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Revision of the *Official Languages Act*: Thoughts and Avenues for Reform

Report

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July 2021

The Revision of the Official Languages Act: Thoughts and Avenues for Reform

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Moncton (New Brunswick)

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PART I: INTRODUCTION

On August 4, 2002, a new *Official Languages Act* came into force in New Brunswick. It was a long-awaited response to the persistent demands of the Acadian community, demands which go back at least as far as the day after the adoption of the first *Official Languages Act* in 1969.

One objective of the new Act was to harmonize the province's laws with its constitutional obligations under the *Canadian Charter of Rights and Freedoms*' sections 16 to 20. The Charter had come into effect after the 1969 Act, so the law no longer met the province's constitutional obligations.

We have now had almost 20 years to assess the effectiveness of the 2002 law, and ten years to assess the 2012 amendments made to it. We can assess its strengths and weaknesses. I intend to provide an overview of the constitutional and legislative framework that should guide our thinking in this new round of reform.

The language provisions of the *Canadian Charter of Rights and Freedoms*, as well as the provisions of the *Official Languages Act* and the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick,* constitute the social contract on which the cohabitation of New Brunswick's two official linguistic communities is based. They are a minimum, a bottom line, below which New Brunswick cannot go. No dialogue or negotiation can justify that a dilution or a reduction of the conditions of this social contract be accepted.

The terms of this contract have been accepted by the Legislative Assembly and, in the case of the *Charter* provisions, by the Canadian Parliament, giving them political and legal legitimacy beyond any doubt. The terms list the fundamental values and principles that guide the cohabitation of New Brunswick's two official language communities, values and principles that must not be abandoned no matter the opposition that is encountered. Compromising our values will always cost us more than respecting them. It is in this spirit that I approach this exercise.

A. Is it necessary in a democratic society to protect a language or languages?

Traditional fundamental rights - such as the freedoms of expression, of thought, of opinion and of religion, to name a few - remain an inevitable standard in our liberal democratic societies. They form the backbone of our democracies. We often tend to associate these fundamental rights with the individual, since by giving these rights legal protection, we are defending the dignity of the human person.

[1] The statements contained in this report are the sole responsibility of the author.

Linguistic rights, on the other hand, have the essential characteristic of being attributed to a group. And so, they are often misunderstood because they come in conflict with the majority's concept of fundamental rights. Take, for example, the debate on the language used in commercial signage. Under an orthodox fundamental rights approach, this issue is solely about freedom of expression: the right of the merchant to post signs in the language of his or her choice. However, for the linguistic minority, the obligation to post signs in both official languages is considered an essential step in the protection and development of their language and culture. How then can these two views of the same issue be reconciled? How then can the needs of a minority language community be met if the law only protects individual freedoms?

The organization of public space to accommodate the presence of a minority group is often in contradiction with the traditional vision of the democratic state, one of whose theoretical foundations is the uniformity of its individual components and the indivisibility of its sovereignty.[2] This perception makes it impossible for the majority group to conceive linguistic minorities as a distinct group, since, according to its view, a democratic state has and should have only two types of interests: first, that of the individuals who operate in the private space, and second, that of the collectivity, represented in the public space by the sovereign state, i.e. the government and its institutions.

This view of the sovereign state does not provide for the existence of a language arrangement to meet the demands of the minority group.[3] According to this view, since the state adopts linguistically and culturally neutral policies and norms, it cannot discriminate against any group. Only a uniform application of laws, policies and norms to all citizens can guarantee equality for all. If the linguistic specificity of a minority group is recognized, this recognition can only be symbolic and should not be seen as imposing a binding legal standard.

The minority community's desire to obtain legal recognition of its existence is unfortunately often misunderstood by the majority community. For the majority group, the very concept of "language rights" is difficult to understand, as the majority, except in special cases, does not need "rights" to protect its language and culture. The majority group, through the public institutions it controls, develops the rules and norms that will apply to all citizens. For the majority group, a democratic and egalitarian society is one that ensures that every citizen will have equal access to the decision-making process in the public space and that guarantees the existence of a private space within which everyone can exercise personal autonomy and make their own choices in accordance with their values. According to this view, the state should not jeopardize this balance. As we shall see, however, language rights have the effect of disrupting this balance.

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[2] Nicolas Levrat, « Solutions institutionnelles pours des sociétés plurielles », *Minorité et organisation de l'État,* Université Libre de Bruxelles, and Centre international de la common law en français (CICLEF), Université de Moncton, presented at the 4th international colloquium of CICLEF, Bruylant, Bruxelles, 1998, p. 3.

[3] *Ibid.*

B. A Journey to the Heart of Language Rights: The Concept of Substantive Equality?

On May 1, 1986, the Supreme Court of Canada handed down three decisions that have had an impact on many people's conception of language rights. Known as the 1986 trilogy, the three decisions in *MacDonald, Bilodeau* and *Société des Acadiens*[4], allowed the Supreme Court to develop a theory inviting us to consider language rights differently from other fundamental rights. According to these decisions, it was not up to the courts, through interpretation, to improve, add to or modify the historical constitutional compromise that gave rise to these rights.[5] Indeed, the courts should be reluctant to be instruments of change in this area and they should approach these rights with great restraint. These decisions suggested that it was more appropriate that the legislative process, being a democratic process unlike the judicial sphere, be the one to advance language rights based on political compromise.[6]

Therefore, according to this approach, the evolution of language rights will depend on the political climate of the moment and on the balance of power that the minority has with the majority and the political authorities. However, such an approach fails to recognize the collective dimension of language rights, thus depriving them of their most important feature. It has the effect of artificially narrowing the scope of these rights: language is seen only as a tool for communication, not for social and cultural development and growth. Language rights are, at most, only a form of accommodation allowing the individual to communicate, under specific conditions, with the state.

But shouldn't language rights aim to protect what Hon. Michel Bastarache defines as "**a sign of belonging, a cultural heritage [and] a concrete expression of a community identity**"?[7] The importance of a country's language framework is not based on the sum of individual interests, but rather on the community aspect of those interests which places more emphasis on the collective interests of those rights.[8] According to this approach, language is seen also as cultural heritage and a vehicle of identity.

The thesis expressed in the 1986 trilogy stands in the way of this concept of language rights. Their individual-centered and political compromise approach excludes any collective recognition of the minority community.

In 1999, the Supreme Court of Canada rejected this negative interpretation. In a majority judgment in the *Beaulac* decision, the Court found that the existence of a political compromise should have

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[4] *MacDonald v. City Montréal, 1986*, 1 SCR 460 *[MacDonald]; Bilodeau v. A.G. (Man.)*, 1986, 1 SCR 449; *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education,* 1986, 1 SCR 549.

[5] *MacDonald, ibid*. para. 61, 103-104.

[6] *Société des Acadiens, supra* para. 65 and 68.

[7] Michel Bastarache, « Introduction » in Michel Bastarache, ed., *Les droits linguistiques au Canada*, 2nd ed., Cowansville (Qc), Yvon Blais, 2004, p. 6 [*Les droits linguistiques au Canada*].

[8] D. G. Réaume, « Official Language Rights: Intrinsic Value and the Protection of Difference » in W. Kymlicka and W. Norman, ed., *Citizenship and Diverse Societies*, Oxford, Oxford University Press, 2000, 245.

no impact on the scope of language rights.[9] It stated that where the 1986 trilogy of judgments advocate a restrictive interpretation of these rights, they should be set aside.[10] This means that language rights must be interpreted broadly and generously and in a purposive manner consistent with the preservation and development of official language communities.[11]

For language rights to be effective, the state must take positive measures to implement them. The state must also take note that the principle of equality does not have a more limited sense when applied to language rights, but must be given its true meaning, which is of substantive equality.[12] Equality is an idea that refers to a concrete reality. Therefore, we must remember that there is often a significant gap between formal equality and substantive equality.

Formal equality is achieved when members of the official language minority and those of the majority community are treated identically by offering them identical services in French and English, with no regard to the possible differences between the two communities.

Substantive equality, on the other hand, is achieved when differences in the characteristics and circumstances of the minority community are taken into account, where necessary, by offering services with distinct content or through a different mode of delivery, in order to ensure that the minority receives services of the same quality as the majority. **This is the norm in Canadian law**.

It is therefore not sufficient to treat all persons or language communities in the same way to ensure equality. To the extent that members of a minority community may have different needs, treating them in the same way as members of the majority community can cause greater inequality. Nowhere has this principle of substantive equality been better expressed than in the words of the American judge Frankfurter:

> "He was a wise man who said that there is no greater inequality than the equal treatment of unequal individuals."[13]

> "We could rephrase this and say that there is no greater inequality than the equal treatment of two unequal official language communities. In this context, the state must therefore ensure equal access to services of equal quality for members of both official language communities, taking into account the needs of the minority community."[14]

There is therefore a constitutional obligation to make services of equal quality available to the public in both official languages, and substantive equality must be the norm. While it may sometimes be sufficient to offer identical services to both official language communities to comply with the principle of linguistic equality, this may not always achieve substantive equality, depending on the nature of the service in question. It is therefore essential that the government

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[9] *R. v. Beaulac*, [1999] 1 SCR 768, para. 22 and 24 [*Beaulac].*
[10] *Ibid.* para. 25.
[11] *Ibid.*
[12] *Ibid.* para. 22.
[13] 339 U.S. 162 (1950), p. 184.
[14] *DesRochers v. Canada (Industry),* [2009] 1 SCR 194.

adopt a method to evaluate how it should provide provincial services and programs in order to comply with substantive equality.

As the Treasury Board of Canada has indicated, to achieve substantive equality Government officials must first determine whether the service or program they are putting in place:

a) is aimed at community development, as opposed to a service or program provided to individual members of the public

b) requires consideration of regional, cultural or linguistic characteristics

c) aims to provide medium or long-term benefits and involves an ongoing relationship with the beneficiaries of the service (as opposed to a one-off service)

d) whether the participation of the target population is required in the development or implementation of the service or program in order to achieve its objectives.

If the answer to any of these questions is yes, then, in a second step, government officials will need to determine whether a uniform service is appropriate, taking into account the target population and the nature of the service or program. They will have to ask, among other things, whether it is a service or program for which a uniform service (the same delivery method and content) would provide the same benefit to members of both official language communities.

If the answer to this question is no, then they will have to proceed to a third step to determine how to adapt the service or program to the needs of the official language minority community:

a) Is it necessary to adapt the content to take into account the specific needs of the linguistic minority?

b) Is it necessary to adapt the method of service delivery to take into account the particular needs of the linguistic minority?

If the answer to any of these questions is "Yes", then the service or program will have to be adapted to the needs of the minority to ensure that the content or mode of delivery takes into account the particular needs of the minority community. This is how the concept of substantive equality works.

It is therefore clear that the exercise of language rights cannot be seen simply as a response to a request for accommodation.[15] Rather, it requires a real commitment on the part of the government apparatus and the recognition of the specificity of the minority group.

C. Language Rights in New Brunswick: The Quest for the Holy Grail?

When the state recognizes the rights of a minority language group, it is admitting, at least implicitly, that majority rule cannot always guarantee respect for the specificity of that minority. Indeed, asking persons who are members of a minority community to submit to the choices of the majority

[15] *Ibid*. para. 24.

on matters relating to education, for example, amounts to forcing them to accept the values of the majority and to renounce their own identity. Linguistic minorities cannot be sure that the majority will take their linguistic and cultural concerns into account, or even that it understands their needs.

An individual member of a minority group cannot be required to give up his or her identity as a result of a choice made by the majority. There can be no 'general will' on matters of identity, i.e. language or culture. The language and culture of a community are part of the history and way of life of a community. They define how people live together, how they express themselves and how they perceive things. They are the anchor for each person in a community.[16] The state is no longer, in this case, the central vehicle for the attachment of identity, although it can play a significant role.

When the state decides to recognize that a minority group has rights, it must rethink the comprehensive approach that is part of the logic of traditional fundamental rights, i.e. that rights should apply uniformly to all without distinction. It must also pay particular attention to its own context and find solutions that are appropriate to it. These solutions will have to meet the needs of the minority group and may therefore vary from province to province and from state to state, since the demands of minority groups will not always be the same. Language rights can only be asymmetrical in their conception and application, as they are embedded in different contexts that have been shaped by a distinct combination of historical, social and political factors.

In the case of New Brunswick, sections 16 and 16.1 of the Charter of Rights and Freedoms are the essential starting points for any legal analysis of language planning.[17] These provisions recognize the equality of official languages and the equality of official linguistic communities, respectively.

Section 16(2) of the Charter provides that:

"English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick."

Nearly 40 years after its adoption, this provision still remains controversial as to its actual scope. Is the section merely a symbolic principle or does it confer tangible rights? According to the first view, the provision is purely declaratory, a symbolic provision that is not enforceable. Article 16 would, in other words, be a "preamble" announcing the rule that should govern the interpretation of the articles that follow. It would contain an ideal rather than describe a reality. It reminds us of a paradise that we would like to achieve, without constituting a constitutional requirement to attain it.

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[16] A. Margalit and J. Raz, « National Self-Determination » (1990) 87/9 *Journal of Philosophy* 439, pp. 447-49: « cultural identity provides an anchor for [people's] self-identification and the safety of effortless secure belonging ».

[17] The other provisions of the *Charter* that affect language rights in New Brunswick are sections 17 to 20 and section 23. Sections 17, 18 and 19 guarantee the equality of English and French in the debates and proceedings of the Legislative Assembly, in court proceedings and in the laws and regulations of the province. Section 20 guarantees the public the right to receive services from provincial institutions in the official language of their choice. Section 23 deals with the right to minority language education, the only provision, perhaps along with subsection 16(3), that grants rights to minorities in all Canadian provinces and territories, i.e. French outside Quebec and English in Quebec.

Since the decision in *Beaulac*,[18] such a restrictive interpretation of the scope of section 16 can no longer be upheld. The equality recognized in this section creates specific obligations.[19] The section imposes on government the obligation to pay particular attention to the notion of linguistic duality. It also imposes on government the obligation to apply this notion with rigorous and unwavering logic in the definition and implementation of positive rights.[20]

Section 16.1 is unique to New Brunswick. It provides:

"(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 such distinct educational and cultural institutions as are necessary for the preservation and promotion of those communities.

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

This section essentially restates certain provisions of the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*.[21] The section's recognition of the principle of equality of the official language communities clarifies the purpose of the language guarantees. It reflects Parliament's commitment to the equality of official language communities. It serves to promote the two official languages and the cultures they represent, and to support the continued vitality and development of both official language communities. It imposes an obligation on the provincial government to take positive measures to ensure that the minority official language community has equal status and equal rights and privileges with the majority official language community, thus making the principle of equality of the two linguistic communities a dynamic concept.[22]

The purpose of the constitutional language provisions is, in my view, clear: they are intended to preserve the two official languages and the cultures they represent and to enhance the vitality and support the development of both official language communities. This entails concrete legal consequences and imposes an obligation on the provincial government to take positive steps to ensure that the minority official language community has status, rights and privileges equal to those of the majority official language community. These rights are dynamic. They involve provincial government intervention to ensure, as a minimum, equal treatment of both communities and, where necessary, differential treatment in favour of the linguistic minority in order to achieve the collective as well as the individual dimension of the substantive equality of status, right and privilege. The principles of equality of the official languages and of the two official linguistic

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[18] [1999] 1 SCR 768.
[19] N. Vaz and P. Foucher, « Le droit à la prestation des services publics dans les langues officielles » in *Les droits linguistiques au Canada*, supra p. 318; Charles N. Weber, « The Promise of Canada's Official Language Declaration » in J. E. Manget, ed., *Official Languages of Canada*, LexisNexis, 2008, pp. 131-170.
[20] J. Magnet, « The Charter's Official Languages Provision: The Implementation of Entrenched Bilingualism » (1982) 2 Sup. Ct. L. Rev. 163, p. 182.
[21] SNB 1981, c O-1.1
[22] *Charlebois v. City of Moncton (2001),* 242 NBR (2d) 259, para. 80 [*Charlebois]*.

communities therefore require that the provincial government adopt positive measures to ensure the implementation of these rights. They also create obligations for provincial institutions.

It is within this theoretical framework that we must begin our reflection on the revision of the *Official Languages Act*.

The next section will deal with the principles that must guide the interpretation of these rights.

