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November 12, 2008

The Honourable David Caplan
Minister of Health and Long-Term Care
Equity Unit, Health System Policy and Relations Branch
Health System Strategy Division
80 Grosvenor St, 8th Floor
Hepburn Block, Queen's Park
Toronto, ON M7A 1R3

Subject: Proposed Regulation: The Engagement of the Francophone Community pursuant to Section 16 of the *Local Health System Integration Act, 2006*.

Dear Minister,

On September 13, 2008, you tabled a proposed regulation on the engagement of the Francophone community pursuant to Section 16 of the *Local Health System Integration Act, 2006*, S.O. 2006, c.4 (hereafter “the *LHSIA*”). In this regard, I am pleased to provide you with a number of comments about this proposed regulation. I should point out that my propositions must not be taken as formal recommendations.

To date, the Office of the French Language Services Commissioner has received close to eighty complaints up to this point about the proposed regulation. These complaints come either from individuals, from community organizations or involved in the health sector. I sincerely believe that, with a number of modifications, including some substantial ones such as the addition of a French language services coordinator, an acceptable solution can be found that respects both the purpose of *LHSIA* and the legitimate concerns of the Francophone communities.

The goal of the *LHSIA* is to promote local appropriation of the health care system for the twofold purpose of knowing the community better in order to better serve it and of being able to be directly accountable to the community. Ontario's Francophones are no different from other members of the local community; they also want to participate actively in the decision-making process while at the same time ensuring that there is effective accountability. This is a matter of governance, which is not to be confused with management, which is not at issue here at all.

The position and modification proposed by the Office of the French Language Services Commissioner is divided into two parts. The first provides a brief overview of the legislation with respect to French-language services. The second discusses the proposed regulation as well a series of proposals for modifying the proposed regulation, notably through the addition of a French language services coordinator.

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PART 1 – THE LEGISLATION

1. The *French Language Services Act* and the health sector

a) The *French Language Services Act* in general

The *French Language Services Act*, R.S.O. 1990, c. F.32 (hereafter “the *FLSA*”) sets out the Government of Ontario’s obligation to ensure that its services are delivered in French,¹ and the right of the people to use French to communicate with any head or central office of a government agency or institution of the Legislature or with a local office in a designated region.²

The term “government agency” is defined explicitly in the *FLSA*:

- (a) a ministry of the Government of Ontario, except that a psychiatric facility, residential facility or college of applied arts and technology that is administered by a ministry is not included unless it is designated as a public service agency by the regulations;
- (b) a board, commission or corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council;
- (c) a non-profit corporation or similar entity that provides a service to the public, is subsidized in whole or in part by public money and is designated as a public service agency by the regulations;
- (d) a long-term care home as defined in the *Long-Term Care Homes Act, 2007* that is designated as a public service agency by the regulations, other than a municipal home or joint home established under Part VIII of the *Long-Term Care Homes Act, 2007*, or a home for special care as defined in the *Homes for Special Care Act* that is designated as a public service agency by the regulations;
- (e) a service provider as defined in the *Child and Family Services Act* or a board as defined in the *District Social Services Administration Boards Act* that is designated as a public service agency by the regulations.

The Court of Appeal of Ontario has confirmed that “*it was within the overall context of steady progression and advancement of services in French that the FLSA was introduced and passed in 1986.*”³ In the same decision, the Court of Appeal had this to say about the underlying purposes and objectives of the *FLSA*:

[143] The legislative history and the comments of the members of the legislature when the *FLSA* was enacted permit this court to draw a number of inferences and conclusions about the underlying purposes and objectives of the *FLSA* and the intention of the legislature enacting it. One of the underlying purposes and objectives of the Act was the protection of the minority francophone population in Ontario; another was the advancement of the French language and promotion of its equality with English. These purposes coincide with the underlying unwritten principles of the Constitution of Canada. As already stated, underlying constitutional principles may in

¹ Section 2, *FLSA*. “*The Government of Ontario shall ensure that services are provided in French in accordance with this Act.*”

² Section 5(1), *FLSA*. “*A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.*”

³ *Lalonde v. Ontario (Health Services Restructuring Commission)* (2001), 56 O.R. (3d) 577 at para 141.

certain circumstances give rise to substantive legal obligations because of their powerful normative force.⁴

The *FLSA* must be interpreted in light of the fundamental constitutional principle of the respect and protection of minorities. Consequently, it must receive a broad and liberal interpretation, in accordance with its objectives of promoting and protecting Ontario's Francophone community. The Ontario Court of Appeal also recognized the quasi-constitutionality of the *FLSA*.

