



# Investigation Report

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**INSTITUTION IN QUESTION** Department of Social Development

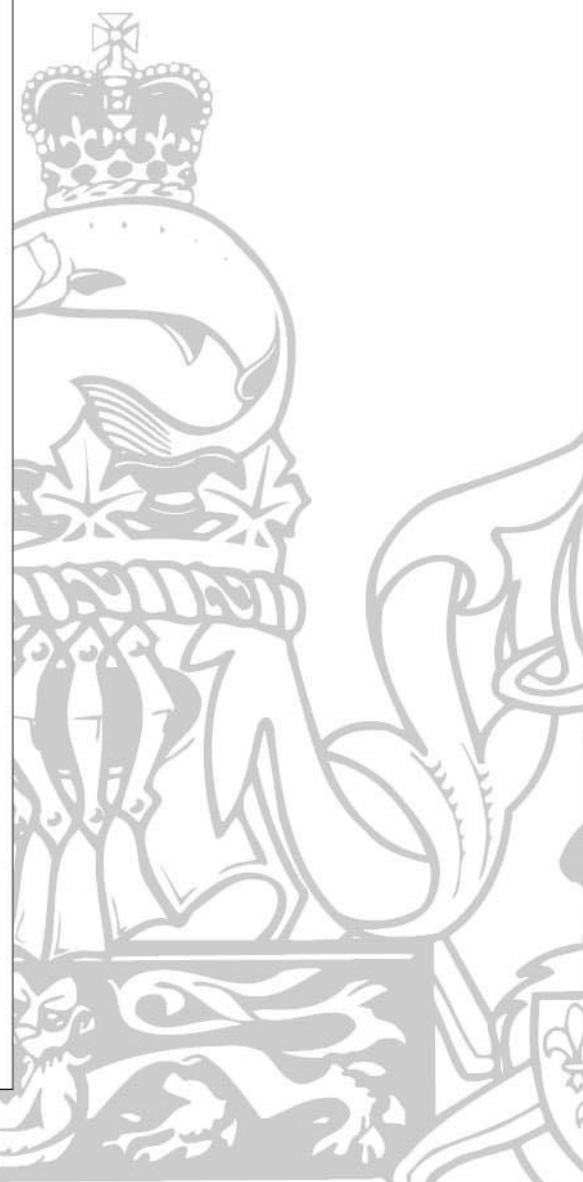
**SUBJECT** Delivery of services in both official languages in New Brunswick nursing homes

Investigation conducted by the Commissioner

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**REPORT DISTRIBUTED TO THE FOLLOWING PERSONS** Premier  
Deputy Minister of Social Development  
Clerk of the Executive Council Office  
Francophone stakeholders

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# Summary

Through legislative, regulatory and financial measures, the Province of New Brunswick provides guidance and support for all nursing home activities. The Office of the Commissioner of Official Languages (OCOL) believes that this situation makes nursing homes third parties within the meaning of section 30 of the *Official Languages Act* (OLA). Under this section, when an institution engages a third party to provide a service on its behalf, the institution “is responsible for ensuring” that its linguistic obligations are met by the third party.

How does the Department of Social Development, which is responsible for nursing homes, ensure that the residents of these homes can obtain services in the official language of their choice? That is the question that prompted this investigation undertaken by the Commissioner in February 2018.

The answers provided by the Department of Social Development indicated that this department is aware of its obligation to ensure that the residents of nursing homes can receive services in the official language of their choice. In that regard, the inclusion of a clause setting out linguistic obligations in contracts between the Province and new private nursing homes is a worthwhile measure. The Department is also putting forward other administrative measures that are supposed to ensure respect for language rights. However, the OCOL must conclude that these measures are clearly insufficient to comply with section 30 of the OLA and to guarantee Francophone and Anglophone seniors nursing home services in the official language of their choice. The Commissioner therefore makes the following recommendations:

THAT the institution adopt a strategy for meeting the nursing home services needs of each official language community, in accordance with the principle of equality of the two official language communities as set out in the *Canadian Charter of Rights and Freedoms*;

THAT the institution adopt a regulatory framework to govern the provision of services in both official languages in nursing homes as well as create Anglophone and Francophone living environments within bilingual nursing homes, and ensure that compliance with this regulatory framework is an integral part of the conditions to be met to obtain an operating licence;

THAT the institution adopt effective mechanisms

- for verifying the delivery of services in residents’ choice of official language;
- for verifying the existence of Anglophone and Francophone living environments within bilingual nursing homes;

THAT the institution develop and provide training on language rights for managers and employees of nursing homes;

THAT inspectors of nursing homes receive training to help them effectively assess the quality of services in the official language of choice of residents of nursing homes as well as the quality of Anglophone and Francophone living environments within bilingual nursing homes.

