

**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

FACTUM OF THE RESPONDENT

September 20, 2024

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PART I – OVERVIEW

1. The applicants seek judicial review of decisions to approve funding and undertake to issue a licence for a new long-term care home in Pickering. The Minister of Long-Term Care (the “Minister”) determined it was in the public interest to increase the number of long-term care beds in Pickering. The Director in the Ministry appointed to exercise licensing related powers under Part VIII (Licensing) of the *Fixing Long-Term Care Act, 2021*,¹ (the “Act”), which was the Director of Capital Planning Branch, (the “Director”) gave the proponent of the new home, Southbridge, a conditional undertaking to issue it a licence, subject to meeting applicable conditions.
2. Southbridge currently operates a long-term care home in Pickering known as Orchard Villa. It applied for approval to build a new, expanded home in Pickering twice: first in 2019 and again in 2021. The applicants challenge the approval of that second application; they do not challenge the Minister’s approval of the first application.
3. The Minister did not prejudge his decision to approve Southbridge’s second application. Everything the applicants complain of flowed from the Minister’s decision to approve the first application.
4. The applicants’ case is fatally flawed. They are strangers to the regulatory process and lack standing to bring this application. Their attack on the Director’s decision to give an undertaking is premature: an undertaking to issue a licence at some point in the future is an interim step that does not entitle a proponent to operate a long-term care home.

¹ *Fixing Long-Term Care Act, 2021*, SO 2021, c 39, Schedule 1 [*FLTCA*].

5. Nor does the applicants' case have substantive merit. The impugned decisions complied with the governing legislation, did not engage *Charter* values, and were reasonable. The applicants were not deprived of procedural fairness.

6. This application should be dismissed, with costs to the respondent.

PART II – FACTS

7. The Ministry of Long-Term Care has announced several calls for applications for long-term care bed allocations since 2018. Through those processes, the Ministry has issued tranches of funding for new and redeveloped beds in various parts of the province.²

8. Southbridge applied for capital funding in response to a call for applications in 2019 (the “2019 Application”).³ In its application, Southbridge sought funding approval for construction of a new long-term care home in Pickering, to replace its current, smaller home. The Minister approved that application in November 2020.

9. Southbridge applied for funding again in response to a call for applications in 2021 (the “2021 Application”), which was further revised in March 2023. That second application was for a larger number of new beds than were approved in 2020 and under an updated capital funding policy. It was not prompted by a change in corporate ownership, as the applicants suggest although

² Summary of Briefing Note to Minister of Long-Term Care, dated May 1, 2023, **Record of Decision, Volume 2, Tab 19, pp. 691-692.**

³ Application for Long-Term Care Home Development, dated November 15, 2019, **Record of Decision, Volume 1, Tabs 6A-J, pp. 229-366.**

Southbridge had made a previous funding application in 2017: see Application for the Enhanced Long-Term Care Home Renewal Strategy submitted by CVH (No 6) GP Inc, as the general partner of CVH (No 6) LP, **Record of Decision, Volume 1, Tabs 1A-N, pp. 1-209.**

the revision reflected the change in the composition of the limited partnership.⁴ That second funding application was approved in June 2023, and the 2019 Application was set aside.

A. Southbridge’s Performance at Orchard Villa Improved After 2020

10. Like other long-term care homes in Ontario, Southbridge’s Orchard Villa home struggled with a COVID outbreak in the spring of 2020.

11. Southbridge did not manage Orchard Villa at the time of the outbreak; the home was managed by a management company, Extendicare Canada Inc. (“Extendicare”).⁵ The Ministry noted at the time that Ontario had requested the assistance of the Canadian Armed Forces (“CAF”) to combat the outbreak, and that the CAF had provided a report outlining a number of serious concerns its members had observed at Orchard Villa.⁶

12. In June 2020, the Director withdrew approval for Southbridge’s management contract with Extendicare and approved a new management contract for Orchard Villa to be managed by Lakeridge Health, a public hospital corporation, to stabilize the home and to manage the outbreak.⁷

13. Following Lakeridge health’s stabilization of Orchard Villa , the Ministry approved a transition plan to ensure that the home would be managed in a way that would minimize the risk of further outbreaks.

⁴ Applicants’ Factum, dated August 23, 2024 at para 12 [Applicants’ Factum].

⁵ Memorandum to Director, Licensing, Policy and Development Branch recommending approval of management contract, dated June 11, 2020, **Record of Decision, Volume 18, Tab 77, p. 5433.**

⁶ Summary Package to Director, Licensing, Policy and Development Branch, dated June 12, 2020, **Record of Decision, Volume 18, Tab 77, p. 5490,**

⁷ Letter from Director, Licencing Policy and Development Branch to CVH (No 6) LP, dated June 12, 2020, **Record of Decision, Volume 18, Tab 79, p. 5496.**

14. The Ministry's data, discussed below, show a marked improvement in Orchard Villa's performance after the outbreak in 2020, after the removal of Extendicare as manager.⁸

B. The *Fixing Long-Term Care Act, 2021*

1) The Act Gives the Minister and Director Broad Discretion

15. Part VIII of the Act governs licencing of the long-term care sector in Ontario.

16. A licence is required to operate residential premises for persons requiring nursing care in Ontario. With some exceptions, it is an offence to do so without a licence.⁹ An undertaking to issue a licence, discussed below, does not authorise a person to operate a long-term care home.

17. As part of the licencing process, the Minister is required to determine whether or not there should be a long-term care home in a particular area, and how many long-term care beds should be in that area, by "considering what is in the public interest" in that regard. The Act sets out in s. 99(1) the factors that the Minister should take into account in her consideration of the public interest, including the existing long-term care bed capacity in the area, the other facilities and services available, current and predicted demand, available funding, and "any other matters that the Minister considers to be relevant."¹⁰

18. The Minister has the discretion to restrict who may be issued a licence based on her determination of the public interest. The Legislature has set out in s. 100(1) the factors the Minister must consider in her determination of the public interest for the purposes of that section: the effect of issuing a licence on the concentration of ownership in the sector and the balance between non-

⁸ Southbridge Homes Compliance History, dated August 2021, **Record of Decision, Volume 22, Tab 96, pp. 7035 - 7047.**

⁹ *FLTCA*, *supra* note 1, s 98.

¹⁰ *FLTCA*, *supra* note 1, s 99(1).

profit and for-profit operators.¹¹ The Minister is not permitted to consider any other factors except those that are prescribed by the Regulation for this purpose, and no such other factors have been prescribed.¹²

19. The Act provides that a person is only eligible for a licence if, “in the Director’s opinion”, they meet a number of enumerated requirements focused on the likelihood that the licensee will operate the home in a competent manner consistent with the Act and other applicable law.¹³

20. Following a Minister’s determination of need for a long-term care home, and of whether any restrictions are needed on who can be a licensee, and subject to the other requirements in the Act, the Director, if willing, may do one of two things: issue a licence,¹⁴ or give an undertaking to issue a licence on condition that the proposed licensee agrees to satisfy the conditions specified in the undertaking.¹⁵ In the latter case, the Director must issue a licence if she determines that the proposed licensee has complied with the conditions.¹⁶ If she determines that the proponent has not complied with the conditions, she may refuse to issue a licence.¹⁷ The proponent may seek review of that refusal by the Minister.¹⁸

21. The Act provides that “anything done” by the Minister or the Director under Part VIII with respect to ss. 99 (determination of need based on public interest) and 100 (restrictions on who can

¹¹ *FLTCA*, *supra* note 1, s 100(1).

¹² *FLTCA*, *supra* note 1, s 100(1)(c).

¹³ *FLTCA*, *supra* note 1, s 101.

¹⁴ *FLTCA*, *supra* note 1, s 102.

¹⁵ *FLTCA*, *supra* note 1, s 103(1).

¹⁶ *FLTCA*, *supra* note 1, s 103(6).

¹⁷ *FLTCA*, *supra* note 1, s 103(7).

¹⁸ *FLTCA*, *supra* note 1, s 103(8).

be a licensee) is “within the sole discretion of the Minister or Director” and not subject to appeal.¹⁹ Decisions of the Director under Part VIII with respect to conditions of a licence are within the Director’s “sole discretion” and are not subject to appeal.²⁰

22. Eligibility for a licence is restricted to those who, “in the Director’s opinion”, meet a list of enumerated criteria set out in s. 101(1) of the Act.²¹ A proposed licensee is not required to meet the s. 101 criteria at the time it receives an undertaking to grant a licence; it need only satisfy those criteria at the point it is to be issued a licence.

