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Ontario COVID-19 commission suggests public-private LTC model in final report

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On April 30, 2021, the Honourable Frank N. Marrocco, Angela Coke, and Dr. Jack Kitts, commissioners of Ontario's Long-Term Care COVID-19 Commission (the Commission), submitted their final report.

Background

Struck in the midst of the COVID-19 pandemic, the Commission had a mandate to investigate how and why COVID-19 spread in long-term care (LTC) homes, actions taken to prevent the spread, and how key elements in the existing long-term care system affected the spread of COVID-19.

The final report was the product of more than 170 formal meetings with more than 700 individuals. The Commission also received and considered some 300 written submissions. The Commission made 85 recommendations, which included:

1. Pandemic preparedness
2. Addressing the aftermath of COVID-19 for residents and staff
3. Infection prevention and control
4. Strengthening health care system integration
5. Improving resident-focused care and quality of life
6. French-language services
7. Addressing the human resources challenges
8. Operational and LTC development funding
9. Increasing accountability and transparency in LTC
10. Comprehensive and transparent compliance and enforcement
11. Health Protection and Promotion Act investigations
12. Government's Response to the Commission's Report

Ontario's LTC needs growing

It should not come as a surprise that Ontario's population is aging. The scale of required capital is many folds more than the budget currently allotted to LTC. The Commission found the province needs to create 55,000 more LTC beds by 2033 just to maintain

current capacity, which would cost approximately $19 billion. The Commission further estimates that Ontario will need between 96,000 and 115,000 new beds by 2041 to keep up with the growing demand for LTC placements. If this is so, the cost will exceed $33.6 billion in current dollars, or $1.68 billion a year for 20 years.

While the Commission heard repeatedly that COVID-19 has seriously undermined the reputation of for-profit homes in the LTC sector, necessitating a change in the status quo, it also recognized that there is a role to be played by private capital, given the massive capital costs of building new LTC homes.

In that regard, the Commission made a notable suggestion on the model for developing and funding future LTC homes:

> The government should separate the construction of long-term care facilities from the care provided in those facilities… For example, construction of long-term care homes would continue to be open to the private sector so that the capital required to construct the facilities could still be accessed. The province would pay to use the facility as a long-term care home, thereby providing a return to the investors who put up the capital to build. The province would license not-for-profit operators or for-profit operators who are mission-driven rather than dividend-driven to manage the long-term care home. The province would provide sufficient funds for operations in a manner consistent with the way it currently provides operational funding.

The public-private model

In our experience, the public-private model suggested by the Commission would be most feasible when a public or quasi-public entity controls the underlying lands. This could include lands owned by the province, municipalities, hospitals and school boards.

When considering the use of public lands to enter into such an arrangement, it will be important to consider any regulatory constraints or approvals. For example, a lease of such lands by a hospital would likely require consent under the *Public Hospitals Act*. It may be necessary for the province to amend regulations to remove regulatory barriers to encourage this particular development model.

When creating this type of public-private model, a number of legal issues will need to be considered, including but not limited to, land transfer tax, HST, property tax, zoning/land use issues, and third-party financing engagements.

In addition, although not specifically raised by the Commission, any public-private models should address the ongoing responsibility for repairs and maintenance of the LTC home. Over the lifecycle of a home, which can span decades, material repairs and replacement will be required, such as roof replacement, parking lot resurfacing, building systems repairs and modernization, etc. While the Commission recommends that the operation of the home should be the responsibility of mission-driven operators (those that focus on the care provided, not profits), it remains to be seen whether the private sector certain responsibilities throughout the lifecycle of the home.

Questions remain on how attractive the public-private model suggested by the Commission may be for privately owned property, particularly in more urban environments where land values could be maximized by other types of real estate development, such as condominiums.

To encourage the development of new LTC homes on private lands, incentives will foreseeably be required to incorporate such land use as part of a larger mixed-use development. This can be achieved by providing significant financial incentive, by encouraging LTC as a community benefit in the land approvals process, or by tying the development of LTC homes to increased density for other uses, potentially on the same site. Once constructed, a mission-driven operator can run the long-term care home, as suggested by the Commission.

In addition to broadening land use permissions to include LTC uses in planning instruments such as zoning by-laws, municipalities have the opportunity to incentivize this type of development through municipal development charges and parkland dedication by-law regimes, and their forthcoming community benefits charge strategies, by creating full or partial exemptions for LTC uses.

Takeaways

Ultimately, much will depend on whether the Commission's suggestion will be accepted, and, if so, how the province would incentivize such a public-private funding model for the construction of LTC homes to see if it is an attractive model for private-sector participation.

In our experience, if the model is attractive to the private sector, it will be critical to have an established legal framework addressing risk, cost sharing, dispute resolution and governance (amongst other issues), in order for the public-private arrangement to meet the objectives of both parties.

Reach out to your BLG lawyer, or any of the key contacts below, if you have questions regarding the Commission's report or the proposed public-private model.

By

Katie Butler, Brennan M. Carroll

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blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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