

**GREATER RESPECT FOR  
LANGUAGE RIGHTS THROUGH  
IMPROVEMENTS TO THE  
*OFFICIAL LANGUAGES ACT***

**Brief submitted by the Office of the  
Commissioner of Official Languages  
for New Brunswick concerning the  
review of the New Brunswick  
*Official Languages Act***

**July 2021**

“... language rights must in all cases be interpreted  
purposively, in a manner consistent with the  
preservation and development of official  
language communities in Canada.”

*R. v. Beaulac*, [1999] 1 S.C.R. 768

OFFICE OF THE COMMISSIONER  
OF OFFICIAL LANGUAGES  
FOR NEW BRUNSWICK



COMMISSARIAT AUX  
LANGUES OFFICIELLES DU  
NOUVEAU-BRUNSWICK

# INTRODUCTION

Although not a well-known fact, it is an important one: New Brunswick's *Official Languages Act* (OLA) takes precedence over nearly all of the province's other statutes.<sup>1</sup> This precedence attests to the fundamental importance that the legislator gives to the language rights of New Brunswickers. In that regard, one must remember that the OLA gives effect to obligations set out in the *Canadian Charter of Rights and Freedoms*, a component of the Canadian constitution. In fact, New Brunswick is the only province that is specifically mentioned in the Charter. This is because in 1982, and later in 1993, New Brunswick requested and was granted its request that the language rights of New Brunswickers be enshrined in the Constitution, Canada's most important legal document.

Language rights take precedence because they serve a basic societal purpose: to promote the vitality and ensure the sustainability of both languages and both official language communities in the province, while ensuring that both languages are used in the public domain. In other words, the purpose of language rights greatly exceeds their practical or utilitarian character, that is, to provide public services in the requester's choice of official language.

## CHARTER PROVISIONS THAT SPECIFICALLY CONCERN NEW BRUNSWICK

<b>CHARTRE CANADIENNE DES DROITS ET LIBERTÉS</b>	<b>CANADIAN CHARTER OF RIGHTS AND FREEDOMS</b>
<p><b>Langues officielles du Nouveau-Brunswick</b> 16. (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><b>Official languages of New Brunswick</b> 16. (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><b>Progression vers l'égalité</b> 16. (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>Advancement of status and use</b> 16. (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>

<sup>1</sup> The OLA does not take precedence over the *Education Act* or any other statute or legislative provision or measure intended to promote the equality of both linguistic communities or to establish separate educational or cultural institutions.

<p><b>Communautés linguistiques française et anglaise du Nouveau-Brunswick</b> 16.1(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><b>English and French linguistic communities in New Brunswick</b> 16.1(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>Rôle de la législature et du gouvernement du Nouveau-Brunswick</b> 16.1 (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>Role of the legislature and government of New Brunswick</b> 16.1 (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.</p>
<p><b>Travaux de la Législature du Nouveau-Brunswick</b> 17. (2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick.</p>	<p><b>Proceedings of New Brunswick legislature</b> 17. (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.</p>
<p><b>Documents de la Législature du Nouveau-Brunswick</b> 18. (2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.</p>	<p><b>New Brunswick statutes and records</b> 18. (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.</p>
<p><b>Procédures devant les tribunaux du Nouveau-Brunswick</b> 19. (2) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Nouveau-Brunswick et dans tous les actes de procédure qui en découlent.</p>	<p><b>Proceedings in New Brunswick courts</b> 19. (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.</p>
<p><b>Communications entre les administrés et les institutions du Nouveau-Brunswick</b> 20. (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>	<p><b>Communications by public with New Brunswick institutions</b> 20. (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>

# REVIEW OF THE OLA: AN OPPORTUNITY TO MAKE FURTHER PROGRESS TOWARDS THE SUBSTANTIVE EQUALITY OF OUR TWO OFFICIAL LANGUAGES

**"We wanted to ensure that we would not wait another 33 years to ensure that the bill that was in place reflected the realities of New Brunswick, and fulfilled the aspirations of the people of New Brunswick. That was why we included the principle that a review must be undertaken. The Premier shall initiate a review of this Act before December 31, 2012."  
Premier Bernard Lord, Hansard, June 5, 2002, p. 48**

In June 2002, the members of the Legislative Assembly of New Brunswick unanimously adopted a new, long-awaited *Official Languages Act*. The first Act, adopted in 1969, had become seriously outdated in the intervening years. To prevent a recurrence of this situation, the new *Official Languages Act* contains a clause stipulating that the Premier must initiate his or her review within a prescribed timeframe. At the time of the last review of the OLA in 2013, the following review provision was reaffirmed:

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
Révision de la Loi	Review of Act
42(1) Le premier ministre entreprend la révision de la présente loi, laquelle doit être terminée au plus tard le 31 décembre 2021.	42(1) The Premier shall initiate a review of this Act, and the review shall be completed no later than December 31, 2021.
42(2) Une révision visée au paragraphe (1) s'effectue en la forme et de la manière prescrites par règlement.	42(2) A review under subsection (1) shall be in the form and manner prescribed by regulation.
2013, ch. 38, art. 1	2013, c.38, s.1

The OLA review process must facilitate advancement towards the equality of New Brunswick’s two official languages and two official language communities. In other words, the OLA review cannot result in maintenance of the status quo or changes that undermine this equal status. This advancement obligation stems from the following Charter provisions:

<p><b>Progression vers l’égalité</b>  16. (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>Rôle de la législature et du gouvernement du Nouveau-Brunswick</b>  16.1 (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>Advancement of status and use</b>  16. (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>Role of the legislature and government of New Brunswick</b>  16.1 (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.</p>
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The Office of the Commissioner of Official Languages for New Brunswick conducts investigations and studies to fully identify the strengths and weaknesses of the OLA, as well as its inconsistencies and ambiguities, and to propose elements to increase its impact. Consequently, the Office of the Commissioner deems it appropriate to submit its assessments and recommendations to the Legislative Assembly to improve this Act, and thereby advance towards the substantive equality of both official languages and the two official language communities.

# SECTION 1

## APPLICATION OF THE OLA TO INSTITUTIONS

### PART ONE: ELIMINATING AMBIGUITIES

#### Ensure that the basic obligations apply to all institutions

The OLA applies to a very large number of institutions, particularly provincial government departments, Crown corporations, the courts, etc. The institutions are defined in the Act as follows:

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
« institution » désigne les institutions de l'Assemblée législative et du gouvernement du Nouveau-Brunswick, les tribunaux, tout organisme, bureau, commission, conseil, office ou autre créés afin d'exercer des fonctions de l'État sous le régime d'une loi provinciale ou en vertu des attributions du lieutenant-gouverneur en conseil, les ministères, les Sociétés de la Couronne créées sous le régime d'une loi provinciale et tout autre organisme désigné à titre de mandataire de Sa Majesté du chef du Nouveau-Brunswick ou placé sous le contrôle du lieutenant-gouverneur en conseil ou d'un ministre provincial	“institution” means an institution of the Legislative Assembly or the Government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant-Governor in Council, a department of the Government of New Brunswick, a Crown corporation established by or pursuant to an Act of the Legislature or any other body that is specified by an Act of the Legislature to be an agent of Her Majesty in right of the Province or to be subject to the direction of the Lieutenant-Governor in Council or a minister of the Crown

Note that the following are not included in the OLA's definition of institution: separate educational institutions; separate cultural institutions; the province's school system, including the English and French sections of the Department of Education and Early Childhood Development, and the schools and their committees, boards and administrations; community centres; and universities and, as applicable, community colleges. Consequently, the OLA does not apply to these institutions whose linguistic homogeneity is protected under sections 16.1 and 23 of the *Charter* and under the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*.

Under sections 27 to 30 of the OLA, all institutions must ensure that members of the public are able to communicate with and to receive their services in the official language of their choice. The following provisions state the key linguistic obligations set out in the OLA.

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
<p><b>Communication avec le gouvernement et ses institutions</b> 27 Le public a le droit de communiquer avec toute institution et d'en recevoir les services dans la langue officielle de son choix.</p>	<p><b>Communications with government and its institutions</b> 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.</p>
<p><b>Obligation des institutions</b> 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.</p> <p>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.</p>	<p><b>Obligations of institutions</b> 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.</p> <p>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.</p>
<p><b>Affichage et publication à l'intention du public</b> 29 Tout affichage public et autres publications et communications destinés au grand public et émanant d'une institution sont publiés dans les deux langues officielles.</p>	<p><b>Posting of signs and publications intended for the public</b> 29 Institutions shall publish all postings, publications and documents intended for the general public in both official languages.</p>
<p><b>Prestation de services pour le compte de la province</b> 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 articles 27 à 29.</p>	<p><b>Services provided by third parties</b> 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.</p>

In addition to sections 27 to 30, the OLA contains sections describing additional and specific language obligations for certain sectors, particularly the courts, police departments, professional associations, and municipalities.

Over the years, the Office of the Commissioner has found that sections in the OLA that are specific to certain institutions create confusion about their obligations. In fact, some feel that the specific provisions included in the sections supersede the basic obligations of all institutions listed in sections 27 to 30, particularly the active offer of service and bilingual signage.

If such an interpretation were accepted in the context of litigation, it would undermine the language rights of New Brunswickers. The Office of the Commissioner believes that there must not be any ambiguities about the basic obligations, such as the active offer of service, delivery of services in both official languages and bilingual signage.

**RECOMMENDATION**

The Office of the Commissioner recommends the addition of a section specifically stating that the basic obligations (sections 27 to 30) apply to all institutions, including those for which there are special sections in the OLA. A special paragraph in this new section would take into account that the linguistic obligations of cities, municipalities and regional service commissions are defined in a regulation of the OLA.

<b>PROPOSITION DE MODIFICATION</b> <b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>PROPOSED MODIFICATION</b> <b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
30.1 (1) Les articles 27 à 30 s’appliquent à toutes les institutions, y compris les institutions visées aux articles 31, 33 et 41.1.	30.1 (1) Sections 27 to 30 apply to all institutions, including institutions bound by sections 31, 33, and 41.1.
30.1 (2) Les articles 28.1 et 30 s’appliquent également aux cités, municipalités et commissions de services régionaux visées aux articles 36 et 39.	30.1 (2) Sections 28.1 and 30 also apply to cities, municipalities and regional service commissions bound by sections 36 and 39.

## **IMPORTANCE OF BASIC LINGUISTIC OBLIGATIONS:**

### **ACTIVE OFFER OF SERVICE**

**[Translation] “If the languages have equal status, it must therefore be concluded that an active offer must be made. It is a question of dignity and of mutual respect for individuals in society. It cannot be acceptable to encourage and to justify various standards from one language to another.”  
Court of Queen's Bench, *R. v. Gautreau* (1989)**

The active offer is an invitation from a public servant to a member of the public whereby the latter is invited to make use of a service in his/her choice of official language. This offer consists in welcoming members of the public or answering the telephone in both official languages (*Hello, Bonjour*). Bilingual signage also supports the active offer.

By incorporating the active offer of service into the new OLA in 2002, the legislator tried to change the entire dynamic of the delivery of bilingual services in the province: Henceforth, it would no longer be up to members of the public to request a service in the official language of their choice, it would be up to the institution to offer it. In fact, it must be borne in mind that the statute adopted in 1969 did not require institutions to inform members of the public of their right to use the official language of their choice. On the contrary, it was up to the individual to request service in his or her choice of official language. Many members of official language minority communities naturally hesitated to request service in the official language of their choice. This situation, of course, prevented substantial progress from being made in the delivery of bilingual services. The active offer is specifically intended to change this dynamic.

It is therefore vitally important for there not to be any ambiguity in the obligation of any institution listed in the OLA to actively offer its services in both official languages.

## Eliminating any ambiguity about the obligations of police departments

A large section of the OLA deals with the obligations of peace officers. It should be noted that these obligations pertain specifically to police officers and not to police services. As shown below, a single paragraph covers police services and is intended to ensure that peace officers discharge their obligations to serve the public in both official languages.

LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK	NEW BRUNSWICK OFFICIAL LANGUAGES ACT
<p>Services de police  <b>Prestation de services par un agent de la paix</b>            31(1) Tout membre du public a le droit, lorsqu'il communique avec un agent de la paix, de se faire servir dans la langue officielle de son choix et il doit être informé de ce choix.</p> <p>31(2) Lorsque l'agent de la paix n'est pas en mesure d'assurer la prestation des services dans la langue officielle choisie en vertu du paragraphe (1), il doit prendre les mesures nécessaires et ce dans un délai raisonnable pour lui permettre de répondre au choix fait par le membre du public au paragraphe (1).</p> <p>31(3) Il incombe aux agences responsables ou aux corps policiers, le cas échéant, de veiller à mettre en œuvre les mesures nécessaires pour répondre au choix fait par un membre du public en vertu du paragraphe (1) et pour appuyer l'obligation de l'agent de la paix au sens du paragraphe (2).</p> <p>31(4) Lorsqu'il détermine si l'agent de la paix a pris dans un délai raisonnable les mesures nécessaires que prévoit le paragraphe (2), le tribunal prend en compte les efforts qu'a déployés l'agence responsable ou le corps policier afin de s'acquitter des obligations que lui impose le paragraphe (3).            2013, ch. 38, art. 1</p>	<p>Policing services  <b>Services provided by a peace officer</b>            31(1) Members of the public have the right, when communicating with a peace officer, to receive service in the official language of their choice and must be informed of that right.</p> <p>31(2) If a peace officer is unable to provide service in the language chosen under subsection (1), the peace officer shall take whatever measures are necessary, within a reasonable time, to ensure compliance with the choice made under subsection (1).</p> <p>31(3) A police force or agency, as the case may be, shall ensure the availability of the means necessary to respond to the choice made by a member of the public under subsection (1) and to support the obligation placed on a peace officer under subsection (2).</p> <p>31(4) When determining if a peace officer has taken the measures necessary under subsection (2) within a reasonable time, a court shall consider the efforts made by the police force or agency to fulfil its obligations under subsection (3).            2013, c.38, s.1</p>

Upon reading this section, some believe that only peace officers have linguistic obligations. Consequently, a police department’s communications with the public would not be subject to the OLA. It is difficult to conceive that a police department might not have linguistic obligations, while its police officers would. In addition, the Office of the Commissioner believes that a police department is the very example of an institution within the meaning of the OLA, i.e., an organization that “performs a governmental function” (see the definition of institution). In that regard, the Supreme Court ruled<sup>2</sup> that police departments are institutions within the meaning of subsection 20(2) of the Charter.