2) The Director Has the Discretion to Decide How to Consult the Public

23. Generally, the Director must consult the public before issuing or undertaking to issue a licence.²² The Act gives the Director the discretion to determine how public consultations will be conducted.²³

C. The Impugned Decisions

24. The applicants take issue with decisions of the Director, both taken in June 2023 in connection with the 2021 Application as revised. However, the determinations made in the course of assessing the 2019 Application formed a part of the decision-making process for the impugned decisions.

¹⁹ *FLTCA*, *supra* note 1, s 118(1).

²⁰ *FLTCA*, *supra* note 1, s 118(2).

²¹ *FLTCA*, *supra* note 1, s 101(1).

²² *FLTCA*, *supra* note 1, s 109(1) and (3).

²³ *FLTCA*, *supra* note 1, s 109(2).

1) The Minister Considered the Public Interest Three Times

25. The Minister first considered the public interest relating to Southbridge's application to build a new home in Pickering before she²⁴ approved the 2019 Application. In weighing the public interest, the Minister considered the factors set out in ss. 96 and 97 of the *Long-Term Care Homes Act, 2007*,²⁵ the predecessor to the Act. The decision package prepared for the Minister set out a detailed consideration of the need for beds,²⁶ and whether restrictions were needed on who could be a licensee based on considerations of concentration of ownership,²⁷ and the sector balance between for-profit and non-profit operators.²⁸

26. Although not required by statute, the decision package included reference to the COVID outbreak at Orchard Villa (under the management of Extendicare) and the fact that it had both entered into a voluntary management agreement with a local hospital (replacing Extendicare as the external manager of the home) and required military assistance.²⁹

27. The Minister³⁰ considered the public interest a second time before the Director approved the transfer of Southbridge's licence for Orchard Villa as part of a corporate reorganization.³¹

²⁴ In 2020, the Minister was the Hon. Dr. Merrilee Fullerton.

²⁵ *Long-Term Care Homes Act, 2007*, SO 2007, c 8 [*Previous Act*]. Sections 96 and 97 of the Previous Act are identical to ss 99(1) and 100(1) of the *FLTCA*, respectively. A determination made under s 96 and/or s 97 of the Previous Act is deemed to have been made under the *FLTCA*: O Reg 246/22, s 373(1)-(2) [*General Regulation*].

²⁶ Briefing Note to Minister of Long-Term Care, dated October 25, 2020, **Record of Decision, Volume 1, Tab 8, pp. 378, 381, 396 and 426.**

²⁷ *Ibid*, **Record of Decision, Volume 1, Tab 8, pp. 379, 381, 396, 426.**

²⁸ *Ibid*, **Record of Decision, Volume 1, Tab 8, pp. 379, 382, 396, 427.**

²⁹ *Ibid*, **Record of Decision, Volume 1, Tab 8, pp. 378 and 396.**

³⁰ In 2022, the Minister was the Hon. Paul Calandra.

³¹ Memorandum of Minister of Long-Term Care to Director, Capital Planning Branch, dated October 12, 2022, **Record of Decision, Volume 18, Tab 87, p. 5623.**

28. The Minister considered the public interest a third time before he approved the 2021 Application. Again, the decision package prepared for the Minister set out a consideration of the need for beds,³² and whether restrictions were needed on who could be a licensee based on considerations of concentration of ownership,³³ and the sector balance between for-profit and non-profit operators.³⁴

2) The Director Provided an Undertaking to Issue a Licence

29. The Director did not issue Southbridge a licence. Instead, she considered a recommendation to provide an undertaking to issue a licence, with conditions.

30. The Long-Term Care Inspection Branch provided two assessments in response to Southbridge's application. In November 2020, the Ministry's Capital Planning Branch noted that Inspection Branch had expressed concerns about Southbridge, noting that the home had required a management contract with Lakeridge Health (replacing its management contract with Extendicare) and military assistance during a COVID outbreak.³⁵

31. In October 2021, the Inspection Branch revised its view, with the following context:

Orchard Villa received support from the Canadian Armed Forces (CAF) during Wave 1 of the pandemic. Additionally the licensee entered into a [voluntary management contract] for 90 days with Lakeridge Hospital from June 12, 2020 to September 10, 2020. Over the past year the home has shown improvement by

³² Briefing Note to Minister of Long-Term Care, dated May 1, 2023, **Record of Decision, Volume 2, Tab 20, pp. 703 and 705.**

³³ *Ibid*, **Record of Decision, Volume 2, Tab 20, pp. 703 and 705-6.**

³⁴ *Ibid*, **Record of Decision, Volume 2, Tab 20, pp. 703 and 706-7.**

³⁵ Note to File on Licensing Transaction Review, dated November 21, 2020, **Record of Decision, Volume 22, Tab 95, p. 7033.**

establishing sufficient staffing levels and stable leadership. The home has received minimal non-compliances in the past year.³⁶

32. That assessment was consistent with the compliance data available to the Ministry.³⁷

33. The staff of the Capital Planning Branch (responsible for licensing matters) noted³⁸ the input from the Inspection Branch, which included information provided in May 2023 indicating that at that point there were concerns about an outstanding compliance order for the current home.³⁹ As a result in part of that input, the staff of Capital Planning Branch recommended that the Director give an undertaking to issue a licence with additional conditions.⁴⁰

34. The Director implemented her staff's recommendation and gave an undertaking to issue a licence. The undertaking included four statutorily prescribed conditions and 13 additional conditions, including:

- that Southbridge maintain compliance in the existing home and self-manage the proposed home;
- that it be required to hire a management company other than Extendicare if Southbridge's self management of the proposed home proved incapable of maintaining compliance;
- that it retain a hospital or not-for-profit entity to provide ongoing clinical support at the proposed home; and

³⁶ Memorandum to Long-Term Care Inspections Branch, dated October 19, 2021, **Record of Decision, Volume 22, Tab 97, p. 7050.**

³⁷ Southbridge Homes Compliance History, dated August 2021, **Record of Decision, Volume 22, Tab 96, pp. 7035 - 7047.**

³⁸ Memorandum to Director, Capital Planning Branch, dated June 23, 2023, **Record of Decision, Volume 22, Tab 98, p. 7054.**

³⁹ Memorandum from Capital Planning Branch to Long-Term Care Inspections Branch, dated May 10, 2023, **Record of Decision, Volume 23, Tab 98H, pp. 7163-7164.**

⁴⁰ Memorandum to Director, Capital Planning Branch, dated June 23, 2023, **Record of Decision, Volume 22, Tab 98, p. 7055.**

- that the Inspections Branch maintain a regular and proactive inspection schedule of the existing home until the licence for the proposed home would be issued.⁴¹

35. The Director has not issued a licence to Southbridge for the proposed home.

3) Two Rounds of Public Consultation

36. On May 4, 2021, the Director determined that public consultation was required in relation to any decision to undertake to issue a licence to Southbridge.⁴² That consultation was conducted in accordance with s. 106 of the *Long-Term Care Homes Act, 2007* (the “Prior Act”).⁴³

37. Members of the public had an opportunity to present their views at public meeting held by teleconference on July 15, 2021 and in writing.⁴⁴ Catherine Parkes participated in the public meeting⁴⁵ and subsequently submitted comments in writing to the Ministry.⁴⁶ The Ontario Health Coalition (the “Coalition”), which retained legal counsel for the purposes of the public

⁴¹ Licence undertaking acknowledged on June 26, 2023, **Record of Decision, Volume 23, Tab 99, pp. 7184-7186**. See also Licence undertaking conditions for Southbridge Pickering (f.k.a. Orchard Villa), **Record of Decision, Volume 23, Tab 100, pp. 7190-7191**.

⁴² Director’s Decision Note, dated May 4, 2021, **Record of Decision, Volume 22, Tab 98D, pp. 7067-7068**.

⁴³ Section 106 of the *Previous Act*, *supra* note 25 corresponds to s. 109 of the *FLTCA*, *supra* note 1. Section 377 of the *General Regulation*, *supra* note 25 states: “Any consultation or determination under section 106 of the former Act that occurred before this section came into force is deemed to be a consultation or determination under section 109 of the Act.”

⁴⁴ Notice of public consultation as published on June 10, 2021, **Record of Decision, Volume 21, Tab 94, p. 6920**. See also Notice of public consultation, **Record of Decision, Volume 22, Tab 98E, p. 7070**.

⁴⁵ Notes of public consultation on July 15, 2021, **Record of Decision, Volume 22, Tab 94V, p. 7022**. See also Affidavit of Catherine Parkes, sworn April 17, 2024 at para 24 [Parkes Affidavit], **Application Record, Tab 3, p. 153**.