In addition to the recognition of its language rights, Ontario's Francophone community needs institutions in order to develop and thrive. Public recognition of the language, i.e., status and the institutional support given to the community are key factors of development of the francophone community.

Thus, the principle of substantive equality has value when it is accompanied by recognition of the right of the Francophone community to participate in and manage the institutions that are essential to its development. The battle to keep Montfort Hospital open is a reminder of the importance of the connection between a community's institutions, public recognition of the community by the government, and the preservation of Ontario's Francophone heritage for future generations, as indicated in the preamble to the *FLSA*.

Government agencies play a vital role into the enhancement of the French speaking communities in Ontario. In speaking with government agency administrators, I often emphasize the importance of clearly understanding the needs of their target Francophone clientele. It is simply a question of excellence in a modern public service.

b) The *FLSA* in the context of health

Any decrease in the health services that are offered to the Francophone community and any action that would compromise the training of health professionals in French "would increase the assimilation of Franco-Ontarians."⁵ Health institutions play a positive, determining role in the promotion of Francophone communities.

In *Lalonde* (also known as the Montfort case), the Divisional Court and the Court of Appeal of Ontario recognized that health institutions have a broader institutional role than the provision of health care services. "This larger institutional role includes maintaining the French language, transmitting francophone culture, and fostering solidarity in the Franco-Ontarian minority". In this decision, Montfort Hospital was described as "an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario."⁶

The courts have employed a broad, liberal interpretation of the *FLSA*. In the context of health, the Court of Appeal of Ontario defined the term "services" in Section 5 of the *FLSA* as referring to the health care services offered at the time Montfort Hospital was designated under the *FLSA*.⁷ Thus, the Court determined that the Health Services Restructuring Commission's decision to decrease the health services offered by Montfort Hospital ran contrary to the *FLSA*.

The designation of an institution under the *FLSA* has been interpreted as granting not only the right to health care services in French but also the right "to whatever structure is

⁴ *Lalonde, supra* [143].

⁵ *Lalonde, supra* [162].

⁶ *Lalonde, supra* [181].

⁷ *Lalonde, supra* [160].

necessary to ensure that those health care services are delivered in French”.⁸ It follows that a decision—even a discretionary one—that modifies the services that are offered by a health institution designated under the *FLSA*, even the quality of those services “cannot simply invoke administrative convenience and vague funding concerns as the reasons for doing so”.⁹

What emerges clearly from *Lalonde* is that the courts have recognized the important role that health institutions play in the protection, promotion, and development of Ontario’s Francophone communities. The *FLSA* must be interpreted broadly and liberally, in order to protect the important role played by these health institutions.

2. The Local Health System Integration Act, 2006

a) Guiding Principles

The *LHSIA* created a mechanism by which health resources in Ontario could be analyzed and, potentially, integrated by a regional agency, i.e., the Local Health Integration Network (hereafter “the LHIN”).

The preamble to the *Act*:

The people of Ontario and their government,

f) believe the health system should be guided by a commitment to equity and respect for diversity in communities in serving the people of Ontario and respect the requirements of the *French Language Services Act* in serving Ontario’s French-speaking communities;

The legislator clearly recognizes the remarks of the Ontario Court of Appeal in *Lalonde* with respect to the important role that health institutions play to preserve Francophone communities.

The purpose of the *LHSIA* is stated in Section 1 of the *Act*:

The purpose of this Act is to provide for an integrated health system to improve the health of Ontarians through better access to high quality health services, co-ordinated health care in local health systems and across the province and effective and efficient management of the health system at the local level by local health integration networks.

The legislator indicates here its clear will to allow planning and management directly into the hands of LHINs.

b) The Role of the Ministry of Health in the Integration of the Health System

The Ministry is gradually removing itself from the daily administration of the system, in order to focus on the design, funding, monitoring, and development of strategies. This is a form of stewardship. This is what the *LHSIA* provides.¹⁰

⁸ *Lalonde, supra* [162].

⁹ *Lalonde, supra* [168].

¹⁰ *LHSIA*, Section 14(1).

To advise the Minister on health service delivery issues related to Francophone communities and on priorities and strategies for the provincial strategic plan related to those communities the *LHSIA* states that the Minister must establish a “French language health services advisory council”.¹¹ Such a council was established last year.

