

COMMISSARIAT AUX
LANGUES OFFICIELLES DU
NOUVEAU-BRUNSWICK



OFFICE OF THE COMMISSIONER
OF OFFICIAL LANGUAGES
FOR NEW BRUNSWICK

SPEECH BY THE COMMISSIONER OF OFFICIAL LANGUAGES
FOR NEW BRUNSWICK, KATHERINE D'ENTREMONT, AT THE
ANNUAL MEETING OF THE LANGUAGE RIGHTS SUPPORT
PROGRAM

LANGUAGE RIGHTS SUPPORT PROGRAM – ANNUAL MEETING

NOVEMBER 23, 2015
UNIVERSITY OF OTTAWA, DESMARAIS BUILDING
20 MINUTES

THEME OF THE ANNUAL MEETING: THE PROGRESSION TOWARDS EQUALITY OF
STATUS AND USE OF FRENCH AND ENGLISH IN CANADA

Check against delivery.

Introduction

Mesdames, Messieurs
Ladies and Gentlemen
Bonjour, Good afternoon

I am very pleased to be here with you today and...to see my two colleagues, Graham Fraser and François Boileau.

It is always a great pleasure for me to attend the Language Rights Support Program – Annual Meeting – an important opportunity to share information and to reflect on the advancement of language rights in different parts of Canada.

If you will permit me, I would like to acknowledge a few people in the room, some fellow New Brunswickers: first, jurist Michel Bastarache.

I would like to take this opportunity to thank him as well as jurist Michel Doucet for their support a few weeks ago when some politicians, believe it or not, publicly criticized me for doing...my job, that is, for initiating an investigation into the delivery of bilingual services by security officers working in government buildings.

Mr. Bastarache and Mr. Doucet wrote an open letter in which they clearly explained the role of the Commissioner of Official Languages.

Once again, I would like to thank them from the bottom of my heart. It is good to know we have support when our work is called into question in a public forum.

I would also like to acknowledge the president of the Association des enseignantes et enseignants francophones du Nouveau-Brunswick, Marc Arseneault, and the Executive Director, Louise Landry, who are here today. Welcome to you all.

The importance of constitutional guarantees

Over the past few weeks, there has been a lot of media coverage in New Brunswick on the subject of official bilingualism because of the investigation I launched into the security services.

We are used to making the headlines and having to explain the importance of language rights.

However, this time, the situation was far more serious because politicians made some remarks that led people to think that violating the *Official Languages Act* was not a big deal...that there are more important things to do than worry about respecting the language rights of New Brunswickers. There was public speculation about the appropriateness of the Commissioner launching her own investigation. And there were remarks from a political leader who implied that I should focus less on OLA violations and more on promoting bilingualism.

Imagine...after nearly 50 years of official bilingualism in the only officially bilingual province in Canada.

Fortunately, Acadian and Francophone leaders and ordinary Anglophone citizens corrected these politicians, and I think that most of them are now back on track.

That said, these events underscore once again the importance of constitutional guarantees with respect to language rights.

Because any province can find itself in a situation where its political leaders refuse to emphatically defend the language rights of its citizens. Indeed, any province can be forced to deal with institutions that choose to ignore their linguistic obligations.

That is why we must pay tribute to the men and women who had the intelligence, foresight, and determination to ensure that language rights were guaranteed under the Canadian Constitution. Thus, when there is a lack of political will, minorities know they have another line of defence – the courts.

In this regard, New Brunswick is fortunate: The *Charter* guarantees specific protections for New Brunswickers, namely under subsection 16(2) and section 16.1.

The heart of the matter

I have been asked to speak to you today about the importance of, and the issues raised by, these two provisions and how they are linked to the positive measures in the *Official Languages Act*.

That is quite an agenda...

I am not a jurist; I cannot hope to offer you a legal analysis of these two sections.

We have some leading experts in this matter here today, and I will leave it to them to talk to us about that.

I am going to speak more about my thoughts on the relationship between the equality of our two official languages and the equality of our two linguistic communities.

A bit of context

As you know, New Brunswick enjoys remarkable constitutional protections.

First, the *Charter* establishes the equality of English and French in New Brunswick. This was included in subsection 16(2) when the *Charter* was passed in 1982. This subsection also confirms that New Brunswick is an officially bilingual province.

The origin of this recognition can be found in the first *Official Languages Act* of New Brunswick, which was adopted in 1969 following the work of the Royal Commission on Bilingualism and Biculturalism.

Second, the *Charter* establishes the equality of New Brunswick's two official linguistic communities and their right to distinct educational and cultural institutions under section 16.1.

