

November 22, 2021

**Via E-mail**

Ms. Natalie Mehra  
15 Gervais Drive, Suite 201  
Toronto Ontario, M3C 1Y8

Dear Ms. Mehra:

**Re: Bill 37: An Act to enact the Fixing Long-Term Care Act, 2021**

You have asked for our opinion about amendments to the *Ontario Long Term Care Act* which the Ford government has tabled as *Bill 37: An Act to enact the Fixing Long-Term Care Act, 2021*. In particular, you asked us to consider amendments affecting i) the commitment to promoting not-for-profit long-term care (“LTC”) services; and ii) the eligibility requirements that apply to licensing and other approvals that may be given by the Director under the Act.

For reasons set out below, in our view the proposed amendments at issue would:

1. Effectively negate the commitment to promote not-for-profit care as set out in the preamble to the current Act. Such a reversal is particularly remarkable given i) the invidious record of for-profit providers during the Covid pandemic; and ii) the fact that unlike any other jurisdiction in Canada, for-profit providers already have a commanding presence in LTC in Ontario.
2. Undermine the current eligibility requirements of the Act that empower the Director to license an LTC home, or approve transfers and management contracts, only where the applicant’s record of past conduct shows, *inter alia*, that:
  - “... the home will be operated in accordance with the law and with honesty and integrity”;
  - the prospective licensee or contractor “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”; and

- “. . . the home will not be operated in a manner that is prejudicial to the health, safety or welfare of its residents”.

By removing references to these eligibility standards from provisions empowering the Director to issue licenses, and approve transfers and contracts, the Government’s apparent attempt is to give the Director a freer hand to issue licenses and approve contracts to corporations that have a deplorable record of past conduct. Indeed, the Ministry’s recent record of approvals to such corporations reinforces the view that this is its intent.

Analysis:

As now written, the preamble to the Act includes the following statement:

*The people of Ontario and their government: . . . Are committed to the promotion of the delivery of long-term care home services by not-for-profit organizations.*

The proposed amendment would state:

*Are committed to the promotion of the delivery of long-term care home services by not-for-profit and mission-driven organizations;*

The provision is ambiguous and may read either to indicate that there are not-for-profit organizations that are not mission driven, or to include the promotion of for-profit organizations that are mission driven. The first of these interpretations would clearly undermine the commitment of the former Act to not-for-profit organizations.

The second would essentially negate the commitment to not-for-profits by effectively erasing the distinction between for-profit and not-for-profit care. There are simply no LTC service providers, including those that are essentially real estate investment vehicles, that don’t claim to have the best interests of their residents at heart.

Moreover, s.4 of the Act requires that all LTC operators adopt a mission statement that accords with the Patients Bill of Rights, and the Government now proposes that every licensee ensure, inter alia, that:

*the principles, purpose and philosophy of care set out in the mission statement are driven by the primary goal of providing quality care that is resident-directed and safe; [s. . .]*

In other words, all LTC licensees must now declare, at least pay lip service, to being mission-driven, thus erasing any distinction that might favour not-for-profit homes, notwithstanding their far better record of providing quality and safe resident care.

As we know, the directors of for-profit corporations have a fiduciary obligation to serve their shareholders. That is their paramount obligation, regardless of the nature of the business enterprise. That priority has resulted in many for-profit long-term care homes in Ontario adopting business

strategies that have not only deprived LTC residents of quality care, but too often have taken their lives.

Our understanding is that 58% of Ontario LTC homes are owned by for-profit operators; moreover the operation of many other homes is contracted out to for-profit companies. The footprint of the for-profit industry is much larger in Ontario than in any other province, and so proportionately has been the loss of life in LTC homes during the Covid pandemic. Moreover, the adverse impacts of the pandemic, including the loss of life, was far more severe in for-profit LTC homes in Ontario than for not-for-profit homes in the Province.

Instead of revising the Act to contain, let alone reduce the presence of for-profit operators, the proposed amendments are likely only increase the already dominant presence of for-profit LTC.

### **Ignoring the Record of LTC companies**

Under s. 98 of the Act as it is now written, “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;  
  
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:  
...
- (b) 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;
- (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 not be operated in a manner that is prejudicial to the health, safety or welfare of its residents:
- (d) the person is not ineligible because of any other reason that may be provided for in the regulations. 2007, c. 8, s. 98 (1).

The Government’s proposals would leave these criteria largely intact, but seek to remove any reference to them from provisions that empower the Director to:

Issue a license under s. 99 [s. 102 in Bill 37]

give an undertaking to issue a license under s. 100 [s. 103 in Bill 37]

give an undertaking to issue a license on under S. 103 – 3 years prior to the expiration of a license [s. 107 in Bill 37]

impose conditions on the transfer of a license under 105 [s. 108 in Bill 37]

approve someone gaining a controlling interest in a licensee under s. 109 [s. 112 in Bill 37]

approve management contracts under s. 110 [s. 113 in Bill 37]

Under the Act as it is now written, these Director powers are explicitly to be exercised subject to the eligibility requirements set out in s. 98 of the Act. This stipulation is removed in in Bill 37.

There are, as we know, several LTC licensees that have dismal records of non-compliance with the Act and regulations, and that have repeatedly failed to operate homes in a manner that wasn't prejudicial to the health, safety or welfare of its residents. These include homes in which literally dozens of residents perished during the Covid pandemic because of neglect and incompetent management. These failures were so indefensible that the Ford government passed legislation shielding them from negligence claims.

Several of these same companies are now applying for licenses so they can continue and even expand their operations with the benefit of provincial subsidies. The apparent intent of Bill 37 is to enable the Director to turn a blind eye to even the most egregious records of non-performance and neglect when determining these license applications.

While Bill 37 would preserve the eligibility standards of the Act, by removing specific reference to this requirement from provisions that empower the Director to make key licensing decisions, the Government's plan appears to be intended to insulate an indefensible decision to license a clearly ineligible operator, from judicial scrutiny.

In sum:

The scope of this opinion is limited to two discrete issues that bear upon fundamental questions concerning the character and quality of long-term-care in Ontario. Following the catastrophe that resulted in nearly 4000 deaths in Ontario LTC homes, disproportionately in those operated by for-profit providers with terrible records of compliance, one hoped that the Government would take steps to truly foster not-for-profit care, and to deny incompetent providers the right to new licenses. Instead, Bill 37 intends to do the very opposite.

Sincerely,



**Steven Shrybman**  
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