PART II: PRINCIPLES THAT SHOULD GUIDE THE INTERPRETATION OF LANGUAGE RIGHTS

People are often not aware of the determinant role that courts have played in the development of language rights in Canada. Indeed, it would not be wrong to say that it is the courts, more than governments, that have contributed to defining our language framework. It is therefore important, in this process of revising New Brunswick's *Official Languages Act*, to appreciate the evolution of the legal approach in order to understand the principles that should govern the interpretation of these rights.

In agreeing to entrench language rights in the Constitution and in legislation, the New Brunswick legislature also decided to entrust the judiciary with the delicate and pressing task of clarifying their legal scope and ensuring their enforcement. In this regard, in *Reference re Manitoba Language Rights*, the Supreme Court of Canada stated that "[i]t is the responsibility of the judiciary to ensure that the government complies with the Constitution" and of judges to "protect those whose constitutional rights are violated, whoever they may be and whatever the reasons for the violation".[23]

Thus, the role of the courts is to define, interpret, apply and enforce existing constitutional and legislative norms. For some, this process represents an ongoing dialogue between society and the judicial, legislative and executive branches of government.[24]

Many argue vehemently that it is undesirable for the courts to interfere with language rights in this way: such matters should be left to legislators alone. Indeed, hardly a day goes by without sharp commentary or criticism attacking the *Charter* as allowing unelected judges to usurp the role of legislators.

Yet, as former Chief Justice Dickson of the Supreme Court of Canada explains, the adoption of the *Charter* allowed Canada to move from a system of parliamentary supremacy to one of constitutional supremacy.[25] With the adoption of the *Charter*, New Brunswick citizens became, among other things, holders of language rights that no provincial government can challenge or attempt to limit. It is therefore inevitable that disputes will arise that will have to be resolved by the courts.

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[23] *Reference Re Manitoba Language Rights*, 1985, 1 SCR 721, p 744, 19 DLR (e) 1. See also, *Re B.C. Motor Vehicle Act*, 1985 2 SCR 486, para 16, 24 DLR (4) 536.

[24] See F. Larocque, «Les recours en droits linguistiques» in M. Bastarache et M. Doucet, dir, *Les droits linguistiques au Canada*, 3rd ed, Cowansville (QC), Yvon Blais, 2013, 993, p 1001; P. Hogg et A. Bushell, «The Charter Dialogue Between Courts and Legislatures», 1997, 35 Osgoode Hall LJ 75. For a critique of the "dialogue" theory, see J. Baron and G. Sigalet, «The "Charter Party's" new dance with the judiciary», online: Policy Options Politiques http://policyoptions.irpp.org/magazines/september-2016/the-charter-partys-new-dance-with-the-judiciary/.

[25] B. Dickson, «Keynote Address» in *The Cambridge Lectures 1985*, pp 3-4, quoted in *Vriend v Alberta*, 1998 1 SCR 493, para 131, 156 DLR (4) 385 [*Vriend*]. See also *Reference re Secession of Québec supra* note 2, para 72.

It is important to remember that it was the New Brunswick legislature that voluntarily decided, in endorsing the language provisions of the *Charter*, to entrust this role to the courts.[26] However, that fact has not stopped the debate surrounding the "legitimacy" of such an approach, which some describe as the "judicialization of the identity debate". Those who view it that way argue that the involvement of the courts in the interpretation of these rights is illegitimate "because it allows unelected people (judges) to overrule the decisions of elected people (legislators), which is undemocratic".[27]

Justice Iacobucci responds fully to this argument in the following terms:

> "it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.
>
> So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen."[28]

To fulfill this mandate, the courts do not have to substitute themselves for legislatures or governments. It is sufficient for them to ensure respect for the Constitution, and they "have been expressly invited to perform that role by the Constitution itself."[29] By ruling on the constitutional validity of laws and executive decisions, the courts facilitate and sustain dialogue with the other two levels of government. Such dialogue is vital: it holds them accountable to each other: "[t]his dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it."[30]

Former Chief Justice Dickson clarifies the spirit in which the judiciary conducts the conversation:

> "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[31]

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[26] *Vriend, ibid*. para 132.
[27] *Ibid*. para 133.
[28] *Ibid*. para 134-35.
[29] *Ibid*. para 136.
[30] *Ibid*. para 139.
[31] *R v. Oakes*, 1986 1 SCR 103, para 64, 26 DLR (4) 200.

With respect to the *Charter* in particular, the legislative and executive branches of government are required to uphold the values and principles set out in the Charter. If they fail to do so, the judiciary must be ready to intervene to ensure that these values and principles are adequately protected. In doing so, judges are not acting undemocratically, but rather fulfilling the role that elected officials have given them. By intervening to ensure that the language rights enacted by the legislator are respected, the courts set themselves up as guardians of public order against the arbitrary nature of the decisions before them, reminding the legislators of the principles that serve as a basis for implementing the values of the *Charter*.

Let us now turn to these principles, which should guide our approach to the revision of the *Official Languages Act*.

A. The Charter and the Interpretation of Language Rights

Before the adoption of the *Charter*, it was thought that courts would interpret language rights broadly and generously. However, in 1986, three decisions were rendered - *MacDonald, SANB and Bilodeau* – which produced the opposite effect. In those decisions, the Supreme Court of Canada said, and it is worth repeating, that the courts must exercise restraint in interpreting language rights, since these rights, unlike other fundamental rights, originated from a political compromise.

For example, in *MacDonald*, Beetz J. said that section 133 of the *Constitution Act, 1867* did not introduce a program or system of official bilingualism at the federal level and in the province of Québec. Rather, that section provided for a limited form of mandatory bilingualism in the legislative branch, combined with an even more limited form of optional unilingualism, at the discretion of the person speaking in parliamentary debates or in a court proceeding, as well as the drafter or author of pleadings or court documents. He added that this system represents a constitutional minimum resulting from a historical compromise that can be supplemented by relevant federal and provincial legislation. But he said it is not the role of the courts to interpret, improve, modify, or add to this historic constitutional compromise.[32]

In the *Société des Acadiens* decision, the Supreme Court of Canada held that the rights guaranteed for New Brunswick courts by section 19 of the *Charter* are similar in nature and scope to those guaranteed by section 133 of the *Constitution Act, 1867* for Canadian and Québec courts. In essence, the court said that language rights, being foreign to the requirements of natural justice, must not be confounded with them. The Court added that language rights are the same as those guaranteed by section 17 of the *Charter* with respect to the debates of Parliament. The speaker, drafter, or author of court proceedings has the constitutionally protected power to speak or write in the official language of their choice.[33] Thus, section 19 of the *Charter* does not guarantee that the

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[32] *MacDonald v. City of Montréal*, 1986 1 SCR 460 [*MacDonald*], para 103-04. See also *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education*. 1986 1 SCR 549, para 65 and 68.
[33] *Société des Acadiens, ibid*. para 53.

speaker will be heard or understood in the language of their choice, nor does it confer a constitutional right to do so.

In the 1986 trilogy of decisions, the Supreme Court of Canada said that language rights are not truly fundamental rights, that they are the product of a *political compromise* that cannot be expanded through judicial interpretation. Oddly, the Supreme Court of Canada said that the State and its representatives, when acting in their official capacity, enjoy a linguistic freedom that is independent of that of citizens. One is left to wonder whether Premier Blaine Higgs may be drawing his logic regarding language rights from the narrow reasoning of that trilogy, which, as we shall see, has since been rejected.

But the *Charter* was designed precisely to recognize the rights and freedoms of citizens vis-à-vis the State. Consequently, in providing services to the community, the State and its representatives must fulfill certain obligations and responsibilities, including the obligation to give the public a real choice as to the language used. I find it shocking, to say the least, that representatives of the State could deny citizens their rights that were specifically designed for them.

B. A New Beginning

The restrictive approach to the interpretation of language rights proposed in the 1986 trilogy was nuanced in several subsequent decisions.[34] These decisions reaffirmed that language rights were an important means of supporting official language communities and their culture. They adopted a broad interpretation of these rights considering their purpose, though they did not go so far as to challenge the principles of political compromise and judicial restraint. That would happen a few years later in other Supreme Court of Canada decisions, *Reference re Secession of Québec*[35], *R. v. Beaulac*[36] and *Arsenault-Cameron v. Prince Edward Island*.[37]

1. The Reference re Secession of Québec and the Principle of the Protection of Minorities

Although not strictly a decision dealing with language rights, the *Reference re Secession of Québec* remains a key decision for anyone interested in the issue. In it, the Supreme Court of Canada stated that the Canadian Constitution is based on four fundamental guiding principles: federalism, democracy, constitutionalism and the rule of law and, finally, respect for minority rights. The Court said these guiding principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based".[38] It added that these principles have dictated major

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[34] See *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* 1987 1 SCR 1148, 40 DLR (4) 18; *Ford v Québec (Attorney General)*, 1988 2 SCR 712, 54 DLR (4) 577; *Mahé, supra* note 1; *Reference re Manitoba Language Rights*, 1992 1 SCR 212, 88 DRL (4) 385; and *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), 1993 1 SCR 839, 100 DLR (4) 723 [*Reference re Public Schools Act*].

[35] *Reference re Secession of Québec, supra*.

[36] *Beaulac, supra*.

[37] *Arsenault-Cameron, supra*.

[38] *Reference re Secession of Québec, supra* at para 49.

elements of our constitutional structure and are its *lifeblood*.[39] Furthermore, these principles "assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions".[40] Just as important, it said, "respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"".[41] These principles are not merely descriptive. They have a powerful standard-setting force, and are binding on both courts and governments. They are not expressly stated in the Constitution, but they can, by virtue of a written provision, give rise to real legal obligations that set significant limits on government action.[42]

For the purposes of this paper, we will focus on the principle of minority rights, without wishing to diminish the importance of the other three principles. According to the Supreme Court of Canada, the principle of minority rights has its origins in the protection of the educational rights of religious minorities guaranteed by section 93 of the *Constitution Act, 1867*, and the provisions of the *Charter* relating to the protection of minority language and educational rights.[43] With respect to the *Charter*, the Court stated that "[u]ndoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities".[44] It recognized that "a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority".[45]

The Supreme Court of Canada stated that the constitutional provisions protecting minority language rights, religious rights and educational rights are also the result of a historical compromise. And contrary to what was stated in the 1986 trilogy, these provisions are based on principles, even if they are the result of political negotiations and compromises, said the Court.[46] The protection of minorities is part of our history, not just a principle invented by the *Charter* in 1982.[47]

The Supreme Court did not specify the nature and scope of guiding principles such as the protection of minorities. However, in the *Reference re Provincial Court Judges*[48], speaking about the significance of constitutional principles, it did give a serious warning and a reminder that these principles are not an invitation to disregard the written Constitution.[49] It emphasized the importance of the written text of the Constitution and stated that a written constitution promotes

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[39] *Ibid*. para 51.
[40] *Ibid*. para 52.
[41] *Ibid*.
[42] *Ibid*. para 54.
[43] *Ibid*. para 79.
[44] *Ibid*. para 81.
[45] *Ibid*. para 74.
[46] *Ibid*. para 80-81.
[47] *Ibid*.
[48] *Reference re Remuneration of Judges of the Prov. Court of P.E.I.; Reference re Independence and Impartiality of Judges of the Prov. Court of P.E.I.,* 1997, 3 SCR 3, 150 DLR (4) 577 [*Reference re Judges of the Prov. Court*].
[49] *Ibid*. para 93.

legal certainty and predictability, provides "a foundation and a touchstone for the exercise of constitutional judicial review".[50] The Supreme Court added that constitutional principles can guide the courts in interpreting constitutional texts and fill in gaps or deficiencies in those texts.[51]

The fact that these principles may be useful in governing the interpretation of the written text of the Constitution is consistent with the traditional role of the courts. However, allowing courts to invoke these principles to fill in gaps in constitutional texts raises a different set of problems. Firstly, it becomes necessary to demonstrate that gaps exist in the language of the constitutional text and, secondly, that it is necessary to fill those gaps to support the logic behind the text. The next question is whether this confers on judges the power to engage in drafting text, where the legislature left off.[52] The Court set a clear limit to the legal scope of these principles when it stated they are not an invitation to disregard the written text of the Constitution.[53]

There is a significant difference between the use of unwritten principles as stand-alone grounds to strike down a law, and their use as an interpretive tool in the discussion of constitutional issues. When a court bases itself on unwritten principles to strike down a law or government action, it is reasonable to think that the ruling flows from the text of the Constitution. So, when unwritten principles give rise to rights that challenge the validity of a law, they can be said to flow from the text of the Constitution. Even if they are not expressly set out in the text, these rights arise from it when they are understood and interpreted in their full and proper legal, historical, and political contexts. That is how unwritten or structural principles assist the courts in revealing the full meaning of the Constitution, and in fleshing out its provisions.[54]

That said, what is the scope of the constitutional principle of the protection of minorities with respect to language rights? In *Lalonde et al. v. Health Services Restructuring Commission*,[55] the Ontario Court of Appeal used this principle as a key factor in the protection and development of language rights in Canada. In its view, the constitutional principle of the protection of minorities was a shield against any attempt to revert to a restrictive interpretation of language rights. Moreover, the Ontario Court of Appeal concluded that the interpretation rule flowing from this principle applies not only to constitutional guarantees, but also to language rights set out in laws.

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[50] *Reference re Secession of Québec, supra* at para 53.
[51] *Reference re Judges of the Prov. Court, supra* at para 95.
[52] See J. LeClair, «Canada's Unfathomable Unwritten Constitutional Principles» 2002, Queen's LJ 389; R. Elliott, «References, Structural Argumentation and the Organizing Principles of Canada's Constitution», 2001, 80 CBR 67 [«Organizing Principles of Canada's Constitution»]; M. Walters, «The Common Law Constitution of Canada: Return to *Lex non Scripta* as Fundamental Law», 2001, 51 UTLJ 91; S. Choudry, «Unwritten Constitutionalism in Canada: Where do Things Stand?», 2001, 35 CBLJ 113; P. Monahan, «The Public Policy Role of the Supreme Court of Canada in The Secession Reference», 1999 11 NJCL 65.
[53] *Reference re Secession of Québec, supra* note 175. See also, *Eurig Estate (Re)*, 1998 2 SCR 565, 165 DLR (4) 1, para 66: implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text»; and *Reference re Judges of the Prov. Court, supra*, para 93.
[54] See «Organizing Principles of Canada's Constitution», *supra*.
[55] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 O.R. (3) 577, [2001] O.J. No. 4767 (QL) (CA) [*Lalonde*].

Those principles enabled it to rule on the validity of a discretionary decision relating to the role and function of an existing institution, in this case the Montfort Hospital.

The New Brunswick Court of Appeal, in *Charlebois v. City of Moncton*,[56] took a more traditional approach to the role that these guiding principles can play. The Court recognized that the underlying principles have dictated major aspects of Canada's constitutional structure and are its lifeblood.[57] However, it also stated that these principles cannot be used to overturn government action,[58] but they will be useful in interpreting existing language rights and in clarifying the meaning of the written text of the Constitution.[59]

In light of these decisions, we can conclude that the use to which these principles may be put has yet to be determined.

2. Beaulac or the End of the 1986 Trilogy

The *Beaulac* case was a major turning point in language rights. With that decision, the Supreme Court of Canada seized the opportunity to restore order to the interpretation of principles that should guide language rights. The majority decision, rendered by Bastarache J., stated that with respect to the principle of progression towards language equality:

> "The principle of advancement does not exhaust section 16 which formally recognizes the principle of equality of the two official languages of Canada. [...] I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the *Charter*, which formalized the notion of advancement of the objective of equality of the official languages of Canada in the Jones case, supra, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time."[60]

The Court added that, to the extent that it advocated a restrictive interpretation of language rights, the judgment re *Société des Acadiens* must be overruled.[61]

> "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. ... To the extent that *Société des Acadiens du Nouveau-Brunswick* ... stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful

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[56] *Charlebois v. Moncton (City)*. 2001 NBCA 117.
[57] *Ibid*. para 54.
[58] *Ibid*. para 58.
[59] *Ibid*. para 56.
[60] *Beaulac, supra*, para 22 and 24.
[61] *Beaulac, ibid*. para 25.

> to reaffirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin."[62]

The Supreme Court of Canada also stated that language rights are intended "to protect the country's official language minorities and to ensure the equality of status of English and French..."[63] The Court also emphasized that the principle of equality in language law is not limited in meaning, but must be given its true meaning: "This Court has recognized that substantive equality is the correct norm to apply in Canadian law".[64] Therefore, when establishing institutional bilingualism, the government must ensure equal access to services of equal quality for members of both official language communities. The State must take into account the specific needs of the minority community. The exercise of language rights is not exceptional and cannot be considered as a simple request for accommodation.[65] They require government action for their implementation and therefore create obligations for the State.