# Background

After studying the issue of the linguistic obligations of nursing homes twice, i.e. in 2008 and in a study in 2011 (2011-1389), the Office of the Commissioner of Official Languages (OCOL) for New Brunswick decided to take a look at this issue again. On the one hand, Francophone stakeholders expressed their concerns to the OCOL about the lack of services in French in some areas of the province. On the other hand, the Province's position on the status of nursing homes, stated in the 2012 Speech from the Throne, as well as the recommendations of the Select Committee on the Revision of the Official Languages Act in 2013 have significantly altered the situation relative to this issue.

The OCOL now believes that nursing homes are third parties within the meaning of section 30 of the OLA. The OCOL's position is based on the fact that nursing home operations in New Brunswick are closely governed by the Province, as shown in the following:

- The *Nursing Homes Act* and Regulation 85-187 govern the establishment and operation of nursing homes;
- The Department of Social Development must approve all nursing home admissions;
- The Province subsidizes low-income nursing home residents;
- Under the *Nursing Homes Act*, the Province may provide financial assistance to aid and encourage the establishment, operation and maintenance of nursing homes in the province;
- The Department of Social Development ensures that “the 67 nursing homes comply with the *Nursing Homes Act*, the Regulations under the Act, and departmental standards and policies by managing the size, structure and general operations of the nursing home system.”<sup>1</sup>

This third-party relationship was also confirmed when the government stated the following in the 2012 Speech from the Throne:

*To ensure your government and service providers are delivering services consistent with the intent of the seniors' charter, amendments will be introduced to the Ombudsman Act to expand the Ombudsman's powers to include services to seniors funded by government and **delivered by third-party service providers such as nursing homes**, special care homes, enhanced special care homes for persons with dementia and home support services.*

[our emphasis]

Taking the aforementioned into consideration, the OCOL finds that the Province of New Brunswick has an obligation to ensure that the residents of nursing homes can receive services in the official language of their choice. As part of this investigation, the OCOL sought to ascertain how the Department of Social Development (the institution) ensures that nursing homes respect the language rights of New Brunswick residents.

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<sup>1</sup> New Brunswick Department of Social Development website, consulted on February 14, 2018.

It should also be pointed out that the Select Committee on the Revision of the Official Languages Act clearly acknowledged in its report<sup>2</sup> the need for seniors in the province to have access to nursing home services in the official language of their choice:

*Services to seniors*

*“Respondents noted that being able to use one’s own language and receive services in that language is an essential part of aging with dignity. They recognized that it would be unrealistic to build nursing homes all over the province on a strictly linguistic basis if the numbers are not there to justify it. However, they recommended that nursing homes, special care homes, and agencies providing services to seniors have linguistic obligations. Different ways were suggested to promote service provision and the establishment of mechanisms to promote access to social and cultural activities in the language of choice within establishments that accommodate people from both official linguistic communities. Respondents pointed out that demographic changes and the aging population will require new strategies and new approaches for the provision of services to seniors and that these services go far beyond nursing homes.” (p. 7)*

*“The committee noted that senior citizens have a right to receive services in the language of their choice and that it is important that the departments responsible for developing and implementing these services be reminded of this right. The committee stressed that the issue of services to seniors is constantly evolving and is much broader than the nursing home issue. The committee is of the opinion that any new strategy must consider all services on the basis of current and future needs.*

*The committee recommends that the government:*

- *identify the needs of seniors for the next few years, taking into consideration the specific needs of the linguistic communities;*
- *review the relevant Acts and regulations to take into account the needs identified;*
- *develop the necessary policies and strategies to meet these needs; and*
- *establish an action plan that will enable seniors to get the services they need in the official language of their choice.” (p. 24)*

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<sup>2</sup> *Report of the Select Committee on the Revision of the Official Languages Act* (Fredericton, N.B.: Legislative Assembly of New Brunswick, Spring 2013).

# Findings of the investigation

## Investigation pursuant to subsection 43(13) of the OLA

On February 21, 2018, pursuant to subsection 43(13) of the *Official Languages Act* (OLA), a notice of investigation was sent to the Deputy Minister of Social Development to serve notice of the intention of the Office of the Commissioner to conduct an investigation into this matter. In this notice, the Commissioner requested that the institution reply to a series of questions and provide the Commissioner with documents.

## Institution's Answers

In a letter dated April 23, 2018, the Deputy Minister of Social Development answered the OCOL's questions. The OCOL's questions and the institution's answers are set out below.

1. Please provide us with a list of all nursing homes in each region of the province, indicating for each the number of beds and the official language(s) of service delivery.

Please see attached - Appendix A.

2. Please provide us with the official criteria used by your institution to define a bilingual nursing home (e.g., number of employees speaking either official language, level of proficiency required in the second official language, cultural programming required in each official language, etc.).

