

2011-2012 Annual Report

**2011-2012 Annual Report of the Office of the Commissioner of  
Official Languages for New Brunswick**

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September 2012

Hon. Dale Graham  
Speaker of the Legislative Assembly of New Brunswick

Mr. Speaker:

Pursuant to Section 43(21) of the *Official Languages Act*, I am pleased to submit the report concerning the activities of the Office of the Commissioner of Official Languages for New Brunswick for the period of April 1, 2011 to March 31, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'm to', with a long horizontal stroke extending to the right.

Michel A. Carrier, Q.C.  
Commissioner of Official Languages for New Brunswick

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# Foreword

## **New Brunswick: Only Officially Bilingual Province**

English and French are the official languages of New Brunswick; they have equality of status and equal rights and privileges. According to the 2006 Census, 64.4% of New Brunswickers have English as their mother tongue. French is the mother tongue of 32.4% of the province's residents.

### ***Official Languages Act***

The *Official Languages Act* (OLA) requires the following institutions to offer and provide their services in both official languages:

- Legislative Assembly and its agencies (e.g., the Office of the Commissioner of Official Languages for New Brunswick),
- provincial departments,
- regional health authorities and hospitals,
- Crown corporations (e.g., NB Liquor, NB Power, Service New Brunswick),
- the province's courts,
- policing services,
- any board, commission or council, or other body or office, established to perform a governmental function.

In addition, the OLA imposes obligations on:

- cities (Bathurst, Campbellton, Dieppe, Edmundston, Fredericton, Miramichi, Moncton, Saint John),
- municipalities with an official language minority of at least 20% of the population (Charlo, Dalhousie, Eel River Crossing, Rexton, Richibucto, Shediac and Tide Head),
- planning commissions and solid waste commissions serving an area with an official language minority of at least 20% of the population.

The OLA does not apply to private-sector enterprises, except in cases where they offer services to the public on behalf of the provincial government.

### **Active Offer**

Institutions bound by the OLA have an obligation to inform citizens that their services are available in both official languages. As a result, it is not up to citizens to request service in their language, it is up to the institution to make that offer. Examples of active offer include answering the telephone or greeting someone in both official languages.

### **Commissioner of Official Languages**

The OLA has established the position of Commissioner of Official Languages. The Commissioner has a dual mission: to investigate and make recommendations with regard to compliance with the Act, and to promote the advancement of both official languages in the province. The Commissioner is an officer of the Legislative Assembly and is independent of government.

### **Annual Report**

The Act provides that the Commissioner of Official Languages must report on his or her activities each year. This ninth Annual Report presents a description of the activities carried out between April 1, 2011, and March 31, 2012.

## From the Commissioner

# From words to actions



Michel A. Carrier

Linguistic equality is a major societal undertaking. Since the first official languages act was passed in 1969, this project has slowly taken shape thanks to courageous political acts and concrete measures. But this voyage towards equality is not yet over. Putting words into actions therefore remains the rallying cry.

The 2011-2012 fiscal year was marked by the adoption of the *Government Plan on Official Languages: Official Bilingualism – A Strength*. I have long called for such a plan. Over the years, I have become convinced that the all-too-frequent breaches of the *Official Languages Act* are the result of the lack of a plan to implement the Act. This new government initiative corrects the situation by requiring all departments to adopt targeted measures in order to comply fully with their linguistic obligations. By putting official languages back into the mainstream of government activities, this plan gives official bilingualism new impetus, I am very delighted to say.

### Language of work: the weak link

With respect to bilingual services for the public, the government plan contains a wide range of measures that should enable the government to attain its objectives. However, when it comes to language of work within the

provincial public service, the government plan can still be improved upon. In fact, it contains very few innovative measures for creating a work culture that would ensure equal usage of both languages within government.

Creating this bilingual work culture is essential for three reasons. First, it is a matter of respecting the right of public servants to work in the official language of their choice, which right<sup>1</sup> arises from the equal status of English and French in the province. Second, the quality of government services in both languages is closely linked to their use in the daily activities of public servants. Third, a government administration that truly works in both languages is important for the vitality of the French language in New Brunswick.

It is impossible to overemphasize the vital role played by senior public servants in creating this bilingual work culture. However, challenges lie ahead.

"The review of the *Official Languages Act* is an important exercise because it provides an ideal opportunity to bring us a step closer to the realization of linguistic equality in New Brunswick, in short, to put words into actions."

Michel A. Carrier

### Bilingualism within the senior public service

The appointment of the new Auditor General of Canada, Michael Ferguson, garnered a great deal of media attention last fall. Although the competition notice<sup>2</sup> stipulated that proficiency in both official languages was required, the federal government decided to ignore this criterion. A number of observers were surprised that Mr. Ferguson, a former senior public servant from New Brunswick, the only officially bilingual province, was not fluent in both official languages.

For several years now, the provincial government has made use of the "team approach" to apply the *Official Languages Act*. This approach consists in forming teams of public servants with a variety of language skills to provide services for the public in English and French. Each team can therefore be made up of unilingual and bilingual employees. Under this approach, all public servants do not have to speak both languages. According to a government document:<sup>3</sup>

"Individual positions are not designated as bilingual or unilingual. [...] When, for example, a bilingual employee leaves his or her job, it does not necessarily mean it will be staffed with another bilingual employee. It depends on the current overall linguistic capability of the team."

It should be noted that the team approach was not designed to allow public servants to be supervised in the official language of their choice. Furthermore, according to a government document<sup>4</sup>, unilingual employees can become supervisors provided their team meets the requirements for the delivery of bilingual services. Unilingual public servants can therefore continue to access senior positions.

Over the past few months, my Office has conducted a study of the implementation of the new government plan on official languages (see page 13). From our conversations with officials from four departments, it has become quite clear that having unilingual employees in senior positions is not likely to help create a bilingual work environment.

There is a reason for the team approach: it enables unilingual persons to work within the provincial public service. However, this approach must be consistent with the right of government employees to work and be supervised in the official language of their choice. The team approach must promote bilingualism within the senior public service, not hinder it.

Over the course of my career, I have never met a senior public servant in New Brunswick who speaks only French. However, the reverse is not true. In its Plan on Official Languages, the government made a commitment to improve the bilingual capacity of the senior public service. I applaud that initiative. The government must now be rigorous in order that its language of work practices ensure that French has equal status with English in the operation of government.

Of course, language of work is a complex matter that may cause concern for some. But it is above all a matter of equality and respect.

### Seizing all opportunities to progress

Our quest for equality is not over; it remains a work in progress. More than ever, the government must move from words to actions. In this respect, all opportunities must be seized because the vitality of a language is linked to numerous factors. Last year, I made several

recommendations concerning various aspects of the vitality of languages, immigration and child care services in particular. I outline the government's response to some of those recommendations on pages 10 and 11. Last year, I also proposed a series of measures to improve the *Official Languages Act* in anticipation of the review process, which was to be launched by December 31, 2012. I commend the government for not waiting until that date to begin this important process. In fact, during the course of the past fiscal year, the Select Committee on the Revision of the *Official Languages*

*Act* was formed and began its work. It should be noted as well that approximately thirty Acadian and Francophone organizations submitted proposals for improving the Act last fall, several of which were similar to the ones that I personally proposed.

The review of the *Official Languages Act* is an important exercise because it provides an ideal opportunity to bring us a step closer to the realization of linguistic equality in New Brunswick, in short, to put words into actions.

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- 1 The ability of employees to work in their preferred official language is subject to the government's duty under the *Official Languages Act* to offer and provide services in the official language chosen by the public.
  - 2 Canada Gazette, Vol. 144, No. 40
  - 3 Official Languages: Straight Talk on Language of Work - Government of New Brunswick
  - 4 Official Languages: Straight Talk on Language of Work - Government of New Brunswick



# Language Issues

## Follow-up

This first section looks at developments with regard to certain issues presented in the 2010-2011 annual report.

## Immigration to New Brunswick

The New Brunswick government is stepping up efforts to increase immigration to the province. In so doing, it is playing a key role in shaping the future vitality of each linguistic community. The Office of the Commissioner reviewed the province's immigration activities and programs. After that study, the Commissioner made the following recommendations in his 2010-2011 annual report:

- Given the particular challenges associated with Francophone immigration, the provincial government should develop and implement a long-term strategy on Francophone immigration. This strategy should also contain a component to promote the integration of Allophone immigrants in the Francophone community.
- Under the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* and the province's constitutional obligation to protect and promote the status, rights, and privileges of both linguistic communities, the provincial government should establish an official policy and clear guidelines to ensure that its immigration practices promote both linguistic communities equally.

On December 8, 2011, the Commissioner met with Martine Coulombe, the Minister responsible for Population Growth, to present her with the highlights and recommendations of his study.

A few months after that meeting, the Commissioner wrote to the Minister to inquire whether his

recommendations had been acted upon by the Department. In a letter to the Commissioner dated April 13, 2012, Minister Coulombe wrote as follows:

*After our meeting, I made sure that my Department took steps to comply with the two recommendations concerning immigration that you made in your last annual report.*

*Over the past few months, staff at my Department have been working actively on developing a long-term strategy on Francophone immigration. To that end, a work unit with a specific Francophone immigration mandate was established. Work on the strategy is still ongoing. While developing the strategy, we took into consideration several aspects of your recommendations, including the importance of having a component to promote the integration of Francophone newcomers and establishing clear guidelines to ensure that our immigration practices respect the equality of the two linguistic communities. We will be happy to present you with a copy of that strategy once it is completed.*

### New Brunswick Provincial Nominee Program

In response to the Commissioner's request, Minister Coulombe also provided him with a linguistic breakdown of the candidates accepted under the New Brunswick Provincial Nominee Program, during the period from April 1, 2011, to March 31, 2012.

### New Brunswick Provincial Nominee Program

Candidates accepted (broken down according to language(s) spoken)  
April 1, 2011 to March 31, 2012

#### Francophone candidates

Number of candidates: 7

Total number with family members: 11

#### Bilingual candidates (English and French)

Number of candidates: 70

Total number with family members: 105

#### Anglophone candidates

Number of candidates: 514

Total number with family members: 1013

Source: Department of Post-Secondary Education, Training and Labour

## Early Learning and Childcare Act

On April 16, 2010, the Legislative Assembly enacted the *Early Learning and Childcare Act*. The preamble to the Act clearly sets out the importance of high-quality early learning and childcare services in promoting the development of young children. In that regard, one of the innovative aspects of the new legislation is the obligation for childcare facilities to use the provincial curriculum framework. There are two versions of this curriculum: one developed by the Francophone community and the other by the Anglophone community. It is important to note that the new legislation allowed childcare facility operators to use both curricula at a single facility, thus approving bilingual centres. The Commissioner believes this provision is contrary to the basic principle of duality in education. In the 2010-2011 annual report, the Commissioner recommended that the provincial government apply the principle of duality to all early childhood services.

In March 2012, the Commissioner met with Jody Carr, Minister of Education and Early Childhood Development, to discuss his recommendation concerning early childhood services. Two months later, the Legislative Assembly adopted the *Act to Amend the Early Learning and Childcare Act*. Section 7 of this Act provides that a licensed facility shall use, in its entirety, one of the curriculum frameworks (the English version or the French version), and no longer both.

The Commissioner is pleased with this amendment, although he recognizes that it does not fully implement the principle of duality in private childcare facilities. The Commissioner hopes that further government measures, such as the establishment of two provincial early childhood services networks, one for each linguistic community, will promote full application of this principle.

## Government's Voice Mail System

Last year, the Commissioner again raised the issue that the provincial government's voice mail system was not fully compliant with the principle of active offer of service in both official languages. Indeed, some of the system's automated instructions were in only one language.

In January 2012, the Acting President of the New Brunswick Internal Services Agency wrote to the Commissioner, informing him that an overhaul of the voice mail service in the spring of 2012 would make it possible to correct this problem.