This restrictive interpretation of the obligations of police departments has not had serious consequences because most police departments report to a city or municipality that has certain linguistic obligations under Regulation 2002-63 of the OLA. Consequently, their police departments acquire the same basic linguistic obligations. However, some police departments report to municipalities that do not have linguistic obligations. This is precisely the case of the Grand Falls municipal police department and of the Beresford, Nigadoo, Petit-Rocher and Pointe-Verte (BNPP) and Kennebecasis regional police departments.

**RECOMMENDATION**

To eliminate any ambiguity in the interpretation of the linguistic obligations of police departments and police officers, the Office of the Commissioner recommends that the wording of subsection 31(1) be changed to specifically include policing services and that “police force” be defined as any policing service operating in New Brunswick.

<b>PROPOSITION DE MODIFICATION</b>	<b>PROPOSED MODIFICATION</b>
<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
Services de police	Policing services
Prestation de services par un agent de la paix <b><u>et un corps policier</u></b>	Services provided by a peace officer <b><u>and a police force</u></b>
31(1) Tout membre du public a le droit, lorsqu’il communique avec un agent de la paix <b><u>ou un corps policier</u></b> , de se faire servir dans la langue officielle de son choix et il doit être informé de ce choix.	31(1) Members of the public have the right, when communicating with a peace officer <b><u>or a police force</u></b> , to receive service in the official language of their choice and must be informed of that right.

<sup>2</sup> *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 – Supreme Court of Canada

## IS IT STILL REASONABLE TO GRANT REASONABLE TIMES?

Subsection 31(2) of the OLA sets out that “If a peace officer is unable to provide service in the language chosen under subsection (1), the peace officer shall take whatever measures are necessary, within a reasonable time, to ensure compliance with the choice made under subsection (1).”

During the OLA review in 2013, the Committee on the Revision of the OLA rejected the proposal to replace the words “within a reasonable time” with the word “immediately.” The Committee felt that this proposal was not realistic, because it could require all police officers to be bilingual. Instead, the Committee recommended the inclusion of a subsection stating what a reasonable time is, based on the police department’s efforts to discharge its linguistic obligations.

The Legislative Assembly accepted this recommendation and the subsection was incorporated into the OLA.

The Office of the Commissioner questions the constitutionality of such a subsection because subsection 20(2) of the *Canadian Charter of Rights and Freedoms* does not stipulate a reasonable time for providing services in either official language. It also appears that the requirement of a reasonable time to obtain a service is contrary to the constitutional principle of equality of the two official languages and of both official language communities. Moreover, what constitutes a reasonable time?

Eighteen years have passed since the adoption of the new OLA in 2002. Seven years have passed since the last OLA review. The Office of the Commissioner is of the opinion that New Brunswick police forces have had sufficient time to provide language training and hire the employees needed to immediately provide services in both official languages. Is it still reasonable to grant reasonable times?

## Re-establishing consistency between sections 20 and 22 of the OLA

According to section 22 of the OLA, when the Province of New Brunswick or an institution is a party to civil proceedings, it must proceed in the language chosen by the other party. This is logical, especially if we consider the notion of access to justice. Section 22 removes barriers by lessening potential linguistic burdens faced by members of the public who are parties to a civil proceeding. A member of the public who is a party to such a proceeding should be able, for example, to receive pleadings in their choice of official language. If they cannot understand legal documents, or even if they cannot understand them fully, this would significantly affect their ability to present their case and to respond to the case put forward by the Province or the institution.

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
22 Dans une affaire civile dont est saisi un tribunal et à laquelle est partie Sa Majesté du chef du Nouveau-Brunswick ou une institution, Sa Majesté ou l'institution utilise, pour les plaidoiries orales et écrites et pour les actes de procédure qui en découlent, la langue officielle choisie par la partie civile.	22 Where Her Majesty in right of the Province or an institution is a party to civil proceedings before a court, Her Majesty or the institution concerned shall use, in any oral or written pleadings or any process issuing from a court, the official language chosen by the other party.

Section 22 is, for the most part, in line with subsection 20(1) of the OLA, which states as follows:

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
20(1) Une personne accusée d'une infraction à une loi ou à un règlement de la province, ou à un arrêté municipal, a droit au déroulement des procédures dans la langue officielle de son choix, et elle doit être informée de ce droit par le juge qui préside avant d'enregistrer son plaidoyer.	20(1) A person who is alleged to have committed an offence under an Act or a regulation of the Province or under a municipal by-law has the right to have the proceedings conducted in the language of his or her choice and shall be informed of that right by the presiding judge before entering a plea.

Whether it is in regard to having committed an offence (subsection 20[1]) or being involved in a civil matter (section 22), the language of the proceedings is chosen by the individual rather than by the Province or the institution. However, there is one important difference. Although municipal by-laws are covered in subsection 20(1), section 22 does not include municipalities. This is because, in a split decision (5:4), the Supreme Court in *Charlebois v. Saint John (City)*<sup>3</sup> held that municipalities do not fall under the definition of “institution” in section 22.<sup>4</sup> However, we do not see a basis for such a distinction. When an individual is a party to judicial proceedings, the type of proceeding or the level of court should not affect whether that person has the right to choose in which language to proceed.

### RECOMMENDATION

In order to enable greater access to justice for members of official language minority communities, and in order to remedy the incongruence between subsection 20(1) and section 22, we recommend that the latter be amended to include municipalities and regional service commissions (RSCs).

#### PROPOSITION DE MODIFICATION

##### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

22 Dans une affaire civile dont est saisi un tribunal et à laquelle est partie Sa Majesté du chef du Nouveau-Brunswick, une institution ou toute municipalité ou CSR, Sa Majesté, ~~ou~~ l’institution, la municipalité ou la CSR utilise, pour les plaidoiries orales et écrites et pour les actes de procédure qui en découlent, la langue officielle choisie par la partie civile.

#### PROPOSED MODIFICATION

##### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

22 Where Her Majesty in right of the Province, an institution or any municipality or RSC is a party to civil proceedings before a court, Her Majesty, ~~or~~ the institution, the municipality or the RSC concerned shall use, in any oral or written pleadings or any process issuing from a court, the official language chosen by the other party.

<sup>3</sup> *Charlebois v. Saint John (City)*, [2005] 3 SCR 563, [2005 SCC 74 \(CanLII\)](#)

<sup>4</sup> It is noteworthy that in this case, the court was not asked to consider constitutional issues.

## What is the purpose of section 33?

As part of the OLA review, the Office of the Commissioner looked at section 33 of the OLA and must conclude, like other parties concerned, that its meaning is unclear.

<p>Services de santé</p> <p>33(1) Aux fins de la prestation des soins de santé dans la province et malgré la définition du mot « institution » à l'article 1, une institution au sens des articles 27 et 28 s'entend du réseau des établissements, installations et programmes de santé relevant du ministère de la Santé ou des régies régionales de la santé établies en vertu de la Loi sur les régies régionales de la santé.</p>	<p>Health services</p> <p>33(1) For the purposes of the provision of health services in the Province and notwithstanding the definition of "institution" in section 1, an institution in sections 27 and 28 refers to the network of health establishments, facilities and programs under the jurisdiction of the Department of Health or the regional health authorities under the Regional Health Authorities Act.</p>
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On the one hand, if this section is intended to confirm the linguistic obligations of both health networks (Horizon and Vitalité), why are only two basic obligations mentioned (sections 27 and 28)? In fact, the active offer of service (28.1), bilingual signage (29) and services provided by third parties (30) are not mentioned in this section. On the other hand, the use of the words "network of health establishments" could be interpreted as not meaning each health establishment.

### RECOMMENDATION

The Office of the Commissioner believes that the legislator should fully review this section to ensure that it cannot be interpreted as limiting the basic linguistic obligations of health services. At the very least, the Office of the Commissioner recommends that the wording of this section be changed as follows:

<p><b>PROPOSITION DE MODIFICATION</b></p> <p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p>	<p><b>PROPOSED MODIFICATION</b></p> <p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p>
<p>33(1) Aux fins de la prestation des soins de santé dans la province et malgré la définition du mot « institution » à l'article 1, une institution au sens des articles 27, <del>et 28, 28.1, 29 et 30</del> s'entend <del>du réseau</del> des établissements, installations et programmes de santé relevant du ministère de la Santé ou des régies régionales de la santé établies en vertu de la Loi sur les régies régionales de la santé.</p>	<p>33(1) For the purposes of the provision of health services in the Province and notwithstanding the definition of "institution" in section 1, an institution in sections 27, <del>and 28, 28.1, 29 and 30</del> refers to <del>the network of</del> health establishments, facilities and programs under the jurisdiction of the Department of Health or the regional health authorities under the Regional Health Authorities Act.</p>

## PART TWO: LOCAL GOVERNMENTS

In 2002, when the new *Official Languages Act* was adopted, language obligations were imposed on all cities and municipalities with an official language minority population of at least 20% of the total population. Language obligations were also prescribed for planning commissions and solid waste commissions, which became regional service commissions (RSCs) in 2013. The RSCs with language obligations are those serving an area with an official language minority population of at least 20% of the total population or that include a city or municipality subject to the OLA.

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
<p><b>Municipalités visées</b> 35(1) Une municipalité dont la population de langue officielle minoritaire atteint au moins 20 % de la population totale est tenue d'adopter et de publier ses arrêtés dans les deux langues officielles.</p>	<p><b>Municipalities bound by the Act</b> 35(1) A municipality whose official language minority population represents at least 20% of its total population is required to adopt and publish its by-laws in both official languages</p>
<p><b>Cités visées</b> 35(2) Les cités sont également tenues d'adopter et de publier leurs arrêtés dans les deux langues officielles sans égard au pourcentage prévu au paragraphe (1).</p>	<p><b>Cities bound by the Act</b> 35(2) A city is required to adopt and publish its by-laws in both official languages irrespective of the percentage required under subsection (1).</p>
<p><b>Communications et services</b> 36 Les municipalités et les cités visées aux paragraphes 35(1), (2) ainsi qu'à l'article 37 sont tenues d'offrir, dans les deux langues officielles, les services et les communications prescrits par règlement.</p>	<p><b>Communications and services</b> 36 A municipality or city to which subsection 35(1), (2) or section 37 applies shall offer the services and communications prescribed by regulation in both official languages.</p>
<p><b>Commissions de services régionaux</b> 39 Toute commission de services régionaux desservant un territoire dont la population de langue minoritaire atteint au moins 20 % de la population totale sont assujetties aux obligations de l'article 41.</p>	<p><b>Regional Service Commissions</b> 39 A regional service commission covering a geographical area with an official language minority population of at least 20% of the total population is subject to the obligations imposed by section 41.</p>
<p><b>Cités et municipalités</b> 40 Toute commission de services régionaux dont le territoire géographique comprend une municipalité ou une cité à laquelle s'appliquent les paragraphes 35(1) ou (2) est assujettie aux obligations qu'impose l'article 41, indépendamment du pourcentage visé à l'article 39.</p>	<p><b>Cities and Municipalities</b> 40 Where the geographical area of a regional service commission includes a municipality or a city to which subsection 35(1) or (2) applies, the regional service commission is subject to the obligations imposed by section 41 irrespective of the percentage required under section 39.</p>

## The need for a better process for designating municipalities and commissions with linguistic obligations

The *Official Languages Act* and Regulations do not define official language minority population and do not specify the procedures for determining the percentage of this population.

According to the information obtained by the Office of the Commissioner of Official Languages for New Brunswick, the Department of Environment and Local Government used mother tongue data from the Statistics Canada Census to determine which municipalities and commissions reached the limit of at least 20%. However, a question arises: Once the limit of at least 20% of the population is reached, does the municipality or commission continue to have obligations in the event that in another census, the percentage of the official language minority population falls below the at-least-20% limit?

The most recent statistics provided by the Department of Environment and Local Government show that the English mother tongue population in two municipalities, Atholville and Eel River Crossing, which in the past had been above the at-least-20% limit, had decreased to 10.5% and 16.1%, respectively, by 2016. Should these two municipalities continue to have linguistic obligations? It should be pointed out that these two municipalities implemented measures to comply with the *Official Languages Act*. In accordance with the regulations, they invested time and effort in developing bilingual services and communications. These regions already have the necessary infrastructure and workforce to serve both linguistic communities. Would it therefore be logical for these municipalities to no longer have linguistic obligations?

### RECOMMENDATION

The Office of the Commissioner recommends the inclusion in the OLA of a section permitting the use of regulations to set up a mechanism for generating and periodically reviewing statistical data for the purposes of drawing up the list of municipalities and regional service commissions with linguistic obligations under the OLA.

#### PROPOSITION DE MODIFICATION

##### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

Le Lieutenant-gouverneur en conseil établit par règlements les modalités utilisées pour calculer et revoir périodiquement le pourcentage de la population de langue officielle minoritaire en application du paragraphe 35(1) et de l'article 39.

#### PROPOSED MODIFICATION

##### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

The Lieutenant Governor in Council established by regulation the procedures used to calculate and periodically review the percentage of the official language minority population under subsection 35 (1) and section 39.

## **The case of rural communities**

Under section 1 of the OLA, a municipality

means a municipality within the meaning of subsection 1(1) of the *Local Governance Act*.

Under the *Local Governance Act*, “municipality” means a city, town or village. Consequently, the eight rural communities are local governance structures that have no linguistic obligation when they reach the at-least 20% limit. It is worth noting that English is the mother tongue of 19.3% of the population of the rural community of Beaubassin-Est. Should rural communities have the same linguistic obligations as municipalities and regional service commissions when they reach the at-least 20% limit? It should be noted that under the *Local Governance Act*, “local government” means a “municipality, rural community or regional municipality.”

### **RECOMMENDATION**

The Office of the Commissioner recommends that rural communities have the same linguistic obligations as municipalities and RSCs.

## **Linguistic obligations to be reviewed for cities, municipalities, and regional service commissions**

The extent of the linguistic obligations of cities, municipalities and regional service commissions is much less than that of other institutions within the meaning of the OLA. In fact, they are only required to provide a certain number of services and communications in both official languages, whereas provincial departments, Crown corporations and other public-sector organizations must provide all their services and communications in English and French.

