



Investigation Report

FILE NUMBER 22-23-084

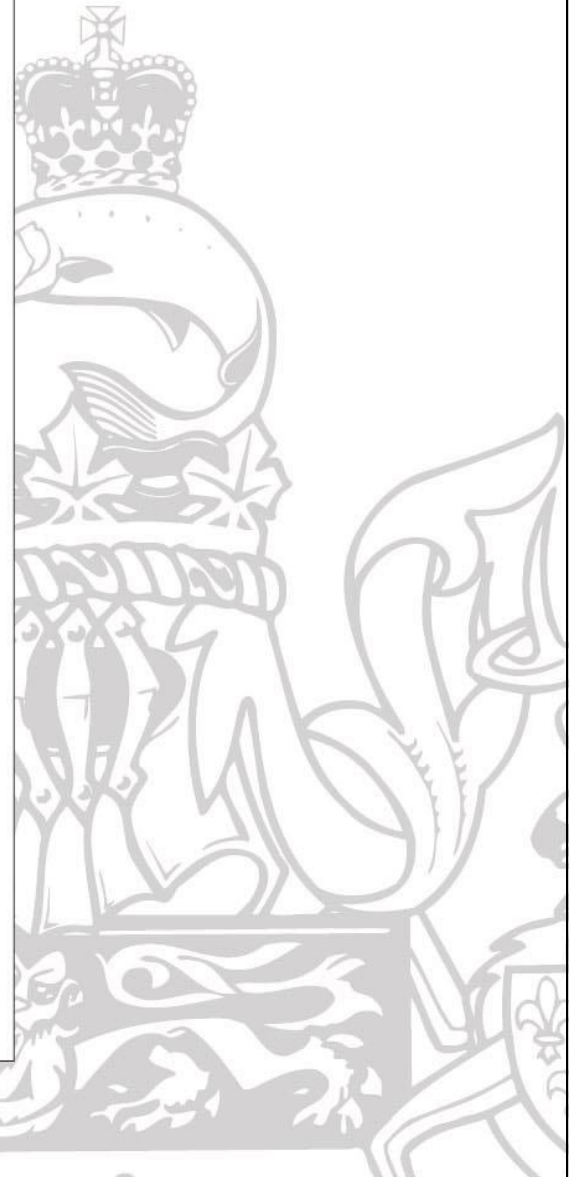
INSTITUTION IN QUESTION Law Society of New Brunswick

SUBJECT Allegations of Deficiencies With
Respect to the Translation of the
Legal Knowledge Examination

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**REPORT DISTRIBUTED TO THE
FOLLOWING PERSONS** Complainant
Executive Director of the Law Society
of New Brunswick
Premier
Clerk of the Executive Council

ISSUE DATE August 2023



Summary

This report was prepared following an investigation into a complaint against the Law Society of New Brunswick (the “institution” or the “Law Society”). On July 31, 2022, the complainant, who was registered as a student-at-law with the Law Society, filed a complaint with the Office of the Commissioner of Official Languages. Having completed the Legal Knowledge Examination on July 20, the complainant alleged that questions on the examination were poorly translated into French and that the Law Society had failed to meet its obligations under the *Official Languages Act* (OLA).

Under the OLA, members of professional associations and the public have the right to communicate with professional associations and receive their services in their official language of choice. However, subsection 41.1(3) of the OLA states that no person shall be placed at a disadvantage for choosing one official language over the other in fulfilling the requirements of a professional association, such as taking a profession’s entrance examination.

On August 31, 2022, the Commissioner of Official Languages (the “Commissioner”) recused herself from this matter due to a real or perceived conflict of interest relating to her former title as deputy executive director of the Law Society before her appointment as Commissioner. That same day, pursuant to subsection 43(8) of the OLA, the Commissioner referred this matter to Marie-France Pelletier, Ombud of New Brunswick, for investigation and review.

