

**OFFICE OF THE COMMISSIONER
OF OFFICIAL LANGUAGES
FOR NEW BRUNSWICK**



**COMMISSARIAT AUX
LANGUES OFFICIELLES DU
NOUVEAU-BRUNSWICK**

JANUARY 2014

INVESTIGATION REPORT

DEPARTMENT OF NATURAL RESOURCES

**SENT TO: THE PREMIER
THE DEPUTY MINISTER
THE COMPLAINANT**

**IN THE MATTER OF THE OFFICIAL LANGUAGES ACT OF
NEW BRUNSWICK, R.S.N.B. 2002, CHAPTER O-0.5**

**SUBJECT: Complaint under the *Official Languages Act*
Department of Natural Resources
Allegation of deficiency with respect to communications in French**

INVESTIGATION REPORT

1. Complaint

On September 20, 2013, the complainant from Tracadie, N.B., filed a complaint with our office, the details of which are as follows:

The complainant was stopped by two conservation officers between 10:00 p.m. and 11:00 p.m. on September 19, 2013, as he was driving alone in the woods along the railway track, between Bathurst and Newcastle. The complainant alleges that one of the conservation officers spoke to him in English only, without making an active offer of service. The complainant says he spoke a few words in English, but his poor knowledge of this language did not enable him to carry on an effective conversation with the officers or to understand the reason why he had been stopped. The complainant notes that the conservation officer did not do anything to try to find someone who could serve him in French and that his co-worker was a unilingual Anglophone as well. The complainant says that the officers then proceeded to search his vehicle and that, shortly after, a third officer, also a unilingual Anglophone, arrived on the scene.

He says he had to wait for more than an hour before he was able to speak through a portable radio, with someone who could speak his language of choice. The officer reportedly tried to explain the charges against him, but because of poor reception, he did not understand everything she was saying. From what he could understand, she supposedly told him to contact a lawyer before 10 o'clock the following morning. At that point, he was reportedly given a business card for the Assistant Conservation Supervisor at the regional office in Miramichi.

2. Investigation

On October 10, 2013, a letter in lieu of a notice of investigation pursuant to subsection 43(13) of the Official Languages Act (the "OLA") was sent to the Department of Natural Resources (the "Department" or "institution"). In that letter, we asked the institution to let us know its position with respect to the complainant's allegations, to answer two questions, and to provide us with an update on the implementation of recommendations made in an investigation report released on February 22, 2013. The Department provided us with that information in a letter dated November 1, 2013. Here are the answers provided to the two questions:

[Translation]

1. What is the linguistic profile of conservation personnel in Newcastle?

Linguistic profile of conservation personnel in Miramichi

The linguistic profile of the conservation team at the Miramichi office is as follows: four Anglophone positions and three bilingual positions. These positions are associated with a variety of titles and responsibilities. There is one conservation supervisor position, one assistant conservation supervisor position, and five conservation officer positions, two of which are seasonal. The minimum level of language proficiency required for all bilingual positions on this team is 2+ (intermediate plus). (Note that all second-language proficiency assessments are done by the Department of Post-Secondary Education, Training and Labour.) Two of our officers are considered bilingual and a third will be assessed shortly, and we believe he too will be considered bilingual.

2. What measures are in place to ensure provision of services in both official languages of all times by conservation officers in the province?

Measures in place to ensure provision of services in both official languages at all times by conservation officers in the province

To ensure the provision of services in both official languages, an enforcement protocol was developed a few years ago with the help of the Executive Director and Investigator Pierre Beaudoin at the Office of the Commissioner of Official Languages (see appended protocol). Additionally, the protocol was reviewed and approved by the Commissioner. We are committed to reviewing this protocol shortly in order to make sure it is up to date.

It should be noted that, for specialized positions such as our conservation officers, recruiting bilingual employees is a challenge for the Department.

