



Investigation Report

FILE NUMBER 23-24-019

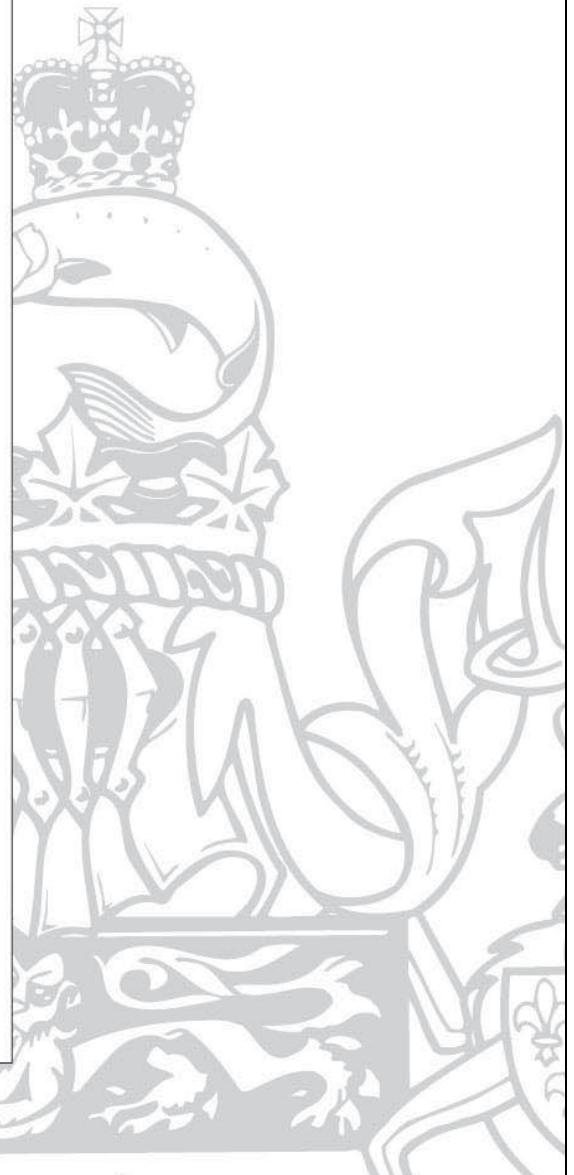
INSTITUTION IN QUESTION Department of Health

SUBJECT Allegations of deficiencies in the
provision of services in French

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**REPORT DISTRIBUTED TO THE
FOLLOWING PERSONS** Deputy Minister of Health
Complainant
Premier
Clerk of the Executive Council
Executive Director of the Secretariat
of Official Languages

ISSUE DATE March 2024



Summary

This report was prepared following an investigation into a complaint against the Department of Health (the institution). Specifically, the complainant alleges experiencing difficulties due to their official language when requesting virtual health care through the eVisitNB platform, namely the Maple application and website¹ provided on the institution's behalf. The situation of fact reported by the complainant was not denied by the institution.

Upon conclusion of this investigation, the Office of the Commissioner of Official Languages has established, for the reasons set out in this report, that the complaint is **founded** and that the institution failed in its duty under the *Official Languages Act* of New Brunswick (OLA) to ensure that its obligations were being respected by its third party.

Having established that the complaint is founded, the Commissioner makes the following recommendations:

1. **THAT** the institution ask patients expressly for their official language of choice on first contact without relying on the language settings configured on their electronic devices and that it ask its provider to modify its system so that this choice can be respected throughout all stages of patients' use of the eVisitNB system;
2. **THAT** the institution ensure that its provider responds more promptly and effectively when situations of non-compliance with the *Official Languages Act* of New Brunswick (OLA) are brought to its attention;
3. **THAT** the institution ensure that the provider puts measures in place so that health care professionals who do not understand a patient's official language do not initiate a consultation with that patient or, if necessary, that the provider puts measures in place so that the health care professional can send the patient back to the front of the queue until another health care professional who understands the patient's official language of choice is available;
4. **THAT** the institution prevent inequality in wait times, ask its provider to break down wait time statistics by official language chosen and conduct a more in-depth study of the resources required to assess wait times on the eVisitNB/Maple platform and to ensure service of equal quality in the two official languages;
5. **THAT** the recommendations made in the previous report concerning eVisitNB, as well as those in this report, be reviewed regularly by the institution and its provider to prevent a reoccurrence of the

¹ fr.evisitnb.ca and www.evisitnb.ca

situations brought to its attention and thus ensure equal access for members of the two official linguistic communities;

6. THAT the institution provide an update, within three months following the issue of this report, on the implementation of the corrective measures it has agreed to take or requested from its provider.

Complaint

The details of the complainant's allegations are as follows:

According to the complainant, the eVisitNB (www.evisitnb.ca) and GetMaple (app.getmaple.ca) websites are available to New Brunswick residents who do not have a family physician and are seeking primary health care.