With respect to the argument that language rights are the result of political compromise, the Supreme Court of Canada noted that sections 7 to 15 of the *Charter* are also the result of political compromise. However, there is no reason in Canada's constitutional history to apply a restrictive interpretation to these rights. The Court concluded that the existence of a political compromise has no bearing on the scope of language rights.[66] There is no contradiction, it said, between the protection of individual liberty and personal dignity, and the broader objective of recognizing the rights of official language communities. The objective of protecting official language minorities is achieved by the fact that all members of the minority community can exercise independent and individual rights, rights that are justified by the very existence of the community. Language rights are neither negative nor passive rights; they are rights that can only be exercised if the means are provided.[67] In other words, the reason for their protection is no different from that of other fundamental rights recognized by the Charter, and they should therefore not be treated differently.

3. Arseneault-Cameron or the Consolidation of Beaulac

Although the *Arsenault-Cameron* decision dealt with the right to minority language education, guaranteed by section 23 of the *Charter*, the Supreme Court of Canada took the opportunity to consolidate the new approach to the interpretation of language rights set out in *Beaulac*. Speaking for a unanimous Court, Major and Bastarache JJ. reiterated the conclusion reached in *Beaulac*, reaffirming that language rights being the result of a political compromise is not unique to them and does not affect their scope.[68] This served to confirm the principle expressed in that case: that

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[62] *Ibid*.
[63] *Ibid*. para 41.
[64] *Ibid*. para 22.
[65] *Ibid*. para 24.
[66] *Ibid*.
[67] *Ibid*. para 20.
[68] *Arsenault-Cameron, supra*, para 27.

language rights must always be interpreted in a way that is consistent with the preservation and development of official language communities in Canada.

The Supreme Court of Canada also noted that language rights also serve to redress past injustices suffered by the minority community. In exercising their discretionary power, government authorities must consider the requirements of the *Charter* and give sufficient weight to the promotion and preservation of the minority language culture.[69] The Court also emphasized that substantive equality requires that official language minorities be treated differently from the majority, when necessary, because of their particular circumstances and needs.[70] Accordingly, in order to move closer to actual, substantive equality, the governments must take into account the context and the effect of each measure on the minority group and ensure that it does not have a negative impact on the group.

4. The decisions that followed

We will now consider three other decisions of the Supreme Court of Canada: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*[71], *Solski (Tutor of) v. Québec (Attorney General)*[72], and *DesRochers v. Canada (Industry)*[73] and also look at some New Brunswick decisions.

(i) The Doucet-Boudreau decision or the extension of the new trilogy

The main issue in *Doucet-Boudreau* was whether, after finding that section 23 of the *Charter* had been violated and then ordering the province to make efforts to establish homogeneous French-language educational facilities and programs within a specified period, the Nova Scotia Supreme Court had jurisdiction under section 24(1) of the *Charter* to hold the province accountable.

In answering the question, Justices Iacobucci and Arbour, who wrote the Court's 5-4 majority decision,[74] focused on the principles that should guide courts in interpreting language rights guaranteed by the *Charter*. They reconfirmed that the *Charter* must be given a broad and liberal interpretation, not a narrow or formalistic one.[75] This broad and liberal interpretation applies as much to remedies under the *Charter* as to the rights guaranteed in it.

In the Court's view, the purpose of language rights is "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population".[76] The Court was reiterating the view it had taken in the *Mahé* decision, that any guarantee of language rights

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[69] *Ibid*. para 30.
[70] *Ibid*. para 31.
[71] *Doucet-Boudreau v. Nouvelle-Écosse (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*].
[72] *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 SCR 201 [*Solski*].
[73] *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 SCR 194 [*DesRochers*].
[74] While the Court was divided on the issue of the interpretation of subsection 24(1), no judge questioned the principles enunciated by the majority regarding the interpretation of language rights.
[75] *Doucet-Boudreau, supra* note 230, para 23.
[76] *Ibid*. para 26.

cannot be separated from concern for the culture conveyed by the language in question.[77] The Court then referred to the remedial nature of language rights, which has been confirmed in numerous decisions.[78] The purpose of language rights is to redress past injustices, not only by halting the gradual erosion of official language minority cultures in Canada, but also by actively promoting their development. For this reason, language rights must be interpreted in recognition of "previous injustices that have gone unredressed and which have required the entrenchment of protection of minority language rights".[79]

The Court also points out that the fact that language rights are the result of a political compromise does not affect their nature or their importance.[80] Another characteristic of language rights, wrote the majority, is that they are particularly vulnerable to government inaction or procrastination.[81] As a result, the risk of assimilation increases as governments fail to meet their language obligations. If delay, procrastination, or hesitation is tolerated, it will allow governments to eventually evade their obligations since the communities for which these rights were adopted will disappear or become so weakened that the exercise of these rights will become futile or their implementation pointless.

(ii) The Solski decision and the principle of cultural and linguistic security of minority communities

In *Solski*, the Supreme Court of Canada reviewed the history of language rights in Canada. Among other things, it pointed out that, even before sections 16 to 23 of the *Charter* came into force, section 133 of the *Constitution Act, 1867* contained an embryonic language framework.[82] Moreover, laws of considerable scope had been implemented at the federal level and in several provinces to recognize the language rights of minority communities, such as the *Official Languages Act*[83] adopted by the Parliament of Canada in 1969, or the *Official Languages Act of New Brunswick*[84] adopted the same year by that province. These laws deal with situations that involve not only individual rights, but the very existence of linguistic communities and their perception of their future.[85]

The Court also recognized that accommodating language rights is challenging given the fact that there are two levels of social and legal relationships in Canadian society. On the one hand, the personal development of each member of the minorities and their families that must be ensured, while on the other hand, language questions affect the development and presence of English-speaking minorities in Québec and of French-speaking minorities elsewhere in Canada. Language rights also raise the issue of the perception that Québec's francophone community has of their

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[77] *Mahé, supra* note 1, p 362.
[78] *Doucet-Boudreau, supra* para 27.
[79] *Doucet-Boudreau, ibid*. para 27 and *Reference re Public Schools Act, ibid*. p 850.
[80] *Doucet-Boudreau, ibid*. See also *Beaulac, supra*, para 25, and *Arsenault-Cameron, supra*, para 27.
[81] *Doucet-Boudreau, ibid*. para 29.
[82] *Solski, supra*, para 4.
[83] LC 1969, c 54.
[84] LNB 1969, c 14.
[85] *Solski, supra*.

future in Canada given that, while it is a majority in Québec, it is a minority in Canada and even more so in North America. Add to this already complex picture the serious difficulties caused by the rate of assimilation of francophone minorities outside Québec, whose hard-fought language rights have only recently been won.[86]

The Supreme Court of Canada thus highlights the issues involved in the linguistic framework of Canadian society, the objective of which is to protect minority communities at the provincial level, while recognizing the vulnerability of the French language, both nationally and in the province of Québec. These sometimes-conflicting challenges underscore the urgency of engaging in a frank and open dialogue on these issues. For the minority community, language remains central to its sense of belonging, and, while they are personally important, language rights are also essential to ensuring the linguistic and cultural security of this community. The collective dimension of language rights thus becomes a determining factor in the achievement of the purpose of these rights, which is to ensure the survival and development of linguistic communities. Judicial interpretation thus has the responsibility of reconciling sometimes divergent perceptions and interests. Therefore, the social, demographic, and historical contexts are the necessary backdrop for the analysis of language rights.[87]

(iii) The Desrochers decision and the concept of substantive equality

In *Desrochers*, the Supreme Court of Canada reiterated that courts are required to interpret language rights liberally and purposefully and that the relevant provisions must be interpreted in a manner consistent with the preservation and development of official language communities in Canada. The Court noted that it has repeatedly reaffirmed that the concept of equality of language rights must be given its true meaning, that substantive, as opposed to formal, equality must be the norm, and that the exercise of language rights must not be viewed as a mere request for accommodation.[88]

If the principle of linguistic equality in the delivery of services set out in section 20 of the *Charter* entails an obligation to provide services of equal quality to the public in both official languages, the question arises as to what is meant by "*equal quality*"? To provide a service of *equal quality*, it will be sufficient for the government, as a rule, to communicate and provide the same service equally in both official languages. On the other hand, it will sometimes be necessary to go further and take into account the specific needs of the language community receiving the services and adapt these services to its needs and cultural reality. A service that is adapted to the needs of the majority and is simply offered to the minority in its language constitutes, at best, an accommodation and might not meet the requirement of *equal quality* of service.[89] The Supreme Court of Canada stated that "it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services with distinct content. Depending on the nature of the service in question, it is

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[86] *Ibid*. para 5.
[87] *Ibid*.
[88] *DesRochers, supra*, para 44.
[89] *Ibid*. para 47.

possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question".[90]

(iv) New Brunswick decisions

New Brunswick is the only officially bilingual province in Canada. While other provinces recognize certain language rights and are subject to obligations under legislation or constitutional enactments, none has declared itself officially bilingual. As the New Brunswick Court of Appeal noted in *Charlebois v. City of Moncton*:

> "the recent history of the last thirty years shows that successive New Brunswick governments have, on four separate occasions during that period, enacted language rights legislation or have entrenched language rights in the Canadian Constitution which collectively provide the province with a constitutional language regime quite particular to New Brunswick and unique in the country. Obviously, these legislative and constitutional provisions impose obligations on the province which are also particular to New Brunswick."[91]

The Court of Appeal noted that the bilingualism framework established by the Act in New Brunswick is not personal bilingualism, since it does not require individuals to acquire both official languages. Rather, it is an institutional bilingualism which is intended to promote the use of two languages by the province and its institutions in the delivery of public services. Under such a regime, individuals have the choice of using either English or French in their dealings with government institutions.[92]

The Court stated:

> "Given the significant role played in the history of this province by the law and the Constitution in matters of language rights as I have just described, I think it is quite appropriate to recall, as recognized by Canadian language rights case law, that the recognition of the status of official languages is both a legal and a political act. Politically, the recognition of the constitutional principle of the equality of official languages in New Brunswick is the manifestation of a fundamental political choice based on a compromise between the two recognized official linguistic communities of our province. Legally, it is incumbent upon the courts to interpret the scope of *Charter*-guaranteed language rights not only by referencing the history and sources of these rights to determine their purpose and scope but also by referencing the constitutional documents themselves. A consideration of the historical evolution of minority rights in New Brunswick is one of the requirements that flows from the broad and liberal interpretation that should be adopted in this matter."[93]

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[90] *Ibid*. para 51.
[91] *Charlebois v. Moncton, supra*, para 8.
[92] *Ibid*. para 10.
[93] *Ibid*. para 11.

The Court of Appeal found that it was impossible to understand the scope of language guarantees without considering the fundamental principle that embodies both the language policy implemented in New Brunswick and the government's commitment to bilingualism and biculturalism. It added that "[t]he constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's language guarantees regime".[94]

Referring to the principles of interpretation set out in *Beaulac*, the Court of Appeal concluded that the purpose of language rights is to preserve the two official languages and the cultures they represent and to enhance the vitality and development of the two official language communities. It added that language rights are remedial in nature and have concrete consequences. They impose an obligation on the provincial government to take positive measures to ensure that the minority official language community enjoys equal status and equal rights and privileges with the majority official language community. The principle of equality is a dynamic concept which requires as a minimum measure the equal treatment of both language communities, but in certain circumstances where necessary to achieve equality, differential treatment in favour of a linguistic minority to achieve the collective as well as the individual dimension of substantive equality of status.[95]

In *Gautreau v. New Brunswick*,[96] Richard J. noted that equality is "[Translation] a question of dignity, pride and mutual respect of individuals in society. We cannot accept and justify different standards from one language to another".[97] In *R. v. Gaudet*,[98] Lavigne J. stated: "[Translation] It is not sufficient that a linguistic guarantee is granted on paper; it still has to be used or implemented to make sense".[99] The special linguistic status that the province of New Brunswick has given itself distinguishes it from other Canadian jurisdictions: "[Translation] [this status] testifies to the importance of New Brunswickers' commitment to language rights and therefore requires increased respect that is not found in other Canadian jurisdictions."[100] The interpretation of language rights must therefore be responsive to context, and the interpretation process must be consistent with the need to take into account the purpose of the guarantee in question and the preservation and development of official language communities.

> Language rights must be interpreted in a context-sensitive manner. They must remain living rights and not be frozen by past political arrangements. In the words of Michel Bastarache [...]: "[Translation] The judicial work is not the work of an archaeologist tending to specify what the founders of the Constitution had exactly envisaged at the outset, but

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[94] *Ibid*. para 62.
[95] *Ibid*. para 80.
[96] *Gautreau v. New Brunswick (1989)*, 101 NBR (2) 1, overturned by the Court of Appeal on another issue (1990), 109 NBR (e) 54, and leave to appeal to the Supreme Court of Canada denied, [1991] 3 SCR viii.
[97] *Ibid*. p 28.
[98] *R v. Gaudet*, 2010 NBQB 27, 355 NBR (2) 277.
[99] *Ibid*. para 24.
[100] *Ibid*. para 28.

> rather an effort to ascertain what the text conceived at that time may mean to us now". An analysis of the history of language rights in Canada, and more specifically in New Brunswick, reveals a subtle but steady evolution in the language situation in New Brunswick. The linguistic situation in New Brunswick is in a state of constant change and the gains made by the linguistic minority today are the result of a long evolution.[101]

In a relatively recent decision[102], which unfortunately has not received the attention it deserves, Justice Denise A. LeBlanc wrote, after reviewing the principles that should guide the interpretation of language rights:

> "The New Brunswick government and its institutions cannot, by contract or in a collective agreement repeal, limit or contravene the provisions of OLA, or the Charter for that matter, and, in case of conflict, the OLA prevails."[103]

This is a warning that should not need to be given, but unfortunately the history of New Brunswick in matters of official languages reminds us that it is sometimes necessary to repeat the obvious several times before it is finally, hopefully, understood.

Finally, Chief Justice Drapeau of the Court of Appeal, after indicating that the courts must avoid giving a restrictive interpretation to statutory and constitutional provisions dealing with language rights, adds that the interpretation most likely to reflect the application of the following principles should be favoured:

(1) the right to use one or the other official language requires acknowledgement of a duty on the part of the state to take positive steps to promote the exercise of that right;

(2) the objective of the entrenchment of this right in the *Charter* was none other than to contribute to "the preservation and protection of official language communities".[104]

It is these principles that must guide us in the present review of the *Official Languages Act*.

In the next section, I will discuss the proposed changes that I believe should be part of this review if we are still aiming to achieve substantive equality.

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[101] *Ibid*. para 39-40.
[102] *Her Majesty the Queen v. Canadian Union of Public Employees, Local 4848*, 2019 NBQB 097.
[103] *Ibid*. para 95.
[104] *R v. Losier*, 2011 NBCA 102, 380 NBR (2) 115, para 10.

PART III: THE OLA: A QUASI-CONSTITUTIONAL STATUTE (PROPOSED AMENDMENTS)

In *Canada (A.G.) v. Viola*, the Federal Court of Appeal described Canada's *Official Languages Act* [105] in the following terms:

> "The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of the *Charter* as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the *Charter*, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it."[106]

This description applies equally well to the *Official Languages Act* of New Brunswick and the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, which are also quasi-constitutional statutes that express the fundamental objectives of New Brunswick society. Both statutes must also be interpreted in a manner that promotes the policy considerations that underlie them.

With respect to the *Official Languages Act* of New Brunswick, its quasi-constitutional character is confirmed in its preamble. The preamble reproduces verbatim sections 16 to 20 of the *Canadian Charter of Rights and Freedoms*.

The preamble states:

WHEREAS the Constitution of Canada provides that English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the Legislature and Government of New Brunswick; [Section 16(2) of the *Charter*].

AND WHEREAS the Constitution of Canada confers upon the public, in New Brunswick, the right to use English or French in the Legislature and in the courts of New Brunswick, as well as to have access to the laws of New Brunswick in both official languages; [sections 17(2), 18(2) and 19(2) of the *Charter*]

AND WHEREAS the Constitution of Canada also provides for the right of any member of the public to communicate with and to receive available services from any office of an institution of the Legislature or Government of New Brunswick in either official language; [subsection 20(2) of the *Charter*].

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[105] RSC 1985, c 31 (4th Supp) [*Federal OLA*].
[106] 1991 1 FC 373, para 16, [1990] ACF no 1052 (QL) (CA).

