age of this group is at the core of their chronic medical needs, which led them to be admitted to hospital and which prevents their discharge to the community. The disproportionate impact of the impugned provisions on this group is clear:

(a) Health care for services required by elderly patients with ongoing and often complex medical needs has been chronically under-resourced, both in respect to reducing the availability of hospital beds and services suitable to caring for these patients, and by underfunding long-term care;

(b) ALC patients are stereotyped and labelled as ‘bed blockers’ for trying to access the health care and medical services they require;

(c) ALC patients are singled out by being denied the right to informed consent to medical treatment and to the privacy of their health information;

(d) ALC patients are coerced to give their consent under the impugned provisions, at the risk of being entirely excluded from the process of seeking admission to a

LTC home, and of facing a $400 daily financial penalty if they decline a transfer to a LTC home that has been chosen for them, without their consent and contrary to generally accepted principles in the provision of medical care in society; and,

(e) ALC patients are subjected to increased and unnecessary physical and psychological harms, as detailed above, including hastening their death.

54. Bill 7 also perpetuates, reinforces or exacerbates disadvantage. It targets for differential treatment a group that is already stereotyped and vulnerable, by removing their most fundamental rights, as described in detail above in paragraphs 15-23 and 30-32. The distinctions drawn by Bill 7 do not respond to the actual capacities and needs of ALC patients. Some of these patients are still in need of treatment and care in hospital, and while others might have their needs met by certain LTC homes capable of providing that care, Bill 7 deprives them of their right to informed consent about the choice of such homes. Instead, Bill 7 coerces these patients to accept admission to a LTC home that will risk their health and well-being. Thus Bill 7 thus denies ALC patients equal access to the health care provided to other Ontarians.

55. Accordingly, Bill 7 violates s. 15(1) of the *Charter*.

9. The Violations of ss. 7 and 15 are Not Saved under s. 1 of the *Charter*

56. The respondents bear the burden of establishing that infringements of ss. 7 and 15(1) of the *Charter* are reasonable limits demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charte*r, a burden they cannot meet. The Applicants reserve the right to respond to the government's s. 1 evidence and submissions.

10. Legislative provisions relied upon

57. *More Beds, Better Care Act, 2022*, S.O. 2022, c. 16;

58. *Fixing Long-Term Care Act, 2021*, S.O. 2021, c. 39, Sched. 1;

59. *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A;

60. *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Sched. A;

61. *Public Hospitals Act*, R.S.O. 1990, c. P.40;

62. O. Reg. 484/22: *General*;

63. O. Reg. 485/22: *Hospital Management*;

64. O. Reg. 486/22: *Hospital Management*;

65. *Canadian Charter of Rights and Freedoms*, ss. 1, 2(b), 2(d) and 24(1);

66. *Constitution Act, 1982*, s. 52(1);

67. *Rules of Civil Procedure*, RRO 1990, Reg 194, r. 14.05(3)(g.1); and

68. Such further and other grounds as Counsel may advise and this Honourable Court may deem just.

69. The following documentary evidence will be used at the hearing of the application:

(a) Affidavit of Natalie Mehra, affirmed April 11, 2023;

(b) Affidavit of Jane E. Meadus, affirmed April 11, 2023;

(c) Affidavit of Dr. Samir Sinha, affirmed March 21, 2023;

(d) Affidavit of Dr. Amit Arya, affirmed March 23, 2023;

(e) Affidavit of Dr. Gerald Heckman, affirmed March 3, 2023;

(f) Affidavit of Dr. Pat Armstrong, affirmed March 13, 2023;

(g) Affidavit of Dr. Maurice St. Martin, affirmed March 15, 2023;

(h) Affidavits of John and Jane Doe (ALC patients, SDMs or their families), to be sworn; and

(i) Such affidavits and other evidence as counsel may advise and this Honourable Court may permit.

April 12, 2023

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Applicants

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HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, THE MINISTER OF HEALTH, and THE MINISTER OF LONG-TERM CARE

Respondents

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced in Toronto

NOTICE OF APPLICATION

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