The complainant stated:

[Translation]

I have been without a doctor for five years, so eVisitNB is my primary care provider, unfortunately. On May 16, 2023, I was twice denied health care service in French through a message to me in English indicating "cannot understand what you wrote, sorry." Both times I was refused without an alternative option and with the communication explaining the reason 100% in English.

Then I finally decided to translate my request into English and submit it in English. This time it was accepted almost immediately and I was able to converse with a nurse, but only in English.

What are unilingual Francophone residents supposed to do? Not only was I denied service because of my language, but the reasons were provided in English only. My right to receive medical services in my official language has clearly been violated by the New Brunswick government and its partners eVisitNB and GetMaple. Communications from GetMaple were 100% in English, even though my preferences were set to French and the website was in French mode. The text messages from GetMaple were also in English only.

The request could have been put on hold until a French resource could be found, but no, the request (which takes up a lot of a person's time) was simply rejected. On top of that, the reason for the rejection was provided in English only: "sorry, cannot understand what you wrote." There are times when Anglophone patients have access to primary care services that Francophone patients do not have access to, and this is unacceptable.

The New Brunswick government and its partners eVisitNB and GetMaple have clearly failed in their responsibility to respect the Official Languages Act and the Canadian Charter of Rights and Freedoms.

Investigation

Background to the Notice of Investigation

This complaint follows a complaint filed by the Commissioner in September 2022 and seven other complaints filed with the Office of the Commissioner of Official Languages (OCOL) between October 2022 and February 2023 concerning a lack of services in French on the eVisitNB/Maple virtual health care platform. According to the OCOL, these numerous complaints are evidence of a significant lack of language equality affecting the Francophone official linguistic minority community.

The complaint filed by the Commissioner was resolved on February 2, 2023, via informal resolution with the Department of Health (the institution), whereby the institution was asked to provide an update in writing on the steps that had been or would be taken to avoid a reoccurrence of this type of incident. The OCOL was primarily interested in knowing that

- members of the public who choose French as their preferred language are not disadvantaged by longer wait times than those who choose English as their preferred language

and that the institution

- reminds its third parties that offer services on its behalf of their obligations under the OLA and their duty to offer services of equal quality in both official languages.

An investigation report was written for the other seven complaints in March 2024. In conclusion, the OCOL has determined that the numerous complaints filed with its office between October 2022 and February 2023 regarding eVisitNB/Maple are founded and that there have been serious violations of the OLA.

In its investigation report², the OCOL made the following recommendations to the institution:

- 1. THAT the institution take immediate steps to ensure that the third party that offers services on its behalf, eVisitNB Inc., take steps to rectify its website and application to ensure that all users who register to obtain online services are not prejudiced in any way by their choice of language;**
- 2. THAT the institution take immediate steps to ensure that all users of the system offered on its behalf by eVisitNB Inc. be able to obtain services and continue to obtain services in the official language of**

² Rapport 22-23-138, 22-23-145, 22-23-172, 22-23-174, 22-23-182, 22-23-189 et 22-23-226, <https://bit.ly/3Q9DDYJ>.

their choice no matter where they are in the process, without delay being caused by choosing to be served in either official language;

3. **THAT** the institution take immediate steps to ensure that users of the system receive these services in the official language of their choice and that the choice of official language will not cause any delay in the provision of services by the third-party provider eVisitNB Inc.;
4. the institution take immediate steps to ensure that the third party that offers services on its behalf, eVisitNB Inc., has adequate staffing in order to meet the institution's obligations under the OLA;
5. **THAT** the institution take immediate steps to modify its online registration procedures to ensure that its third-party provider, eVisitNB Inc., provide an active offer of services to members of the public such that all users of its website have access to the same information and have the same ability to register in and use the system in both official languages;
6. **THAT** the institution report back to the OCOL within 30 days of receipt of this report as to the status of the implementation of Recommendations 1 to 5.

Investigation under Subsection 43(13) of the *Official Languages Act* of New Brunswick

After this complaint (file 23-24-019) was filed on May 24, 2023, the OCOL decided to conduct a second investigation under subsection 43(13) of the *Official Languages Act* of New Brunswick (OLA), as the previous investigation was still in progress. The OCOL explained to the institution that because situations had reoccurred after it had been made aware of the issue, the OCOL was conducting a second investigation into the Department of Health and its third party, eVisitNB/Maple:

[Translation] As confirmed by this new complaint filed with the Office of the Commissioner, the situation does not yet appear to have been resolved.

Despite the differences in the situations, the Office of the Commissioner is concerned in all cases about the delays experienced by eVisitNB patients who choose French as their preferred official language and about the fact that, depending on their preferred official language, not all patients on the eVisitNB platform receive service of equal quality.

The complaint we are bringing to your attention in this matter is the same as those in our notice of investigation of February 2, 2023. You and your provider have already been given ample notice and opportunity to ensure that the situation

described in this complaint does not repeat itself. The Office of the Commissioner has therefore decided to send a new notice of investigation to the Department of Health.

A notice of investigation dated July 10, 2023, was sent to the institution. In this notice of investigation sent to the Deputy Minister, the institution was asked to inform the OCOL of its assessment of the facts concerning the allegations made by the complainant, provide any additional information that may be useful in this matter and answer a series of questions.