AND WHEREAS the Constitution of Canada also recognizes that 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; [s.16.1 of the *Charter*].

AND WHEREAS the Constitution of Canada affirms, with respect to both official languages, the authority of the Legislature and Government of New Brunswick to advance the status, rights and privileges set out therein; [subsection 16(3) of the *Charter*].

AND WHEREAS New Brunswick is committed to enacting an *Official Languages Act* that respects the rights conferred by the *Canadian Charter of Rights and Freedoms* and allows the Legislature and the Government to fulfill their obligations under the Charter.

In addition, section 1.1 of the OLA defines the purpose of the Act as follows:

(a) to ensure respect for English and French as the official languages of New Brunswick;

(b) to ensure that English and French have equality of status and equal rights and privileges as to their use in all institutions of the Province; and

(c) to set out the powers and duties of the institutions of the Province with respect to the two official languages.

The preamble and the section defining the purpose of the Act are not simply adornments serving as stylistic embellishments. They have true meaning and are used in the interpretation of the provisions that follow. I often feel that government officials tend to forget the important legal significance of the preamble and section 1.1.

Section 2 designates the Premier as the **only** person responsible for the application of the *Official Languages Act*. The Legislature did so with the intention of sending a clear message to the machinery of government regarding the importance it attaches to the Act. Unfortunately, successive premiers since its adoption in 2002 seem to have forgotten the clear mandate that the Act gives them and have chosen to designate another Minister to "deal" with this task. It would be important in this review process to ensure that the person designated by the *Act* accepts the responsibilities assigned by the Legislative Assembly. We should not allow premiers to unilaterally change the Act and thus avoid their obligations.

Section 3 gives the *Official Languages Act* precedence over all other Acts, except the *Education Act* and any Act, law or provision that is designed to promote the equality of the two linguistic communities, or to establish separate educational institutions or cultural institutions. Therefore, distinct educational institutions, distinct cultural institutions, the province's school system, including the English and French sections of the Department of Education, including schools, district education councils, community centres, universities and community colleges are not covered by the Act.

Politicians and government institutions all too easily forget that this legislation is at the top of the province's legislative hierarchy. The preamble and the provisions quoted evidently confirm the quasi-constitutional nature of the Act. Its quasi-constitutional status gives the Act an importance that other statutes do not have, and it is essential that it be taken into account in any revision of the Act.

Despite the importance of the *Official Languages Act*, and the fact that New Brunswick declared itself an officially bilingual province more than 50 years ago, the French language remains vulnerable in the province. Certain major demographic trends (language transfer, births, exogamy, age composition, migration) should be a source of concern. For example, although the population having French as its mother tongue has increased in sheer numbers since 1951 in New Brunswick, the proportion of that group within the province as a whole has continued to decline rapidly. If we compare the number of people who claim French as their mother tongue with the number of people who claim French as their first official language, we find that there are more people in the former group than the latter in New Brunswick. This should be of concern, because, apart from the fact that the francophone community is not integrating foreign language speakers, more and more people with French as their mother tongue are adopting English as their daily language at the expense of their mother tongue.

Add to this picture a fertility rate that is below replacement level, a language transfer rate that is close to 11% (and that rate is much higher in some regions of the province), a negative net migration rate, a low attraction capacity for immigrants and an aging population, and it is obvious that these major demographic trends will likely have negative effects on the vitality of the province's francophone community if nothing is done. Without becoming unduly pessimistic, it seems appropriate to consider that a certain social determinism could jeopardize the survival of the minority language community. To curb this trend, the provincial government will have to show a real willingness to act to provide the minority community with the means to redress its current demographic situation as quickly as possible.

In addition to living in an Anglo-dominant environment within its province, New Brunswick's francophone community is largely influenced by the Anglophone culture present throughout Canada and North America. In many regions of the province, and unfortunately in many Acadian regions, French is nearly non-existent in the linguistic landscape. It is therefore of the highest importance that public decision-makers have an accurate understanding of the influence of the majority environment on language and on individual behaviour. Indeed, studies have shown the negative effects of the "status language" on the minority language:

> (Translation) the majority group's language becomes a "status language"; it is the language that dominates intergroup contacts and will be used primarily in areas related

> to social mobility. In other words, the minority language will tend to become a "private language" and the dominant group's language will become the "public language."[107]

It is not surprising then, that in this context, some members of the minority community prefer to speak the language of the majority when they are in public. Even though most of them are aware that they have rights, they hesitate to invoke them for fear of disrupting and destabilizing a certain established order and for fear of being perceived as provocateurs. If we want to ensure the survival of the French language in New Brunswick, a radical change of attitude is required, at the very minimum. Recognition and implementation of language rights can enhance the status of the minority language, which is why they are so important in a context like New Brunswick. But the government must believe in these rights, and the francophone community must be determined to use them, and in this regard, nothing is certain.

In the current process of the revision of the *Official Languages Act*, it would be appropriate to clearly recognize that the French language is in a vulnerable situation and that it must receive greater support from government institutions to ensure its vitality and development.

It is often difficult for a member of the majority language community to understand the situation of a person in a minority situation. In fact, Anglophones in New Brunswick automatically take it for granted that they will be served in their language without delay, at the hospital, by Ambulance New Brunswick and by all provincial institutions, no matter where they are in the province. It seems perfectly normal for them to receive services in their language from private businesses, to work in their language, to have access to practice exams for professions in their language, or to have access to childcare services or a nursing home in their language.

For francophones in New Brunswick, obtaining these services in French is often haphazard and demanding them represents a political act, which, unfortunately, many are not prepared to do.

Evidently, in this context, we cannot underestimate the importance of maintaining strong institutions to protect the language and culture of the francophone community. The *Official Languages Act* must foster the development of the full potential of the francophone community by supporting its institutions. Institutional completeness[108] must not only be confirmed but actively supported by the provincial government, in education (from daycare to post-secondary), in health, in immigration, in culture, in justice, and so on.

To achieve this, I recommend that the *Official Languages Act* be amended to include:

- **a commitment from the provincial government and its institutions to protect and support the French language and the institutions of the francophone community in order to help support their vitality.**

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[107] R. Landry, R. Allard and K. Deveau, "Un modèle macroscopique du développement psycholangagier en contexte intergroupe minoritaire" (2008) *Diversité urbaine* 45 at 53-54.

[108] Linda Cardinal and Rémi Léger, "La complétude institutionnelle en perspective", in *Politique et Société*, digital release: November 29, 2017, https://id.erudit.org/iderudit/1042233ar

- **that the provincial government commit to supporting sectors that are key to the vitality of the francophone community (e.g. immigration, education, health, nursing homes, culture, justice, etc.) and to protect and promote strong institutions for the francophone community in these sectors.**
- **that the provincial government adopt a policy on francophone immigration in collaboration with representatives of the province's francophone community.**

To finalize the recognition of the distinctiveness of New Brunswick's linguistic characteristics in the *Canadian Charter of Rights and Freedoms*, I believe the time has come to merge the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* (Bill 88) with the *Official Languages Act*.

The *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* should, in the New Brunswick context, play a role similar to that played by Part VII of Canada's *Official Languages Act*. We need to give this Act a more visible place, as it has been overlooked, to say the least, since its adoption in 1981.

The *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* offers a detailed vision of the duality of the two official language communities in the province. Its preamble states that one of the legislator's goals in adopting the Act was to increase the opportunities for the French-speaking community to benefit from its cultural heritage and to preserve it for future generations. That is why the legislator considered it important to recognize the principle of equality of status of the two linguistic communities. This quasi-constitutional law must be interpreted broadly and liberally, in accordance with its purpose. It must be binding and have some means to bring about its implementation. The *Act Recognizing the Equality of Communities* must provide a framework for action by public institutions. What should that framework include?

First, the *Act Recognizing the Equality of Communities* reaffirms the equality of status and the equality of rights and privileges of the two communities. Second, the Government of New Brunswick shall *ensure* the protection of the equality of status and of the equal rights and privileges of the official language communities and, in particular, "their right to distinct institutions within which cultural, educational and social activities may be carried on". Although the law uses the adverbial phrase "en particulier/*in particular*" instead of the adverb "notamment/*including*" that is used in section 16.1 of the *Charter*, I am of the view that it still provides generous institutional protection that can be used to further clarify the scope of the institutions that section 16.1 protects.

Section 3 of the Act provides that "in the allocation of public resources and in its policies and programs," the government shall take "positive actions to promote the cultural, economic, educational and social development of the official linguistic communities".

In *Charlebois v. City of Moncton*, the New Brunswick Court of Appeal clearly explained the scope of this Act:

> "At the same time, subsection 16.1(2) of the *Charter* expressly provides that it is "the role of the legislature and government of New Brunswick to preserve and promote" the status, rights and privileges of the two official language communities. This provision encompasses, like section 23 of the *Charter*, a collective dimension and imposes on the government the obligation to act positively to ensure the respect and substantive application of these language guarantees. In addition, section 3 of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, the principles of which were entrenched in section 16.1 of the *Charter*, is more explicit about the commitment of the government and states that the government "shall, in its proposed laws, in the allocation of public resources and in its policies and programs, take positive actions to promote the cultural, economic, educational and social development of the official linguistic communities."[109]

Unfortunately, other than in the *Charlebois* decision, the *Act Recognizing the Equality of Communities* has received little, if any, mention in the courts since its adoption. Successive provincial governments have largely ignored it, as if it did not exist. The public does not seem to be aware of its existence. It is time to correct this situation.

I therefore propose that the following sections be added to the *Official Languages Act*:

- **Recognizing the unique character of New Brunswick, the French linguistic community and the English linguistic community are officially recognized as one province, for all purposes to which the authority of the Legislature of New Brunswick extends; the equality of status and the equal rights and privileges of the two communities are affirmed.**
- **The Government of New Brunswick is committed to ensuring the protection of the equality of status and the equality of rights and privileges of the official linguistic communities and in particular their rights to distinct institutions where cultural, educational, and social activities can take place.**
- **The Government of New Brunswick will, in its proposed legislation, in its allocation of public resources and its policies and programs, take positive measures to ensure the cultural, economic, educational and social development of the official language communities.**

In the next section, I will address the issue of the implementation of the *Official Languages Act*.

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[109] *Charlebois v. Moncton*, (City of), 2001 NBCA 117, at para 115.

PART IV: REVIEW OF THE OLA: IMPLEMENTATION (PROPOSAL OF AMENDMENTS)

We can adopt the best *Official Languages Act* there is, but without an proper implementation plan, it will have virtually no effect. When our current *Act* was revised in 2013, Section 5.1 was added. The purpose of this addition was to address the issue of implementation. The section seemed promising. Unfortunately, as I will show, successive governments failed to follow up on implementation and the section quickly fell into oblivion and indifference.

Section 5.1 was introduced as a result of the revision of the Act in 2013. The *Select Committee on the Revision of the Official Languages Act* explains the purposes of this provision as follows:

> "The committee believes that it is important to confirm in the Act the government's obligation to provide itself with a comprehensive plan for ensuring compliance with the Official Languages Act. This plan should present a variety of ways to meet challenges and contain innovative actions to promote the creation of a bilingual culture within the civil service and to advance the substantive equality of both official linguistic communities. This comprehensive plan should also identify mechanisms to put in place so that government can reflect the specific reality of each linguistic community when developing its programs and policies." [my emphasis].

The objective was noble, but unfortunately, the result, as we shall see, never met expectations. Let us analyze section 5.1.

Subsection 5.1(1) provides for the development of a plan setting out the way the obligations under the *Official Languages Act* are to be met. The plan must specify the goals and objectives of the province's obligations, as well as measures to ensure the equal status of the two linguistic communities, the equal use of English and French in the public service, the consideration of language of work when identifying work teams and developing linguistic profiles for positions in the public service. The plan must also propose measures to improve the bilingual capacity of senior civil service. In addition, it must set out measures to review and improve public signage policies, considering the two linguistic communities and the linguistic composition of a region. Finally, the plan must set out the performance measures used to evaluate the effectiveness of the measures and the time frames for their implementation.

Under subsection 5.1(2), the Premier is responsible for the central coordination of the plan and for ensuring its implementation. Section 5.1(3) provides that each component of the public service will be required to develop an action plan setting out how the goals and objectives and the implementation of the measures in the Plan will be achieved. Subsection 5.1(4) requires that, promptly after the end of a fiscal year, institutions covered by the provision submit a report to the Premier on the activities undertaken under their action plans. The Premier is required under subsection 5.1(5) to report annually to the Legislative Assembly on the activities undertaken under the plan.

The *Official Languages Act* therefore required the government to have an Implementation Plan as of December 5, 2013. However, it was not until July 24, 2015, that it "complied" with this obligation.[110] Since then, no changes have been made to the plan and no further mention has been made of section 5.1. For all intents and purposes, this section has remained an orphaned and forgotten provision.

We will therefore focus on the 2015 Plan, which has the "distinction" of being the only plan that "purports" to follow the obligations of Section 5.1.

(i) Section 5.1(1)(a)

Subsection 5.1(1) provides that the province shall develop a plan setting out the manner in which it will meet its obligations under the *Official Languages Act*. Paragraph 5.1(1)(a) specifically provides that the plan shall set out the goals and objectives of the province's obligations.

I found no clear statement of these goals and objectives in the 2015 Plan. It is true that in the section entitled "Vision by sector of activity", under the heading "language of service", we find the following statement:

> "An active offer and services of equal quality in English and French, according to the person's choice, regardless of location in the province.[111] And a little further: the plan "is designed to eliminate the shortfalls that persist.[...] It will link the findings to date with the overall anticipated outcomes, strategic and measurable objectives, and the means to be implemented."[112]

While I agree with these objectives, I find it difficult to conclude that they meet the intent of paragraph 5.1(1)(a). We would have expected the 2015 Plan to state clearly at the outset the nature of the obligations imposed by the *Official Languages Act* - which are not limited to language of service - and to set out for each of these obligations the province's goals and objectives.

On the subject of language of service, the province notes that, despite the fact that several years have passed since the language of service policy[113] was implemented, "the policy is still largely misunderstood or inappropriately applied.[114] The province therefore believes that institutions must "continue to implement the measures needed for full application of the [OLA] with respect to language of service".[115] The means by which this objective would be achieved remain fairly general. They provide, among other things, that "departments and agencies" ensure that all written and oral

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[110] *Plan on Official Languages - Official Bilingualism: A Fundamental Value*, 2015, p. 1, online: Government of New Brunswick https://www2.gnb.ca/content/dam/gnb/Departments/iga-aig/pdf/PlanonOfficialLanguagesOfficialBilingualismAFundamentalValue.pdf [Plan 2015].
[111] *Ibid.*, p 5.
[112] *Ibid.*, p 6.
[113] *Official Languages - Language of Service Policy and Guidelines, online: Government of New Brunswick* https://www2.gnb.ca/content/gnb/en/departments/finance/human_resources/content/policies_and_guidelines/language_service.html [Policy – Language of Service]
[114] Plan 2015, 12, p 10.
[115] Ibid., p 11.

communications are in the language of choice of the recipient, that the principle of active offer is applied, that “departments and agencies” ensure that the language skills of employees “are balanced to provide quality services in both official languages”, and that "departments and agencies” take measures to ensure that the language of service is the same in both official languages, that they will take steps to ensure that the language capabilities of employees in the other official language are maintained or improved, and finally, that they will ensure that service providers' contracts with third parties respect "the language criteria" set out in the language of service policy.

These are obligations that, for the most part, already exist in the Official Languages Act. Simply repeating them does not constitute their implementation as required by section 5.1.

(ii) Paragraph 5.1(1)(b)

Paragraph 5.1(1)(b) requires the province to set out in the Plan measures to ensure the equal status of the two linguistic communities. It would have been interesting if the authors of the Plan had defined what they understood by this statement, but this was not done. The section entitled "Legal Foundations" does refer to the *Act respecting the equality of the two linguistic communities* and to section 16.1 of the *Charter*, but nothing more. Focus 3, entitled “Development of the two official linguistic communities”, is the only place where an indirect reference is made to paragraph 5.1(1)(b). However, strategic objectives 3.1 (“Official bilingualism is a fundamental value conveyed by the government and its employees”) and 3.3 ("The government takes advantage of official bilingualism for the purposes of economic development and job creation") do not seem to me to be very relevant for the purposes of this paragraph.