The Department's position with respect to the incident is as follows:

[Translation]

I would like to start by providing you with an abbreviated sequence of events as indicated in our files for the incident of September 19, 2013. Please note that the following information was collected for the interim report at the time of the incident, last September. The complainant was stopped by two of our conservation officers ([Officer A] and [Officer B]) at 11:34 p.m., and the active offer was made. The complainant asked to be served in French, so [Officer B] contacted [Officer C] within the next few minutes. It should be noted that [Officer C] received an intermediate plus proficiency rating in oral French on a language assessment done by the Department of Post-Secondary Education, Training and Labour. [Officer C] went to the scene, arriving at 11:44 p.m., or 10 minutes after our officers stopped the complainant. [Officer C] first confirmed that the complainant wanted to be served in French. He started reading the complainant his rights in French, which is consistent with the enforcement protocol. When the complainant was informed that he had been stopped for night hunting, he became upset and asked many questions that [Officer C] could not understand because the complainant was speaking quickly. At that point, [Officer C] informed the complainant that he was going to contact an officer who would be able to speak French better. [Officer C] then contacted the

Provincial Mobile Communication Centre (11:52 p.m.) and asked the operator to locate an officer who spoke French and could read the complainant his rights.

[Officer D] (Francophone) came to the radio a few minutes later, and [Officer C] asked her to read the complainant his rights and the police caution for night hunting. [Officer D] read these over the radio of the Department of Natural Resources (DNR). [Officer C] was present during the conversation, and the reception was very good, with no static. The complainant and [Officer D] engaged in a conversation for the purpose of answering the complainant's questions. The conversation ended shortly before 12:18 a.m. As you can see, the incident took place in less than an hour, the active offer was made, and the complainant was served in French.

Here is the Department's update with respect to the recommendations made in the previous matter:

Update with respect to the implementation of the recommendations concerning the previous complaint

The first recommendation was that the institution review the composition of the work teams in the region and make any necessary changes to ensure the provision of services of equal quality in both official languages at all times and without delay.

In our response to the previous complaint, we informed the investigator of the composition of the team at the registration station at the Miramichi office. Two bilingual positions were identified, one of which was vacant. The minimum level of linguistic proficiency required for all bilingual positions on this team is level 2+ (intermediate plus). (Note that all assessments of second-language proficiency are done by the Department of Post-Secondary Education, Training and Labour.)

We reviewed the composition of the Miramichi team and determined that two bilingual employees were sufficient to provide services of equal quality in both official languages within the prescribed time frames. Unfortunately, our second bilingual position is still vacant. We can assure you that the person hired for the vacant position will have the bilingual language skills required by our linguistic profiles.

The second recommendation was that, with respect to official languages training, the institution be abundantly clear to ensure its employees understand that the Department will not tolerate any lack of respect towards those who are merely exercising their language rights.

In our response to the previous complaint, we informed the investigator that we were working to ensure that all employees completed the Knowledge Centre's two mandatory modules on official languages. These modules explain the guidelines and the Department's obligation under the *Official Languages Act*. We believe that, with the help of these modules, among other things, we will be able to raise awareness and achieve compliance with the Act.

Also, we determined that an awareness session on language rights would at least be beneficial for staff at the Miramichi office. We plan to offer this session in the fall.

We sent a copy of the institution's response to the complainant and gave him 20 days to get back to us with his comments. On November 14, 2013, he contacted us by telephone and said that the conservation officer in question did not have the ability to communicate with him in French as stated in the Department's response, and he noted that the officer had made use of the radio service because he could not communicate in French. Also, the complainant reiterated that the reception was poor and inadequate for communication purposes.

At the request of the Commissioner of Official Languages, a meeting was held on December 4, 2013, with the Deputy Minister and the Executive Director of the Department's Regional Operations and Support Services (Division) to discuss this matter.

We believe the information above is sufficient for us to draw convincing conclusions without the need to continue our investigation or invoke any additional powers such as those conferred on a commissioner under the *Inquiries Act*.

3. Observations, Analysis, Conclusion and Recommendations

For the following reasons, we find that this complaint is founded.

