

Update

Health Care Law

October 27, 2006

Ontario Government Introduces Bill 140: the Proposed *Long-Term Care Homes Act, 2006*

Introduction

On October 3, 2006, the Ontario government introduced new legislation that, if passed, will have a substantial impact on many aspects of the long-term care industry in Ontario.

The *Long-Term Care Homes Act, 2006* (“LTCHA” or the “Act”) would establish a new system of governance for long-term care homes and would replace the *Nursing Homes Act*, the *Charitable Institutions Act* and the *Homes for the Aged and Rest Homes Act*.

The genesis of this proposed legislation was the May 2004 government report entitled *Commitment to Care: A Plan for Long-Term Care in Ontario* and the follow-up discussion paper entitled *Future Directions for Legislation Governing Long-Term Care Homes*.

In very broad terms, the legislation addresses several key aspects of the long-term care regulatory regime, including:

- Management of Ontario’s long-term care system (including the licensing scheme for long-term care homes);
- Funding of homes and accountability;
- Compliance inspections and enforcement measures;
- Service expectations and requirements; and
- Residents’ rights and safeguards.

From the government’s point of view, some of the highlights of LTCHA are that it would, among other things:

- Promote zero tolerance of abuse and neglect of long-term care home residents;
- Enshrine whistle-blowing protections for staff, residents and volunteers who report abuse or neglect;
- Require that a registered nurse be on duty in the home at all times;
- Restrict the use of restraints to limited circumstances where it is absolutely necessary and only with appropriate safeguards; and
- Define licence terms for long-term care homes of up to 25 years and provide that licences can be revoked in cases of non-compliance.

Commercial Implications

From a commercial perspective, we believe the most significant aspects of LTCHA are the following:

Changes to Licensing Regime

Term

Currently, nursing home licences bear a term of 1 year. However, in practice they are renewed as of right. The Act provides that the new long-term care licences would be issued for a fixed term of up to 25 years. Under the new regime, licences would expire at the end of the term, but could be revoked earlier for cause. Upon the Act becoming effective, the following licence terms would apply:

- New beds – 25 years
- Class A beds – 15 years
- Class B beds – 12 years
- Class C beds – 10 years
- Upgraded Class D beds – 10 years
- Un-Upgraded Class D beds – 1 year (subject to term extension provisions in cases where agreements to redevelop are reached)

Renewal

At least three years prior to a licence term's expiration (or such shorter period as may be provided for in the regulations), the Ministry would be required to provide notice of renewal, including any conditions attached to such renewal. There has been some discussion that these conditions may include capital funding requirements and other expenditures. It should also be noted that a failure by the Ministry to provide written notice would be deemed to be notice that the licence in question will not be renewed. We anticipate that the new licensing regime and, in particular, the three year notice provision, will very much inform the conditions upon which lenders in the long-term care space will provide financing.

Sole Discretion

The Act specifies that the following decisions of the Minister or the Director are within their sole discretion: (i) a decision to issue or not issue a licence (including a notice, given before the expiry of the licence term, that no new licence will be issued); or (ii) a decision with respect to the term of a licence, number of beds, or any other condition of a licence. In addition, the Director would not be required to provide reasons for deciding whether or not to issue a new licence.

Public Interest Considerations and Competitive Process

The Ministry would continue to be required to have regard for the "public interest" when issuing licences. However, as noted below under the heading "*Potential Expansion of Licensing Requirements and Restrictions*", certain criteria have been added to the public interest analysis. Additionally, in issuing or renewing licences, the Ministry would have the ability to implement a competitive process, which we believe may take a form similar to the RFQs and RFPs used in connection with the development program.

Temporary Licences

The Act provides for temporary licences that could be issued for a fixed term of no more than 5 years. These temporary licences may provide a means to more efficiently transition new operators.

Increased Potential Liability for Directors and Officers

LTCHA sets out several offences under which directors and officers of a licensee or manager of a home could be held personally liable. For example, such directors and officers could be guilty of an offence if they were to authorize, permit or concur in a contravention of certain reporting requirements under the Act or were involved in contravening the whistle-blowing protections. Operators may therefore need to explore more comprehensive D&O insurance.