The origins of section 16.1 can be found in a provincial act adopted in 1981, one that is not as well known as the OLA – that is the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*.

The principles of this act were included in the *Charter* in 1993, following the referendum on the Charlottetown Accord in 1992.¹

The Commissioner's work

In 2002, the Legislative Assembly of New Brunswick adopted a new *Official Languages Act*. In fact, it is under this new act that the position of the Commissioner of Official Languages was established.

Naturally, the preamble to the 2002 act takes up the main provisions of the *Charter* with respect to language rights in New Brunswick. However, understandably, the *Official Languages Act* does not extend to distinct institutions, such as schools, under section 16.1.

Does that mean that I cannot take an interest in section 16.1? No.

I also have the mandate to promote the advancement of our two official languages. This enables me to take an interest in the factors associated with language vitality, namely in the distinct institutions set out in 16.1.

It has been just over 20 years

A few years ago, New Brunswick celebrated the 20th anniversary of the addition of section 16.1 to the *Canadian Charter of Rights and Freedoms* in 1993.

The International Observatory on Language Rights at the Université de Moncton organized a symposium to mark that anniversary.

An article in *L'Acadie Nouvelle* summarized the symposium, saying that Acadia underutilizes the provisions of the *Charter*.

I certainly share this conclusion, because, in just over 20 years, section 16.1 has been invoked very rarely in court decisions.

The exception, of course, is *Charlebois v. Moncton*, which led to the adoption of a new *Official Languages Act* in 2002.

It is also interesting to note the following excerpt from the Court of Appeal in the Charlebois case with respect to section 16.1:

This provision is the legislative confirmation of the obligation of the provincial government to act positively. By its legislative and constitutional commitments, New Brunswick has accepted that it has the responsibility to take all possible steps for the preservation and development of the two official language communities. By that, it recognizes that the two languages and the two cultures they transmit constitute the common heritage of all persons in New Brunswick, and they must be able to enjoy an atmosphere conducive to development.^{1,5}

A principle used to a greater extent

Although section 16.1 is rarely used in court, I do feel, however, that the principle of the equality of New Brunswick's two communities is more widely applied by the Acadian and Francophone community and even the government. In my view, three cases illustrate this fact.

Health

In March 2008, the New Brunswick government announced a major reform of its health care system.

One of the key elements of that reform involved reducing the number of regional health authorities from eight to two. (These authorities manage the province's hospitals, among other things.)

The new Regional Health Authority A therefore takes in the facilities serving a predominantly French-speaking clientele, whereas Regional Health Authority B takes in those serving a predominantly English-speaking clientele.

The establishment of two health authorities by the provincial government seems to have been aimed at giving the Francophone and Acadian community a say in the management of health care facilities. In fact, in an interview published in an Anglophone daily newspaper on February 2, 2009, the then Premier said that the Acadian population would never accept a single bilingual health authority. It should be noted that the two new health authorities, A and B, were not officially designated on a linguistic basis.

In fact, the legal challenge was likely triggered by the fact that one of the former health authorities, the Beauséjour Regional Health Authority, which included Moncton's Francophone hospital, the Dr. Georges Dumont, is an officially Francophone authority. Its amalgamation with more or less bilingual authorities had Francophones worried this would be a major setback. And for good reason.

A structure had been established that seemed to reflect some type of duality while imposing a bilingual internal operation. There was a clear contradiction, and some even feared that this precedent could compromise the integrity of duality in the education sector.

The group *Égalité Santé en français*² was formed, mobilizing public opinion, and contesting the reform of the health authorities before the courts.

Finally, in April 2010, an out-of-court settlement was reached: the provincial government agreed to designate Authority A as an authority that operates in French and Authority B, in English.

It is important to note here that the two authorities are required to provide all of their health services in both official languages.

The linguistic designation of the two new authorities was incorporated into the *Regional Health Authorities Act*. In addition, a section³ requiring the two authorities to improve their services in French was added to the Act. In fact, the government made a commitment to develop a catch-up plan with respect to the facilities located in the Francophone and bilingual regions, designed to ensure a fair distribution of health services in the province.

Several questions have been raised over the course of this debate, one of which is: Can a health authority be considered a distinct institution under section 16.1?

The court did not have to settle this question. However, in my opinion, the out-of-court settlement tacitly acknowledged it.

Education

There is another example of how the principle of equality was addressed by New Brunswick's Acadian and Francophone community. It deals with education.

Last month, the Association des enseignantes et des enseignants francophones du Nouveau-Brunswick, some Francophone organizations, and a parent filed a lawsuit against the Province.

In this matter, the Francophone organizations believe that the provincial government is not investing enough funds in an envelope specifically designed to cover the additional costs of French-language education.