The concerns expressed by the complainant in this matter concern the non-application of sections 27, 28, and 28.1 of the OLA, which provide as follows, respectively:

27 Members of the public have the right to communicate with any institution and to receive its services in the official language of their choice.

28 An institution shall ensure that members of the public are able to communicate with and to receive its services in the official language of their choice.

28.1 An institution shall ensure that appropriate measures are taken to make it known to members of the public that its services are available in the official language of their choice.

Punctuality, simultaneity, and equivalency in the quality of the services obtained are the concepts underpinning these provisions. A person's language preference should therefore not lead to undue delay or affect the quality of services and communications offered by an institution. Section 28.1 of the OLA states clearly that members of the public must be informed that they have the right to be served in the official language of their choice.

This active offer of service is the first major step that representatives of an institution of the provincial government must go through. It consists in making it clear that services are available in both official languages. Greetings in both official languages are a key component of quality services. It is no longer acceptable, as it used to be prior to the adoption the OLA in 2002, to wait for citizens to request services in one language or the other. It should be noted as well that, once citizens make their choice of language known, the necessary mechanisms must be in place to ensure they can immediately receive the services offered by the institution in that language.

A. Active offer

In this case, the Department notes that “[Officer C] first confirmed that the complainant wanted to be served in French.” We note that this officer arrived on the scene at least 10 minutes after the complainant had been stopped by the other two officers. If these two had made the active offer as they should have, [Officer C] would not have had to reconfirm this choice. After making the active offer of service, the conversation must continue in the language of choice of the member of the public, i.e., in the language used by this individual. Although the information in the file does not enable us to conclude that this requirement was not met, it seems to us that the Department should follow up with its staff to ensure that the active offer is made from the moment of first contact with any member of the public and that this person’s choice is respected immediately and without reconfirmation of this choice. Accordingly, we recommend the following:

Recommendation No. 1

That the institution conduct random checks of active offer and services in both official languages with its staff to determine whether the time frames for the provision of services for clients are of equal quality in both official languages at all times. These random checks should enable it to determine whether interactions with the public are always in compliance with the OLA and to take corrective action promptly.

B. Linguistic profile

During our investigation, we noted other factors that require the Department’s attention. For this reason, we thought this matter should be discussed with the Deputy Minister and the Executive Director of the institution’s Regional Operations and Support Services (Division). At that meeting, they conceded that [Officer C] was not able to serve the complainant in his language of choice and that he therefore made use of the radio service.

However, [Officer C] had received an intermediate plus proficiency rating in oral French (level 2+), which is, according to the Department, “the minimum level of language proficiency required for all bilingual positions on this team.” In addition, in its response, the Department notes that “two of our officers are considered bilingual and a third will be assessed shortly, and we believe he too will be considered bilingual.”

This is a major revelation in terms of certificate relevance: the Department must therefore ask itself whether the 2+ requirement is adequate for this work, which can be dangerous, or whether this officer had lost his ability to speak French at the required level since his assessment. The institution must also check to see whether the other positions described as bilingual are actually held by individuals capable of providing services in both official languages.

The Department must re-examine the relevance of certificates in light of this case and go beyond documentation checks by checking the actual linguistic capacity of its staff in order to ensure compliance with its linguistic obligations and the safety of these employees. Accordingly, we recommend the following:

Recommendation No. 2

- A. That the institution conduct a full review of the language proficiency levels required for each bilingual position within the Department to ensure that each is held by a person with the level of bilingualism appropriate for the nature of the job.**
- B. That the institution implement a language skills retention process for the bilingual members of its staff.**
- C. That the institution periodically conduct checks to ensure the retention of the prescribed level of language skills for each bilingual member of its staff.**

C. Protocol for communicating in the language of choice

The above-mentioned Departmental protocol includes the option of using the radio when its staff is unable to offer service in French. Our research showed that our office has already looked at this approach in the past (See previous file). For convenience purposes, we repeat below what was said about this practice in the earlier matter:

[Translation]

b) Protocol in place to communicate in the language of choice

Since we have concluded that the protocol in effect, which seems to prescribe the use of the radio, telephone, or any other electronic means in order to provide communication in the official language of choice, is unacceptable in that it is used as a front-line measure, not just as an alternate measure, we recommend:

That the institution immediately take steps that will enable it to analyze the current protocol in the light of this report and that it amend the protocol so as to ensure that it fulfills the obligation of providing equal service in both official languages.