Thanks to this upgrading by Bell Aliant, any person who phones a provincial department can select the language in which they wish to hear an employee's absence greeting, regardless of whether that employee is bilingual or not, as well as all other instructions.

The Commissioner is pleased by this announcement and thanks the Internal Services Agency and Bell Aliant for making the provincial government's voice mail system compliant with the OLA. He hopes that all institutions subject to the OLA are using a similar voice mail system.

## Appearance of the Commissioner before the Standing Committee on Legislative Officers

On June 30, 2011, the Commissioner appeared before the eight members of the Standing Committee on Legislative Officers. That appearance, which lasted nearly three hours, allowed the Commissioner to provide an overview of the activities of his office during 2009-2010 and to answer the members' many questions. The topics looked at included the revision of the OLA, the plan for implementing the OLA, access to second-language

courses, language of work within the public service, the status of official bilingualism in the province, and linguistic duality.

The Commissioner believes the meeting was very beneficial and hopes the committee will invite him to report on his activities every year.

## Main Issues

This second section deals with two particular issues examined by the Commissioner in the last year.

### Government Plan on Official Languages

## Meeting the Challenges, Transforming the Culture

Summary: The Commissioner believes that the Government Plan on Official Languages contains significant measures that should lead to progress in linguistic equality in the province. However, he is of the opinion that the plan must be improved in order to meet significant challenges, especially in relation to the language of work in the public service.

On October 20, 2011, Premier David Alward presented the Government Plan on Official Languages, Official Bilingualism – A Strength, to all government employees (Part 1).

The Commissioner of Official Languages for New Brunswick welcomed the announcement, as he had been advocating the adoption of such a measure for several years. Indeed, he believes the plan should enable government institutions to comply fully with their linguistic obligations and contribute to the advancement of both official languages in the province.

The two-year plan (2011 to 2013) contains some 30 measures associated with four categories:

- Language of service
- Language of work
- Promotion of official languages
- Knowledge of the *Official Languages Act* (OLA) and other obligations

Some of the significant measures outlined in the plan include the following:

- *The government will review its language training program to make it more strategic and effective.*
- *The government will develop mechanisms to improve the bilingual capacity of the provincial senior public service.*

- *All departments and agencies will review the linguistic profile of their section to enable all employees to work in the language of their choice.*
- *The government ensures that official bilingualism is included as a fundamental value of the public service and is clearly included in the Code of conduct of the employees of the public service.*
- *The government will introduce an annual activity to celebrate bilingualism and the equality of the linguistic communities.*
- *Employees will participate in training sessions enabling them to discuss the advantages of official bilingualism and convey the government's message.*

The Commissioner believes that these very important measures give new momentum to linguistic equality while enhancing application of the OLA.

### Implementation of the government plan in the departments and agencies

Each provincial agency and department must meet the objectives of the government plan by developing and adopting its own action plan, which will outline the department's activities, evaluation methods, and expected outcomes for each of the two years.

It should be noted that some departments are responsible for implementing measures that affect the public service

The Commissioner notes very few concrete measures in either the government plan or in the action plans reviewed that are likely to create a truly bilingual organizational culture. It is as though people believe that it is a matter of informing employees of their right to work in the language of their choice for this right to be exercised.

as a whole. This is the case with the Department of Intergovernmental Affairs (responsible for coordinating the government plan) and the Office of Human Resources. For example, the action plan for the Office of Human Resources contains the following activities for implementing the government's objective of developing mechanisms to improve the bilingual capacity of the provincial senior public service:

- *Determine the public service's bilingual capacity including senior management.*
- *Develop new guidelines for the development of linguistic profiles to ensure that proficiency in both official languages is found throughout all levels of the organization.*

### Review by the Office of the Commissioner

To learn how institutions are implementing the government plan, the Commissioner invited three departments and one agency to participate in a study. The four institutions – the Internal Services Agency; the Department of Post-Secondary Education, Training and Labour; the Department of Transportation and Infrastructure; and the Office of Human Resources – agreed to the Commissioner's request. The selection of these institutions was not related to any complaints about them but rather to the particular nature of their mandates regarding delivery of bilingual services.

More specifically, the review consisted of the following:

- examining the departments' action plans in support of the government plan;
- collecting information about the steps being taken and the efforts being made to implement the action plans;

- identifying the opportunities and challenges associated with the government plan.

The four institutions were first asked to send the Commissioner a copy of their action plans. Afterward, the Commissioner and his staff met with senior management from each institution in February and March 2012 to go over the various analytical points above.

### Commissioner's General Findings

- On the whole, the four institutions demonstrated a clear commitment to implementing the government plan. Generally, the measures in the action plans match up closely with the government's objectives.
- The Commissioner noted some discrepancies among the four institutions when it came to the number and nature of the measures proposed and to the schedules established. Moreover, he has doubts about whether it is appropriate to leave the selection of all of the measures for implementing the government plan up to the institutions. Of course, this approach enables each department to adopt measures that suit its situation. However, it could also produce uneven results among institutions.
- Some government representatives mentioned that their organizations would have liked to receive more support for implementing the government plan and their action plans. The Commissioner noted that there is no interdepartmental committee that enables the departments to coordinate implementation of their efforts and to share their experiences in this area.
- In its plan, the government recognizes that "in some situations, it can be difficult, if not impossible, for an employee to work in the language of his or her choice." The government plan contains the objective

of implementing the necessary measures to develop a work climate and environment conducive to the introduction of the language of work policy. However, the Commissioner notes very few concrete measures in either the government plan or in the action plans reviewed that are likely to create a truly bilingual organizational culture. It is as though people believe that it is a matter of informing employees of their right to work in the language of their choice for this right to be exercised.

- The government plan and the action plans do not adequately take into account the obstacles associated with the use of French in workplaces that are predominantly Anglophone, including:
  - the pressure exerted by an organizational culture that favours English;
  - obstacles related to the use of French (participation of unilingual Anglophone co-workers, time needed to translate documents, lack of knowledge of specialized terms in French, etc.);
  - the phenomenon of linguistic insecurity (belief of not having a good grasp of one's mother tongue).
- Some government representatives pointed out that it is difficult to reconcile an employee's right to work in the official language of his or her choice with the government's practice of employing unilingual managers. While recognizing the government's commitment to "*develop mechanisms to improve the bilingual capacity of the provincial senior public service*", the Commissioner believes that additional measures are required as regards language of work.
- The government plan and the action plans contain few innovative measures to support Anglophone public servants who have learned French and want to practise their second-language skills. The Commissioner believes that such measures are necessary in order to create a truly bilingual organizational culture, ensure better bilingual

service delivery, and foster the vitality of the French language in the public service.

- The Commissioner believes that the government plan and the action plans do not adequately recognize the government's role as a lever for the vitality of the French language in New Brunswick. In other words, the use of the official languages within government is seen only as a way of serving members of the public in the official language of their choice.

#### **Implementation of the government plan: poor coordination, insufficient resources**

Following his discussions with senior management of the four institutions, the Commissioner met with representatives of the Department of Intergovernmental Affairs, which is responsible for coordinating the plan at the provincial level. That meeting enabled the Commissioner to inform the Department of his preliminary findings further to his study and to receive feedback.

According to the Government Plan on Official Languages, the tasks of the coordinating department are as follows:

- *coordinate the preparation of action plans in every department and agency and their evaluation;*
- *suggest means or actions arising from the Plan that require the attention of the central administration;*
- *follow up with departments and agencies on a regular basis;*
- *ensure preparation of components arising from overall accountability for government as a whole.*

During his discussion with the representatives of the Department of Intergovernmental Affairs, the Commissioner learned that only one person is working on coordination of implementation of the government plan, on a half-time basis. The Commissioner believes that this resource is woefully inadequate for such an initiative.



## Adopting the Means to Succeed

The Commissioner believes that the government plan and the action plans he has reviewed do not include all the necessary measures to reach their objectives. The Commissioner therefore invites the government to consider the following additions:

### Bilingual organizational culture

- Awareness sessions on the use of both official languages in the workplace. These sessions will provide an opportunity for employees to discuss the role of French in oral and written communications, reflect on the consequences of using a single language on the vitality of the other language, and suggest innovative strategies for ensuring the equality of French and English.
- Set up temporary work teams operating in French. These groups, consisting of Francophones and Anglophones who speak French, would address the unilingualism of certain managers while enabling Anglophone public servants to practise their French-language skills.
- Implement a clear policy on bilingualism for all senior public servant positions in New Brunswick.
- Prepare a comprehensive picture of the level of bilingualism among managers and implement a clear policy on training, promotion, and hiring in order to address all the challenges in this area.
- Help employees who have taken language training to use their second language by setting up a mentoring program under which they will be supervised in this language.

- Distribute electronic language capsules to employees. These would pertain to, among other things, the policies related to language of service and language of work.
- Develop activities that encourage employees to use French at work; for example, designate certain days of the week as Writing in French Day.
- Offer French upgrading courses to encourage employees to use that language in the workplace.
- Alternate the order in which the English and French versions are presented (left and right columns, top and bottom of page) in documents distributed to employees.

### Implementation of Government Plan on Official Languages

- Review the human and financial resources dedicated to coordinating the plan.
- Immediately set up a committee of deputy ministers responsible for supervising the implementation of the plan, ensuring that best practices are shared, and preparing for the development of the next government plan.
- Until the role of the official languages coordinator is reviewed, designate the director of human resources to oversee the action plan in each department.



## Review of the *Official Languages Act*: The process has begun

Pursuant to section 42(1) of the *Official Languages Act* of New Brunswick, the Premier must initiate a review of the Act by December 31, 2012.

On June 8, 2011, the Select Committee on the Revision of the *Official Languages Act* was set up by the Legislative Assembly. Consisting of 11 MLAs and chaired by the Attorney General, the committee's mandate is as follows:

- oversee the examination of and consultation on the *Official Languages Act*;
- review legal decisions, recommendations of the Office of the Commissioner of Official Languages, as well as suggestions and recommendations from civil society and New Brunswickers;
- file with the Legislative Assembly an interim report and a final report with recommendations.

The Commissioner applauds the formation of this committee and believes this is a very important step in the revision process.

### New Brunswick's Acadian and Francophone community proposes amendments

On December 13, 2011, at a news conference, twenty-nine Acadian and Francophone organizations unveiled their proposed amendments to the *Official Languages Act* of New Brunswick. The document, written in the form of a bill, proposed numerous amendments to the OLA. Those proposals were the result of consultations within the Acadian and Francophone community, including a public conference held in November 2010 in Moncton.

In its "bill", the Acadian and Francophone community recommended the following:

- Consolidating the *Official Languages Act* and the *Act Recognizing the Equality of the Two Official Linguistic Communities* into a new act to be called the *Equality of Linguistic Communities Act*.
- Giving provincial civil servants the right to work in their official language of choice.
- Imposing linguistic obligations on professional associations and nursing homes.
- Imposing, as a minimum, the use of French and English in public signage and commercial advertising for any private-sector organization located in a municipality, rural community, or local service district whose minority official language population makes up at least 20% of the total population.

The Commissioner of Official Languages has reviewed the amendments proposed carefully and notes that several of them are similar to the amendments in his 2010-2011 annual report, including language of work, government signage, and public-private partnerships. He also notes certain proposals that would have the effect of broadening his mandate to include all legislative provisions concerning language rights, whether or not they are in the *Official Languages Act*. In such case, the Commissioner believes that additional resources should be allocated to him, since current resources are barely adequate for the full exercise of his responsibilities.

#### Members of the Select Committee on the Revision of the *Official Languages Act*

Marie-Claude Blais, Chair  
Hédard Albert, Vice-Chair  
Yvon Bonenfant  
Greg Davis  
Carl Killen  
Claude Landry

Pam Lynch  
Wes McLean  
Ryan Riordon  
Chris Collins  
Roland Haché

## Commissioner's proposed amendments

In his 2010-2011 annual report, the Commission explained how the OLA could be improved in order to fully implement the principle of the equality of the two official languages in the province. Below are the main amendments proposed by the Commissioner.