Response from the Institution

On August 8, 2023, the institution provided its response to the complaint and stated:

[Translation] The responses to the questions contained in your letter are included in the attached document.

Please note that we shared your questions with the providers of eVisitNB for response. We felt that they were in a better position to speak to how their platform works. Answers to questions 1, 2 and 4 are responses from eVisitNB.

Thank you for sharing these questions and concerns with me. We will continue to work closely with eVisitNB to ensure that all New Brunswickers receive service in their language of choice.

Position of the Institution

The institution's response does not include its assessment of the facts.

Questions Asked by the OCOL and Answers Provided by the Institution

Question 1 – Language Preferences, Denial of Service and the Queue

The OCOL asked the institution to clarify the situation in which the complainant's preferred official language is said to have adversely affected the quality of service and caused delays in consulting with a health care professional.

[Translation]

1. According to the complainant, after being denied health care services in French two times and deciding to make the request in English, health care services were obtained in English “almost immediately.” Without referring us to the responses you already submitted for the previous files, please explain in detail and in chronological order the steps you have taken since our office notified you of concerns with the eVisitNB system — particularly the communications of September 26, 2022, and February 2, 2023, concerning the previous files mentioned above — to resolve:

1a. situations where the system seems unable to accommodate patients' official language of choice;

ANSWER: *In cases where the patient has incorrect language settings, they must change their language settings so the system will match them with a provider who speaks their language of choice. The provider will text the patient with a French message telling them they must correct their language preferences in the app and resubmit their request for a consultation.*

1b. situations where patients are denied service due to their choice of official language;

ANSWER: *Patients are not denied service because of the patient's choice of official language. As stated in a), they are asked to correct their language settings so the system will match them with a provider who speaks their language of choice.*

1c. situations where patients are forced to return to the back of the queue after receiving notice from a health care professional that they could not respond to their request due to their choice of official language;

ANSWER: *We are currently working on changes to the platform so patients with incorrect language settings can correct them and be placed back at the front of the queue. We are also establishing a new process to ask the patient twice if their preferred language setting is correct before entering the queue. These changes should be operational by the fall of 2023.*

1d. any other situation involving delays due to the official language chosen by patients using the eVisitNB platform.

ANSWER: *Refers to a situation that does not occur since delays can only occur when the patient has incorrect settings. The steps we have taken to address the issue are discussed in a), b), and c).*

Question 2 – Communications from Health Care Providers in the Official Language of Choice

The OCOL asked the following question:

[Translation]

2. According to the complainant, communications from the eVisitNB/GetMaple platform were in English only, even though the chosen language for communication was French. What steps have been taken since September 26, 2022, and February 2, 2023, to ensure that, if the health care professional provides information to patients, the patients will receive this information in their chosen official language and not in the other official language?

ANSWER: *Patients requesting a consult from eVisitNB start by visiting the eVisitNB website. This path to the application where care is provided (Maple) is required to ensure the patient is not charged for their consult. When they arrive at the website, depending on their device settings, the website may or may not be displayed in their language of choice. If not, they can choose to change the display language.*

However, this only impacts the website, not the application. The patient must also change their language preferences in the application for their preferred language to be the display language. It is not possible to change the language preferences in the application from the website. As a result, we have placed a notice on the website that patients must also change their language preferences in the application. This notice is displayed to every patient requesting a consult.

Question 3 – Cooperation between the Institution and its Provider

The OCOL asked the institution to indicate whether it worked in cooperation with its third party to ensure that the third party understood its linguistic obligations and could provide all of its services in both official languages at all times, without undue delay and despite unforeseen circumstances.

[Translation]

3. Please indicate whether your department supports the provider in offering platform services to the public in both official languages by ensuring the provider understands its language obligations under the OLA.

ANSWER: Yes. The department meets frequently with eVisitNB and offers support as required. They are aware of their obligations to offer service in both official languages.

Question 4 – The Complainant's Perception of Unequal Wait Times Based on the Official Language of Choice

The OCOL asked the institution the following questions:

[Translation]

4. According to the complainant, after being denied health care services in French two times and deciding to make the request in English, health care services were obtained in English “almost immediately.” Once again, the complainant indicated feeling that wait times are longer if patients choose French rather than English.

4a. Question 1d asks what steps you have taken to resolve situations of undue delay when patients choose to receive service in either official language. If no steps have been taken, please specify the reasons for that decision.

ANSWER: Actions have been and are being taken to eliminate the potential for patients to have incorrect language settings. Once completed, these should eliminate the issue. If the patient has the correct language settings, the quality of service is equal. We have focused on eliminating the possibility of incorrect patient language settings using the methods described in points 1 and 2.

4b. Please provide a detailed description of the steps you will be taking to support your provider in ensuring that the quality of its services to the public is equal for both official linguistic communities.

ANSWER: *Same as response to a. above.*

The OCOL's Request for an Update

On November 10, 2023, the OCOL sent a second letter to the institution, offering it the opportunity to provide:

[Translation] an update on any new measures that have been put in place by the institution and its eVisitNB system provider as a result of our notice of investigation dated July 10, 2023, in connection with this file (23-24-019) and since its last correspondence in this file.