What are these costs? Among other things, the francization of students, the cultural and identity-building mission of Francophone schools, the rural character of many schools, as well as the production of French-language educational resources.

Just to clarify, in my capacity as Commissioner, I do not have the mandate to intervene in this matter because as I mentioned, schools, community colleges, and universities are not subject to the *Official Languages Act*.

This dispute does, however, highlight a very interesting new element in the quest of New Brunswick's Francophone community for substantive equality in education through the equality budget envelope, which is why I am talking about this today.

For those of you who are not familiar with this issue, it should be noted that three reports established the need to give New Brunswick's Francophone schools funding adapted to its educational and cultural mission.

Thus, in 2009, in his report entitled *Education in Acadian New Brunswick: A path to cultural and linguistic self-sufficiency* (Leblanc, 2009), Gino Leblanc recommended that a committee of experts be established to review the funding of Acadian and Francophone schools by the federal and provincial governments.

In 2010, the Panel of Experts on the Funding of Francophone Schools (Collette, Cormier, and Rousselle, 2010) recommended⁴ the establishment of an equality budget envelope to make it possible to achieve substantive equality in education. Moreover, the panel recommended evaluating the specific costs of substantive equality.

Economist Pierre-Marcel Desjardins was tasked with implementing this second recommendation. In 2013, he presented his report,⁵ in which he estimated at a total of roughly \$11 million the additional amounts required to fulfil the cultural and identity mandate of Francophone schools.

In 2014, the Progressive Conservative government spent \$1 million⁶ on the equality budget envelope. In 2015, the new Liberal government increased that amount to \$2.5 million.⁷

Therefore, the principle of an equality budget envelope is not contested in New Brunswick; two different governments agreed to allocate funds to this envelope.

The dispute in this case is more about the amount allocated to the envelope.

In my opinion, this concept of an equality budget envelope is another example of how the principle of equality is applied.

Furthermore, this is consistent with what the Court of Appeal of New Brunswick stated in the Charlebois matter, and I quote:

The principle of the equality of the two language communities is a dynamic concept. It implies provincial government intervention which requires at a minimum that the two communities receive equal treatment but that in some situations where it would be necessary to achieve equality, that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.

Application of the *Official Languages Act*

My third and final example of the greater use of the principle of equality in New Brunswick is drawn from the actions of the government itself.

In 2013, the Legislative Assembly added some new provisions to the *Official Languages Act*. As a result, the Province now has an obligation to prepare a plan setting out how it will meet its obligations under the Act.

This plan must include measures to ensure the equality of status of the two linguistic communities.

A few months ago, the government tabled its plan for implementing the *Official Languages Act*. The measures set out in the plan include the following:

Briefs submitted to the Executive Council will contain a section discussing the potential impact of the program or policy on Anglophone and Francophone communities.

This may seem like a simple, trivial measure, but my decades of work experience in the public service enables me to affirm that, if government employees and politicians were to truly examine government actions from the standpoint of the impact of those actions on each of the official language communities, we would truly be able to establish the principle of the equality of our two linguistic communities.

The big misunderstanding

These three examples are proof that the principle of the equality of our two linguistic communities is much more widely used now than it was in the past.

So what is the relationship between the equality of the two official languages and the equality of our two linguistic communities?

In preparing for this presentation, I debated how to summarize these two main points in terms of language rights in New Brunswick.

Well, I would say that official bilingualism, or subsection 16(2), has unanimous support, and duality, or section 16.1, well, it is highly misunderstood.

Opinion survey

Imagine that you are in downtown Moncton.

You talk to random citizens.

Talk to an Anglophone, then a Francophone, and they will tell you that they understand the rationale for official bilingualism. The right to receive government services in the official language of their choice seems perfectly logical to them.

And even when controversy abounds over official bilingualism in our beautiful province, most people recognize that Anglophones and Francophones should be entitled to services in their language.

So people are fairly unanimous on that issue.

Now go back to downtown Moncton and ask people what they think of duality – in New Brunswick, “duality” refers to distinct institutions.

There is a strong likelihood that the Francophone will tell you that duality within the school system is vital to that community's future.

The Anglophone, however, will ask you, “why the separation?”

Why is it that duality is so misunderstood?

Explain, again and again

In 2009, on the occasion of the 40th anniversary of the adoption of the first *Official Languages Act*, the Office of the Commissioner contributed to an important survey on bilingualism.

Although the results of the study already date back a few years, they tell us a lot about the reasons for the difference of opinion among Anglophones and Francophones with respect to distinct institutions.