### Scope of the OLA

- Incorporate into the Act the right of civil servants to work in the official language of their choice.
- Make parapublic organizations, such as professional associations, subject to the OLA.
- Better define and frame the applicable language obligations in the case of public-private partnerships, the privatization of public services, and the granting of monopolies to private agencies.
- Set up a standing legislative committee to conduct an annual review of OLA-related matters.
- Clarify the Regulation to the OLA in order to avoid ambiguities.
- Incorporate provisions into the Act on government signage to ensure that the latter, while giving both official languages equal prominence, reflects, through the positioning of the words in English and French, the regions' linguistic reality.

### Application of the OLA

- Incorporate provisions into the OLA requiring institutions to develop and apply a plan to implement their linguistic obligations.
- Set up a standing deputy ministers' committee on official languages.
- Give Provincial Court judges the authority to rule on the language rights entrenched in the OLA.
- Make it compulsory to review the OLA every 10 years and set a time limit for the review period.

### The powers and work of the Commissioner of Official Languages

- Bestow the same powers on the Commissioner as those given to the Ombudsman.
- Incorporate provisions into the OLA to protect complainants against reprisals.

### Going beyond Official Bilingualism - Languages planning

- Incorporate provisions into the OLA so that the government can develop and implement a comprehensive framework for official languages planning.

# Investigations

## Introduction

### **Role of the Commissioner as regards Compliance with the *Official Languages Act***

The Commissioner conducts and carries out investigations on application of the OLA, either pursuant to any complaint made to the Commissioner or on his own initiative. If the Commissioner determines that the complaint is founded, he may make recommendations in his investigation report to improve compliance with the OLA. The Commissioner makes every effort to follow up on complaints as swiftly as possible by first ascertaining the relevance of each complaint and then, if necessary, interceding with the institutions concerned.

The Commissioner works discreetly and in a spirit of cooperation with the concerned institutions and favours a transparent approach characterized by support and collaboration. However, the Commissioner will not, if confronted by a blatant lack of cooperation on the part of an institution, shy away from publicly denouncing such resistance in his annual report.

### **Filing of Complaints**

Anyone wishing to file a complaint may do so either in person, in writing or by phoning. The Office of the Commissioner's website ([www.officiallanguages.nb.ca](http://www.officiallanguages.nb.ca)) describes the procedure for filing a complaint. All complaints received are considered confidential, and every effort is made to keep the complainant's identity anonymous.

The Commissioner may refuse to investigate or cease to investigate any complaint if, in his opinion, the complaint:

- is trivial, frivolous, or vexatious;
- is not made in good faith;
- does not involve a contravention or failure to comply with the Act;
- does not come within the authority of the Commissioner.

In such cases, the Commissioner must provide the complainant with reasons for the decision to do so.

Also, the Commissioner may take up a matter with an institution without there being an official investigation. For example, a situation that does not directly contravene the OLA may nonetheless adversely affect the advancement of the two official languages. Under his promotional mandate, the Commissioner may make the concerned institution aware of this situation.

### **Complaints handled between April 1, 2011, and March 31, 2012**

Between April 1, 2011, and March 31, 2012, the Commissioner's office handled 203 complaints. Of that number, 115 were admissible, with 97 based on lack of service in French and 18 on lack of service in English. A total of 60 complaints were deemed inadmissible on the grounds that they did not come under the Commissioner's authority or did not concern an institution within the meaning of the OLA, and 28 complaints were referred to other institutions for consideration. In addition, the Commissioner's office responded to 85 requests for information.

### **Main steps in complaint-handling process**

- The Office of the Commissioner receives the complaint and determines if it is admissible for investigation.
- If the complaint is accepted, the Commissioner notifies the institution concerned of his intention to investigate.
- The investigation is carried out.
- At the end of his investigation, the Commissioner forwards his report to the Premier, the administrative head of the institution concerned, and the person who filed the complaint. He may include in his report any recommendations he deems appropriate as well as any opinion or reasons supporting his recommendations.

If the complainant is not satisfied with the Commissioner's findings, he or she may seek redress before the Court of Queen's Bench of New Brunswick. A judge may decide on the redress that he or she deems fair and appropriate with regard to the circumstances. It should be noted that nothing in the Act precludes a complainant from applying directly to the Court of Queen's Bench instead of filing a complaint with the Commissioner of Official Languages. However, such a process entails costs for the person initiating it.

## Statistics 2011-2012

**TABLE 1 Complaints and requests for information**

Category	Services in French	Services in English	Total
Admissible complaints	97	18	115
Inadmissible complaints	19	41	60
Complaints referred elsewhere <sup>1</sup>	12	16	28
<b>Total of complaints</b>	<b>128</b>	<b>75</b>	<b>203</b>
Requests for information	39	46	85

<sup>1</sup> 1 Complaints referred to: federal Office of the Commissioner of Official Languages, Human Rights Commission, Ombudsman, other.

**TABLE 2 Admissible complaints by category**

Category	Services in French	Services in English	Total
In person	26	7	33
Signage	7	0	7
Telephone communication	20	3	23
Website	14	0	14
Documentation	19	6	25
Other	11	2	13
<b>Total</b>	<b>97</b>	<b>18</b>	<b>115</b>

**TABLE 3 Status of admissible complaints**

Status	Services in French	Services in English	Total
Complaints under investigation or completed	70	8	78
Investigations not initiated (pending additional information from the complainant and/or institution)	2	1	3
Complaints not investigated by the Commissioner (pursuant to subsection 43(11)(c) of the OLA) or withdrawn by the complainant	25	9	34
<b>Total</b>	<b>97</b>	<b>18</b>	<b>115</b>

**TABLE 4 Institutions targeted by a complaint, status of investigation and results**

Institutions	Number of Complaints	Investigations under way	Investigations completed	Founded	Unfounded
Atlantic Lottery Corporation	1	1	0	0	0
Communications NB	1	0	1	1	0
Culture, Tourism and Healthy Living	3	2	1	1	0
Education and Early Childhood Development	1	0	1	1	0
Efficiency NB	1	0	1	1	0
Election NB	6	0	6	6	0
Environment and Local Government <sup>1</sup>	13	3	10	9	1
Finance	1	0	1	1	0
Government Services	2	0	2	2	0
Health <sup>2</sup>	12	2	10	8	2
Justice	7	2	5	3	2
Legislative Assembly	1	0	1	1	0
NB Liquor	4	0	4	2	2
NB Power	1	0	1	1	0
New Brunswick Insurance Board	1	0	1	0	1
Post-Secondary Education, Training and Labour	2	1	1	1	0
Public Safety	6	2	4	2	2
Service New Brunswick	5	0	5	4	1
Social Development	6	2	4	3	1
Transportation and Infrastructure	2	0	2	2	0
Westmorland-Albert Solid Waste Corporation	1	1	0	0	0
WorkSafe NB	1	0	1	1	0
<b>Total</b>	<b>78</b>	<b>16</b>	<b>62</b>	<b>50</b>	<b>12</b>
<p>1 One of these complaints is related to the services provided by the Greater Moncton Planning District Commission. The other twelve (12) had to do with the services of certain municipalities (Fredericton, Dalhousie, Miramichi, Saint John and Moncton). None of these complaints are related to the services provided by the Department of Environment and Local Government.</p> <p>2 One of these complaints is related to the services provided by the Department of Health. Another one is related to the services provided by the New Brunswick Health Council. The other ten had to do with health care facilities.</p>					

## Selection of Complaints

The following section contains summaries of investigation reports concerning complaints that were founded. These reports, which were tabled by the Commissioner during fiscal 2011-2012, illustrate the wide range of complaints brought to his attention.

### The Moncton Hospital and the Dr. Everett Chalmers Regional Hospital Horizon Health Network

#### Complaint No. 1

On March 14, 2011, the complainant accompanied a person to The Moncton Hospital. When they arrived at the reception desk for Clinic E (Endoscopy and Minor Surgery), they did not receive an active offer of service in both official languages. The patient registration process was carried out in English only.

While they were in the waiting room, the complainant noted that the two receptionists on duty were speaking English only, without offering people the chance to be served in French. However, he also noted two posters indicating that bilingual services were available. An hour later, a nurse came to fetch the patient. When the complainant asked her about the procedure to be followed by persons accompanying patients, he noted that she was not speaking French.

When the patient was in the examining room, the complainant heard some very offensive remarks about Francophones, without being able to identify the voices.

When the patient rejoined the complainant, the complainant noticed that he was having trouble standing up and asked an employee, in French, for a wheelchair. She did not understand the complainant, and he had to explain using gestures.

The complainant thinks that what he "saw and experienced in that sector of the hospital was revolting and unacceptable."

#### Complaint No. 2

On July 21, 2011, the complainant went to the Dr. Everett Chalmers Regional Hospital for a blood test. When he was called to register, the clerk greeted him in English only. The complainant replied, "Bonjour." Still in English, the clerk asked him if he wanted service

in French. He replied, "Oui," and a few minutes later, a bilingual clerk registered him. The complainant then went to the room where the blood tests are done. No active offer was made, and the nurse spoke to the complainant in English only. He spoke to the nurse in French, and this time, his choice of language was ignored.

#### Complaint No. 3

On August 1, 2011, the complainant went to the ER at The Moncton Hospital. Although the complainant spoke French as soon as he arrived, the triage nurse spoke to him in English and failed to make an active offer of service. The complainant felt obligated to continue in English, and he was processed in that language.

#### Observations and Analysis

It should be noted from the outset that the investigation deals only with language of communication between the employees of the institution and members of the public and not with the institution's language of work.

This investigation relates to paragraph 19(2)(b) of the Act, which states as follows:

- Despite subsection (1), a regional health authority shall provide health services to members of the public in the official language of their choice through the regional health authority's network of health establishments, facilities and programs.

Furthermore, according to section 19(3) of the Act, each regional health authority has the responsibility to improve the delivery of health services in the French language.



In these three cases, there were many violations relating to the delivery of services in French. The elements common to these three complaints are the lack of active offer and the inability (partial or total) to receive services in French.

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 telling residents that services are available in English and French. 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 of the OLA in 2002, to wait for residents to request services in one language or the other. It should be noted as well that, once residents 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.

### ***Complaint No. 1***

With regard to the first complaint (reception desk of Clinic E of The Moncton Hospital) the complainant and the patient he was accompanying received no active offer of service, and the patient registration process was in English only. There were deficiencies in the delivery of French-language services at several points during their visit to the hospital, as indicated earlier.

The information provided by the institution about this complaint shows that the manager of Clinic E was informed of this problem. That clinic has 42 employees, 17 of whom are bilingual. This means that patients should, at least in theory, be able to receive services in the official language of their choice at all times. The institution noted the following efforts in response to the complaint:

- The institution reviewed requirements and expectations concerning the professional conduct of Clinic E staff with regard to the OLA.
- The institution reviewed the appropriate process concerning active offer and the clinic's emergency plan in cases where Anglophone staff members serve Francophones.

- The director of Clinic E explained to all staff the importance of making an active offer. When a clerk asks patients which language they prefer, he or she indicates "Fr" in the file to alert the clinic's staff to the fact that the patient prefers to communicate in French and that the patient should be assigned a nurse who speaks French.
- The director of Clinic E added active offer to the agenda for the next staff meeting to ensure follow-up of this matter.
- The director of ambulatory care at The Moncton Hospital changed her patient ID verification tool to include active offer in her current verification practices.
- The ambulatory care service made official languages a permanent agenda item for all of its meetings.
- The Horizon Health Network developed and implemented a four-year strategic plan on official languages that provides all staff with a clear vision and orientation regarding official languages. The plan includes an official languages policy, and in fall 2011, the Organizational Development service will launch new standardized orientation material concerning official languages and active offer.