Since then, the Department has indicated to us that an enforcement protocol was developed a few years ago to ensure the provision of services in both official languages at all times by conservation officers in the province. This protocol seems to have been modified because the radio is no longer a front-line strategy but rather an alternate tactic. In this regard, the comments made by Judge Blanchard in *Doucet v. Canada*, 2004 FC 1444, [2005] 1 F.C.R., are relevant:

[43] Sgt. Hastey testified with respect to the protocol established by the RCMP for meeting the needs of Francophone travellers. I would like to point out that, however well-intentioned it may be, the service is limited. Sgt. Hastey testified that, on occasion, a unilingual English officer meets someone who speaks only French. Arrangements are made for such individuals to communicate via radio to a bilingual member who is on the air. In my view, such an arrangement is by no means sufficient for the RCMP to fulfill its obligations under the Charter and the OLA so that any member of the public is entitled to communicate with a federal institution in the official language of his or her choice.

[Emphasis added.]

The radio is therefore not an acceptable way for the Department to meet its language obligations so that members of the public are entitled to communicate with provincial institutions in the official language of their choice. We would like to state once again that, as discussed at our meeting of December 4, 2013, the former Commissioner did not approve the Department's protocol. The Commissioner must ensure the application of the OLA and therefore cannot "approve" the protocols or policies of the departments that come under his jurisdiction.

In this regard, we take note of the Department's commitment to conduct a review of this protocol in the near future to ensure that it is up to date, and we recommend the following:

Recommendation No. 3

That the institution immediately undertake a review of the protocol for communicating in the language of choice to ensure that it complies with the linguistic obligations without using the radio system to provide service in one of the two official languages only.

D. Follow-up with respect to the previous file

Following recommendation was made in our report on the above mentioned matter:

[Translation]

Since the Greater Miramichi area is a popular location for hunting and fishing, those who engage in these sports in this area come from across New Brunswick, and many of them are from Francophone regions in the northern part of the province. The Department must therefore take this factor into account and make sure the teams have an adequate number of bilingual employees to meet the demand. In our view, the current profile does not seem adequate and, as a result, we recommend the following:

1. That the institution review the composition of the work teams in the region and make any modifications necessary to ensure the provision of services of equal quality in both official languages at all times and without delay.

The Department told us it had reviewed the composition of the Miramichi team and had determined that two bilingual employees were sufficient to provide service of equal quality in both official languages within the prescribed time frames but that one of these bilingual positions remained vacant. We are very disappointed to hear that nothing has changed since the release of the report on February 2013 in that case. We find it hard to understand how a single bilingual employee is able to serve all Francophone clients in the province. Should there not at least be a replacement who can assume this responsibility during the employee's absence? Recruiting bilingual employees may be a challenge for the Department, especially for specialized positions such as conservation officers; however, in light of this, it seems clear to us that the institution must be even more vigilant, proactive, and even creative in order to be able to rise to these challenges.

The Department needs to think outside the box in this case when recruiting professionals, and it absolutely must go beyond the programs typically used for this purpose. At our meeting, alternatives were discussed for the training of specialized individuals who could fill the voids within the Department. Accordingly, we recommend the following:

Recommendation No. 4

That the institution show some imagination and flexibility in its efforts to recruit trained individuals who can provide services of equal quality in both official languages to fill the vacant positions within its Department.

Pursuant to subsection 43(16) of the OLA, I respectfully submit this report to the Premier, to the Deputy Minister of the institution concerned, and to the complainant.

[original signed by]

Katherine d'Entremont, M.P.A.
The Commissioner of Official Languages for New Brunswick

Signed at Fredericton
in the Province of New Brunswick
This 13th day of January 2014