The OCOL's request states:

[Translation] I am writing to you today to advise you that we now wish to carry out an analysis of the information in this file in preparation for drafting our investigation report.

As you are already aware, this is our second investigation into the eVisitNB system, or more specifically the steps taken by your institution since I began my investigation into the similar files that have already been brought to your attention (see files 22-23-138, 22-23-145, 22-23-172, 22-23-174, 22-23-182, 22-23-189 and 22-23-226). Despite the fact that these two investigations are concurrent, it should be noted that my office will draft the investigation report for this file (23-24-019) *independently* of the report resulting from my first investigation. As a result, the answers you have previously provided for these numerous files will not be included in our analysis in preparation for writing the report for this second investigation.

I have received at least one response to my initial inquiry outlining certain steps that have been taken with regard to the eVisitNB system since I notified you of this complaint. However, I do not wish to presume that you would want these steps to be considered in the context of an investigation other than that which they were addressing.

Since this situation is somewhat out of the ordinary, I thought it appropriate to contact you to explain the above and offer you the opportunity to file an additional response.

Update from the Institution

Following this update request, the institution sent the following response on November 27, 2023:

[Translation] *The Department of Health has been working with the provider to address language issues on their website and application. Here are the steps taken to ensure the offer is made in the client's language of choice:*

- *addition of simplified directions to the registration page for new and existing clients on selecting language of choice;*
- *addition of prominent messages on accessing the application in the language of choice;*
- *complete linguistic verification of the website and application by departmental staff and employees of provider eVisitNB*
- *updates to:*
 - *new client registration pages by increasing the font size and using bold type for the message displayed at the top of the page leading to the platform;*
 - *text fields and their titles;*
 - *menu items that clients (new and existing) must choose or click on:*
 - *the message that eVisitNB is currently closed (French mobile and French web);*
 - *the coverage description for the service (French mobile);*
 - *the symptom list (French mobile);*
- *updates to the training and user guide for staff providing direction in the event that clients make a language choice that does not align with their preferred language;*
- *return to the front of queue once incorrect language settings have been corrected;*
- *request made to the platform provider to add a new process for asking the patient twice whether their preferred language settings are correct before entering the queue;*
- *regular checks by navigating through the platform and looking for any changes caused by updates.*

The Department of Health continues to work closely with the eVisitNB provider. If you have any further questions or concerns following the changes/updates to the website and application, we would be happy to meet with you to discuss them.

Analysis

Relevant provisions of the OLA in this matter are as follows:

COMMUNICATION WITH THE PUBLIC

Communications with government and its institutions

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.

Obligations of institutions

28 An institution shall ensure that members of the public are able to communicate with and to receive its services in the official language of their choice.

28.1 An institution shall ensure that appropriate measures are taken to make it known to members of the public that its services are available in the official language of their choice.

Services provided by third parties

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.

COMMISSIONER OF OFFICIAL LANGUAGES

Mandate and responsibilities of Commissioner

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

COMMUNICATION AVEC LE PUBLIC

Communication avec le gouvernement et ses institutions

27 Le public a le droit de communiquer avec toute institution et d'en recevoir les services dans la langue officielle de son choix.

Obligation des institutions

28 Il incombe aux institutions de veiller à ce que le public puisse communiquer avec elles et en recevoir les services dans la langue officielle de son choix.

28.1 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.

Prestation de services pour le compte de la province

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.

COMMISSAIRE AUX LANGUES OFFICIELLES

Mandat, responsabilités du commissaire et plaintes

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

and make recommendations with regard to compliance with this Act and to promote the advancement of both official languages in the Province.

43(10.1) Despite subsection (10), when the Commissioner considers it appropriate, the Commissioner may attempt to resolve a complaint without conducting an investigation.

de faire des recommandations visant le respect de la présente loi et de promouvoir l'avancement des deux langues officielles dans la province.

43(10.1) Par dérogation au paragraphe (10), le commissaire peut, lorsqu'il l'estime indiqué, tenter de régler une plainte avant de procéder à une enquête.

As indicated above, this investigation is the result of a complaint filed by the Commissioner and concluded through an informal resolution as well as seven other complaints from the public that were the subject of an investigation report. The complaint filed by the Commissioner was prompted by a situation in which a Francophone complainant who had registered in French on the Maple application received a message warning her that selecting a language other than English could lead to a longer wait time. The remaining seven complaints highlighted a variety of situations where complainants did not receive service in French either on the eVisitNB website or through the Maple application.

As the OCOL explained in the investigation report on the seven previous complaints filed by members of the public, Maple is a virtual health care provider responsible for operating eVisitNB, a service offered on behalf of the New Brunswick government. Many New Brunswickers do not have access to a family doctor or nurse practitioner. The New Brunswick government has reached an agreement with Maple, enabling it to offer online health care to all New Brunswickers with a Medicare card. New Brunswickers are therefore able to consult health care professionals for their medical problems, routine check-ups and prescriptions. For some members of the public, eVisitNB is the only way to consult a health care professional and access medical care without going to the emergency room or a walk-in clinic.

