

IN THE MATTER OF A REVIEW PROCEEDING  
PURSUANT TO SECTION 7.5 OF THE MASTER AGREEMENT  
DATED MARCH 15, 1995 BETWEEN  
THE PROVINCE OF BRITISH COLUMBIA  
(AS REPRESENTED BY THE MINISTER OF HEALTH)  
AND THE DENOMINATIONAL HEALTH CARE FACILITIES ASSOCIATION

AND IN THE MATTER OF THE AFFILIATION AGREEMENT  
DATED MAY 30, 1997 BETWEEN  
THE FRASER HEALTH AUTHORITY  
AND THE SISTERS OF CHARITY OF PROVIDENCE  
IN BRITISH COLUMBIA (ST. MARY'S HOSPITAL)

AND IN THE MATTER OF A NOTICE OF TERMINATION  
OF THE AFFILIATION AGREEMENT GIVEN BY  
THE FRASER HEALTH AUTHORITY TO THE  
SISTERS OF CHARITY OF PROVIDENCE

Report and Advice by the Review Panel  
to the Honourable Colin Hansen  
Minister of Health Services

Review Panel:

Donald R. Munroe, Q.C.

William E. Ireland, Q.C.

Frederick Day, Q.C.

Counsel for the FHA:

Robert J. McDonell

Counsel for St. Mary's;

W. S. Berardino, Q.C. and  
Pamela Cyr

Date of Report:

December 23, 2002

On March 15, 1995, the Province of British Columbia (as represented by the Minister of Health) entered into a Master Agreement with the Denominational Health Care Facilities Association. A purpose of the Master Agreement was the fixing of certain principles by which the then-existing Regional Health Boards might enter into individual agreements with denominational societies (who theretofore as part of their religious missions had carried out and delivered health care in many parts of the Province) for the continued delivery by such societies of health care within the respective health regions.

On May 30, 1997, the Simon Fraser Health Region (SFHR) entered into an Affiliation Agreement with the Sisters of Charity of Providence in British Columbia. The Fraser Health Authority (FHA) is today the successor to the SFHR under the Affiliation Agreement. The Sisters of Charity of Providence own and operate St. Mary's Hospital in New Westminster, as they have since 1886.

Under Section 6 of the Affiliation Agreement, the SFHR (today the FHA) provided funding each year to St. Mary's comprising about 90 percent of St. Mary's annual budget. In exchange, St. Mary's has provided health care programs and services as negotiated and re-negotiated from time to time pursuant to Section 4 of the Affiliation Agreement. By all accounts, the delivery by St. Mary's of health care programs and services has been exemplary. St. Mary's has developed centres of excellence in some surgical and medical program areas. It has been a reliable provider of on-schedule elective surgery in its surgical fields. Importantly, St.

Mary's also serves as an alternative site of medical beds for the nearby Royal Columbian Hospital in emergency overflow situations (St. Mary's does not itself have an emergency department).

On July 10, 2002, the FHA gave written notice to St. Mary's of the termination of the Affiliation Agreement, effective 365 days hence. In form, the notice of termination of the Affiliation Agreement is just that: a notice of termination of a contract between the two parties to the contract. However, St. Mary's states that the practical consequence of the notice of termination, if implemented, will be the closure of the hospital. The documents filed by the FHA in this review proceeding appear to acknowledge that reality.

Section 8.1 of the Affiliation Agreement states (so far as material to this proceeding) that:

...This Agreement may be terminated by either party giving not less than 365 days written notice to the other party.

However, such notice of termination is not entirely unreviewable. That observation arises from Section 2.3 of the Affiliation Agreement which expressly incorporates Section 7 of the Master Agreement (among other provisions); and then from Sections 7.2 and 7.5 of the Master Agreement which create and describe a process by which a notice of termination may be independently reviewed.

For present purposes, the effect of Section 7.2 of the Master Agreement is that St. Mary's was entitled to "request a review in accordance with this subsection"

(which it did) of the FHA's notice of termination of the Affiliation Agreement.

Section 7.2 goes on to say that:

The review process shall consist of the appointment of an independent panel (Panel) comprised of three members, one appointed by each of the [FHA] and [St. Mary's] with the third member, who shall be the chairperson, appointed by the other two appointees. The Panel shall review all relevant information and shall give advice (non-binding) to the Minister in accordance with subsection...7.5....