Security Interests and Enforcement

The Act has both positive and less positive aspects from a lender's point of view. While the Act clearly recognizes the right to grant more expansive security interests in long-term care assets, it also provides that no lender would be able to acquire direct control over the operation of a home by exercising a security interest except through a MOHLTC-approved management contract. However, because the Act provides for temporary licences to be granted without the necessity of the public approval process, lenders may have an additional avenue through which to seek direct enforcement. Also, we believe the Act allows for increased flexibility in the granting of indirect security interests.

Funding Policy and Conditions

The sections of LTCHA dealing with the funding of long-term care homes provide that the Minister *may* provide funding for a home and attach conditions to the funding. This wording is different from the current funding provisions of the *Nursing Homes Act* (which provide that the Minister *shall* provide funding). However, it is not clear whether this would represent an actual change in funding policy. In addition, the provision of funding would be subject to any other conditions and restrictions provided for in the regulations (which have not yet been released).¹

Regulation of Non-Arm's Length Transactions

Certain non-arm's length transactions (to be defined in regulations which have not been released) would be prohibited and others would require the Director's consent. In addition, licensees would be required to submit

¹ The amendments to the *Nursing Homes Act* recently passed by the Ontario government (as part of the *Local Health System Integration Act, 2005*), but that have not yet been proclaimed into force, contain funding provisions very similar to these provisions of LTCHA. However, no regulations setting out terms and conditions for funding have been released for comment and, in light of LTCHA's introduction, it is not even clear these amendments to the *Nursing Homes Act* will ever be proclaimed into force.

reports to the Director on various types of non-arm's length transactions. We believe that these new provisions may circumscribe operators' abilities to conduct amalgamations, debt transactions and other tax driven internal reorganizations.

Potential Expansion of Licensing Requirements and Restrictions

The current public interest tests and eligibility requirements would be strengthened under the Act, giving the Ministry greater control over where beds are located and who can operate them. In addition to the current public interest criteria, the Act also provides that in determining whether there should be a long-term care home in an area, the Minister may take into account those matters set out in the regulations and any other matters the Minister considers relevant. In determining *who* may be issued a licence, the Act would direct the Minister to take into account the concentration of *ownership, control or management* of long-term care homes (not just ownership, as is the case under the current provisions of the *Nursing Homes Act*).

Change in Character of Long-Term Care Licences and Transfer Restrictions

Under the current regime, nursing home licences are stated to be non-transferable. The essential character of these licences would be formally changed upon the proclamation of the LTCHA as licences would be capable of being transferred in the manner permitted by the Act. Consequently, as noted above under the heading "*Security Interests and Enforcement*", interests in licences would be capable of being granted. Although the Act sets out detailed provisions on the process for transferring licences, we believe these provisions would continue to provide some flexibility in structuring acquisition transactions.

Prohibitions and Reporting Requirements relating to Controlling Interests

The Director's approval would be required where a person wishes to acquire a "controlling interest" in a corporate licensee. This requirement may be problematic because it appears to apply to all corporate licensees, including widely-held corporations listed on a stock exchange. The Director would be entitled to attach conditions to his or her approval. However, as with the

licence transfer restrictions, we believe these provisions would continue to provide some flexibility in structuring acquisition transactions.

Impact of Whistle-blowing Protection Scheme

Licensees and managers of long-term care homes would need to keep the new whistle-blowing protections in mind when issuing reprimands or dismissing staff and, in general, when implementing labour management and other administrative policies on a day-to-day basis. Additionally, there is heightened concern over these provisions as whistle-blower reports received by the MOHLTC may trigger Ministry audits.

Restrictions on the Acquisition of Non-Profit Homes

Non-profit homes would no longer be permitted to be transferred to the for-profit sector, except in limited circumstances set out in the regulations (which have not been released).

Possible Need to Rework Existing Resident Documents and Agreements

The Act provides for the enactment of regulations setting out specific requirements for documents to be signed by residents. In addition, any agreement between a licensee and a resident or prospective resident, substitute decision-maker or family member would be voidable by the resident, prospective resident, substitute decision-maker or family member, as applicable, within 10 days after it is made.