Since the Government of New Brunswick has entered into an agreement with eVisitNB/Maple for providing services to the public on its behalf, under section 30 of the OLA, the government must ensure that Maple provides its services in accordance with the same obligations as government institutions.

Through its analysis of this file, the OCOL has concluded that the complaint is **founded** and that there have again been serious violations of the OLA.

The OCOL felt it necessary to conduct a second investigation into the matter of eVisitNB, as the situations reported by the complainants in connection with the previous investigation were repeated in the complaint associated with this file. In addition, the complainant expressed disappointment at not having been able to obtain service in their preferred language, French. The complainant had to resort to using English to obtain service, which, according to the complainant, does not amount to equal service for members of both official linguistic

communities. In the opinion of the OCOL, in addition to the complainant's language rights not being respected, this type of situation contributes to the devaluation of one of the two official languages, which is a breach of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* as well as the *Canadian Charter of Rights and Freedoms*.

The OCOL wishes to emphasize that the situation of fact as described by the complainant is not denied by the institution. While the institution's responses do not contradict the complainant's allegations, neither do they confirm them. In the absence of further details from the institution, the only version of the complaint available to the OCOL is that reporting the complainant's personal experience when attempting to obtain service from the eVisitNB system in the official language of choice, which was French. The OCOL does not dispute the veracity of the responses provided by the institution, nor can it doubt the good faith of the complainant.

Compliance with the OLA

Active Offer of Service

The obligations imposed by the OLA are clear: the institution must be able to communicate with the public and offer the public its services in both official languages. Furthermore, the institution must inform the public that its services are available in both official languages. In other words, the public should not have to request service in either official language, as both languages should already be offered. This is what is called the "active offer of service."

Section 28.1 of the OLA states:

***28.1** An institution shall ensure that appropriate measures are taken to make it known to members of the public that its services are available in the official language of their choice.*

The onus is on the institution to inform members of the public that its services are available in both official languages at all times. It is not the obligation of members of the public to ensure that the language settings on their devices correctly indicate one official language or the other, as the institution and its provider maintain. However, according to the complainant, the language settings were correctly configured. The institution's response informed the OCOL as follows:

[Translation] Actions have been taken to eliminate the potential for patients to have incorrect language settings. Once completed, these should eliminate the issue. If the patient has the correct language settings, the quality of service is equal.

In the institution's response, the onus seems to be placed more on the patients to indicate their desire to receive service in their preferred official language. Of particular note are the phrases [translation] "they are asked to correct their language settings," "delays can only occur when the patient has incorrect settings" and "[i]f the patient has the correct language settings, the quality of service is equal." Patients are responsible for modifying their own settings, although in this case, the complainant claims to have already chosen the correct settings.

It appears that the eVisitNB/Maple system may seem complex for some users who perhaps do not have detailed knowledge about technological devices with regard to defining their language settings. In the view of the OCOL, the initial procedure patients follow to request a consultation is not direct. We were told that to avoid being charged for a consultation, [translation] “patients requesting a consult from eVisitNB start by visiting the eVisitNB website.” This website may be displayed in either official language based on the settings of the device patients are using. If the website is not displayed in their language of choice, then to choose the other official language, patients have to click on a button to switch languages. Based on the OCOL’s observations, this button is not necessarily visible when users browse the website for the first time. Moreover, switching from one language to the other is an additional step. Users may also have to find their way on the website in the official language other than their chosen language.

As stated in the previous report, the OCOL is of the opinion that the provider is relying on patients’ device settings instead of asking them directly to indicate their preferred language; this is not an active offer, since the onus is on the institution to inform patients that all of its services are available in both official languages. Even if the institution or its provider believes it is able to correctly predict the official language in which patients wish to be served, the institution has an obligation to make an active offer on first contact. It is not the duty of the institution or its provider to attempt to guess in which official language service should be offered.

Patients should not be responsible for changing their settings on the website or in the application to be offered service in their official language of choice. Rather, it is the responsibility of the institution to respect the official language in which patients wish to be served regardless of the language used to browse the website/application or configured on their devices.

In its second response, the institution informed us that its provider had made changes [translation] “to address these language issues on its website and app”:

- *addition of simplified directions to the registration page for new and existing clients on selecting language of choice;*
- *addition of prominent messages on accessing the application in the language of choice*

Changing the language settings on the website and application seems somewhat complex. Once users have registered in one language, they must navigate the website to change their language choice by clicking on “Settings” and then “Languages.” The institution states that “simplified directions” have been added so that members of the public can choose their preferred language. In the case at hand, once again, the responsibility for informing the institution of the language of choice falls on the shoulders of the members of the public, not the institution.

Finally, the language in which a user communicates should be sufficient to make clear to the institution in which language the user wishes to be served.