Strategic objective 3.2 is perhaps more relevant in this regard. It states that “[i]mplementation or amendment of a policy or program takes into account its impact on the province’s Anglophone and Francophone communities”.[116] In this objective, we see an application of the principle of substantive equality. As I have already explained in another text, substantive equality is achieved when differences in the characteristics and circumstances of the minority community are taken into account, by offering services with distinct content or through a different delivery method in order to ensure that the minority receives services of the same quality as the majority.[117] The 2015 Plan, however, offers no guidance on how to achieve this objective, except to say that “Briefs submitted to the Executive Council will contain a section discussing the potential impact of the program or policy on Anglophone and Francophone communities”. There is no way of knowing if this is the case, but I doubt it.

The Plan goes on to state that “A practical guide will be developed for writing MECs concerning official languages”.[118] Again, I am not aware of any such guide.

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[116] Ibid., p 14.
[117] See, in particular, *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 SCR 194 [DesRochers].
[118] Plan 2015, supra, p 14.

(iii) Paragraphs 5.1(1)(c) and (d)

Paragraphs 5.1(1)(c) and (d) deal specifically with language of work. They state that the province shall propose in the Plan measures to ensure the equal use of English and French in the public service and to ensure that language of work is taken into account in determining work teams within the public service. The Plan must develop language profiles for public service positions.

Focus 2 of the 2015 Plan addresses paragraphs 5.1(1)(c) and (d). With respect to measures to ensure the equal use of English and French in the public service, this focus provides that "All employees will work in an environment and climate that will encourage them to use the official language of their choice in their workplace". To ensure that this environment and climate exists, the following is proposed as a means: "All departments and agencies will review their linguistic profiles and determine how to enable all employees to work in the language of their choice".[119] This approach may also be used to implement paragraph 5.1(1)(d), which requires the province to specify in the Plan measures to ensure that language of work is taken into account in determining work shifts in the public service and to develop language profiles for positions in the public service. The lack of detail in the Plan makes a serious analysis of this objective impossible.

The province then refers to the government's language of work policy, which has been in effect since 2009.[120] It notes that "most departments offer their staff the right to work in their language of choice", but they are also "the first to admit that, in some situations, it is very difficult, if not impossible, to work in one's language of choice if that language is French".[121] The reasons for the difficulty of working in French for public servants are said to be" time constraints and the presence of unilingual senior officials".[122] It was also added that in some cases, given the importance or complexity of a file, "it will be requested that the work be done in English, to avoid translation".[123]

As for specific measures to correct this situation, the province proposes, among other things, that "The preferred language of work of all employees will be identified, particularly with respect to work tools, performance reviews, drafting of documents".[124] I assume that the authors of the Plan meant that employees will have the right to choose both the official language in which they wish to receive their work instruments and performance appraisals and the language in which they wish to write their documents. Each of these elements is already included in the *Policy and Guidelines on Official Languages - Language of Work*. Therefore, these are not new measures.

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[119] Plan 2015, supra, p 12.
[120] Government of New Brunswick, Administration Manual, no AD-2919, vol 2, Language of Service Policy and Guidelines – Language of work, online: https://www2.gnb.ca/content/gnb/en/departments/finance/human_resources/content/policies_and_guidelines/language_work.html [Policy – Language of Work].
[121] Plan 2015, supra, p 12.
[122] *Ibid*.
[123] *Ibid*.
[124] *Ibid*.

The 2015 Plan also states that "support will be provided to managers to ensure that employees can work in their language of choice"[125], that "Small meetings will be held in a manner that encourages the use of both official languages", that "for large meetings, both official languages will be used"[126] and that "training courses offered to employees will be available in both official languages". We would have to see the action plans of the various parts of the public service to know whether these measures related to language of work have in fact been implemented, but to date, these plans have not been produced.

With respect to language of work, the 2015 Plan does not really include any new measures. It rehashes what already exists. Yet, this plan presented a golden opportunity to create the impetus for a permanent change of mentality within the public service.

Unfortunately, there is no clear commitment to this!

(iv) Paragraph 5.1(1)(e)

According to paragraph 5.1(1)(e) of the OLA, the Plan shall include measures to improve the bilingual capacity of senior management in the public service. The 2015 Plan makes it clear that the presence of unilingual senior management is one of the persistent barriers to the right to work in one's own language in the public service. We would therefore have expected that statements about executive bilingualism would be found under Focus 2 - Language of Work. However, in this plan, the two statements that specifically address this issue are found under Focus 1 - Language of Service.

In her 2015-2016 Annual Report, the Commissioner of Official Languages, Katherine d'Entremont, reacts as follows:

> "According to government representatives, the measures related to the bilingualism of senior management were placed in the "Language of Service" focus, as it was in that area that the unilingualism of managers would cause the most problems. Moreover, the drafters felt it was not relevant to repeat these measures in the "Language of Work" focus. At the very least, this explanation reveals a lack of understanding of the reality in the field. In fact, working in the official language of one's choice implies the ability of supervisors to communicate in the language of their employees."[127]

Strategic Objectives 1.2 and 1.3 of Focus 1 call for measures to be put in place to improve the bilingual capacity of "senior management" and "middle management" in the public service. The means (strategies) mentioned in the Plan to achieve the objective basically repeat the words of the

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[125] "The government will develop mechanisms to strengthen the bilingual capacity of senior management in the provincial public service to better serve the public".

[126] It would appear that a definition exists in common usage within the public service of what the authors mean by the terms "small meetings" and "large meetings". However, we have not been able to find it.

[127] Office of the Commissioner of Official Languages for New Brunswick, Investigation Report: Analysis of the Plan on Official languages -Official Bilingualism: A Fundamental Value -2015, March 2016, p 57 [Investigation Report: Plan on Official languages, 2015]

objective. Yet, as such, this Plan could have drawn on the excellent analysis of the situation undertaken by Commissioner d'Entremont in her 2014-2015 Annual Report.[128]

In this report, Commissioner d'Entremont gave prominence to the issue of bilingualism among senior public servants. The Commissioner said that official bilingualism has never meant that all government employees must speak both official languages. She showed that, based on the latest government data, only 41% of provincial civil servants are required to be bilingual.[129] She expressed surprised at this state of affairs: "However, one would expect those primarily responsible for applying the OLA, i.e., senior public servants, to be required to speak both languages. But, in Canada's only officially bilingual province, no policies or guidelines make it a requirement".[130] She adds that there are several reasons for this phenomenon, and she groups them into four categories that justify the fact that bilingualism must be an essential skill for senior public service positions:

1. Communicating with the two linguistic communities[131]
2. Ensuring the quality of bilingual services provided to the public[132]
3. Creating a bilingual work environment[133]
4. Embodying one of the province's fundamental values.[134]

Commissioner d'Entremont did not hesitate to describe the province's position on bilingualism in the senior public service as "ambiguous, if not contradictory".[135]

The Commissioner therefore recommended that, for the years 2015-2019, all competitions and staffing processes for deputy minister, assistant deputy minister and senior executive positions include as a prerequisite the ability to speak and understand both official languages, or a commitment to acquire this proficiency within three years of the date of appointment. Then, starting in 2020, the ability to speak and understand both official languages would become a prerequisite for appointment to any of these positions. Without bothering to study the Commissioner's proposals further, the government rejected these recommendations outright and without any discussions.[136]

In her investigation report on the *Analysis of the Official Languages Plan*, Commissioner d'Entremont noted that the Plan did not set any targets for the bilingual capacity of executives.[137]

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[128] Office of the Commissioner of Official Languages for New Brunswick, Annual Report 2014-2015, online: https://officiallanguages.nb.ca/wp-content/uploads/2012/02/annual_report_2014-2015.pdf [Annual Report 2014-2015].
[129] *Ibid.*, p 18.
[130] *Ibid.*
[131] *Ibid.*, p 20.
[132] *Ibid.*, p 21.
[133] *Ibid.*
[134] *Ibid.*, p 22.
[135] *Ibid.*, p 24.
[136] «Government rejects call for all senior bureaucrats to be bilingual», CBC New Brunswick, online: http://www.cbc.ca/1.3117111.
[137] Investigation Report: Plan on Official languages, 2015, supra note 39.

She added that paragraph 5.1(1)(e) of the *Official Languages Act* requires the government to take measures to improve the language capacity of senior management. However, since the Plan does not provide for any such measures, she concludes that it does not comply with the Act.[138] She indicated that the only specific information mentioned in the Plan regarding bilingualism among senior public servants was the minimum level of second language proficiency required, namely the intermediate level two plus (2+),[139] which she considered too low.[140]

Commissioner d'Entremont then referred to a study conducted by the management consulting firm *Goss Gilroy* on second language training, which addressed the issue of the level of second language proficiency required of public servants,[141] and quoted the following statement: "Key respondents indicate that level 3 is the norm when staffing bilingual positions."[142] She therefore recommended that, in order to ensure that implementation complies with paragraph 5.1(1)(e) of the OLA, oral communication level 3, "Advanced", should be the minimum level. This position is diametrically opposed to that of Premier Higgs, who recently proposed a reduction in language requirements for public servants.

Further in her investigation report, Commissioner d'Entremont noted that "working in the official language of one's choice implies the ability of the supervisor to communicate in the language of their employees".[143] Indeed, for an employee to be able to exercise this right, it is not enough to allow them to work in the language of their choice. It is also necessary to create a work environment that "actively supports the use of English and French." [144] She wrote:

> "However, the Plan contains very few substantive measures to address the following challenges:
>
> - pressure exerted on Francophone employees by an organizational culture that favours English (close to 90% of the documents sent to the Translation Bureau by provincial departments are written in English);
> - constraints related to proficiency in the French language (presence of unilingual Anglophone managers, presence of unilingual Anglophone employees on teams, translation deadlines for documents, lack of knowledge of specialized terms in French, etc.);

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[138] *Ibid.*, p 9.
[139] *Ibid.*
[140] The Commissioner refers to the Second Language Oral Proficiency Evaluation scale, online: https://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/eval/FSLOralProficiency.pdf. The scale can be summarized as following: NOVICE (0+) Basic competency using memorized phrases.
BASIC (1) basic competency. BASIC PLUS (1+) basic competency plus INTERMEDIATE (2) limited proficiency in their second working language INTERMEDIATE PLUS (2+) limited proficiency in their second working language ADVANCED (3) General professional proficiency ADVANCED PLUS (3+) General professional proficiency plus SUPERIOR (4) Advanced professional proficiency
[141] Report on the Review of the New Brunswick Second Language Services, March 2011, Goss Gilroy Inc., quoted in Investigation Report: Plan on Official languages, 2015, supra note 39, p 10.
[142] Investigation Report: Plan on Official languages, 2015, *ibid.*
[143] *Ibid.*, p 13.
[144] *Ibid.*, p 14.

- the phenomenon of linguistic insecurity (employees believe they do not have a good grasp of their mother tongue), which can push Francophone civil servants to use English to express themselves."[145]

(v) Paragraph 5.1(1)(f)

Paragraph 5.1(1)(f) states that the province shall set out measures to provide for the review and the improvement, when necessary, of the public signage policies of the Province, which policies shall include consideration of the two linguistic communities and of the linguistic composition of a region.

The paragraph refers to section 29 of the OLA, which provides that "institutions shall publish all postings, publications and documents intended for the general public in both official languages". This appears to have been completely forgotten in the 2015 Plan as there is no mention of public signage.

(vi) Section 5.1(1)(g)

The final requirement of section 5.1(1) is found in paragraph (g), which calls for the Plan to include performance measures for evaluating the effectiveness of the actions implemented under the plan and the time frames within which they must be implemented.

The Plan generally provides that the Official Languages Coordination Unit of the Executive Council Office will evaluate annually the performance follow-up reports submitted by departments and agencies. However, nowhere is there mention of the nature of these performance measures. In only one place in the Plan, in Strategic Objective 1.5 of Focus 1 - Language of Service, is there mention of "mechanisms to measure progress with regard to language of service". The ways mentioned to achieve this objective are limited to two: an evaluation of "public feedback", and "annual reporting". Annual reports are already provided for in subsections 5.1(4) and (5) of the OLA. Therefore subsection 5.1(1) had to refer to something else when it mentions performance measures. With respect to "public feedback", I do not see how this is sufficient to meet the obligation in 5.1(1)(g). Relying solely on " public feedback " is, in my view, insufficient and ineffective. Who will be collecting these comments and what methodology will be used to do so? It should be noted that people in minority situations rarely tend to complain about a lack of service in their language and that the absence of complaints is not always a sure sign that all is well.

As for the timeline for the 2015 Plan, it appears to be five years, if we go by the Action Plan Template. It is now 2021, and I see nothing to convince me that even the fairly broad objectives of the plan have been implemented.

I believe it is important that changes be made to section 5.1 to make it more than a statement of intent, to make it a real measurement of implementation.

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[145] *Ibid.*

I therefore propose the following additions to the provision:

5.1(1)The Province **undertakes to** prepare an **annual** plan setting **for the implementation of its** obligations under this Act, and the plan shall include the following:

(a) goals and objectives with respect to its obligations under this Act;

(b) measures to ensure the equality of status of the two linguistic communities;

(c) measures to ensure the equality of use of the English and French language in the public service;

(d) 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;

(e) measures to improve the bilingual capacity of senior management in the public service;

(f) measures to provide for the review and the improvement, when necessary, of the public signage policies of the Province, which policies shall include consideration of the two linguistic communities and of the linguistic composition of a region; and

(g) performance measures for evaluating the effectiveness of the measures implemented under the plan and time frames within which they must be implemented.

5.1(2) The Premier is responsible for ensuring central government coordination and oversight of the implementation of the plan prepared under subsection (1).

5.1(3) Each portion of the public service shall prepare an action plan setting out how it will meet the goals and objectives included in the plan prepared under subsection (1) and how it will implement the measures included in that plan.

5.1(4) **In the month following** the end of each fiscal year, each portion of the public service **shall** submit a report to the Premier with respect to the activities under its action plan.

5.1(5) **Within one month after** the end of a fiscal year and after receiving reports under subsection (4), the Premier shall table **before the Standing Committee on Official Languages of the Legislative a report on the activities undertaken under the plan developed under subsection (1).**

5.1(6) **The Standing Committee on Official Languages of the Legislative Assembly shall review the report to ensure that it complies section 5.1 and shall make such recommendations as it considers appropriate. (Provision will have to be made for the establishment of such a committee. I will come back to this in another text).**

- **I am also proposing, in line with a recommendation by Commissioner d'Entremont, that for the years 2022 to 2025, all competitions and staffing processes for deputy ministers, assistant deputy ministers and senior managers include as a prerequisite the ability to speak and**

understand both official languages, or a commitment to acquire this ability within three years of the date of appointment, failing which the appointment will be revoked.

- That, as of 2025, the ability to speak and understand both official languages be a prerequisite for appointment to any of these positions.
- That the minimum language proficiency for these positions be set at 3.

In the next text, I will deal with official languages in the Legislative Assembly and legislation.

PART V: OLA REVIEW: PARLIAMENTARY AND LEGISLATIVE BILINGUALISM (PROPOSED AMENDMENTS)

Many people would be inclined to minimize the influence that legislative and parliamentary bilingualism can have on the development and vitality of a minority language community. Without claiming that this sector of activity outweighs, for example, the right to education in the minority language, it is undeniable that the role it plays is decisive both in terms of promoting the language and culture of the minority and in affirming the identity of the minority group in relation to the majority language group. It is also a means of asserting the rights of the official language minority group. Conversely, the absence of the minority language in this public sphere sends a negative message to the minority group about the status of their language.[146]

The constitutional and legislative clauses regarding legislative and parliamentary bilingualism are therefore of real value not only sociolinguistically, but also politically. They raise the status of the minority language in the political sphere by placing it on par with the majority language. Moreover, they provide the minority group with a certain legitimacy. As one author notes:

> "If we cannot, at a minimum, ensure the French language will be used in our legislatures and among our judiciary and lawmakers, it will become increasingly difficult to protect or encourage its use within the general population, and we will effectively be bidding it adieu within Canada."[147]

A. Parliamentary Bilingualism

On July 1, 1867, the date of Canadian Confederation, section 133 of the Constitution was the only section that dealt with parliamentary and legislative bilingualism.[148] It introduced an embryonic form of bilingualism or a linguistic asymmetry at both the federal and Québec levels. It provided that everyone was free to speak in English or French in the debates of the House of Commons and the Senate and in the Québec National Assembly, and specified that the minutes, records and journals of the Parliament of Canada and the Québec National Assembly must be in both official languages and that the Acts of Parliament and the National Assembly must also be printed and passed in both languages. A similar provision applied to the province of Manitoba when it joined Confederation in 1870.[149]

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[146] See, among others, R. Landry, «Autonomie culturelle et vitalité des communautés linguistiques officielles en situation minoritaire» (2009) 11 RCLF 19.

