



REVIEW OF THE *OFFICIAL LANGUAGES ACT* AND THE FINN-MCLAUGHLIN REPORT: AN OPPORTUNITY TO MAKE FURTHER PROGRESS TOWARDS THE SUBSTANTIVE EQUALITY OF OUR TWO OFFICIAL LANGUAGES

**BRIEF SUBMITTED BY THE OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES FOR NEW BRUNSWICK TO THE
STANDING COMMITTEE ON OFFICIAL LANGUAGES OF THE LEGISLATIVE ASSEMBLY OF NEW BRUNSWICK AND ITS
REVIEW OF THE NEW BRUNSWICK *OFFICIAL LANGUAGES ACT***

***“Language rights are not negative rights, or
passive rights; they can only be enjoyed if the
means are provided.”***

Supreme Court of Canada, (R. v. Beaulac) 1999

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.¹ This precedent 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 person's choice of official language.

CHARTER PROVISIONS THAT SPECIFICALLY CONCERN NEW BRUNSWICK

| CHARTE CANADIENNE DES DROITS ET LIBERTÉS | CANADIAN CHARTER OF RIGHTS AND FREEDOMS |
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| Langues officielles du Nouveau-Brunswick 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. | Official languages of New Brunswick 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. |
| Progression vers l'égalité 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. | Advancement of status and use 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. |
| Communautés linguistiques française et anglaise du Nouveau-Brunswick 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. | English and French linguistic communities in New Brunswick 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. |

¹ 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.

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| <p>Rôle de la législature et du gouvernement du Nouveau-Brunswick 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>Travaux de la Législature du Nouveau-Brunswick 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>Documents de la Législature du Nouveau-Brunswick 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>Procédures devant les tribunaux du Nouveau-Brunswick 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>Communications entre les administrés et les institutions du Nouveau-Brunswick 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>Role of the legislature and government of New Brunswick 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>Proceedings of New Brunswick legislature 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>New Brunswick statutes and records 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>Proceedings in New Brunswick courts 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>Communications by public with New Brunswick institutions 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> |
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REVIEW OF THE *OFFICIAL LANGUAGES ACT* AND THE FINN-MCLAUGHLIN REPORT: 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, met the obligations of the government 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* (OLA). 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* contained a clause stipulating that the Premier must initiate his or her review within a prescribed timeframe. In the review of 2013, a provision was included to conduct a review by December 31, 2021. At the time of the last review of the OLA in 2023, the following review provision was reaffirmed:

| LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK | NEW BRUNSWICK OFFICIAL LANGUAGES ACT |
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| Révision de la Loi | Review of Act |
| 42(1) Le premier ministre procède à la révision de la présente loi, la révision devant être terminée au plus tard le 31 décembre 2031. | 42(1) The Premier shall initiate a review of this Act, and the review shall be completed no later than December 31, 2031. |
| 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. |
| 2023, ch. 10, art. 1 | 2023, c.10, s.1 |

Two commissioners were appointed to conduct the 2021 review of the *Official Languages Act*: the Honourable Judge Yvette Finn and John McLaughlin. Their review resulted in their *Report of the 2021 Review of the Official Languages Act of New Brunswick*. (The Finn-McLaughlin Report).

In 2024, the Premier of New Brunswick announced the creation of the Standing Committee on Official Languages. In 2025 pursuant to a Notice of Motion to the Legislature, the Committee was directed by the Legislature to review the OLA and to “oversee the examination of and consultation on the Act, to review the recommendations from the 2021 Finn-McLaughlin Report.”

Any review process of the OLA must facilitate advancement towards the equality of New Brunswick’s two official languages and two official linguistic 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:

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| <p>Progression vers l’égalité 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>Advancement of status and use 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>Rôle de la législature et du gouvernement du Nouveau-Brunswick 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>Role of the legislature and government of New Brunswick 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> |

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, because of this specialized knowledge, the Office of the Commissioner deems it important to submit its assessments and recommendations to the Legislative Assembly in order to improve this Act and thereby advance towards the substantive equality of both official languages and the two official linguistic communities.

The Finn-McLaughlin Report contained eight recommendations. The Office of the Commissioner of Official Languages (OCOL) will provide submissions about those recommendations in the order they appear in the Finn-McLaughlin Report, as well as other submissions as appropriate.