The investigation made it possible to establish, for the reasons set out in this report, that the complaint is **unfounded** and that the institution met its obligations under the *Official Languages Act* of New Brunswick.

Complaint

The complaint, as described in the Commissioner's online complaint form, reads as follows:

[Translation] As a student-at-law, I had to take my Legal Knowledge Examination with the Law Society of New Brunswick. The examination clearly places Francophone students at a disadvantage as compared with Anglophone students. Many of the examination's questions are very poorly translated into French, giving Francophones the need to consult the English version to better understand them. I strongly suspect that my peers did not have to do the same. What would happen if a unilingual Francophone were to take the examination? They would certainly fail.

The Law Society of New Brunswick, which is a professional association, has evidently not, in this case, met its linguistic obligations as defined under section 41 *[sic]* of the *Official Languages Act*.

Background

The Law Society is one of around 40 professional associations in New Brunswick. Professional associations exercise the fundamental role of protecting the public by regulating and monitoring professional practice. Since July 1, 2016, all professional associations in the province have been required to provide their services in both official languages.

Under the OLA, members of associations and the public have the right to communicate with professional associations and receive their services in their official language of choice. Moreover, the OLA states that no person shall be placed at a disadvantage for choosing one official language over the other in fulfilling the requirements of a professional association, such as taking an examination.

Investigation

Preliminary Findings of the Investigation

On October 13, 2022, the Ombud of New Brunswick (the “Commissioner’s delegate” or the “delegate”) issued a notice of investigation to the Law Society under subsection 43(13) of the OLA and subsequently notified the complainant.

In this letter, the Commissioner’s delegate asked the Law Society to respond to the complainant’s allegations by providing any additional information relevant to this matter and sending the delegate a copy of the Legal Knowledge Examination of July 20, 2022. The delegate also asked the Law Society to respond to the following questions:

Admission to the Law Society

1. What requirements for admission to the Law Society were in place on July 20, 2022?
2. What is the consequence of failing the Legal Knowledge Examination in terms of admission to the profession?

Development of Legal Knowledge Examination

3. When, how and by whom was the Legal Knowledge Examination developed?
4. What process was followed for approving the final versions (in both languages) of the Legal Knowledge Examination?
5. Does the Law Society update the content of the Legal Knowledge Examination on a regular basis?
 - a. Has the examination been updated recently? If so, when and by whom?

French version of Legal Knowledge Examination

6. Is the French version of the Legal Knowledge Examination used on July 20, 2022, a translation of the English version?
 - a. If so, who translated it? What are the translator’s qualifications, particularly as regards the translation of legal texts into French?
 - b. If not, who prepared the French version? What are the qualifications of the person who prepared the French version, particularly as regards the preparation of legal texts in French?
7. Has the French version of the Legal Knowledge Examination used on July 20, 2022, been reviewed?
 - a. If so, when and by whom? What are the qualifications of the person or group of people who reviewed the French version?
8. If a review of the French version did take place, were subsequent changes made to the text?
 - a. If so, by whom and what are the qualifications of the person or group of people who made changes to the French version?

Response of the Law Society

On November 25, 2022, the Law Society provided a thorough response to the delegate's questions, refuting the allegations made by the complainant.

To summarize, the Law Society responded that the Legal Knowledge Examination for admission to the Law Society was developed by legal experts with the support of consultants specializing in the development of competency-based professional examinations. The examination's preparation involved the participation of 42 Law Society members, of which 22 identify as Francophone or as both Anglophone and Francophone. The questions were written in English and French and then translated by the Université de Moncton faculty of law's Centre de traduction et de terminologie juridiques (CTTJ). The examination does not have an English version and a French version as such. It is instead a single examination in a bilingual format, with its English and French questions arranged side by side.

Regarding admission to the Law Society, the institution indicated that the Legal Knowledge Examination is one of three mandatory evaluations that students-at-law must pass in addition to articling. If a student-at-law fails, the examination may be rewritten up to two times. A student-at-law who fails the examination three times must repeat the admission program.

