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## Brief concerning the revision of Ontario *Regulation 398/93* and revocation of the designation of Penetanguishene General Hospital

Submitted to the Minister of Francophone Affairs

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## 1. Executive Summary

The process of designating and revoking the designation of agencies under the *French Language Services Act*<sup>1</sup> requires the ongoing participation and co-operation of a number of government actors to meet the requirements and avoid any service gaps. In the case of a healthcare agency, the actors concerned are the Ministry of Health and Long-Term Care, the Ministry of Francophone Affairs, the Local Health Integration Network (LHIN) and the French Language Health Planning Entity (Entity” or “Entities”).

With its *Proposed Amendment to Ontario Regulation 398/93*, the Ministry of Francophone Affairs is requesting comments on the revocation of the designation of Penetanguishene General Hospital. This public consultation is late and redundant. In 2008, before the first of the many mergers and status changes affecting Penetanguishene General Hospital, including the transfer of its services to Georgian Bay General Hospital (“GBGH”) the Ministry of Francophone Affairs and the Ministry of Health and Long-Term Care should have studied and respected the process described in the Act for revoking a designation.

That process was not followed, and consequently, the government actors are in violation of the Act. These failures had serious consequences on the delivery of quality French-language health services to Francophone patients.

The Commissioner recommends a series of specific measures regarding, in particular, accountability, organizational effectiveness and rapid identification of service gaps, for the purpose of remedying that violation and also preventing future violations of this kind.

## 2. Background

### 2.1. *Legal and regulatory framework for designating and revoking the designation of a public service agency*

Under the Act, there is a process by which publicly funded public service agencies can be designated by regulation, *Ontario Regulation 398/93, Designation of Public Service Agencies* (“the Regulation”). Penetanguishene General Hospital received partial designation in 2002, and GBGH in 2017. The following services are designated:

- ambulatory care programs,
- finance,
- human resources, and
- telecommunications services (“the designated services”).<sup>2</sup>

In the event that a designated service must, for extrinsic reasons, be removed or modified, the Act provides the government with some latitude – sections 7 and 10:

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<sup>1</sup> *French Language Services Act*, R.S.O. 1990, c. F.32 (“the Act”).

<sup>2</sup> The names of the services were modified, without consequence, when they were transferred from Penetanguishene General Hospital to GBGH.

7 The obligations of government agencies and institutions of the Legislature under this Act are subject to such limits as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made.

[...]

10 (1) This section applies to a regulation

- (a) exempting a service under clause 8 (c);
- (b) revoking the designation of a public service agency;
- (c) amending a regulation designating a public service agency so as to exclude or remove a service from the designation.

(2) A regulation to which this section applies shall not be made until at least forty-five days after a notice has been published in *The Ontario Gazette* and a newspaper of general circulation in Ontario setting forth the substance of the proposed regulation and inviting comments to be submitted to the Minister.

(3) After the expiration of the forty-five-day period, the regulation with such changes as are considered advisable may be made without further notice.

First, by virtue of its obligations under section 7, the ministry responsible for monitoring the designated agency must be able to show that “all reasonable measures and plans for compliance with this Act have been taken or made” before moving forward with revoking the designation. Hence, if the ministry has to restrict the provision of services, it must make certain that that restriction is necessary within the meaning of the Act. The Ministry of Francophone Affairs is responsible for providing ministries and government agencies with advice during the process, approving the designation request and making the appropriate arrangements to have the Regulation amended.

The bar for justifying a revocation or a reduction in services is high. In *Lalonde v Ontario*, the Court of Appeal of Ontario held that “[t]he word ‘necessary’ in this context (in section 7) would appear to mean that existing services can only be limited when this is the only course of action that can be taken”<sup>3</sup> (our underline), and that

“Although it is impossible to specify precisely what is encompassed by the words ‘reasonable and necessary’ and ‘all reasonable measures’, at a minimum they require some justification or explanation for the directions limiting the rights of francophones to benefit from Montfort as a community hospital.”<sup>4</sup>

Second, if the ministry can justify the revocation, it has to fulfil its obligations under section 10 and publish a notice announcing the amendment of the Regulation in *The Ontario Gazette* and a newspaper of general circulation in Ontario for at least 45 days.