THE LANGUAGE CONTEXT IN NEW BRUNSWICK

All New Brunswickers must be aware that we do have two official linguistic communities in New Brunswick, the English linguistic community and the French linguistic community. French is the minority language. A report was prepared for the Commissioner of Official Languages in 2018 by the Canadian Institute for Research on Linguistic Minorities, *The Language Situation in New Brunswick: Worrying Trends and Some Encouraging Signs*.² The study noted some concerning trends:

- “Decline in weight of the French-language community but stability of the demographic weight of Anglophones.”
- “Decline in the use of French at home while the use of English is increasing.”
- “French is slowly fading into the background for some Francophones.”

² Canadian Institute for Research on Linguistic Minorities, *The Language Situation in New Brunswick: Worrying Trends and Some Encouraging Signs*, D. Pépin-Filion, J. Guignard Noël, June 2018

In 2021 the census was conducted in Canada. The results showed a slow erosion of French as a first language in New Brunswick.

In 2022 there remained 7100 languages spoken in the world and experts predict that between 50% and 90% of these will disappear during this century.³

The combination of these realities creates a situation of urgency as it relates to the vitality and future of the French language in New Brunswick. There has never been a more urgent need to take positive steps to ensure the vitality of our two official languages and, in particular, our minority official language: French.

³ *Le Monde diplomatique*, « Manière de voir », Leclerc, Jacques. Édition déc. 2022 – janvier 2023.

SECTION 1

Matters pertaining to the administration of the *Official Languages Act*

THE STANDING COMMITTEE ON OFFICIAL LANGUAGES

Finn-McLaughlin report

Recommendation 1

That the *Official Languages Act* be amended to provide for the establishment of a Standing Committee on Official Languages of the Legislative Assembly. This committee will be a legitimate forum for elected officials to engage in frank and constructive discussions on the official languages situation in New Brunswick. This committee will be established in accordance with the provisions of Part IX of the *Standing Rules of the Legislative Assembly of New Brunswick*.

1.1 That this committee be specifically charged with monitoring the progress of the application of the *Act*, the regulations and instructions made under it, with considering the reports of the Premier, the Commissioner of Official Languages and the Department of Official Languages, and with making recommendations as appropriate.

Position of the Office of the Commissioner of Official Languages

The Office of the Commissioner of Official Languages (OCOL) applauds the creation of the Standing Committee. Since its creation, the Commissioner has met with the Committee on two occasions and has presented and answered questions about her annual reports. Indeed, some of these discussions have provided the Commissioner with ideas for positive measures that the OCOL will implement.

The OCOL notes that the Finn-McLaughlin Report set out a specific mandate for the committee, which is robust. The OCOL hopes that the committee will be a forum for the timely study of issues relating to our two official languages and that the committee will consider input from stakeholders and the public on these issues as well as providing substantive reports on their findings.

DEPARTMENT OF OFFICIAL LANGUAGES

Finn-McLaughlin report

Recommendation 2

That the *Official Languages Act* be amended to provide for the establishment of a Department of Official Languages. This department will be the focal point for all aspects of the implementation of the *Act* and will assume responsibility for and coordinate the official languages file within all parts of government.

Position of the Office of the Commissioner of Official Languages

The OCOL believes that recommendation should be adopted.

The OLA prevails over all other legislation in New Brunswick, with the exception of the *Education Act*:

| Primauté de la loi, cas d'exception | Act prevails, exceptions |
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| <p>3(1) Toute loi ou ses règlements d'application, autre que la présente loi, ne peuvent être interprétés de manière à supprimer, restreindre ou enfreindre une disposition de la présente loi et, en cas de conflit, la présente loi l'emporte.</p> <p>3(2) La paragraphe (1) ne s'applique pas à la <i>Loi sur l'éducation</i> et toute autre loi, disposition législative ou mesure visant à promouvoir l'égalité des deux communautés linguistiques ou visant l'établissement d'institutions d'enseignement distinctes ou d'institutions culturelles distinctes.</p> | <p>3(1) No act, or regulation under it, other than this Act, shall be interpreted so as to repeal, limit or contravene a provision of this Act and, in case of conflict, this Act prevails.</p> <p>3(2) Subsection (1) does not apply to the <i>Education Act</i>, or any other act, legislative provision or measure which promotes the equality of the two linguistic communities or establishes distinct educational institutions or distinct cultural institutions.</p> |

In addition, section 2 of the OLA sets out that the Premier is responsible for the administration of the Act. This reflects the importance that legislators attached to the OLA. The OLA stems directly from the obligations that the *Canadian Charter of Rights and Freedoms* imposes on the province of New Brunswick – which is also why the OLA prevails over other provincial legislation.