Recommendation No. 1:

The Office of the Commissioner recommends that the institution ask patients expressly for their official language of choice on first contact without relying on the language settings configured on their electronic devices and that it ask its provider to modify its system so that this choice can be respected throughout all stages of patients' use of the eVisitNB system.

Denial of Service by Reason of Official Language of Choice

In the present case, the complainant states that the provider denied service on the eVisitNB/Maple platform because of the complainant's language of choice, French. The complainant does not indicate having originally registered on the platform in either official language. However, this is irrelevant, as the complainant explains that the "preferences at time of confirmation were set to French and the website was in French mode." The complainant therefore expected to receive health care service in that language of choice. The institution also appears to have been informed of the patient's choice of official language.

According to the complainant, the health care service was not provided in French. The complaint reads:

[Translation] Not only was I denied service because of my language, but the reasons were provided in English only. My right to receive medical services in my official language has clearly been violated by the New Brunswick government and its partners eVisitNB and GetMaple.

Under the OLA, as soon as a member of the public requests service in one of the two official languages, the service must be provided in that chosen official language without undue delay. In the complaint, the complainant indicates having filled out a request for health care in French twice. Based on this, and without any information indicating otherwise, the complainant was denied service in the language of choice. The complainant was informed twice, in English only: "cannot understand what you wrote, sorry."

While the institution and its provider do not deny the complainant's experience, the institution indicated as follows to the OCOL in its initial response:

[Translation] Patients are not denied service because of the patient's choice of official language... [T]hey are asked to correct their language settings so the system will match them with a provider who speaks their language of choice.

Patients should not have to correct their language settings to receive services in their official language of choice, nor should they be denied service by reason of their official language of choice. As indicated above, it is the duty of the institution and, therefore, its provider to inform patients on first contact that they have access to the services in the official language of their choice. After receiving an active offer of services from the outset, patients choose their official language rather than asking the institution or its provider.

Continuity of Service

Once patients have indicated their language of choice to the institution or provider, the latter must maintain continuity of service in that language. As soon as the institution and its provider become aware of a person's official language of choice, their duty becomes an obligation to provide care in the official language previously chosen. This is what is called "continuity of service." Additionally, it is up to the institution to determine what it needs to do to ensure this continuity of service at all times without undue delay.

According to the complainant:

[Translation] On May 16, 2023, I was twice denied health care service in French through a message to me in English indicating "cannot understand what you wrote, sorry." Both times I was refused without an alternative option and with the communication explaining the reason 100% in English.

This English-only message from the provider fails to uphold continuity of service. Why was the complainant's request not transferred to a health care professional who spoke the complainant's language of choice? Why did a health care professional who could not understand or speak the complainant's language of choice accept the request and send the complainant this message only in the other official language? Why was the complainant's request not "put on hold until a French resource could be found"?

Despite the institution's assertion that "[p]atients are not denied service because of the patient's choice of official language," it is indicated that the complainant's request was denied and the explanation provided in English only. The complainant became frustrated, gave up and submitted a third request, this time in English. Although it could be said that on this third attempt, it was the language the complainant had chosen this time, and despite successfully obtaining a consultation in that language, the complainant states that this is not the same as receiving equivalent service in the language originally chosen.

As the OCOL noted in the previous report, the complainants were denied access to service in their language of choice. The present complaint is similar to those in the previous files but occurred several months after the OCOL had informed the institution of the initial complaints. In the view of the OCOL, this incident should not have occurred. The institution appears to have breached its linguistic obligation under the OLA, as its provider, despite its efforts, was unable to prevent a reoccurrence of the previous complaints.

In its update sent to the OCOL on November 27, 2023, the institution listed the measures it had, or was going to, put in place to ensure continuity of service in the language of choice of any member of the public:

- *complete linguistic verification of the website and application by departmental staff and employees of provider eVisitNB;*

[...]

- *updates to the training and user guide for staff providing direction in the event that clients make a language choice that does not align with their preferred language;*

[...]

- *regular checks by navigating through the platform and looking for any changes caused by updates.*

This demonstrates to the OCOL that the institution is aware of the linguistic shortcomings to which the complainants were exposed (in this file and previous files) and is motivated to modify its platform to fully meet all its linguistic obligations under the OLA. However, despite assurances that the provider has put measures in place to address the situation, the OCOL is not convinced that the situation has been rectified.

It is appropriate to caution the institution that when it reports a language issue on its provider's platform, the provider should take immediate steps to correct this shortcoming. The institution is also responsible for ensuring that the requested corrections are made. The OCOL noted above that the complaint in this file is similar to those in the previous files. At the time the present complaint was filed, the situation therefore had not yet been resolved. Consequently, the institution should be putting checks and balances in place to ensure that its provider is making the corrections brought to its attention by the institution in a timely manner not only to avoid a reoccurrence of these types of complaints but also to ensure that all New Brunswickers have access to health care services in their language of choice at all times without undue delay.

Recommendation No. 2:

The Office of the Commissioner recommends that the institution ensure that its provider responds more promptly and effectively when situations of non-compliance with the *Official Languages Act of New Brunswick (OLA)* are brought to its attention.

