Commissariat aux
services en français
de l'Ontario

Office of the
French Language Services
Commissioner of Ontario

Brief from the Office of the French Language Services Commissioner concerning Bill 41, An Act to amend various Acts in the interests of patient-centred care

Submitted to the members of the Standing Committee on the Legislative Assembly

Toronto

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1. Introduction

The Office of the French Language Services Commissioner ("Office of the Commissioner") hereby submits this brief to the Standing Committee on the Legislative Assembly ("Committee") in connection with its study of Bill 41, *An Act to amend various Acts in the interests of patient-centred care* ("Bill 41"), commonly known as the *Patients First Act, 2016*, which amends the *Local Health System Integration Act, 2006*[1] ("LHSIA") and other related acts.

It is important to begin by referring to an amendment proposed in subsection 4(2) of Bill 41 that is simple but very important to Ontario's Francophone community, an amendment that adds a new element to the mandate of the local health integration networks ("LHINs"):

> **4. (2) Section 5 of the Act is amended by adding the following clause:**
>
> (e.1) to promote health equity, reduce health disparities and inequities, and respect the diversity of communities and the requirements of the French Language Services Act in the planning, design, delivery and evaluation of services. (Our underline)

The intent expressed in this clause is commendable and goes to the heart of this bill's purpose, which is of concern to the Office of the Commissioner: patients first (obviously, in view of the Office of the Commissioner's mandate, this brief has a narrower focus: *Francophone* patients). However, in addition to stating the necessity of complying with the *French Language Services Act*[2] ("FLSA"), it is important to ensure that the legislative framework governing the delivery of health services promotes the fulfilment of that goal. Too often, Francophone patients, because they are ill, very vulnerable and members of a minority, are unable to obtain services in French in keeping with the language rights granted to them by the FLSA.

Moreover, this problem is acknowledged by the Ministry of Health and Long-Term Care ("the Ministry"):

> Some Ontarians – particularly Indigenous peoples, Franco-Ontarians, members of cultural groups (especially newcomers), and people with mental health and addiction challenges – are not always well-served by the health care system.[3] (Our underline)

However, the addition at 5. e.1) is not sufficient to fill the gaps in the system. Even with this addition, the Francophones will continue to suffer from the shortfalls in the inadequate offer of French-language services. The Legislative Assembly has here the opportunity to remedy two major shortcomings in the current system that deprive Francophone patients of French-language health services of equal quality: the absence of effective mechanisms for holding bodies accountable for French-language health services, and the lack of clarity concerning the role of the French Language Health Planning Entities ("Entities").

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[1] *Local Health System Integration Act, 2006*, SO 2006, c 4.
[2] *French Language Services Act*, RSO. 1990, c F.32 ("FLSA").
[3] *Discussion Paper: Patients First – A Proposal to Strengthen Patient-Centered Health Care in Ontario*, December 17, 2015, p 4.

To properly address the Minister's concerns about the inequitable services provided to Franco-Ontarians, we recommend that the Committee make a few amendments to Bill 41. These amendments are intended to introduce additional mechanisms to ensure compliance with the FLSA and to give the Francophone community a larger role as a partner in planning French-language health services.

The amendments may also put an end to the legal dispute between the Office of the Commissioner and the LHINs. The latter argue that since they do not have an explicit legislative mandate to deliver health services themselves, they do not have the power to delegate that obligation to service providers. Consequently, health service providers have no obligations regarding the delivery of health services in French, and the LHINs do not have to verify that the service providers are not complying with the regulation or the FLSA.

The Office of the Commissioner has repeatedly pointed out the illogical nature of the LHINs' position, corroborated by the Ministry, both from a legal and political perspective. If the LHINs' legal interpretation prevails, it will mean that service providers can no longer be forced to build the capacity to deliver health services in French.

The Legislative Assembly has a perfect opportunity to remedy the legislative shortcomings and finally protect the language rights of Francophone patients. The Office of the Commissioner hopes that the Committee will take its proposals seriously and amend the LHSIA accordingly.