As for the offensive remarks about Francophones overheard by the complainant while the patient was in the examining room in Clinic E, it is important to note that the institution was unable to determine whether those comments were made by a staff member or a patient at the hospital. However, since those comments are entirely unacceptable, if there is even a remote possibility they were made by a staff member, it is essential for the institution to be proactive and vigilant in making employees aware of the importance of respecting both official languages.

### ***Complaint No. 2***

With regard to the second complaint, when the complainant went to the Dr. Everett Chalmers Hospital for a blood test, no active offer was made, and his choice of official language was ignored.

The institution informed the Office of the Commissioner that Laboratory Services at this hospital has 14 employees, 6 of whom are bilingual, and they have a

process and an emergency plan in place, as mentioned earlier, for offering services to patients in the language of their choice. Unfortunately, this process was not followed on the day the complainant went to his appointment.

The Horizon Health Network's internal investigation showed that, even though three bilingual employees were on duty at the time of the incident, no attempt was made to meet the complainant's request to be served in French.

In response to this complaint, the institution informed the Office of the Commissioner that it had conducted a comprehensive review of the active offer process within Laboratory Services in order to identify deficiencies and opportunities for improving services. The institution has implemented certain corrective measures:

- Unilingual employees will no longer just say "Un moment s'il vous plaît" (One moment please) to patients. Rather, they will hand Franco-phone patients a card as soon as they indicate their preference for French-language services. The card will explain in writing that the unilingual employee will seek the help of a bilingual co-worker.
- After registration of the patient, phlebotomy labels will indicate the language chosen so that Laboratory Services staff will know what it is.
- Laboratory Services plans to do a full review of the policy on official languages and active offer at the next staff meeting. In addition, those items will be added to the agenda of the meetings of Horizon's phlebotomy services.
- To ensure that the emergency plan is followed, when required, it will be posted in locations that are easily accessible to all phlebotomy services staff.

### ***Complaint No. 3***

The third complainant did not receive an active offer of service at the ER of The Moncton Hospital, and he felt obligated to continue in English.

The Horizon Health Network indicated that it was very disappointed to learn that such an incident had occurred. The Moncton Hospital, including the ER, has many bilingual employees (44.4 employees out of a total of 97.8 positions).

An internal investigation showed that, on the day of the incident, only one triage nurse was on duty at the time of the incident. However, there were seven bilingual employees in that department, which means that the complainant should have received adequate services in the official language of his choice. The institution has implemented the following corrective measures at several levels:

- Reviewing all processes relating to the OLA and active offer with the triage nurse who was working on the day of the incident.
- Reviewing all processes relating to the OLA, active offer, and the emergency plan with all staff at the next ER staff meeting.
- Posting a copy of the emergency plan in a readily accessible location to ensure that it is followed, when necessary.

In these three cases, there was no active offer and no effort was made to locate bilingual employees who could provide the complainant with French-language services, except by the registration clerk in the second case.

After reading the Horizon Health Network's responses, the Commissioner notes that a number of corrective measures have been taken since the incidents in question. However, it is deplorable that all of these incidents occurred when the staff on duty were able to offer bilingual services to the complainants.

Despite the efforts made by the Horizon Health Network, the institution clearly continues to face considerable challenges when it comes to raising awareness and engaging certain members of its staff in active offer and the delivery of services in French.

## Conclusions and Recommendations

On the basis of the investigations, it can be concluded that the institution did not act in accordance with the requirements of OLA and that the three complaints are founded. Sections 27, 28, and 28.1 of the OLA were violated. The findings of this investigation show that there are still many gaps in the institution's ability to fulfill its linguistic responsibilities, despite the considerable efforts it has made.

The Commissioner duly notes the corrective actions taken by the institution in response to these three complaints and the commitment recently made by the President and CEO of the Horizon Health Network. He welcomes the Horizon Health Network's development and implementation of a four-year strategic plan intended to provide all staff with a clear vision and orientation with respect to official languages. The launch of the new standardized orientation material concerning official languages and active offer by the Organizational Development service should prove to be a step in the right direction.

It seems clear that the institution must be even more vigilant and proactive, and step up its efforts to meet its challenges. Furthermore, it must absolutely go beyond

programs and guidelines by adopting measures to check their effectiveness. These random checks should enable it to determine whether interactions with patients comply with the OLA and its internal policies and to take corrective action promptly.

In this regard, the commissioner makes the following recommendation:

### Recommendation No. 1

That the institution conduct random checks of active offer and services in both official languages at all of its establishments in order to ensure that its strategic plan and the various corrective measures, including awareness and policy development efforts, are not only understood by staff but implemented daily.

### Recommendation No. 2

That the Horizon Health Network measure the effectiveness of its language tools (explanatory card, phlebotomy labels, and "Fr" noted on patient files) by making unscheduled checks at the establishments targeted by the complaints, as well as at all of the Horizon Health Network's establishments.

## Fredericton Court House Department of Justice

### Complaint

On the morning of March 7, 2011, the complainant went to the Fredericton courthouse. When the complainant walked through the metal detector, the Sheriff's Officer spoke to him in English only, even when the latter responded in French. Furthermore, the complainant alleges that, when the hearing he was attending opened, the Deputy Sheriff asked the public to stand up in English only, saying "All rise."

### Observations and Analysis

One of the key elements of New Brunswick's *Official Languages Act* is active offer. It consists in making clients aware at first contact that services are available in both official languages. When the complainant entered the courthouse, he should therefore have received an active

offer of service and then been served in the language of his choice. Although the Department was unable to determine the circumstances of the situation reported by the complainant, it admits that it is possible that "the staff may not have used the active offer of service." Neither does the institution deny the allegations concerning the language used when court opened. The Commissioner therefore considers the complaint to be founded.

In his investigation report, the Commissioner noted that the Fredericton courthouse also houses the New Brunswick Court of Appeal, the province's highest court where persons from all walks of life (judges, lawyers, persons subject to trial, etc.) and from both linguistic communities congregate. Consequently, the quality of

the services provided there should be exemplary and reflect the spirit and letter of the OLA.

In its letter of response, the institution noted the following corrective actions:

- The Department has reminded all staff in Fredericton Sheriff Services of their obligation under the OLA to provide an active offer of service in both official languages and to seek assistance from a bilingual co-worker, if necessary.
- The institution has also required that any employee, who has not already done so, must complete the online I-learn course on language of service.
- It has also required the officers who are normally assigned to the main entrance to re-read the on-line information.
- The Department will revisit the requirements of its linguistic profiles to ensure that it can continue to meet its language requirements.

- In response to the language used in opening the court, a reminder has been sent to all staff in Sheriff Services and Court Services that they are to address the gallery in both official languages when opening court, regardless of the language that will be used for the trial.

## Conclusions and Recommendation

The corrective measures taken by the Department seem to be satisfactory for improving the delivery of services in both official languages at the Fredericton courthouse. However, the institution must go beyond just implementing these measures and check to make sure they are effective. The Commissioner therefore makes the following recommendation:

That the Department conducts random audits to ensure Fredericton court officers respect the provisions set out in the OLA.

## Road Conditions Information Service

Department of Transportation and Infrastructure

### Complaint

On December 28, 2010, the complainant, who was planning to drive to the Acadian Peninsula from Moncton, dialed 1-800-561-4063 several times to reach the road conditions information service.

After listening to the automated greeting, she pressed “2” for service in French. After a long wait, a person answered...in English. Late in the afternoon, the complainant called again, but the same thing happened. The next day, the scenario repeated itself. When the complainant requested service in French, the operator replied in English that the French-language service was not available that morning, and she apologized.

### Observations and Analysis

Deficiencies in the French-language services provided by the road conditions information service have been the

subject of complaints before. In his 2009-2010 annual report, the Commissioner indicated in no uncertain terms that this situation is unacceptable and very worrisome:

*During the year, the Office of the Commissioner received three complaints concerning the Department of Transportation’s road conditions telephone line. In the three instances, the complainants had chosen service in French, but the agent who answered did not speak that language. The Francophone or bilingual agents were either not available or had not started their shifts.*

(...)

*The service in question is a crucial one. People often consult it before setting out to ensure that the roads they will be travelling on are passable. Consequently, the safety of New Brunswickers and visitors to*

*our province depends heavily on it. It is therefore unacceptable that this service is not able to provide the public with the desired information in both official languages simultaneously.*

*It is essential that, in future, the Department ensure that the provider of this service rigorously adheres to the language clause in the contract. To bolster that clause, we believe that the wording of section 30 of the OLA should be inserted into all contracts of this nature. The institution is responsible for ensuring that the provider of this service is actually able to meet the requirements imposed by the OLA and that it is fully committed to doing so. Should the company fail to fulfill its obligations, we expect the Department to immediately take the necessary steps to rectify the situation.*

*More generally, in view of the scope of the services provided by the Department, it must be more rigorous and implement a verification process designed to ensure that third parties acting on its behalf respect both the spirit and the letter of the OLA.*

#### *Recommendation No. 1*

*That the Department of Transportation undertake to ensure that third parties with which it enters into agreements for the provision of services to the public have the human and technological resources needed to comply with the OLA.*

#### *Recommendation No. 2*

*That the Department of Transportation conduct periodic checks of its service providers to ensure that they are continuing to apply the measures needed to be in compliance with the requirements of the OLA at all times.*

#### *Recommendation No. 3*

*That the Department take prompt action when we bring a language deficiency that could jeopardize public safety to its attention.*

### **Conclusions**

Unfortunately, a few months after the tabling of that annual report, the situation had not changed, judging from what the complainant had to go through.

In connection with the investigation of this matter, the Commissioner thought it would be a good idea to meet in person with the new deputy minister to discuss it. During that conversation, the deputy minister made a clear and unequivocal commitment that changes would definitely be made to prevent such incidents in the future.

Without wanting to question the Department's commitment or good will, the Commissioner believes that it will be necessary to follow up on this. The Office of Commissioner will therefore do some checking early next winter in the hope of discovering that corrections have been made and that the service to the public is of equal quality regardless of the official language chosen.

## New Brunswick Health Council

### Complaint

On April 14, 2011, the complainant called a toll-free number to participate in the 2011 primary health care survey organized by the New Brunswick Health Council (NBHC). The person who answered the phone spoke only in English. When the complainant spoke to him in French, the person continued in English, without even offering to forward her call to a bilingual person.

In order to verify these allegations, an investigator at the Commissioner's office called the same number that same day. This enabled her to confirm the situation described by the complainant.

### Observations and Analysis

Section 30 of the OLA states that "The Province and its institutions are responsible for ensuring that all services offered to the public by third parties on their behalf are delivered in both official languages."

After reading over the letter of response from the New Brunswick Health Council, the Commissioner believes that the necessary arrangements had been made in advance to ensure that the private company hired to conduct the survey complied with the OLA. The letter from that company notes the efforts made to ensure communication in both official languages. Everything therefore seemed to be in place to ensure that the survey was carried out smoothly in both official languages.

While the proactive approach taken by the NBHC is commendable, the incident reported by the complainant shows that there were some deficiencies with the various measures taken.

In its reply, the Health Council expressed its commitment to official languages in these terms:

- The NBHC has learned a lesson from this incident. In our future projects, greater attention will be paid to the application of our processes.

As for the survey firm, it responded as follows:

- This complaint has certainly showed us that it is important to have appropriate measures and procedures in place but that it is just as important to follow them at all times.

### Conclusions

In view of these considerations, the Commissioner does not think it necessary to make any formal recommendations in this case. However, he does urge the NBHC to remain vigilant in the future to guarantee services to all New Brunswickers in the official language of their choice.



## Economic and Social Inclusion Corporation

### Complaint

On January 13, 2011, a complaint was filed by the New Brunswick Common Front for Social Justice Inc. (hereinafter the “Common Front”) on behalf of the Association des juristes d’expression française du Nouveau-Brunswick and the Société de l’Acadie du Nouveau-Brunswick against the New Brunswick Economic and Social Inclusion Corporation and the community economic and social inclusion networks.