Service of Equal Quality

In the complaint, the complainant reports getting an impression of inequality in the provision of services through the eVisitNB/Maple platform. Although the complainant feels that all settings on the website and application were correct, they report being unable to obtain a consultation in their language of choice, French. The health care professional even advised in English only that they did not understand the request, thus denying service: "cannot understand what you wrote, sorry."

As explained above, the active offer of service and continuity of service in the language of choice of members of the public are extremely important. The health care professional with whom the complainant's request was apparently matched in the present case should have understood the request formulated in the complainant's language of choice. The complainant's request should not have been denied by reason of their language of choice and should instead have been put on

hold for another health care professional having the language skills required to perform the consultation in the complainant's language of choice.

Recommendation No. 3:

The Office of the Commissioner recommends that the institution ensure that the provider puts measures in place so that health care professionals who do not understand a patient's official language do not initiate a consultation with that patient or, if necessary, that the provider puts measures in place so that the health care professional can send the patient back to the front of the queue until another health care professional who understands the patient's official language of choice is available.

Upon receiving the first complaint regarding denial of service, the institution and its provider should have immediately taken corrective action to ensure that the situation did not reoccur. Three months elapsed between the notice of investigation from the OCOL in the previous files and the notice of investigation in the current file. The institution and its provider were already aware of one such situation, and although the OCOL was advised in the first response in the associated file that "[p]atients are not denied service because of the patient's choice of official language," it appears clear to the OCOL that the complainant was left at a disadvantage by reason of their official language of choice.

The complainant states as follows in the complaint, after two requests submitted in French were denied:

Then I finally decided to translate my request into English and submit it in English. This time it was accepted almost immediately, and I was able to converse with a nurse, but only in English.

This leads us to examine two important points relating to the complaint before us: the feeling of devaluation of one official language in comparison to the other and the delays experienced by reason of official language of choice.

Devaluation by Reason of Official Language of Choice

As stated above, after twice being refused service in their language of choice, the complainant decided to submit the request a third time, this time in English. According to the OCOL, this demonstrates that the institution and, therefore, the provider failed to fully meet their linguistic obligations under the OLA. If service is not adequately available in either of the two official languages, members of the public who normally choose one language may find themselves obliged to choose the other without insisting on being served in their official language of choice.

However, members of the public need to feel entirely comfortable choosing to be served in their official language after receiving an active offer of service in both official languages. As noted in previous situations, if the service received is not adequate or if members of the public feel that the service in their language is not equivalent to what is offered in the other official language,

they are often unlikely to assert their language rights. Instead, they are more likely to accept service in the other official language. Past experience has also shown that many people do not insist on receiving services in their official language of choice. In the opinion of the OCOL, this is what occurred in the situation brought to its attention.

Delays Caused by Denial of Service in the Chosen Official Language

In the complaint, the complainant states that the two consultation requests submitted in French were refused because the other person did not understand that language. The complainant then decided to submit a third request in English. The complainant states that this request “was accepted almost immediately.” According to the complainant, this “takes up a lot of a person’s time.”

In the notice of investigation in the previous files, the OCOL presented questions to the institution concerning the relationship between wait time and official language of choice. The institution replied that “patients do not wait longer for service based on their language choice” and, subsequently, “Our platform provider does not break out the consult statistics by language.”

In the associated file, the OCOL requested updates regarding the following items:

- situations where patients are forced to return to the back of the queue after receiving notice from a health care professional that they could not respond to their request due to their choice of official language;
- any other situation involving delays due to the official language chosen by patients using the eVisitNB platform.

The institution responded that it was “currently working on changes to the platform so patients with incorrect language settings can correct them and be sent back in the queue near the front of the line” and that this “[r]efers to a situation that does not occur since delays can only occur when the patient has incorrect settings.”

In the situation at hand, according to the complaint, the complainant had chosen the correct settings: “my preferences were set to French and the website was in French mode.” Moreover, the details of the request had been submitted in French. The OCOL has no reason to doubt the complainant’s assertion. There is every indication that the complainant received a reply in English only despite requesting service in French, even though the institution had a duty to make this offer.

According to the OLA, when receiving a service from a government institution or provider, equal quality of service dictates that undue delays due to the choice of official language are unacceptable. It is up to the institution and, therefore, its provider to offer the service in both official languages at all times without undue delay regardless of the specific circumstances. Although the OCOL was not informed by the complainant of the specific delays experienced, it finds that the complainant did indeed encounter delays that a member of the public requesting

service in the other official language, English, would not have experienced, not being obliged to fill out a consultation request two or three times.

As stated previously, the complainant completed the consultation request three times – twice in French and once in English. Each of these requests corresponds to a period of time during which the complainant had to wait to get a consultation. It should be noted that the complainant does not have a family doctor and needed this consultation to receive health care. According to the OCOL, the complainant encountered a delay even though the institution assures us that this “situation... does not occur.”

The complainant explains that, due to the impression of devaluation of their language and the delays experienced, the service received was not equal to that which a member of the public who chose the other official language would have received. For the OCOL, this is demonstrated by the refusal of two requests, according to the complainant, and submission of a third request, in English, in response to which the complainant received a consultation.