Following the 2021 review, the government created a Secretariat of Official Languages but did not create a Department of Official Languages. In its 2021 brief submitted for the 2021 review of the OLA, the OCOL did recommend the creation of a Secretariat. The OCOL had been making this recommendation for several years. Why was this?

As a result of the 2013 review of the OLA, the *Act* was amended to require the government to prepare an Implementation Plan setting out how the Province will meet its obligations under the *Act*. Section 5.1(1) sets out what is to be included in the implementation plan:

- Goals and objectives with respect to its obligations under the OLA;
- Measures to ensure the equality of status of the two linguistic communities;
- Measures to ensure the equality of use of the English and French language inside the public service;
- 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;
- Measures to improve the bilingual capacity of senior management in the public service;
- Measures to provide for the review and improvement, when necessary, of the public signage policies;
- Performance measures for evaluating the effectiveness of measures implemented under the plan and time frames within which they must be implemented.

In its 2017-2018 annual report, the OCOL reported on its investigation into the first year of the Implementation Plan, finding the results disappointing. It was found that the then Coordination Unit for the Plan on Official Languages had little influence on the Plan's implementation and particularly on the achievement of certain key measures of the Plan. It was at this point in time that the OCOL examined how the work of official languages was advanced in government. It was noted that the branch of government responsible for coordination of the Plan on Official Languages fell under Intergovernmental Affairs, a section headed by a Deputy Minister who had responsibilities in other government departments. In addition, that section also dealt with the Canadian Francophonie.

Also, the OCOL determined that responsibilities regarding official languages were also "scattered" through other departments. For example, the responsibility to establish language requirements for staffing processes belonged to Service New Brunswick, while the Treasury Board was responsible for working with official language coordinators with respect to departmental action plans.

The OCOL therefore recommended the creation of a Secretariat to be the administrative support to the Premier in their primary responsibility of administering the OLA, and particularly the application of the OLA's Implementation Plan.

It is a positive step to have the establishment of the Secretariat of Official Languages. However, the Secretariat is still not a government department and lacks the hierarchical influence of a government department. The Deputy Minister responsible for the Secretariat has other departmental responsibilities in addition to official languages. The creation of a Department of Official Languages would reflect the importance of the OLA and New Brunswick's status as the only officially bilingual province.

RECOMMENDATION 1

Office of the Commissioner of Official Languages

A Department of Official Languages should be established to reflect the constitutional significance of the status of New Brunswick's two official languages. The department will have the responsibility to provide support for institutions and services subject to the OLA in addition to the public.

THE COMMISSIONER OF OFFICIAL LANGUAGES' ROLE, POWERS AND RECOURSE MECHANISMS

Commissioners Finn and McLaughlin examined the mandate and role of the Commissioner of Official Languages and there was a clear understanding of the Official Languages Commissioner's dual mandate to investigate complaints and make recommendations to ensure corrective action, as well as the promotional mandate. In terms of the promotional mandate the Commissioners noted:

“Clearly, though, it is an important function, because if the Commissioner only deals with complaints, the office is seen as an official languages watchdog, and we feel strongly the role should be much more balanced than that.”⁴

Finn-McLaughlin report

Recommendation 3

That the provisions of the *Act* relating to the position of Commissioner of Official Languages be reviewed in order to increase the effectiveness and relevance of this function to the people of New Brunswick:

3.1 Investigation and duty to respond: That a provision be added to section 43 of the *Act* requiring the institution that is the subject of an investigation report to respond to the Commissioner within 30 working days. This response must include the measures that will be taken to correct the situation or, if no measures are taken or contemplated, the reasons for not following up on the investigation report. In the event of failure to do so, the Commissioner may apply to the court for an order requiring the parties to provide a response.