Regarding the development of the Legal Knowledge Examination, the institution noted that the July 2022 version had been redeveloped by a Law Society admission program working group established in 2016. In January 2018, the services of a firm specializing in competency assessment in a professional setting (the "competency experts") were engaged to help the working group fulfill its mandate. Five principles were established to guide the entire process of renewing the admission program: broad-based competency, defensibility, quality experience, bilingualism and sustainability. According to the institution, the bilingualism criterion ensured that "French and English participants in the bar admission program should experience consistent quality and value."

The Law Society then described the seven steps of the examination development process:

- 1) *Competency profile*: The competency experts developed a competency profile for lawyers, which was verified through a survey of practising lawyers in New Brunswick under the supervision of experts in psychometrics.
- 2) *Examination content specifications*: Using the competency profile, the Law Society, competency experts and a second firm specializing in test development ("development experts") developed the examination's content specifications to guide the preparation of questions. Following a large-scale validation study and a day-long working group meeting, two PhD-level psychometricians helped the working group determine the weighting of competencies for the examination.
- 3) *Development of examination questions*: Experts in different legal areas were recruited to prepare questions for the Legal Knowledge Examination. These experts drafted questions

in English or French, depending on their comfort level. The Law Society stated that the persons who wrote the questions reviewed reference materials (including general information, performance indicators and a writing guide), attended training (including feedback on practice questions) and were involved and supported in adjusting the questions. The question development training focused not only on general best practices in question writing but also on how to ensure the translatability of questions.

- 4) *Review of questions:* The competency experts completed an initial internal review to ensure the quality of the format and correct any obvious errors. All questions were then sent, by legal area, to another expert in the area to review the accuracy, level, structure and metadata of each question and evaluate them against the criterion of a minimally competent candidate. A second review was completed by the competency experts following this feedback.
- 5) *Translation of questions:* The Law Society explained that all items in the bank of Legal Knowledge Examination questions were translated by the CTTJ, which was established to further the implementation of bilingualism within the legal systems of Canada's common law jurisdictions. The CTTJ offers translation, revision, drafting, consulting and terminological services. It translates all decisions of the Court of Appeal of New Brunswick and the most important decisions of the Court of King's Bench of New Brunswick.
- 6) *Final review of questions:* The questions translated for the bank of questions were then subjected to a three-step final review:
 - 1) a review of the question's bilingual format by an expert in the legal area whose first official language spoken is opposite that of the expert who submitted the question for translation;
 - 2) a review of all questions relating to Indigenous law by an Indigenous lawyer; and
 - 3) a review of the final questions in the bilingual format by a group of lawyers with fewer than five years of practice to identify any additional problems with the questions, such as translation or typographical errors or a lack of clarity.
- 7) *Approval of questions:* Finally, the questions were reviewed and given final approval by the working group. The Law Society provided the following details on the final approval process:

[Translation] A total of 28 subject matter experts (lawyers) were involved in preparing and reviewing the questions. Of those lawyers, 14 identified as Anglophone, 9 as Francophone, 4 as either bilingual or fluently bilingual and 1 identified otherwise (Wolastoqey). The final pilot phase involved 15 participants (13 lawyers and 2 non-lawyers, for comparison purposes). Of these participants, five identified as Francophone, five as Anglophone, four as bilingual or fluently bilingual and one identified otherwise (Chinese but fluent in English). A list of potential problems, including language problems, was drawn up by [the competency experts] and the Director of Admissions for review by the working group.

Regarding potential language problems, the working group agreed to defer to the translations of the CTTJ, except under specific circumstances (such as obvious

typographical errors). All flagged language problems were reviewed by a Francophone subgroup of the working group. All changes were approved by the working group chair.