The complainant told the OCOL:

[Translation] There are times when Anglophone patients have access to primary care services that Francophone patients do not have access to, and this is unacceptable.

The New Brunswick government and its partners eVisitNB and GetMaple have clearly failed in their responsibility to respect the Official Languages Act and the Canadian Charter of Rights and Freedoms.

Recommendation No. 4:

The Office of the Commissioner recommends that the institution prevent inequality in wait times, ask its provider to break down wait time statistics by official language chosen and conduct a more in-depth study of the resources required to assess wait times on the eVisitNB/Maple platform and to ensure service of equal quality in the two official languages.

Recommendation No. 5:

The Office of the Commissioner recommends that the recommendations made in the previous report concerning eVisitNB, as well as those in this report, be reviewed regularly by the institution and its provider to prevent a reoccurrence of the situations brought to its attention and thus ensure equal access for members of the two official linguistic communities.

Recommendation No. 6:

The Office of the Commissioner recommends that the institution provide an update, within three months following the issue of this report, on the implementation of the corrective measures it has agreed to take or requested from its provider.

Equal Status of the Two Official Languages

Additionally, in *R. v. Beaulac*, [1999] 1 S.C.R. 768, the Supreme Court of Canada clearly indicated as follows:

39 [...] in the context of institutional bilingualism, 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. The governing principle is that of the equality of both official languages.

The OCOL wishes to note that the institution is not respecting the equality of New Brunswick's two official linguistic communities if it encourages its providers to propose that the public choose between inferior service in their preferred official language and immediate service in the other official language.

Conclusion and Recommendations

Based on its investigation, the Office of the Commissioner of Official Languages is able to establish that, for the reasons set out in this report, the complaint is **founded** and that the Department of Health (the institution) failed to meet its obligations under the *Official Languages Act* of New Brunswick (OLA).

The Office of the Commissioner would like to thank the institution for its responses and for its cooperation in allowing the Office of the Commissioner to consult its internal documents with a view to completing this investigation.

The Office of the Commissioner also acknowledges the institution's efforts and working "closely with the eVisitNB provider" to ensure compliance with the OLA.

The New Brunswick Court of Appeal has clearly stated the obligations of government institutions with regard to language rights. In *Charlebois v. Mowat*, 2001 NBCA 117, it noted as follows:

The principle of equality entrenched in subsection 16(2) [of the Canadian Charter of Rights and Freedoms] must be interpreted according to its true meaning, i.e., substantive equality is the applicable norm. Substantive equality means that language rights that are institutionally based require government action for their implementation and therefore create obligations for the government.

The eVisitNB system, as it functioned at the time for the complainant in this investigation, did not demonstrate the true and substantive equality of the two official linguistic communities. It is the institution's responsibility to maintain true equality and, in the case at hand, to ensure that its third party complies with the linguistic obligations of the institution on whose behalf it provides services.

At the time of writing, it is the OCOL's opinion that since the filing of the present complaint, both the institution and its provider have made improvements to the eVisitNB website and Maple platform to enhance the quality of the experience for members of both official linguistic communities but that these improvements remain inadequate. The OCOL therefore encourages the institution to continue its efforts to ensure the equal quality of its services in the two official languages.

Having established that the complaint is founded, the Commissioner makes the following recommendations:

- 1. THAT the institution ask patients expressly for their official language of choice on first contact without relying on the language settings configured on their electronic devices and that it ask its provider**

to modify its system so that this choice can be respected throughout all stages of patients' use of the eVisitNB system;

2. THAT the institution ensure that its provider responds more promptly and effectively when situations of non-compliance with the *Official Languages Act* of New Brunswick (OLA) are brought to its attention;
3. THAT the institution ensure that the provider puts measures in place so that health care professionals who do not understand a patient's official language do not initiate a consultation with that patient or, if necessary, that the provider puts measures in place so that the health care professional can send the patient back to the front of the queue until another health care professional who understands the patient's official language of choice is available;
4. THAT the institution prevent inequality in wait times, ask its provider to break down wait time statistics by official language chosen and conduct a more in-depth study of the resources required to assess wait times on the eVisitNB/Maple platform and to ensure service of equal quality in the two official languages;
5. THAT the recommendations made in the previous report concerning eVisitNB, as well as those in this report, be reviewed regularly by the institution and its provider to prevent a reoccurrence of the situations brought to its attention and thus ensure equal access for members of the two official linguistic communities;
6. THAT the institution provide an update, within three months following the issue of this report, on the implementation of the corrective measures it has agreed to take or requested from its provider.

Pursuant to subsection 43(16) of the OLA, we submit this report to the Deputy Minister of Health, the complainant and the Premier. We also submit it to the Clerk of the Executive Council and to the Executive Director of the Official Languages Secretariat.

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

Shirley C. MacLean, K.C.
Commissioner of Official Languages for New Brunswick
Signed at the City of Fredericton,
Province of New Brunswick, this
25th day of March 2024