1.1 Summary

The Office of the Commissioner's comments are based on two main principles: (i) the application of the FLSA and its regulations to the LHINs and the service providers, and (ii) the LHINs' accountability for French-language health services.

(i) Application of the FLSA and its regulations to the LHINs and the service providers

The LHINs, in conjunction with the Entities, must together identify the service providers that will deliver French-language health services. The services delivered by these health service providers are delivered on behalf of a government agency, the LHINs, which are agents of the provincial Crown, under an agreement with the LHINs. This has two consequences: These service providers are third parties under Regulation 284/11, *Provision of French language services on behalf of government agencies*, when they provide services in an area designated under the FLSA; and the LHINs, also by virtue of Regulation 284/11, have the obligation to ensure that the service providers are fulfilling their legal obligations with regard to French-language health services.

(ii) LHINs' accountability for French-language health services

The LHSIA gives the Entities only a consultative role in the process of delivering French-language health services. Even though the Entities were appointed specifically on the basis of their expertise and knowledge of the Francophone community's priorities, the LHINs do not

fully cooperate with them when planning French-language services. The lack of a shared accountability framework between the LHINs and the Entities hampers the efficient provision of French-language health services and prevents transparency.

2. Importance of holding the parties involved in delivering French-language health services accountable for the FLSA's requirements

2.1. The statutory and regulatory framework for the provision of French-language health services in Ontario

Under the LHSIA, the Ministry provides health services through the LHINs. There are 14 LHINs, each of which coordinates and funds health services for a particular area. The funding that the Ministry allocates to the provision of health services is transferred to the LHINs, which in turn enter into agreements with health service providers to deliver health services directly to the public.

Under Bill 41, the LHINs are *direct* health service providers in notably the areas of home health care services. For the other activity areas, the LHINs are *indirect* providers in that they enter into accountability agreements with health service providers. Some of these service providers are designated as government agencies under the FLSA (for example, Montfort Hospital),[4] but the majority are not.

The FLSA requires government agencies to provide French-language services at their head office and any office serving a designated area. In section 1 of the FLSA, a government agency is defined in part as follows: "[a] corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council". By this definition, the LHINs are unquestionably government agencies. Under section 2 of the LHSIA, an LHIN is defined as "a corporation". Section 7 of the same Act states that an LHIN's board of directors is composed of "members appointed by the Lieutenant Governor in Council".

Both the Ministry and the LHINs are responsible for ensuring that the provision of French-language health services meets the requirements of the FLSA. By virtue of Regulation 284/11, *Provision of French language services on behalf of government agencies*,[5] and subsection 5(1) of the FLSA, an LHIN, as an agent of the Ministry, is required to ensure that a health service provider identified by the LHIN and an Entity and located in an FLSA-designated area, communicates in French with the public and provides its services to the public in French.

Under this regulation, a government agency must ensure that a third party complies with the FLSA if it provides services (i) under an agreement with the government agency, and (ii) on behalf of the government agency. The accountability agreements between the health service providers and the LHINs confirm that the health services are being provided under an agreement with a government agency. Furthermore, the health service providers deliver

[4] See Regulation 398/93, *Designation of public service agencies*.
[5] Regulation 284/11, s 1 and 2.

services on behalf of the Ministry, represented by the LHINs, since they are executing a government program.

To respect the right to French-language services in the health sector, the LHINs and the Ministry must ensure that health services are provided in a way that meets the requirements of the FLSA. Meanwhile, health service providers identified by the LHIN and the Entity as French-language health service providers located in designated areas have no direct obligations arising from the FLSA. Instead, any obligation with regard to delivering services in French must stem from the agreement with the LHINs. In concrete terms, this means that the LHINs are required to include contractual provisions in their agreements with health service providers in designated areas and to ensure that those provisions are followed.