Section 7.5 of the Master Agreement, which is the provision most central to this review proceeding, is in the following terms:

Where the Panel is of the opinion a decision to terminate the [Affiliation Agreement] was not reasonable having regard to:

- (a) the financial resources of the [FHA];
- (b) the health care needs of the region or community;
- (c) whether hospital services or other health care services provided by other agencies or the [FHA] were arbitrarily favoured over [St. Mary's] or where funding to [St. Mary's] has not been provided in like manner as funding for non-denominational facilities;

the Panel shall advise the Minister.

Where the Panel advises the Minister that the decision to terminate the [Affiliation Agreement] was not reasonable, the MINISTER, in his or her sole discretion, shall decide whether or not to terminate the [Affiliation Agreement].

As we have indicated, St. Mary's requested a review of the FHA's notice of termination of the Affiliation Agreement. In due course, the undersigned were constituted by the FHA and St. Mary's as the Review Panel.

As described by Section 7.2 of the Master Agreement, our task has been to "review all relevant information" for the purpose of giving non-binding advice to the Minister. Relevance is determined by reference to Section 7.5 of the Master Agreement: which fixes the criteria for determining whether a notice of termination is unreasonable. The FHA and St. Mary's have cooperated enormously with the Review Panel, and with each other, in the gathering together and providing of relevant information. As well, the Review Panel conducted a two-day hearing (initially scheduled for November 14-15, 2002; adjourned by consent pending discussion between the FHA and St. Mary's until December 9-10, 2002) at which the information was probed by the examination and cross-examination of witnesses; and at which the FHA and St. Mary's made written and oral argument.

Additionally, the Review Panel has been provided with a copy of a petition to the Legislative Assembly signed (we are told) by approximately 20,000 persons seeking sustained funding by the FHA of St. Mary's Hospital; copies of letters from individual citizens and community groups to the same effect; and copies of letters from physicians and other health care professionals testifying to the valuable role played by St. Mary's in the delivery of health care programs and services. While some of the information contained in such materials is relevant to an inquiry under Section 7.5 of the Master Agreement, some is not. It must be said, however, that the materials speak loudly to the strong desire within the community and amongst the affected medical personnel for the continued funding and operation of St. Mary's Hospital, if possible.

## II

St. Mary's acknowledges that changes are necessary in the provincial health-care system to deal with existing and looming deficits, including in the region administered by the FHA. More particularly, St. Mary's acknowledges that in today's financial environment, the options potentially requiring consideration include the transfer of services; the reduction of services; and the closure of programs or facilities.

Very clearly, the FHA is facing serious financial pressures. The FHA was formed in late 2001 by the merger of three former Health Regions. We were informed that the FHA is Canada's largest integrated regional-based health authority, providing health care services to a population of approximately 1.4 million. That population resides in a number of communities in the Lower Mainland; in the South Fraser area; and in the Fraser Valley. The FHA owns, operates and/or provides funding for a wide range of organizations including hospitals, long term care facilities, mental health centres, public health units, home care providers, and environmental services. Of the many acute care facilities in the FHA regional area, St. Mary's is the only one not owned and directly operated by the FHA. However, the FHA has contractual relationships with various other health services providers, some of which are denominational. The several FHA organizations employ approximately 22,000 health care professionals and support staff. Some 2000 physicians have privileges within the FHA regional area.

The FHA's annual budget is approximately \$1.5 billion, the major source of funding or revenue being grants from the provincial government. When the FHA assumed the operations of the three predecessor Health Regions, it was immediately

in a substantial deficit position. And virtually from the outset, the FHA was given direction by the provincial government that it must operate within its allocated funding; that there must be no new debt; and that it must balance its budget on an equity basis by March 31, 2005 (which is to say, balance its budget by March 31, 2005, including making up any deficits accumulated in the period from and after March 31, 2001).

The provincial government provided an extraordinary one-time contribution to the FHA's bottom line. However, assuming maintenance of the *status quo*, the FHA's deficits were projected to grow from approximately 160 million dollars in fiscal 2002-03, to 208 million dollars in 2003-04, and to 231 million dollars in 2004-05. And even assuming perfect execution of cost reduction plans earlier formulated by the three predecessor Health Regions, the deficit growth over the three fiscal years ending March 31, 2005 was still projected to rise from 60 million dollars in 2002-03 to 126 million dollars by the end of 2004-05 (i.e., without more radical steps being taken). In short, the FHA had to find 126 million dollars in savings by March 31, 2005.