So, 55% of Francophones felt at that time that the future of the French language was threatened, while only 22% of Anglophones shared that opinion.

If you believe that a language is not threatened, it is unlikely you will think it is necessary to have distinct institutions.

For most Anglophones and Francophones in this province, services in the official language of their choice seem self-evident, duality in the delivery of services, less so.

That said, duality is not a new concept. The *Act Recognizing the Equality of the Two Official Linguistic Communities* was adopted in 1981, nearly 35 years ago.

It is understandable that members of the Anglophone community do not appreciate the challenges faced by the Francophone community.

This situation should, however, urge the provincial government to do more to explain the rationale for duality.

As a general rule in New Brunswick, politicians are constantly faced with the difficult task of addressing this issue head-on.

I have always considered the *Official Languages Act* and the *Act Recognizing the Equality of the Two Official Linguistic Communities* as a kind of social contract between our two linguistic communities, a sort of agreement so we can live together.

So why is it so difficult to defend a social contract? And why is it so difficult to explain what the OECD stated so well in 1976:

“When attempts are made to integrate two systems, one of which is weaker than the other, the lack of symmetry in bilateral relations will cause the integration process to weaken even further the weaker of the two parties. It may eventually become assimilated within a structure – in economic, social and cultural terms – not much different from that of the stronger party.”⁸

This goes to show that there is still a long way to go. Thank you for your attention.

References

1- “The (Charlottetown) Accord was rejected by 54.3% of the Canadian population, but approved by 61.8% of the New Brunswick population. Despite this second failure, which put an end to the constitutional reform project, the result obtained in New Brunswick prompted the government to pursue the bilateral amendment of section 16.1, adopted shortly thereafter on December 4, 1992 by the Legislative Assembly, then on December 16 by the Senate, and on February 1, 1993 by the House of Commons. The amendment was confirmed by proclamation on April 7, 1993 (...).” [Translation] Excerpt from Gaétan Migneault, “La progression des droits linguistiques au Nouveau-Brunswick dans une perspective historique globale,” *McGill Law Journal / Revue de droit de McGill* 52 (Spring 2007).

1.5 - *Charlebois v. Mowat et ville de Moncton*, 2001 NBCA.

2 - *Égalité Santé en français Inc.* was established following the reorganization of the regional health authorities, as announced on March 11, 2008, by the Honourable Michael Murphy, the then Minister of Health. This reform, known as the “Murphy Reform,” did away with the existing regional health authorities and established just two entities: Regional Health Authority A and Regional Health Authority B. (*Égalité Santé en français website*)

3 – *Regional Health Authorities Act*

19(1) Regional Health Authority A/Régie régionale de la santé A shall operate in French and Regional Health Authority B/Régie régionale de la santé B shall operate in English.

19(2) Despite subsection (1), a regional health authority shall
 (a) respect the language of daily operations of the facilities under its responsibility, and
 (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.

19(3) Each regional health authority has the responsibility to improve the delivery of health services in the French language.
 2010, c.30, s.1

4 - Lucille Collette, Marianne Cormier and Serge Rousselle, *Rapport du Panel d’experts sur le financement de l’école francophone au Nouveau-Brunswick*.

Recommendation 1

“That the government appropriate an additional, permanent resource envelope from the province’s consolidated fund that would make it possible to meet the needs identified in the preceding chapter with a view to achieving substantive equality in education.”

Recommendation 2

“That the Department of Education take the initiative of providing logistical support for the school districts and other government authorities involved so that over the next few months they can work toward determining additional amounts required to fulfil the cultural and identity mandate of Francophone schools, and that this exercise be carried out using a standard formula that includes each of the elements contained in the preceding chapter related to the needs and investments deemed necessary owing to the minority context in which the Francophone community is evolving.”

5 - Pierre-Marcel Desjardins, *Report on Recommendations 1 and 2 in the Report of the Panel of Experts on the Funding of Francophone Schools: Document Submitted to the Action Group for the Commission on Francophone Schools (GACÉF) – Final Report*, September 2012.

6 - "To increase the capacity of Francophone schools and their communities to promote academic achievement and identity-building, \$1.5 million has been allocated to begin the implementation of the recommendations of the Pierre-Marcel Desjardins report." News release from the Department of Education and Early Childhood Development, 18 February 2014.

7 - "The government will allocate \$2.5 million to the schools, in addition to the usual operating budget." [Translation] Excerpt from Radio-Canada, "Le ministre Rousselle réplique aux enseignants," *Ici Radio-Canada Acadie* [online], 1 June 2015.

8 - Organization for Economic Co-operation and Development, *Reviews of National Policies for Education: Canada*, 1976.