

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SIMON NISBET AS LITIGATION GUARDIAN OF DOREEN NISBET

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. The defendant admits the allegations at paragraphs 9, 118, 194, and 197 of the Statement of Claim.
2. The defendant has no knowledge in respect of the allegations at paragraphs 8 and 164-71 of the Statement of Claim and puts the plaintiff to the strict proof thereof.
3. The defendant denies all of the remaining allegations in the Statement of Claim, including that the plaintiff or potential class members are entitled to the relief sought in paragraph 1 of the Statement of Claim, and puts the plaintiff to the strict proof thereof. Where the plaintiff has pleaded evidence, the defendant does not admit that the pleading is proper or that the evidence is admissible.

Ontario Long-Term Care Homes

4. With respect to the allegations at paragraph 10 of the Statement of Claim, the *Long-Term Care Homes Act, 2007*, S.O. 2007, c.-8 (the "Act") and Ontario Regulation 79/10 (the "Regulation") apply to Long-Term Care Homes ("LTCH") licensees in Ontario.
5. The defendant denies that it operates and/or manages LTCHs, that there is a LTCH "system" which it controls, and that it acts as a guarantor of LTCH residents' health or safety.

6. LTCHs are owned, operated, managed, and controlled by licensees as defined in the Act (“Licensees”). The Act and the Regulation impose obligations on Licensees in respect of a range of matters, including: residents’ rights, care, and services; reporting and complaints; protecting residents from abuse and neglect; admissions; resident and family councils; medication management; infection prevention and control; emergency plans; food safety and quality; residents’ finances and staffing. Section 5 of the Act states that every Licensee of a long-term care home shall ensure that the home is a safe and secure environment for its residents.

7. The Minister of Long-Term Care (the “Minister”) may provide funding to Licensees for LTCHs. The Minister may determine the number of LTCHs and long-term care home beds in a particular area. The Act confers on the Director appointed under the Act (the “Director”) discretion in respect of the licencing of LTCHs, under Part VII of the Act, subject to the requirements set out in the Act. The Act confers on the Minister discretion in respect of the approval of municipal LTCHs, under Part VIII of the Act, subject to the requirements set out in the Act. All decisions taken in respect of any of the foregoing, and any failure to take such decisions, are neither justiciable nor actionable.

8. The Director may issue, renew, and/or revoke licences subject to the requirements set out in the Act. Decisions regarding the issuance, renewal, and/or revocation of any licence, including any failure to make any such decision, are not actionable.

9. The Minister, the Director, and inspectors appointed under the Act have certain authority under the Act, including the following:

- a. The Minister may appoint inspectors to conduct inspections or make inquiries to verify whether Licensees are complying with the Act;
- b. Where a Licensee has failed to comply with the Act, an inspector or the Director has certain enforcement powers; and
- c. The Minister may issue directives to Licensees respecting LTCHs where the Minister considers it to be in the public interest to do so.

10. Decisions and failures to make decisions regarding the administration and/or enforcement

of the Act, including but not limited to decisions with respect to any of the statutory powers described above, are not actionable.

The COVID-19 Pandemic in Ontario

11. COVID-19 is a novel form of coronavirus. In late January 2020, the defendant announced the first Ontario case of COVID-19. Throughout the first part of 2020, COVID-19 spread rapidly throughout the world, resulting in a global pandemic.

12. At all relevant times, the defendant exercised its legislative, regulatory and policy-making authority to address the spread of COVID-19 as it thought best. Steps taken pursuant to that authority included but were not limited to:

- a. On March 17, 2020, the Lieutenant Governor in Council (LGIC) declared an emergency under Order in Council 518/2020 (Ontario Regulation 50/20) pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act* (“EMCPA”). Further to the declaration of emergency, the LGIC issued and renewed emergency orders pursuant to subsections 7.0.2(4), 7.0.8, 7.1 and 7.1(2) of the EMCPA, and continued pursuant to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17*, including but not limited to:
 - i. O. Reg. 74/20 (Work Redeployment for Certain Health Service Providers);
 - ii. O. Reg. 77/20 (Work Deployment Measures in Long-Term Care Homes);
 - iii. O. Reg. 95/20 (Streamlining Requirements for Long-Term Care Homes);
 - iv. O. Reg. 146/20 (Limiting Work to a Single Long-Term Care Home);
 - v. O.Reg 156/20 (Deployment of Employees of Service Provider Organizations);
 - vi. O.Reg 157/20 (Work Deployment Measures for Municipalities);
 - vii. O.Reg 205/20 (Education Sector); and
 - viii. O. Reg. 210/20 (Management of Long-Term Care Homes in Outbreak);
- b. Amending existing regulations, including but not limited to: O. Reg 72/20; O. Reg 79/10; O. Reg 83/20; and O. Reg 248/20.
- c. Issuing guidance documents, directives, memoranda, and policies;
- d. Introducing the COVID-19 Action Plan for Protecting Long-Term Care Homes;