2.2. The LHINS maintain that they have no obligation to provide health services in a way that complies with the FLSA's requirements.

Although it is obvious to the Office of the Commissioner that service providers are subject to the FLSA and its regulations, the LHINs believe that since they do not provide health services directly,[6] they do not have the power to delegate that obligation to service providers, and therefore they do not have to ensure that the providers are in compliance with the FLSA.

In its 2013-2014 annual report, *Rooting for Francophones*,[7] and its 2014-2015 annual report, *A Voice for the Voiceless*,[8] the Commissioner pointed out the illogical nature of the LHINs' legal position, corroborated by the Ministry. If this interpretation were to prevail, it would mean that health service providers could not be forced to provide services in French, even though those services are funded by the government. It goes without saying that such an interpretation of the facts and of Ontario legislation is completely inconsistent with the history of French-language services in the province in the health sector and certainly contrary to both the letter and the spirit of the LHSIA and the FLSA.

Service providers are on the front lines of health service delivery to all Ontarians, including Francophones. In the Office of the Commissioner's opinion, it is clear that service providers identified by the LHINs and the Entities are third parties covered by and subject to Regulation 284/11 by virtue of their contractual relationship with the LHINs, which in turn are agents of the provincial Crown and the Ministry. Furthermore, as evidence by the LHSIA and the service contracts, the service providers implement a government program.[9] Therefore, since

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[6] The Office of the Commissioner recognizes – and it hopes that the LHINs will also recognize – that Bill 41 now obliges the LHINs to provide health services directly to the public, particularly with regard to home care services.
[7] Office of the French Language Services Commissioner, *Annual Report 2013-2014, Rooting for Francophones*, pp. 33-34.
[8] Office of the French Language Services Commissioner, *Annual Report 2014-2015, A Voice for the Voiceless*, p. 16.
[9] In *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 and *Quigley v Canada (House of Commons)*, 2002 FCT 645, the Supreme Court of Canada and the Federal Court respectively noted that third parties hired to specifically implement a government are subject to the governmental institution's constitutional obligations.

Regulation 284/11 applies to the government agency with respect to supervision of the third parties, the LHINs must ensure that the services delivered by the providers are in compliance with the FLSA and its regulations.

2.3 Proposed amendments to Bill 41 to ensure compliance with the FLSA

The time for legal debates and multiple interpretations of the obligations of the LHINs and the service providers is past – ultimately, it is Francophone patients who are losing out and having their language rights violated.

Although the LHINs' very narrow interpretation of their obligations under the FLSA has no basis in law, the fact remains that getting the courts to recognize that the FLSA applies to the LHINs and the service providers would be a long and difficult proposition. Bill 41 therefore offers a golden opportunity for the Legislative Assembly to clarify its intention to respect the FLSA and to confirm the LHINs have a clear obligation to ensure that the provision of French-language health services meets the requirements of the FLSA.

The addition of the new clause 5. (e.1) as proposed in Bill 41 is certainly a positive measure. Nevertheless, this statement of general principle may very well be insufficient to persuade all the LHINs that serve areas designated under the FLSA to change their practices and improve their delivery of French-language services. The Office of the Commissioner is therefore proposing a few additions to Bill 41 to make the LHINs, and also the Ministry, more accountable.

2.3.1 Amending Bill 41 to add accountability mechanisms for the Ministry, the LHINs and the health service providers

The Office of the Commissioner proposes adding provisions to Bill 41 that will establish explicit mechanisms to ensure fulfilment of the obligations that the Minister and the LHINs have to make certain that there is sufficient availability of French-language services where required by the FLSA.