⁴⁶ Email from Cathy Parkes, dated June 25, 2021, **Record of Decision, Volume 21, Tab 94C, p. 6926**.

consultation,⁴⁷ delivered a 44-page petition⁴⁸ that was expressly referenced in the summary of public feedback prepared for the Director.⁴⁹

38. In 2022, the Director held a further public consultation in accordance with s. 109 of the *Act* as a result of the proposed licence transfer necessary to enable a proposed change to Southbridge’s corporate composition (as a limited partnership).⁵⁰ Members of the public had the opportunity to provide their views to the Ministry in writing,⁵¹ and Catherine Parkes and the Coalition both did so.⁵² Materials prepared for the Director and the Minister noted that public comment was mostly directed to “Orchard Villa’s performance during the COVID-19 pandemic.”⁵³ The Ministry determined that any undertaking to issue Southbridge a licence could be made subject to appropriate conditions “to address public concerns.”⁵⁴

D. The Applicants Rely on a Report That Post-Dates the Impugned Decisions

⁴⁷ Email from Steven Shrybman, dated September 23, 2021, **Record of Decision, Volume 21, Tab 94Q, pp. 6958-6959.**

⁴⁸ Emails from Ontario Health Coalition, dated July 27 and August 16, 2021 enclosing petitions, **Record of Decision, Volume 22, Tab 94S, pp. 6966-7009.**

⁴⁹ Memorandum to Director, Capital Planning Branch, dated June 23, 2023, **Record of Decision, Volume 22, Tab 98, p. 7054.**

⁵⁰ Director’s Decision Note on Public Consultation, dated September 7, 2022, **Record of Decision, Volume 19, Tab 89D, pp. 6136-6137**; Notice of Public Consultation placed on Licensing Public Consultation Registry on September 19, 2022, **Record of Decision, Volume 19, Tab 89E, pp. 6139-6140.**

⁵¹ Notice of Public Consultation placed on Licensing Public Consultation Registry on September 19, 2022, **Record of Decision, Volume 19, Tab 89E, pp. 6139-6140.**

⁵² Email from Cathy Parkes, dated October 17, 2022, **Record of Decision, Volume 18, Tab 88DD, p. 5697**; Email from Ontario Health Coalition, dated October 19, 2022 and enclosed submission, **Record of Decision, Volume 19, Tab 88BBBBBBB, pp. 5990-5996.**

⁵³ Briefing Note to Minister of Long-Term Care, dated May 1, 2023, **Record of Decision, Volume 2, Tab 20, p. 703**; Memorandum to Director, Capital Planning Branch, dated October 21, 2022, **Record of Decision, Volume 19, Tab 89, p. 6124.**

⁵⁴ Briefing Note to Minister of Long-Term Care, dated May 1, 2023, **Record of Decision, Volume 2, Tab 20, p. 703.**

39. The applicants argue repeatedly⁵⁵ that the Minister and Director were required to have considered a report of the provincial Ombudsman, prepared following an investigation into the Ministry's oversight of long-term care homes during the COVID-19 pandemic.

40. The Ombudsman's report was released in September 2023, roughly three months after the impugned decisions were taken.

PART III – ISSUES AND THE LAW

41. There are six issues on this application:

- i. Do the applicants have standing to bring this application?
- ii. Is the application premature?
- iii. Are the impugned decisions unreasonable?
- iv. Were the applicants denied procedural fairness?
- v. Is the Director's decision inconsistent with *Charter* values?
- vi. Are the applicants' requested remedies appropriate?

42. The respondent submits, for the reasons set out below, that the applicants lack standing to bring this application, which in any event is premature and that the balance of those questions should be answered in the negative.

A. Preliminary Issues

1) Evidentiary Objections

43. The respondent maintains the objections to the applicants' evidence, as set out in the accompanying motion to strike portions of the applicants' evidence. While the respondent agrees

⁵⁵ Applicants' Factum at paras 7, 9 (the factum refers to the Auditor General, but footnote 9 refers to the Ombudsman's report), 10, 11, 26, 37 and 53d.

that Catherine Parkes' affidavit is admissible on the issue of standing, paragraphs 2 – 22 of her affidavit are otherwise irrelevant and impermissible extrinsic evidence on the application.

2) The Coalition and Catherine Parkes Lack Standing to Bring this Application

44. The applicants have the onus of establishing their standing to bring this application.⁵⁶ They do not satisfy the tests for either private interest or public interest standing.

a. No private interest standing

45. To establish private interest standing, a party must have a “special” or “direct, personal interest” in the subject matter of the proceeding.⁵⁷ In other words, “review of administrative action is reserved for that class of citizen that is found to have a sufficient legally recognized interest in the matter to justify the judicial review application.”⁵⁸

46. The decision under review must affect the party's legal rights or obligations more than those of the general public.⁵⁹ Being an “interested observer” or having a “sense of grievance” does not suffice.⁶⁰ The category of rights that may qualify as direct, personal interests is not closed;⁶¹ personal, economic and property interests have traditionally been so recognized.⁶²

⁵⁶ *Elementary Teachers' Federation of Ontario v Ontario (Minister of Education)*, 2019 ONSC 1308 at para 52 (Div Ct) [*ETFO*]; *Ontario Place Protectors v HMK in Right of Ontario*, 2024 ONSC 4194 at para 15 (Div Ct) [*Ontario Place Protectors*].

⁵⁷ *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at paras 19-20 [*Finlay*].

⁵⁸ *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at para 7 [*Alberta Liquor*].

⁵⁹ *Robichaud v College of Registered Nurses of Nova Scotia*, 2011 NSSC 379 at para 11 [*Robichaud*]; *Accettone Funeral Home Ltd v Ajax Crematorium and Visitation Centre and Bereavement Authority of Ontario*, 2021 ONSC 4081 at paras 22-23 (Div Ct) [*Accettone*].

⁶⁰ *Robichaud*, *supra* note 59 at para 11; *Finlay*, *supra* note 57 at para 21.

⁶¹ *Alberta Liquor*, *supra* note 58 at para 9.

⁶² *Alberta Liquor*, *supra* note 58 at para 9.

47. The Coalition, in its self-description, represents more than 500 member organizations and 750,000 citizens.⁶³ Acting in this representative capacity, the Coalition has no personal legal interest in the impugned decisions.⁶⁴ If the Coalition seeks to bring this application, it must do so on the basis of public interest standing.⁶⁵

48. Ms. Parkes also lacks private interest standing. While she participated in public consultation processes conducted by the Ministry, that fact alone does not confer her standing before this Court.⁶⁶ This is consistent with the principle that a party who participated in a tribunal proceeding does not automatically have standing to challenge the resulting decision.⁶⁷ Standing before the reviewing court turns on whether the party has a direct, person interest in the subject matter of the application.⁶⁸

49. Ms. Parkes fails to identify any such interest in her affidavit, the bulk of which addresses her father's experience prior to his passing.⁶⁹ Her concerns regarding Orchard Villa's past operation and management are not legally cognizable interests entitling her to bring this application for judicial review as of right. Any "satisfaction of righting a wrong" or "upholding a principle" that Ms. Parkes would gain does not suffice to establish private interest standing.⁷⁰

⁶³ Affidavit of Natalie Mehra, sworn April 18, 2024 at para 4, **Application Record, Tab 4, p. 244.**

⁶⁴ See *ETFO*, *supra* note 56 at para 53.

⁶⁵ *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 2 [CCD].

⁶⁶ See e.g. *West Nipissing Police Services Board v. Municipality of West Nipissing*, 2018 ONSC 6454 (Div Ct) (applicant lacked private interest standing despite having presented deputation before municipal council that adopted challenged by-law).

⁶⁷ *Alberta Liquor*, *supra* note 58 at para 12. See also Sara Blake, *Administrative Law in Canada*, 7th ed (Toronto: LexisNexis, 2022) at §7.05, **Respondent's Book of Authorities, Tab 1, p. 3.**

⁶⁸ Blake, *supra* note 67 at §7.05, **Respondent's Book of Authorities, Tab 1, p. 3.**

⁶⁹ Parkes Affidavit at paras 2-20, **Application Record, Tab 3 at pp. 154-162.**

⁷⁰ *Finlay*, *supra* note 57 at para 21.

b. No public interest standing

50. Public interest standing “is not to be granted lightly by the courts.”⁷¹

51. In exercising its discretion to grant or deny public interest standing, a court must assess and weigh three factors: (i) whether the party bringing the action has a genuine interest in the matter; (ii) whether the case raises a serious justiciable issue; (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court.⁷² In considering these overlapping factors,⁷³ the court must “strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it.”⁷⁴

52. In light of these factors and purposes, the applicants should be refused public interest standing to bring this application.

i. No serious issue

53. A “serious” issue is one of public importance that transcends the applicant’s immediate interests.⁷⁵ There must be a “broad societal”⁷⁶ or “significant impact”⁷⁷ to the challenged decision.