The services and communications that must be provided in both official languages by cities, municipalities and regional service commissions are mainly described in an OLA regulation: Regulation 2002-63, Schedule A. On reading the Regulation, it is evident that their language obligations have to do almost exclusively with basic and front-line services, for example, access to information on municipal services.

Regulation 2002-63, including Schedule A, has not been reviewed in depth since the adoption of the new OLA in 2002. In that regard, the Office of the Commissioner would like to point out the very positive results of a comprehensive audit of the compliance of cities, municipalities and regional service commissions with the OLA in 2017. Given the high rates of compliance obtained during these audits, the Office of the Commissioner believed that it was time to consider expanding these communications and services. The Office of the Commissioner also recommended the setting up of a multi-sectoral committee to study this issue. To our knowledge, this recommendation has not been implemented. In recent years, the Commissioner has noted that some items in Schedule A have been open to interpretation. For example, in an investigation of the City of Fredericton's signage practices, the City purported that street signs were not part of the "traffic signs" element included in the list. Another example: What is the scope of the definition of "traffic signs"? The Office of the Commissioner believes that audible traffic signals, such as those for the visually impaired at pedestrian crossings, should be included in this definition.

**RECOMMENDATION**

The Office of the Commissioner recommends that Regulation 2002-63 be subject to the same periodic review as the OLA.

PROPOSITION DE MODIFICATION	PROPOSED MODIFICATION
<p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p>	<p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p>
<p>Révision de la Loi</p>	<p>Review of Act</p>
<p>42(1) Le premier ministre entreprend la révision de la présente loi <b><u>et de ses règlements</u></b>, laquelle doit être terminée au plus tard le 31 décembre <b><u>ANNÉE</u></b>.</p>	<p>42(1) The Premier shall initiate a review of this Act <b><u>and its regulations</u></b>, and the review shall be completed no later than December 31, <b><u>YEAR</u></b>.</p>

## PART THREE: NURSING HOMES

Under section 30 of the OLA, 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.

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
<b>Prestation de services pour le compte de la province</b>	<b>Services provided by third parties</b>
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 articles 27 à 29.	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.

The Office of the Commissioner now believes that nursing homes are third parties within the meaning of section 30 of the OLA. The Office of the Commissioner’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 Province, through 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.” It therefore manages the size, structure and general operations of nursing homes.<sup>5</sup>

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[https://www2.gnb.ca/content/gnb/en/services/services\\_renderer.9615.Services\\_offerts\\_dans\\_les\\_foyers\\_de\\_soins.html](https://www2.gnb.ca/content/gnb/en/services/services_renderer.9615.Services_offerts_dans_les_foyers_de_soins.html)

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.<sup>6</sup>*

Taking the aforementioned into consideration, the Office of the Commissioner 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 a 2018 investigation, the Office of the Commissioner sought to ascertain how the Department of Social Development (the institution) ensures that nursing homes respect the language rights of New Brunswick residents.

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 also put forward other administrative measures that were supposed to ensure respect for language rights. However, the Office of the Commissioner 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.

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<sup>6</sup> <https://www.gnb.ca/cnb/Promos/Throne-2012/TS2012-e.asp>

It should also be pointed out that the Select Committee on the Revision of the Official Languages Act clearly acknowledged in its report 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:*

- (...)*
- establish an action plan that will enable seniors to get the services they need in the official language of their choice.” (p. 24)*

## RECOMMENDATION

The Office of the Commissioner is of the opinion that there must be nursing homes in all of the Province's regions that are able to provide care and offer social activities and other programs in either official language. In that regard, the Office of the Commissioner recommends that provisions be added to the OLA in order to confirm the Province's obligation to ensure that it meets the needs of members of both official language communities in all of the Province's regions.

### PROPOSITION DE MODIFICATION

#### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

Foyers de soins

Il incombe à la province de veiller à ce qu'il existe, en tout temps, dans toutes les régions de la santé du Nouveau-Brunswick, des foyers de soins en mesure de servir le public dans l'une et l'autre des deux langues officielles.

Le Lieutenant-gouverneur en conseil peut par règlement établir des modalités d'application de cet article.

### PROPOSED MODIFICATION

#### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

Nursing homes

It is the responsibility of the province to ensure that there are, at all times, in all health regions of New Brunswick, nursing homes capable of serving the public in either official language.

The Lieutenant-Governor in Council may make regulations for the administration of this section.

## SECTION 2

# RIGHT OF PROVINCIAL PUBLIC SERVANTS TO WORK IN FRENCH OR ENGLISH

*The purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes on the provincial government an obligation to take positive measures to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community. The obligation imposed on the government derives from both the remedial nature of subsection 16.1(1), in recognition of past inequalities that have gone unredressed, and the constitutional commitment made by the government to preserve and promote the equality of official language communities.*

*Court of Appeal of New Brunswick, Charlebois v. Mowat, 2001 NBCA 117 (CanLII)*

In addition to the desire to no longer wait 30 years to review the OLA, it is highly likely that the addition in 2002 of a provision for its periodic review was intended to make it possible to include in the Act elements for which there was not sufficient consensus in 2002. The issue of language of work in the Public Service, which was not included in the 2002 Act, is definitely one of those elements.

When the OLA was adopted in 2002, the government at the time explained its actions primarily by explaining that the OLA had to adhere to the constitutional principles of the *Canadian Charter of Rights and Freedoms*. Under subsection 16(2) of the Charter, 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. In addition, subsection 16.1(1) states that both of New Brunswick's official language communities have equality of status and equal rights and privileges. Pursuant to these constitutional principles, it is clear that every provincial public servant in New Brunswick should be able to work in the official language of his or her choice.

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. In other words, there is a line between public servants' right to work in their choice of official language and the right of members of the public to be served in the official language of their choice.

The "right" to work in one's choice of official language is already set out in the Official Languages – Language of Work Policy and Guidelines, AD 2920 (excerpt below), which were greatly expanded in 2009. The policy states that:

Day-to-day communications between a supervisor and an employee must be in the official language chosen by the employee.

However, there is little disputing the fact that a right included in a policy does not carry the same weight as one incorporated into an Act. Moreover, public servants whose rights are not respected have no recourse. Consequently, a public servant's right to work in his/her choice of official language should be stated in the *Official Languages Act*, as is the case with the federal *Official Languages Act*.

It is important to note that inclusion in the Act of the right to work in one's language should not be considered the only way to encourage the use of both official languages in the Public Service. The reports of the federal Commissioner of Official Languages consistently show just how much progress remains to be achieved in that area in the federal Public Service, even though that right is included in the federal *Official Languages Act*. Consequently, the inclusion in New Brunswick's *Official Languages Act* of the right to work in one's choice of official language should be accompanied by a series of promotional measures and especially by a show of strong leadership by all managers.

**OTHER PERSONNEL MATTERS AND TRANSACTIONS**

**Subject: Official Languages – Language of Work Policy and Guidelines.**

**Number: AD-2920**

**Effective date: April 1, 2009**

***Communication between supervisors and their employees***

*Day-to-day communications between a supervisor and an employee must be in the official language chosen by the employee.*

***Policy Application***

*Supervisors who have the ability to communicate in both official languages must do so by using their employees' official language of choice.*

*A supervisor who cannot communicate in the official language chosen by the employee must ensure that processes are in place to facilitate the employee's request to communicate in his/her preferred language.*

*Please refer to the tool kit.*

***Drafting Documents***

*Employees can draft documents in their official language of choice. Documents must be fully translated once ready for broader circulation or when seeking comments and feedback from a broader audience.*

***Policy Application***

*Managers must encourage employees to draft documents in the official language that they are most comfortable in using. Once the documents are completed or close to being completed and circulated, they must be sent to the Translation Bureau.*

## **Language of work issue discreetly included in the OLA in 2013**

In 2013, during the mandatory OLA review process, a committee of the Legislative Assembly studied the language of work issue. In its report, the Select Committee on the Revision of the *Official Languages Act* stated that this issue had been the subject of many submissions and summarized its key observations as follows. In addition to requests that the right to work in the official language of one's choice be included in the Act, it was also highlighted that it was important that the Act include provisions related to the creation of a work environment conducive to the actual use of both official languages. Some respondents criticized the Language of Work Policy and deemed it ineffective and not in compliance with the obligations set out in the Charter. It was also stated that it "would be a mistake" to imitate federal institutions. However, the report did not provide reasons for the latter statement.

In its report, the Committee does not recommend directly that the right of provincial public servants to work in their choice of official language be included in the Act. Instead, it recommends indirect recognition that might potentially be just as effective. In fact, the Committee recommends that the Act require the government to adopt an OLA implementation plan, which should take the language of work into account in setting up work teams and developing language profiles.

On June 21, 2013, the Legislative Assembly adopted major amendments to the OLA. Noteworthy among these was the addition of section 5.1, which stipulates the government's obligation to adopt an OLA implementation plan. And in accordance with the Committee's recommendation, this plan must include "measures to ensure that language of work is considered when identifying work groups within the public service and when developing language profiles for positions in the public service."

Two years later, the provincial government implemented the new section 5.1 of the OLA by publishing the Plan on Official Languages – Official Bilingualism: A Fundamental Value, 2015.

The Office of the Commissioner conducted two investigations into the implementation of the Plan on Official Languages. With respect to the language of work, the two investigations determined that the government's plan did not allow provincial public servants to be supervised and to work in their choice of official language. This finding stems mostly from the fact that the planned language of work measures have not been implemented by the provincial government.

### **Advancement achieved by including the right to work in one's choice of official language**

The use of a language at work has a considerable effect on the overall vitality of that language. This is not surprising when one considers the amount of time that the labour force spends working. Because the provincial public service is a major employer, it understandably has a key role to play with respect to the vitality of the French language. In 2018, a report of the Canadian Institute for Research on Linguistic Minorities stated that 95% of provincial public servants living in English also spoke English most often at work. By comparison, only 47% of provincial public servants living in French spoke French at work. Given that French and English have equal constitutional status in New Brunswick, such a finding is contrary to this status of equality.

## RECOMMENDATION

The Office of the Commissioner believes that the legislator must clearly state in the OLA that provincial public servants have the right to work in the official language of their choice in order to compel the provincial government, once and for all, to take the necessary measures to allow Francophone and Francophile public servants to be supervised and to work in French.

### PROPOSITION DE MODIFICATION

#### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

##### Langue de travail

Le français et l'anglais sont les langues de travail des institutions. Leurs agents et leurs employés ont le droit d'utiliser, conformément à la présente partie, l'une ou l'autre.

Il incombe aux institutions de veiller à ce que leur milieu de travail soit propice à l'usage effectif des deux langues officielles tout en permettant à leur personnel d'utiliser l'une ou l'autre.

Il incombe aux institutions :

a) de fournir à leur personnel, dans les deux langues officielles, tant les services qui lui sont destinés, notamment à titre individuel ou à titre de services auxiliaires centraux, que la documentation et le matériel d'usage courant et généralisé produits par elles-mêmes ou pour leur compte;

b) de veiller à ce que les systèmes informatiques d'usage courant et généralisé et acquis ou produits par elles puissent être utilisés dans l'une ou l'autre des langues officielles;

### PROPOSED MODIFICATION

#### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

##### Language of Work

English and French are the languages of work in all institutions, and officers and employees of all institutions have the right to use either official language in accordance with this Part.

Every institution has the duty to ensure that work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees.

Every institution has the duty to

(a) make available in both official languages to officers and employees of the institution services that are provided to officers and employees, including services that are provided to them as individuals and services that are centrally provided by the institution to support them in the performance of their duties,

(b) ensure that regularly and widely used automated systems for the processing and communication of data acquired or produced by the institution can be used in either official language; and

c) de veiller à ce que, là où il est indiqué de le faire pour que le milieu de travail soit propice à l'usage effectif des deux langues officielles, les supérieurs soient aptes à communiquer avec leurs subordonnés dans celles-ci et à ce que la haute direction soit en mesure de fonctionner dans ces deux langues.

Le Lieutenant-gouverneur en conseil peut par règlement établir des modalités d'application de cet article.

(c) ensure that, where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, supervisors are able to communicate in both official languages with officers and employees of the institution and any management group that is responsible for the general direction of the institution as a whole has the capacity to function in both official languages.

The Lieutenant-Governor in Council may by regulation establish procedures for the application of this section.

## SECTION 3

# IMPLEMENTATION OF THE ACT

*It is not enough for a linguistic guarantee to be offered on paper; it must be applied or put into practice in order to have meaning.*

*R. v. Gaudet, 2010, Court of Queen's Bench of New Brunswick*

In several respects, New Brunswickers have a remarkable framework for the protection of language rights: provisions in the fundamental law of the land and a provincial statute that implements them. However, this protection can become just a symbol if it is not accompanied by implementation measures.

It is up to the legislative authority to adopt laws, and up to the executive authority to implement them. In that regard, it must be pointed out that section 2 of the OLA states that the Premier is responsible for its implementation. This section attests to the importance that the legislator gives to the language rights of New Brunswickers.

What government body supports the Premier in exercising his or her responsibilities under the OLA? The OLA does not provide an answer to this question.

### **A tool for implementing the OLA**

During the OLA review process in 2013, the Select Committee on the Revision of the Official Languages Act recommended that provisions be added to the OLA so that the provincial government has the obligation to develop and implement an OLA implementation plan. The purpose of this plan is well-explained in the Committee's report:

*Unlike the federal Official Languages Act, the New Brunswick Official Languages Act does not provide for any measures to meet the linguistic obligations of government departments and institutions. The committee notes that many of the difficulties that have arisen seem to be related to ensuring compliance with the Act.*

*The committee believes that it is important to confirm in the Act the government's obligation to provide itself with a comprehensive plan for ensuring compliance with the Official Languages Act. This plan should present a variety of ways to meet*

*challenges and should contain innovative actions to promote the creation of a bilingual culture within the civil service and to advance the substantive equality of both official linguistic communities. This comprehensive plan should also identify mechanisms to put in place so that government can reflect the specific reality of each linguistic community when developing its programs and policies.*

*The committee recommends that provisions be added in the Official Languages Act that require government to develop and implement a comprehensive plan, with clear objectives and timeframes, for meeting its linguistic obligations.*

*The committee also recommends that the planning include:*

- *developing departmental and institutional action plans to meet the objectives of the comprehensive plan;*
- *including the language of work when identifying working teams and developing linguistic profiles;*
- *assessment measures;*
- *measures to improve the bilingual capability of the senior civil service;*
- *mechanisms to advance the substantive equality of both linguistic communities in the province.*

*The committee is of the opinion that follow-up and coordination of government efforts are crucial to ensure the successful implementation of the comprehensive plan and the departmental action plans.*

*Therefore, the committee recommends the addition of provisions in the Act to:*

- *create centralized coordination for implementing the comprehensive plan and departmental action plans;*
- *require government departments and institutions to prepare annual reports on the implementation of their action plans; and*
- *require the preparation of an annual progress report on the comprehensive plan, to be submitted to the Premier and the Legislative Assembly.*

*Report of the Select Committee on the Revision of the Official Languages Act (June 14, 2013)*

The Legislative Assembly accepted the Committee's recommendations and section 5.1 of the OLA came into being. A review of all of the provisions in this section shows that they correspond in large part with the Committee's recommendations.