For the purpose of identifying appropriate cost reductions, the FHA adopted a six-step decision-making approach together with a set of operating principles. On their face, the operating principles which conditioned the six-step decision-making process are entirely reasonable (both in the abstract and in relation to Section 7.5 of the Master Agreement). Likewise the six-step decision-making process itself. The process was one by which deficit reducing ideas were prioritized in relation to the operating principles. Thus, the first option examined was "revenue generation" because it obviously would not adversely impact the delivery of health care, while the very last options examined were "selected program closures" and "selected site

closures”. The options between those two polarities were “general efficiencies”, “best practices”, “alternatives to acute care”, and “program reduction”. By that process, the FHA was able to identify 53 million dollars (by March 31, 2005) of deficit recovery ideas under the early headings of the six-step decision-making approach, but was unable to avoid consideration of the last few headings, including selected program and site closures.

The FHA’s decision to close St. Mary’s Hospital (or, as the FHA would describe it, the decision to terminate the Affiliation Agreement) appears to have been motivated by the following considerations: (1) the need to find program or site closures having budget impact in the range of 28 million dollars; (2) the belief that the closure of St. Mary’s will save 17.2 million dollars by March 31, 2005, with the ability to re-invest 7.5 million dollars in replacement programs and services in other FHA facilities; (3) a view that St. Mary’s would require significant capital expenditures best avoided if possible; (4) a judgment that of the various unpalatable options, the closure of St. Mary’s was the least unpalatable within the frame of the existing guidelines for access to health care services as applied across the FHA’s geographical area of responsibility; and (5) the fact that St. Mary’s is independently owned and therefore less amenable to executive control of its operations by the FHA.

Each of those motivating considerations could sustain elaborate commentary. However, given the major thrust of the argument made to us by St. Mary’s, we can approach the matter with relative economy of expression.



### III

As stated above, the FHA's written notice of termination of the Affiliation Agreement was given to St. Mary's on July 10, 2002. While that was the date of the written notice, the decision by the FHA to give the notice of termination was made at a meeting of the FHA Board of Directors two weeks previously: on June 27, 2002. Indeed, there is some evidence to suggest that the decision to give notice of termination was effectively made by the FHA as early as March 22, 2002. In all events, it is clear that from very early in 2002 (January-February) onward, the senior executives of the FHA were moving in a determined way toward a formal recommendation to the FHA Board of Directors that the Affiliation Agreement with St. Mary's be terminated.

But on the evidence, the first knowledge by St. Mary's that the FHA was even considering termination of the Affiliation Agreement was upon receipt of the written notice of termination on July 10, 2002. Put simply, the FHA did not consult with St. Mary's prior to deciding whether to terminate the Affiliation Agreement; what is more, the FHA clearly made a determination not to consult with St. Mary's as part of its deliberations.

The FHA's Consolidated Operating Plan is that some of St. Mary's health care programs or services will be re-located (by investment of 7.5 million dollars) to other facilities. However, as the FHA acknowledges, the closure of St. Mary's will result in service cuts which the FHA quantifies at 12 million dollars. St. Mary's says that the transfer of services to other facilities cannot possibly be as seamless as the FHA suggests (with the result that the estimate of 7.5 million dollars is unreliable), and further says that the estimate of 12 million dollars in service cuts is

understated (St. Mary's estimate is something greater than 14 million dollars). St. Mary's submits that as the provider of the health care services slated for transfer to the other facilities, and of the health care services identified for elimination, it ought to have been consulted by the FHA prior to the decision to terminate the Affiliation Agreement; and that the deliberate failure of consultation by the FHA is unreasonable within the meaning of Section 7.5 of the Master Agreement.