[147] T. Yurkewich, «Adieu à la langue française» (December 16, 2015), online: ABlawg.ca http://ablawg.ca/wp-content/uploads/2015/12/Blog_TY_Caron_Dec2015.pdf.

[148] *Constitution Act, 1867*, 30 & 31 Vict, c 3, reproduced in R.S.C. 1985, ann II, no 5, art 133 [*Constitution Act, 1867*].

[149] *Manitoba Act, 1870*, R.S.C. 1985, app II, no 8 [*Manitoba*]. Although in 1870 this provision gave Francophones in the province of Manitoba certain constitutional language rights, the Manitoba government did not hesitate 20 years later to pass the *Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890* (Man.), c 14, now RSM 1970, c O-10, thus making English the only official language of the province. In 1892, in *Pellant v. Hébert*, an unpublished decision reproduced in (1981) 12 RGD 242, the St. Boniface County Court ruled that the Act was unconstitutional, holding that Manitoba did not have the jurisdiction to amend or repeal the language guarantees contained in section 23. Manitoba ignored this decision, and unilingualism continued. In 1909, the Court of Appeal was called upon to rule once again on this issue in *Bertrand v. Dussault*, a decision that is unpublished but reproduced in *Re*

No language provision had been made at Confederation for the Acadians of New Brunswick. Nevertheless, on June 12, 1867, a petition signed by 173 Acadians was tabled in the Legislative Assembly by Robert Young, the Member for Gloucester. It asked the New Brunswick Legislative Assembly to publish its debates in French and English. Another petition was filed requesting that the government's public notices also be published in both languages. No action was taken on these petitions.[150] A resolution with the same objective as that of 1867 was reintroduced in 1874 by Théotime Blanchard, Member for Gloucester. It was also defeated.[151] It was not until the adoption of the *Canadian Charter of Rights and Freedoms* in 1982[152] that the right to legislative and parliamentary bilingualism in New Brunswick was finally recognized and enshrined in the Constitution.

Today, section 17 of the *Canadian Charter of Rights and Freedoms* and section 6 of the *Official Languages Act* guarantee Members of the Legislative Assembly of New Brunswick the right to use either English or French in parliamentary debates and committee proceedings.

Section 6 of the *Official Languages Act* reads as follows:

"Everyone has the right to use English or French in the debates and proceedings of the Legislature of New Brunswick."

Since the provision uses the indefinite pronoun "everyone", it is clear that this right extends not only to Members of the Legislative Assembly, but also to officers of the Legislative Assembly and to any person appearing before the Assembly or any of its committees. Thus, persons appearing before the Assembly or its committees have the right to communicate orally or in writing in the official language of their choice. Surprisingly, as Commissioner of Official Languages Shirley MacLean has noted, until recently, simultaneous interpretation was not available to members of the Legislative Assembly during committee proceedings, which posed an obstacle to the use of French. Documents were also tabled in English only. However, it seems that this unfair situation has finally being corrected, thanks to the complaint filed by MLA Kevin Arseneau. It is nevertheless astounding that this situation has persisted for more than 50 years in the only officially bilingual province in Canada!

Forest and Registrar of Court of Appeal of Manitoba (1977), 77 DLR (3d) 445, [1977] MJ No 106 (QL) [Re Forest], this same court again ruled that the law making English the province's only official language was unconstitutional. Once again, the provincial authorities pretended not to be aware of this court decision. It was not until 1979, in *Forest v. Manitoba (Attorney General), [1979]* 2 SCR 1032, 101 DLR (3d) 358, that the Supreme Court of Canada was called upon to decide the issue. It concluded that Manitoba could amend its Constitution, but that it did not have the authority to amend the language rights recognized in section 23. She equated section 23 with section 133 of the *Constitution Act, 1867*, which is an integral part of Canada's Constitution and, as such, cannot be amended by the Province of Quebec. Thus, in a modern context, Quebec can amend its Constitution through Bill 96, but it cannot affect the rights conferred by section 133. The same logic would apply in New Brunswick if the government sought to repeal the language rights recognized in the *Canadian Charter of Rights and Freedoms*. Unfortunately, in Manitoba, the correction had to wait 100 years!

[150] See R. Wilbur, *The Rise of French in New Brunswick*, Formac Publishing, Halifax, 1989 p 3; G. Migneault, *Les Acadiens du Nouveau-Brunswick et la Confédér*ation, Les Éditions de la Francophonie, Lévis, 2009, p 149-52 [Migneault].

[151] Migneault, *Ibid*. pp 153-54.

[152] Part I de la *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

In an ideal legislature, where all MLAs would be bilingual, provisions such as section 17 of the *Charter* and section 6 of the *Official Languages Act* would not be a problem. However, this model assembly, linguistically speaking, does not exist. It certainly doesn't exist in New Brunswick, where a high proportion of MLAs are either unilingual Anglophones or, if they are francophones, are accustomed to speaking in English.

In her 2013-2014 *Annual Report*, the Commissioner of Official Languages, Katherine d'Entremont, noted that a review of the transcripts of Question Period from November 6 to December 13, 2013, revealed that 82% of the debates were conducted in English.[153] The same review for the period from December 4, 2014, to March 27, 2015, produced a result identical to that of 2013: on average, our elected officials spoke in English 82% of the time.[154] In 2015, the situation barely improved. From April 1, 2015, to March 31, 2016, a review of Question Period transcripts revealed that debates were conducted in English 80% of the time.[155] Unfortunately, this practice of accounting for the use of French in the Legislative Assembly was not continued during the interim term of Commissioner Michel Carrier. Just recently the Commissioner of Official Languages, Shirley MacLean, resumed this exercise and her analysis indicated that for thirty-five (35) Question Periods in 2019-2020 that she reviewed, English was used 85% of the time and French only 15% of the time. As such the situation does not seem to be improving.

In her *2015-2016 Annual Report*, Commissioner d'Entremont wrote:

> "The vitality of a language is not only related to the number of speakers. Several other factors play a role: its status (official language or not), its instruction in the schools, its use in the workplace, and its presence in the media. Also, public use of a language, particularly within large institutions, can have an influence on public perceptions with respect to its importance or place within society. We can therefore understand that a balanced use of both official languages in the Legislative Assembly is very important."[156]

As Commissioner d'Entremont notes, Question Period in the Legislative Assembly is one of the highlights of the Legislature's activities. Broadcast on the web and closely followed by journalists, it has a direct and immediate impact on provincial news: "Although simultaneous interpretation is available during question period, the choice of languages used during a debate has a very symbolic value that cannot be underestimated."[157] While respecting the right of Members to use the official language of their choice during debate, the Commissioner made a point of reiterating in her annual reports the crucial role played by elected officials in maintaining the vitality of both official languages and proposed a more balanced use of both official languages in the Legislative Assembly. Let us hope that her timely message will one day be heard.

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[153] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2013-2014*, Fredericton, 2014 p 89.
[154] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2014-2015*, Fredericton, 2015 p 88.
[155] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2015-20*16, Fredericton, 2016 p 84.
[156] *Ibid.*
[157] *Ibid*.

This brings me to the use of French in the public sphere by the Premier and provincial ministers. As we saw during the COVID-19 pandemic, French did not figure prominently in Premier Higgs' press conferences. Had it not been for a reporter from Gaspé who was told to ask her question in English, simultaneous translation would not have been available at these press briefings.

It has become normal in Fredericton for the Premier and his ministers to hold press briefings in English and leave it to francophone journalists to translate what was said. In doing so, our francophone journalists should be careful and remember the Italian maxim: "Traduttore, traditore" (to translate is to betray), meaning that translation is not an exact science and that even the professional translator must sometimes make linguistic choices that can have an impact on the meaning of the message.

In 2018, Commissioner d'Entremont published an investigation report denouncing the lack of importance given to French at a press conference held by Premier Brian Gallant. The conclusions of this report were repeated by Commissioner MacLean in another investigation report in 2020, this time concerning Premier Blaine Higgs. These two reports essentially recommended that all practices related to the use of both official languages in Government of New Brunswick announcements and press conferences be reviewed to ensure a balanced use of the official languages. Symbolically, the Commissioners are asking that we change the perception that in New Brunswick, there are two official languages: English and translated from English.

In her report, Commissioner d'Entremont wrote that even if the entirety of a government announcement is translated into French, this does not respect the equality status provided for in the *Official Languages Act*, since "a language that is available only through translation is not treated in the same way as the other."[158] She added that, "The fact that the Premier, who, under section 2 of the Act, is responsible for the administration of the *Official Languages Act*, used English more than French during the announcement may have been poorly perceived …and may have transmitted the message that one of the province's official languages is more important than the other. It is therefore essential, during public announcements like the one on January 11, 2018, that the Premier be more attentive to ensuring that he uses both official languages equally in his presentation, regardless of where it is made."[159]

Commissioner d'Entremont added, "We therefore believe that balanced use of both official languages during a government announcement, whether it is delivered through traditional methods, social media, or new tools such as Facebook Live, is very important to the perception that each official linguistic community will have of its importance in New Brunswick society… The Office of the Commissioner wishes to reiterate that a balanced use of both official languages during government announcements is very important because this influences the perception that the

[158] Office of the Commissioner of Official Languages for New Brunswick, *Investigation Report*, July 2018, p. 11

[159] *Ibid*.

members of each official community have about their own language."[160] Wise words that unfortunately do not seem to have been understood in Fredericton.

Therefore, I propose that an addition be made to the *Official Languages Act* to provide as follows:

- **that during Government of New Brunswick announcements and press conferences, a balanced use of the province's two official languages be ensured.**

In her *2015-2016 Annual Report*, Commissioner d'Entremont also made an important recommendation with respect to Officers of the Legislative Assembly. She recommended that the province follow the lead of the Canadian Parliament, which in 2013 adopted the *Language Skills Act*.[161] This Act provides that the ability to speak and understand both official languages clearly is a prerequisite for appointment to any of the following positions: Auditor General of Canada, Chief Electoral Officer, Commissioner of Official Languages of Canada, Privacy Commissioner, Information Commissioner, Senate Ethics Board, Conflict of Interest and Ethics Commissioner, Commissioner of Lobbying, Public Sector Integrity Commissioner and President of the Public Service Commission.

Commissioner d'Entremont suggested that the same condition be imposed in New Brunswick with respect to the positions of: Access to Information and Privacy Commissioner, Conflict of Interest Commissioner, Official Languages Commissioner, Child and Youth Advocate, Consumer Advocate for Insurance, Chief Electoral Officer, Ombud and Auditor General.

Unfortunately, this recommendation was rejected by the Gallant government without taking any time to examine its relevance.

Given this recommendation by Commissioner d'Entremont, I propose that the following be added to the *Official Languages Act*:

- **that the ability to speak and understand both official languages be a prerequisite to the appointment of a person to any of the legislative officer positions listed above.**

B. Legislative Bilingualism

Regarding legislative instruments, subsection 18(2) of the *Charter* provides:

"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."

This subsection, like subsections 17(2) and 19(2) of the *Charter*, is generally considered to have its origins in the language of section 133 of the *Constitution Act, 1867*.[162] The Supreme Court of Canada has noted that "Subject to minor variations of style, the language of subsections 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of section 133

[160] *Ibid.*, p 11 and 13
[161] *Language Skills Act*, SC 2013, c 36
[162] *Constitution Act, 1867*, supra note 3.

of the *Constitution Act, 1867*, of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*.[163]

Dickson C.J.C., in dissent, while noting that subsection 19(2) is "in part" a restatement of section 133, makes observations about the limited usefulness of the section 133 jurisprudence in interpreting the language guarantees of the *Charter*. In particular, he says that "despite the similarity between s. 133 and ss. 19(2), we are dealing with different constitutional provisions enacted in different contexts".[164]

The Court of Appeal of New Brunswick also concluded in *Charlebois v. Moncton (City)*[165] that subsection 18(2) has a different legal effect in New Brunswick and that the jurisprudence on section 133 does not fully exhaust the province's obligations. According to the Court of Appeal, section 133 imposes very minimal language guarantees. Its purpose is to preserve the pre-Confederation status quo. In contrast, the provisions of the *Charter* are the product of the legislative and political history of the province and their purpose is to recognize the cultural heritage of New Brunswick's two official language communities. The "historical and legislative context of the enactment of subsection 18(2) reflects a linguistic dynamic much more fertile in nature than the context which might have inspired the framers of section 133 at the time of Confederation".[166] The Court is also of the view that the jurisprudence relating to section 133 of the *Constitution Act, 1867* must be examined with some caution when interpreting the language provisions of the *Charter*.

> "In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron* [...], I think that the principle set out by Beetz, J., in *Société des Acadiens*, according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province[...]."[167] [Emphasis added.]

For example, with respect to municipalities, the Supreme Court of Canada notes that, long before Confederation, the Legislative Assembly of Lower Canada or Québec, as it is known now, had expressly regulated the language that could be used in the drafting and publication of municipal by-laws or regulations. Therefore, municipalities and municipal regulation were on the mind of the framers in 1867. According to the Supreme Court's reasoning, municipal bylaws or regulations, while representing "legislative measures", are a distinct and independent category of legislative measures emanating from a third level of government. In coming to this conclusion, the Supreme

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[163] *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 549 para 50, 69 NBR (2) 271 *[Société des Acadiens]*.
[164] *Ibid*. para 10.
[165] *Charlebois v. Moncton (City)*, 2001 NBCA 117, 242 RNB (2) 259 [*Charlebois v Moncton*].
[166] *Ibid*. para 93.
[167] *Ibid*. para 47.

Court of Canada based its findings on the historical context that existed at the time that section 133 was enacted. This context refers to the particular status of municipalities in Québec as it would have been perceived by the framers at that time.

However, in *Charlebois v. Moncton*, the Court of Appeal of New Brunswick reached a different conclusion than the Supreme Court of Canada on the obligations imposed on New Brunswick municipalities by the *Charter* in subsection 18(2). The *Charlebois* case raised the issue of whether municipalities in New Brunswick must adopt bylaws in both official languages. To conclude that they did, the Court of Appeal had to overcome a major obstacle, namely the Supreme Court of Canada's decision on municipal bylaws and section 133. To do so, the Court of Appeal found that a liberal interpretation of language rights required consideration of the historical development of French-language minority rights in the province:

> "Given the significant role played in the history of this province by the law and the Constitution in matters of language rights as I have just described, I think it is quite appropriate to recall, as recognized by Canadian language rights case law, that the recognition of the status of official languages is both a legal and a political act. Politically, the recognition of the constitutional principle of the equality of official languages in New Brunswick is the manifestation of a fundamental political choice based on a compromise between the two recognized official linguistic communities of our province. Legally, it is incumbent upon the courts to delineate the scope of *Charter*-guaranteed language rights by reference to the history and sources of these rights to determine their purpose and scope as well as to the constitutional documents themselves. A review of the historical evolution of minority rights in New Brunswick is one of the requirements that follow from the use of the broad and liberal method of interpretation that should be used in this matter."[168]

According to the Court of Appeal, the effect of the province's language laws and specific constitutional language provisions has been to create a constitutional regime in the province that is unique in the Canadian context:

> "Indeed, the recent history of the last thirty years shows that successive New Brunswick governments have, on four separate occasions during that period, enacted language rights legislation or have entrenched language rights in the Canadian Constitution which collectively provide the province with a constitutional language regime quite particular to New Brunswick and unique in the country. Obviously, these legislative and constitutional provisions impose obligations on the province which are also particular to New Brunswick."[169]

It therefore concluded that it would be incorrect to assume that any court called upon to rule on the interpretation of sections 17, 18 and 19 of the *Charter* must adhere to the interpretation that courts have already given to section 133 of the *Constitution Act, 1867*. In the Court of Appeal's view, "it is immediately apparent that the historical and legislative context of the enactment of

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[168] *Charlebois v Moncton, supra* para 11.

[169] *Ibid*. para 8.

subsection 18(2) of the *Charter* in 1982 is different from the context at the time of Confederation when section 133 of the *Constitution Act, 1867* was enacted".[170] [25] Thus, it concluded, contrary to what had been decided by the Supreme Court of Canada in the context of section 133, that bylaws adopted by New Brunswick municipalities are subject to the obligations set out in subsection 18(2) of the *Charter*.

