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December 4, 2020

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Email: Brian.Sagar@gov.bc.ca

Attn: Brian Sagar, Senior Director

Dear Sirs/Mesdames:

Re: Long Term Care and Seniors Assisted Living in British Columbia

We have been retained as counsel by a group of individuals, most of whom are family members of residents in licensed long-term residential care and senior assisted living facilities throughout the province of British Columbia and others who have recently had family members in such facilities. Our clients are seeking urgent remedies to the harms being suffered by them and their loved ones as a result of visitation restrictions imposed in response to the COVID-19 pandemic, which include harm to physical and mental health, to dignity and to quality of life of their loved ones and related harms to themselves. The promise of a vaccine is good news, but unfortunately

cannot be counted on for many residents of care homes who may be in the last months, weeks or days of their lives.

We sent an initial communication by email to the Minister of Health and the Provincial Health Officer on November 25, 2020 requesting a discussion. Although we have had no response, we wish to again emphasize our clients' strong preference for a discussion toward solutions. As indicated in our initial communication, the Office of the Provincial Health Officer and the Ministry of Health are to be commended for the difficult and good work undertaken over the past several months to address the COVID-19 pandemic. We fully recognize that the public health and policy issues relating to long-term care and assisted living in this pandemic must be extremely challenging. We hope with this letter to bring perspective on the legal issues from the point of view of our clients.

As you know, the Report of the Seniors Advocate of British Columbia dated November 3, 2020 and the Howe Group Report to the B.C. Care Providers Association Board of Directors dated November 16, 2020 (the "Reports") articulate the nature and extent of the serious harms of the current pandemic measures on care home and assisted living residents and their families, the evidence of those harms, the need for urgent and immediate action and the reasons for the urgency. Those Reports also contain recommendations that could mitigate the harms, in particular the recommendations around the need for better and more consistent essential visits, the need for social visits and the need for testing. There has also recently been an increased call for regional approaches to mitigate the harms.

From a legal perspective, the existing isolation and visitation limits in long-term care and assisted living arguably violate the security of the person and liberty rights of residents of care homes and the rights of their families including our clients. Our clients are seeking urgent action to mitigate or rectify those violations.

We are currently not aware of any material update or revision to the existing COVID-19 long-term care and assisted living visitation policy since June 2020.

We are currently not aware of any evidence that family visits to care homes or to loved ones in palliative care have resulted in material COVID-19 transmission events.

Further, and in particular, we have begun to consider the nature of the existing visitation policy within the relevant statutory and organizational frameworks, the evidence around inconsistent implementation of the existing policy across care homes, the restrictive measures being imposed by care homes beyond that policy, the restrictions that prevent meaningful social visits, the nature and extent of the public health layers of protection that are in place and that have been attempted in care home settings, and how all of the foregoing affect the analysis of proportionality and of duties and standards of care.

The B.C. Civil Liberties Association has taken an interest in this matter and is copied on this correspondence. We are also copying other potentially interested parties. For the time being, we have not copied the health authorities.

<u>The Statutory and Policy Framework</u>

In our initial assessment of the statutory and policy framework, we have identified the following as relevant:

(i) There is a complicated matrix of oversight and responsibility for the operation and funding of long-term care and assisted living facilities in British Columbia. Within that complicated matrix — which involves the health authorities, medical health officers, facility licensing bodies and various stakeholder associations, among others — there are overarching statutory rights given to the individuals who have contracted to reside in those facilities, and corresponding obligations placed on all facility operators:

(a) Under the *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75, licensees have an obligation to operate their facilities "in a manner that will promote the health, safety and dignity of persons in care" and "the rights of those persons in care" (s. 7), including the right to "be treated in a manner, and to live in an environment, that promotes his or her health safety and dignity", "to be protected from … neglect", and "to receive visitors and to communicate with visitors in private" (Schedule, s. 2). Further, residents have "the right to transparency and accountability", including a right to "have ready access to copies of all laws, rules and policies affecting a service provided", and "to have his or her family or representative informed" of the same (Schedule, s. 4).

(b) In respect of facilities licensed under the *CCALA*, the right of residents to receive visitors is further enshrined by s. 57 of the "Residential Care Regulation", B.C. Reg. 96/2009, which provides that "[a] licensee must, to the greatest extent possible while maintaining the health, safety and dignity of all persons in care, ensure that a person in care may receive visitors of the person in care's choice at any time, and communicate with visitors in private".