The section 5.1 provisions are impressive and the Office of the Commissioner felt that they had the potential to be a game changer in terms of compliance with the OLA and advancement towards equality of the two official languages. Unfortunately, an investigation conducted by the Office of the Commissioner of Official Languages in 2017 determined that the provincial government was having major problems implementing the Plan on Official Languages, i.e., the plan drawn up pursuant to section 5.1 of the OLA.

The Office of the Commissioner is of the opinion that this situation stems from the lack of a structure and adequate resources to help the Premier implement the OLA. In fact, there is no department or secretariat of official languages in New Brunswick, which means that there is no deputy minister whose chief responsibility is official languages. In addition, public servants responsible for various aspects of OLA implementation are low level and distributed within two departments.

The lack of a government entity with authority and adequate resources to provide centrally coordinated implementation of the OLA is a major obstacle to full compliance with the Act and to sustained advancement towards the equality of both official languages and both official language communities.

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

That an Official Languages Secretariat be established. It must be:

- placed directly under the authority of the Clerk of the Executive Council and Head of the Civil Service;
- headed by someone with Deputy Minister status; and
- have an appropriate budget and staff with respect to its responsibilities of supporting the Premier in his primary responsibility of administering the *Official Languages Act*.

That the Official Languages Secretariat have the following responsibilities:

- general supervision of the administration of the OLA;
- coordination of the mandatory review process of the OLA;
- development, review, supervision, and evaluation of the Official Languages Implementation Plan;
- provision of advice to all parts of the public service on the application of the OLA;
- development and monitoring of the application of the Language of Work and Language of Service policies;

- compilation and publication of statistical data to measure the advancement toward the equality of use of English and French within the various parts of the public service; and
- the preparation of an annual report on the state of official languages in New Brunswick.

At the time of writing of this brief, the provincial government had still not agreed to implement this recommendation.

### **New Brunswick is an exception in terms of designating an entity to be responsible for ensuring that language rights are upheld**

It should be noted that Ontario's *French Language Services Act* and the federal *Official Languages Act* specify the government entities with responsibilities to centrally coordinate the implementation of the Act, and describe their responsibilities.

<b>LOI SUR LES SERVICES EN FRANÇAIS DE L'ONTARIO</b>	<b>ONTARIO FRENCH LANGUAGE SERVICES ACT</b>
Office des affaires francophones	Office for Francophone Affairs
12 (1) Les employés qui sont jugés nécessaires pour remplir les fonctions du ministre sont nommés aux termes de la partie III de la Loi de 2006 sur la fonction publique de l'Ontario. L'ensemble de ces employés constitue l'Office des affaires francophones.	12 (1) Such employees as are considered necessary shall be appointed under Part III of the Public Service of Ontario Act, 2006 for the administration of the functions of the Minister, and shall be known as the Office of Francophone Affairs.
Fonctions de l'Office des affaires francophones	Function of Office of Francophone Affairs
(2) L'Office des affaires francophones peut :	(2) The Office of Francophone Affairs may,
a) examiner la disponibilité et la qualité des services en français et faire des recommandations en vue de leur amélioration;	(a) review the availability and quality of French language services and make recommendations for their improvement;
b) recommander la désignation des organismes offrant des services publics et l'ajout à l'annexe de régions désignées;	(b) recommend the designation of public service agencies and the addition of designated areas to the Schedule;

<p>c) exiger que des personnes morales à but non lucratif et des organisations semblables ainsi que des établissements, des foyers, des maisons et des collèges visés à la définition du terme « organisme gouvernemental » lui fournissent des renseignements qui peuvent être pertinents en ce qui concerne la formulation de recommandations au sujet de leur désignation en tant qu'organismes offrant des services publics;</p> <p>d) recommander des modifications aux projets des organismes gouvernementaux en ce qui concerne la prestation des services en français;</p> <p>e) faire des recommandations en ce qui concerne l'exemption ou l'exemption proposée d'un service aux termes de l'alinéa 8 (1) c).</p> <p>L'Office remplit également les fonctions qui lui sont assignées par le ministre, le Conseil exécutif ou l'Assemblée législative.</p>	<p>(c) require non-profit corporations and similar entities, facilities, homes and colleges referred to in the definition of "government agency" to furnish to the Office information that may be relevant in the formulation of recommendations respecting their designation as public service agencies;</p> <p>(d) recommend changes in the plans of government agencies for the provision of French language services;</p> <p>(e) make recommendations in respect of an exemption or proposed exemption of services under clause 8 (c),</p> <p>and shall perform any other function assigned to it by the Minister, the Executive Council or the Legislative Assembly.</p>
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<p><b>LOI SUR LES LANGUES OFFICIELLES DU CANADA</b></p> <p>PARTIE VIII Attributions et obligations du Conseil du Trésor en matière de langues officielles</p> <p><b>46 (1)</b> Le Conseil du Trésor est chargé de l'élaboration et de la coordination générales des principes et programmes fédéraux d'application des parties IV, V et VI dans les institutions fédérales, à l'exception du Sénat, de la Chambre des communes, de la bibliothèque du Parlement, du bureau du conseiller sénatorial en éthique, du bureau du commissaire aux conflits d'intérêts et à l'éthique, du Service de protection parlementaire et du bureau du directeur parlementaire du budget.</p>	<p><b>CANADA OFFICIAL LANGUAGES ACT</b></p> <p>PART VIII Responsibilities and Duties of Treasury Board in Relation to the Official Languages of Canada</p> <p><b>46 (1)</b> The Treasury Board has responsibility for the general direction and coordination of the policies and programs of the Government of Canada relating to the implementation of Parts IV, V and VI in all federal institutions other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service and office of the Parliamentary Budget Officer.</p>
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<b>Attributions</b>	<b>Powers of Treasury Board</b>
<p>(2) Le Conseil du Trésor peut, dans le cadre de cette mission :</p> <p><b>a)</b> établir des principes d’application des parties IV, V et VI ou en recommander au gouverneur en conseil;</p> <p><b>b)</b> recommander au gouverneur en conseil des mesures réglementaires d’application des parties IV, V et VI;</p> <p><b>c)</b> donner des instructions pour l’application des parties IV, V et VI;</p> <p><b>d)</b> surveiller et vérifier l’observation par les institutions fédérales des principes, instructions et règlements — émanant tant de lui-même que du gouverneur en conseil — en matière de langues officielles;</p> <p><b>e)</b> évaluer l’efficacité des principes et programmes des institutions fédérales en matière de langues officielles;</p> <p><b>f)</b> informer le public et le personnel des institutions fédérales sur les principes et programmes d’application des parties IV, V et VI;</p> <p><b>g)</b> déléguer telle de ses attributions aux administrateurs généraux ou autres responsables administratifs d’autres institutions fédérales.</p>	<p>(2) In carrying out its responsibilities under subsection (1), the Treasury Board may</p> <p><b>(a)</b> establish policies, or recommend policies to the Governor in Council, to give effect to Parts IV, V and VI;</p> <p><b>(b)</b> recommend regulations to the Governor in Council to give effect to Parts IV, V and VI;</p> <p><b>(c)</b> issue directives to give effect to Parts IV, V and VI;</p> <p><b>(d)</b> monitor and audit federal institutions in respect of which it has responsibility for their compliance with policies, directives and regulations of Treasury Board or the Governor in Council relating to the official languages of Canada;</p> <p><b>(e)</b> evaluate the effectiveness and efficiency of policies and programs of federal institutions relating to the official languages of Canada;</p> <p><b>(f)</b> provide information to the public and to officers and employees of federal institutions relating to the policies and programs that give effect to Parts IV, V and VI; and</p> <p><b>(g)</b> delegate any of its powers under this section to the deputy heads or other administrative heads of other federal institutions.</p>

**RECOMMENDATION**

To ensure full compliance with New Brunswick’s *Official Languages Act*, the Office of the Commissioner believes that the Act should include provisions pertaining to a governance structure for official languages, including designating a government entity to be responsible for supporting the Premier in implementation of the OLA.

<p><b>PROPOSITION DE MODIFICATION</b> <b>LOI SUR LES LANGUES OFFICIELLES</b> <b>DU NOUVEAU-BRUNSWICK</b></p>	<p><b>PROPOSED MODIFICATION</b> <b>NEW BRUNSWICK OFFICIAL</b> <b>LANGUAGES ACT</b></p>
<p><b>Secrétariat aux langues officielles</b></p> <p>Est institué le Secrétariat aux langues officielles afin d'appuyer le premier ministre dans sa responsabilité d'appliquer la présente loi.</p> <p>Fonctions du Secrétariat aux langues officielles</p> <p>Le Secrétariat aux langue officielles peut exercer les fonctions suivantes :</p> <ul style="list-style-type: none"> <li>a) la supervision générale de l'application de la LLO;</li> <li>b) la coordination du processus obligatoire de révision de la LLO;</li> <li>c) l'élaboration, la révision, la supervision et l'évaluation du Plan d'application sur les langues officielles;</li> <li>d) la prestation de conseils à toutes les parties des services publics sur l'application de la LLO;</li> <li>e) l'élaboration et la surveillance de l'application de la Politique sur la langue de travail et la Politique sur la langue de service;</li> <li>f) la compilation et la publication des données statistiques permettant de mesurer la progression vers l'égalité d'usage du français et de l'anglais au sein des différentes parties des services publics;</li> <li>g) la préparation d'un rapport annuel sur l'état des langues officielles au Nouveau-Brunswick.</li> <li>h) toute autre fonction liée à l'application de la présente loi.</li> </ul> <p>Le Lieutenant-gouverneur en conseil peut par règlement établir des modalités d'application de cet article.</p>	<p><b>Official Languages Secretariat</b></p> <p>To support the Premier in his responsibility for the administration of this Act, the Official Languages Secretariat is established.</p> <p>Function of the Official Languages Secretariat</p> <p>The Secretariat for Official Languages can exercise the following functions:</p> <ul style="list-style-type: none"> <li>a) general supervision of the administration of the OLA;</li> <li>b) coordination of the mandatory review process of the OLA;</li> <li>c) development, review, supervision, and evaluation of the Official Languages Implementation Plan;</li> <li>d) provision of advice to all parts of the Public Service on the application of the OLA;</li> <li>e) development and monitoring of the application of the Language of Work Policy and Language of Service Policy;</li> <li>f) compilation and publication of statistical data to measure the progress towards the equality of use of English and French within the different Parts of the Public Service; and</li> <li>g) the preparation of an annual report on the state of official languages in New Brunswick.</li> <li>h) any other function related to the application of this law</li> </ul> <p>The Lieutenant-Governor in Council may by regulation establish procedures for the application of this section.</p>

# SECTION 4

## LEGISLATIVE OFFICERS

### Language requirements

On September 16, 2016, the provincial government published competition notices to staff three senior official positions in the Legislative Assembly: the Conflict of Interest Commissioner, the Consumer Advocate for Insurance and the Chief Electoral Officer for the Province of New Brunswick. It was stated for the three competitions that knowledge of both official languages was an asset. A few days later, a person filed a complaint with the Office of the Commissioner, condemning the fact that bilingualism was not a formal requirement for the three positions. According to the complainant, without this knowledge, a legislative officer:

- cannot communicate with both linguistic communities;
- cannot ensure the quality of the bilingual services offered to the public;
- cannot create a bilingual work environment;
- does not embody the province's fundamental values.

The complainant also stated that not making bilingualism an essential requirement for a legislative officer was contrary to the preamble to the *Official Languages Act*, which states as follows:

The Constitution of Canada provides that 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.

As part of the investigation, the Office of the Commissioner carefully analyzed the mandate and responsibilities of legislative officers by reviewing their incorporating act. The goal was to look at the nature of their work and to examine the impact that a senior official's English or French unilingualism can have on their work. To enhance the usefulness of her investigation, the Commissioner's analysis looked at each of the eight legislative officer positions rather than just focusing on the three positions advertised in the competitions.

The analysis of the mandate and responsibilities of legislative officers was highly instructive. Although they all have different and varied responsibilities, they share a common characteristic: the high frequency and wide variety of their exchanges with various groups. Unilingualism means that the members of one of the two linguistic communities would be unable to communicate

directly with the legislative officer, resulting in inequality of service, a violation of the *Official Languages Act* of New Brunswick.

The Anglophone and Francophone communities of New Brunswick have equal constitutional status. Consequently, the members of each community have the right to communicate with and receive service from legislative officers in the official language of their choice. In addition, services offered in English and French must be of equal quality.

It was the Commissioner's conclusion that bilingualism must be a requirement in the competitions to fill these positions. Legislative officers should speak and understand both official languages and have the ability to do so at a minimum level of 3 (advanced) in their second language, based on the oral proficiency scale. This is necessary to ensure that members of the public are not disadvantaged in any way whatsoever, in accordance with the principle of substantive equality.

For the Office of the Commissioner, not requiring bilingualism for legislative officer positions is the same as denying the constitutional principle of equality set out in the *Charter of Rights and Freedoms*. Anglophone and Francophone MLAs in New Brunswick must be able to converse directly with legislative officers who speak their language. Anglophone and Francophone citizens must be able to invite a legislative officer to make a presentation and to talk with him or her in their language, without a go-between. Journalists must be able to interview legislative officers directly in either official language. The staff of legislative officers must be able to be supervised in English or French.