In the case of a transfer of services between a designated agency and a non-designated agency, two amendments to the Regulation are required:

- (1) an amendment designating the non-designated agency as a government agency under the Regulation (satisfying all the prerequisites that that entails); and
- (2) an amendment to the Regulation revoking the designated agency’s designation, which amendment must be made in accordance with the revocation procedure set out in sections 7 and 10 of the Act.

The Court of Appeal also pointed out that simply directing the institution to which the services will be transferred to request designation is not a “reasonable measure” within the meaning of section 7.<sup>5</sup>

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<sup>3</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA) (“*Lalonde v Ontario*”), at para. 164.

<sup>4</sup> *Lalonde v. Ontario*, at para. 166.

<sup>5</sup> *Lalonde v. Ontario*, at para. 165.

The government cannot make regulatory amendments as it pleases: the Court of Appeal was adamant that the Lieutenant Governor's discretion to make regulations is not absolute when it comes to language rights. In addition, the government "cannot simply invoke administrative convenience and vague funding concerns as the reasons" for limiting designated services<sup>6</sup>. Any "downward revision" of language rights may be subject to a revision based not only on compliance with the Act, but also on the unwritten constitutional principle of minority protection.

Third, designated services cannot be reduced in frequency or quality during the process of being transferred from a designated institution to a designated or non-designated institution.

## 2.2. Chronology of events

In 2002, Penetanguishene General Hospital received partial designation under the Regulation. In 2008, the North Simcoe Muskoka LHIN merged Penetanguishene General Hospital with Huronia District Hospital, located in Midland. On December 1 of that year, the former transferred its assets and obligations under the Transfer Agreement. In this agreement between the hospitals, Huronia District Hospital made a commitment to apply for designation under the Act.<sup>7</sup> GBGH has been operating both sites since 2009.

The Commissioner's Office received 19 complaints in November 2014. Because of the volume of complaints and the critical nature of the issue, the Commissioner met with the Deputy Minister of Health and Long-Term Care on November 10, 2014.

On November 14, 2014, Deputy Minister sent the President of GBGH and the Chief Executive Officer of the North Simcoe Muskoka LHIN a letter in which he stated the following:

"We are aware that the former Penetanguishene General Hospital has undergone changes in structure since its original designation. However, it is the ministry's view that the GBGH effectively assumes responsibility for this designation through its operation of the Penetanguishene site.

For this reason, it is the ministry's view that achieving designation under the FLSA for the Midland site of the GBGH is a necessary precondition for the closure of the Penetanguishene site. The planned closure date of March 2016 allows for some time to achieve this; however, I wish to make clear that designation of the Midland site must be achieved before closure of the Penetanguishene site can occur."<sup>8</sup> (our underline).

In March 2016, the closure of Penetanguishene General Hospital was official. Yet, on that date, GBGH had still not been designated by regulation.

On November 1, 2016, the Commissioner met with senior officials of the Ministry of Health and Long-Term Care to discuss the issue of Penetanguishene General Hospital and the transfer of services to GBGH. It was confirmed without qualification that all of the designated services at Penetanguishene General Hospital had been transferred to GBGH.

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<sup>6</sup> *Lalonde v. Ontario*, at para. 168.

<sup>7</sup> Transfer Agreement between Huronia District Hospital and Penetanguishene General Hospital Inc., December 1, 2008, 6.2 (c) and (d).

<sup>8</sup> Letter from the Deputy Minister of Health and Long-Term Care to the President of GBGH and the Chief Executive Officer of the North Simcoe Muskoka LHIN, November 14, 2014.

In December 2016, the Commissioner's Office received nine additional complaints about the lack of French-language health services of equivalent quality at GBGH. The complaints were about ambulatory care, reception, forms, telephone service, human resources and so on. The Commissioner's Office contacted the Ministry of Francophone Affairs for more information about the partial designation process for GBGH and the quality of French-language health services. At that point, the Ministry of Francophone Affairs confirmed that the partial designation would be confirmed on March 1, 2017.

On March 21, 2017, the Commissioner met with senior officials of the Ministry of Health and Long-Term Care to discuss the situation at GBGH once again. At that meeting, it was confirmed that the government planned to formally request partial designation for GBGH, this time postponed until the following spring.

On March 23, 2017, the Ministry of Health and Long-Term Care pointed out that GBGH had made considerable progress in delivering quality health services in French, even though the Commissioner's Office had received additional complaints in this regard. According to senior officials of the Ministry of Health and Long-Term Care, a number of partners, including the Ministry itself, the LHIN and the Entity 4, were monitoring the fulfilment of GBGH's new obligations under the Act.