Initially, the complaint identified some general concerns regarding the poverty reduction plan entitled *Overcoming Poverty Together: The New Brunswick Economic and Social Inclusion Plan*, adopted on November 13, 2009. The complainants stated the following to us:

*We believe that the existing community organizations will not be able to deliver services of equal quality in both official languages throughout the province.*

On March 14, 2011, the complainants sent us copies of some e-mails that had been sent out by United Way Moncton, the organization chosen to host the network serving Westmorland and Albert counties. Those e-mails, which invited various network stakeholders to participate in “community conversations,” were written in English only. In addition, the complainants told us that the websites of certain host organizations were in English only, including those of Vibrant Communities Saint John and Greater Fredericton Social Innovation.

### Observations and Analysis

#### ***Establishment of the Economic and Social Inclusion Corporation and the Community Inclusion Networks***

The complaint prompted the Office of the Commissioner to research the legislator’s intent when it was decided to develop the inclusion program and to examine the role that was to be played by ESIC and the CINs. A summary of the results of this research is found below.

In October 2008, the Premier of New Brunswick launched a public engagement initiative aimed at adopting a provincial poverty reduction plan.

The initiative was carried out in three phases: a public dialogue phase (public consultation), a roundtable phase (development of options to reduce poverty), and the final forum phase (adoption of a poverty reduction plan).

#### Poverty reduction plan

Following consultations with New Brunswickers from all walks of life, the province’s first-ever poverty reduction plan, *Overcoming Poverty Together*, was launched in November 2009. It describes the measures to be taken to reduce poverty and promote socioeconomic inclusion throughout the province and contains 22 action areas. The aim is to “reduce income poverty by 25% and deep income poverty by 50%” by 2015.

#### Economic and Social Inclusion Corporation (ESIC)

The Corporation was established at arm’s length from government to guide, support, and monitor the implementation of the plan. The members of its board of directors represent various sectors and are responsible for the work of the Corporation. The community inclusion network (CIN) is the mechanism through which community members can meet, set priorities, obtain resources, and take action on issues of concern to them. One of the main tasks of ESIC is to help establish community inclusion networks that are regionally responsive. There are 12 designated CIN regions. Each region has set up its own CIN with assistance from ESIC. ESIC also provides some financial support.

#### Community Inclusion Networks (CINs)

Under the *Economic and Social Inclusion Act*, ESIC may recognize a community inclusion network if the local group has a structure for governance and decision making that includes a board with representation from the business sector, government, the non-profit sector, and citizens who are living or have lived in poverty. In November 2010, ESIC issued a call for interested parties to establish community inclusion networks in their respective regions.

### ***Legislative provisions***

During the course of the investigation, the Office of the Commissioner reviewed all of the relevant legislative provisions, i.e., the *Economic and Social Inclusion Act*, and its Regulation, and the OLA.

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In the light of the concerns expressed by the complainants and the responses received from ESIC, it seems to us that the Corporation has already taken a number of measures with a view to improving the delivery of bilingual services by the CINs. In fact, according to the information at our disposal, ESIC encourages the networks to operate in accordance with the spirit of the OLA. Also, in early April 2012, the Corporation sent us a job description for the CIN coordinator position in Saint John, in which one of the hiring criteria was competence in both official languages. However, the Corporation considers the CINs to be separate, independent organizations that do not come under its authority and do not deliver services on its behalf. Rather, it considers the relationship to be one of partnership and collaboration.

That said, a number of deficiencies persist, including the following:

- Simultaneous interpretation is not always available at certain events.
- Unilingual websites. (However, we were told that they will be available in both official languages soon.)

### **Conclusions and Recommendations**

In our view, the complainants' concerns are founded, at least when it comes to the operation of the networks and their ability to offer equal services in both official languages.

Although it recognizes its obligations, ESIC seems to be advocating an approach meant only to "encourage" the networks to operate in accordance with the spirit of the OLA, since it considers the CINs to be separate, independent organizations that do not come under its authority and do not deliver services on its behalf. It considers their relationship to be one of partnership and collaboration.

It is clear that ESIC, as a Crown corporation, is an institution within the meaning of section 1 of the OLA and that, as a general rule, the services and communications

emanating from the Corporation are in compliance with its official language obligations. Through our exchanges with ESIC, we have noted a firm commitment to official languages within this institution.

Contrary to what ESIC appears to have concluded, the Commissioner believes that the CINs are third parties subject to section 30 of the OLA and, as such, have the same official language obligations as those that must be met by the institutions of the provincial government. The Commissioner reached this conclusion on the basis of the *Economic and Social Inclusion Act* and its Regulation. Indeed, this Act gives ESIC supervisory and monitoring authority, enabling it not only to recognize a group as a network but also to suspend or cancel that recognition. According to the Regulation, one of the reasons ESIC may use to suspend or cancel recognition is that the network "does not address the needs of both official linguistic communities in the geographic area in which the group operates." In the Commissioner's view, this responsibility is similar to the one that institutions have under section 30. ESIC must therefore exercise due diligence over the services offered by the networks. To do that, it is essential that ESIC adopt clear measures, policies, guidelines, and other standards to ensure that the CINs can fully understand and meet their official language obligations. It must go beyond suggestions and encouragement and lay out the rules of the game. In the absence of clear rules and guidelines, the Commissioner believes that ESIC would be unable to exercise the authority conferred upon it by the Act and its Regulation. In the absence of specific rules or guidelines, one might wonder how ESIC could suspend or cancel recognition of a CIN owing to the fact that it failed to deliver services to the linguistic communities.

Although ESIC continues to maintain that the CINs are not third parties within the meaning of section 30, the Commissioner believes that its responsibilities with regard to the networks remain the same and that the mandate conferred upon it by the *Economic and Social Inclusion Act* and its Regulation requires that it act so as to ensure that the networks meet the linguistic needs of both official language communities and that, to do that, it must act as we suggested in the previous paragraph. The aim is not to get bogged down in a legal debate over the interpretation of section 30 but rather to act rigorously and without delay within the confines of its mandate to ensure that the members of the two official linguistic communities are not excluded but receive services and communications of equal quality from the networks.



Although a certain amount of material has been prepared in both official languages, there are still no written policies or guidelines for the networks. This lack of written policies and guidelines concerns us, particularly because the Corporation has already been in existence for a certain amount of time. The Commissioner believes that guidelines are fundamental tools for enabling ESIC to ensure that the CINs are not going to define themselves as organizations that meet the regulatory criteria with respect to official languages just by checking a box.

ESIC must therefore adopt a master plan that clearly sets out what it expects of the CINs in terms of services and communications in both official languages.

The Commissioner therefore makes the following recommendations:

#### **Recommendation No. 1**

That ESIC prepare a strategic plan for the CINs that contains clear policies and guidelines, time frames for the implementation of corrective measures, and assessment tools for ensuring that the networks act in accordance with the legislative and regulatory provisions regarding official languages.

#### **Recommendation No. 2**

That ESIC be even more vigilant and proactive and that it act without delay by continuing its actions with

the CINs to ensure that the services offered to the public by the networks are consistent with our official language values and support the two official linguistic communities.

In addition, the Commissioner believes that ESIC and the CINs must go beyond the obligations of the OLA and the Regulation under the *Economic and Social Inclusion Act* by supporting the two official linguistic communities in accordance with the *Act Recognizing the Equality of the Two Official Linguistic Communities*.

Accordingly, the Commissioner recommends the following:

#### **Recommendation No. 3**

That ESIC take positive measures in all of its activities, including its interaction with the CINs, to promote the cultural, economic, educational, and social development of the official language communities in accordance with the *Act Recognizing the Equality of the Two Official Linguistic Communities* and the spirit of the OLA.

## City of Miramichi

### Complaints

Since May 2009, the Office of the Commissioner has received several complaints about the City of Miramichi. The details are as follows:

#### Website

- The complainant alleges that the city's website does not seem to be available in French.

#### Unilingual Signage

- English-only signage on the city's water tank, which reads "City of Miramichi – Canada's Irish Capital."

#### Services in French

- On October 21, 2009, the complainant called 506-623-2200 to reach City Hall. According to the complainant, the receptionist answered the call without making an active offer and was unable to provide him with the information he wanted in French. The complainant therefore had to continue the conversation in English.
- The complainant alleges deficiency in the delivery of French-language services by various offices (recreational and cultural services, municipal licences, public works, planning, fire prevention, and policing).

#### Municipal By-Laws in French

- The complainant noted that the city's by-laws are not available in French, which is contrary to subsection 35(2) of the OLA.

### Observations and Analysis

The allegations concern non-compliance with the provisions regarding the services and communications offered by cities and certain municipalities, including subsection 35(2) and section 36 of the OLA and subsection 3(2) of Regulation 2002-63.

#### *Website*

The City acknowledges that its website does not meet the requirements of the OLA. The City says that the site is currently being redesigned and will be available in both official languages at the end of this project.

The Commissioner hopes this will be completed as soon as possible. He also hopes this initiative will include measures such that any future updates or changes to the site will ensure that the content is of equal quality in both official languages.

#### *Unilingual Signage*

The City recognizes that the signage on some of its buildings does not meet the requirements of the OLA and its Regulation. It has therefore undertaken to ensure that all new building and facility signs and road signs are in both official languages. It informed the Commissioner that existing signage will eventually be replaced by bilingual signage as part of the regular maintenance process. It says that the two municipal water tanks will need to be repainted in three to five years and that any words or messages will appear in French and English at that time.

The Commissioner understands the challenges associated with the current economic downturn and its implications for the City. However, he is worried about the City's position that existing signage will "eventually" be replaced. The City's commitment without more specific time frames is not very reassuring. Indeed, the Regulation adopted in 2002 required that existing signs be bilingual by the end of 2003.

In the Commissioner's opinion, the City must immediately check all of the signs on its facilities and buildings and prepare a list of those that do not comply with the OLA (including the two water tanks). It must then set a precise schedule for changing them.

### ***Services in French***

The complaints about the lack of French-language services (recreational and cultural services, municipal licences, public works, planning, fire prevention, and policing services) were not denied by the City. It recognizes that it faces serious challenges with regard to a number of services. However, it says that it understands its obligations under the OLA. As indicated by its lawyer in a letter dated September 22, 2011, the City undertakes to remind its employees of their obligations with respect to official languages and to make some staff changes to ensure that it has more bilingual employees.

The Commissioner sees these as positive steps. He understands that the City faces challenges and that there will be certain catch-up period before it is able to comply with all of its obligations under the OLA.

### ***Municipal By-Laws***

The City of Miramichi is subject to subsection 35(2) of the OLA, which requires that it adopt and publish its by-laws in both official languages.

There appears to be a divergence between the comments of the complainant, namely that he was unable to obtain certified copies of certain by-laws in both official languages, and the response of the city's lawyer. The lawyer told us that by-laws are adopted in both official languages and that it should therefore not be difficult to quickly obtain certified copies in either official language.

Needless to say, the City must look into what prevented the complainant from obtaining copies in the official language of his choice and correct any persistent problems to ensure that such incidents can be avoided in the future.

### **Conclusions and Recommendations**

The Commissioner believes the City will have to ensure that its corrective actions are among its priorities and will have to adopt a comprehensive strategy for meeting all of its official languages obligations. The Commissioner therefore recommends the following:

#### **Recommendation No. 1**

That the City adopt a comprehensive master plan on official languages that targets all municipal services subject to the OLA and Regulation 2002-63 to ensure

compliance with all legislative obligations and that it make sure this plan is known to the City's employees. This step, which should identify strengths and weaknesses, and establish objectives, time frames, and a strategy, will help it to meet the challenges it faces and adopt measures for assessing the effectiveness of its plan.

The Commissioner realizes that the proposed changes will not occur overnight. However, during this catch-up period, he believes it is important that the City try to connect more with its Francophone community. This would not only provide the community with some reassurance of the City's good intentions but could also offer some possible solutions for improving access to and the quality of French-language services.