### **Following the federal example**

In June 2013, the federal Parliament passed an act making bilingualism mandatory in competitions to staff senior Officer of Parliament positions. What prompted the passage of that act was the November 2011 appointment of a unilingual Anglophone as Auditor General of Canada. The appointment of a unilingual person to this position led to considerable protest because it was contrary to the principle of the equality of Canada's two official languages. For that reason, the federal Members of Parliament adopted the *Language Skills Act*. Pursuant to the Act, the ability to speak and understand clearly both official languages is a requirement for the appointment of Officers of Parliament.

<b>LOI SUR LES COMPÉTENCES LINGUISTIQUES</b>	<b>LANGUAGE SKILLS ACT</b>
<p>Compétences linguistiques Exigences</p> <p>2 La capacité de parler et de comprendre clairement les deux langues officielles est une condition préalable à la nomination d'une personne à l'un ou l'autre des postes suivants :</p> <p>a) vérificateur général du Canada, dont le titulaire est nommé en vertu du paragraphe 3(1) de la Loi sur le vérificateur général;</p> <p>b) directeur général des élections, dont le titulaire est nommé en vertu du paragraphe 13(1) de la Loi électorale du Canada;</p> <p>c) commissaire aux langues officielles du Canada, dont le titulaire est nommé en vertu du paragraphe 49(1) de la Loi sur les langues officielles;</p> <p>d) Commissaire à la protection de la vie privée, dont le titulaire est nommé en vertu du paragraphe 53(1) de la Loi sur la protection des renseignements personnels;</p> <p>e) Commissaire à l'information, dont le titulaire est nommé en vertu du paragraphe 54(1) de la Loi sur l'accès à l'information;</p> <p>f) conseiller sénatorial en éthique, dont le titulaire est nommé en vertu de l'article 20.1 de la Loi sur le Parlement du Canada;</p> <p>g) commissaire aux conflits d'intérêts et à l'éthique, dont le titulaire est nommé en vertu du paragraphe 81(1) de la Loi sur le Parlement du Canada;</p> <p>h) commissaire au lobbying, dont le titulaire est nommé en vertu du paragraphe 4.1(1) de la Loi sur le lobbying;</p> <p>i) commissaire à l'intégrité du secteur public, dont le titulaire est nommé en vertu du paragraphe 39(1) de la Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles;</p> <p>j) président de la Commission de la fonction publique, dont le titulaire est nommé en vertu du paragraphe 4(5) de la Loi sur l'emploi dans la fonction publique;</p> <p>k) directeur parlementaire du budget, dont le titulaire est nommé en vertu du paragraphe 79.1(1) de la Loi sur le Parlement du Canada.</p>	<p>Language Skills Requirements</p> <p>2 Any person appointed to any of the following offices must, at the time of his or her appointment, be able to speak and understand clearly both official languages:</p> <p>(a) the Auditor General of Canada, appointed pursuant to subsection 3(1) of the Auditor General Act;</p> <p>(b) the Chief Electoral Officer, appointed pursuant to subsection 13(1) of the Canada Elections Act;</p> <p>(c) the Commissioner of Official Languages for Canada, appointed pursuant to subsection 49(1) of the Official Languages Act;</p> <p>(d) the Privacy Commissioner, appointed pursuant to subsection 53(1) of the Privacy Act;</p> <p>(e) the Information Commissioner, appointed pursuant to subsection 54(1) of the Access to Information Act;</p> <p>(f) the Senate Ethics Officer, appointed pursuant to section 20.1 of the Parliament of Canada Act;</p> <p>(g) the Conflict of Interest and Ethics Commissioner, appointed pursuant to subsection 81(1) of the Parliament of Canada Act;</p> <p>(h) the Commissioner of Lobbying, appointed pursuant to subsection 4.1(1) of the Lobbying Act;</p> <p>(i) the Public Sector Integrity Commissioner, appointed pursuant to subsection 39(1) of the Public Servants Disclosure Protection Act;</p> <p>(j) the President of the Public Service Commission, appointed pursuant to subsection 4(5) of the Public Service Employment Act;</p> <p>(k) the Parliamentary Budget Officer, appointed under subsection 79.1(1) of the Parliament of Canada Act.</p>

## RECOMMENDATION

The Office of the Commissioner believes it is time that New Brunswick lived up to its constitutional status and made bilingualism a requirement for all future appointments of senior officers of the Legislative Assembly.

<b>PROPOSITION DE MODIFICATION</b>	<b>PROPOSED MODIFICATION</b>
<p data-bbox="316 487 808 583"><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p data-bbox="316 592 808 630">Compétences linguistiques</p> <p data-bbox="316 655 808 814">La capacité de parler et de comprendre clairement les deux langues officielles est une condition préalable à la nomination d'une personne à l'un ou l'autre des postes suivants :</p> <ul data-bbox="316 840 808 1155" style="list-style-type: none"><li>• le directeur général des élections</li><li>• l'ombud</li><li>• le défenseur des enfants et de la jeunesse</li><li>• le défenseur du consommateur en matière d'assurances</li><li>• le commissaire à l'intégrité</li><li>• le commissaire aux langues officielles du Nouveau-Brunswick</li><li>• le vérificateur général</li></ul>	<p data-bbox="815 487 1307 550"><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p data-bbox="815 592 1307 630">Language proficiency</p> <p data-bbox="815 655 1307 781">Any person appointed to any of the following offices must, at the time of his or her appointment, be able to speak and understand clearly both official languages:</p> <ul data-bbox="815 840 1307 1092" style="list-style-type: none"><li>• Chief Electoral Officer</li><li>• Ombud</li><li>• Child and Youth Advocate</li><li>• Consumer Advocate for Insurance</li><li>• Integrity Commissioner</li><li>• Commissioner of Official Languages for New Brunswick</li><li>• Auditor General</li></ul>

## Term of office for the Commissioner of Official Languages

When the new *Official Languages Act* was adopted in 2002, the OLA provided that the term of the appointment of the Commissioner of Official Languages be a five-year renewable term.

When amendments to the OLA were adopted in 2013, the mandate of the Commissioner was changed to a seven-year non-renewable term with the possibility of a 12-month extension beyond the seven years as set out in subsections 43(3) and (4) of the OLA.

The five-year renewable term could and did provide limitations and concern for the Office of the Commissioner. The Commissioner must provide an annual report. If, in the fourth or fifth year of a mandate the Commissioner wishes to report on an issue of concern which in theory could prove to raise the ire of the government, would there be reticence on the part of a Commissioner to report on that issue as their term was up for renewal? It is important that the independence of the Office be maintained yet be balanced with the realities of attracting quality candidates to the position who will be assured of some job security.

A seven-year non-renewable appointment also creates limitations:

- Appointees may come from a sector where they have not worked closely in the field and there is a significant “learning curve”. An incumbent becomes more and more knowledgeable over time, government institutions achieve a level of comfort with the Commissioner and the public gains a level of respect for the Commissioner over time. If a Commissioner has been in the position for a longer period, the public assumes that they have a level of understanding of the issues which will enhance the public’s respect for the OLA and ultimately, official languages.
- A seven-year non-renewable mandate could create an impediment in recruitment. The position is a senior position and requires a candidate with significant experience in a professional field. Such individuals normally will be employed in high-level positions which they would be reticent to leave for a seven-year term unless they are at the end of their professional careers intending to retire after the mandate or feel that they will have the capacity to find alternate employment at the end of the term. Younger individuals who may have significant relevant professional experience but who may financially not be ready to leave the workforce following a seven-year appointment will not apply for the position. This significantly reduces the pool of qualified candidates from which to choose.

- The Commissioner’s mandate is about ensuring respect for the OLA, hopefully in a positive manner. The Office works closely with various government institutions to achieve positive outcomes. Sometimes this requires implementation of significant policy changes which may take considerable time. Having the Commissioner in their role for a longer period would ensure a sense of continuity and assurance that there will be enough time to effect positive change. It must be recognized that effecting change in government institutions can take time.

It must also be recognized that there may be concern that an appointee may not be a “fit” for the role and a ten-year appointment may be too long. However, there is a robust and independent appointment process in place for the appointment of Legislative Officers. Any possible concerns about a candidate should be revealed in this process. In addition, the OLA does provide for removal or suspension of a Commissioner if issues arise with an appointee during their term.

It is of note that the terms for two Legislative Officers, the Auditor General and the Chief Electoral Officer, are for ten years.

**RECOMMENDATION**

The Office of the Commissioner believes that subsection 43(3) of the OLA should be amended to set the mandate of the Commissioner of Official Languages to a period of ten years and that following the ten-year appointment the Commissioner is not eligible for reappointment.

It is also recommended that this provision take effect after the current seven-year term of the current Commissioner has expired.

## SECTION 5

# COMMISSIONER'S POWERS AND OTHER RECOURSE MECHANISMS

Language rights are basically fundamental rights.<sup>7</sup> The underlying constitutional principle of language rights is the protection of minorities.<sup>8</sup> In the landmark judgment *Beaulac*, the Supreme Court of Canada stated that “Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.”<sup>9</sup>

By including language rights in Canada’s Constitution and codifying them in the *Official Languages Act*,<sup>10</sup> the New Brunswick legislator wanted to formally acknowledge that language rights are not passive rights; instead, they create concomitant positive obligations on the part of the government. As the Supreme Court of Canada explains: “Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.”<sup>11</sup> The Supreme Court also states that language rights would be meaningless in the absence of a duty of the State to take positive steps to implement them.<sup>12</sup>

In *DesRochers*, the Supreme Court of Canada also states: “Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation.”<sup>13</sup> In fact, administrative obstacles cannot serve as excuses to justify a failure to provide services in the minority official language. As the Supreme Court explains so well in *Beaulac* “an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language.”<sup>14</sup>

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<sup>7</sup> See *R v. Mercure*, [1988] 1 S.C.R. 234, p. 268; *Société des Acadiens du Nouveau-Brunswick v. Assn of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, p. 578; and *R v. Beaulac*, [1999] 1 S.C.R. 768, para. 21 [*Beaulac*].

<sup>8</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 79.

<sup>9</sup> *Beaulac*, *supra*, note 7, para. 25.

<sup>10</sup> *Official Languages Act*, SNB 2002, c O-0.5 [OLA].

<sup>11</sup> *Beaulac*, *supra*, note 7, para. 20.

<sup>12</sup> *Ibid.*

<sup>13</sup> *DesRochers v. Canada (Industry)*, 2009 SCC 8, para. 31.

<sup>14</sup> *Beaulac*, *supra*, note 7, para. 39.

It is also appropriate to bear in mind the quasi-constitutional status of the OLA.<sup>15</sup> This status is also confirmed in section 3, which gives the OLA precedence over all other statutes, except the *Education Act* and any other act or legislative provision or measure intended to promote the equality of both language communities or to establish distinct educational or cultural institutions.<sup>16</sup> This quasi-constitutional status is also confirmed in the preamble to the Act, which reprises sections 16 to 20 of the *Canadian Charter of Rights and Freedoms*.<sup>17</sup>

However, this recognition of the fundamental nature and constitutional origin of the OLA means nothing if there is no parallel access to an authority with the jurisdiction to ensure compliance with the OLA. The famous Latin maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy<sup>18</sup> applies as much to language rights as it does to any other branch of law. If language rights are recognized, there must be appropriate recourse in cases where the exercise or full enjoyment of one of those rights is impeded. Indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.<sup>19</sup>

Thus, when provincial institutions fail to discharge their obligations with respect to official languages, the province's citizens must have access to a judicial or administrative authority that can effectively determine that their rights have been violated and order an appropriate remedy.

Moreover, the Office of the Commissioner maintains that it is possible to assess the importance that the legislator gives a statute by analyzing the effectiveness of the penalty mechanisms designed to ensure compliance with it. In that regard, the *Official Languages Act of New Brunswick, 1969*<sup>20</sup> does not contain any specific provision concerning available remedies in cases of violation of the rights guaranteed in the Act. Complainants whose rights have been violated could certainly claim relief from the courts, but the absence of recourse provisions in the Act discouraged many people from undertaking such an initiative.

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<sup>15</sup> See *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, para. 16.

<sup>16</sup> *Official Languages Act*, SNB 2002, c O-0.5, para. 3(2).

<sup>17</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter].

<sup>18</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 [2003] 3 SCR 3, para. 25.

<sup>19</sup> *Ashby v. White* (1703), 2 Ld Raym 938, p. 953. The translation of Chief Justice Holt's quote is that of the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v. Bhaduria*, [1981] 2 S.C.R. 181, p. 191. See also *Doucet-Boudreau*, *ibid*, para. 25. See also M. Doucet, *Les droits linguistiques au Nouveau-Brunswick : À la recherche de l'égalité réelle*, Édition de la Francophonie, page 537 [*Les droits linguistiques au Nouveau-Brunswick*].

<sup>20</sup> *Official Languages of New Brunswick*, RSNB 1973, c O-1 [OLA, 1969].

It should also be understood that recourse to the courts is a process that takes time and which can be expensive. Any court action taken to force the government to respect language rights entails substantial human and financial costs for the litigant. The evidentiary burden and the court costs alone impede the exercise of these rights. Many cases require the testimony of experts, which can be very costly. In addition, these cases often oppose individuals against government organizations. As M. Doucet explains:

[Translation] With limited resources, citizens must deal with the governmental apparatus and the government's almost unlimited financial resources. In addition, in New Brunswick, the Attorney General's practice in these cases is frequently to engage the services of large private law firms and a vast array of lawyers within the machinery of government [...] Citizens therefore have reason to see themselves in the role of David up against Goliath when they decide to take legal action to get their rights upheld. If we also include the financial burden of taking legal action, we will have a better understanding of why many people are reluctant to exercise this option.<sup>21</sup>

In the absence of available remedies, one might have strong misgivings about the effectiveness of the OLA, 1969. In this case, Justice Lavigne's statement in the *R. v. Gaudet* decision is especially meaningful: "It is not enough for a linguistic guarantee to be offered on paper; it must be applied or put into practice in order to have meaning."<sup>22</sup> In fact, what is a law for, if there is no remedy to ensure compliance with the law?<sup>23</sup> It was only in 2002, when the new OLA was adopted, that the New Brunswick legislator agreed to create a remedy for breaches of the Act, by establishing the Office of the Commissioner of Official Languages.

The establishment of the Office of the Commissioner of Official Languages gave citizens greater access to a less expensive procedure to settle issues raised by breaches of the OLA. However, despite this new development, the Office of the Commissioner of Official Languages for New Brunswick still does not have all the necessary authority to fully carry out its mandate.