The *Nursing Homes Act* does not provide the Minister with explicit authority to “designate” a nursing home facility as unilingual English, unilingual French or bilingual. While we do not have criteria to establish bilingual, Anglophone, or Francophone status of a nursing home, and homes “self-identify”, the Act and associated standards require:

*A: Section 2 of the REGULATION 85-187:  
“care plan” means a plan that establishes care objectives and prescribes an integrated program of actions to meet the medical, nursing, dietary, activation and rehabilitation program, psycho-social and spiritual needs of a resident;*

*B: Section 18(d) of the REGULATION 85-187:  
An operator shall ensure that a comprehensive care plan is developed for each resident upon admission, reviewed at least annually and evaluated on an ongoing basis.*

*C: Nursing Home Standard B-VIII-1 SPIRITUAL AND PSYCHO-SOCIAL NEEDS states:  
i. The nursing home must ensure that the spiritual and psycho-social needs are included in the comprehensive care plan for each resident upon admission.*

*ii. The nursing home must ensure that the spiritual and psycho-social needs are reviewed at least annually.*

*iii. The nursing home must ensure that the spiritual and psycho-social needs are evaluated on an ongoing basis.*

In order to maintain compliance, nursing homes must provide services that meet the needs described above. Some measures include, but are not limited to, providing appropriate recreational, spiritual and cultural activities, such as musical events and religious services. In addition, appropriate cultural holidays must be commemorated for both linguistic groups, including culturally appropriate food for festive occasions such as Acadian Day and St. Patrick's Day.

Again, Social Development does not have the authority to define a nursing home's language of service, as that decision is made by the nursing home owner/operator.

3. Does the current number of English, French, and bilingual nursing homes in the province meet the needs of members of each official linguistic community? Please provide the reasons that support your response.

When a person undergoes an assessment for placement in a nursing home, his or her linguistic needs are taken into consideration as part of a comprehensive care approach centered on the individual.

4. What is the average waiting time for a place in a Francophone nursing home, an Anglophone nursing home and in a bilingual home?

Mean wait times are as follows:  
Francophone homes: 81.6 days  
Anglophone homes: 89.85 days  
Bilingual homes: 113 days

There was no statistically significant difference between the French and English nursing homes based on wait time between the wait list and admission.

**\*\*Data for waiting time between the wait list and nursing home admission for the period of May 26, 2016, to March 16, 2018.**

5. Does your institution have a demographic analysis by region, of current and future needs for residential care beds in the Province? If so, please provide this by identifying future needs by region for each official language community.

Under the 2018-2023 Nursing Home Plan, the bed need was developed on a "service area" basis. Each of the 38 service areas was derived by grouping New Brunswick's 273 Census Subdivisions (CSDs) to determine actual service levels. CSDs were grouped based on region, proximity, driving distance, community identity and language. Given that Social Development is not able to designate language of service within the nursing home, there was limited ability to consider language within the development of the new plan; however, Social Development was able to ensure that a particular service area includes only CSDs with the same predominant first official

language. Service areas are developed based on need, regardless of language. See attached - Appendix B.

6. At what point in the process of obtaining a licence to operate a nursing home (including licence renewal and new nursing home construction), is the issue of the language of service delivery in the home considered?

Language is considered in the RFQ/ RFP process as well as in the final Service Agreement signed with the service provider. The section of the Service Agreement on Official Languages states: "The Service Provider shall comply with the *Official Languages Act* (NB) and provide the Nursing Home Services to Residents and their families, and human resource services to employees in the official language of their choice. In addition, the service provider shall maintain all care plans and records in the official language chosen by the Resident." It is during the initial licensing stage that the nursing home self-identifies their language designation to the Department.

7. Is there a government strategy or plan to address any gaps between the two official language communities with respect to access to nursing homes? If so, please send us this plan or strategy.

At this time, Social Development is not aware of gaps between the two official language communities with respect to access to nursing home services. When someone is assessed for nursing home placement their linguistic needs are considered as part of a holistic approach to person-centred care. Potential residents are not obligated to be admitted to a nursing home that cannot provide service in the language of their choice.

8. What steps has your institution taken to ensure access to nursing homes in every region of the province that can provide services in both official languages? Please describe these measures in detail to help us assess their relevance and effectiveness.

Social Development is not able to designate language within nursing homes; however, language was taken into consideration within the development of the new 2018-2023 Nursing Home Plan. In particular, Social Development ensures that a specific service area includes only CSDs that share the same predominant first official language. Also, when someone is assessed for nursing home placement, their linguistic needs are taken into consideration as part of a holistic approach to person-centred care. Social Development ensures, through the inspection process, that residents are receiving adequate and appropriate care. Standards such as B-VIII-1 – *Spiritual and Psycho-Social Needs*, B-VII-1 – *Activation* and B-III-1 – *Resident Care*, are designed to ensure the rights of the residents are being met. This would include the delivery of services in the language of the resident's choice. Potential residents identify their preference for language of service upon application, and are not required to be admitted to a nursing home that cannot provide service in their respective language of choice.

9. What measures does your institution take to ensure that bilingual nursing homes do provide services of equal quality in each of the two official languages? Please describe these measures in detail to help us assess their relevance and effectiveness.

All licensed nursing homes in the Province are inspected at least annually and the Owner/Operator is responsible to develop and implement an action plan to address any particular issue that has been identified. Inspections are conducted to ensure that residents' needs are met

and that there is a complaint process in place at the nursing home. All nursing home inspection reports are posted online for public access.