(c) Similar obligations extend to facilities licensed under the *Hospital Act*, R.S.B.C. 1996, c. 200. Under s. 4 of the *Hospital Act*, the Schedule to the *CCALA*, and the rights guaranteed in that Schedule apply, *inter alia*, to all adult patients who reside in a private hospital licensed under Part 2 of the Act.

(ii) Under the *Public Health Act*, S.B.C. 2008, c. 28, the Provincial Health Officer and regional Medical Health Officers have a range of powers, including the power to issue mandatory emergency orders to address health hazards throughout British Columbia.

(iii) On May 19, 2020, the Deputy Minister of Health and the Provincial Health Officer issued Policy Communiqué 2020-01 to all Health Authority CEOs, which was thereafter supplemented in respect of long-term care and seniors assisted living by a BCCDC guideline document entitled "Infection Prevention and Control Requirements for COVID-19 in Long Term Care and Seniors' Assisted Living", published in June 30, 2020 (collectively, the "Policy"). We observe the following about the Policy:

(a) The Policy purports to require mandatory compliance; however, the statutory authority underlying the mandatory nature of the Policy is unclear. Some but not all health authorities in British Columbia have treated the Policy as being tantamount to a binding order. For example, while the Chief Medical Health Officer from Fraser Health has ordered under the *Public Health Act* that all long-term care and assisted living operators implement and comply with the BCCDC guidance which forms part of the Policy, other health regions have taken a different approach to "essential" and other visits (with some, like Interior Health, mandating what may arguably be more stringent restrictions, with others, like Northern Health and Island Health, apparently making no orders concerning visitor restrictions at all).

(b) The Policy provides for "essential visits" and "family/social visits". To what extent these categories overlap, if at all, is unclear. With respect to "essential visits", the Policy provides that essential visits "shall be limited to one visitor per patient/client within the facility at a time (except in the case of palliative/end of life care)". With respect to "family/social visits", the Policy provides that such visits "are intended to support the emotional well-being of clients/residents and are limited to a single designated visitor per client".

(c) Despite the lack of clarity, the Reports indicate that care home operators are operating in a manner that indicates that the Policy and related orders allow for only one essential visitor per resident.

(d) The Policy contains no restrictions on the duration or frequency of either "essential visits" or "family/social visits", nor does it prohibit visits from taking place in residents' private rooms.

(e) It is evident from the scheme of the *Public Health Act* that in exercising their statutory powers, the Minister of Health, the Provincial Health Officer, and regional Medical Health Officers must be guided by the public interest and the interests of those affected by their actions. Moreover, in exercising their statutory authority, all actors are bound by the *Canadian Charter of Rights and Freedoms*.

(f) While the *Public Health Act* sets out a clear mechanism for the review, reconsideration and reassessment of orders made under the Act, there is no prescribed mechanism for review of a "policy".

(g) To our knowledge, there have been no updates to the Policy since June 30, 2020.

It is evident from the Reports that no one clear or consistent approach to the "one visitor" policy has been adopted in licensed facilities throughout the Province, whether as a result of the Policy or regional orders made under the *Public Health Act*. It is equally evident that some measures and restrictions imposed and adopted by some health authorities and facility operators go beyond those outlined in the Policy, and that this overreach is materially affecting the rights and quality of life of those in care:

(i) In her November 3 report, the Seniors Advocate found that "individual care homes" have been "taking very different approaches to managing both essential and social visits", resulting in "widely divergent practices in care homes across the province" (pp. 6 and 28). For example, the Seniors Advocate made these findings (p. 2):

> When the visit restrictions were amended at the end of June, many family members thought they would once again take up their role as a vital care partner for their loved one. However, two months after visit restrictions were relaxed, the survey found the majority of current visits are only once per week or less and many of these visits are 30 minutes or less. Prior to the pandemic, most family members were visiting several times a week or daily for much longer periods of time.
>
> In the past, most family members would visit in the privacy of their loved one's room (75% of LTC residents live in a private room), but only two out of ten are currently able to enjoy these unobserved private visits. Currently, most visits are in common areas and almost one-third of visits are only permitted outside.

(ii) The Seniors Advocate has also observed that the June 28, 2020 guidelines which form part of the Policy have been "universally interpreted to mean that if you were receiving essential visits [prior to that date], your essential visitor would become your one designated visitor" (p. 10).

(iii) Echoing some of the same concerns as the Seniors Advocate, the B.C. Care Providers Association identified in its November 16 report "significant inconsistencies between communication and directives from the Ministry of Health and the health authorities", and observed that the "[a]ctions of the Province to limit the transmission of COVID-19 has had a detrimental impact on the rights of seniors and staff" (pp. 6 and 7).