With respect to legislative bilingualism, the relevant provisions of the *Official Languages Act* are found in sections 9 to 15. Section 9 states that English and French are the official languages of the legislation.

Section 10 provides that:

The English and French versions of legislation are equally authoritative. / La version française et la version anglaise des lois du Nouveau-Brunswick ont également force de loi."

Section 10 raises a problem of interpretation. First, the term "loi" in the French version of this provision is equivalent to "legislation" in English. Section 9, on the other hand, uses the English term "legislation" and, in French, "législation". Gérard Cornu's *Vocabulaire juridique* defines the word "legislation" in the following terms: Action de légiférer; ensemble des travaux tendant à l'élaboration des lois (projets et propositions de lois, rapports, amendements, débats parlementaires, vote). (Translation: "Action of legislating; the whole of the work tending to the elaboration of laws (bills and proposed laws, reports, amendments, parliamentary debates, voting)).[171] Thus, the word "legislation" may well be used in this broad sense. The word "law" may be used in a restricted sense (as in this one: an enactment of a legislative assembly) or in an extended sense (as in the one given, for example, to the term "rules of law"), in which case the law includes its regulations.[172]

Black's Law Dictionary defines the English word "legislation" as meaning either "*the law so enacted; collectively, the formal utterances of the legislative organs of government*" or "*the whole body of enacted laws*".[173] The English word "legislation" therefore refers to a body of legislation that includes statutes and regulations. Thus, there is no reason to conclude that the word "legislation" in section 10 is limited to "laws".

However, by using the word "loi" in the French version, the legislature creates a problem of interpretation. It could be concluded that the word "loi" is intended to have a narrower meaning, which could be interpreted as excluding regulations. A court might conclude, given the context,

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[170] *Ibid*. para 48.
[171] G. Cornu, *Vocabulaire juridique*, 8th ed, p 506, sense 2.
[172] In my research, I have found that in the *Charter* and the statutes of some provinces, the word "lois" in the French version has «Acts» or «Statutes», as equivalents in the English version, never «legislation». See the *Charter*, where section 18 has in French, «lois» and in English, «statutes». *The Interpretation Act*, CCSM, c I80, art 7 (Acts); *Charter of the French Language*, RLRQ c C-11, art 7; *Legislation Act, LO 2006*, c 21, annx F, art 65; *Language Act*, SS 1988-89, c L-6.1, art 4; *Languages Act*, RSY 2002, c 133, art 4; *Official Languages Act*, RSNWT 1988, c O-1, art 7(1); and *Official Languages Act*, SNU 2008, c 10, art 5. Even in *Interpretation Act*, RSNB 1973, c I-13, the word «loi» is systematically rendered in English by the word «act».
[173] Brian A. Garner, ed, *Black's Law Dictionary*, 10th ed, Thomson Reuters, 2014.

that the French version is a better expression of the Legislative Assembly's intention, and that it excludes regulations from the application of the "equal value" rule. Since, as the saying goes, lawmakers never legislate in vain, a court might conclude that the use of a different word in sections 9 and 10 is deliberate and expresses an intention to restrict the scope of the rule in section 10 to laws passed by the legislature and to exclude regulations and other instruments.

This point of potential ambiguity needs to be addressed.

- **The wording of these two sections should be reviewed to ensure that no ambiguity exists and that the intent is clearly to encompass all legislation, including statutes and regulations.**

Section 11 of the OLA provides as follows:

> "Bills shall be simultaneously introduced in both official languages before the Legislative Assembly and shall be simultaneously adopted and assented to in both official languages./Les projets de lois sont déposés à l'Assemblée législative simultanément dans les deux langues officielles et ils sont aussi adoptés et sanctionnés dans les deux langues officielles."

Thus, contrary to the 1969 *Official Languages Act of New Brunswick*, it would seem that bills and other documents should be excluded from the equal value rule whereby English and French versions of texts have equal authority and that one does not prevail over the other. The 2002 provision does refer only to the obligation to introduce, enact and assent to bills in both official languages and makes no mention of equal value, unlike section 14 of the *Official Languages Act of New Brunswick*, 1969. The same conclusion appears to apply to rules, orders, orders in council, proclamations, which are required to be published in the *Royal Gazette* (section 13), notices, advertisements and other materials of an official character whether or not they are required to be published in the *Royal Gazette* (section 14), and notices, material or documents required to be published by the province or its institutions under this or any other Act (section 15). Nor does section 35 of the *OLA*, which provides that municipalities and cities in the province must pass and publish their by-laws in both official languages, provide that both versions of these by-laws have equal status.

Did legislators really intend to exempt all of these documents from the application of the equal value rule? Did the legislators, when they passed the new Act in 2002, make a conscious decision to narrow the scope of the provision in the 1969 Act? I cannot answer these questions.

It may be that legislators considered that the equal value rule was sufficiently established in section 18 of the *Charter* that it did not need to be repeated in the *OLA* and that the word "Act" as used in that section refers to delegated legislation and municipal bylaws.

To resolve the ambiguity, I propose that a clause similar to the one that existed in the 1969 Act be adopted:

- **In interpreting any official document, bill, statute, by-law, writing, minute, report, motion, notice, advertisement, exhibit, collective agreement or other writing referred to in this Act, both official language versions shall be equally authoritative.**

There is also an important opportunity in the *Official Languages Act* to provide for the establishment of a standing committee on official languages in the Legislative Assembly. It is incomprehensible that, after 50 years of official bilingualism, such a committee has not yet been established. The mandate of such a committee could include receiving the annual reports and investigation reports of the Office of the Commissioner of Official Languages, making recommendations for the implementation of the Act and the Commissioner's recommendations, and dealing with any other matters relating to official languages.

Therefore, I propose this be added to the *OLA*:

- **That a Standing Committee on Official Languages be established. The Committee will be composed of representatives of the political parties represented in the Legislative Assembly.**

In the next section, I will address the issue of judicial bilingualism.

PART VI: OLA REVIEW: JUDICIAL BILINGUALISM (PROPOSED AMENDMENTS)

For a linguistic minority, the right to use their language at every stage of the judicial process is very important. In New Brunswick, this right is enshrined both in the *Canadian Charter of Rights and Freedoms*[174] and in the *Official Languages Act*.[175]

A. Canadian Charter of Rights and Freedoms

Subsection 19(2) of the *Charter* provides that everyone has the right to use English or French in all cases before the courts of New Brunswick and in all proceedings arising from them.

However, this subsection was given a restrictive interpretation in *Société des Acadiens*. In that case, the Société des Acadiens du Nouveau-Brunswick (SANB) and the Association des conseillers scolaires francophones du Nouveau-Brunswick (ACSFNB) brought an action to obtain a judgment to prevent the Grand Falls English School Board from offering its French immersion programs to Francophone students. The Court of Queen's Bench of New Brunswick ruled in favour of the plaintiffs.[176] The decision was appealed and, before the Court of Appeal, the SANB and the ACSFNB requested that the case be heard by a panel of bilingual judges since part of the oral arguments would be in French. A panel of three judges, presided over by a judge who was not bilingual, was appointed to hear the appeal. The SANB and the ACSFNB were of the opinion that section 19 of the *Charter* had been violated and asked to be heard by a panel of judges who understood French, without the assistance of an interpreter.

The case was ultimately referred to the Supreme Court of Canada. The Court was called upon to interpret section 19 of the *Charter* for the first time. Beetz J., writing for the majority, concluded that the right conferred by this section belongs to the speaker, drafter or author of the pleadings and gives the speaker or drafter the power to speak or write in the official language of their choice. According to the majority of the Court, the drafters of the *Charter* would have expressed themselves differently if they had wanted to give the parties the right to be understood in the official language of their choice. They could, for example, have used the word "communicate" to confirm that the section granted the right to be understood in the language the party chose. According to the majority of the Court, "[t]he right to communicate in either language postulates the right to be heard or understood in either language."[177] Section 19, however, provides only for the right to "use" either official language and excludes the right to be understood in the language chosen!

Beetz J. concluded that if the right to use English or French in court includes the right to be heard and understood by the court, such recognition would lead to the constitutional requirement of bilingual courts![178] In his view, "such a requirement would have far-reaching consequences and

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[174] Part 1, *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]
[175] *Official Languages Act*, SNB 2002, c O-0.5, art 16-26 [*OLA*]
[176] *Société des Acadiens du N.-B. et al v. Minority Language School Board No. 50* (1983), 48 NBR (2d) 361, [1983] AN-B no 245 (QL).
[177] *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 549 para 54.
[178] *Ibid*. para 70.

would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada".[179]

In his dissent, Chief Justice Dickson, a unilingual English speaker, writes:

> "What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate to others. In the courtroom, we speak to communicate to the judge or judges. It is fundamental, therefore, to any effective and coherent guarantee of language rights in the courtroom that the judge or judges understand, either directly or through other means, the language chosen by the individual coming before the court."[180]

For her part, Wilson J., another unilingual Anglophone, in her dissenting reasons, is prepared to go even further:

> "Accepting that the concept of bilingualism is relative and not absolute and that it must be related to function and purpose, I would conclude that the judge's level of comprehension must go beyond a mere literal understanding of the language used by counsel. It must be such that the full flavour of the argument can be appreciated. To the extent that this requires what Monnin C.J.M. describes as a comprehension of the nuances of the spoken word, I would agree with him that a judge must attain that level of sophistication in order to make the litigant's linguistic right meaningful in the context of the court's process."[181]

In the *MacDonald* decision, Wilson J., in another dissenting opinion, had written:

> "Austin was one of the early legal theorists who sought to break a right down into its constituent elements: see *Austin on Jurispru*dence (5th ed. by R. Campbell, 1885), vol. 1. He wrote at p. 284:
>
> To every legal right, there are three distinct parties: namely, a party bearing the right; a party burthened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. A sovereign government cannot acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Every party bearing a right (divine, legal, or moral) has necessarily acquired the right through the might or power of another: that is to say, through a law and a duty (proper or improper) laid by that other party on a further and distinct party."[182] (emphasis added)

Although the rule of interpretation of language rights set out in *Société des Acadiens* has since been reversed by the Supreme Court of Canada,[183] the interpretation given of section 19 of the

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[179] *Ibid*. para 73.
[180] *Ibid*. para 25.
[181] *Ibid*. para 186.
[182] *MacDonald v. Ville de Montréal*, [1986] 1 SCR 460, para 153.
[183] See *R. v. Beaulac*, [1999] 1 SCR 768.

Charter has unfortunately not yet been set aside.[184] This interpretation remains relevant pending a new decision that would definitively overturn it.[185] Fortunately, the *Official Languages Act* has corrected this interpretative incongruity at the legislative level.

B. The Official Languages Act

1. Definition of the Term "Courts"

With respect to judicial bilingualism, it should be noted, first, that section 1 of the *Official Languages Act* defines the term "court" as meaning any court or administrative tribunal of the province. This very broad definition covers not only the judicial courts, but also all administrative tribunals such as arbitration tribunals governed by the *Industrial Relations Act* and the *Arbitration Act*,[186] the Small Claims Court[187] and disciplinary tribunals or committees established by professional associations.

2. Official Languages of the Courts

Section 16 of the *Official Languages Act* declares English and French to be the official languages of the courts of the province.

Section 17 states that everyone has the right to use the official language of their choice in all matters before the courts, including all proceedings, pleadings and processes issuing from it.

Section 18 says that no person shall be disadvantaged by reason of a choice made under section 17. In *Chiasson v. Chiasson*, the Court of Appeal, referring to this provision, emphasized the importance of respecting the choice of official language made by the litigant:

> "Judges ought to refrain from engaging in any conduct that might deter a person appearing or giving evidence in any proceeding before the court from being heard in the official language of his choice. In fact, it behooves judges to show the greatest of respect for that person's choice of official language."[188]

3. The Court's Obligation

Section 19 was enacted as a counterbalance to the *Société des Acadiens* decision. It provides that a court hearing a case must understand the official language chosen under section 17, without the

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[184] Réaume, «The Demise of the Political Compromise Doctrine», *supra* note 26.
[185] Mark Power and Marc-André Roy, «De la possibilité d'être compris directement par les tribunaux canadiens, à l'oral comme à l'écrit, sans l'entremise de services d'interprétation ou de traduction» (2015) 45:2 RGD 403.
[186] RSNB 1973, c I-4 and RSNB 2014, c 100. See *L.I.U.N.A., Local 900 v Fern-Co Building Concepts Inc* (2010), 182 CLRBR (2d) 1 para 14.
[187] *Chiasson v Chiasson* (1999), 222 NBR (2d) 233, 94 ACWS (3d) 873 (CA) [*Chiasson*]. See also, *MacFarlane v New Brunswick*, 2004 NBQB 257, [2004] NBR (2d) (supp) no 38. In this case, the adjudicator at the Small Claims Court hearing did not understand French, the language chosen by Mr. MacFarlane in his originating document. The adjudicator felt that his language rights were respected by allowing him to "plead in French with the assistance of the court interpreter". According to Justice Robichaud of the Court of Queen's Bench, there is no doubt that the assignment of the case to an adjudicator who did not understand the official language chosen by Mr. MacFarlane infringed his rights under the *OLANB*, which was in force at the time. We are of the opinion that the same conclusion would apply today, particularly in light of sections 18 and 19 of the *OLA*.
[188] *Chiasson, supra* para 5.

assistance of an interpreter, or consecutive interpretation, or any simultaneous translation technique.

The only decision that I am aware of that dealt with section 19 was *Noble Securities Holding Limited v. Tremblay*.[189] In this case, a default judgment was entered against the defendant. The defendant consequently retained counsel who brought a motion to set aside the default judgment. Mr. Tremblay's counsel wrote to the clerk of the court requesting that the judge appointed to hear the motion recuse himself because his client had decided to have the proceedings conducted in French. Counsel for the plaintiff then pointed out that the entire previous proceeding had been conducted in English and that Mr. Tremblay had even drafted his motion to set aside the default judgment and the affidavit in support of it in English. In his view, Mr. Tremblay had originally chosen to proceed in English and the court should not now allow him to choose the other official language.

This decision raised, among other things, an interesting question: who should determine whether the judge has a sufficient understanding of the official languages spoken at the hearing to be able to try the case? According to this decision, the answer to this question should be left to the judge hearing the case. Judge Rideout himself acknowledged that he did not have the necessary proficiency in French to hear the case without the assistance of an interpreter:

> (Translation)"Although I am not bilingual, I do have some fluency in French. In the motion currently before the Court, I was able to read and understand the affidavit signed by Daniel Tremblay on September 7, 2006. In addition, I was able to understand the brief oral submissions of Mr. Tremblay's counsel, which were also in French. That said, I am not sufficiently fluent in French to hear a motion to set aside a default judgment in this rather complex case without the assistance of an interpreter to confirm certain aspects of Mr. Tremblay's argument."[190]

We can draw some conclusions from this decision. First, the principles set out in sections 16 to 19 of the *Official Languages Act* are mandatory and take precedence over a court order. Thus, the order to assign Justice Rideout to hear the motion could not override the obligation under section 19. Second, the right that these sections recognize is a fundamental right, not a procedural right. Third, these provisions do not specify a time limit, or even how the right is to be exercised. Thus, parties have an absolute right to use the language of their choice in a court proceeding, a right to which the parties have access at any time. It is true, however, that late exercise of this choice may cause delay, disruption, or prejudice to the other party. This was not the case in *Noble Securities Holding*, however, so the Court did not rule on these issues. We will have to wait for a similar scenario to see how the courts deal with these issues. In this regard, however, it is worth recalling what the

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[189] *Noble Securities Holding Limited v. Tremblay*, 2006 NBQB 340, 310 NBR (2d) 131 [*Noble Securities*]

[190] *Ibid*. para 3. Who should assess the language proficiency of judges in either language is a key question, which at present seems to be left to the judge's discretion. The case of *R v. Chagnon* provided an opportunity to examine the issue. In his appeal, Mr. Chagnon's counsel argued that he was unable to receive a trial in his language because of the judge's limited French language skills. Unfortunately, the Court of Appeal did not have to rule on this issue, as the Attorney General conceded the appeal: *Chagnon v. R*, 2016 NBCA 28.