The *LHSIA* states that the Minister shall seek the advice of “province-wide health planning organizations that are mandated by the Government of Ontario.”¹²

c) The Local Health Integration Networks

The *LHSIA* created new agencies for the management of the health system, i.e., the “local health integration networks” (“the LHINs”). Each network is an agent of the Crown¹³ and has a mission:

- to promote the integration of the local health system to provide appropriate, co-ordinated, effective and efficient health services;
- to identify and plan for the health service needs of the local health system in accordance with provincial plans and priorities and to make recommendations to the Minister about that system, including capital funding needs for it;
- to engage the community of persons and entities involved with the local health system in planning and setting priorities for that system, including establishing formal channels for community input and consultation;
- to ensure that there are appropriate processes within the local health system to respond to concerns that people raise about the services that they receive;
- to evaluate, monitor and report on and be accountable to the Minister for the performance of the local health system and its health services, including access to services and the utilization, co-ordination, integration and cost-effectiveness of services;
- to participate and co-operate in the development by the Minister of the provincial strategic plan and in the development and implementation of provincial planning, system management and provincial health care priorities, programs and services;
- to develop strategies and to co-operate with health service providers, including academic health science centres, other local health integration networks, providers of provincial services and others to improve the integration of the provincial and local health systems and the co-ordination of health services;
- to undertake and participate in joint strategies with other local health integration networks to improve patient care and access to high quality health services and to enhance continuity of health care across local health systems and across the province;
- to disseminate information on best practices and to promote knowledge transfer among local health integration networks and health service providers;
- to bring economic efficiencies to the delivery of health services and to make the health system more sustainable;
- to allocate and provide funding to health service providers, in accordance with provincial priorities, so that they can provide health services and equipment;

¹¹*LHSIA*, Section 14(2).

¹²*LHSIA*, Section 14(4).

¹³*LHSIA*, Section 4.

- to enter into agreements to establish performance standards and to ensure the achievement of performance standards by health service providers that receive funding from the network;
- to ensure the effective and efficient management of the human, material and financial resources of the network and to account to the Minister for the use of the resources; and
- to carry out the other objects that the Minister specifies by regulation made under the *LHSIA*.

Like the Ministry, each LHIN shall develop a local strategy, designated under the *Act* as an “integrated health service plan”. This plan must include “a vision, priorities and strategic directions for the local health system and shall set out strategies to integrate the local health system in order to achieve the purpose of [the *LHSIA*]”.¹⁴

In a rapid glance, one could see immediately that the responsibilities are enormous and the task, colossal.

Unlike the Minister, the LHINs do not have an obligation to create a French language health services advisory council; however, they must engage the community in the region served in the development of the integrated health services plan “on an ongoing basis”.

Where the Francophone community is concerned, the *LHSIA* calls for the LHIN to engage this community through its French language health services planning entity. Unlike the term “community”, the term “French language health services planning entity” is not defined in the *Act*. However, the legislator did indicate that the French language health service planning entities must be designated by regulation, so that the LHINs are required to engage them in their planning.

LHINs are government agencies under the *FLSA*. Naturally, because of the explicit obligation to respect the principles of the *FLSA* in the integration of health services, LHINs located in the designated regions must, in the development of these plans, engage the Francophone community “on an ongoing basis”.

The legislator chose to stipulate that the LHINs must engage the community “on an ongoing basis”, which must mean more than mere consultation. The members of the community must have meaningful participation in the development of the service plan and in the setting of priorities.

PART 2 – THE PROPOSED REGULATION

The Francophone community participated in the consultations that led to the enactment of the *LHSIA* in 2006 and to the establishment of the LHINs. One of the main fears of the Francophone community was that its needs and priorities would get played down or lost in the process of analyzing the needs and priorities of the majority of the population. After all, a community that is more adequately served by its health system is a healthier community. The Francophone community understands this principle—which is exactly why it created institutions and networks in order to more fully understand its needs, collect reliable data, and thus more adequately serve its population.

With the inclusion of the LHINs’ obligation to engage the Francophone community via a French-language health services planning entity, the *LHSIA* was not a political compromise; rather, it was an intelligent means of providing service to the Francophone community in

¹⁴*LHSIA*, Section 15.

another way, based on its specific needs. Each LHIN must be capable of assuming full management of public spending for the area it serves. The planning of health services for the Francophone population, on the other hand, will be overseen by a French language planning entity. This is what the *LHSIA* states and this is what the Francophone community understands the *Act* to state.

Main concerns with the proposed regulation with possible solutions

1. Advisory Committees versus French-language Planning Entities

Clearly, there is an issue here that must be addressed. The proposed regulation calls for the creation of committees pursuant to Section 16 of the *LHSIA*. However, the *LHSIA* calls for French language health service planning entities.

