



Justice Centre

for Constitutional Freedoms

July 17, 2020

Premier Doug Ford
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Toronto, ON M7A 1A1

VIA EMAIL: doug.ford@pc.ola.org

Hon. Merrilee Fullerton
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Dr. David Williams
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Dear Premier Ford, Minister Fullerton and Dr. Williams:

Re: Court action pending against Ontario for violation of rights of elderly in LTCH

On June 9, our office wrote to you concerning the appalling consequences for the elderly and vulnerable in long-term care homes ("LTCH") arising from your government's refusal to allow residents access to their loved ones and the benefit of their essential care. By that point, it had already been 85 days since elderly residents had seen their families in person and many had been confined to their rooms for most of that time, living as prisoners.

It appears that little has changed, and we are now more than 120 days post-lockdown. Tireless advocates, nurses, doctors, family members, journalists and others have diligently lobbied your government and tried to bring these issues to the Health Table for a meaningful response.¹ This week, they eagerly anticipated an announcement that family caregivers would be able resume their essential role in attending to the physical, mental, social and emotional needs of our most vulnerable citizens.

¹ See for example **Registered Nurses' Association of Ontario**, [Reuniting family with their loved ones in long-term care homes during COVID-19](#) (July 15, 2020); **Provincial Geriatrics Leadership Office**, [Family Presence in Older Adult Care – A Statement Regarding Family Caregivers and the Provision of Essential Care](#) (June 29, 2020); **Canadian Foundation for Healthcare Improvement**, [Better Together: Re-Integration of Family Caregivers as Essential Partners in Care in a Time of Covid-19](#) (July 8, 2020); and **National Institute on Ageing**, [Finding the Right Balance: An Evidence-Informed Guidance Document to Support the Re-Opening of Canadian Long-Term Care Homes to Family Caregivers and Visitors during the COVID-19 Pandemic](#) (July, 2020).

Instead, your government demonstrated that it either cannot comprehend, or simply refuses to acknowledge, the difference between casual visitors and essential family caregivers. The latter have *always* been a critical part of the healthcare team for elderly LTCH residents, providing vast numbers of hours of unpaid care that is not provided otherwise.

The confusing and sloppy drafting of various versions of Directive #3 and associated guidance documents has now been made more confusing by the addition of a new category of “essential caregivers” – who are not “essential visitors” permitted to attend at any time to fulfill their responsibilities, yet are something inexplicably different than a mere “visitor”. This unclear status does nothing but pay lip service to the plea expressed by families and advocates through the [#NotJustAVisitor](#) social media campaign.

In fact, by failing to provide any guidance to LTCHs as to what to actually *do* with this new category, you have ensured that these “essential caregivers” will remain in a state of perpetual limbo.

Already, some LTCHs are ignoring this designation entirely, issuing new visitor regulations limiting visits to 30 minutes indoors per week, and mandating physical distancing of two metres between the resident and visitor. No mention is made of the “essential caregiver”.

How, exactly, is a family caregiver supposed to feed, clean, groom, change, assist with toileting, bathe, trim nails, conduct physiotherapy, and countless other essential tasks from two metres away?

Despite the weight of authority (see footnote 1) supporting the immediate return of family caregivers and *detailed proposals* to ensure the safety and success of their re-introduction, your government has ignored these rational, evidence-based approaches in favour of chaos, finger-pointing, misery, indignity, and untimely death.

While caution in the earliest days of the pandemic may have been warranted, it has been patently clear for many months now that these essential caregivers could be properly trained in the use of personal protection equipment (“PPE”), and could safely resume their caregiving responsibilities as they had before the lockdown. Instead, you chose to ignore the people who have long experience in helping to care for their relatives in favour of bringing in the army, students, teachers, part-timers, new hires and all sorts of other people who were deemed safe enough to enter the premises.

Responsible family caregivers, however, continue to be treated as nothing more than disease vectors.

Consequently, the care that previously had been provided by family members has—in many cases—simply not continued during the four months of lockdown. Hair was not washed, nails were not trimmed, clothes were not changed, baths were not given, legs

were not stretched, rooms were not cleaned or organized, and filth accumulated in rooms that became prison cells for our vulnerable elders.

That is not even the worst of it; the mental and physical health of many elderly residents has also rapidly declined. For dementia sufferers, the passage of four lonely months has meant that familiar faces have become stranger's faces. Many have lost their will to live. Some have died – alone.²

This isn't right. It isn't moral, it isn't constitutional, and it isn't necessary.

The *Charter of Rights and Freedoms* guarantees Canadians the right to life, liberty and security of the person. At a minimum, the interference by your government in the ability of LTCH residents to make decisions (or have their substitute decision makers make decisions) concerning their bodily integrity and medical care infringes their liberty rights in a manner that is not in accordance with the principles of fundamental justice.

Further, leaving elderly, vulnerable residents to endure intolerable suffering, physically, mentally, and emotionally, impinges on their constitutional rights to liberty and security of the person. As was stated by the Supreme Court of Canada in [Carter v. Canada](#)³:

Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects the right to make fundamental personal choices free from state interference. Security of the person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.