10. What measures does your institution impose on bilingual nursing homes to ensure that their minority language residents are not afraid to avail themselves of services in the language of their choice and do not suffer from any form of ostracism related to their choice of language?

Each nursing home has policies in place to address this, such as policies on residents' rights and resident abuse along with a Resident Council and a Resident Advocate. Social Development sets nursing home standards, such as A-V-1 – *Resident Concerns and Complaints* and A-VIII-1 – *Major Incident Reporting*, which form part of the annual inspection process and must be met by the nursing home. Social Development investigates all complaints that are received in relation to nursing homes.

11. What measures does your institution impose on bilingual nursing homes so that residents can benefit from cultural programming in the official language of their choice?

Social Development has a number of standards in place designed to ensure a holistic approach to resident care, such as B-II-1 – *Comprehensive Care Plan* and B-III-1 – *Resident Care*. Other standards include Spiritual and Psycho-Social Needs as well as Rehabilitation. Every nursing home ensures that an initial care conference, with the multidisciplinary team providing a resident's care, is held within six weeks following the resident's admission. The care conference is held at least annually thereafter and shall discuss the plan of care and any other matters of importance to the resident and his or her substitute decision maker. Again, all nursing homes in the province are inspected at least annually and the Owner/Operator is responsible to develop and implement an action plan to address any particular issue. All nursing home inspection reports are posted online for public access. Standards on activation ensure that the nursing home has a written description of activation programs that includes its goals and objectives and the program is evaluated and updated at least annually. The Activation program must include:

- The development, implementation and communication to all residents and families of a schedule of recreation and social activities that are offered during days, evenings and weekends.
- Recreational and social activities that meet the interest of all nursing home residents including residents with cognitive impairment and residents who are unable to leave their rooms.
- Recreation and social activities that include a range of indoor and outdoor recreation, that benefit all residents of the home and reflect their interests.
- Opportunities for residents and family to provide input regarding the development and scheduling of recreation and social activities.
- Assistance and support to permit residents to participate in activities that may be of interest to them, if they are unable to do so independently.



- The nursing home must ensure that any actions taken with respect to a resident under the program, including assessments, reassessments, interventions and the resident's responses to the interventions, are documented in the resident's record.

#### **Meeting with the institution's representatives**

After analyzing the institution's answers, the Commissioner and staff members met with the Deputy Minister of Social Development and his associates on May 25, 2018 to obtain clarifications of the answers provided by the institution.

## Analysis<sup>3</sup> by the Office of the Commissioner

### A. Historical context

In order to fully understand the issue concerned, it is important to look at healthcare programs for New Brunswick seniors in their historical context. We will therefore provide a brief historical overview of these programs.

When the Province was established in 1784, the equivalent of social services, as they are known today, was provided by families and religious groups. In 1786, the Province adopted a statute entitled the *Poor Law*,<sup>4</sup> which conferred upon each local parish the responsibility of helping and providing relief for destitute persons. Hence the parishes were charged with looking after orphans, the poor, the elderly and the disabled.

At the time of Confederation, the *British North America Act* conferred upon the provinces the exclusive authority to legislate with respect to “the Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Charitable Institutions.”<sup>5</sup> New Brunswick chose to delegate its responsibility in this regard to the municipalities and the parish councils. These institutions would fund their services through property taxes.

It was only at the end of the 1950s that the provincial government started to become more involved in the long-term care system, accepting responsibility for the licensing and monitoring of nursing homes for the aged and infirm. In 1961, New Brunswick was the last province to abrogate the *Poor Law*. It would replace this law with the *Social Assistance Act*,<sup>6</sup> which permitted the provincial government to take a greater share of responsibility for the provision of social services. During the 1960s and 1970s, the long-term care system evolved with the adoption of regulations for the licensing, monitoring, and funding of nursing homes, and the establishment of levels of care and per diems. The government also provided funding for persons in nursing homes who were unable to pay for services.

The *Social Assistance Act* was abrogated in 1966 and replaced with a new statute intended to centralize powers relative to the delivery of social services and eliminate disparities in the quality of social services provided in the province resulting from the varying capacities of parishes and municipalities to fund these services from taxes.<sup>7</sup>

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<sup>3</sup> The Office of the Commissioner wishes to point out that a large part of the analysis is taken from Michel Doucet, *Les droits linguistiques au Nouveau-Brunswick : à la recherche de l'égalité réelle* (Lévis, Que.: Les Éditions de la Francophonie, 2017), pp. 383-393. Several parts of this book have been reproduced in full with the author's authorization. However, before citing certain sections of this report, we ask that you verify in the book and, if necessary, cite the book in as well as this report in your references.

<sup>4</sup> 26 George III, c 43 (1786). See also: James M. Whalen, “Social Welfare in New Brunswick, 1784-1900”, online: Government of New Brunswick <<https://archives.gnb.ca/Irish/Database/Almshouse/text/en-CA/WelfareNB.pdf>>.

<sup>5</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 92(7).

<sup>6</sup> *Social Assistance Act*, SNB 1960, c 9. At the time, there was no obligation to adopt the statutes in both official languages. English was considered the Province's official language.