⁷¹ *Ontario Place Protectors*, *supra* note 52 at para 18.

⁷² *CCD*, *supra* note 65 at paras 28 and 41.

⁷³ *Canadian Elevator Industry Education Program v Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80 at para 60 [*Canadian Elevator*].

⁷⁴ *CCD*, *supra* note 65 at para 30.

⁷⁵ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 42 and 73 [*Downtown Eastside*].

⁷⁶ *Accettone*, *supra* note 59 at para 48.

⁷⁷ *Miner v Kings (County)*, 2017 NSCA 5 at para 39.

Without more, the reasonableness of a licencing decision made by a decision-maker, including a Minister, within their home statute does not raise serious issues.⁷⁸

54. The issues raised by this judicial review application are not of sufficient importance. As in *Accettone*, in which this Court declined to grant the applicant public interest standing, “the issue is one entity’s operation and whether the decision to grant it a conditional licence [undertaking] should be quashed.”⁷⁹ The Applicants have not established, nor do they allege, any repercussions of the decisions under review for the long-term care home industry or the public at large. As the Applicants acknowledge in their factum,⁸⁰ their challenge to the reasonableness of the decisions at issue is fact-based.

55. This judicial review application does not raise any serious issues for an additional reason, namely, it is premature.⁸¹

- ii. The application is not a reasonable and effective means of challenging Southbridge’s ability to develop and operate a new long-term care home

56. Absent exceptional circumstances, judicial intervention in an ongoing administrative process is not a reasonable and effective means of bringing a matter to court.⁸² This is because hearing a premature application for judicial review is not “an economical use of judicial resources”

⁷⁸ See *Bancroft v Nova Scotia (Lands and Forestry)*, 2021 NSSC 234 at paras 127-128, aff’d 2022 NSCA 78.

⁷⁹ *Accettone*, supra note 59 at para 49.

⁸⁰ Applicants’ Factum at paras 53-54.

⁸¹ *Ecology Action Centre v Nova Scotia (Environment)*, 2022 NSSC 104 at para 57.

⁸² *Citizens Alliance of Nova Scotia v Nova Scotia (Health and Wellness)*, 2024 NSSC 253 at para 38.

and does not lend to “the issues [being] presented in a context suitable for judicial determination in an adversarial setting.”⁸³

57. Adopting a “practical and pragmatic” approach,⁸⁴ insofar as the applicants challenge Southbridge’s ability to develop a new long-term care home, they should pursue the matter on judicial review if or when Southbridge is actually licenced to do so.

iii. Conclusion on public interest standing

58. As the authorities confirm, “not every breach of the law attracts judicial scrutiny because not every transgression warrants legal attention that is constrained by available resources.”⁸⁵

59. While judicial review ensures the legality of state decision-making,⁸⁶ courts exhibit restraint before intervening in an ongoing process out of respect for the legislature’s choice to delegate decision-making to administrative actors.⁸⁷ Balancing the legality principle against the proper judicial role,⁸⁸ this Court should decline to grant the applicants public interest standing.

⁸³ *CCD*, *supra* note 65 at para 54. For a discussion of these rationales underlying the premature doctrine, see *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 32-33 [*CB Powell*]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 36 [*Halifax*].

⁸⁴ *Downtown Eastside*, *supra* note 75 at paras 47, 51 and 64.

⁸⁵ *Canadian Elevator*, *supra* note 73 at para 15.

⁸⁶ *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paras 17 and 20.

⁸⁷ *CB Powell*, *supra* note 83 at para 32; *Halifax*, *supra* note 83 at para 36.

⁸⁸ *Downtown Eastside*, *supra* note 75 at paras 30 and 31-34.

B. This Application is Premature in Part

60. The applicants' attack on the Director's decision is premature. The applicants challenge the Director's decision to give an undertaking to issue a licence pursuant to s. 103 of the Act. As noted above, no licence has been issued for the proposed new home.

61. The issuance of an undertaking is an interim step under the licencing regime created by Part VIII of the Act. Only if the Director ultimately determines that the proponent has met the conditions attached to the undertaking will the proponent receive a licence. If the Director refuses to issue a licence, the proponent – in this case, Southbridge – can appeal to the Minister.

62. It is well established that, absent exceptional circumstances, courts should not interfere with an ongoing administrative process until it has run its course.⁸⁹

C. The Standard of Review is Reasonableness

63. The respondent agrees that the standard of review for the decisions of the Minister and Director is reasonableness.⁹⁰

64. There is no standard of review applicable to matters of procedural fairness: either the procedure is fair or it is not, and the Court must determine whether the required level of procedural fairness has been accorded.⁹¹

⁸⁹ *CB Powell*, *supra* note 83 at para 31; *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541 at paras 68-70.

⁹⁰ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para. 16. [Vavilov]

⁹¹ *TA v Ontario*, 2024 ONSC 4580 at para 27 (Div Ct); *Abbott v London Health Sciences Centre*, 2024 ONSC 3949 at para 7 (Div Ct).

D. The Impugned Decisions Are Reasonable

1) The Minister's Decision was not Predetermined

65. The sole basis for the applicants' argument that the Minister's decision was unreasonable is the claim that the Minister had predetermined the matter before deciding. This is unfounded.

a. Decision-Makers are Presumed to be Impartial

66. The level of impartiality required of a decision-maker exercising broad regulatory powers is that of an "open mind."⁹² Disqualifying bias exists only where there the applicant establishes "a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile."⁹³

67. The threshold is high given that decision-makers are presumed to be impartial.⁹⁴ Cogent evidence, as opposed to mere suspicion, is required to displace this presumption.⁹⁵ The only evidence the applicants point to in support of their allegations are decisions taken pursuant to the Minister's approval of Southbridge's first capital funding application.

b. No Predetermination of the Public Interest Issue

68. As discussed above, the Minister first considered the public interest under ss. 96 and 97 of the *Long-Term Care Homes Act, 2007* in 2020, prior to her approval of Southbridge's 2019 Application for funding. The applicants ignore that history and context by complaining⁹⁶ that the

⁹² *Sunwold Farms Ltd v AgriCorp*, 2015 ONSC 6111 at para 25 (Div Ct); *1671183 Ontario Inc o/a Pharma Stop v Ontario (Ministry of Health and Long-Term Care)*, 2015 ONSC 6779 at para 32 (Div Ct).

⁹³ *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at 1197.

⁹⁴ *Interlink Solutions Inc v Ontario (Ministry of Economic Development, Job Creation and Trade)*, 2022 ONSC 5865 at para 59 (Div Ct) [*Interlink*].

⁹⁵ *Interlink*, *supra* note 94 at para 59.

⁹⁶ Applicants' Factum at para 31.

Minister provided funding for the project before considering the public interest as part of the 2021 Application.

69. The Minister did not predetermine the issue of public interest by approving the 2019 Application. The determination of specific issues taking into account the public interest within the scope of ss. 96 and 97 of the Prior Act was, as the applicants note, central to the Minister's decision to approve the first capital funding application.

70. The applicants' reliance⁹⁷ on the ministerial zoning order ("MZO") as further proof of the Minister's having predetermined his decision ignores the fact that the MZO was issued by the Minister of Municipal Affairs and Housing.

2) The Director's Decision to Give an Undertaking Was Reasonable

a. The Director Complied with the Act

71. The Director's decision to give an undertaking to issue a licence was consistent with Part VIII of the Act.

72. The staff of the Capital Planning Branch (responsible for licensing matters) consulted with the Inspections Branch prior to recommending the Director of the Branch to give an undertaking. As discussed, the decision package before the Director noted that the Inspections Branch had concerns about an outstanding compliance order at the home. Given that the decision to give an undertaking was a preliminary, interim step in the licensing process, that inquiry of the Inspections Branch was sufficient.

⁹⁷ Applicants' Factum at para 32.

73. Moreover, the Act did not require the Director to conclude that Southbridge was eligible to receive a licence at the time she gave the undertaking. Section 103 provides that the Director may, “subject to s. 101” (*inter alia*), give an undertaking to issue a licence to a person on condition that the person agrees to satisfy the specified conditions set out in the undertaking. Section 101 provides that a person is only eligible “to be issued a licence” if the Director is of the opinion that they will meet the defined criteria, all of which are concerned with the likelihood that the home will be operated by the licensee with integrity, in a competent and honest manner consistent with the Act and other applicable law, that will not be prejudicial to the health, safety or welfare of its residents. Read together with s. 101, all s. 103 requires to give an undertaking is that the Director be of the opinion the proponent will meet the s. 101 criteria by the time the licence is to be issued.