He therefore recommends the following:

#### **Recommendation No. 2**

That the City also be proactive during the catch-up period by considering various possible solutions, including the following:

- 1) consulting with the Francophone community by continuing discussions with the Conseil communautaire Beausoleil;
- 2) contacting the Department of Environment and Local Government and other New Brunswick municipalities to inquire about the availability of tools and sharing of best practices for municipalities.

With regard to signage, the Commissioner recommends the following to encourage the City to take stronger action:

#### **Recommendation No. 3**

That the City take immediate action by preparing a list of all of the signs on all of its buildings and facilities that do not comply with the Regulation, that it identify the steps to be taken with regard to the signs that need to be corrected or replaced, and that it set a schedule for the performance of the work.

## Dr. Georges-L. Dumont Regional Hospital

Vitalité Health Network

### The initial complaint

On September 29, 2010, the complainant, arrived at the Emergency Department (hereafter “ER”) of the Dr. Georges-L. Dumont Regional Hospital in Moncton as she was suffering from extreme pain in her foot. The complainant states that she was at the hospital for approximately six hours and that the majority of her time was spent at the ER waiting to be seen by a doctor. The complainant alleges that during this waiting period, she would have observed on several occasions ER staff calling out names of patients and room numbers in French only. She further alleges that French-speaking patients were being treated first and that English speaking patients, including her, had to wait the longest. She feels that this was discriminatory. After she was seen by the attending physician in the ER, the complainant was sent to the waiting room of the X-Ray Department. The complainant states that she willingly left the hospital at around 3:00 p.m. as she felt that she was not receiving the care and attention she expected. The complainant confirmed that she had been served in her preferred language of choice, English, at every point of service while she was at the Dr. Georges-L. Dumont Regional Hospital.

### The second complaint

On September 30, 2010, the complainant phoned the Dr. Georges-L. Dumont Regional Hospital. The complainant states that the receptionist who answered did so in both official languages. The complainant explained to the receptionist that she wanted to file a complaint with respect to the lack of care and attention during her visit the previous day. The complainant alleges that the receptionist asked her to specify the department concerned to which the complainant answered the ER. The complainant’s call was then transferred to a woman’s voicemail, whose message was entirely in French. The complainant states that although she did not understand the message, she nevertheless left a message in English at the end of the beep and was, at the time of the complaint, waiting for her call to be returned.

### Observations and Analysis

The complainant expressed her concerns in relation with the non-application of the OLA, particularly with respect to sections 27, 28 and 28.1 which stipulate the following:

*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.*

The investigation and analysis pertain solely to communications between the institution’s employees and members of the public and not to the language of operation of the health authority in question, since pursuant to subsection 18.1(1) of the *Regional Health Authorities Act*, Regional Health Authority A (including Dr. Georges-L. Dumont Regional Hospital) shall operate in French and Regional Health Authority B shall operate in English.

Accordingly, the investigation relates to paragraph 18.1(2)(b) of the *Regional Health Authorities Act* which stipulates that:

*18.1(2) notwithstanding subsection (1), a regional health authority shall*

*(b) provide health services to members of the public in the official language of their choice through the regional health authority’s network of health establishments, facilities and programs.*

### Initial complaint

In this matter, the complainant alleged that the Emergency staff called out patient names and room

numbers on several occasions in French only. She also alleged that French-speaking patients were being treated first and that her, along with other English-speaking patients experienced longer waiting times before seeing a doctor. The institution indicated in its response letter that patients reporting to any of the Emergency Departments are prioritized based on the following triage system: upon arrival, patients are triaged and prioritized according to their need for care and not according to their spoken language.

Based on the information gathered by the Office of the Commissioner over the years, there is no basis to dispute the institution's statement to the effect that the triage in place at the emergency departments in our province's hospitals is based on need for care and on no other factor. It is a well-known fact that the wait involved in emergency rooms is often lengthy and frustrating to many. It is our understanding that this situation is not confined to New Brunswick and anecdotal evidence would suggest that this is a problem mostly everywhere in Canada. Based on the information in this matter, the Office of the Commissioner cannot conclude that the wait experienced by the complainant is due to anything other than the normal factors that patients face when waiting at the emergency departments.

It is important to note that the complainant acknowledges that she did receive services in her preferred language at every point of service while she was at the hospital.

It is our understanding based on the files we have had to deal with over the years that the practice in most hospitals is to determine at the earliest contact the patient's language of choice and to place it in the patient's file so as to ensure that this choice is respected throughout the stay. This would explain why the complainant was served in her language of choice at all levels of service and also why the other patients were addressed in French by the hospital's personnel when it was time for them to be served.

We therefore cannot conclude that this practice, as outlined in the complaint, contravenes the obligations of the OLA.

### ***Second complaint***

The complainant also alleges that after telephoning the hospital to file a complaint, a receptionist answered in both languages. She then transferred her call to a voice

mail service, and the complainant heard an automated greeting which was in French only.

The institution informed the Office of the Commissioner that it conducted an internal investigation which revealed that the employee's automated greeting on the voice mail service was, in fact, only in French. The institution stated that this is due to the recent change in Bell Aliant's voice mail service, such that there is no longer a standard automated bilingual greeting option. The employee was not aware of the recent change. However, she did create a personalized bilingual voice mail greeting once informed of the change, since the option of creating a bilingual voice mail is still possible.

Based on the information above, we conclude that in this particular instance, the communication in question did not meet all the requirements under the OLA, more specifically with respect to the right of the public to be promptly informed that services are available in the official language of their choice as stipulated in section 28.1.

It appears that the incident in question was an isolated incident as a result of an employee not being aware of a recent change regarding the Bell Aliant voicemail system. We are satisfied with the measures taken by the health network, of not only informing the employee in question, but also ensuring that its employees are well-informed of these changes and create a personalized greeting in both official languages.

## **Conclusions and Recommendations**

Based on our observations and analysis above, the Commissioner has determined that the incident in question, relating to the second complaint, does not appear to be indicative of serious systemic deficiencies at Vitalité Health Network. The work we have conducted on various occasions has shown that an institution cannot assume that its employees are always fully aware of all the complexities and issues that arise when it comes to living up to the obligations found in the OLA. Accordingly, we conclude this report by making the following two recommendations in order to strongly encourage the institution to continue its efforts and to increase its vigilance so as to ensure that services to the public are of equal quality in both official languages:

**Recommendation No. 1**

That Vitalité Health Network conduct periodic verifications of its employees' voicemail greetings, with respect to employees that interact with the public, to ensure compliance with the obligation of making an "active offer of service" pursuant to section 28.1 of the OLA.

**Recommendation No. 2**

That Vitalité Health Network continue to remind its front-line employees of their obligations under the OLA and specifically of the importance of always informing members of the public that services are available in the official language of their choice.

## **Two languages that are equal... and of equal quality!**

Over the past year, the Commissioner's office has received complaints about the quality of French in certain government texts. Those complaints included, among other things, typographical errors, grammatical or syntax errors, and even the presence of English words in French texts. Owing to the nature of the complaints, they were dealt with quickly, and the errors were brought to the attention of the institution concerned, which generally corrected them right away.

In a recent case, the person responsible for an institution said she was surprised that an error on an official form was the subject of a complaint to the office. The Commissioner then reminded her that the equal status of French and English requires that texts prepared by institutions be of equal quality. He noted as well that any failings in this regard call into question this equal status, while casting discredit on the quality of government communications.

The Commissioner recognizes that errors may sometimes slip into official texts. However, he notes that those brought to his attention are almost always in the French versions. This situation shows that greater vigilance is needed to ensure that the two versions of official texts are of equal quality.

# Court Decisions



## The decision by the Court of Appeal of New Brunswick in the *Losier* case reaffirms the importance of language rights

On September 4, 2008, Serge Allain Losier was charged with operating his vehicle while impaired by alcohol. It should be noted that the police officer who arrested Mr. Losier in Fredericton waited about 30 minutes before offering him service in the official language of his choice.

During the Provincial Court trial\*, the judge concluded that Mr. Losier's language rights had been violated and that, consequently, the evidence obtained in contravention of his rights could not be used against him, resulting in his acquittal.

The Crown appealed that decision, first to the Court of Queen's Bench, which affirmed the decision, and then to the Court of Appeal. On October 11, 2011, New Brunswick's highest court upheld the verdict of acquittal.

This decision is important, as it closely associates the language rights outlined in the *Official Languages Act* of New Brunswick with those entrenched in the *Canadian Charter of Rights and Freedoms*. This link is important for two reasons. On one hand, it enables the Provincial Court to hear a case associated with language rights violations because that court may hear any matter related to Charter rights. On the other hand, since a violation of Charter rights entitles one to a remedy under section 24 of the *Charter*, the Provincial Court of New Brunswick may award a remedy for a language rights violation.

It is important to point out that, in its decision, the Court of Appeal of New Brunswick noted that the exclusion of evidence is not necessarily the appropriate remedy for all language rights violations.

### Excerpt from the Court of Appeal of New Brunswick decision *R. v. Losier*, 2011 NBCA 102 (CanLII)

In a remarkably detailed decision, the Court of Queen's Bench judge, sitting on appeal under Part XXVII of the *Criminal Code*, dismissed the Attorney General's appeal after ruling: (1) the trial judge had jurisdiction to decide the issue of whether the respondent's language rights had been violated after he was stopped; (2) the police officer's duty to inform the respondent of his right to be served in the official language of his choice arises not only from s. 31(1) of the *Official Languages Act*, but also from s. 20(2) of the *Charter*; and (3) the trial judge correctly concluded the rights conferred upon the respondent by these provisions had been violated and properly excluded the qualified technician's certificate pursuant to s. 24(2) of the *Charter*.

The Attorney General seeks leave to appeal. She contends the trial judge erred in law: [TRANSLATION] (1) "by recognizing the jurisdiction of the Provincial Court to rule on a language rights violation in the present circumstances"; (2) "by importing the requirements of natural justice into language rights and vice versa"; (3) "in his interpretation and application of s. 31 of the *Official Languages Act* and s. 20(2) of the *Canadian Charter of Rights and Freedoms*"; and (4) "by granting [a remedy] that is not justified in law and which could bring the administration of justice into disrepute."

#### Analysis and decision

The grounds of appeal raise important questions of "law

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\* Excerpts of the Provincial Court decision in the *Losier* case are reproduced in the 2010-2011 Commissioner's Annual Report.



Finally, while there is no question that language rights under the *Charter* are “infrangible” (...) and that s. 24 must be interpreted in a way that upholds “*Charter* rights by providing effective remedies for their breach” (...), it bears underscoring that exclusion of evidence essential to the prosecution is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. The analysis required under s. 24(2) must be carried out.

Excerpt from the decision of the New Brunswick Court of Appeal in the *Losier* Case

alone” within the meaning of s. 839(1) of the *Criminal Code*. Accordingly, the Attorney General is granted leave to appeal.

That being said, we are in substantial agreement with the reasons given by the judge of the Court of Queen’s Bench (see paras. 14-49 in particular). In our opinion, those reasons reflect a sound appreciation of the pertinent principles of law, particularly with respect to the meaning and scope to be given to s. 20(2) of the *Charter*.

The police officer who stopped the respondent was under a duty to comply with the obligations imposed on institutions of the government of New Brunswick by s. 20(2) of the *Charter* (see *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 (CanLII), 2008 SCC 15, [2008] 1 S.C.R. 383; *R. v. Gauthier* reflex, (1989), 101 N.B.R. (2d) 1, [1989] N.B.J. No. 1005 (Q.B.) (QL), rev’d on other grounds 1990 CanLII 4014 (NB CA), (1990), 109 N.B.R. (2d) 54, [1990] N.B.J. No. 860 (C.A.) (QL), leave to appeal refused [1991] 3 S.C.R. viii, [1990] S.C.C.A. No. 444 (QL); and *R. v. Gaudet*, 2010 NBQB 27 (CanLII), 2010 NBQB 27, [2010] N.B.J. No. 25 (QL)).