<sup>7</sup> *Social Welfare Act*, SNB 1966, c 27.

The provincial government continued to work with special care homes and nursing homes in licensing, inspections and funding throughout the 1970s. Subsidies continued to be provided to resident unable to pay for their own care, with per diems being standardized on the basis of the level of care needed. Toward the end of the 1980s, the government was funding most of the operating costs of nursing homes via resident care subsidies.

During the 1990s and 2000s, the long-term care system was changed. A directive was drafted with a view to targeting families, not individuals, as responsible for the costs of uninsured services. Although subsidies were allocated to individuals unable to cover all of the costs related to these services, the government paid the costs only as a last resort.

In New Brunswick, services for the elderly are managed by the Department of Social Development. Department and Long-Term Care Program employees determine the level of care required by seniors submitting applications for services. Seniors—sometimes together with the family—decide themselves whether or not to go into a nursing home. Following an assessment carried out by social workers and nurses working in the long-term care field, the elderly person chooses the nursing home that suits him or her best. Distance and language can be acceptable reasons for refusing a vacant spot in a nursing home. If there are few nursing homes in an area, it is possible to direct the senior to a home in another area.

## **B. Legal and regulatory context of nursing homes in New Brunswick**

The *Nursing Homes Act* defines a nursing home as “a residential facility operated, whether for profit or not, for the purpose of supervisory, personal or nursing care for seven or more persons who are not related by blood or marriage to the operator of the home and who by reason of age, infirmity or mental or physical disability are not fully able to care for themselves but does not include an institution operated under the *Mental Health Act*, the *Hospital Services Act*, the *Hospital Act* or the *Family Services Act*.”<sup>8</sup>

The operation of these facilities is closely regulated by the Act. Subsection 3(1) states: “Without the prior written approval of the Minister, no person shall incorporate a company for the purposes of, or one of the objects of which is, establishing, operating or maintaining a nursing home.” The Act also states in Subsection 4(4): “The Minister may refuse to issue or renew a licence under this section if the Minister is not satisfied that it is in the public interest to establish, operate or maintain a nursing home.” The Minister can also prescribe terms and conditions that the Minister considers appropriate.<sup>9</sup> Section 24 states that without the prior written approval of the Minister, no person shall add a building or facilities to, or alter, a building or facility or part of a building or facility that is used for the purposes of a nursing home.

The Act also includes provisions dealing with the financial assistance that the Province may grant to nursing homes. Among other things, the Minister may, with the approval of Cabinet and in accordance with the regulations, provide financial assistance “to aid and encourage the establishment, operation and maintenance of nursing homes in the Province.”<sup>10</sup> Lastly, it stipulates that the Lieutenant-Governor in Council may make regulations concerning the terms and conditions that apply to licences as well as to the

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<sup>8</sup> R.S.N.B. 2014, c. 125.

<sup>9</sup> *Ibid.*, s. 4(5). See also section 10, Appointment of trustee.

<sup>10</sup> *Ibid.*, s. 22(2).

management and operation of nursing homes.<sup>11</sup> New Brunswick Regulation 85-187 under the *Nursing Homes Act*, contains a series of provisions dealing with the operation of nursing homes.

In its detailed answer, the institution says that the *Nursing Homes Act* does not confer on the Minister the express authority to “designate” a nursing home facility as unilingual French, unilingual English or bilingual. It also says that it has no criteria for determining what a bilingual, English or French nursing home is, and that the nursing homes “self-identify” what they are. It is during the first stage of issuance of the licence that the nursing home makes its linguistic designation known to the Department. But a bit further on in its answer, the institution produces a table indicating that there are currently 68 nursing homes in New Brunswick: 18 are French (28%); 45 are English (65%) and 5 are bilingual (9%). We also notice that there is no French or bilingual nursing home in the municipalities of Fredericton, Miramichi and Saint John.

It should be noted that during the meeting with the institution’s representatives,<sup>12</sup> the Office of the Commissioner learned that the linguistic designation of a nursing home is based, in fact, on the predominant language within the facility (for example, the language of work). Consequently, the designation “French”, “English” or “bilingual” does not necessarily mean that the services for residents are only provided in that language.

The institution’s representatives also said that only six nursing homes managed by the private firm Shannex had linguistic requirements. Shannex currently manages these nursing homes in Riverview (1), Quispamsis (1), Moncton (1) and Fredericton (3). In the service agreements with Shannex, the following clause was added:

The Service Provider shall comply with the *Official Languages Act* (NB) and provide Nursing Home Services to Residents and their families, and human resources services for employees in the official language of their choice. In addition, the Service Provider shall maintain all care plans and records in the official language chosen by the Resident.”

We will come back to this clause a bit further on in our analysis.

As for the measures taken to ensure that bilingual nursing homes effectively provide equal quality services in both official languages, the institution explains that all nursing homes are inspected at least once a year and that it is up to the owner or operator to draw up and implement an action plan to remedy all problems identified.