Recent Mounting Evidence of Harm from the Policy and Resulting Orders and Operations

The Reports each describe in unambiguous terms the mounting evidence of harm to residents of long-term care homes and seniors residing in assisted living facilities throughout British Columbia as a result of the Policy, compounded by its inconsistent interpretation and application.

As the Seniors Advocate found (at p. 11):

> The reported visit frequency and duration of visits for the designated visitor are, on average, significantly shorter and less frequent than visits prior to the pandemic. For example, prior to the pandemic, 18% of LTC visits were daily, 41% were several times per week (but not daily), and only 4% were 30 minutes or less.
>
> Upon first visiting their loved one after the visit restrictions were amended, 61% of family members reported their overall impression was that their loved one seemed worse than when they last saw them and specifically identified:
>
> - 46% reported physical functioning was worse;
> - 58% reported cognitive functioning was worse; and
> - 58% reported their loved one's mood and emotional well-being was worse.
>
> These observations would support the need to be concerned about the unintended consequences of the visitor restrictions on those living in LTC/AL. Each quarter in LTC, we regularly assess residents on a number of indicators including physical function, cognitive function, mood and behaviour. On average, we see a worsening of condition in about 25% of residents. The observation of family members doubles that number for the first quarter (April 1 to June 30). The 7% rate of increase in the use of antipsychotics (and an additional 3% rate of increase in the use of antidepressants) over the time period of the visitor restrictions is an added warning sign of potential health impacts from visitor restrictions.

Moreover, the Seniors Advocate's report reveals that insofar as "essential visits" are concerned, and despite the best intentions of the Policy, almost half (45%) of essential visit applications have been denied by care homes (p. 9), and of those essential visits allowed, the majority were only once per week or less and one third of essential visits lasted for just 30 minutes or less (p. 10), representing a significant decrease from pre-pandemic conditions (p. 8).

Our clients have their own experiences of the serious harms described in the Reports.

Key Recommendations of the Seniors Advocate and the B.C. Care Providers Association

Recognizing the mounting evidence of harm from the current Policy and its resulting application, the Seniors Advocate and the B.C. Care Providers Association have made certain recommendations in the Reports. From the perspective of our clients, the key ones are as follows:

(i) **Greater autonomy and flexibility in relation to essential visits.** All residents of long-term care and assisted living facilities need the opportunity to identify an essential care partner who can visit frequently and provide those supports and services that are essential to the health, physical and emotional well-being of the residents (Report of the Seniors Advocate at p. 30). As the Seniors Advocate has stated, "[w]e need to formally recognize the role that some family members play as essential care providers for their loved one", and "[w]e need to respect that family members and residents are better able than care home administration to determine if their visits are essential to the health and well-being of residents" (p. 29).

(ii) **Expanding and clarifying the need for social visits.** In addition to visits from an essential care partner, residents of long-term care and assisted living facilities need social visitors, with the number and frequency of social visits appropriately balanced in light of both the risk of COVID-19 and the severe risks to resident health, happiness and quality of life resulting from long-term isolation and separation (Report of the Seniors Advocate at p. 30). The Seniors Advocate recommends that "[a]t a minimum, we need to allow for at least one social visitor (in addition to the essential care partner visitor) with provision for additional social visitors as determined by individual circumstances)" (p. 29; underline emphasis added). Similarly, while acknowledging some division among operators, the B.C. Care Providers Association has noted that providers "would like to see flexibility built into visitation such that community circumstances may dictate visits, rather than a provincial approach, particularly as restrictions need to resume" (p. 35).

(iii) **Deploying preventative and ameliorative testing.** We understand that the current approach to testing in long-term care and assisted living facilities is reactive, not preventative. Given the particular vulnerability of seniors to COVID-19, and the attendant harm to the physical and emotional well-being of residents (and their loved ones) felt as a consequence of the current Policy and its application, such an approach is insufficient. The Seniors Advocate and the B.C. Care Providers Association have both recommended the use of rapid testing in long-term care and seniors assisted living facilities (B.C. Care Report at pp. 10, 35, 45; https://globalnews.ca/news/7480423/bc-long-term-care-home-rapid-testing/). As the B.C. Care Report identifies, rapid testing for everyone entering a facility is one of the top priorities for addressing the second wave in long-term care and assisted living in our province (pp. 44-45).