3.2 Annual Report's Follow-up: That subsection 43(21) be amended to require that the Commissioner's annual report be tabled in the Legislative Assembly and considered by the proposed Standing Committee on Official Languages and the Legislative Assembly for follow-up.

3.3 Premier's Response: That the *Act* be amended to require the Premier to table in the Legislative Assembly, within 90 days of receipt of the Commissioner's annual report, a written response outlining the steps the government intends to take in response to the report or, if no steps are taken or contemplated, the reasons for not acting on specific recommendations. This written response must also be considered by the proposed Standing Committee on Official Languages.

3.4 Arbitration: That consideration be given to introducing an arbitration process in the *Act* to resolve disputes between Government and the Commissioner or complainants. The use of arbitration could generate solutions more quickly and less expensively than referring the matter to court.

3.5 Conflict of Interest: That a provision be added to the *Act* that provides a mechanism for the Commissioner to delegate their investigative powers to deal with complaints received in which the Commissioner is in a real or perceived conflict of interest.

3.6 Promotional Role: That the Commissioner's promotional mandate under subsection 43(9) of the *Act* be clarified to ensure that they are able to fulfill their role in accordance with legislative intent.

During the 2021 review, the OCOL made extensive submissions about the role and work of the Commissioner. Since that review we have also seen the amendments that were adopted with respect to the Federal *Official Languages Act*. The amendments that appear to have attracted the most attention are that the Federal Commissioner by regulation will be given the authority to impose pecuniary fines in some circumstances.

It is important to provide clear context of the role of the Commissioner of Official Languages as well as the possible role that penalties may play in the effectiveness of that role.

⁴ Finn-McLaughlin, *Report of the 2021 Review of the Official Languages Act of New Brunswick*, p.24

Language rights are basically fundamental rights.⁵ The underlying constitutional principle of language rights is the protection of minorities.⁶ 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.”⁷

By including language rights in Canada’s Constitution and codifying them in the *Official Languages Act*,⁸ 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.”⁹ 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.¹⁰

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.”¹¹ 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.”¹²

It is also appropriate to bear in mind the quasi-constitutional status of the OLA.¹³ 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 linguistic communities or to establish distinct educational or cultural institutions.¹⁴ 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*.¹⁵

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”¹⁶ 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.

⁵ 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*].

⁶ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 79.

⁷ *Beaulac*, *supra*, note 7, para. 25.

⁸ *Official Languages Act*, SNB 2002, c O-0.5 [OLA].

⁹ *Beaulac*, *supra*, note 7, para. 20.

¹⁰ *Ibid.*

¹¹ *DesRochers v. Canada (Industry)*, 2009 SCC 8, para. 31.

¹² *Beaulac*, *supra*, note 7, para. 39.

¹³ See *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, para. 16.

¹⁴ *Official Languages Act*, SNB 2002, c O-0.5, para. 3(2).

¹⁵ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the Charter].

¹⁶ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 [2003] 3 SCR 3, para. 25.

Indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.¹⁷

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, 1969¹⁸ 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.

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 Michel 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.*¹⁹

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."²⁰ In fact, what is a law for if there is no remedy to ensure compliance with the law?²¹ 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.

¹⁷ *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*].

¹⁸ *Official Languages of New Brunswick*, RSNB 1973, c O-1 [OLA, 1969].

¹⁹ M. Doucet, *Les droits linguistiques au Nouveau-Brunswick*, *supra*, note 13, page 545.

²⁰ *R. v. Gaudet*, 2010 NBQB 27, 355 NBR (2d) 277, para. 24.

²¹ *Les droits linguistiques au Nouveau-Brunswick*, *supra*, note 12, page 600.

The establishment of the Office of the Commissioner of Official Languages gives 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 enhance these powers in order to provide the Commissioner with the means to fully carry out the Commissioner's mandate.

To that end, during the time of the 2021 review process, 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,²² Nunavut and the Northwest Territories.²³ We also paid special attention to what is done in other countries by consulting enabling legislation for commissioners of the Welsh Language²⁴ and the Irish language.²⁵

REQUIRING INSTITUTIONS TO ACT UPON THE COMMISSIONER'S INVESTIGATION REPORT

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 OCOL 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.