> **Section 14 of the *Local Health System Integration Act, 2006* is amended by adding the following:**
>
> (4.1) In developing priorities and strategic directions for the health system and the local health systems in the provincial strategic plan, the Minister shall ensure that said priorities and strategic directions foster the provision of health services in a way that meets the requirements of *the French Language Services Act*.
>
> **Subsection 18(2) of the *Local Health System Integration Act, 2006* is amended by adding the following:**
>
> (e.1) the obligation for the network, where applicable, to meet the requirements set out in the *French Language Services Act*;

The *Local Health System Integration Act, 2006* is amended by adding the following section:

20.2 In entering into service accountability agreements with the health service providers referred to in section 20 and identified by the local networks and the French language health planning entities, the local networks shall ensure that the availability of health services satisfies the requirements set out in the French Language Services Act.

These provisions would ensure that the Minster of Health and Long-Term Care and the LHINs take their obligations under the FLSA into account in developing their priorities. The new subsection 14(4.1) would ensure that the FLSA is taken into account when the Minister develops priorities and strategic directions. The new subsection 18(4) would ensure that the accountability agreement between the Minister and the LHINs contains provisions on compliance with the FLSA.

The new section 20.2 would impose an obligation on the LHINs to ensure that the accountability agreements contain provisions on the availability of French-language services. As explained earlier, not necessarily all health service providers would have an obligation to provide services in French. However, the LHINs would have to ensure that such services are provided in the designated areas they serve.

2.4 Conclusion

The LHINs had, and still have, obligations regarding the delivery of health services in French. Before the LHINs were established, the Ministry was directly responsible for identifying the service providers and requiring them to develop the capacity to provide health services in French. It does not make sense that with the LHINs' arrival in the health ecosystem, replacing the Ministry in the direct relationship with service providers, the Francophone population no longer has access to health services in French.

The Ministry needs to carefully evaluate the operation of the French-language health service delivery system in Ontario. The service providers are clearly executing a government program on behalf of the LHINs – it follows logically that the LHINs' linguistic obligations under the FLSA should also be part of this execution work.

3. Accountability of the LHINs

As indicated above, there are a number of decision-making bodies in the health system, including the Ministry, the LHINs and the service providers. In this model, the service providers are accountable to the LHINs, which are in turn accountable to the Ministry.

With regard to French-language health services, the important role played by the Entities must also be considered. These organizations are prescribed by section 16 of the LHSIA and enabled by Regulation 515/09, *Engagement with the Francophone community under section 16 of the Act*.

In 2009, the Office of the Commissioner published a report that dealt specifically with the planning of French-language health services,[10] in which we stressed the importance of accountability by all decision-making bodies concerned. Specifically, the LHINs are, by their nature, accountable to the government, and they have to justify their budgetary and administrative decisions. As we saw earlier, the Ministry ensures this accountability by requiring accountability agreements with each of the 14 LHINs and between the LHINs and the service providers.

However, to guarantee accountability at all levels, the Entities have to participate in the planning of French-language health services in partnership with the LHINs. Without the Entities' full, ongoing participation, the LHINs cannot confirm that the health services planning and integrating processes that they coordinate reflect the true needs of the Francophone communities they must "engage".

3.1 An expanded role for the Entities – more than just consultation

As pointed out in the Office of the Commissioner's 2009 report, the LHINs must ensure not only that services are provided in French, but also that Francophone needs are taken into account when they plan, fund and deliver health services. Again, we should note here that not all service providers have to provide services in French – the LHINs must identify certain service providers, in conjunction with the Entities, on the basis of the Franco-Ontarian community's specific needs.

The LHSIA specifies this requirement and enables the establishment of the Entities, which, according to this statute, participate in the community engagement that the LHINs are required to perform.[11] Under Regulation 515/09, the Entities' role is to "advise" the LHINs.[12] To properly serve the Francophone population, the Entities must be able to do more than just "advise".

To be able to properly serve the Francophone population, the Entities have to participate in the planning of French-language health services. The Entities were selected specifically for their expertise and knowledge regarding French-language health services.[13] Consequently, they should be able to collaborate as partners with the LHINs in planning and coordinating French-language services.