### 3. Analysis

For the revocation of the designation to satisfy the requirements of the Act, the North Simcoe Muskoka LHIN and the Ministry of Health and Long-Term Care must comply with sections 7 and 10. In other words, before discontinuing the designated services provided by Penetanguishene General Hospital, the LHIN was under an obligation to ensure that "all reasonable measures and plans for compliance with [the] Act have been taken or made."

Furthermore, as noted by the Court of Appeal in *Lalonde v. Ontario*, simply directing GBGH to request designation is not a "reasonable measure" within the meaning of section 7. The procedures specified in this section must be carried out, failing which the Ministry of Health and Long-Term Care and the LHIN are in violation of the Act.

#### *3.1 The closure of Penetanguishene General Hospital and the transfer of the designated services to GBGH were carried out in violation of the Ministry's guarantees*

Through official correspondence from Deputy Minister, the Ministry of Health and Long-Term Care gave assurances that the designation of GBGH was a condition for the closure of Penetanguishene General Hospital (March 2016). However, GBGH was designated on July 1, 2017, more than one year after the closure of Penetanguishene General Hospital. Moreover, the designated services were transferred to GBGH in the summer of 2016, nearly one year before the designation of GBGH.

Hence, the closure of Penetanguishene General Hospital and the transfer of services were carried out in violation of the Ministry's guarantees. The transfer of services was also effected before GBGH was designated and therefore before it was ready and able to provide those services.

### *3.2 The closure of Penetanguishene General Hospital and the transfer of the designated services to GBGH were carried out in violation of the Act*

Penetanguishene General Hospital and Huronia District Hospital merged in December 2008. The former transferred its assets and obligations to the latter and was dissolved as a separate entity. At that time, under the transfer agreement, Huronia District Hospital was to continue providing Penetanguishene General Hospital's designated services and consequently had to obtain designation under the Act. Huronia District Hospital was never designated.

The merger of Penetanguishene General Hospital and Huronia District Hospital, their acquisition by GBGH in 2009, and the transfer of the designated services from the Penetanguishene site to Midland were not executed in compliance with the procedural obligations of sections 7 and 10 of the Act: the Regulation was never amended following the governance changes in accordance with sections 7 and 10. The Ministry of Health and Long-Term Care, the LHIN and the Ministry of Francophone Affairs are all responsible for this violation.

In 2009, GBGH was not in a position to fulfil its obligations under the Act; nor is it in a position to do so in 2017, recent complaints would suggest. Even after the multiple remedial efforts by the LHIN, the Ministry of Health and Long-Term Care and the Ministry of Francophone Affairs, the complaints received of late indicate that the designated services are either absent or of inadequate quality.

The Ministry of Health and Long-Term Care must take a leadership role and ensure compliance with the Act by the LHIN and health service providers such as GBGH, especially when they are designated under the Act. Clearly, compliance with the Act requires more concerted efforts in the areas of planning, transparency and accountability, in particular through closer co-operation with Entity 4.

In addition, the Ministry of Health and Long-Term Care must be able to determine the role played by each party reporting to it that is involved in the designation process, in determining compliance gaps, in developing a remedial action plan, and in accountability for following up. Again, these parties, specifically the LHINs, must cooperate with the Entities to take advantage of their expertise and their connections with the Francophone community.

The Ministry of Francophone Affairs, in view of its explicit obligations under the Act, must also assume a prominent role in designations, compliance audits and designation revocations. Moreover, there was no mechanism by which the Ministry of Francophone Affairs could monitor the designated agencies' compliance and respect of their obligations pursuant to the Act. This lack of monitoring and accountability contributed to the marked failures to offer French-language health services at both hospitals.

It is only since 2014 that the Ministry of Francophone Affairs has required designated agencies to prepare a three-year compliance plan for themselves and for the third parties with which they have contracts.<sup>9</sup> However, there remains a general lack of clarity with regard to preparing and following up on these compliance reports. Specifically, according to the instructions provided by the Ministry of Francophone Affairs, "[a]ny changes to French language services offered to clients must be accompanied by the relevant supporting documents."<sup>10</sup> Hence, this instruction assumes that a ministry can justify a compliance gap while specifying the measures taken to address it. In addition, since the

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<sup>9</sup> For general information, see Ontario Regulation 284/11, *Provision of French Language Services on behalf of Government Agencies*.