The legislator chose to make certain each LHIN are aware of their own responsibilities toward the Francophone community without discarding the vitally important organizations that are already working within the health system, in French, hence, the reference to the French language health planning entity in the *LHSIA*. It is clearly not a mistake from the legislator but a clear indication of its will that LHINs associate themselves with the vitally important organizations. The impression must not be given that the system is starting all over again, or that all of the expertise and networking that has been accomplished in recent years, indeed for many years, is being set aside.

The proposed regulation must address the establishment of French language health service planning entities. Having said this, I am not convinced that a common definition exist within the Francophone stakeholders as well as within the ministry itself. I believe it to be very important that we were to agree to a common definition.

Several stakeholders contend that there is a major flaw here because failure to consult a major player in the system—the four existing French language health service networks that are already active in the planning of French-language health services—runs counter both to the object of the *LHSIA* to consult health stakeholders in the community and to the object of the *FLSA* to ensure the protection and promotion of Francophone communities.

What should the French language health service planning entities look like? Some stakeholders are recommending using the existing French language health service networks, one of which has already been formally recognized by the Ministry of Health and Long-Term Care. They state that this would avoid the creation of a parallel health care planning structure.

Others could legitimately claim that this is not a good idea and that it should be possible to deal directly with the LHINs, without going through an intermediary.

Quite apart from a name change, other changes are necessary in terms of resources, oversight of these entities, and LHIN accountability for its obligations under both the *LHSIA* and the *FLSA*.

In my opinion, there is an important role for the French language health service planning entities, for each of the LHINs, and for the networks and other vital institutions in the community.

2. Composition of the French language health service planning entities

The proposed regulation indicate that the composition of the committee, assuming it will now be an planning entity, consist of individuals who represent the diversity of the Francophone community and who are involved in or affected by the local health system.

The proposed regulation also states that individuals appointed to these entities must include members of the Francophone community and representatives of the health care sector that are connected to the community and that are involved in the planning and delivery of health care in the local area, including community organizations, institutions of learning, members of regulated health professions, and health service providers.

Some of the LHINs have already taken steps in this direction, sometimes dealing directly with the Francophone network in their region.

The two main concerns are that these new planning entity would not be composed in majority by Francophones and that they would be left alone, without resources and support. The first concern is resolved with the wording of the proposed regulation.

As for the second concern, it seems to me that it is founded. I will address the issue further down.

3. Mandate of the French language health service planning entities

Section 2 of the proposed regulation describes the activities of the French language health services planning entity. This seems fairly complete, except for a few key elements such as the **collection of reliable data** on the language question in order to more clearly identify the problems and issues of the Francophone communities.

4. Oversight and Resources of the French language health service planning entities

Although the composition of these new committees appears to be adequate, the fact remains that they act in an advisory capacity, and there is no indication of adequate resources or of follow-up on their recommendations. This is one more reason to change the proposed regulation to provide for French language health planning entity.

The LHINs are responsible for ensuring that the *FLSA* is respected because they are new government agencies within the meaning of the *Act*.

In my first annual report, I stated emphatically that it was critically important to take French language services into consideration right from the policy, program, service, and product design stage. I conducted an in-depth analysis of the role of the ministries' French language services coordinators. Section 13 of the *French Language Services Act* states that a French language services coordinator shall be appointed within each ministry. The legislator's desire to ensure that the coordinators had direct access to their respective deputy ministers was to facilitate the coordinator's work of planning, internal liaison, and follow-up. If the coordinator were actively involved in each ministry's strategic planning process, it would be easier to integrate the notion of French-language services that are useful and effective for the well-being of Ontario's Francophone communities.

The French language services coordinator's primary responsibility, within each ministry, is to supervise the integration of French-language services into the ministry's short-, medium-,

and long-term strategy. Thus, the French language services coordinators play an advisory role with respect to needs, priorities, and liaison, both for the ministry and for the Francophone communities.

Moreover, it is to be hoped that with direct access to the ministry's chief administrator, this person is in a position to influence the design of the ministry's strategic directions, as is the case with the general directors of the administration.

5. Include a Coordinator in the Proposed Regulation

The LHINs are new government agencies. As such, **they must have a French language services coordinator**. The proposed regulation should provide for this obligation.

The primary activity of the French language services coordinator within each LHIN would be to ensure follow-up of the activities of the French language health services planning entity. The coordinator should also be able to directly influence the strategic planning and other directions of the entire LHIN. This new role should also be described in the proposed regulation.

I am well aware of two things. First, it is a proposition that have been developed through the prism of my role as the French Language Services Commissioner and not as a specialist in the health sector. Second, I am also aware that the actual coordinator system in the OPS is flawed, thus my recommendation of changes in my first Annual Report. Nonetheless, this solution has the merit of placing the LHINs' responsibility with respect to French-language services front and centre.