Insofar as rapid testing may not be viable or appropriate in certain long-term care or assisted living settings, it remains the case that alternative forms of testing should be explored for deployment on a large scale in these setting, *e.g.* the mouth rinse and gargle sample collection deployed for school-aged children in British Columbia (more recently made available to adults at test collection centres in Vancouver Coastal Health, as well).

A proactive approach to testing in long term care and assisted living could help achieve minimal impairment of the rights of our clients and their loved ones — toward aiding in the avoidance of outbreaks, which in the current regime results in seriously harmful isolation and confinement to the resident, toward accelerating resolution of outbreaks, and toward creating not just safer but more opportunities for visitation. Both Reports recognize the foregoing as essential to the health, quality of life and well-being of residents in care and as being desired by residents.

The Relief Sought

Our clients, for themselves and for their loved ones, seek the following immediate relief:

(i) **Clarification about the meaning of "essential visits" and "social visits" in the Policy.** This clarification must address whether a resident's "essential visitor" is intended to be the same person as their designated "social visitor".

(ii) Clear directions from the Provincial Health Officer and the Minister of Health to the regional health authorities, the Director of Licensing under the *CCALA*, and all operators of long-term care and seniors assisted living facilities in the province **that the Policy, and any orders made or operational measures taken in relation to the Policy, must be carried out:**

(a) in a manner that respects the privacy rights of the residents of facilities to the greatest degree possible, in particular arranging for visits to take place in private rooms where residents reside in private rooms and in other private for residents who reside in shared rooms as much as can reasonably be accommodated;

(b) in a manner that accommodates a duration and frequency of visits from a resident's essential care partner that is commensurate to the resident's need for care and assistance from their loved one (with the resident and the essential care partner being given a significant voice in determining the level of need) — the essential care partner should arguably have access as do other care providers in the system;

(c) in a manner that recognizes and emphasizes the important role that essential care partners play in maintaining the physical health and emotional well-being of residents in care.

(iii) **Amendment to the Policy to clearly allow for social visitors in facilities in addition to the essential visitor.** Absent an outbreak, social visits should be allowed in addition to visits from an essential care partner. Reasonable limits could be prescribed in an amended policy to appropriately balance the risk, *e.g.* prescribing the duration and frequency of social visits in the short term; introducing testing (including the saline gargle tests) for all social visitors in addition to other reasonable layers of protection; perhaps coupled with a period of self-isolation by visitors between receipt of a negative test and their visit to a loved one. Regional allowances may also make sense for social visitors.

(iv) **Amendment to the Policy or a similar initiative to provide for the deployment of testing resources to facilitate visitation.** We re-iterate here the proposed shift from reactive to proactive testing in long-term care and seniors assisted living facilities.

If testing resources are scarce because of current demand from the general public, it would seem that those resources should be allocated to our clients and their loved ones and others in long-term care and assisted living who are among those at the highest risk both from COVID-19 and related harms. It has become known that many groups in society have remarkably lower risks from COVID-19 compared to people like our clients and their loved ones (see, for example, Liu et al., "COVID-19 in long-term care homes in Ontario and British Columbia", Canadian Medical Association Journal, early release September 30, 2020; Ioannidis, "Infection fatality rate of COVID-19 inferred from seroprevalence data", Bulletin of the World Health Organization, October 14, 2020).

Public resources should arguably be focussed and deployed as much as possible in favour of this high-risk group to mitigate the most serious matrix of harms they face.

If any of the relief sought can be considered and/or achieved by way of the review, reconsideration and reassessment mechanism contemplated in *Public Health Act*, then we ask that such process occur on an expedited and urgent basis, that we be immediately advised of the anticipated timeline, and that the results be communicated with the same urgency. If such process is not available on an expedited basis or at all for any reason, please advise.

Why the Relief Sought is Necessary and Fair

We consider that our clients and their loved ones have claims and remedies available to them under the *Charter of Rights and Freedoms*, particularly s. 7, and/or in tort, both in connection with harms that have become disproportionate and unacceptable under the existing Policy, and in connection with the choices made by government and operators in implementing the Policy and in preferring certain interests and rights over others.

We have no doubt that it is well understood that the need for balance in the Policy and the related orders of regional Medical Health Officers is a recognition of the need for proportionality. Proportionality is a cornerstone of every measure and analysis that involves potential infringement of rights in furtherance of another purpose and object for the public good.