The institution said that it is not currently aware of any disparity between the two official language communities in term of access to nursing home services. It also said that when a person is assessed for placement in a nursing home, linguistic needs are taken into consideration as part of a holistic person-centered care approach. However, we must express some reservation about this statement by the institution when we consider that there is no definition of what a bilingual nursing home is and that there are no bilingual or French nursing homes in some of the Province’s municipalities with a large Francophone population.

We will come back to a number of these points a bit further on in our analysis.

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<sup>11</sup> *Ibid*, s. 31.

<sup>12</sup> May 25, 2018

### C. Do nursing homes have linguistic obligations towards their residents?

Under the *Nursing Homes Act*, the provincial government, through the Minister of Social Development, closely monitors the operation and management of nursing homes. Can it be considered that these facilities, given the organic and financial relationship that they have with the provincial government, although owned by private operators, are institutions of the New Brunswick government in the same way, for example, as municipalities, and thus the *Canadian Charter of Rights and Freedoms* and the OLA apply to their activities? We are not convinced of the merits of this argument and are not prepared to conclude that these facilities are institutions within the meaning of the OLA or the Charter. This conclusion does not necessarily imply that they do not have linguistic obligations.

We are of the opinion that nursing homes, although they are not, in a strict sense, institutions of the Province, are third parties that provide services on behalf of the Province or its institutions and, consequently, correspond to the definition in section 30 of the OLA and are required to honour obligations imposed upon them in sections 27 to 29 of this Act.

Since the Province, under the *Constitution Act, 1867*, is responsible for “establishment, maintenance, and management of hospitals, asylums, charities, and charitable institutions,” it is the Province that should, constitutionally, look after these facilities. However, it decided to pass legislation assigning this task to private entities. In doing so, it cannot abdicate its linguistic responsibilities. In *Godbout v. Longueuil (City)*,<sup>13</sup> the Supreme Court of Canada also stated that provincial legislatures and governments cannot bypass their obligations by conferring vesting government authority in third parties that come under their jurisdiction.

#### OCOL’s previous positions with respect to this issue

In 2008, an individual asked the Office of the Commissioner to consider the issue of the linguistic obligations of nursing homes. The OCOL concluded at the time that nursing homes were part of the private sector and that they were not institutions within the meaning of the OLA. It also concluded that this Act did not stipulate that these facilities had official mandates from the provincial government to provide services to the public. It concluded that section 30 of the OLA did not apply in this case.<sup>14</sup>

On March 24, 2011, the Association francophone des aînés du Nouveau-Brunswick (AFANB)<sup>15</sup> filed a complaint with the OCOL in which it stated its concerns about non-existent or insufficient long-term care services for Francophone seniors in some regions of New Brunswick. Following that complaint in 2011, the OCOL became aware of the conclusions of a nursing homes study conducted by the Canadian Institute for Research on Linguistic Minorities on nursing homes and a legal analysis of the AFANB submitted for its review. Contrary to the conclusions it arrived at in 2008, the OCOL concluded, in 2011, “that the Government of New Brunswick, through the Department of Social Development, plays a significant role in the nursing home sector.”<sup>16</sup> [our underlining]. It also said that the Department acted at least “as an

<sup>13</sup> *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844{ XE "*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844" }, 152 DLR (4th) 577.

<sup>14</sup> Report of the Commissioner of Official Languages for New Brunswick, File number 2011–1389 (November 2012, p. 6 [*OCOL Report*]).

<sup>15</sup> Before 2012, the Association was called the Association acadienne et francophone des aînées et aînés du Nouveau-Brunswick.

<sup>16</sup> *Supra* note 14, p. 14.

active observer” in this sector.<sup>17</sup> Because the Department of Social Development is responsible for enforcing and implementing the *Nursing Homes Act*, it therefore exercises undeniable authority in the operation and management of these facilities.

The Commissioner of Official Languages pointed out that there is no doubt about the provincial government’s interest in and concerns about the situation of seniors. The Commissioner noted that the Department’s website displays the mandate of the Nursing Home Services Branch as follows:

“The Nursing Home Services branch is responsible for the planning, design, monitoring and inspection of the services provided to residents in nursing homes. This branch ensures the safety of residents through the licensing and monitoring of nursing homes, liaises with nursing homes and the NB Association of Nursing Homes on relevant issues and provides professional and program advice to directors of nursing homes.”<sup>18</sup>

The Commissioner of Official Languages also said:

“According to an article published on November 17, 2012 in the Fredericton daily newspaper *The Daily Gleaner* and entitled “Nursing Home Association Urges Solution Unique to Province”, the New Brunswick Association of Nursing Homes is of the opinion that “in seniors’ care, it is time to set up a model that will address our province’s particular needs.”

We are aware that there are many components to be taken into consideration, but we think that bilingualism continues to be a crucial, unique component in New Brunswick. Consequently, language should be a key factor at various levels of nursing home management in our province.”<sup>19</sup> [our underlining].