In order 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, almost 25 years of experience show that the power to make recommendations has its limits and can sometimes prove ineffective.

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 OCOL. 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.

²² *Official Languages Act*, RSC 1985, c 31 (4th Supp.) [Federal OLA].

²³ *Official Languages Act*, SNu 2008, c 10 [Nunavut OLA]; *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 [NWT OLA].

²⁴ Welsh Language (Wales) Measures, 2011. [*Welsh Language Act*].

²⁵ *Official Languages Act*, 2003, Ireland [OLA Ireland].

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 agrees with Recommendation 3.1 in the Finn-McLaughlin Report and 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 opinions 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 3.1 in the Finn-McLaughlin Report reflects the recommendation of the OCOL in its 2021 submission. Therefore, the OCOL supports that recommendation.

RECOMMENDATION 2

Office of the Commissioner of Official Languages

Response from institutions

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 |
|--|---|
| <p>LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK</p> <p>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.</p> | <p>NEW BRUNSWICK OFFICIAL LANGUAGES ACT</p> <p>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.</p> |

RECOMMENDATION 3

Office of the Commissioner of Official Languages

Tabling of annual report in the Legislative Assembly

The OCOL also supports recommendation 3.2 in the Finn-McLaughlin Report and points out that the Commissioner's annual report is now tabled in the Legislative Assembly and is considered by the new Standing Committee on Official Languages.

RECOMMENDATION 4

Office of the Commissioner of Official Languages

Response from the Premier

The OCOL is in agreement with recommendation 3.3 in the Finn-McLaughlin Report which would require the Premier, who is responsible for the administration of the OLA, to table a written response to the Legislative Assembly within 90 days following receipt of the Commissioner's annual report and would outline the response the government intends to take to the report.

RECOMMENDATION 5

Office of the Commissioner of Official Languages

Enforcement Agreements

The OCOL recommends that the OLA be amended to permit the Commissioner to enter into enforcement agreements with institutions to improve on their compliance with their OLA obligations which have been raised in the recommendations of the OCOL.

The Finn-McLaughlin recommendation 3.4 suggests an arbitration process to “resolve disputes” between the government and the Commissioner and complainants. In 2021, the OCOL recommended that the Commissioner be authorized to enter into executory agreements with institutions that contravene the *Act* on a regular basis. Commissioners Finn and McLaughlin rejected this approach, stating that this would give the perception that it is the Commissioner who is responsible for the *Act*, noting that the responsibility for enforcing the *Act* remains with the government. With respect, the capability of concluding enforcement agreements would simply be an additional step in the administrative toolbox for the OCOL.

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 address 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.**

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.

RECOMMENDATION 6

Office of the Commissioner of Official Languages

Commissioner's right to see legal remedy

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

It may be that it is implicit that the Commissioner may seek a legal remedy to the courts. However, in order to avoid any ambiguity such authority should be included in the *Act*. Section 78 of the federal *Official Languages Act* provides the federal Commissioner with the authority to do so. It should be clear to institutions that this authority exists, especially when they are concluding executory agreements with the Office of the Commissioner.

DELEGATION OF COMMISSIONER’S AUTHORITY IN THE EVENT OF A CONFLICT OF INTEREST

Commissioners Finn and McLaughlin did recommend (Recommendation 3.5) that a conflict-of-interest provision be added to the OLA to permit the Commissioner to delegate investigative powers when in a conflict of interest. Section 43.01(1) was added to the *Act* in 2023 providing the Commissioner with the power to delegate their authority.

THE COMMISSIONER’S PROMOTIONAL MANDATE

Recommendation 3.6 of the Finn-McLaughlin report suggests the Commissioner’s promotional mandate needs to be clarified. They state,

*“We believe that the Commissioner can make an important contribution to facilitating the advancement of a positive perception of official languages in our province.”*²⁶ They also point out that the *Act* is silent on initiatives that should be carried out under this component.

As Commissioner I cannot underscore enough the importance of the OCOL’S promotional mandate. However, I also believe that the legislators at the time in 2002 were deliberate in not detailing what initiatives would fall under that mandate.