Ultimately, four questions (out of a bank of about 300) were changed by the working group and justified as follows:

- Three questions contained minor errors (i.e. misconjugated verbs, a pluralization that was corrected in both the English and French versions of a question and a typographical error in a question).
- One term appeared to have been correctly translated but was unfamiliar to the working group's reviewers. Because this term appeared in a decoy (an incorrect option in a multiple-choice question) and was not based on any particular act or decision, it was replaced by the more commonly used translation.

Otherwise, our files indicate that the translations of the original questions by the CTTJ were not modified (unless authorized by the CTTJ). Upon reviewing each flagged language issue, the working group concluded that while accurate, the language used in some of the CTTJ's translations may not necessarily have been common. For example, while the language used by the CTTJ may have correctly reflected the primary source, such as a decision or an act, it may not have been language commonly used in the community (such as anglicisms).

The working group recognizes that one of the key competencies in the competency profile is the ability to "extract and construct meaning from messages communicated in the English or French language." This involves the ability to understand legal terms and concepts in at least one of the two languages. The working group also recognized that bilingual candidates are occasionally familiar with some legal terms or concepts in French and with others in English. As a result, all candidates were given access to the questions in both languages simultaneously (i.e. they did not have to choose one language or the other). In addition, if a legal term or concept was flagged as potentially unfamiliar, the working group endeavoured to use that specific term in the program guide's study resources, where appropriate. For example, the term "ADR" (alternative dispute resolution) was translated by the CTTJ as "MSRD" (modes substitutifs de résolution des différends), but the working group noted that some candidates would be more familiar with the term "MARC" (modes alternatifs de règlement de conflits). In the program guide, the term "MSRD" (preferred by the CTTJ) along with the full phrase, "modes substitutifs de résolution des différends," are expressly used for those unfamiliar with this term.

The Law Society's response also shed light on some other issues raised with regard to the French version of the examination by explicitly addressing them. To summarize, the Law Society stated that there are not two distinct versions of the examination in each language but just one

bilingual version. Experts from different legal areas prepared the examination questions in their language of choice after following comprehensive training on best practices in developing multiple-choice questions. These questions were reviewed by the competency experts hired by the Law Society before being submitted for translation, and each translation was then reviewed by an expert in the relevant legal area and proficient in the language of the translation.

The Law Society also stated that there is a process for reviewing the questions in the bank of Legal Knowledge Examination questions that includes the same quality control measures as followed in the development of the bank of questions. For example, because of the amendments to the *Divorce Act* that came into force in March 2021, all components of the examination relating to the *Family Law Act* had to be reviewed and the bank of questions updated before the examination in July 2022. No other changes were made to the questions on the examination of July 20, 2022, but a recent legislative change rendered one of the questions incorrect, making all multiple-choice answer options false. It was therefore withdrawn from the bank of questions for subsequent revision.

Outcome of Investigation

The final step of the investigation was to review the electronic version of the Legal Knowledge Examination administered in July 2022 and to confirm some of the information provided by the Law Society in its response. The delegate sent two senior lawyers from her team to visit the Law Society's offices to meet with the Director of Admissions and take a close look at the examination in question and any related documents.

They spent three hours accessing the file and performing a thorough comparison of each question on the examination in English and French. No typographical, or major syntactical or translation errors in either language, nor any ambiguity or terminology that could confuse an attentive reader, were identified during this review.

This meeting also provided an opportunity to explore the Law Society's response in greater depth by confirming parts of it with the Director of Admissions and reviewing related documents, such as the 156-page orientation manual developed for all Law Society members who participated in developing the Legal Knowledge Examination; the summary report from April 1, 2019, prepared by the test development experts on the development of the Legal Knowledge Examination; and an inter-office memorandum from January 16, 2020, prepared by the competency experts on the weighting of Legal Knowledge Examination scores. This step of the investigation, the reading of these files, allowed us to confirm that the processes followed by the institution to ensure the integrity of its procedures for examination and admission to the Law Society were rigorous and that the responses provided by the institution are accurate.