As the matter was argued by St. Mary's, Section 7.5 of the Master Agreement provides, in effect, that the FHA, in considering whether to terminate the Affiliation Agreement, must give consideration to the matters identified in sub-sections (a), (b) and (c) of that provision. Where the FHA is faced with financial pressures, sub-section (a) is engaged; where, as the result of the financial pressure, the FHA considers shutting down a facility providing health care to the region or community, sub-section (b) is engaged; and where the facility identified for possible closure is funded but not owned or operated by the FHA, sub-section (c) is engaged. In the further submission of St. Mary's, it follows in the present context that the FHA was required to reasonably consider the impact on the public of eliminating certain of the health care services provided to the public by St. Mary's, and to reasonably consider the feasibility, cost and impact on the public of the transfer of services from St. Mary's to another facility. St. Mary's then asks this question rhetorically: How can one reasonably assess the impact on the public of cutting health care services by shutting down a hospital, or reasonably assess the feasibility, cost or impact on the public of a transfer of health care services to another locale, without full consultation with the very hospital presently delivering the health care services identified for elimination or transfer?

The FHA's reply to St. Mary's argument about a lack of consultation was twofold. First, the FHA suggests that consultation did occur: in the context of the development of the Clinical Services Directional Plan (a suggestion we cannot accept). Second, and more forcefully, the FHA argues that the question of consultation is not within the Review Panel's mandate under Section 7.5 of the Master Agreement unless the lack of consultation shows or can be equated with irrationality in the decision itself. In that connection, the FHA urges upon us (without disagreement from St. Mary's) the definition of "unreasonable" adopted by Mr. Justice Cory in a 1993 decision of the Supreme Court of Canada: which is to say, "not having the faculty of reason; irrational...not in accordance with reason or good sense". Pursuing that point, the FHA rightly emphasizes that its financial circumstances are precarious. As the FHA states, the termination of the Affiliation Agreement with St. Mary's is only one part of a program to deal with a very substantial projected deficit. From the FHA's perspective, and in terms of the health care needs of the region generally, the difficulties associated with the cancellation of the Affiliation Agreement with St. Mary's are not disproportionate to the difficulties arising from closures and reductions of services elsewhere in the region. In the view of the FHA, the avoidance of service impact due to deficit reduction is simply not possible. It is really just a question of mitigation of impact. Finally on this point, the FHA submits that the Review Panel "...should have some deference toward the administrators of the FHA in utilizing the available resources in the current fiscal environment to meet the...health care needs of the region". Simply put, and reiterating an argument made above, the FHA says that the presence or absence of prior consultation with St. Mary's is beside the point unless the lack of consultation demonstrates irrationality in the decision itself. In the submission of the FHA, such finding cannot be made.

#### IV

As a prelude to further discussion of the consultation issue, let us first address some of the individual points made by St. Mary's.

One point made by St. Mary's is that the comparative table of services (i.e., as between St. Mary's, Burnaby Hospital and Eagle Ridge Hospital) used by the FHA as part of its analysis leading to notice of termination was incomplete. That is true. However, the table does fairly compare the three hospitals in relation to the services listed; and we are satisfied with the FHA's explanation why other services were not also listed.

St. Mary's also argues that the FHA's analysis of the situation understates St. Mary's bed and operating room capacity. There may be merit to that suggestion. However, we do not think the gap to be material to the ultimate question of whether the notice of termination was unreasonable.

St. Mary's further submits that the FHA's analysis fails to take account of the 3 million dollars St. Mary's annually derives from private or charitable sources. In the light of the FHA's explanation on that score, we find that the 3 million dollars was not ignored, and indeed was considered in its proper context.

With particular reference to Section 7.5(c) of the Master Agreement, St. Mary's argues that it has been effectively marginalized (i.e., in relation to other facilities) by funding decisions or allocations made in the past by the SFHR, particularly as regards capital improvements. In our view, the evidence does not rise to the level suggested by St. Mary's. Even assuming inequity at the time, the

specific instances cited by St. Mary's are an insufficient basis for stalling or diverting future health care directions. In short, we do not regard the past funding controversies cited by St. Mary's as an appropriate foundation for concluding that the FHA's notice of termination of the Affiliation Agreement in 2002 is unreasonable.

A more substantial argument by St. Mary's (with reference to Section 7.5(b) of the Master Agreement) is that the intended transfers of services from St. Mary's to other facilities will not be as seamless as represented by the FHA. St. Mary's is probably correct that the transfers will result in some dissipation of the service teams, with consequential loss of team skills and experience, as well as locational disruption for patients. Of course, it would be much better if that could be avoided. But if, in the final analysis, the FHA's financial mandate requires the transfer of services from one facility to another, the likely problem identified by St. Mary's is unavoidable. Regardless of which facility is determined as the appropriate transferor of services, the problem is encountered. We repeat that it obviously would be better if the problem could be avoided. However, if the problem cannot be altogether avoided, then from the broader regional perspective, St. Mary's argument arising from the intended transfers amounts simply to an argument for maintenance of an institutional *status quo*.