As the majority pointed out in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25 (QL), it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. We draw additional guidance from that landmark decision. Indeed, among the interpretations that might reasonably be given to such provisions, courts must favour the one that is more likely

to reflect the application of the following principles: (1) the right to use one or the other official language requires acknowledgement of a duty on the part of the state to take positive steps to promote the exercise of that right; and (2) the objective of the entrenchment of this right in the *Charter* was none other than to contribute to “the preservation and protection of official language communities”:

Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees; see J. E. Oestreich, “Liberal Theory and Minority Group Rights” (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, “Human Rights, Group Rights, and Peoples’ Rights” (1999), 21 *Hum. Rts. Q.* 80, at p. 83: “[A] right . . . is conceptually tied to a duty”; and R. Cholewinski, “State Duty Towards Ethnic Minorities: Positive or Negative?” (1988), 10 *Hum. Rts. Q.* 344.

[...]

Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation

of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later. [paras. 20, 25]

[Emphasis added.]

We are of the opinion that the interpretation the Provincial Court, as well as the Court of Queen's Bench, gave to s. 20(2) is in synch with those instructions. We note that it echoes the interpretation adopted by the Court of Queen's Bench in *R. v. Gautreau* (Richard C.J.Q.B) and *R. v. Gaudet* (LaVigne J.). At any rate, we reject the restrictive interpretation of s. 20(2) espoused in other decisions, notably *R. v. Robichaud*, 2009 NBPC 26 (CanLII), 2009 NBPC 26, 350 N.B.R. (2d) 113.

Finally, while there is no question that language rights under the *Charter* are "infrangible" (see *R. v. McGraw*,

2007 NBCA 11 (CanLII), 2007 NBCA 11, 312 N.B.R. (2d) 142 and *Bujold v. R.*, 2011 NBCA 24 (CanLII), 2011 NBCA 24, 369 N.B.R. (2d) 262) and that s. 24 must be interpreted in a way that upholds "*Charter* rights by providing effective remedies for their breach" (see *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), 2001 SCC 81, [2001] 3 S.C.R. 575 at para. 19), it bears underscoring that exclusion of evidence essential to the prosecution is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. The analysis required under s. 24(2) must be carried out.

The trial judge's analysis in this case is, in all respects, harmonious with s. 24(2) and the instructions provided by McLachlin C.J.C. in *R. v. Grant*, 2009 SCC 32 (CanLII), 2009 SCC 32, [2009] 2 S.C.R. 353. Given the circumstances and the applicable standard of review (see *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, [1995] S.C.J. No. 38 (QL) and *R. v. Buhay*, 2003 SCC 30 (CanLII), 2003 SCC 30, [2003] 1 S.C.R. 631), we are of the view, like the judge of the Court of Queen's Bench, that the trial judge's decision to exclude the qualified technician's certificate should not be reversed.

## Losier case: The province applies to the Supreme Court for leave to appeal the decision by the Court of Appeal and then withdraws its application

On December 9, 2011, the Office of the Attorney General of New Brunswick officially applied to the Supreme Court of Canada for leave to appeal the decision by the Court of Appeal in the Losier matter. In its Notice of Intent to Appeal, the Province plead that:

- *The Court of Appeal erred in law by imparting constitutional scope to certain provisions of a law enacted by the Legislative Assembly of New Brunswick, namely, section 31(1) of the Official Languages Act;*
- *The Court of Appeal erred in law by concluding that section 20(2) of the Canadian Charter of Rights and Freedoms had been violated; and*
- *The Court of Appeal erred in law by excluding the certificate of the qualified technician.*

In its exposition of the arguments, the Province "recognizes that Mr. Losier's OLA-guaranteed rights were violated when Officer Jordan did not inform him of his right to be served in French and English when he was arrested." [Translation] However, the Province maintains "that in this context, such a violation of the *Official Languages Act* does not comprise an automatic violation of the rights provided for in section 20(2) of the *Charter*." [Translation] Thus, the Province argued that in this case, "because the provisions of section 31(1) of the OLA could not be included in section 20(2) of the *Charter*, the respondent's constitutional rights had not been violated." [Translation]. Consequently, "the lower courts did not have the authority to exclude the certificate of the qualified technician (the evidence) pursuant to the remedial provisions in section 24 of the *Charter*." [Translation]

The Province's position surprised many observers. By contending that the provisions of the OLA could not be associated with those of the *Charter*, it appeared that the Province was recommending a restrictive interpretation of language rights, which is contrary to the one recommended by the Supreme Court in the *Beaulac* decision. The Court of Appeal of New Brunswick in the *Losier* outlined the following:

*As the majority pointed out in R. v. Beaulac, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25 (QL), it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. We draw additional guidance from that landmark decision. Indeed, among the interpretations that might reasonably be given to such provisions, courts must favour the one that is more likely to reflect the application of the following principles: (1) the right to use one or the other official language requires acknowledgement of a duty on the part of the state to take positive steps to promote the exercise of that right;*

On December 22, 2011, reversal of decision: the Province no longer wishes to proceed with the appeal. The Office of the Attorney General stated in a news release published the same day:

*On Wednesday, Dec. 21, the Deputy Attorney General requested that the Notice of Intent to Appeal filed with the Supreme Court of Canada in the case of R. v. Losier be withdrawn. Upon reflection it was determined that if the Supreme Court agreed to hear the matter, it would have unintended results on the importance afforded to the Official Languages Act. It has been determined, having examined all the circumstance of this case, that it would not be in the public interest to continue with the appeal and that withdrawing it was the appropriate option.*

## **Trial in official language of choice**

# **State does not have to translate all documentation**

In Canada, all persons have the right to be tried in the official language of their choice and to be heard by a judge who speaks that language. As such, interpretation services is provided for, among other things, witnesses who do not testify in the language of the accused. Additionally, evidence which is not in the language of the trial will be translated.

The right to be tried in the official language of one's choice does not mean that the state has to provide the accused with all of the prosecution's material in the official language chosen by the accused. Two recent decisions in the Provincial Court of New Brunswick confirm this interpretation. Defence counsel had asked the Crown to translate some of the prosecution's material into English. Although the trial was taking place in English, the Crown refused. Defence counsels argued that this refusal infringed upon the constitutional rights of their client. In both cases, the judges ruled that the state had no obligation to translate certain documents in the Crown's case file.

## **Trial of Mario Bossé**

### **Provincial Court of New Brunswick, Moncton**

Mario Bossé was accused of attempted murder, assault, and uttering death threats against a woman. His trial was held in the Provincial Court in Moncton. The accused, who spoke French and English, opted for a trial in English and retained the services of a unilingual Anglophone lawyer, who asked the Crown to translate the witnesses' written statements (documents which had not then been submitted as evidence) that were in French into English. The Crown refused. Defence counsel contested the decision before the judge, alleging that it violated Mr. Bossé's constitutional rights (*Canadian Charter of Rights and Freedoms*) and certain sections of the *Official Languages Act* of New Brunswick.

In his ruling, the judge noted that Mr. Bossé's right to be tried in the official language of his choice was being fully respected and that all of the evidence filed (oral and written) that was not in English would be translated. The judge recognized that there could be cases where not translating disclosure (all of the documents in the Crown's possession during a trial) could violate the accused's right to make full answer and defence. However, in Mr. Bossé's case, the judge ruled that this did not apply.

## **Excerpts from the judge's decision (unpublished)**

The question which must be answered in this case is whether the facts support a conclusion on a balance of probabilities that Mr. Bossé's ability to fully answer the charges and defend himself or his right to a fair hearing has been violated by the Crown's refusal to provide him with an official translation of the statements in question from French to English.

At the outset, it is, I believe, important to be absolutely clear on two points:

Mr. Bossé's right to have his trial in either English or French is unfettered and indisputable; so is his right to choose the lawyer he wants to represent him in these matters. That is not the issue in this case.

In my view, Mr. Bossé has failed to show that his right under s. 7 of the *Charter* has been violated. Let me explain further by making a few points I consider important. First, Mr. Bossé received his complete disclosure in a language he fully understands. Second, while his choice of counsel may have resulted in certain practical difficulties with respect to the disclosed material, there exists in the Court's opinion other feasible solutions to Mr. Bossé in overcoming the apparent difficulties created by his choice of counsel. For instance, there is nothing to suggest he is unable to assist his lawyer in understanding the statements provided in the French language or that someone else in Mr. Fowler's law firm could not do the same in a satisfactory manner.

And, if it was judged by Mr. Fowler that only an 'official' translation could afford him an opportunity to fully assess the disclosed material and make informed decisions about Mr. Bossé's defence, the latter has certainly not demonstrated he lacked the financial wherewithal to pay to have it translated.

There are cases that may arise in which the accused could successfully establish that the failure to provide translated disclosure effectively prejudices an accused's right to make full answer and defence. An example can be found in Judge Michaud's as yet unreported decision in the case of *R. v. Shawn Babineau*, decided in Moncton on July 15, 2011. However, the case before me is not one of those situations.

(...)

In the present case, the accused has chosen to have all proceedings conducted in the English language. His right to so choose will be protected by this court. Any evidence (oral or documentary) that is not in the English language will be translated. The Court will see to this.

In the Court's view, what disadvantage may exist in this case does not flow from Mr. Bossé having chosen to have his trial in the English language but from his choice of counsel. Statements provided in the course of

the Crown's obligation to disclose are not evidence, nor do they constitute a pleading or process issuing from a court which would have to be provided in the language chosen by the accused.

Furthermore, while Mr. Bossé, as a member of the public, is entitled to communicate with the Crown's office in either English or French and to receive services in the official language of his choice, that does not entitle him to have disclosure material obtained in the course of a criminal prosecution translated for his or his lawyer's benefit unless he can show a violation of his Section 7 *Charter* right to make full answer and defence. I do not believe that that is the kind of "service" contemplated by s. 27 of the *Official Languages Act*, for example, particularly in light of the fact that sections 16, 17 and 18 of that Act already deal with questions of language in all matters before the court.

In that respect, I subscribe to the opinion of my colleague, Judge Ronald LeBlanc, expressed in the case of *R. v. Emile Curry and Lee Curry* dated July 2, 2009. (Accused sought an Order to have documents prepared in English translated into French by the Crown.) To my knowledge, that decision has never been published or translated but I have attached a copy in any event as Appendix "A" for the benefit of the parties.

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### **Trial of Mario Doiron Provincial Court of New Brunswick, Bathurst**

Mr. Doiron was accused of driving while under the influence. At the time of his arrest, he obtained services in the official language of his choice: French. He later opted to be tried in English. His lawyer, a unilingual Anglophone, asked that the Crown translate the documents written in French by the police officer. The Crown refused. In his ruling, the judge said that Mr. Doiron's language rights had been respected and that, rather, the problem stemmed from his lawyer's unilingualism.

### **Excerpts from the judge's decision *R. v. Doiron*, 2011 NBPC 36 (CanLII)**

What Mr. Maxwell is alleging is that because the state has refused to furnish him, a unilingual Anglophone lawyer, with an officially translated version of six pages of documents written by the police in the language chosen by his client at the time of his communication with them, there has been a failure by the state to comply with the principles of fundamental justice, and more particularly the right to make full answer and defence.

With respect, I disagree. The principles of fundamental justice do not have such a far-reaching and all-encompassing scope. Mr. Maxwell was required to prove on a balance of probabilities that the Crown's failure to provide the translation to the defence has impaired the accused's ability to make full answer and defence. He has failed to do so.

Mr. Justice La Forest in the Supreme Court of Canada case of *R. v. Lyons* 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, stated at paragraph 88:

“It seems to me that s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favorable procedures that could possibly be imagined...”