6. Accountability

In order to help the LHINs to fulfill their responsibilities towards the Francophone population, the legislator provided for the establishment of French language health service planning entities. These entities will be issuing recommendations. How will we make sure that the LHINs will make the proper follow-up to these recommendations? Who will provide the follow-up?

The LHINs are government agencies within the meaning of the *FLSA*. Consequently, they have a responsibility to ensure that the French language service requirements are respected in their respective local areas. Within the meaning of the *FLSA*, it is the LHINs that are accountable for this to the Francophone population.

Via the LHINs, the legislator also provided for local appropriation of decision-making. This decision-making must comply with the objectives of the *LHSIA* and the *FLSA*. If a LHIN failed to follow the recommendations of its French language health services planning entity, it must be able to justify this decision. Let us be clear: the LHINs have a duty to make decisions. And they must account for these decisions publicly. But an annual report is not enough. **Other accountability measures must be put in place to reassure the population, notably the Francophone population, that the statutes, including the *FLSA*, will be complied with.**

If a LHIN is unable to justify its decision, then it has failed to fulfill both its mandate under the *LHSIA* and its obligations under the *FLSA*. Clearly, in such situations, the role of the Ministry is to ensure that the entities respect the law. The Ministry should already be thinking about the possible consequences of a failure to meet the requirements of the legislation.

I believe that this is a very important, indeed, a fundamental issue. As would be true for the general population, it would be unacceptable for Ontario's Francophones if a government agency, i.e. a LHIN, were unable to justify a decision that did not appear to reflect the recommendations of its French language health services planning entity.

The Ministry already appears to have some interesting options for accountability. These must be provided for in the regulatory framework. The proposed regulation should also include clear provisions on compliance with the obligations under the *FLSA*. The proposed regulation should also provide clear indicators of performance excellence in the area of French-language services.

To further strengthen accountability between the planning entity and the LHIN, the proposed regulation should provide for at least one annual meeting prior to any decisions with respect to health service planning.

For too long, French speaking communities have seen a clear lack of accountability from many ministries, agencies or service providers, specially in the health sector, in regards to the respect of the *FLSA*. Now that Francophone communities are better organized, have made significant progress toward self identifying problems and solutions in health, it would be a great shame if we were to rebuilt from scratch. No one is asking for a parallel system, but for a certainty that we will work collectively in the interest of the population. A clear regulation is essential.

7. Who would be the French language services coordinator for each LHIN?

The French language services coordinator could be a person hired specifically for this purpose. The coordinator could be someone who is already an employee of the LHIN who would take on additional responsibilities.

The coordinator could also be a **corporation**. This opens up the possibility that an existing French-language health network could assume the role of coordinating the planning activities of the French language health services planning entity. In the event that the French language services coordinator is a corporation, the proposed regulation could stipulate that it designate someone to ensure follow-up with the LHIN and to participate in discussions on the LHIN's health system planning and directions.

8. A group of LHINs

The proposed regulation provides for the possibility that two or more LHINs will jointly establish one committee (assuming that this is now a French language health services planning entity). This is a very viable possibility. For example, there are no fewer than five LHINs operating in the Greater Toronto Area. If there is only one Francophone seniors' residence in the region, it is highly likely that Francophone seniors will gravitate to this residence from all parts of the GTA. This makes it desirable to have linkages between the LHINs and, therefore, for them to have a single French language health services planning entity.

The proposed regulation should provide for each French language health services planning entity to have a French language services coordinator. As stated above, this role could be given to a corporation. Costs and resources could be shared proportionally by the LHINs in the group, pro-rated to the number of Francophones served by each LHIN in the group.

The grouping of LHINs seems logical. Unfortunately, Francophones have often had the experience of a wide gap between what seems logical and what actually happens. In order to avoid lengthy discussions amongst the LHINs, the Ministry should give serious consideration to using its influence, by means of its regulatory powers or some other means, to ensure that the LHINs form groups to establish a French language health services planning entity and that they do so without undue delay.

Conclusion

To conclude, as it now stands, the proposed regulation contains serious flaws. Strictly in my role as French Language Services Commissioner and acting upon my legislated mandate to analyze compliance with the *FLSA*, I have exposed these flaws and attempted to offer pragmatic solutions. Having said this, it appears clearly to me that more consultations, this time with key stakeholders, will be necessary.

I hope that you will find my comments useful, and I remain,

Yours truly,

A handwritten signature in black ink, appearing to be 'François Boileau', with a long horizontal flourish extending to the right.

Commissioner François Boileau