The enactment of the LHSIA was based on the principle of subsidiarity. This is the idea that it is desirable for public policy decisions to be made by the decision-making body that is closest to the people affected by the decisions.[14] In the area of French-language health services, the

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[10] Special Report on French Language Heath Services Planning in Ontario, 2009 ("2009 report").
[11] Regulation 515/09, s 3(1).
[12] Regulation 515/09, s 3 (1).
[13] Regulation 515/09, s 2 (2).
[14] Justice L'Heureux-Dubé described the principle of subsidiarity as follows: "This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also

Entities are the bodies closest to the Francophone community and are therefore in the best position to understand its specific needs. On the basis of this principle, the Entities should be able to make the decisions, or at least play an active role in the decision-making process, when French-language health services are being planned, prioritized and integrated to the overall provincial health system.

In the area of education, the Supreme Court of Canada concluded that the majority group may have difficulty understanding the specific needs of the minority and will not always see why it would require different treatment.[15] This is self-evident in the health sector: the Entities, which speak for Franco-Ontarians, are in a better position to understand the Francophone community's specific needs and should therefore have a legislative mandate to coordinate French-language health services as partners of the LHINs.[16] The Minister himself supports this approach: In his discussion paper entitled *Patients First: A proposal to strengthen patient-centred health care in Ontario*, he confirms that

> [o]ver the next few years, as we continue to transform and restructure the health care system — making it more integrated, accessible, transparent and accountable — we will work to improve health equity and reduce health disparities. In their expanded role, LHINs would be responsible for understanding the unique needs of Indigenous peoples, Franco-Ontarians, newcomers, and people with mental health and addiction issues in their regions, and providing accessible, culturally appropriate services.[17] (Our underline)

It is important, even critical, for the LHINs to adjust their health services to the needs of the Francophone community, of course. But they must also work together with the Entities to plan French-language health services, since they are the bodies that understand the Francophone community's needs.

In short, the health system must operate in a way that puts Francophone patients' health needs first: the LHSIA and its regulations must contain mechanisms to ensure the accountability of all parties – the Ministry, the LHINs, the Entities and the service providers. Otherwise, Francophone patients are the ones left out in the cold when they are most vulnerable.

Bill 41 supports accountability in the health system: the Ministry has decided to add a number of audit, investigation and monitoring measures to guarantee an open, transparent system. In

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closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity." *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241 at para 3.

[15] *Arsenault-Cameron v Prince Edward Island*, [2000] 1 SCR 3, at para 54; *Mahé v Alberta*, [1990] 1 SCR 342 at p 372.

[16] See Forgues, Éric, et al. *L'offre de services de santé en français en contexte francophone minoritaire. Institut canadien de recherche sur les minorités linguistiques*, 2011, p 15: [Translation] "Taking the French language into account in the organization of health services will reflect the kind of social relationship that Anglophones and Francophones have in the provinces. […] Anglophones' historical dominance over Francophones should give way, today, to a more egalitarian relationship."

[17] *Patients First: A proposal to strengthen patient-centred health care in Ontario*, p 11.

our opinion, the quality and availability of French-language health services must be part of these new measures.

3.2 Proposed amendments to the bill to give the planning entities a greater role

The Office of the Commissioner proposes three specific additions to Bill 41 to clarify the relationship between the Entities and the LHINs.

The first change would formalize the Entities' role in planning French-language health services. The Office of the Commissioner therefore recommends that section 15 be amended by adding an obligation to collaborate:

> **Section 15 of the *Local Health System Integration Act, 2006* is amended by adding the following subsection:**
>
> (4) In developing an integrated health service plan for the local health system under subsection (1), the local health integration network shall consult
>
> (a) the Aboriginal and First Nations health planning entity for the geographic area of the network that is prescribed; and
>
> (b) the French language health planning entity for the geographic area of the network that is prescribed.

Except for minor differences, the above-proposed subsection 15(4) is identical to subsection 16(4) of the LHSIA.

