



**CLASS ACTION CLINIC**  
Windsor Law

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Standing Committee on Justice Policy  
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### **Written Submissions Re: Bill 218**

The Class Action Clinic at the University of Windsor writes to express concern about Bill 218. While the Clinic applauds the Government for protecting healthcare workers, the Clinic believes that the legislation is overbroad and detrimental to the three goals of class actions – greater access to justice, preservation of judicial economy, and behaviour modification of wrongdoers.<sup>1</sup>

#### **THE CLINIC'S MISSION + SERVICES**

The Class Action Clinic's central mission is to serve the needs of class members across Canada. Launched in October 2019, it is the first not-for-profit organization that provides class members summary advice, assistance with filing claims in settlement distribution processes, and representation in court proceedings. The Clinic is dedicated to creating greater awareness about class actions through public education, outreach, and research. The Clinic does not initiate or conduct class actions, and is not funded by either the plaintiffs' or defence bar, or any industry group. Its sole purpose is to help individual class members, and in doing so, better fulfill the access to justice promise of the class action regime. A more complete description of our services is attached as Appendix A or can be found on the Clinic's website:

[www.classactionclinic.com](http://www.classactionclinic.com).

The Clinic is directed by Jasminka Kalajdzic, an Associate Professor of Law at the University of Windsor, and Canada's leading class action scholar. Andrew Eckart, formerly a class action litigator and sessional instructor of tort law at the University of Windsor, serves as Supervising Lawyer to oversee the work of law student case workers.

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<sup>1</sup> *Dutton v. Western Shopping Centres*, 2001 SCC 46 at paras. 27-29.

## THE HARMS RESULTING FROM THE LONG-TERM CARE HOME COVID CRISIS ARE WELL-SUITED FOR CLASS ACTION LITIGATION

The infection rate of COVID-19 amongst senior citizens in long-term care homes (“LTCs”), has been well-documented. Some of the statistics bear repeating:

- There are 626 LTCs in the province,<sup>2</sup> housing more than 79,000 people.<sup>3</sup>
- By the end of the first wave of COVID-19, 55% of the LTCs had reported an outbreak.<sup>4</sup>
- With the rise of the second wave, 78 LTCs are currently facing an outbreak.<sup>5</sup>
- There are currently over 500 active cases of COVID-19 among residents – the numbers are increasing daily.<sup>6</sup>
- To date, 1959 residents have died from exposure to the virus.<sup>7</sup>

Ontario’s Long-Term Care COVID-19 Commission (the “Commission”) provided Minister Fullerton an update as recently as October 23, 2020. The Commission identified characteristics which were common amongst the most impacted homes:

- location in communities with high infection rates;
- insufficient leadership capacity;
- pre-existing and COVID-related staffing shortages; and

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<sup>2</sup> Canadian Institute for Health Information, “Long-term care homes in Canada: How many and who owns them?” (24 September 2020), online: <<https://www.cihi.ca/en/long-term-care-homes-in-canada-how-many-and-who-owns-them>>.

<sup>3</sup> Ontario Long Term Care Association, “Ontario Budget Submission 2020 - Challenges and solutions: Rebuilding long-term care for Ontario’s seniors” online: <<https://www.oltca.com/OLTCA/Documents/Reports/OLTCA-2020-Budget-Submission---final.pdf>>.

<sup>4</sup> Frank N. Marrocco, Angela Coke & Jack Kitts, “Letter to Minister Fullerton from Ontario’s Long-Term Care COVID-19 Commission”, October 23, 2020, online: <[http://ltccommission.commissionsld.ca/ir/pdf/20201023\\_First%20Interim%20Letter\\_English.pdf](http://ltccommission.commissionsld.ca/ir/pdf/20201023_First%20Interim%20Letter_English.pdf)>.

<sup>5</sup> Gabby Rodriguez, “Ontario reports 948 new coronavirus cases, 7 more deaths” (2 November 2020) *Global News*, online: <<https://globalnews.ca/news/7436575/ontario-coronavirus-cases-november-2-covid19/>>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

- a lack of strong infection prevention and control (“IPAC”) measures, including difficulty cohorting and isolating positive residents, often because of limitations of the physical environment.<sup>8</sup>

The Commission found that LTCs faced significant staffing shortages even before COVID and that accountability for compliance with proper IPAC measures were not in place.<sup>9</sup> These deficiencies in the provision of healthcare services to vulnerable Ontarians may be why residents of LTCs had such high infection and death rates.

Given this environment, it is unsurprising that many statements of claim for proposed class actions have been filed as against the operators of LTCs. In some cases, the Government of Ontario has been named as a defendant, allegedly because it has failed to properly regulate and oversee the operation of these homes. The Clinic has counted at least 15 separate proposed class actions against LTCs. Most were filed before October 1, 2020, the date on which the amendments to the *Class Proceedings Act, 1992* came into effect.

The statements of claim include allegations of breach of contract, negligence, breach of fiduciary duty, breach of the *Occupier’s Liability Act*, breach of the Ontario *Human Rights Code*, wrongful death, and infringements of protected *Charter* rights.

The underlying facts in these cases are common amongst them all. They also raise common legal issues and the proposed class members are easily identified with reference to objective criteria. The claims are well suited to be adjudicated on a class wide basis and will meet the three underlying objectives of class proceedings: access to justice for the victims; preservation of judicial economy; and behaviour modification of the wrongdoers. The Clinic views the class action procedure as an efficient one to manage the claims from the perspective of both plaintiffs and defendants.