Again, the Commissioner of Official Languages is an independent legislative officer, like the Auditor General, the Ombud, the Child, Youth and Seniors Advocate, the Insurance Advocate and the Chief Electoral Officer. Each of these offices is independent of government and has the legislative authority to fulfill a specific mandate.

The elements that may be necessary to promote our two official linguistic communities may change from year to year. It may depend on the types of complaints received, the action or inaction of government institutions on a specific issue, or what issues may be of particular importance to New Brunswickers at any given time. The OCOL needs to be able to make decisions about promotion that are distanced from government and reflect the spirit of the OLA.

Promotion remains a positive tool that is used to educate New Brunswickers about our two official languages, to dispel myths around official languages and to create a sense of pride in our two official languages. The OCOL has specialized experience and knowledge that can assist with this. Also, the OCOL is accepted by the public as an **independent voice** who is doing this work and is seen as a trusted source for promotion.

The largest impediment to promotion is the lack of funding that is provided to the OCOL for promotion.

RECOMMENDATION 7

Office of the Commissioner of Official Languages

The Commissioner’s promotional mandate

The OCOL recommends that no changes be made to the mandate of the Commissioner under section 43(9) of the OLA.

²⁶ Finn-McLaughlin, Report of the 2021 Review of the *Official Languages Act* of New Brunswick, p.23

SECTION 2

Language of work, healthcare & nursing homes

LANGUAGE OF SERVICE POLICY

Commissioners Finn and McLaughlin in **Recommendation 4.1** outlined 5 sub recommendations to support public servants in meeting the Government's Language of Service Policy. That policy is in place to ensure that Government and its institutions offer and provide services to the public of equal quality in both official languages.

Finn-McLaughlin report

Recommendation 4.1

That the government take all necessary measures to clarify the language requirements for provincial civil servants (current and future) to enable them to effectively deliver quality services in both official languages and to improve their second-language competencies to make them more competitive for advancement. Among other things, the following actions must be taken:

4.1.1 Provide training to employees and supervisors on the content of the language of service policy to ensure general understanding of linguistic profiles and the integrated team approach.

4.1.2 Review the language profiles for all positions in the various institutions to meet Government's language of service obligations, while taking regional language realities into account.

4.1.3 Review the language proficiency ranges required to ensure that they are in line with the range of positions in the provincial civil service.

4.1.4 Develop a standardized assessment of language skills that is generally recognized by the private and public sectors in New Brunswick and elsewhere, but that is contextualized for different types of positions, (i.e., entry level clerical, public facing service providers, middle management, senior policy advisors, deputy heads, etc.).

4.1.5 Offer effective English and French training programs to facilitate second-language learning for employees of government institutions. These courses should be available not only to employees in positions with specific language requirements, but also to those who express an interest in taking them. The objective is to ensure that employees not only have the opportunity to learn a second language, but that their language ability is a springboard for future promotion to positions requiring specific language skills. To the extent possible, the training programs should be intensive and immersive in nature.

RECOMMENDATION 8

Office of the Commissioner of Official Languages

The Office of the Commissioner of Official Languages feels that recommendation 4 as proposed by Commissioners Finn and McLaughlin will provide support to the government's language of work policy.

LANGUAGE OF WORK POLICY

In Recommendation 4.2, Commissioners Finn and McLaughlin refer to the language of work.

Finn-McLaughlin report

Recommendation 4.2

That Government (through the proposed Department of Official Languages), take all necessary measures to ensure that provincial public servants can work in the official language of their choice and in an environment that is conducive to the use and learning of both official languages. The following actions must be taken:

4.2.1 Ensure that initiatives are put in place to create an organizational culture that fosters a work environment conducive to the effective use of both official languages while allowing employees to use either one.

4.2.2 Adopt a plan with specific short-, medium- and long-term objectives to ensure that, within a reasonable period of time, all employees of institutions are able to work in the language of their choice.

4.2.3 Clearly indicate language requirements when posting positions so that potential candidates have a clear idea of the employer's expectations in this regard.

4.2.4 Take measures to improve the bilingual capacity of senior management within the public service (including officers of the Legislative Assembly), who would benefit from, as would the employees they lead, the ability to speak and understand both official languages.