- e. Conducting inspections and making inquiries of LTCHs;
- f. Providing emergency funding to Licensees for infection prevention and containment and to increase LTCH bed availability;
- g. Providing personal protective supplies and equipment to Licensees, assisting Licensees in securing personal protective equipment, and maintaining a centralized repository of daily-updated information from providers respecting supply of PPE by issuing Minister's Orders pursuant to the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7;
- h. Launching a hiring campaign for LTCHs for both health care and non-health care positions;
- i. Providing "pandemic pay" wage increases for frontline LTCH workers;
- j. Involving hospitals in deploying Infection Prevention and Control teams to LTCHs and redeploying hospital staff to help with staffing shortages in LTCHs;
- k. Issuing emergency orders allowing the defendant to take certain steps, including steps to:
 - i. Limit work sites for LTCH employees to one home;
 - ii. Provide Licensees with greater flexibility to redeploy staff to areas of need; and
 - iii. Issue mandatory management orders and facilitate new management by hospitals for Licensees struggling to address a COVID-19 outbreak and contain the spread of the virus.
- l. Requesting and receiving assistance from the Canadian Armed Forces to provide additional support to certain Licensees struggling with COVID-19 outbreaks.

Crown Immunities

13. This action is barred by Crown immunity, both at common law and by statute.

14. The defendant is immune from suit in respect of all of its good faith acts and/or omissions under the Act and Regulation. The defendant pleads and relies upon s. 181 of the Act which is a complete bar to the within action.

15. The defendant is immune from suit in respect of all allegations of direct liability in negligence. The defendant is immune from suit in tort, save and except to the extent that Crown immunity has been expressly lifted by statute. No provision of the *Crown Liability and Proceedings Act, 2019* ("the *CLPA*") or of any other applicable legislation removes the defendant's immunity in respect of claims of direct liability in negligence.

16. No negligence claim lies against defendant except by way of vicarious liability for the negligence of Crown officers, employees, or agents. At paragraph 209 of the Statement of Claim, the plaintiff excludes from her claim any claim against the defendant in vicarious liability for the fault or negligence of any other person, or for which the defendant could claim contribution or indemnity. Crown officers, employees, and agents are both (1) other persons and (2) persons against whom the defendant could claim contribution and indemnity. Accordingly, the plaintiff has excluded from her claim all claims against the defendant in vicarious liability for negligence of any Crown officers, employees, or agents. Therefore, no justiciable negligence claim is pled against the defendant. The defendant pleads and relies upon s. 8(2) of the *CLPA*.

17. The defendant is immune from suit in respect of all regulatory decisions, including but not limited to inspections and actions taken following inspections. The defendant pleads and relies upon s. 11(2), (3), and (6) of the *CLPA*.

18. The defendant is immune from suit in respect of any negligence in the making of or failure to make a decision in good faith respecting a policy matter. The defendant pleads and relies upon ss. 11(4) and 11(5) of the *CLPA*.

19. The defendant is immune from suit for any negligence or failure to take reasonable care while exercising or intending to exercise powers or performing or intending to perform duties or functions of a legislative nature, including the enactment of an Act or the making of a regulation. The defendant pleads and relies upon section 11(1) of the *CLPA*.

20. The defendant is not liable for the acts or omissions of any Crown agencies, Crown corporations, independent contractors providing services to the Crown, and transfer payment recipients, including Licensees. The defendant pleads and relies on s. 9(1) of the *CLPA* and s. 181 of the *Act*.

21. Crown immunity is a complete bar to the plaintiff's negligence claim, requiring the dismissal of same.

No Negligence

22. In the alternative, if Crown immunity is not a complete bar to the plaintiff's negligence

claim, the defendant denies that it owed any duties of care to the plaintiff or proposed class members, as alleged at paragraphs 172-75 of the Statement of Claim or otherwise. The defendant denies that a relationship of proximity existed between it and the plaintiff and/or proposed class members by reason of legislation, statements allegedly made, or otherwise. In the alternative, if there is a *prima facie* duty of care (which is denied), it is negated by policy considerations.

23. If the defendant owed a duty of care, which is not admitted but is denied, the defendant denies that the standard of care is as set out at paragraphs 177-179 of the Amended Statement of Claim or indeed that any standard of care can be devised that would apply to its policy decisions. In respect specifically to the allegations contained at paragraph 2 of the Statement of Claim, the defendant denies that there is or can be any established standard of care applicable to the adequacy of how a sovereign entity may choose to regulate and oversee LTCHs.

24. With respect specifically to the allegations contained at paragraphs 6 and 131 of the Statement of Claim, the defendant denies that it is required to regulate and/or oversee LTCHs in the same manner as that adopted in any other jurisdiction or that the approaches adopted in other jurisdictions establish a standard of care binding on the defendant. In the alternative, the defendant denies that such a standard could be established by reference to steps taken in any single jurisdiction, such as British Columbia, that may be chosen by the plaintiff.

25. In the alternative, the defendant denies that it violated any duty of care owed to the plaintiff or proposed class members.

26. In the further alternative, if the defendant violated any duty of care owed to the plaintiff or proposed class members, which is denied, then the defendant denies that any such violation caused the plaintiff or proposed class members to suffer any harm. If the plaintiff or proposed class members suffered any harm, any such harm was caused by others.