74. As discussed above, the Director imposed a long list of conditions on the undertaking, including that Southbridge maintain compliance in the existing home and self-manage the proposed home, and imposing inspections every two months. A failure by Southbridge to meet any of those conditions could be grounds to both cancel the undertaking⁹⁸ or conclude that Southbridge did not meet the s. 101 criteria, resulting in no licence being able to be issued.

75. Finally, while the Legislature has enumerated in s. 101 the various criteria that a proposed licensee must meet to qualify for a licence, it has not identified particular documents that must be reviewed. There is no basis for the applicants’ argument that s. 101 required the Director to consider their preferred list of reports before deciding to give an undertaking.

b. The Director’s Decision is Transparent, Intelligible and Justified

⁹⁸ *FLTCA*, *supra* note 1, s 103(7).

76. When read in light of the material before her, the Director’s decision to give an undertaking is reasonable.

77. The respondent agrees that an administrative decisionmaker’s reasons, where required, must be transparent, intelligible and justified. Specifically, a decisionmaker’s reasons must be intelligible and justified to the party affected by the decision.⁹⁹

78. The reasonableness of a decision must be read in the context and history of the proceedings. That includes reviewing the material that was before the decisionmaker, which may explain an aspect of the reasoning process that is not apparent from the reasons themselves.¹⁰⁰

79. The intended audience of the Director’s decision to give an undertaking was Southbridge, the party affected by that decision. Southbridge was aware of the issues before the Director when she made her decision, including its regulatory record, and could clearly discern from the decision letter the terms of her decision. Southbridge has not sought to challenge the conditions attached to the undertaking, or otherwise suggested that the Director’s decision was unreasonable.

80. That the applicants, who are strangers to the licensing process, say they cannot discern the logic of the Director’s decision is not determinative of its reasonableness.

c. The Director’s Decision Does not Engage the *Doré* Framework

81. The *Doré* framework applies where a discretionary administrative decision engages *Charter* protections, either by infringing *Charter* rights or limiting the values underlying them.¹⁰¹

⁹⁹ *Vavilov*, supra note 90 at paras 81, 86 and 93.

¹⁰⁰ *Vavilov*, supra note 90 at paras 91 and 94.

¹⁰¹ *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paras 60-61 and 64 [*Commission scolaire*].

As a threshold matter or “preliminary question,” a reviewing court must therefore consider whether “any limitations are imposed on *Charter* values.”¹⁰²

82. On this application, the decisions at issue do not impose any limitations on any *Charter* values because the licencing process is ongoing.

83. Each case where the Supreme Court of Canada held that the *Doré* framework applied involved the outcome of a completed administrative process. *Doré* involved a sanction imposed against a lawyer after a hearing before the disciplinary Council of a law society.¹⁰³ *Loyola* concerned a high school’s denial of an exemption from teaching a mandatory curriculum following a series of exchanges with the Minister.¹⁰⁴ In *Trinity Western*, a law society refused accreditation to a proposed law school after benchers voted to affirm the results of a binding referendum of licensees.¹⁰⁵ Finally, in *Commission scolaire*, the Minister declined to admit five children to a French first language education program, despite the school board having recommended their admission to the Minister.¹⁰⁶

84. Being interim, the impugned decisions challenged akin to the referendum in *Trinity Western* and the recommendation made in *Commission scolaire*. It was the benchers and the Minister in those cases, respectively, whose decisions were subject to the *Doré* framework. Absent any final decision to issue a licence to Southbridge, the *Doré* framework does not apply.

¹⁰² *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 58 [*Trinity Western*]; *Commission scolaire*, *supra* note 101 at para 84.

¹⁰³ *Doré v Barreau du Québec*, 2012 SCC 12 at paras 16-17.

¹⁰⁴ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 24-28.

¹⁰⁵ *Trinity Western*, *supra* note 102 at paras 19-22.

¹⁰⁶ *Commission scolaire*, *supra* note 101 at paras 17-43.

85. Said another way, the link in this case between the state conduct at issue and the alleged limitation on *Charter* values is too tenuous. While the values of security and human dignity are said to underlie s. 7 of the *Charter*,¹⁰⁷ the Supreme Court of Canada has insisted that “a sufficient causal connection ... is the port of entry for s. 7 claims.”¹⁰⁸ The possibility of Southbridge being issued a licence at some point is the kind of “uncertain, speculative and hypothetical”¹⁰⁹ event that does not trigger a *Charter* protection, whether a s. 7 right or a value underlying it.

86. For these reasons, the *Doré* framework has no applicability to the case at bar.

E. The Applicants Were Not Deprived of Procedural Fairness

87. The applicants were not owed a duty of fairness, having no individual rights, privileges or interests affected by the impugned decisions.¹¹⁰ As this Court has reaffirmed, “[t]here is no general common law duty of procedural fairness owed to the public at large whenever a government entity grants a particular person or entity a licence, permission or approval of some kind.”¹¹¹

88. If the Applicants were owed a duty of fairness, it was at the lower end of the spectrum. The decisions at issue were administrative and polycentric, affecting the broader public as opposed to specific individuals.¹¹² They were of lesser importance to the applicants as “concerned citizens” in comparison to neighbouring landowners whose property interests are directly affected by any

¹⁰⁷ See *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 78 [*Blencoe*].

¹⁰⁸ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 78.

¹⁰⁹ *Blencoe*, *supra* note 107 at para 60.

¹¹⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20.

¹¹¹ *Eastern Georgian Bay Protective Society Inc v Minister of the Environment, Conservation and Parks*, 2021 ONSC 4038 at para 27 (Div Ct) [*Protective Society*].

¹¹² See *MacDonald v Alberta Health Services*, 2013 ABQB 404 at para 81 [*MacDonald*].

construction of a new long-term care home facility.¹¹³ While the relevant legislation required the Director to consult the public before undertaking to issue a licence,¹¹⁴ they had considerable discretion under the statute as to how and when to solicit input.¹¹⁵ The applicants have not established that they had a legitimate expectation of any different or higher participatory rights.

89. At best, the applicants were entitled to “an opportunity to have some input into the decision making process.”¹¹⁶ That opportunity was required to be fair in all the circumstances, and not perfect.¹¹⁷ While the applicants challenge the adequacy of the Ministry’s public consultation in July 2021,¹¹⁸ a subsequent one placed no restrictions on the length or nature of submissions that the public could make.¹¹⁹ Through this latter process, the applicants had the opportunity to, and did in fact,¹²⁰ present their views to the Ministry.

90. For these reasons, any minimal duty of fairness was satisfied by the Respondent.

F. The Applicants Seek Inappropriate Remedies

1) No Basis for this Court to Substitute its own Decision

¹¹³ See *Protective Society*, *supra* note 111 at para 27; *Rudderham v Nova Scotia (Environment)*, 2019 NSSC 86 at para 37; *Blair Engaged - Residents’ Association Inc v Corporation of the City of Cambridge*, 2023 ONSC 1964 at para 79 (Div Ct).

¹¹⁴ *Previous Act*, *supra* note 25, s 106(1)(b). See also *FLTCA*, *supra* note 1, s 109(1)(b).

¹¹⁵ *Previous Act*, *supra* note 25, s 106(2). See also *FLTCA*, *supra* note 1, s 109(2).

¹¹⁶ *MacDonald*, *supra* note 112 at para 84.

¹¹⁷ *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 685.

¹¹⁸ Applicants’ Factum at para 72; Parkes Affidavit at paras 24-27, **Application Record, Tab 3, pp. 164-165**.

¹¹⁹ Notice of Public Consultation placed on Licensing Public Consultation Registry on September 19, 2022, **Record of Decision, Volume 18, Tab 88, pp. 5625-5626**.

¹²⁰ Email from Cathy Parkes, dated October 17, 2022, **Record of Decision, Volume 18, Tab 88DD, p. 5697**; Email from Ontario Health Coalition, dated October 19, 2022 and enclosed submission, **Record of Decision, Volume 19, Tab 88BBBBBBB, pp. 5989-5996**, .

91. The applicants ask that this Court substitute its own decision for those of the Minister and Director, rather than remitting them back for redetermination.