Meanwhile, and with the consent of the Law Society, its response was shared in full with the complainant, who was asked if the response was satisfactory or, if not, whether further details

on the complaint or specific errors found in the French questions on the Legal Knowledge Examination could be provided.

The complainant stated that the response was not satisfactory and asked that we continue the investigation. The complainant's response reads as follows:

[Translation] The response received is not satisfactory, as it is evident that most of the questions, for Francophones, have been translated. In the spirit of the Beaulac (1999) and DesRochers (2009) decisions, translation is simply an accommodation and not equal treatment for Francophones. To meet its linguistic obligations, I believe the Law Society of New Brunswick should write its questions in English and French simultaneously. A perfect example is the way jurists write our laws.

Analysis

The OLA applies to the rules and conditions governing admission to professional associations, including those of the Law Society. The relevant provisions are as follows:

Professional associations

41.1(1) In this section, “professional association” means an organization of persons that, by an Act of the Legislature, has the power to admit persons to or suspend or expel persons from the practice of a profession or occupation or impose requirements on persons with respect to the practice of a profession or occupation.

41.1(2) When a professional association exercises a power referred to in subsection (1), the professional association

a) shall provide services and communications related to the exercise of that power in both official languages, and

b) with respect to its power to impose requirements, shall ensure that a person is able to fulfil those requirements in the official language of his or her choice.

41.1(3) No person shall be placed at a disadvantage by reason of exercising his or her right to choose an official language in which to fulfil requirements imposed by a professional association.

41.1(4) A professional association shall offer its services and communications to members of the public in both official languages.

Members admitted to the Law Society will be responsible for upholding the entire system of citizens’ rights, which includes protecting the language rights of all New Brunswickers. The codes of ethics of the various law societies across the country, including that of the Law Society of New Brunswick, have been substantially revised over the past two decades to highlight the role of lawyers in informing clients of their language rights and in referring cases to the appropriate lawyers where necessary. (Alain Roussy, *Le Code de déontologie et les droits linguistiques*, 2018 96-1 *Revue du Barreau canadien* 241, 2018 *CanLIIDocs* 136).

Prior to their appointment, the clerks of our courts and democratic institutions, as well as the judges themselves, are invariably members of the Law Society. Furthermore, it is lawyers who must defend all of these rights. It is therefore important that the Law Society, whose mandate is to regulate the conditions of admission to the practice of law, be vigilant in its application of all provisions of the OLA but particularly of section 41.1.

The finding of this investigation is that the Law Society is fully aware of its obligations under the OLA. It has taken a myriad of measures to ensure students-at-law are entitled to equitable admission to the Law Society and that they are able to take the Legal Knowledge Examination in their language of choice without disadvantage. Examples of these measures include

- having an equal number or even a majority of Francophone and bilingual legal experts who received training on and participated in the examination’s development;
- hiring consultants and psychometricians to help develop the examination;

- assigning all translation work to the CTTJ, whose expertise in the legal terminology of the common law is recognized internationally;
- ensuring the final examination, in its bilingual format, was reviewed by legal experts with a first language opposite that of those who wrote the questions;
- having a Francophone subgroup analyze all questions flagged as having a language or interpretation problem; and
- charging a subgroup of lawyers with fewer than five years' experience with completing a review before the working group carried out its final review.

All of these points demonstrate the care and means employed by the Law Society to fully meet its obligations under section 41.1 of the Act.

In addition to the explanations provided by the Law Society, our own review of the relevant documents and Legal Knowledge Examination questions did not reveal any obvious errors in translation, syntax or usage. We did not identify any concerns regarding the quality of the French questions or examination preparation materials that would lead us to conclude that students-at-law who are unilingual Francophones or whose ability to understand English is limited would be at a significant disadvantage compared to their Anglophone or bilingual peers. In the absence of any specific examples from the complainant after having taken the examination that might have provided further information, our comprehensive review of the documentation is conclusive.