Given the major role that the OLA plays in the hierarchy of provincial statutes, the lack of effectiveness of the remedies recognized in the Act is difficult to understand. For that reason, the Office of the Commissioner is of the opinion that this revision process must be used to review these powers in order to provide the Commissioner with the means to fully carry out the Commissioner's mandate.

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<sup>21</sup> M. Doucet, *Les droits linguistiques au Nouveau-Brunswick*, *supra*, note 13, page 545.

<sup>22</sup> *R. v. Gaudet*, 2010 NBQB 27, 355 NBR (2d) 277, para. 24.

<sup>23</sup> *Les droits linguistiques au Nouveau-Brunswick*, *supra*, note 12, page 600.

To that end, the Office of the Commissioner reviewed the powers conferred on Commissioners of Official Languages in other jurisdictions, including, in particular, three Canadian jurisdictions that have adopted official languages legislation: the federal government,<sup>24</sup> Nunavut and the Northwest Territories.<sup>25</sup> We also paid special attention to what is done in other countries by consulting enabling legislation for commissioners of the Welsh Language<sup>26</sup> and the Irish language.<sup>27</sup>

To monitor and implement the OLA, the Commissioner's powers basically consist in the authority to carry out investigations and make recommendations. These powers, although significant, are insufficient to ensure full compliance with the Act. In fact, 20 years of experience show that the power to make recommendations has its limits and can sometimes prove ineffective. The reluctance of some government institutions to implement the recommendations and timeframes for their implementation, which can sometimes take several years, are sources of frustration for complainants and undermine the credibility of the OLA, not only for government institutions, but also for the public.

In the following pages, the Office of the Commissioner sets out some recommendations that would help to correct some deficiencies of the OLA with respect to available remedies for complainants and the powers of the Commissioner of Official Languages.

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<sup>24</sup> *Official Languages Act*, RSC 1985, c 31 (4th Supp.) [federal OLA].

<sup>25</sup> *Official Languages Act*, SNu 2008, c 10 [Nunavut OLA]; *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 [NWT OLA].

<sup>26</sup> Welsh Language (Wales) Measures, 2011. [Welsh Language Act].

<sup>27</sup> *Official Languages Act*, 2003, Ireland [OLA Ireland].

## OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES

The Office of the Commissioner of Official Languages for New Brunswick as well as the position of Commissioner of Official Languages were created pursuant to section 43 of the OLA. The Commissioner is appointed by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly. To ensure the independence of the position, a selection committee is set up to designate candidates for possible appointment as Commissioner. The selection committee is made up of the Clerk of the Executive Council or a person designated by the Clerk, the Clerk of the Legislative Assembly or a person designated by the Clerk, a member of the judiciary and a member of the university community.

The selection committee's mandate consists in drawing up a list of competent candidates. After receiving this list, the Premier, who is the minister responsible for implementing the OLA, consults the leader of the official opposition and the leaders of the other political parties represented in the Legislative Assembly about one or more candidates on the list.

The Commissioner of Official Languages is a public servant of the Legislative Assembly, not of the government, appointed for a seven-year, non-renewable term. The Lieutenant Governor in Council can extend this term for a maximum period of 12 months. The Commissioner is appointed to hold office during good behaviour and may only be removed for incapacity, neglect of duty or misconduct upon an address in which two thirds of the members of the Legislative Assembly concur. The position is therefore independent of the government, the various departments and other government institutions.

Under section 43 of the *Official Languages Act*, the role of the Commissioner is to investigate, report on, and make recommendations with regard to compliance with this Act and to promote the advancement of both official languages in the province. The Commissioner conducts investigations following the receipt of complaints from the public. He can also conduct an investigation on his own initiative. Following the investigations, the Commissioner can submit reports and make recommendations. The Commissioner can also, when he deems it appropriate, try to settle a complaint before conducting an investigation. The Commissioner can also, at his discretion, refuse or cease to investigate a complaint if he feels that the complaint is trivial, frivolous or vexatious, or made in bad faith, or if the subject-matter of the complaint does not involve a contravention of or failure to comply with the OLA.

Pursuant to subsections 43(16) and (17), if the Commissioner decided to investigate a complaint, he must give advance notice of his intention to the Deputy Head or any other administrative authority in the institution concerned. Once the investigation is completed, the Commissioner submits the findings as well as any recommendations, including any opinion or reasons leading to the recommendations, to the Premier, to the Deputy Head or to any other administrative authority in the institution concerned, as well as to the complainant. Under subsection 43(17.2), if the Commissioner feels that the public interest requires it, he can publish a report on the findings of the investigation and on any recommendations made as a result of this investigation.

The OLA also stipulates that the Commissioner must submit an annual report every year to the Speaker of the Legislative Assembly. The annual report contains a report on the activities of the Office of the Commissioner, as well as some recommendations for improving the provision of services in both official languages.

## **Requiring institutions to act upon the Commissioner's investigation report**

Under subsection 43(9) of the *Official Languages Act*, the Commissioner's role is to investigate, report on, and make recommendations with regard to compliance with this Act and to promote the advancement of both official languages in the province. To carry out part of this role, the Commissioner conducts investigations either after receiving complaints or on his or her own initiative.

The OLA confers on the Commissioner the important task of ensuring that the provincial government and its institutions discharge the obligations set out in the Act. Through investigation reports, the Commissioner seeks to establish a dialogue with provincial institutions in order to promote full and complete implementation of the OLA. In addition, the investigation reports are used to raise public awareness and inform the public about language rights. Unfortunately, the Office of the Commissioner finds that, despite some good will expressed by some institutions, others are resistant to this search for dialogue and seem to consider the Commissioner's reports and recommendations as obstacles and not as tools to be used to improve their performance with respect to official languages.

The primary objective of the investigation reports is to determine whether rights recognized in the OLA have been violated. The recommendations made in the Commissioner's investigation reports are intended to shed light on the facts and practices that gave rise to the complaint. The Commissioner thus seeks to resolve the problem by making pragmatic recommendations. Although they deal with a specific problem raised in the complaint, the recommendations also provide general suggestions as to how to prevent recurrences of the type of violation concerned elsewhere. In addition, when systemic problems are discovered, recommendations can be made in the Commissioner's report that changes be made to government practices and policies and, if necessary, to legislation.

The problems raised most often where the Commissioner's investigations are concerned are that the recommendations issued are not always implemented by the institution concerned or that they are implemented too slowly, which for the complainant can be frustrating and discouraging, because in the meantime, the complainant's rights continued to be disrespected. Violations that are repeated following the submission of an investigation report erode public confidence in the effectiveness of the Act and seriously undermine the credibility of the Office of the Commissioner of Official Languages. Regardless of the statute concerned, it is unacceptable for a violation to continue being repeated after a judicial or administrative authority has penalized the violation. This is even more true of a quasi-constitutional statute, such as the OLA.

Despite the Commissioner's authority to conduct investigations and make recommendations, the Commissioner of Official Languages is not empowered to order provincial institutions to comply with the OLA. The Commissioner's influence remains persuasive and non-coercive. Despite being the protector of the New Brunswick public with respect to official languages, the Commissioner's power to act is still fairly limited. However, if the Commissioner's powers are insufficient to ensure compliance with the OLA, the very relevance of the position risks being called into question.

To increase the effectiveness of the investigation reports, the Office of the Commissioner suggests that the OLA be amended so that an institution targeted by an investigation is required to reply in writing to the report within a period of 30 days following its receipt and that in this reply, it be required to explain the methods it has implemented or intends to implement in order to comply with the recommendations set out in the report.

With respect to this requirement to reply within a specific period to the investigation reports, the Office of the Commissioner discovered in its research that there is a comparable requirement in two other pieces of legislation. In the *Welsh Language Act*, for example, subsection 4(3) states that institutions targeted by an investigation "must have due regard" for the recommendations or opinion issued by the Commissioner. Subsection 32(3) of the Nunavut OLA states that the Commissioner can request that the administrative head of the institution inform the Commissioner, within the time period that the Commissioner establishes, of the measures taken or being considered in order to follow up on the Commissioner's recommendations and whether any measure has not been taken or is not being considered, and the reasons for not following up on the Commissioner's recommendations. It is therefore not uncommon or idiosyncratic for an amendment to be adopted requiring institutions to account for their actions following the submission of the investigation report.

## RECOMMENDATION

The Office of the Commissioner recommends that the *Official Languages Act* be amended to make institutions account for their actions following the submission of the investigation report.

PROPOSITION DE MODIFICATION	PROPOSED MODIFICATION
<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
43(17.1.1) a) Dans les trente (30) jours suivant la réception des résultats de l'enquête du commissaire que prévoit le paragraphe (16) ou (17), l'administrateur général ou tout autre responsable administratif de l'institution concernée devra faire parvenir au commissaire une réponse écrite qui précisera les moyens pris ou qui seront pris par l'institution pour se conformer aux recommandations du rapport d'enquête ou si aucune mesure n'a été prise ni envisagée, les raisons pour ne pas donner suite à ses recommandations.	43(17.1.1)(a) Within thirty (30) days following receipt of the results of the Commissioner's investigation as prescribed in subsection (16) or (17), the deputy head or other administrative head of the institution concerned must send to the Commissioner a written reply specifying the steps taken or that will be taken by the institution to comply with the investigation report's recommendations, or if no measure has been implemented or considered, the reasons for not following up on its recommendations.

### **Authorization to conclude enforcement agreements with institutions that contravene the Act on a regular basis**

In the Office of the Commissioner's experience, there are some cases where institutions about which there have been numerous complaints of failure to comply with the OLA, and despite the Commissioner's recommendations, the situation did not improve. If the Office of the Commissioner could conclude enforcement agreements, it would be able to deal with this specific problem.

An enforcement agreement is an agreement whereby an institution or an organization targeted by a complaint undertakes to implement certain measures in order to comply with the recommendations set out in an investigation report. An enforcement agreement therefore includes commitments to establish the necessary conditions for compliance with the OLA. It also stipulates that the institution or organization has a duty to provide an accounting at regular intervals of the efforts made to fulfil the commitments made.

The agreement concluded on November 20, 2017, by the parties in a legal dispute involving Ambulance New Brunswick, the provincial government and civil parties is a good example of an enforcement agreement. This agreement includes commitments made by Ambulance New Brunswick and the government to discharge their obligations under the OLA. It also stipulates that Ambulance New Brunswick and the government must submit a report every year to the Commissioner describing the progress made in fulfilling these commitments. It is true that the Office of the Commissioner of Official Languages was not one of the parties to this agreement, but it is nonetheless a good example of what an enforcement agreement could look like.

The Office of the Commissioner therefore suggests that the OLA be amended to stipulate that institutions and organizations that fail **on a recurring basis** to discharge their obligations under the OLA may be required to conclude an enforcement agreement with the Office of the Commissioner of Official Languages. **It is important to point out that the objective is not to make it a requirement that all institutions and organizations conclude such agreements. Instead, the Office of the Commissioner is seeking the authorization to be able to conclude such agreements with institutions against which complaints are made on a recurring basis.**

Although we were unable to find provisions for such enforcement agreements in other legislation,<sup>28</sup> we found that the *Welsh Language Act* provides for a process that, in some respects, is similar. Section 79 of this Act states that the Commissioner may request that an institution subject to the Act draw up an action plan for implementing its recommendations within a set period of time.

The Office of the Commissioner is of the opinion that the enforcement agreement is an approach that promotes collaboration by giving the institution a chance to remedy the situation voluntarily, while making it clear that a legal penalty will be imposed in cases of continued non-compliance. In the event that an institution or an organization fails to fulfil the commitments made or to comply with the schedule set out in the enforcement agreement, the Commissioner can ask the Court, if necessary, to issue an order instructing the institution to comply with the agreement and order it to periodically provide the Court with an accounting of progress made in fulfilling its commitments. The enforcement agreement would therefore ensure compliance with the OLA following investigations.

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<sup>28</sup> However, the Commissioner of Official Languages of Canada proposes this mechanism in his federal OLA modernization project.

## RECOMMENDATION

The Office of the Commissioner recommends that the *Official Languages Act* be amended to give the Commissioner authorization to conclude enforcement agreements.

### PROPOSITION DE MODIFICATION

#### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

43 (17.1.2) (a) Dans les soixante (60) jours suivant la réception du rapport d'enquête que prévoit le paragraphe (16) ou (17), le commissaire pourra conclure avec une institution une entente exécutoire.

43(17.1.2) (b) L'entente exécutoire énonce les engagements pris par l'institution pour respecter les recommandations du rapport d'enquête, inclut un échéancier pour la mise en œuvre de ces engagements et prévoit l'obligation pour l'institution de rendre compte à des intervalles réguliers au commissaire de la mise en œuvre de ces engagements.

43 (17.1.2) (c) Dans l'éventualité où une institution ne respecte pas les engagement pris dans l'entente exécutoire que prévoit l'alinéa (a), le Commissaire pourra demander à la cour de faire exécuter l'accord en tout ou en partie et d'accorder les recours qu'il juge appropriés

### PROPOSED MODIFICATION

#### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

43 (17.1.2)(a) Within sixty (60) days following receipt of the investigation report stipulated in subsection (16) or (17), the Commissioner may conclude an enforcement agreement with an institution.

43(17.1.2)(b) The enforcement agreement states the commitments made by the institution to implement the recommendations in the investigation report, includes a schedule for fulfilling these commitments and stipulates that the institution is required to provide the Commissioner at regular intervals with an accounting of progress made in fulfilling these commitments.

43 (17.1.2)(c) In the event that an institution fails to fulfil the commitments made in the enforcement agreement as stipulated in paragraph (a), the Commissioner may apply to the Court to have the agreement enforced in whole or in part and to grant the remedies that it deems appropriate.

## Making it easier for complainants to take legal action

Subsection 43(18) of the OLA states that a complainant who is not satisfied with the conclusions made in an investigation conducted by the Office of the Commissioner or with the resolution of the complaint may apply to The Court of Queen's Bench of New Brunswick for a remedy.

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
43(18) Le plaignant qui n'est pas satisfait des conclusions du commissaire reçues au terme de l'enquête en vertu du paragraphe (16) ou de la suite donnée à sa plainte, peut former un recours devant la Cour du Banc de la Reine du Nouveau-Brunswick.	43(18) If a complainant is not satisfied with the conclusions of the Commissioner received under subsection (16) or with the resolution of the complaint, the complainant may apply to The Court of Queen's Bench of New Brunswick for a remedy.
43(19) Le juge de la cour visée au paragraphe (18) rend la réparation qu'il estime juste et convenable eu égard aux circonstances.	43(19) The judge of a court referred to in subsection (18) may grant such remedy as he or she considers appropriate and just in the circumstances.