No Fiduciary Duty or Breach of Fiduciary Duty

27. In respect of the claims at paragraphs 184-202 of the Statement of Claim, the defendant claims Crown immunity in respect of the plaintiff's claim for alleged breach of fiduciary duty. In the alternative, the defendant claims Crown immunity for any claim against it for direct, as opposed to vicarious, liability for any alleged breach of fiduciary duty. The defendant is immune

from suit, save and except to the extent that Crown immunity has been expressly lifted by statute. The defendant denies that any provision of the *CLPA* or of any other applicable legislation renders the defendant liable for claims of breach of fiduciary duty.

28. In the alternative, the defendant denies that it owed a fiduciary duty to the plaintiff or to the proposed class members. The defendant denies that the plaintiff and/or the proposed class members were at any relevant time under its power and control and puts the plaintiff to strict proof thereof. The defendant denies that there was special relationship between it and the plaintiff or proposed class members which required it to act in the best interests of any one of them. The defendant also denies the allegations at paragraph 184 of the Statement of Claim that it granted, underwrote, and/or guaranteed certain rights for LTCH residents and the allegations at paragraphs 187 and 189 of the Statement of Claim that the plaintiff and class members were in a relationship of trust, reliance, and/or dependence on the defendant.

29. Contrary to the allegations at paragraph 189 of the Statement of Claim, if the defendant owed any fiduciary duties, which is denied, the content of that duty would not be to ensure any particular outcome, but only to take reasonable steps.

30. In the further alternative, the defendant denies that it breached any fiduciary duties as set out at paragraph 191 of the Statement of Claim, or at all. In the further alternative, if the defendant breached any fiduciary duties, which is denied, the defendant denies that any such breach or breaches caused the plaintiff or proposed class members to suffer harm. If the plaintiff or proposed class members suffered harm (which is denied), any such harm was caused by others.

No Breach of the Canadian Charter of Rights and Freedoms (“the Charter”)

31. In respect of the allegations set out at paragraphs 192-202 of the Statement of Claim, the defendant denies that it breached the plaintiff’s and/or proposed class members’ rights under ss. 7 and/or 15 of the *Charter*, and puts the plaintiff to the strict proof thereof.

32. The defendant denies that it deprived the plaintiff or the potential class members of their rights to life, liberty, or security of the person as alleged at paragraphs 195-196 of the Statement of Claim. In the alternative, the defendant denies that any such deprivation was not in accordance

with the principles of fundamental justice.

33. The defendant denies that it discriminated against the plaintiff and potential class members based on their age as alleged at paragraphs 197-201 of the Statement of Claim.

34. In the alternative, the defendant's actions were justified pursuant to s. 1 of the *Charter*.

35. In the alternative, if the defendant breached the plaintiff's rights under ss. 7 or 15 of the *Charter* in a manner that cannot be justified under s. 1, which is denied, the defendant denies that an award of damages pursuant to s. 24(1) of the *Charter* is warranted. The defendant denies that *Charter* damages are functionally required to fulfill the objects of compensation, vindication of rights, or deterrence of future *Charter* breaches. Further, good governance concerns preclude an award of *Charter* damages. In the alternative, any functional considerations in favour of awarding *Charter* damages are negated by countervailing factors.

36. In the alternative, the defendant pleads that adequate alternative remedies are available to achieve the objects of compensation, vindication, and deterrence, such that *Charter* damages are neither appropriate nor just.

No Damages

37. In respect of the allegations at paragraphs 203-207, the defendant denies that the plaintiff or potential class members suffered any loss or damages. In the alternative, if the plaintiff or potential class members suffered loss or damages (which is denied), the loss or damages claimed were not caused by the defendant, or by any other person or persons for whom the defendant is in law responsible.

38. If the plaintiff or any of the potential class members suffered any loss or damages as alleged or otherwise (which is denied), then such loss or damages are excessive and too remote and the defendant puts the plaintiff to the strict proof thereof. Further, the plaintiff and any other potential class members have failed to mitigate same.

39. Moreover, the damages allegedly suffered by the proposed Family Class members, save and except any damages specifically authorized by s. 61 of the *Family Law Act*, RSO 1991, c. F-3 (and it is denied that any such damages were suffered), are not recoverable in law.

40. In any event, the issue of what damages, if any, were suffered by class members requires proof by individual class members. An aggregate assessment of damages would not be in conformity with s. 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

41. The defendant denies that its conduct warrants an award of punitive or aggravated damages.

42. The defendant pleads and relies on: the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17; the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; the *Long-Term Care Homes Act, 2007*, S.O. 2007 and O. Reg 79/10 enacted thereunder; the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 and all regulations enacted thereunder; the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17 and all regulations made and/or continued thereunder; the *Health Protection and Promotion Act*, R.S.O. 1990, c. H-7 and all regulations made thereunder; the *Family Law Act*, RSO 1990, c. F-3; the *Negligence Act*, R.S.O. 1990, c. N.1, and the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

43. The defendant asks that the action be dismissed, with costs.

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**SIMON NISBET AS LITIGATION
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- and -

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OF ONTARIO**

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**ONTARIO
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STATEMENT OF DEFENCE

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