They also noted in their report:

"During the consultations, several public servants indicated that it was difficult to work in French within a dominant English language environment. Others, who were bilingual Anglophones or were trying to improve their French, mentioned that they had few opportunities to use, maintain or develop their proficiency in French at work."²⁷

It can be implied that section 16.1(1) of the *Canadian Charter of Rights and Freedoms* creates a duty upon the Government of New Brunswick to take positive steps to remedy inequalities that have remained.

²⁷ Ibid p.28

It states:

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.

16.1(2) The role of the legislature and the government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

“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)

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.

In 2021 the Office of the Federal Commissioner of Official Languages conducted a survey *Linguistic (In)security at Work*. The survey related to federal government employees in Canada.

One of the survey findings was: *“The results show that respondents from both language groups and from all regions were much more likely to have felt uncomfortable using French...”*²⁸

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.

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*. 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.

²⁸ OCOL Canada, *Language (IN) Security at Work, Exploratory Survey on official languages among federal government employees in Canada, Study Report 2021*

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.

RECOMMENDATION 9

Office of the Commissioner of Official Languages

The Office of the Commissioner believes that the OLA must be amended to state that provincial public servants have the right to work and be supervised in the official language of their choice.

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.

The measures proposed in the Finn-McLaughlin Report also would support the language of work provision in the OLA.

HEALTH SERVICES

Finn-McLaughlin report

Recommendation 5

With respect to official language requirements for health care in New Brunswick:

5.1 Amend subsection 33(1) of the *Act* to include a reference to sections 28.1, 29, and 30 to include the active offer of services (s.28.1), the posting and publication of information for the public (s.29) and the provision of services by a third party on behalf of the province (s.30). (For example: Ambulance NB and extra-mural services).

5.2 Ensure that in any action relating to the development of a provincial health plan, the operating language of the health authorities must not take precedence over their obligation to provide all care in the official language of the patient's choice.

5.3 Ensure that the provisions of subsection 19(3) of the *Regional Health Authorities Act*, which imposes on both authorities the responsibility to improve the delivery of health services in French, are respected in the development of a provincial health plan.

Position of the Office of the Commissioner of Official Languages

This was a recommendation contained in the Office of the Commissioner's 2021 submission. It provides express clarification that the linguistic obligations contained in sections 27, 28, 28.1, 29 and 30 apply to health establishments. We recommend removing the reference to "réseau/network" as this could potentially be misleading and be interpreted as not meaning each health establishment.

NURSING HOMES

Finn-McLaughlin report

Recommendation 6

In recognition of the importance of communication as a matter of basic human dignity, and considering the unique and vulnerable position of seniors who are transitioning to long-term care, we recommend:

6.1 That a provision be added to the *Official Languages Act* stating that nursing homes, as defined in the *Nursing Homes Act*, are subject to the *Official Languages Act*.

6.2 That the language preference of the resident, when moving into a nursing home, be taken into account by the competent authorities.

6.3 That Government immediately develop a strategy to improve the capacity of nursing homes to provide equal quality of service in both official languages. Among other things, Government must make high quality language training available to front-line nursing home staff, so they are better able to communicate with residents in the official language of their choice. This recommendation will be expanded upon in our companion report on second-language learning.

Position of the Office of the Commissioner of Official Languages

This was a recommendation contained in the OCOL's 2021 submission. The Office of the Commissioner has already concluded that nursing homes are third parties within the meaning of section 30 of the OLA.

| LOI SUR LES LANGUES OFFICIELLES DU NOUVEAU- BRUNSWICK | NEW BRUNSWICK OFFICIAL LANGUAGES ACT |
|--|--|
| Prestation de services pour le compte de la province | Services provided by third parties |
| 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 OCOL had come to this conclusion based on the fact that nursing home operations in New Brunswick are closely governed by the Province, as shown by 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.²⁹

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.*³⁰

Taking the aforementioned into consideration, the Office of the Commissioner has found 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 (operated by Shannex) 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 that Francophone and Anglophone seniors in nursing homes receive services in the official language of their choice.

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 linguistic communities in all of the Province's regions.