Subsection 43(18) states nothing regarding the procedure that complainants can use to bring their case before The Court of Queen's Bench.

In New Brunswick, as a general rule, an action in court is introduced by a Notice of Action with Statement of Claim attached.<sup>29</sup> Upon receipt of a Notice of Action, the defendant normally has 20 days to file a Statement of Defence.<sup>30</sup> The Statement of Claim and the Statement of Defence are part of the *pleadings*. Each pleading must contain a concise statement of the material facts on which the claim or the defence are based, but not the evidence by which those facts are proved. After the close of pleadings,<sup>31</sup> the parties proceed to the pre-trial discovery of documents and to the parties' examinations in chief.<sup>32</sup> It is only upon the conclusion of this procedure, not counting the various motions that may be filed in order to settle preliminary or procedural issues, that the case can finally be scheduled for a hearing before judge. Overall, this procedure can be time-consuming and very expensive. In the case of an action brought pursuant to subsection 43(18), the use of this procedure to seek a legal remedy before the Court of Queen's Bench could result in heavy financial burden on the complainant as well as in long delays before a decision is rendered.

<sup>29</sup> NB Reg, 82-73, R 16. [Rules of Court of New Brunswick]

<sup>30</sup> *Ibid*, R 20.

<sup>31</sup> *Ibid*, R 27.05.

<sup>32</sup> *Ibid*, R 27 and R 28.

Some<sup>33</sup> maintain that the Notice of Application procedure,<sup>34</sup> which involves the submission of evidence by affidavit and shorter time frames, is the preferred procedure to follow when the issue raises questions of public interest, as is the case with language rights. According to Rule 16.04 of the Rules of Court New Brunswick, this procedure can only be justified under paragraph (j), which states that “a proceeding may be so commenced [. . .] in respect of any matter where it is unlikely that there will be a substantial dispute of fact.” Because a claim intended to assess the issue of whether or not there was a violation of a language right recognized in the OLA is bound to raise a dispute of fact, it would be surprising for a court to allow the proceeding to be commenced by Notice of Application, unless it is not expressly provided for in a statutory provision.

Consequently, we are of the opinion that it is more effective, in the case of a legal action involving a language issue of public interest, to allow the legal action to be commenced by a Notice of Application rather than by a Notice of Action. A provision could be included in the OLA to allow use of the Notice of Application procedure in all cases pursuant to subsection 43(18). The evidence in this type of proceeding could, unless instructed otherwise by the Court, be submitted by means of an affidavit. As soon as the Notice of Application is filed, the Court would act as manager and would make sure that the procedure unfolded within a reasonable time period. The parties would have the right to cross-examine the holders of affidavits with the managing judge’s authorization and in accordance with the procedure approved by the judge. We believe that it would reduce the length of court cases and consequently greatly reduce costs.

**RECOMMENDATION**

The Office of the Commissioner recommends that the *Official Languages Act* be amended to include the following paragraph:

<b>PROPOSITION DE MODIFICATION</b> <b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>PROPOSED MODIFICATION</b> <b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
43(18.1) Le recours prévu au paragraphe (18) est introduit par avis de requête tel que prévu dans les Règles de procédure du Nouveau-Brunswick.	43(18.1) The remedy provided for in subsection (18) is introduced by means of a Notice of Application, as set out in the Rules of Court of New Brunswick.

<sup>33</sup> See M. Doucet, *Les droits linguistiques au Nouveau-Brunswick*, supra, note 12, pages 539 to 542.

<sup>34</sup> *Ibid*, R 16.04.

An action in court can also be very costly for an individual. The Office of the Commissioner therefore deems it necessary that the OLA be amended to include a provision similar to that in section of 81 of the federal OLA. This provision states as follows:

<p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p>43(18) Le plaignant qui n'est pas satisfait des conclusions du commissaire reçues au terme de l'enquête en vertu du paragraphe (16) ou de la suite donnée à sa plainte, peut former un recours devant la Cour du Banc de la Reine du Nouveau-Brunswick.</p> <p>43(19) Le juge de la cour visée au paragraphe (18) rend la réparation qu'il estime juste et convenable eu égard aux circonstances.</p>	<p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p>43(18) If a complainant is not satisfied with the conclusions of the Commissioner received under subsection (16) or with the resolution of the complaint, the complainant may apply to The Court of Queen's Bench of New Brunswick for a remedy.</p> <p>43(19) The judge of a court referred to in subsection (18) may grant such remedy as he or she considers appropriate and just in the circumstances.</p>
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**RECOMMENDATION**

The Office of the Commissioner recommends that the *Official Languages Act* be amended to include the following paragraph:

<p><b>PROPOSITION DE MODIFICATION LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p>43(18.2) (a) Les frais et dépens sont laissés à l'appréciation du tribunal et suivent, sauf ordonnance contraire de celui-ci, le sort du principal.</p> <p>43(18.2) (b) Cependant, dans les cas où il estime que l'objet du recours a soulevé un principe important et nouveau quant à la présente loi, le tribunal accorde les frais et dépens à l'auteur du recours, même s'il est débouté.</p>	<p><b>PROPOSED MODIFICATION NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p>43(18.2) (a) The costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.</p> <p>43(18.2) (b) Where the Court is of the opinion that an application has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.</p>
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## Officially giving the Commissioner the right to address the Courts

The OLA of Canada gives the federal Commissioner the right to seek a legal remedy before the Courts.<sup>35</sup> We also find similar provisions in the Nunavut OLA,<sup>36</sup> in the Northwest Territories OLA<sup>37</sup> as well as in the *Welsh Language Act*.<sup>38</sup>

The OLA does not specifically state that New Brunswick's Commissioner of Official Languages has this authority. It is true that a broad interpretation of the OLA could lead to the conclusion that this right exists implicitly. Moreover, did the Commissioner not exercise this right by obtaining intervenor status in *New Brunswick v. Canadian Union of Public Employees, Local 4848*? Although this may be the case, we are nonetheless of the opinion that this authority must be expressly included in the OLA to avoid any ambiguity. In addition, it was recommended in the Office of the Commissioner's 2011–2012 annual report that the Commissioner be granted the option of seeking remedies before the courts,<sup>39</sup> but this recommendation has still not been acted upon.

### RECOMMENDATION

The Office of the Commissioner recommends that the *Official Languages Act* be amended to grant the Commissioner the right to seek legal remedies.

#### PROPOSITION DE MODIFICATION

##### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

43(18.3) Le commissaire peut selon le cas :

- a) exercer lui-même le recours que prévoit le paragraphe 43(18);
- b) comparaître devant le tribunal pour le compte de l'auteur d'un recours.

43(18.4) L'article 43 (18.3) n'a pas pour effet de porter atteinte au pouvoir du commissaire de demander l'autorisation d'intervenir dans toute instance judiciaire relative au statut ou à l'usage du français ou de l'anglais.

#### PROPOSED MODIFICATION

##### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

43(18.3) Depending on the case, the Commissioner may:

- (a) apply himself or herself for remedy, as provided in subsection 43(18);
- (b) appear before the Court on behalf of the applicant for a remedy.

43(18.4) Nothing in subsection 43(18.3) in any way limits the Commissioner's authority to apply for authorization to intervene in any court proceedings having to do with the status or use of French or English.

<sup>35</sup> OLA of Canada, s. 78.

<sup>36</sup> OLA of Nunavut, *supra*, note 25, s. 36.

<sup>37</sup> OLA of NWT, *supra*, note 25, ss. 32(2).

<sup>38</sup> *Welsh Language Act*, *supra*, note 26, s. 8.

<sup>39</sup> Commissioner of Official Languages for New Brunswick, *From Words to Actions: 2011-2012 Annual Report*, Fredericton, p. 18.

## Delegation of the Commissioner’s powers in the event of a conflict of interest

Under section 43 of the OLA, the commissioner has, among others, the following powers and mandate:

<p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p>COMMISSAIRE AUX LANGUES OFFICIELLES</p> <p>Mandat, responsabilités du commissaire et plaintes</p> <p>43(8) Le commissaire peut conclure des contrats de services professionnels pour des périodes de temps limitées ou dans des domaines particuliers, s’il l’estime nécessaire à l’exercice de ses fonctions en vertu de la présente loi.</p> <p>43(9) Conformément aux pouvoirs qui lui sont conférés en vertu de la présente loi, le rôle du commissaire est d’enquêter, présenter des rapports et de faire des recommandations visant le respect de la présente loi et de promouvoir l’avancement des deux langues officielles dans la province.</p>	<p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p>COMMISSIONER OF OFFICIAL LANGUAGES</p> <p>Mandate and responsibilities of Commissioner</p> <p>43(8) The Commissioner may contract for such professional services, for limited periods of time or in respect of particular matters, as he or she considers necessary to enable the fulfillment of the Commissioner’s responsibilities under this Act.</p> <p>43(9) In accordance with the authority provided to the Commissioner under this Act, it is the role of the Commissioner to investigate, report on and make recommendations with regard to compliance with this Act and to promote the advancement of both official languages in the Province.</p>
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The Act is however silent on the commissioner’s options should he receive a complaint that could place him in a conflict of interest, whether real or perceived.

### RECOMMENDATION

The Office of the Commissioner recommends that the legislator consider the issue of complaints received by the commissioner that could create a conflict of interest for him and add a subsection to the OLA allowing the commissioner to delegate his investigative powers when a real or perceived conflict of interest exists.

## Increase complainants' and the Commissioner's immunity

Section 43.1 of the OLA is intended to protect complainants from reprisal after they file a complaint.

<p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p>43.1 Il est interdit d'exercer des représailles contre un plaignant ou d'en ordonner l'exercice du fait qu'il a déposé de bonne foi une plainte auprès du commissaire ou collaboré à l'enquête que prévoit la présente loi.</p>	<p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p>43.1 No person shall take a reprisal against a person or direct that one be taken against a person because the person has made a complaint in good faith to the Commissioner or cooperated in an investigation under this Act.</p>
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In order to better protect complainants, the Office of the Commissioner is of the opinion that this section should be amended to specify not only that complainants must not be the target of reprisals, but also that threats must not be made against them or that they be discriminated against because of the complaint they filed. A similar provision is included in paragraph 62(2)(a) of the federal OLA.

Moreover, in its current form, section 43.1 offers little recourse to complainants in the event that they are the target of reprisals, threats or discrimination after filing a complaint. The only recourse is to file a complaint with the Office of the Commissioner of Official Languages. To send a clear message that such actions are not tolerated, the Office of the Commissioner suggests the addition of a new paragraph imposing on the party or the institution at fault a monetary penalty of \$5,000 to \$25,000.

### RECOMMENDATION

The Office of the Commissioner recommends that the *Official Languages Act* be amended to include the following provisions:

<p><b>PROPOSITION DE MODIFICATION</b></p> <p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p>43.1 (a) Il est interdit d'exercer des représailles, de faire de la discrimination ou de proférer des menaces contre un plaignant ou tout autre personne ou d'en ordonner l'exercice du fait que le plaignant a déposé de bonne foi une plainte auprès du commissaire ou que le plaignant ou toute autre personne a collaboré à l'enquête que prévoit la présente loi.</p>	<p><b>PROPOSED MODIFICATION</b></p> <p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p>43.1(a) It is prohibited to take reprisals, discriminate or make threats against a complainant or any other person, or to order that such actions be taken because the complainant has made a complaint in good faith to the Commissioner or that the complainant or any other person cooperated in an investigation under this Act.</p>
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<p>43.1(b) Toute personne ou institution qui enfreint le paragraphe 43.1(a) est passible, sur déclaration sommaire de culpabilité en vertu de la procédure prévue dans la Loi sur la procédure applicable aux infractions provinciales, LN-B 1987, c P-22.1, d'une amende pouvant aller de 5 000 à 25 000\$.</p>	<p>43.1(b) Any person or institution contravening subsection 43.1(a) is liable on summary conviction, pursuant to the procedure set out in the <i>Provincial Offences Procedure Act</i>, SNB 1987, c P-22.1, to a fine of \$5,000 to \$25,000.</p>
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Section 43.2 grants immunity to the Commissioner when he performs a task related to his/her duties. This section states as follows:

<p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p> <p>43.2 Le commissaire ou quiconque occupe un poste ou remplit des fonctions relevant de lui ne peut faire l'objet d'une instance du fait d'actes qu'il peut accomplir, de rapports qu'il peut présenter ou de propos qu'il peut tenir dans l'exercice effectif ou censé tel de l'une des fonctions que lui attribue la présente loi, que cette fonction ait relevée ou non de sa compétence, sauf preuve établissant que ce dernier a agi de mauvaise foi.</p>	<p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p> <p>43.2 No proceedings lie against the Commissioner or against a person holding an office or appointment in the Office of the Commissioner for anything he or she may do, report or say in the course of the exercise or intended exercise of his or her functions under this Act regardless of whether that function was within his or her jurisdiction, unless it is shown the person acted in bad faith.</p>
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The reason is that subsection 43(15) of the OLA states that the Commissioner is a commissioner under the *Inquiries Act*,<sup>40</sup> and also enjoys the immunity stipulated in subsection 12(1) of the latter Act. This subsection states as follows:

<p><b>LOI SUR LES ENQUÊTES</b></p> <p>12(1) Aucune action ne peut être intentée ou poursuivie contre un commissaire en raison d'un acte qu'il est censé avoir accompli en sa qualité de commissaire, sauf s'il apparaît que l'acte a été accompli sans motif valable, avec une réelle malveillance, et entièrement au-delà de ses compétences.</p>	<p><b>INQUIRIES ACT</b></p> <p>12(1) No action shall be brought or maintained against a commissioner by reason of an act purporting to be done by the commissioner in his or her capacity as a commissioner, unless it appears that the act was done by the commissioner without reasonable cause and with actual malice and wholly without jurisdiction.</p>
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<sup>40</sup> *Inquiries Act*, RSNB 2011, c 173.