#### **D. Ensuring that linguistic obligations are fulfilled**

Today, the OCOL is convinced that section 30 of the OLA applies to nursing homes because of relationships with the government. As we stated above, the Province is constitutionally responsible for nursing homes, a responsibility that it decided to assign to private or community entities. It cannot disengage from its linguistic responsibilities. Section 30 of the OLA states as follows:

30. When the Province or an institution engages a third party to provide a service on its behalf, the Province or the institution, as the case may be, is responsible for ensuring that its obligations under sections 27 to 29 are met by the third party.

30. Si elle fait appel à un tiers afin qu’il fournisse des services pour son compte, la province ou une institution, le cas échéant, est chargée de veiller à ce qu’il honore les obligations que lui imposent les sections 27 à 29.

<sup>17</sup> *Supra* note 14.

<sup>18</sup> “Nursing Home Services (Unit)”, online: Department of Social Development <[http://www2.gnb.ca/content/gnb/en/departments/social\\_development/contacts/dept\\_renderer.140.20256.4.6525.html#mandates](http://www2.gnb.ca/content/gnb/en/departments/social_development/contacts/dept_renderer.140.20256.4.6525.html#mandates)>.

<sup>19</sup> *Supra* note 14, p. 16.

So, the Province must ensure that nursing homes, as third parties providing services on its behalf, fulfil the Province’s obligations under sections 27 to 29, that is:

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.	27. Le public a le droit de communiquer avec toute institution et d’en recevoir les services dans la langue officielle de son choix.
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. Il incombe aux institutions de veiller à ce que le public puisse communiquer avec elles et en recevoir les services dans la langue officielle de son choix.
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.	28.1 Il incombe aux institutions de veiller à ce que les mesures voulues soient prises pour informer le public que leurs services lui sont offerts dans la langue officielle de son choix.
29. Institutions shall publish all postings, publications and documents intended for the general public in both official languages.	29. Tout affichage public et autres publications et communications destinés au grand public et émanant d’une institution dans les deux langues officielles.

It is also incumbent upon the Province, particularly the Department of Social Development, to ensure that services provided to seniors by nursing homes are in one or the other of the official languages and that, within the spirit of the OLA, it must ensure that these services are of equal quality in both official languages. Once again, the OCOL reminds the Province that it is ultimately responsible and bound by an obligation to take action to ensure respect for the language rights of seniors living in nursing homes.

As part of this investigation, the OCOL basically sought to ascertain how the institution ensured that third parties (the nursing homes) fulfilled their linguistic obligations.

The OCOL is pleased with the inclusion of a clause about compliance with the OLA as part of the Request for Qualification (RFQ) and Request for Proposal (RFP) processes, as well as in the final service agreement signed with the service provider.

The institution confirmed that this clause is included in new contracts signed with Shannex. Because Shannex operates or will operate nursing homes in the regions where a number of stakeholders have criticized insufficient services in French, it can be assumed that the institution wishes to correct this problem.

Although positive, this clause is clearly insufficient to ensure the fulfilment of linguistic obligations.

First, it is quite telling to note that private nursing homes to which a linguistic clause applies are not designated “bilingual” in the list provided by the institution. The OCOL knows that this designation can be used to describe the internal language of operations or the predominant language within a nursing home. However, if a private nursing home has the obligation to serve residents in both official languages, what is the impact of the unilingual Anglophone designation on Francophone seniors looking for a nursing home?

Second, the linguistic clause takes only one aspect of the issue into account: delivery of services. A nursing home is first and foremost a living environment. What measures are taken to make it possible for the residents of a bilingual nursing home to have homogeneous living areas in French? In many respects, the institution's answer ignores the challenges related to use of a minority language in a bilingual or majority Anglophone facility. In fact, the unequal dynamic between a majority language and a minority language will often result in the minority group members having to use the majority language. The only way to deal with this dynamic is to reserve separate areas where seniors can "live" in their language. The institution's answers indicate that there are no standards for creating true Francophone and Anglophone living areas within bilingual nursing homes.

Third, there is no specific procedure for settling a situation of non-respect of linguistic rights. The institution ensures that a person who is not obtaining service in his/her language can file a complaint. Do nursing home residents know that they have language rights? And what about the legitimate fear felt by all residents that if they file a complaint there may be reprisals? How do the institution's inspectors ensure that services are indeed available in the official language of choice and of equal quality in both languages? The OCOL also notes that there do not appear to be criteria for assessing the quality of service in the resident's choice of official language.<sup>20</sup> To whom will a resident go to file a complaint concerning his/her language rights? Lastly, what will be the consequences for a nursing home that fails to comply with the provisions of the OLA? In many respects, the institution's answers give the impression that it seems to rely on the goodwill of the nursing homes to ensure the fulfilment of their linguistic obligations.

#### And other nursing homes

The addition of a clause on linguistic obligations affects only a few new private nursing homes. What about other nursing homes? The institution says that this poses challenges, but it says that it is prepared to work with the nursing homes in order to be able to serve members of both language communities.