²⁹ *Les droits linguistiques au Nouveau-Brunswick*, supra, note 12, page 600

³⁰ *Official Languages Act*, RSC 1985, c 31 (4th Supp.) [federal OLA]

SECTION 3

Municipalities

Finn-McLaughlin report

Recommendation 7

With respect to official language requirements for municipalities:

7.1 Establish, by regulation, a mechanism to periodically review the statistical data and the terms and conditions that will clearly identify the municipalities and regional service commissions that are subject to the *Act* (re: calculating the 20% in subsection 35(1)).

7.2 Define the terminology "official language minority" in subsection 35(1) of the *Act* so that official language minority persons can be clearly identified.

7.3 Revise Regulation 2002-63 to update the list of services and communications set out in Schedules A and B and that the *Act* be amended to specify that this regulation be reviewed as required and at the time of the periodic review of the *Act*.

7.4 Amend the *Act* to provide that rural municipalities (rural districts) are subject to the same linguistic obligations as municipalities and regional service commissions.

7.5 Amend section 22 of the *Act*, which deals with the obligations to use the language chosen by the civil party in a civil matter before a court, to include municipalities and regional service commissions.

Since the 2021 review of the *Official Languages Act*, the Government of New Brunswick has undertaken significant municipal reform. There has been no similar revision to Regulation 2002-63 of the OLA which references the obligations of municipalities and regional service commissions.

In New Brunswick, pursuant to section 35(1) of the OLA, municipalities whose official language minority population represents at least 20% of its total population, and all cities have language obligations. Amendments to the *Local Governance Act* in 2023 created a new local governance structure, which includes 77 local governments and 12 rural districts. Of these new entities, there are eight towns and villages that have obligations pursuant to the OLA. Eight of 12 Regional Service Commissions must offer services in both official languages that are set out by regulation.

The OLA and Regulations do not define official language minority population and do not specify the procedures for determining the percentage of this population. It is not known how the 20% threshold used in the OLA threshold was arrived at.

The municipal reform coincided with the 2021 census to some extent. This resulted in some areas having obligations under the OLA that did not before, such as Memramcook and Grand Falls.

Following the reform, some of the reconstituted Towns and Villages adopted official language policies. The OCOL received many complaints and communications from residents of those communities relating to their language rights. The OCOL responded to these matters in a way that we hope explained the changes.

There is some ambiguity about how the 20% is calculated. Our office was advised that the Department of Environment and Local Government uses mother tongue data from Canada Census statistics to determine which municipalities and commissions reach the 20% limit.

Position of the Office of the Commissioner of Official Languages

In the view of the OCOL, regulations under the OLA should have a mechanism to require a statistical review of the statistical data and the terms and conditions that will apply to municipalities and regional service commissions. The Commissioner is in agreement with the proposed recommendations of Commissioners Finn and McLaughlin as they relate to municipalities. The regulations are very dated and lack clarity. For example, Regulation 1(a) under Regulation 2002-63 requires municipalities to provide communications that are “public notices of a general nature” in both official languages. During the COVID pandemic, the OCOL was required to take a position whether COVID notices to the public in various platforms fell into that category. The Regulation has not been reviewed since 2002 and needs to be updated and modernized to reflect today’s realities.

CONCLUSION

As Commissioner, I conclude this submission by stating that in completing this exercise I wanted as much as was possible to restrict the submissions of the Office of the Commissioner of Official Languages to the recommendations contained in the Finn-McLaughlin Report. We have done so, to a large extent, although we have made some additional recommendations that, in our view, assist the important work of our office.

The work of Commissioners Finn and McLaughlin is important, as it encapsulates the input of hundreds of New Brunswickers.

However, I hope that the Committee recognizes the depth of understanding of the *Official Languages Act* that the Office of the Commissioner of Official Languages has. As an independent office, we deal daily with questions from both linguistic communities, and we assess these issues in a fair manner. The Office has been in existence for almost 25 years now. The recommendations we make and those that we support come from extensive experience and a true desire to effect positive change by supporting amendments to the *Official Languages Act* that will move the dial toward true equality for our two official linguistic communities. We are not there yet, and our current demographic realities have created, in my view, a sense of urgency to take positive steps.

I urge the Government of New Brunswick to do so. They have a constitutional responsibility to do so, but we all owe it to our children and grandchildren to preserve our two official languages. They are what makes us the most special place in Canada!