92. It is well established that, in most cases, the appropriate remedy on judicial review is to remit the matter to the decisionmaker for reconsideration with the benefit of the court’s reasons. Declining to remit a matter to the decisionmaker may be appropriate where it is obvious that a particular outcome is inevitable and that sending it back would serve no useful purpose.¹²¹

93. The Court of Appeal recently cautioned against a reviewing court substituting its own legal analysis for that of the decision-maker’s:¹²²

Where, as here, the reviewing court concludes that the reasons are flawed, for example by failing to follow the applicable law, then the reviewing court should refrain from conducting its own analysis to determine the appropriate outcome. Unless the matter fits into one of the “limited scenarios” described in *Vavilov*, at para. 142, the reviewing court should instead remit the matter back to the original decision maker to be decided in accordance with the applicable law.

94. None of the limited scenarios from *Vavilov* – concerns about delay, fairness to the parties, or urgency in providing a resolution – are present in this case. Nor is there any basis to conclude that the Minister and Director would inevitably come to the same decisions if the matter were remitted to them, as the applicants suggest. Moreover, given the Legislature’s decision to delegate broad discretion to the Minister and/or Director under ss. 99, 100 and 101 of the Act, this Court should be reluctant to substitute its own view of the public interest in those sections.

¹²¹ *Vavilov*, *supra* note 90 at para 141.

¹²² *Thales DIS Canada Inc v Ontario (Transportation)*, 2023 ONCA 866 at para 102. See also *Ledore Investments v Dixin Construction*, 2024 ONSC 598 at para 42 (Div Ct).

95. Finally, the applicants' suggestion that the decisions should not be remitted to the Minister and Director is particularly remarkable, given that the primary basis for their application is their complaint that the decision-makers did not consider information they were required to consider. If that is the case, it is inconsistent to argue that decision should not be remitted to be redetermined on what they say is the proper factual record.

2) Declarations of Past Unlawfulness Are Improper

96. Although not pursued in their factum, in their notice the applicants seek various declarations that the Minister and Director acted "unlawfully, unreasonably, improperly, disproportionately, arbitrarily, and without and in excess of [his/her] statutory discretion and authority".¹²³

97. Declaratory relief is a discretionary remedy, available in certain limited circumstances.¹²⁴ This Court can give a declaration of right in appropriate circumstances.¹²⁵

98. However, courts have declined to grant declarations that a past conduct is wrong without any implication to the rights of the applicant, on the grounds that such relief is unavailable, amounts to a declaration of fact, or would not address the issues between the parties.¹²⁶

¹²³ Notice of Application, paras 1(e) - (g), **Application Record, Tab 1, pp. 9-10.**

¹²⁴ *SA v Metro Vancouver Housing Corp.*, 2019 SCC 4 at para 60.

¹²⁵ *1472292 Ontario Inc (Rosen Express) v Northbridge General Insurance Company*, 2019 ONCA 753 at para 22; *Courts of Justice Act*, RSO 1990, c C.43, s 97.

¹²⁶ *Telecommunication Employees Association of Manitoba Inc v Manitoba Telecom Services Inc*, 2007 MBCA 85 at paras 64-66; *Webber v Anmore (Village)*, 2012 BCCA 390 at para 14; *Freemont Canning Co v Wall*, [1941] 3 DLR 96, [1940] OJ No 417 at para 49, Robertson CJO (CA).

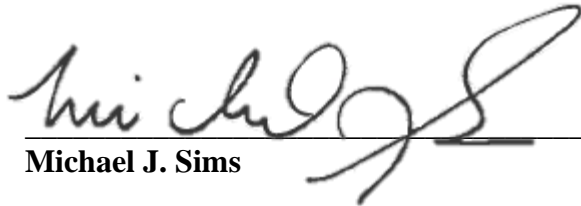
99. To the extent that the applicants can demonstrate any right or interest in the impugned decisions, they are not engaged by a declaration of past wrongdoing by the Minister or Director. The requested declaratory relief should be refused, regardless of the outcome of the application.

PART IV – ORDER SOUGHT

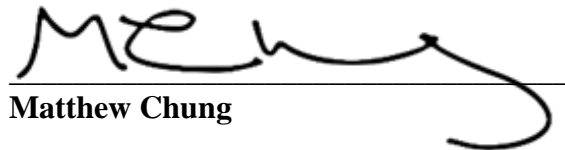
100. For the reasons set out herein, this application should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 20, 2024



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CHRONOLOGY

Date	Event	Source (Record of Decision)
Aug 2017	Southbridge applies for Enhanced Long-Term Care (“LTC”) Renewal Strategy	Vol. 1, Tab 1
Nov 15, 2019	Southbridge applies for LTC development (“ 2019 Application ”)	Vol. 1, Tab 6
Jun 12, 2020	Director withdraws approval of management agreement between Southbridge and Extendicare Director approves management agreement between Southbridge and Lakeridge Health	Vol. 18, Tabs 78 & 79
Sept 11, 2020	Director approves transitional management plan	Vol. 18, Tab 81
Nov 20, 2020	Minister approves 2019 Application Minister imposes conditions on approval	Vol. 1, Tabs 9 & 10
Jun 10, 2021	Notice of public consultation	Vol. 21, Tab 94
Jun-July 2021 (various)	Public consultation	Vols. 21 – 22, Tab 94 A – W
Jun 16, 2021	Minister sends executed first development agreement	Vol. 2, Tab 17
Jul 6, 2022	Director grants Southbridge emergency licence	Vol. 18, Tab 84
Aug 22, 2022	Southbridge applies to transfer licence to new partnership	Vol. 18, Tab 85
Sept 19, 2022	Notice of public consultation	Vol. 18, Tab 88
Oct 2022 (various)	Public consultation	Vols. 18 – 19, Tab 88

Oct 12, 2022	Minister determines no restrictions are required in public interest	Vols. 18, Tab 87
Nov 18, 2022	Director approves transfer of licence to new partnership	Vol. 21, Tab 91
Mar 21, 2023	Southbridge applies for LTC home development (“ 2023 Application ”)	Vol. 2, Tab 18
Jun 14, 2023	Minister approves 2023 Application Assistant Deputy Minister imposes conditions	Vol. 2, Tabs 22 & 23
June 16, 2023	Second development agreement executed	Vol. 2, Tab 26
Jun 16, 2023	Director’s acceptance of transition plan	Vol. 21., Tab 93
Jun 22, 2023	Minister sends executed second development agreement	Vol. 2, Tab 29
Jun 26, 2023	Director gives undertaking to issue licence Director imposes conditions on undertaking	Vol. 23, Tabs 99 & 100
Jul 5, 2023	Director issues amended temporary licence	Vol. 23, Tabs 102 & 103
Aug 30, 2023	Ministry approves working plans	Vol. 18, Tab 73

SCHEDULE “A” - List of Authorities

Jurisprudence

1. *Elementary Teachers' Federation of Ontario v Ontario (Minister of Education)*, 2019 ONSC 1308 (Div Ct)
2. *Ontario Place Protectors v HMK in Right of Ontario*, 2024 ONSC 4194 (Div Ct)
3. *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607
4. *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904
5. *Robichaud v College of Registered Nurses of Nova Scotia*, 2011 NSSC 379
6. *Accettone Funeral Home Ltd v Ajax Crematorium and Visitation Centre and Bereavement Authority of Ontario*, 2021 ONSC 4081 (Div Ct)
7. *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27
8. *West Nipissing Police Services Board v. Municipality of West Nipissing*, 2018 ONSC 6454 (Div Ct)
9. *Canadian Elevator Industry Education Program v Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80
10. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45
11. *Miner v Kings (County)*, 2017 NSCA 5
12. *Bancroft v Nova Scotia (Lands and Forestry)*, 2021 NSSC 234, aff'd 2022 NSCA 78.
13. *Ecology Action Centre v Nova Scotia (Environment)*, 2022 NSSC 104
14. *Citizens Alliance of Nova Scotia v Nova Scotia (Health and Wellness)*, 2024 NSSC 253
15. *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61
16. *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10
17. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26