## **BILL 218 IS A HEAVY-HANDED APPROACH**

The Attorney General for Ontario has described the purpose of Bill 218 as proposing “liability protection for workers, volunteers and organizations that make an honest effort to follow public health guidelines and laws related to exposure to COVID-19. It would also maintain the right of Ontarians to take legal action against those who wilfully or with gross negligence endanger others.”<sup>10</sup> Given the immense pressure faced by healthcare workers during the COVID crisis, this is a laudable goal. Bill 218, however, is a heavy-handed approach and could

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<sup>8</sup> *Supra* note 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 196A (October 20, 2020) at 9792. (Hon. Doug Downey).

potentially protect wrongdoers at the expense of victims of negligence. We identify three issues.

First, the lack of specificity with respect to who is protected under the Bill could lead to the protection of groups beyond those in the healthcare sector who have observed proper public health guidance. Section 2(1) extends the protection of liability to any “person” which could mean “individual, corporation or other entity, and includes the Crown in right of Ontario”. In contrast, similarly enacted legislation in British Columbia<sup>11</sup> prescribes certain groups of people as benefitting from the protection of liability. If the purpose of the Bill is to shield healthcare workers who act in “good faith” from liability, then these workers should be more specifically identified.

Second, the definition of “good faith effort” as including “an honest effort, whether or not that effort is reasonable” significantly lowers the bar of a potential finding of gross negligence. In cases of negligence *simpliciter*, courts generally assess the conduct of the defendant relative to the conduct of a reasonable person in the same circumstances.<sup>12</sup> Given the standard of care expected of an individual in a similar situation, did that person do what was reasonably expected of them? Bill 218 lowers the standard of care. A tortfeasor may now act unreasonably in the provision of health care services, and, as long as they do so honestly by subjectively believing they are abiding by public health guidance, they will not be accountable in tort. In a situation where almost two thousand vulnerable Ontarians have died, lowering the standard of care expected of potential tortfeasors, including a government responsible for overseeing a safe LTC home regime, is unacceptable to those victims and their families.

Finally, the current wording of the legislation could mean that tortfeasors, though grossly negligent<sup>13</sup>, could be absolved of liability where they put in an “honest effort”. Imposing this subjective requirement in the analysis is incompatible with the standard of care analysis that takes place in negligence cases where intent is not a relevant factor. Put simply, “good faith” is not a defence to grossly negligent conduct. This incompatibility will likely involve protracted litigation and years of judicial consideration to resolve.

## CONCLUSION

While we applaud the government’s efforts to protect healthcare workers and ensure that insurance premiums are not prohibitively expensive, those who cause harm through negligent

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<sup>11</sup> *COVID-19 Related Measures Act*, SBC 2020, c 8 and *COVID-19 (Limits on Actions and Proceedings) Regulation*, BC Reg 204/2020

<sup>12</sup> *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.

<sup>13</sup> Defined as “a “very marked departure from the standards by which responsible and competent people....govern themselves” - *McCulloch v. Murray*, 1942 CanLII 44 (SCC), [1942] SCR 141.

and grossly negligent acts ought to be held accountable. Lowering a standard of care where lives have been lost does not provide access to justice to those victims and their families.

We respectfully but strongly urge the government to reconsider the provisions in Bill 218 discussed in this letter.

Sincerely,



Andrew Eckart

Encl.



Jasminka Kalajdzic

## Appendix A



## OUR MISSION + SERVICES

The Class Action Clinic's central mission is to serve the needs of class members across Canada. It is the first not-for-profit organization designed to provide class members summary advice, assistance with filing claims in settlement distribution processes, and representation in court proceedings. The Clinic is also dedicated to creating greater awareness about class actions, through public education, outreach, and research. Although the Clinic does not initiate or conduct class actions, we can provide referrals to class action firms.

## LEGAL INFORMATION & ADVICE

Members of the public often have a vague idea that they may be covered by a class action but do not know what to do to 'be a part of it'. In fact, class members usually need to do nothing to participate formally in the action, but most people, including lawyers who do not practice class action law, are unfamiliar with Ontario's opt-out system. Class members may have received a court notice or other correspondence in the mail confirming they are part of a class action, but need assistance understanding the information. Still others may have been notified that a class action has settled, and they need help figuring out what the settlement means for them. All of these legal questions can be addressed by the Class Action Clinic's team of law students and review counsel. Such assistance will reduce the possibility that a class member misses a deadline or fails to take steps to protect their interests in the litigation. Review counsel and law students will, in the appropriate case, represent class members in court.

## SETTLEMENT CLAIMS

It is quite common for approved settlements and judgments to include a claims procedure. Class members receive notices and then must complete claims forms and/or provide documents or other information to a claims administrator who determines the class member's eligibility. These are sometimes complex processes, and class members often need assistance completing the forms. In certain cases, traditional legal clinics have provided support; poverty law clinics can now refer the work to or rely on the Class Action Clinic for class action expertise, so that they can devote scarce resources to traditional clinic work. In other cases, class members have hired lawyers

or “form-fillers” to assist them, but have been mistreated or financially exploited. The Clinic will be an additional resource to class members who require assistance completing claims forms and providing the necessary documents to best support their claims.

## **CLASS ACTION DATABASE**

There have been repeated calls for empirical data about class actions, from both academics, judges and the bar. It is a call supported by all stakeholders interviewed for the Law Commission of Ontario’s (LCO) Class Action Project. The LCO is constructing a database that will be free to the public, and that will contain essential information about past and current class actions, including the name of parties, pleaded causes of action, counsel information, and outcomes. The LCO intends to transfer the database to Windsor Law and the Class Action Clinic will maintain it going forward. Information about new class actions will be available on the database and will serve as a form of notice to potential class members, in addition to providing valuable information to academics, lawyers and judges.

## **MORE INFORMATION**

For more information and to access links to the extensive media coverage of the Clinic, visit [www.classactionclinic.com](http://www.classactionclinic.com).