Brief Overview of the Various Parts of LTCHA

The following is a brief, high-level overview of the topics that are dealt with in the main "Parts" that make up LTCHA:

Part II deals with the rights of residents of long-term care homes and the care and services to which they are entitled. This includes:

- a bill of rights for residents;
- a requirement that every long-term care home have a mission statement that is prepared in accordance with certain guidelines;
- the development of a plan of care for every resident setting out all aspects of the resident's care;

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- all licensees must ensure that certain programs and services are provided, including programs and services related to the following:
 - i. Nursing and personal support services;
 - ii. Restorative care;
 - iii. Recreational and social activities;
 - iv. Dietary and hydration services;
 - v. Medical services;
 - vi. Information and referral assistance;
 - vii. Religious and spiritual practices;
 - viii. Accommodation services; and
 - ix. A volunteer program.
- a requirement for at least one registered nurse to always be on duty and on-site at the home;
- a requirement that the licensee of a long-term care home protect residents from abuse and ensure that they are not neglected by the licensee or the licensee's staff (in particular, the licensee must establish and comply with a policy to promote zero tolerance of abuse and neglect);
- the establishment of a regime for making reports and complaints, together with whistle-blowing protections for all persons including staff, residents and volunteers; and
- a requirement that inspections and inquiries be made by inspectors in response to reports and complaints.

This Part also contains provisions aimed at minimizing the restraining of residents, and establishing safeguards for when restraining is allowed. Further, it deals with transfers to a secure unit and the use of personal assistance services devices that restrict movement.

Finally, Part II provides for the establishment of an Office of the Long-Term Care Homes Resident and Family Adviser to assist and provide information to residents, families and others and to perform other functions.

Part III outlines how the admission of residents to long-term care homes must be handled. Specifically, placement co-ordinators would determine a person's eligibility to be admitted and authorize a person's admission to a specific home. This placement co-ordinator would only

be able to act after certain assessments have been made (including an assessment of such matters as health, personal care requirements and behaviour). The provisions also provide further guidance as to the required admission process, including providing preference for veterans in certain cases and rights of appeal.

Part IV deals with the Residents' Council and Family Council of a long-term care home. Every home would be required to have a Residents' Council and may establish a Family Council. The powers of these councils are set out in detail.

Part V deals with the operation of long-term care homes. This Part deals with a wide range of matters, including:

- Key staff, such as the Administrator of the home, the Director of Nursing and Personal Care, and the Medical Director;
- Minimum staff qualifications;
- Providing for continuity of care by limiting the use of temporary, casual and "agency" staff by licensees;
- Screening measures for staff, including criminal reference checks;
- Training of staff;
- Information that must be provided to residents;
- The regulation of certain documents;
- Quality management and satisfaction surveys;
- Infection prevention and control and emergency plans; and
- Reporting requirements.

Part VI deals with funding for long-term care homes, and outlines limitations on the charges that licensees may make to residents. Part VI also imposes restrictions on non-arm's length transactions.

Part VII deals with the licensing of long-term care homes. It is prohibited to operate residential premises where nursing care is provided except in accordance with the legislation (but hospitals and certain other facilities are exempted).

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Licences are to be issued by the Director based on what the Minister considers to be the public interest, taking into account certain enumerated criteria. In addition, criteria are set out for who is eligible to be issued a licence and the process for the issuance of a licence.

Pursuant to the provisions of Part VII, licences are to be issued for a fixed term of up to 25 years, with a three-year notice before the end of the term as to whether a new licence will be issued. Certain restrictions are placed on the transfer of licences and rules are established for public consultations before licences are issued or transferred.

Part VII also establishes rules governing the procedure for when a licensee wishes to have someone else manage the home under a "management contract" and sets out requirements relating to the exercise of security interests, changes in corporate licensees, temporary licences and short term authorizations for additional beds.

Part VIII provides for long-term care homes established and maintained by municipalities. This Part also provides for the approval of First Nations homes.

Part IX deals with compliance and enforcement matters. It includes provisions for inspections of long-term care homes, and specifies actions that may be taken when a licensee does not comply with the legislation.

Inspections would, in the ordinary course, be required at least once a year and would normally be unannounced. Inspectors would be given an assortment of powers in carrying out their duties. This Part also outlines a graduated system of sanctions, including: (i) work orders; (ii) the withholding of funding; and, in the most serious cases, (iii) the revocation of the licensee's licence.

Part X deals with assorted administrative and miscellaneous areas and transitional matters. This includes transitional provisions relating to existing nursing homes and approved charitable homes for the aged.

This is just a brief summary of the detailed provisions set out in the proposed *Long-Term Care Homes Act, 2006*. To the extent you have questions about a specific aspect of this legislation or the long-term care industry in general, or if you require legal advice, please contact one of the members of the Goodmans Seniors Care Practice Group listed below:

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