That principle was recently reiterated by the Saskatchewan Court of Appeal at paragraph 96 of *R. v. Bitternose* (2009) SKCA 54:

96 “Justice La Forest, speaking for the Court in *R. v. Lyons*, observed that the requirements of fundamental justice were not immutable; rather, they varied according to the context in which they were invoked. Section 7 of the *Charter* entitled the accused to a fair hearing, but it did not entitle him to the most favorable procedures that could possibly be imagined. To similar effect are the comments of McLachlin J., as she then was, in *R. v. O'Connor*, that an accused is entitled to no more than a fundamentally fair trial, a process taking into account “not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process ...”

Mr. Doiron speaks both the English and French language. He chose to speak in the French language when he communicated with Cst. Doiron at the time of his arrest. Cst. Doiron wrote up his notes and his case synopsis in the French language, the language he knew Mr. Doiron had chosen to communicate with the police.

Mr. Doiron then chose to retain the services of a unilingual Anglophone lawyer. That certainly is his right. But he chose a lawyer he knew was at a linguistic disadvantage relative to his case. That was his choice; it was not made or compelled by the state. It is entirely possible he was of the belief that the advantage of having competent counsel outweighed the drawback of hiring a lawyer who was at a linguistic disadvantage. One could draw a parallel, for example, of hiring a competent lawyer from Vancouver to defend your case in New Brunswick: you may consider yourself to be at an advantage on the legal front, but the drawback is that it will cost you more to defend your case.

The issue is this: when an accused person chooses to hire competent counsel who is at a linguistic disadvantage, then under what circumstances would he be able to argue that his right to make full answer and defence has been compromised by the refusal of the state to correct that imbalance? Without answering that question those circumstances do not, in my opinion, exist in this case.

Mr. Maxwell is able to communicate with his client. His client is able to instruct him on the contents of the documents obtained from the prosecution in accordance with the disclosure obligations. His client understands all of the evidence gathered against him and he is able to prepare his defence in consultation with his lawyer.

Mr. Doiron has requested a trial in the English language and the Court will ensure compliance with this choice. He will undoubtedly understand all of the evidence that will be presented by the prosecution. In the event the prosecution intends to call a witness who will testify in a language other than English, an interpreter will be made available. In the event the prosecution intends to introduce a document in the French language, an interpreter will translate it for the benefit of the accused. The Court will see to this.

There are many options available to Mr. Doiron to assist his counsel. He can himself translate the documents; he can have someone translate the documents for his lawyer’s benefit, or he can hire another lawyer fluent in both languages to assist Mr. Maxwell.

What Mr. Maxwell in reality is seeking, to use his expression, is “legal precision”. By having the documents translated by a trained professional, he will be in a better position to cross-examine the witness. That, in my estimation is exactly what was cautioned against by Mr. Justice La Forest in his admonition that an accused is not entitled to “the most favorable procedures that could possibly be imagined...”

The application is dismissed.





# Promotion

## Facelift for Commissioner's Office websites

### 2tongues: a highly dynamic site

The 2tongues.ca website, aimed at children aged 9 to 14, has undergone a radical transformation. Besides its entirely new graphics, the redesigned site features content that is much more diversified and appealing to young people. It offers humorous video clips (Exercise It!), testimonials from young New Brunswickers, and language quizzes. Launched in 2005, this site promotes official languages to young people. One thing has not changed, however: the site's address: [www.2tongues.ca](http://www.2tongues.ca).

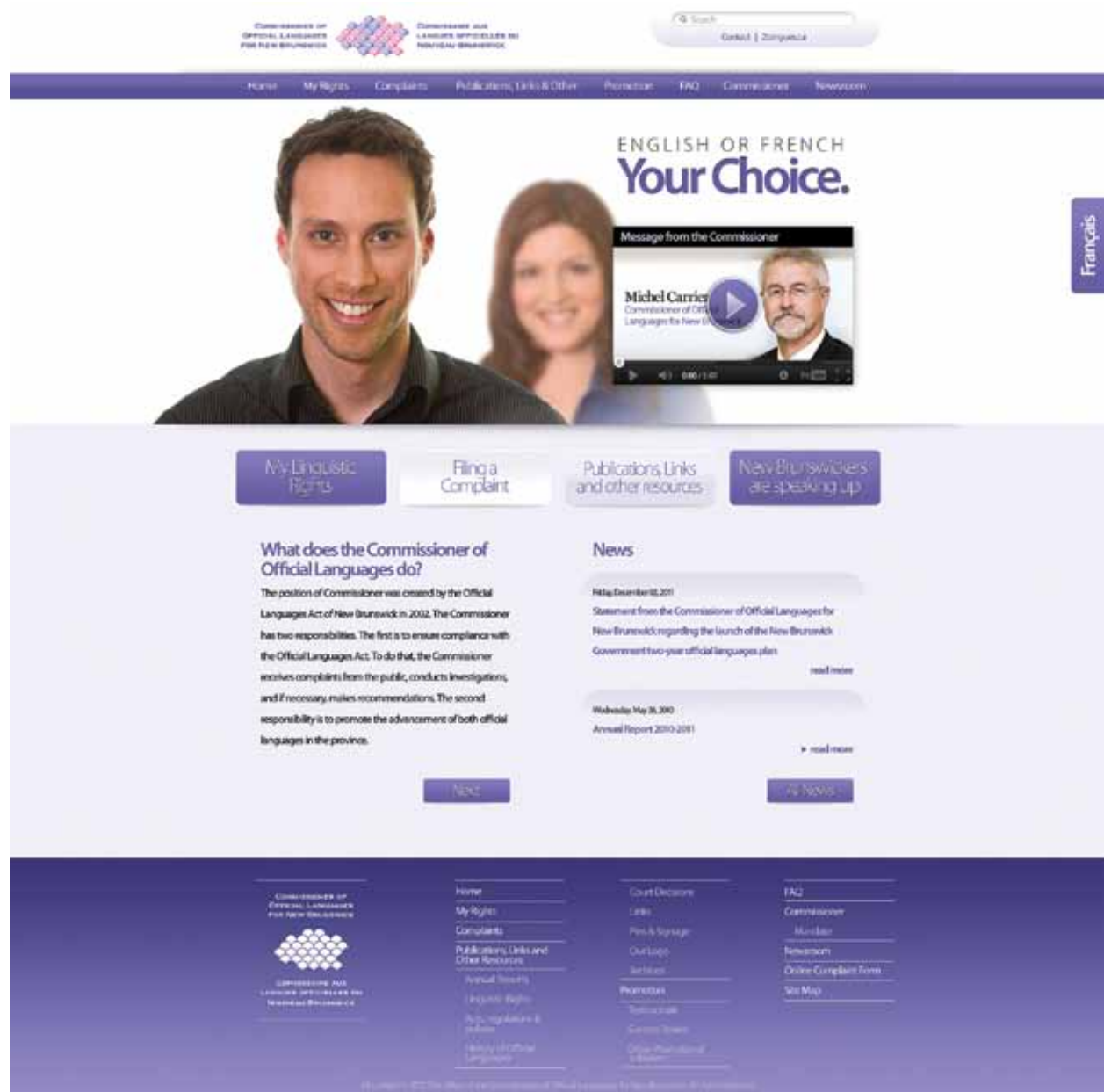




## Objective: making the Commissioner's office website user-friendly

Created in 2003, the website of the Office of the Commissioner of Official Languages also needed a facelift. Since official languages are often considered a complex subject, the new site was designed to be more user-friendly and easy to use. Information was therefore reorganized into a few categories, a search function was added, and the Office produced a video recording of the Commissioner explaining his mandate and how to file a complaint. Consequently, the site's graphics are uncluttered. Finally, photos of New Brunswickers scroll across the home page to highlight the fact that the *Official Languages Act* is there to serve people. Discover the new site at the following address: [officiallanguages.nb.ca](http://officiallanguages.nb.ca).

These facelifts were carried out by Razor Creative. The 2tongues project was made possible thanks to funding under the Canada/New Brunswick Agreement on the Provision of French-Language Services.



## Vitality of the French Language

### Summer literacy program for young Francophone students

Launched in June 2011, the programme *Alphab(été)sation* (summer literacy program) has allowed students at École Dr-Marguerite-Michaud in Bouctouche to expand their vocabulary during the summer months and to have fun while they do it. Each participating student receives a kit containing 40 vocabulary cards (5 words per week for 8 weeks). Each card contains a word, an image, a simple definition, and a phrase. At the end of each week, the students do an activity related to the word and become eligible in a competition.

The program, which targets students from kindergarten to Grade 3, seems to be having a positive impact. In fact, the success rate in reading of students at the school increased by 38% between 2010 and 2011. The programme *Alphab(été)sation* is an initiative of School District scolaire 11 and is supported by Place aux compétences (PAC), the Coopérative de Bouctouche, and the Caisse populaire de Kent-Sud. Commissioner Carrier congratulates the creators of this program. He believes it is an outstanding initiative through which the school and the community work together to help the students succeed in French.

### Avantage Miramichi Advantage: a project that's paying off

On March 29, 2012, the Commissioner took part in an event highlighting the success of the Avantage Miramichi Advantage project, the goal of which is to increase the provision of bilingual services by local businesses. At the event, some 30 Miramichi businesses were awarded *Champion de la promotion des deux langues officielles* certificates by the Conseil communautaire Beausoleil for their participation in the project.

The Commissioner congratulates the Conseil communautaire Beausoleil for the success of the campaign and for all its efforts aimed at helping French flourish in the greater Miramichi region. Below is an excerpt from the speech given at the event by Sylvain Melançon, Executive Director of the Centre communautaire Beausoleil.

In 2011, the Société de l'Acadie du Nouveau-Brunswick released an update of a study done in 2004 on the economic impact of Francophones in the region. The contribution of Francophones to the local economy now stands at nearly \$132 million per year. Another point that emerged from the study should be mentioned as well. Outflows amount to \$135 million per year, meaning that, for each dollar spent by Francophones in the Miramichi region, another is spent outside the region. Does that statistic not point to the immense business potential that could be tapped into?

(...)

The year 2011-2012 could be described as the second phase of the Avantage Miramichi Advantage project. Over the years, there has been a change in mentality and attitude between the linguistic communities such

that a real climate of openness has developed. This has made it possible to take yet another step in promoting the two official languages within local businesses. The main objective of the project this year was to be in the field, providing direct support for business owners in the retail sector rather than being involved in discussions and consultation.

Our project proposal contained three main activity streams based on our experience in 2006-2008 and on telephone surveys of local businesses in the summer of 2011.

A francization kit was prepared that contained tools for helping businesses take one more step towards promoting the two official languages. I would like to point out the presence this evening of Jean Gaudet, a councillor for the City of Dieppe. I wish to thank the Communications

Department of the City of Dieppe for their support at the start of the project. A copy of their new kit was sent to us, and it inspired us to develop the Miramichi kit. A big thanks to Dieppe for their excellent collaboration.

The second activity stream involved visiting businesses. We're very happy to have met with over 100 retail businesses this year as part of the Avantage Miramichi Advantage project. We received a very warm welcome, and a number of owners started using some of the tools in the kit right away.

The third stream of the project this year was the organization of activities to promote the two official languages, including this evening's event. We coordinated a consultation meeting in January and several social activities during the year.

Promotion of the two official languages takes time and energy. Francophone customers do not expect to be

served in French all the time, but they really appreciate your efforts to accommodate them in their language of choice. This year, the climate was favourable to taking yet another step towards carving out a place for French within local businesses.

Starting in April, we'll be continuing our efforts to support businesses two days a week in the hope that our partners will express an interest in collaborating to make this position a permanent one. I believe this is in everybody's interest. We have to strengthen our presence in the community and promote positive actions designed to give French more of a public presence in Miramichi. I'd like to thank Murielle and Jeremy for their efforts and their excellent work on the project this year. I think we can safely say that Avantage Miramichi Advantage 2011-2012 was an overwhelming success! Thank you for your involvement and your leadership!