18. *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541
19. *TA v Ontario*, 2024 ONSC 4580 (Div Ct)
20. *Abbott v London Health Sciences Centre*, 2024 ONSC 3949 (Div Ct)
21. *Sunwold Farms Ltd v AgriCorp*, 2015 ONSC 6111 (Div Ct)
22. *1671183 Ontario Inc o/a Pharma Stop v Ontario (Ministry of Health and Long-Term Care)*, 2015 ONSC 6779 (Div Ct)
23. *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170
24. *Interlink Solutions Inc v Ontario (Ministry of Economic Development, Job Creation and Trade)*, 2022 ONSC 5865 (Div Ct)
25. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
26. *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31
27. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32
28. *Doré v Barreau du Québec*, 2012 SCC 12
29. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12
30. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
31. *Canada (Attorney General) v Bedford*, 2013 SCC 72
32. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817
33. *Eastern Georgian Bay Protective Society Inc v Minister of the Environment, Conservation and Parks*, 2021 ONSC 4038 (Div Ct)
34. *MacDonald v Alberta Health Services*, 2013 ABQB 404
35. *Rudderham v Nova Scotia (Environment)*, 2019 NSSC 86
36. *Blair Engaged - Residents' Association Inc v Corporation of the City of Cambridge*, 2023 ONSC 1964 (Div Ct)
37. *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653
38. *Thales DIS Canada Inc v Ontario (Transportation)*, 2023 ONCA 866

39. *Ledore Investments v Dixin Construction*, 2024 ONSC 598 (Div Ct)
40. *SA v Metro Vancouver Housing Corp*, 2019 SCC 4
41. *1472292 Ontario Inc (Rosen Express) v Northbridge General Insurance Company*, 2019 ONCA 753
42. *Telecommunication Employees Association of Manitoba Inc v Manitoba Telecom Services Inc*, 2007 MBCA 85
43. *Webber v Anmore (Village)*, 2012 BCCA 390
44. *Freemont Canning Co v Wall*, [1941] 3 DLR 96 (Ont CA)

Secondary Sources

45. Sara Blake, *Administrative Law in Canada*, 7th ed (Toronto: LexisNexis, 2022)

SCHEDULE “B”
Text of Relevant Statutes and Regulations

Fixing Long-Term Care Act, 2021, SO 2021, c 39, Schedule 1, ss 98-104, 107-109, 111-113, 118 and 193

PART VIII - LICENSING

98 (1) No person shall operate residential premises for persons requiring nursing care or in which nursing care is provided to two or more unrelated persons except under the authority of a licence under this Part or an approval under Part IX.

(2) Subsection (1) does not apply to,

- (a) premises falling under the jurisdiction of,
 - (i) the *Child, Youth and Family Services Act, 2017*,
 - (ii) the *Private Hospitals Act*,
 - (iii) the *Public Hospitals Act*, or
 - (iv) the *Retirement Homes Act, 2010*; or
- (b) other premises provided for in the regulations.

(3) Every person who contravenes subsection (1) is guilty of an offence.

99 (1) Subject to subsection (2), the Minister shall determine whether or not there should be a long-term care home in an area, and how many long-term care home beds there should be in an area, by considering what is in the public interest, having taken into account,

- (a) the long-term care home bed capacity that exists,
 - (i) in the area, or
 - (ii) in the area and any other area;
- (b) the other facilities or services that are available,
 - (i) in the area, or
 - (ii) in the area and any other area;
- (c) the current and predictable continuing demand for long-term care home beds,
 - (i) in the area, or
 - (ii) in the area and any other area;

- (d) the funds available for long-term care homes in Ontario;
- (e) any other matters that may be provided for in the regulations; and
- (f) any other matters that the Minister considers to be relevant.

(2) The Minister is not required to make a determination under subsection (1) where,

- (a) the Minister has made a policy respecting the matters described in subsection (1); and
- (b) the Director has decided that an application for a licence is covered by the policy and that the Director is entitled to act under the policy.

(3) If the Minister makes a policy under subsection (2), the Minister shall ensure that the policy is made available to the public.

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a policy made under subsection (2).

100 (1) The Minister may restrict who may be issued a licence based on what the Minister considers to be in the public interest, having taken into account,

- (a) the effect that issuing the licence would have on the concentration of ownership, control or management of long-term care homes,
 - (i) in the area,
 - (ii) in the area and any other area, or
 - (iii) in Ontario;
- (b) the effect that issuing the licence would have on the balance between non-profit and for-profit long-term care homes,
 - (i) in the area,
 - (ii) in the area and any other area, or
 - (iii) in Ontario; and
- (c) any other matters that may be provided for in the regulations.

(2) The Minister may make a restriction in a particular case of an application for a licence or, where the Minister has made a policy respecting the matters described in subsection (1), the Director may decide whether an application is covered by the policy and whether or not the restriction applies.

(3) If the Minister makes a policy under subsection (2), the Minister shall ensure that the policy is made available to the public.

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a policy made by the Minister under subsection (2).

101 (1) 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;
- (b) where the home is subject to a development agreement, the home, or the beds that are subject to a development agreement, complies with, and will continue to comply with, the applicable design manual and any additional design requirements required under the development agreement;
- (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:
 - (i) the person,
 - (ii) if the person is a corporation, the officers and directors of the corporation and any other person with a controlling interest in the corporation, and
 - (iii) if the person with a controlling interest referred to in subclause (ii) is a corporation, the officers and directors of that corporation;
- (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:
 - (i) the person,
 - (ii) if the person is a corporation, the officers and directors of the corporation and any other person with a controlling interest in the corporation, and
 - (iii) if the person with a controlling interest referred to in subclause (ii) is a corporation, the officers and directors of the corporation; and
- (f) the person is not ineligible because of any other reason that may be provided for in the regulations.

(2) If the Director decides that a person is not eligible to be issued a licence under subsection (1), the Director shall serve the person with a copy of the Director's decision, including reasons.

(3) A person who the Director decides is not eligible to be issued a licence may appeal the decision to the Appeal Board and, for that purpose, sections 171 to 176 apply as if references to the licensee were references to the person, and with such other modifications as are necessary.

102 Following a determination by the Minister or a decision of the Director under section 99, the Director may issue a licence for a long-term care home at the location specified in the licence subject to any restrictions under section 100 and subject to section 101.

103 (1) Following a determination by the Minister or a decision of the Director under section 99, the Director may, subject to any restrictions under section 100 and subject to section 101, give an undertaking to issue a licence to a person on condition that the person agrees to satisfy the specified conditions set out in the undertaking.

(2) An undertaking shall be in two parts, one to be described as “non-amendable components” and the other to be described as “amendable components”.

(3) The non-amendable components shall consist of,

(a) a description of where the long-term care home will be;

(b) the following aspects of the licence to be issued:

(i) the number, class and type of beds,

(ii) the term of the licence, and

(iii) any conditions the licence is to be subject to;

(c) other components provided for in the regulations; and

(d) any other components that the Director considers appropriate.

(4) The amendable components shall consist of any matters not provided for in subsection (3).

(5) The amendable components may be amended on consent, but the non-amendable components may not be amended under any circumstances.

(6) If the Director determines that the person has complied with the specified conditions, the Director shall issue the licence.

(7) If the Director determines that the person has not complied with the specified conditions, the Director may cancel the undertaking by serving the person with notice of the cancellation.

(8) Within 15 days of being served with a notice of cancellation, the person may request the Minister to review the cancellation, and the Minister may confirm the cancellation or revoke it and direct the Director to amend any specified conditions that are amendable components.

104 (1) A licence is subject to the conditions, if any, that are provided for in the regulations.

(2) The Director may make a licence subject to conditions other than those provided for in the regulations,

(a) at the time a licence is issued, with or without the consent of the licensee; or

(b) at the time a licence is reissued under section 108, with or without the consent of the new licensee.

(3) It is a condition of every licence that the licensee shall comply with this Act, the *Connecting Care Act, 2019*, the regulations, and every directive issued, order made or agreement entered into under this Act and those Acts.

(4) Every licensee shall comply with the conditions to which the licence is subject.

[...]

107 (1) A licensee shall not operate more beds in a long-term care home than are allowed under the licence for the home or under the terms of a temporary licence issued under section 114 or a temporary emergency licence issued under section 115.

(2) Every licensee shall ensure that all the beds that are allowed under the licence are occupied or are available for occupation.

(3) If beds are unoccupied and unavailable for occupancy for 14 consecutive days or more, and the licensee did not obtain written permission from the Director for them not to be available for occupancy, the Director may, by order served on the licensee,

(a) amend the licence to reduce the number of beds allowed under the licence by the number of unoccupied and unavailable beds; or

(b) impose any conditions on the licence that are provided for in the regulations.

(4) A licensee whose licence has been amended or had conditions imposed on it under subsection (3) may appeal the Director's order to the Appeal Board and, for that purpose, sections 171 to 176 apply with any necessary modification.

108 (1) A licence, or beds under a licence, may not be transferred except by the Director in accordance with this section.

(2) A transfer that results in a change of the location specified in the licence, including a change of location of beds, may only be made following a determination or decision under section 99.

(3) All transfers are subject to any restrictions under section 100 and subject to section 101.

(4) A request for approval of a proposed transfer may be submitted to the Director for the Director's consideration.