The elderly are no less entitled to these rights than any other Canadian. In the rare circumstances when a government must violate such rights, it has the responsibility under section 1 of the *Charter* to ensure that there is a rational connection between the measures taken and the objective, and that such measures are proportionate and minimally impairing of the rights of citizens.

Section 1 demands a balancing of interests where rights conflict with the government's broader purposes, but the onus is on the government to justify the infringement, not the citizen. Your government's singular focus on one risk has prevented an appropriate balancing of the benefits and costs of your decision to infringe the rights and freedoms of Ontarians.⁴ You are violating our clients' *Charter* rights, and the rights of the isolated elderly generally in your care in a manner that cannot be demonstrably justified in a free and democratic society.

² For a small sampling of the many stories submitted to the Justice Centre for Constitutional Freedoms, see: <https://www.jccf.ca/in-the-news/covid-19/>

³ 2015 SCC 5, paragraph 64 (citations and quotes omitted) - <http://canlii.ca/t/gg5z4>

⁴ This has been expanded upon on a detailed report prepared by the Justice Centre for Constitutional Freedoms. "[Unprecedented and Unjustified: A Charter analysis of Ontario's response to Covid-19](#)" (June 22, 2020).

Furthermore, section 1 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 prohibits discrimination on the basis of age and family status. By denying residents necessary access to their essential caregivers because they are a family member, you are discriminating on the basis of family status. All that our elderly clients want is for the dignity and humanity of having a loved one attend to their deeply personal physical and emotional needs, rather than some strange teacher or soldier. That your government would ignore the pleas of elderly residents and their family members, and continue to keep out family caregivers in favour of myriad other unqualified helpers, smacks of discrimination and, frankly, ageism. This further implicates section 15(1) of the *Charter*.

Additionally, the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, section 21(2), requires substitute decision makers (“SDM”) to act in the best interest of an individual’s health care when providing consent. Family members must be able to consistently evaluate and monitor the condition of their loved ones in order to work with health care professionals and give informed consent. The *Long-Term Care Homes Act, 2007*, S.O. 2007, c.8 further recognizes this responsibility at section 6(5), where it requires a licensee to ensure that SDMs have the opportunity to participate fully in the development and implementation of a resident’s plan of care. In the absence of physical presence, LTCHs are using infrequent Skype or other types of video calls to allow monitoring, but this is simply not sufficient. The technology itself can be stressful to elderly, particularly those suffering from dementia, and may provide a false or incomplete picture of the health status of the resident to his or her designated SDM. Separating the designated SDM from the elderly resident is akin to separating a seeing-eye dog from a visually impaired person; when denied access, the SDM cannot perform the duty owed, and the promises made, to their loved ones.

And finally, the Residents’ Bill of Rights as detailed in section 3 of the *Long-Term Care Homes Act, 2007*, confirms residents’ dignity and their right to make choices about their own care (or have their SDMs do so), and to “receive visitors of his or her choice...without interference.”

It is also in your government’s interest to move quickly to allow family caregivers to return to LTCHs. Such caregivers ease the burden on employees to ensure that an appropriate level of care can be provided to all residents. They also provide oversight, so that small problems are nipped in the bud and issues with LTCH management and care are not swept under the rug, allowing them to snowball into disasters. This is to the benefit of everyone, including the LTCHs and your government, who are already facing lawsuits for providing inadequate care. This problem will only worsen the longer essential family caregivers are kept out.

We cannot wait any longer for your government to appreciate the problem and enact the appropriate solution. Too many daily news conferences have come and gone without action. We have been retained by several families and are in the process of drafting pleadings. We anticipate commencing proceedings on **Tuesday, July 21** unless a

government directive is issued forthwith that is clear, concise, explicit and mandatory for all LTCHs in the province of Ontario, without exception, providing as follows:

1. That each LTC (and other congregate care) resident, or their SDM, identify up to three Essential Family Care Providers (“EFCP”);
2. That each LTCH extend their current internal policies related to COVID-19 with respect to screening and PPE to EFCPs. For a home in an active outbreak, the EFCP may be asked to sign a waiver that they are placing themselves at an increased risk of contracting COVID-19;
3. That each LTCH provide all identified EFCPs with current and regularly updated information and education related to PPE, infection prevention and control practices, and any directives in place because of COVID-19;
4. That LTCHs provide each EFCP with identification to be used for entry to the LTCH (there should be no restrictions on the number, length, or timing of visits by a designated EFCP);
5. The government shall facilitate access to PPE and the LTCH shall ensure that there is adequate PPE for use by EFCPs, consistent with the requirements for staff. There shall be no restrictions on close interaction between the EFCP and the resident, although the EFCP shall commit to maintaining a two-metre physical distance from the LTCH staff, other residents and other EFCPs as long as physical distancing is recommended.⁵

Pursuant to section 174.1(3) of the *Long-Term Care Homes Act, 2007*, every licensee of a LTCH shall carry out every operational or policy directive that applies to the LTCH. None of the foregoing should be presented as optional for any LTCH in Ontario.

We trust that you will review the linked documents and this letter, and do what is right by our greatest generation. They have suffered enough.

Yours sincerely,



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"Defending the constitutional freedoms of Canadians"

⁵ As recommended by the Registered Nurses' Association of Ontario. [Reuniting family with their loved ones in long-term care homes during COVID-19 \(July 15, 2020\)](#).