Similarly the argument arising from service cuts. The most noticeable (although not only) result of the closure of St. Mary's will be longer wait-lists for surgeries at other hospitals in the FHA region. In the past 2-3 years, the surgical wait-lists at the Royal Columbian Hospital and Eagle Ridge Hospital have been rising. It is difficult to predict the added impact on the wait-lists of the closure of St. Mary's, but it seems clear that the addition of surgical cases from St. Mary's will

be an exacerbation. Again, it would be far better if longer wait-lists could be avoided. However, the FHA has been instructed that it must operate within its financial resources. If, in the final analysis, compliance with that instruction requires the closure of one or more facilities, then the hard choices must be made from the broader regional perspective. Clearly in that circumstance, the Master Agreement does not uniquely exempt St. Mary's from consideration for closure.

## V

We return now to the more general issue arising from the FHA's decision not to consult with St. Mary's prior to giving notice of termination of the Affiliation Agreement. We are frankly surprised by the lack of prior consultation, in the face of a clearly contracted commitment to do so (Affiliation Agreement, Section 5.1). We presume this omission to be a reflection of a strained working relationship in recent years. The lack of prior consultation is St. Mary's strongest argument. However, we think our advice to the Minister should not simply revolve around a legal opinion about whether the absence of prior consultation did or did not render the decision to terminate unreasonable within the meaning of Section 7.5 of the Master Agreement. We think in the circumstances that an advisory opinion having such narrow focus would be of limited assistance to the Minister in the discharge of his ultimate responsibility to determine whether or not to terminate the Affiliation Agreement.

In the result, we go further by posing this question: If there *had* been prior consultation, what contribution would St. Mary's have made to the resolution of the difficult problem confronting the FHA? Put another way, what solutions would St. Mary's have advanced as being material to the FHA's deliberations concerning the

ongoing viability of the Affiliation Agreement in the context of the severe financial pressures?

The answer to that question lies in a fairly comprehensive plan developed by St. Mary's, and adduced in evidence, which St. Mary's says would achieve at least the savings the FHA would realize by St. Mary's closure, while at the same time substantially avoiding the detrimental impact on health care services (transfers and cuts) flowing from such closure.

We can put the matter this simply: If St. Mary's alternative plan is consistent with government policy, and if the plan is equally as cost efficient as closure while substantially maintaining existing levels of health care services, then termination of the Affiliation Agreement would not be reasonable within the meaning of Section 7.5 of the Master Agreement. But if, on the other hand, St. Mary's plan is not consistent with government policy, or would not be as cost efficient as closure while substantially maintaining service levels, then the notice of termination will be reasonable and should be allowed to operate according to its terms.

We mention "government policy" because in one respect, St. Mary's alternative plan engages policy issues which the Review Panel is not competent to address. Neither are we health care economists or consultants, qualified to do a full comparative assessment of St. Mary's alternative plan. We do think, however, that such assessment should independently be done for purposes of assisting the Minister in the ultimate determination, pursuant to Section 7.5 of the Master Agreement, of whether the notice of termination of the Affiliation Agreement is unreasonable.

Our advice to the Minister, then, is that he instruct Ministry staff to undertake such assessment as promptly as possible, and to report to the Minister the result thereof. We repeat what we said above: If the Ministry assessment validates St. Mary's assertions about the alternative plan, and the plan does not offend government policy, then in our view the notice of termination will be unreasonable. But if the Ministry assessment does not validate St. Mary's assertions, or if the plan is not consistent with government policy, then it would be unreasonable not to allow the FHA's notice of termination to operate according to its terms.

RESPECTFULLY SUBMITTED

DATED THE 23<sup>rd</sup> DAY OF DECEMBER, 2002.

"Donald R. Munroe"  
Donald R. Munroe, Q.C.  
Chair

"Frederick Day"  
Frederick Day, Q.C.  
Member

"William E. Ireland"  
William E. Ireland, Q.C.  
Member