<sup>10</sup> Ministry of Francophone Affairs, *Agency Designation Plan and Evaluation Tool*, June 2014.

Ministry of Francophone Affairs does not follow up on compliance reports, a gap reported by a ministry might persist for a period of three years.

#### **4. Conclusion and Recommendations**

In summary, from 2008 on, all of the government actors involved – the Ministry of Health and Long-Term Care, the North Simcoe Muskoka LHIN and the Ministry of Francophone Affairs – failed to fulfil their obligations under the Act. The discrepancies between those obligations and the decisions made over the last 10 years are flagrant. The government actors either did not know or did not comply with their obligations.

Before eliminating the designated services at the Penetanguishene General Hospital, the North Simcoe Muskoka LHIN and the Ministry of Health and Long-Term Care had the obligation to ensure that all reasonable measures were taken to respect the Act. These obligations are more than legal and administrative hoops to jump through: the government must justify its decisions and organize consultations before the revocation of designation and transfer of services so that Francophone communities can understand the process and the impacts on the delivery of French-language services in their region and voice their opinions.

The violations of the Act had real and serious consequences for Francophone patients in the Penetanguishene region, and notwithstanding their vigilance and courage, these violations could have gone unnoticed.<sup>11</sup> In the future, when designating or revoking designations, or when auditing designated agencies for compliancy, government actors must take the necessary steps to improve accountability, transparency and respect of the Act. Above all else, they must consider the impact of their actions, and inaction, on the healthcare services to Francophone patients.

In consideration of his powers as an ombudsman, the Commissioner recommends three courses of action to prevent a recurrence of the Penetanguishene situation.

##### **Recommendation 1**

The Commissioner recommends that the Minister of Health and Long-Term Care oversee compliance with the Act by:

- (a) ensuring that the North Simcoe Muskoka LHIN
  - i. is held accountable for the decisions made by GBGH and other designated or identified health service providers in its area of jurisdiction; and
  - ii. cooperates with the French Language Health Planning Entity, Entity 4, in completing a comprehensive analysis and audit of the accessibility and quality of the designated services provided at GBGH;

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<sup>11</sup> Moreover, a cursory analysis of the agencies designated under the Act suggests that there may be other violations of the Act and the Regulation that have so far gone unnoticed. In fact, this could very easily have happened in the case of Penetanguishene General Hospital, but for the vigilance of the complainants.

- (b) ensuring that the report prepared by the North Simcoe Muskoka LHIN in accordance with the proposed new section 5 of Ontario Regulation 515/09, *Engagement with the Francophone Community under Section 16 of the Act*, includes a complete description of the measures taken and results achieved after the transfer of the designated services to GBGH.

## **Recommendation 2**

The Commissioner recommends to the Minister of Health and Long-Term Care that the following actions be undertaken to ensure his Ministry's compliance with the Act:

- (a) direct all LHINs to specify in accountability agreements the obligations of and accountability measures for all designated health service providers identified in their respective jurisdictions;
- (b) tie those obligations and accountability measures to specific timelines for implementation, compliance and audit, and to specific timelines for identifying and rectifying departures from the compliance plan;
- (c) confirm in the Ministry-LHIN Accountability Agreements the roles, responsibilities and obligations of all parties involved with regard to systemic compliance gaps, including the process specified by sections 7 and 10 of the Act and by the Regulation;
- (d) ensure that the LHINs collaborate with their respective Entities to complete a comprehensive analysis of the availability of designated health service providers identified in their respective jurisdictions.<sup>12</sup>

## **Recommendation 3**

The Commissioner recommends that the Minister of Francophone Affairs develop a detailed compliance framework, which would include precise norms, to be implemented by all ministries, concerning the performance of agencies designated by the Regulation and their fulfilment of their obligations under the Act.

The framework will also have to be capable of identifying and taking into account any changes in the status of a designated agency, including mergers, acquisitions and name changes, so that the Regulation can be amended in accordance with the process set out in sections 7 and 10 of the Act.

This audit process must be carried out on an annual basis.

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<sup>12</sup> This could be achieved using the planning tool developed by the French Language Health Services Network of Eastern Ontario. The tool generates relevant information about the capacity to deliver French-language health services for the purpose of supporting planning, performance monitoring and decision-making. Supported by a province-wide data collection process, the ultimate goal is to improve access to French-language health services.