We commend the institution's goodwill, while reminding it that this is not sufficient. In fact, this answer gives the impression that measures will be taken to "accommodate" members of a language community. The constitutional status of equality of the two official languages and of the two official language communities guarantees equal quality services in both official languages, not accommodation. Consequently, the challenges with respect to access to nursing homes where one can live and receive services in one's choice of official language are still unresolved five years after the recommendations of the Select Committee on the Revision of the Official Languages Act. This situation is not unlike that in which the Court of Appeal of New Brunswick<sup>21</sup> determined that New Brunswick municipalities are "institutions of the Legislature and Government of New Brunswick within the meaning of subsection 16(2) of the Charter" and this same subsection imposes linguistic obligations on the province's municipalities. As we know, the legislators had to include a criterion in the OLA to make it possible to determine the municipalities to which these obligations would apply. Moreover, the communications and services to which these obligations apply have been defined in an OLA regulation.

#### **E. Ascertaining the needs of both language communities in order to satisfactorily meet their needs**

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<sup>20</sup> See the nursing home assessment reports on the Social Development website.

<sup>21</sup> Charlebois v. Moncton (City), 2001 NBCA 117



Under the *Canadian Charter of Rights and Freedoms*, members of New Brunswick’s two official language communities have fundamental rights:

<i>Canadian Charter of Rights and Freedoms</i>	<i>Charte canadienne des droits et libertés</i>
<p><b>16.</b>                      (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.</p> <p>(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.</p>	<p><b>16.</b>                      (2) Le français et l’anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.</p> <p>(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l’égalité de statut ou d’usage du français et de l’anglais.</p>
<p><b>16.1.</b>                      (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.</p>	<p><b>16.1</b>                      (1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d’enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.</p>
<p>(2) The role of the legislature and government of New Brunswick to reserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.</p>	<p>(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé.</p>
<p><b>20.</b>                      (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.</p>	<p><b>20.</b>                      (2) Le public a, au Nouveau-Brunswick, droit à l’emploi du français ou de l’anglais pour communiquer avec tout bureau des institutions de la législature ou du gouvernement ou pour en recevoir les services.</p>

Under these Charter provisions, which are also mentioned in the preamble to the OLA, provincial institutions must take necessary measures to protect and promote each language community.

As part of this investigation, the OCOL asked the institution questions to ascertain each language community’s specific needs. The institution said that it “is not aware of gaps between the official language communities with respect to access to nursing home services.”

This answer is surprising, given the many interventions by the Association des aînés francophones du Nouveau-Brunswick, the findings of the research conducted by the Canadian Institute for Research on Linguistic Minorities, mentioned above, and the position of the Select Committee on the Revision of the Official Languages Act with respect to nursing homes, particularly the following excerpt:

Identify the needs of seniors for the next few years, taking into consideration the specific needs of the linguistic communities;

The OCOL would like to remind the institution that it has the constitutional obligation to consider the specific needs of each linguistic community and to take the necessary measures to address them.

## Conclusion and Recommendations

When an institution engages a third party to provide a service on its behalf, the institution “is responsible for ensuring” that the third part fulfils the institution’s linguistic obligations. How does the Department of Social Development, the department responsible for nursing homes, ensure that seniors can obtain services in the official language of their choice within nursing homes?

At the end of this investigation, the Commissioner finds that the Department of Social Development does not have the framework or the tools to ensure that nursing homes fully respect the linguistic rights of their residents.

We wish to remind the Province that it cannot evade its obligations under the *Charter* and the OLA for the simple reason that an activity falling under its jurisdiction is carried out by a third party. It is obliged to adopt statutes or regulations setting out positive measures to uphold the equality of the official languages and the equality of official language communities with respect to the delivery of services to seniors. It must also ensure that it provides every individual, regardless of his or her official language, access to nursing homes providing services in his or her language. If legislative amendments are required to achieve this objective, the Province must employ the necessary means to make the amendments.

The OCOL wishes to emphasize the importance of making respect for a person’s choice of official language a priority in the senior care sector.

Having completed this investigation, the Commissioner makes the following recommendations:

THAT the institution adopt a strategy for meeting each official linguistic community’s needs for nursing home services with the principle of equality of the two linguistic communities as set out in the *Canadian Charter of Rights and Freedoms*;

THAT the institution set up a regulatory framework to govern the provision of services in both official languages within nursing homes as well as ensure the creation of English and French living environments within bilingual nursing homes, and that compliance with this regulatory framework be included in the terms and conditions required to obtain an operating licence;

THAT the institution adopt effective mechanisms for

- verifying the delivery of services in residents’ choice of official language;
- verifying the existence of English and French living environments within bilingual nursing homes;

THAT the institution develop and provide language rights training for nursing home managers and employees;

THAT nursing home inspectors be given training to enable them to effectively assess the quality of services in residents' choice of official language in nursing homes, as well as the quality of English and French living environments within bilingual nursing homes.

In accordance with subsection 43(16) of the OLA, we respectfully submit this report to the Premier, the Deputy Minister of Social Development, the Clerk of the Executive Council Office, and Francophone stakeholders.

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

Dated at the City of Fredericton,  
Province of New Brunswick  
This 19th day of July 2018