The federal OLA also grants immunity to the federal Commissioner of Official Languages. In that regard, section 75 of that Act states as follows:

<b>LOI SUR LES LANGUES OFFICIELLES DU CANADA</b>	<b>CANADA OFFICIAL LANGUAGES ACT</b>
<p>75(1) Le commissaire — ou toute personne qui agit en son nom ou sous son autorité — bénéficie de l’immunité civile ou pénale pour les actes accomplis, les rapports ou comptes rendus établis et les paroles prononcées de bonne foi dans l’exercice effectif ou censé tel de ses attributions.</p>	<p>75(1) No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.</p>
<p>75(2) Ne peuvent donner lieu à poursuite pour diffamation verbale ou écrite ni les paroles prononcées, les renseignements fournis ou les documents ou autres pièces produits de bonne foi au cours d’une enquête menée par le commissaire ou en son nom, ni les rapports ou comptes rendus établis de bonne foi par celui-ci dans le cadre de la présente loi. Sont également protégées les relations qui sont faites de bonne foi par la presse écrite ou audio-visuelle.</p>	<p>75(2) For the purposes of any law relating to libel or slander,            (a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Commissioner under this Act is privileged; and            (b) any report made in good faith by the Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.</p>

Section 34(1) of the Nunavut OLA states that “reports and information provided by the Languages Commissioner under this Act are not subject to appeal or to review by a court.” In the Northwest Territories OLA, section 25 states that “no criminal or civil proceedings lie against the Languages Commissioner, or against any person acting on behalf or under the direction of the Languages Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Languages Commissioner under this Act.”

In *New Brunswick v. Canadian Union of Public Employees, Local 4848*,<sup>41</sup> The Court of Queen’s Bench confirmed that the Commissioner’s report can only be reviewed within the limitations of the provisions in subsection 43(18) of the OLA. Consequently, according to this decision, only the complainant may request that a Commissioner’s report be reviewed by the courts. Therefore, the amendment we propose should not prevent a complainant who is dissatisfied with the Commissioner’s conclusions from contesting them in court.

**RECOMMENDATION**

Based on our research and to clarify the immunity accorded to the Commissioner, the Office of the Commissioner recommends that section 43.2 of the OLA be amended as follows.

PROPOSITION DE MODIFICATION LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK	PROPOSED MODIFICATION NEW BRUNSWICK OFFICIAL LANGUAGES ACT
<p>43.2 Le commissaire ou quiconque occupe un poste ou remplit des fonctions relevant de lui ne peut, <u>à l’exception de ce qui est prévu au paragraphe 43(18), faire l’objet d’une instance civile ou pénale ou d’une révision judiciaire</u> du fait d’actes qu’il peut accomplir, de rapports qu’il peut présenter ou de propos qu’il peut tenir dans l’exercice effectif ou censé tel de l’une des fonctions que lui attribue la présente loi, que cette fonction ait relevée ou non de sa compétence, sauf preuve établissant que ce dernier a agi de mauvaise foi.</p>	<p>43.2 <u>Except as provided in subsection 43(18), no civil or criminal proceedings or judicial review</u> lie against the Commissioner or against a person holding an office or appointment in the Office of the Commissioner, for anything he or she may do, report or say in the course of the exercise or intended exercise of his or her functions, regardless of whether that function was within his or her jurisdiction, unless it is shown the person acted in bad faith.</p>

<sup>41</sup> *New Brunswick v. Canadian Union of Public Employees, Local 4848*, 2019 NBQB 097.

## Provincial government’s obligation to reply in writing to the recommendations in the Office of the Commissioner’s annual report

Subsection 43(21) of the OLA states that the Commissioner shall, within such time as is reasonably practicable after the end of each year, prepare and submit to the Legislative Assembly a report summarizing the activities of the Office of the Commissioner and put forward recommendations to improve the Act’s effectiveness. Unfortunately, these annual reports are often forgotten as soon as they are submitted and the recommendations they contain are often rejected or ignored without any valid reason given for that decision.

In order to give effect to the annual reports, we suggest that the OLA be amended to state that the Premier, the minister responsible for the administration of the Act, must table in the Legislative Assembly, within thirty (30) days following the submission of the annual report, a written reply explaining what the government intends to do to follow up on the annual report, or, as the case may be, explain why he or she does not intend to follow up on the annual report.

### RECOMMENDATION

The Office of the Commissioner recommends that the *Official Languages Act* be amended to include the following provision:

#### PROPOSITION DE MODIFICATION

##### LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

43(21.1.1) Dans les trente (30) suivant le dépôt du rapport que prévoit le paragraphe 43(21.1), le premier ministre dépose à l’Assemblée législative une réponse écrite au rapport dans laquelle il précise les mesures que le gouvernement entend prendre pour donner suite au rapport ou ou si aucune mesure n’est prise ni envisagée, les raisons pour ne pas donner suite à au rapport.

#### PROPOSED MODIFICATION

##### NEW BRUNSWICK OFFICIAL LANGUAGES ACT

43(21.1.1) Within thirty (30) days following the submission of the report, as stipulated in subsection 43(21.1), the Premier must table in the Legislative Assembly a written reply to the report in which he or she specifies the measures that the government intends to take to follow up on the report, or, if no measure is to be taken or considered, provides the reasons for not following up on the report.

# SECTION 6

## OTHER OLA PROVISIONS

### Translation of court decisions

Section 24 of the OLA states that any final decision of any court shall be published in both official languages where:

- (a) it determines a question of law of interest or importance to the general public, or
- (b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

<b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b>	<b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b>
Publication des décisions	Publication of decisions
24(1) Les décisions ou ordonnances définitives des tribunaux, exposés des motifs et sommaires compris, sont publiés dans les deux langues officielles a) si le point de droit en litige présente de l'intérêt ou de l'importance pour le public; ou b) lorsque les procédures se sont déroulées, en tout ou en partie, dans les deux langues officielles.	24(1) Any final decision, order or judgment of any court, including any reasons given therefor and summaries, shall be published in both official languages where (a) it determines a question of law of interest or importance to the general public, or (b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.
Publication des décisions de la Cour d'appel	Publication of Court of Appeal decisions
25 Les décisions de la Cour d'appel sont réputées satisfaire aux critères de l'article 24.	25 All decisions of the Court of Appeal are deemed to fall within the scope of section 24.
Le prononcé d'une décision	Rendering of a judgment
26 Les articles 24 et 25 n'ont pas pour effet d'interdire le prononcé, dans une seule langue officielle, d'une décision ou de l'exposé des motifs auquel cas la décision n'est pas invalide pour autant.	26 Sections 24 and 25 shall not be construed so as to prevent the pronouncement of a judgment, including the reasons in support of the judgment, in either official language and in such a case, the judgment is not invalid by reason only that it was pronounced in one official language.

Over the years, the Office of the Commissioner has found that this section of the OLA is interpreted very strictly by the New Brunswick government. The provincial government still seems to believe that the obligation to publish in both official languages does not apply at the time decisions are made available to the public, but rather when they are published in the New Brunswick court reports, i.e., long after a final decision has been made public.

The Office of the Commissioner believes that this interpretation is erroneous in the light of subsection 24(2), which confirms that a stay of the application of subsection 24(1) is possible if there is a risk that its application would be harmful to the public interest or to a party to the proceedings.

24(2) Dans les cas visés par le paragraphe (1) ou lorsque la publication d'une version bilingue entraînerait un retard qui serait préjudiciable à l'intérêt public ou qui causerait une injustice ou un inconvénient grave à une des parties au litige, la décision, exposé des motifs compris, est publiée d'abord dans l'une des langues officielles, puis dans les meilleurs délais, dans l'autre langue officielle.	24(2) Where a final decision, order or judgment is required to be published under subsection (1), but it is determined that to do so would result in a delay or injustice or hardship to a party to the proceedings, the decision, order or judgment, including any reasons given, shall be published in the first instance in one official language and, thereafter, at the earliest possible time, in the other official language.
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Moreover, the Office of the Commissioner is of the opinion that the spirit of equality in the OLA calls for the criteria set out in paragraph (a) of subsection 24(1) to be inverted as follows: “Any final decision, order or judgment [. . .] shall be published in both official languages [. . .] unless the question of law ***is not of interest or importance to the general public***.”

In that regard, it should be noted that in January 2011, a working group, set up by the Minister of Justice and tasked with reviewing the issue of publication and translation of New Brunswick court decisions, published a report recommending that all decisions should be translated, unless the person in authority decides that it is not of interest or importance to the general public.

Like other stakeholders, the Office of the Commissioner is of the opinion that the French and English versions of sections 24, 25 and 26 of the OLA must be verified to ensure that they are similar in both languages. The following table, prepared by Gérard Snow and reproduced by Michel Doucet, shows the equivalency problems that have been noted:

<i>Provision</i>	<i>English Version</i>	<i>French Version</i>
24(1)	Any final decision, order or judgment . . .	Les décisions ou ordonnances définitives...
24(2)	the decision, order or judgment . . .	la décision...
25	All decisions of the Court of Appeal . . .	Les décisions de la Cour d'appel...
26	the judgment . . .	la décision

In the French version, the terms “*décisions*” or “*ordonnances*” are used, whereas in the English version, the terms “decision”, “order” and “judgment” are used. Mr. Doucet talks about this lack of consistency and the possible consequences, as follows:<sup>42</sup>

[Translation] As [Mr. Snow] points out: “One would think that, like their federal counterparts, the New Brunswick legislator did not truly intend to distinguish between these concepts [ . . . ], but if that is the case, it fell into a curious trap, because they open the door to possible arguments in favour of expanding or limiting the scope of various provisions.” Given the vagueness of sections 24, 25 and 26, one still hopes that the legislator will quickly make necessary corrections or, if not, that the courts deal with the issue.

**RECOMMENDATION**

The Office of the Commissioner recommends that sections 24, 25 and 26 be revised to ensure similarity of content and meaning between the French and English versions of the sections.

PROPOSITION DE MODIFICATION	PROPOSED MODIFICATION
<p><b>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</b></p>	<p><b>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</b></p>
<p>Publication des décisions</p>	<p>Publication of decisions</p>
<p>24(1) Les décisions ou ordonnances définitives des tribunaux, exposés des motifs et sommaires compris, <b><u>sont rendues publiques simultanément dans les deux langues officielles.</u></b></p>	<p>24(1) Any final decision, order or judgment of any court, including any reasons given therefor and summaries, <b><u>shall be made public simultaneously in both official languages.</u></b></p>
<p>24(2) <b><u>L'article 24 (1) ne s'applique pas si le point de droit en litige ne présente de l'intérêt ou de l'importance pour le public.</u></b></p>	<p>24(2) <b><u>Section 24 (1) does not apply if the decision fails to determine a question of law of interest or importance to the general public.</u></b></p>
<p>Publication des décisions de la Cour d'appel</p>	<p>Publication of Court of Appeal decisions</p>
<p>25 <b><u>Les décisions de la Cour d'appel sont réputées présenter de l'intérêt ou de l'importance pour le public.</u></b></p>	<p>25 <b><u>All decisions of the Court of Appeal are deemed to determine a question of law of interest or importance to the general public.</u></b></p>

<sup>42</sup> *Supra*, note 33, pages 233–234.

## Medical records

Every year, the Office of the Commissioner of Official Languages receives information requests or complaints concerning access to medical records in the patient's or the physician's choice of official language.

The Office of the Commissioner is unable to act upon complaints having to do with this issue, because the language in medical records does not fall within its jurisdiction. Indeed, there are legislative provisions in the *Personal Health Information Privacy and Access Act* concerning the language used in medical records. A person who feels that his or her rights have not been respected under this act can file a complaint with the Ombud's Office.

<b>LOI SUR L'ACCÈS ET LA PROTECTION EN MATIÈRE DE RENSEIGNEMENTS PERSONNELS SUR LA SANTÉ</b>	<b>PERSONAL HEALTH INFORMATION PRIVACY AND ACCESS ACT</b>
Langues officielles 2016, ch. 7, art. 1	Official languages 2016, c.7, s.1
9(1) Si une personne physique présente la demande prévue à l'article 7 et que le document contenant des renseignements personnels sur la santé n'est pas disponible dans la langue officielle de son choix, le dépositaire auquel la Loi sur les langues officielles s'applique prend les mesures nécessaires pour qu'un médecin ou quelque autre fournisseur de soins de santé l'aide à interpréter son document.	9(1) If an individual makes a request under section 7 and the individual's record containing personal health information is not available in his or her official language of choice, a custodian to whom the Official Languages Act applies shall provide the individual with access to a physician or other health care provider to assist the individual in interpreting the record.
9(2) S'il l'estime indiqué, le dépositaire auquel la Loi sur les langues officielles s'applique peut traduire ou faire traduire les parties pertinentes du document contenant des renseignements personnels sur la santé d'une personne physique pour les besoins du médecin unilingue qui la traite, si le médecin ne comprend pas la langue officielle dans laquelle celui-ci est établi.	9(2) If a custodian to whom the Official Languages Act applies considers it appropriate, the custodian may translate or cause to be translated the relevant provisions of an individual's record containing personal health information for the purpose of a unilingual physician treating the individual if the record is in an official language the physician cannot understand.
2016, ch. 7, art. 2	2016, c.7, s.2

In 2014–2015, the Commissioner participated in the legislative review of the *Personal Health Information Privacy and Access Act*, because section 9 of this Act covers the translation of information relative to medical records. At that time, the Commissioner pointed out that patients and physicians did not seem to be aware of this section of the Act and recommended that the custodian be responsible for informing individuals and physicians of this provision. The Commissioner also recommended wording that more strictly defined the custodian’s responsibility. These two recommendations were not accepted.

The Office of the Commissioner of Official Languages finds that section 9 of the *Personal Health Information Privacy and Access Act* does not seem to meet the needs of patients and physicians. For example, in 2019, the Office of the Commissioner received a complaint from a group of physicians concerning their inability to get essential medical information translated into English. They said that the difficulty in obtaining translated records resulted in deficient care for patients that could be harmful to them.

**RECOMMENDATION**

The Office of the Commissioner believes that section 9 of the *Personal Health Information Privacy and Access Act* should be reviewed, so that it more effectively meets the needs of patients and physicians. This review could also be an opportunity to consider whether the Commissioner of Official Languages should have jurisdiction with respect to section 9 of this Act, owing to the very nature of the Act.

*The development of the Office of the Commissioner of Official Languages’ recommendations regarding the review of the Official Languages Act was made possible in part by a grant received under the Canada-New Brunswick Agreement on the Provision of French-Language Services.*