Proportionality is a function of the context of risks and harms in a given situation. In this pandemic, the risks and harms have been evolving quickly. In caring for one of our province's most vulnerable populations, government and operators must recognize and respond quickly to this evolution. Failing to do so risks overbreadth, disproportionality, and breach of the rights and standards of care that exist both at common law and in statute:

(a) As indicated by the Report of the Seniors Advocate, the ultimate goal of long-term care and assisted living is to promote quality of life, not immortality (p. 30). Despite this purpose, quality of life is the very thing that has been severely compromised and harmed through the existing Policy and its application. As indicated by the Seniors Advocate, the matter of quality of life is urgent to citizens in long-term care and assisted living, together with their families, since the remaining life of those citizens is short, regardless of the status of COVID-19. Too much precious time has already been lost for our clients and their loved ones.

(b) As the Seniors Advocate has stated in her report, "the large majority of [survey] respondents — both residents and families — reported that the current visitor restrictions are not working for them and some referred to them as **inhumane**" (p. 28).

While about 300 residents of long-term care and assisted living facilities in British Columbia have died from COVID-19 from the start of the pandemic to date, each year in our province approximately 25% of residents of long-term care pass away (Report of the Seniors Advocate at p. 15). From the start of the pandemic, more than <u>4,500 residents have died from illnesses or conditions other than COVID-19.</u> For each of those people, the last months, weeks and days of many of those residents' lives was spent alone or lacking a meaningful opportunity to connect with their loved ones (Report of the Seniors Advocate at pp. 2, 15). That tragedy affects each and every resident.

(c) There is no evidence of any or material transmissions of COVID-19, of which we are aware, arising from non-staff hospital, palliative, or facilities visitations.

(d) It is well established that residents of facilities are among the most vulnerable to COVID-19. However, residents and their families are also unfortunately among those in our province suffering the most serious unintended consequences of measures intended to protect against COVID-19.

(e) Those with the greatest risk of COVID-19 should be given the greatest say in how they assess their risk and need for protection, and how they view the balance of risks. Respect for the life, dignity and security of these individuals, together with the principles of fundamental justice and the right to procedural fairness, demands that their voices are heard and respected. Their message is clear: quality of life is of paramount importance; residents and their families have a lower fear of COVID-19 and a greater fear of death from loneliness; and while for most British Columbians the promise of a vaccine will bring back many of the freedoms suspended during the course of this pandemic, that promise cannot be counted on for many residents of care homes who are in the last months, weeks or days of their lives.

(f) Much effort has been devoted to achieving balance in other spheres in British Columbia, allowing those spheres to manage in a safe way with minimal unintended harm. Schools have reopened with frameworks to allow children to attend and learn in person; businesses have been given a framework within which to viably operate so as to contribute to our economy and the livelihoods of employees; and where businesses and employees are unable to operate, access to provincial and federal financial support has been made available. The effort to strike the necessary proportionate balance of protecting the residents of facilities from COVID-19, while recognizing the utmost importance of promoting their quality of life, has so far fallen short.

(g) In light of the Reports, it is arguable that a "twin" public health hazard has emerged in continuing care by the measures taken to date to address COVID-19. That health hazard must be addressed with at least the same urgency and vigour as has been applied to addressing COVID-19.

As the Supreme Court of Canada recognized in *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, "the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly" (para. 62), and underlying the right to liberty and security of the person "is a concern for the protection of individual autonomy and dignity" (para. 64). Even provisions which are intended to protect the most vulnerable in our society — or which are sincerely aimed at the preservation of life — may infringe the rights guaranteed under s. 7 of the *Charter* in a manner that violates the principles of fundamental justice. Those principles which safeguard against a violation under s. 7 include overbreadth, gross proportionality and a

duty of procedural fairness. See also: *British Columbia Civil Liberties Association* v *Canada (Attorney General)*, 2018 BCSC 62, appeal allowed in part 2019 BCCA 228.

In the present circumstances, we consider that our clients and their loved ones have a strong basis for establishing a violation of their rights under s. 7 of the *Charter*, including on the basis of overbreadth and gross proportionality, and that the steps taken by government in responding to the risk of COVID-19 in care homes are, in view of the evolution and duration of this pandemic, neither minimally impairing nor justifiably proportionate. The aforementioned relief sought could mitigate the violation of rights and the arguably tortious harm that is occurring.

We look forward to hearing from you at your earliest opportunity. Thank you.

Yours truly,

Nathanson, Schachter & Thompson LLP
Per:

Karen L.M. Carteri
KLC/jb/syb

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