In addition, no part of the process of developing and preparing the Legal Knowledge Examination, including translating the questions, leads us to conclude that language rights were simply accommodated, as indicated by the complainant. The quality of the French text was confirmed, and neither the writing, translation nor quality control processes followed for either the English or French questions supports the theory that the French version of the examination was an afterthought. The Law Society considered the quality of the French texts throughout the development process, up to the final reviews.

It appears to us that the underlying problem, or the social issue, raised by this matter does not concern just the quality of the examination or admission procedures of the professional association, which in this case is beyond reproach. This situation also concerns the work that needs to be done at an earlier stage to help Francophone or bilingual students-at-law being admitted to the Law Society (not to mention all lawyers) to develop a good command of French legal, technical and procedural language.

Francophone or bilingual lawyers practising law in French must possess an advanced legal vocabulary in the language. The reality of practising law in French, however, is not the same in Edmundston, Caraquet, Moncton or Fredericton, but the language rights of an official-language minority must be exercised on a daily basis across the province. This could lead to a discrepancy between the language in common use and official terminology, as used in statutes, legal texts

and case law or as sanctioned by law faculties or specialized organizations in the field, such as the CTTJ.

The Law Society made this point itself in its response:

[Translation] Upon reviewing each flagged language issue, the working group concluded that while accurate, the language used in some of the CTTJ's translations may not necessarily have been common. For example, while the language used by the CTTJ may have correctly reflected the primary source, such as a decision or an act, it may not have been language commonly used in the community (such as anglicisms).

[...]

In addition, if a legal term or concept was flagged as potentially unfamiliar, the working group endeavoured to use that specific term in the program guide's study resources, where appropriate. For example, the term "ADR" (alternative dispute resolution) was translated by the CTTJ as "MSRD" (modes substitutifs de résolution des différends), but the working group noted that some candidates would be more familiar with the term "MARC" (modes alternatifs de règlement de conflits). In the program guide, the term "MSRD" (preferred by the CTTJ) along with the full phrase, "modes substitutifs de résolution des différends," are expressly used for those unfamiliar with this term.

As law is constantly evolving, minority settings make adapting French law to neologisms, innovation and new expressions a considerable challenge. For these reasons and many others, those practising law in French are faced with linguistic inference, anglicisms and, in the most severe circumstances, outright abandonment.

In this context, all stakeholders (including the Law Society, lawyers' associations, law faculties, organizations specializing in legal terminology, courts and tribunals and current and future lawyers) have a role to play in ensuring the practice of law in French and, consequently, the preparation of Francophone or bilingual students-at-law to practise the profession in French, is supported. As a result, they must also help bridge the gap between the language in common use and official French legal terminology.

The Law Society plays a key role in achieving this objective. As the organization responsible for standardizing the practice of law in New Brunswick and pursuant to its own linguistic obligations, it may act as a unifying body to facilitate these important discussions among the stakeholders named above. We therefore encourage the Law Society to take concrete actions in this regard, such as establishing an official languages committee, holding reflection meetings or developing joint action plans, for example.

Conclusion

The complaint alleging that unilingual Francophone students are placed at a disadvantage and that there are translation issues on the French version of the Law Society of New Brunswick's Legal Knowledge Examination of July 20, 2022, is rejected as being demonstrably unfounded.

The Law Society exhibited a careful concern for accuracy and quality control in all aspects of the development and administration of the Legal Knowledge Examination, pursuant to its obligations under section 41.1 of the *Official Languages Act*.

In accordance with subsection 43(16) of the OLA, we are sending this report to the Premier, the Clerk of the Executive Council, the Executive Director of the Law Society of New Brunswick and the complainant.

Pursuant to subsection 43(18) of the Act, if the complainant is dissatisfied with the conclusions presented following this investigation, an application may be made to the Court of King's Bench of New Brunswick for a remedy.

Marie-France Pelletier
Delegate of the Commissioner of Official Languages for New Brunswick

Dated at the City of Fredericton,
Province of New Brunswick, this
8th day of August 2023