The second change would be to amend an existing clause by replacing the word "engage" with "consult", which better reflects the relationship that the LHINs should have with the Entities:

> **Subsection 16(4) of the *Local Health System Integration Act, 2006* is amended by replacing "engage" with "consult".**

The imposition of an obligation to consult in the context of planning health services is not without precedent. Subsection 14(4) of the Act requires the Minister to consult the councils established in subsection 14(2) "[i]n developing priorities and strategic directions for the health system and the local health systems in the provincial strategic plan".

The third amendment we propose would add a partial list of items on which the Entities must be consulted by the LHINs:

> **Section 16 of the *Local Health System Integration Act, 2006* is amended by adding the following subsections:**
>
> (4.2) In the consultations under subsection (4), the planning entity may make recommendations on the following subjects:
>
> (a) methods of engaging the Francophone community in the area served by the network;
>
> (b) the health needs and priorities of the Francophone community in the area served by the network, including the needs and priorities of diverse groups within that community;

> (c) the health services available to the Francophone community in the area served by the network;
>
> (d) the identification and designation of health service providers for the provision of French language health services in the area served by the network;
>
> (e) strategies to improve access to, accessibility of and integration of French language health services in the local health system; and
>
> (f) the planning for and integration of health services in the area served by the network.
>
> (4.3) The local health integration network shall publish each year the French Language Health Planning Entities' recommendations pursuant to section 4.2 and the method by which they were integrated to its integrated health service plan.

Except for minor modifications, the six criteria identified above are identical to those in Regulation 515/09, which are reproduced above. The main effect of this amendment would be to entrench the type of interaction between the LHINs and the Entities that is already specified by regulation, while making it clear that it is actually an obligation to "consult", as opposed to a simple duty to "engage" the Entities (a term that has no statutory or regulatory definition). In addition, to ensure that the LHINs actually consider the recommendations, the new subsection 16(4.3) would impose onto the LHINs an obligation of accountability.

4. Conclusion

To conclude, the Office of the Commissioner wishes to reiterate the importance of improving the current health system for the sake of Francophone patients.

It is illogical for the LHINs not to take adequate measures to ensure that the health services provided by health service providers on their behalf meet the FLSA's requirements. Worse, it is inconceivable to the citizen, including and especially the Francophone citizen, that the FLSA's application to health services funded by the LHINs would be questioned. It is not just a position that has no basis in law; it also results in Francophone patients not having health services in their language at critical times.

For a number of years, the Commissioner denounced the situation to the government and attempted unsuccessfully to obtain concrete changes. Instead of amending the legislative framework to put in place concrete, effective mechanisms, governmental authorities have tried to find band-aid solutions without altering the legislative framework.

In the Office of the Commissioner's opinion, the LHINs should be more transparent when evaluating the Entities' recommendations and when they are planning French-language health services; this will help them to better address the Francophone community's specific needs and consequently enhance accountability and the quality of French-language health services.

Bill 41 is an excellent opportunity for the Legislative Assembly to put an end to a sterile legal debate and to finally implement lasting solutions for the delivery of tailored French-language health services that meet Franco-Ontarians' expectations.

This brief is, first and foremost, an attempt to solve the above-mentioned problems in a spirit of cooperation. We sincerely hope that the Committee will accept our proposed amendments to the LHSIA. We have seen all too often the inequity of French-language services for Francophone patients; the solution to these problems can no longer be left to the mercy of a misinterpretation of the government's language rights obligations.

But this brief is also, secondly, a warning. A warning that we are committed to remain vigilant, supported by our compassion towards Francophone patients. This is why we promise to come back to the Ministry's and LHINs' offer of French-language health services in our next annual report.

The Minister of Health and Long-Term Care has stressed the importance of Bill 41, noting in particular that Ontario's Francophones do not receive health services of equal quality and that those health services are not always tailored to address their needs. Adoption of the amendments proposed in this brief would make it possible to replace words with concrete actions.