(5) Where the Director gives approval, a licence may be transferred by being surrendered to the Director for reissue to another person.

(6) A licence reissued under subsection (5) may be for a different location and such a licence may be reissued to the same licensee.

(7) Where the Director gives approval, beds under a licence may be transferred by,

- (a) licences being surrendered to the Director for reissue with beds transferred from one licence to another; or
- (b) a licence being surrendered to the Director for reissue with beds transferred to a new licence issued by the Director.

(8) A non-profit entity may not transfer a licence or beds to a for-profit entity except in the limited circumstances provided for in the regulations.

(9) No interest in a licence, including a beneficial interest, may be transferred except in accordance with this section.

(10) Subsection (9) does not apply to the giving of a security interest in a licence.

109 (1) Subject to subsection (3), the Director shall consult the public before,

- (a) issuing a licence for a new long-term care home under section 102;
- (b) undertaking to issue a licence under section 103;
- (c) transferring a licence, or beds under a licence, under section 108; or
- (d) amending a licence to increase the number of beds or to extend the term of the licence under section 116.

(2) The Director may determine how public consultations under subsection (1) shall be conducted.

(3) The Director is not required to consult the public under subsection (1) or under any other provision of this Act where the Director,

- (a) has determined that a public consultation is not warranted in the circumstances; or
- (b) has made a policy governing types of circumstances in which public consultation is not warranted, and the policy applies to the circumstances, unless the Director makes an exception to the policy.

(4) If the Director makes a policy under clause (3) (b), the Director shall ensure that the policy is made available to the public.

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a policy made by the Director under clause (3) (b).

[...]

111 (1) A licensee that is a corporation shall notify the Director in writing within 15 days of any change in the officers or directors of the corporation.

(2) A licensee shall immediately notify the Director in writing if the licensee has reason to believe that a person has gained a controlling interest in the licensee.

(3) Where a long-term care home is managed by a person under a contract under section 113, the licensee of the home shall immediately notify the Director in writing if the licensee has reason to believe that anything mentioned in subsection (1) or (2) has occurred with respect to the person.

112 (1) A person that by any method gains a controlling interest in a licensee shall obtain the approval of the Director, unless the regulations provide otherwise.

(2) The approval by the Director is subject to any restrictions under section 100 and subject to section 101 as those sections would apply with respect to the licensee if the person had already gained a controlling interest in the licensee, unless the regulations provide otherwise.

(3) The Director may attach conditions to an approval.

(4) The regulations may provide for when the approval of the Director must be obtained and for the process for obtaining such approval.

113 (1) A licensee of a long-term care home shall not allow anyone else to manage the home except pursuant to a written contract approved by the Director.

(2) Subsection (1) does not apply to the management of the home by the Administrator.

(3) The contract described in subsection (1) must comply with any requirements established by the regulations.

(4) The following apply with respect to the approval by the Director of a contract described in subsection (1):

1. Before approving the contract, the Director must be satisfied that the contract complies with any requirements established by the regulations.
2. The approval by the Director is subject to section 101 as if the person who would manage the long-term care home were to be the licensee.

(5) The Director may withdraw their approval of a contract at any time.

(6) A licensee shall not allow a contract described in subsection (1) to be amended materially without the approval of the Director.

[...]

118 (1) Anything done by the Minister or the Director under this Part in respect of sections 99 and 100 is within the sole discretion of the Minister or Director and is not subject to an appeal.

(2) Decisions of the Director under this Part with respect to the term of a licence, number of beds, or any other condition of a licence are within the sole discretion of the Director and are not subject to an appeal.

[...]

PART XI - ADMINISTRATION, MISCELLANEOUS

193 (1) The Lieutenant Governor in Council may make regulations for carrying out the purposes and provisions of this Act.

(2) Without restricting the generality of subsection (1), the Lieutenant Governor in Council may make regulations,

[...]

27. providing for any transitional matters the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of this Act;

[...]

(3) A regulation under paragraph 27 of subsection (2) may provide that it applies despite this or any other general or special Act.

O Reg 246/22 made under the *Fixing Long-Term Care Act, 2021, SO 2021, c 39, Schedule 1, ss 373(1)-(2) and 377.*

373 (1) A determination by the Minister under section 96 of the former Act shall be deemed to be a determination under section 99 of the Act.

(2) A determination by the Minister that a restriction is, or is not, needed under section 97 of the former Act shall be deemed to be a determination by the Minister under section 100 of the Act.

[...]

377 Any consultation or determination under section 106 of the former Act that occurred before this section came into force is deemed to be a consultation or determination under section 109 of the Act.

PART VII - LICENSING

96 The Minister shall determine whether or not there should be a long-term care home in an area, and how many long-term care home beds there should be in an area, by considering what is in the public interest, having taken into account,

- (a) the long-term care home bed capacity that exists,
 - (i) in the area, or
 - (ii) in the area and any other area;
- (b) the other facilities or services that are available,
 - (i) in the area, or
 - (ii) in the area and any other area;
- (c) the current and predictable continuing demand for long-term care home beds,
 - (i) in the area, or
 - (ii) in the area and any other area;
- (d) the funds available for long-term care homes in Ontario;
- (e) any other matters that may be provided for in the regulations; and
- (f) any other matters that the Minister considers to be relevant.

97 The Minister may restrict who may be issued a licence based on what the Minister considers to be in the public interest, having taken into account,

- (a) the effect that issuing the licence would have on the concentration of ownership, control or management of long-term care homes,
 - (i) in the area,
 - (ii) in the area and any other area, or
 - (iii) in Ontario;
- (b) the effect that issuing the licence would have on the balance between non-profit and for-profit long-term care homes,
 - (i) in the area,

(ii) in the area and any other area, or

(iii) in Ontario; and

(c) any other matters that may be provided for in the regulations.

98 (1) 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;

(b) 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:

(i) the person,

(ii) if the person is a corporation, the officers and directors of the corporation and any other person with a controlling interest in the corporation, and

(iii) if the person with a controlling interest referred to in subclause (ii) is a corporation, the officers and directors of the corporation;

(c) 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;

(d) 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:

(i) the person,

(ii) if the person is a corporation, the officers and directors of the corporation and any other person with a controlling interest in the corporation, and

(iii) if the person with a controlling interest referred to in subclause (ii) is a corporation, the officers and directors of the corporation; and

(e) the person is not ineligible because of any other reason that may be provided for in the regulations.

(2) If the Director decides that a person is not eligible to be issued a licence under subsection (1), the Director shall serve the person with a copy of the Director's decision, including reasons.

(3) A person who the Director decides is not eligible to be issued a licence may appeal the decision to the Appeal Board and, for that purpose, sections 165 to 170 apply as if references to the licensee were references to the person, and with such other modifications as are necessary.

[...]

106 (1) Subject to subsection (3), the Director shall consult the public before,

- (a) issuing a licence for a new long-term care home under section 99;
- (b) undertaking to issue a licence under section 100;
- (c) deciding whether or not to issue a new licence under section 103;
- (d) transferring a licence, or beds under a licence, under section 105; or
- (e) amending a licence to increase the number of beds or to extend the term of the licence under section 114.

(2) The Director may determine how public consultations under subsection (1) shall be conducted.

(3) The Director is not required to consult the public under subsection (1) or under any other provision of this Act where the Director,

- (a) has determined that a public consultation is not warranted in the circumstances; or
- (b) has made a policy governing types of circumstances in which public consultation is not warranted, and the policy applies to the circumstances, unless the Director makes an exception to the policy.

(4) If the Director makes a policy under clause (3) (b), the Director shall ensure that the policy is published on the website of the Ministry or in the manner prescribed by regulation.

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a policy made by the Director under clause (3) (b).

Courts of Justice Act, RSO 1990, c C.43, s 97

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

THE ONTARIO HEALTH COALITION and CATHERINE PARKES

Applicants

- and -

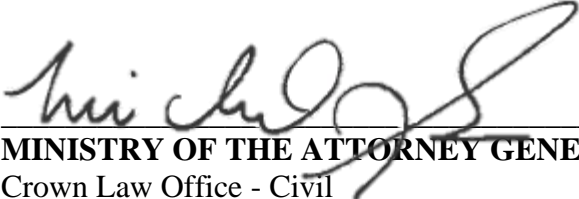
ONTARIO MINISTER OF LONG-TERM CARE

Respondent

CERTIFICATE OF THE RESPONDENT

The Respondent's lawyer estimates that 2 hours will be required for oral argument.

September 20, 2024


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Applicants

ONTARIO MINISTER OF LONG-TERM CARE
Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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