Supreme Court of Canada said in *Beaulac*: in dealing with the issue of a late application under section 530 of the *Criminal Code*, Bastarache J. noted the following:

> "Mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, 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."[191]

- **Considering the foregoing, I believe it is necessary to provide in the OLA that a test be developed to assess the language skills of persons wishing to be appointed to the judiciary in New Brunswick.**

4. Duty of Provincial Institutions in a Civil Action

Section 22 provides that if a court is seized of a civil action to which "Her Majesty in right of the Province or an institution is a party to civil proceedings before a court, Her Majesty or the institution concerned shall use, in any oral or written pleadings or any process issuing from a court, the official language chosen by the other party." This gave rise to a judicial debate that ended up in the Supreme Court of Canada. At the heart of the debate was the question of whether the term "institution" used in section 22 includes municipalities in the province. The issue was decided by the Supreme Court of Canada in *Charlebois v. Saint John (City)*.[192]

In a split decision (5-4 majority), the Supreme Court of Canada dismissed the appeal. The majority concluded that the *Official Languages Act* has two main structural features:

> "1. The word "institution", as defined in s. 1, acts as a central provision that identifies those public bodies on which the Legislature imposes particular language obligations in other provisions of the OLA. I will review those obligations shortly.
>
> 2. The OLA groups under various headings different areas of activity or services which fall under the purview of the public administration of the province and impose specific language obligations under each heading. "Municipalities" is one such heading."[193]

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[191] *Beaulac, supra* para 39.
[192] *Charlebois v Saint John (City)*, 2005 SCC 74, [2005] 3 SCR 563 [*Charlebois v. Saint John*]. For a critique of this decision, see Michel Doucet and Mark Power, «*Charlebois c Saint John (Ville)*: phare d'une régression en matière de droits linguistiques?» (2006) 8 RCLF 383 [Doucet et Power, «phare d'une régression»].
[193] *Charlebois v. Saint John, supra* note 82 para 16.

The majority acknowledged that it is plausible that Parliament intended to include municipalities in the definition of the term "institution".[194] However, they immediately added that sections 35 to 38 of the OLA impose specific linguistic obligations on municipalities. Therefore, to accept that municipalities are "institutions" for the purposes of section 22 would lead to inconsistent and illogical consequences.[195] And so, in this decision, the Supreme Court said that a municipality could choose to proceed in a language different from that used by the citizen in a court proceeding.

To correct the deficiency in the *Official Languages Act* highlighted by this decision and to restore some consistency to the law, I suggest that the following provision be added:

- **In a civil case before a court to which Her Majesty in right of New Brunswick, an institution or a municipality designated under section 35[196] of the Act is a party, Her Majesty, the institution or the municipality shall use the official language chosen by the civil party in oral and written pleadings and in any pleadings arising from it.**

5. Language of Court Decisions and Orders

Published court decisions are a vital working tool for legal practitioners. In a common law system such as New Brunswick's, the role of court decisions is just as essential as that of legislation, hence the importance of their translation. According to Karine McLaren:

> (Translation) "While much has been written about the issue of legislative bilingualism in Canada, it is clear that the issue of translation of judicial decisions seems to have been relegated to the shadows in legal circles. Given the paramount importance of case law in Canada's legal system, it is striking that the issue has received so little attention to date."[197]

New Brunswick's constitutional obligations with respect to judicial bilingualism arise from subsection 19(2) of the *Charter*, as I have already mentioned. I have also said that these language obligations have been given a much less generous interpretation by the courts than other language obligations.

It must be repeated: the logic of the Supreme Court in the 1986 trilogy was that the guaranteed rights belong not only to the parties, but also to witnesses, lawyers and even judges and other judicial officers.[198] Thus, just as the litigant has a constitutional right to speak in the language of their choice in court, so too does the judge have a constitutional right to write their reasons in

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[194] *Ibid*. para 17.
[195] *Ibid*. para 19.
[196] Section 35 states: 35(1) A municipality whose official language minority population represents at least 20% of its total population is required to adopt and publish its by-laws in both official languages. 35(2) A city is required to adopt and publish its by-laws in both official languages irrespective of the percentage required under subsection (1).
[197] Karine McLaren, «La langue des décisions judiciaires Canada» (2015) 2 RDL 1, p 1 [McLaren].
[198] *MacDonald, supra* para 61.

the language of their choice. Moreover, the court is under no obligation to provide a translation of its judgment into the language of the litigant.[199]

However, the decision in *Beaulac* provides an opportunity for a new interpretation of section 19 of the *Charter* with respect to judicial bilingualism. This new interpretation would require the State, namely the province of New Brunswick, to take the necessary steps to ensure that judicial decisions, to name just a few, are made available in the official language of the recipients' choice.[200] Thus, the right to receive judicial decisions in the official language of one's choice would no longer be just a statutory right recognized by the *Official Languages Act*, but, more importantly, would become a full constitutional right.

In the case of legislative provisions, section 24 of the *Official Languages Act* provides that final decisions or orders of the courts, including reasons and summaries, shall be published in both official languages: (1) it determines a question of law of interest or importance to the general public, or (2) the proceedings leading to its issuance were conducted in whole or in part in both official languages. The criterion of " interest or importance to the general public" is therefore of great importance in New Brunswick since the translation of court decisions depends on it.

It is interesting to note the difference between the New Brunswick provision and that in the federal *Official Languages Act*.[201] Subsection 20(1) of the federal *Official Languages Act* requires that final decisions, including reasons, be made available to the public in both official languages at the same time in two cases: (1) where the point of law at issue is of interest or importance to the public; and (2) where all or part of the proceedings were conducted in both official languages, or all or part of the pleadings were in both official languages. However, the "interest or importance to the public" test at the federal level relates only to the question of simultaneous publication, not translation.[202] The New Brunswick legislature, for its part, "carefully avoided mentioning simultaneity" in section 24(1).[203]

Yet, despite this "oversight" by the legislature, this is the practice followed by the New Brunswick Court of Appeal when it decided to apply the rule of simultaneity to its decisions.[204]

The Court of Appeal considers that the obligation to publish its decisions simultaneously stems directly from the *Official Languages Act*. Yet, the New Brunswick Court of Appeal is the only court to issue its decisions simultaneously in both official languages. If its interpretation is correct, the other courts in the province should also be subject to the same obligation.

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[199] McLaren, *supra* p 6.
[200] *Ibid*. page 13.
[201] *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.)).
[202] McLaren, *supra* note 123 p 19.
[203] Gérard Snow, «La publication des décisions de justice Nouveau-Brunswick et Canada» in Lynne Castonguay and Nicholas Kasirer, ed, *Étudier et enseigner le droit: hier, aujourd'hui et demain – Études offertes à Jacques Vanderlinden*, Cowansville (Qc), Yvon Blais, 2006 p 367 [Snow].
[204] *Town of Caraquet et al. v Minister of Health and Wellness*, 2005 NBCA 34, 282 NBR (2d) 112 para 1.

The New Brunswick Department of Justice has also not accepted this interpretation by the Court of Appeal. In a letter dated May 27, 2004, to the Commissioner of Official Languages, the Department argued that to meet the requirements of the *Official Languages Act*, it is sufficient to first publish in one language those final decisions that meet the criteria for publication in both official languages set out in subsection 24(1), and eventually publish a translation. According to the Department, this does not contravene section 24.

The Commissioner of Official Languages rejected this restrictive interpretation of section 24 and held that the only interpretation that ensures consistency between subsections 24(1) and 24(2) of the *Official Languages Act* is one that requires the simultaneous publication of court decisions in both official languages.[205] It is difficult to disagree with the Commissioner.

On October 14, 2003, to obtain answers to several questions concerning the publication and translation of judgments, the Association des juristes d'expression française du Nouveau-Brunswick (AJEFNB) filed a complaint with the Office of the Commissioner of Official Languages.[206] The AJEFNB argued, among others, that section 24 of the *OLA* was not being fully respected. In its view, only the New Brunswick Court of Appeal meets the requirements of that section since it is the only one to publish its decisions simultaneously in both official languages. The complaint thus revealed the glaring deficiencies in the implementation of section 24 by the Court of Queen's Bench and the Provincial Court.

We should remember that from 1985 to 2005, all decisions published in the *New Brunswick Reports (NBR)*, issued under the authority of the Maritime Law Book, a private, for-profit corporation that produces decision books in all provinces except Quebec, were published in both official languages. As of 2005, only translations required by law are published in both official languages. However, some court decisions which are not translated were published in one language only, if Maritime Law Book felt that they would be useful to lawyers. What was seen as the norm from 1985 to 2005 became the exception starting in 2005, except for decisions of the New Brunswick Court of Appeal.

It is true that section 24 of the *Official Languages Act* does not specify who is responsible for selecting decisions to be published in both official languages. Moreover, to my knowledge, there are no guidelines within the Department of Justice or the courts themselves regarding the coordination and selection of decisions to be translated.[207]

The Commissioner agreed with the AJEFNB and concluded that: (Translation)"the manner in which final decisions and orders of the courts (except for decisions of the Court of Appeal) are published

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[205] See Office of the Commissioner of Official Languages for New Brunswick, *Investigation Report*, File no. 2003-0103, Langue de publication des jugements – simultanéité – allégations de contravention à la Loi sur les langues officielles du Nouveau-Brunswick (June 2006), online : Association des juristes d'expression française du Nouveau-Brunswick <http://test.ajefnb.nb.ca/wp-content/uploads/2013/04/RapportCommissaireLanguesOfficiellesJuin2006.pdf>.

[206] *Ibid*.

[207] *Ibid*. p 23. According to the *Report*, the Department of Justice explained the absence of a policy or directive by saying that it had not received any statement from the Chief Justices regarding the publication of decisions, and that judges were free to render their decisions in both official languages, if they deemed it desirable to do so.

does not comply with the requirements of the *OLA*".[208] He added that the current regime, which provides for the eventual publication of decisions in both official languages in the *NBR* series, "falls far short of ensuring respect for the right to equal service in both official languages".[209] The Commissioner therefore made three recommendations to the Department of Justice:

1. "That the Department of Justice consult immediately with all stakeholders in order to create a policy for the translation and availability of final court decisions, orders or judgments that is in conformity with the OLA and its principles and that, once the consultation is complete, steps be taken immediately to enact the policy.

2. That the Department of Justice takes steps as soon as possible to ensure that all the decisions that appear in New Brunswick Reports (bound edition or other) be published in both official languages.

3. That, if the Department does not agree with his interpretation of the term "publish," that it takes the necessary steps to have the matter referred to the New Brunswick Court of Appeal as soon as possible."[210]

However, despite this report, it seems that the problem has not been resolved. In his 2007-2008 annual report, the Commissioner wrote:

> "Twenty months have passed without a formal response from the Department of Justice. The Commissioner sent a letter to the Deputy Minister on February 1, 2008, requesting a status report on the implementation of his recommendations. Three weeks later, he received a letter from the Deputy Minister assuring him that his staff was in the process of gathering information about the issue and would contact the Commissioner to schedule a meeting. The Commissioner considers the fact that almost two years have passed since he sent his recommendations to be most frustrating; especially since no concrete action was taken by the Department, which represents a laissez-faire attitude towards language rights."[211]

On May 9, 2008, the Department of Justice responded to the Commissioner. In this letter, the Department rejected the conclusions reached by the Commissioner and indicated it believed it was respecting its obligations under section 24 of the *OLA*, adding that it had no intention of referring the matter to the New Brunswick Court of Appeal.[212]

Following this response, the Commissioner wrote:

> "The Commissioner is discouraged not only by the position finally taken by the Department of Justice, but also by the fact that no details were provided of any analysis or work done by the Department in addressing the issues he raised in his report following the investigation

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[208] *Ibid*. p 31.
[209] *Ibid*. p 31-32.
[210] *Ibid*.
[211] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2007-2008* p 55.
[212] *Ibid*. p 56.

> into the matter. There appears to have been nothing done since the problem was first raised in 2003. For such an important issue to receive such little attention is disconcerting."[213]

It was not until 2010 that a Working Group to examine the issue of publication and translation of court decisions was formed by the Department of Justice. The Task Force's report was finally filed in 2011. In the report, the Group expressed the view that the selection of decisions of interest or importance to the public and therefore deserving of simultaneous publication in both official languages should be left to the judge or author of the decision. The Group also recommends first establishing objective criteria to assist in the selection of these decisions and criteria that should be interpreted generously, and then developing a calendar to determine the time required for translation for the purposes of subsection 24(2) of the *OLA*.[214]

Ms. McLaren provided some details regarding the follow-up to the Working Group's recommendations:

> (Translation) "According to the information we have obtained, the decision as to which judgments are selected for translation is now made by the Department of Justice (Office of the Attorney General). All court decisions selected for translation are forwarded to the provincial Translation Bureau. The Translation Bureau has established guidelines as to the deadlines to be applied to translation requests. These are simply calculated according to the number of words in the text to be translated. The Translation Bureau has recently implemented a tendering process that allows it to assign translations of court decisions to various suppliers that meet their requirements. With respect to the third recommendation of the Working Group, unfortunately we were unable to obtain information on whether objective criteria have been put in place to select judgments for translation. So there still seems to be some doubt about the matter[215] [emphasis added]."

I am not sure where this issue stands today because the stakeholders do not seem to be talking about it anymore. However, to avoid the inconsistency that seems to exist between the interpretation of sections 24 and 25, I suggest:

- **That subsection 24(1) of the Official Languages Act of New Brunswick be amended to provide that both versions of final decisions - including the statement of reasons and summaries - be made available to the public simultaneously in both official languages: 1) if the point of law at issue is of interest or importance to the public; 2) where all or part of the proceedings were conducted in both official languages or where all or part of the pleadings were drafted in both official languages**
- **That the province's practice with respect to the translation of judgments, including decisions of administrative tribunals, be updated, taking into account the**

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[213] *Ibid*.
[214] McLaren, *supra* p 33.
[215] *Ibid*.

recommendations of the Commissioner of Official Languages in his June 2006 investigation report.

However, these recommendations will not solve everything, because there are other problems with section 24. Indeed, this section raises many questions regarding the interpretation of its French and English versions.

In order to understand the problem with this provision, I reproduce both the English and the French versions:

24 (1) Any final decision, order or judgment of any court, including any reasons given therefor and summaries, shall be published in both official languages where

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

24 (1) Les décisions ou ordonnances définitives des tribunaux, exposés des motifs et sommaires compris, sont publiés dans les deux langues officielles

a) si le point de droit en litige présente de l'intérêt ou de l'importance pour le public; ou
b) lorsque les procédures se sont déroulées, en tout ou en partie, dans les deux langues officielles.

(2) Where a final decision, order or judgment is required to be published under subsection (1), but it is determined that to do so would result in a delay or injustice or hardship to a party to the proceedings, the decision, order or judgment, including any reasons given, shall be published in the first instance in one official language and, thereafter, at the earliest possible time, in the other official language.

(2) Dans les cas visés par le paragraphe (1) ou lorsque la publication d'une version bilingue entraînerait un retard qui serait préjudiciable à l'intérêt public ou qui causerait une injustice ou un inconvénient grave à une des parties au litige, la décision, exposé des motifs compris, est publiée d'abord dans l'une des langues officielles, puis dans les meilleurs délais, dans l'autre langue officielle.

In his excellent text, Gérard Snow pointed out the many ambiguities of this article. Among other things, he shows that the English and French versions of subsection 24(2) "diverge substantially".[216] He notes, first, that the French version states that the two-stage publication regime in section 24(2) would apply to all cases covered by section 24(1). If this is the case, he says, "then what is the point of the phrase 'or where publication of a bilingual version would cause a delay'"(Translation).[217] The problem, he contends, is the conjunction "or" which is in the French version only, after "in the cases referred to in subsection(1)".

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[216] Snow, *supra* p 369.
[217] *Ibid*.

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I agree with Mr. Snow that the French version is flawed, and that the intent of Parliament is better expressed in the English version. As he points out, "Parliament must have intended to say: 'Where, in the circumstances referred to in subsection (1), the publication of a bilingual version would cause a delay ...'".[218]

Mr. Snow raises another ambiguity between the English and French versions of subsection 24(2). The English version contains the phrase "...but it is determined that to do so would result in a delay...", which has no equivalent in the French version. The English version thus suggests that a decision must be made by someone, though it does not specify who must make it.

Finally, as Mr. Snow points out, according to the English version, **any delay** would allow the exception system to be invoked ("Where a final decision, order or judgment is required to be published under subsection(1), but it is determined that to do so would result in a delay or injustice or hardship to a party to the proceedings [...]"). The exception system could be invoked, in the English version, in two cases: (1) where the production of the decision in both languages would cause a delay, or (2) where the delay would result in prejudice to the public interest or injustice or serious inconvenience to a party to the proceedings.

In the French version, the exception system can only be invoked if "the publication of a bilingual version would cause a delay that would be prejudicial to the public interest or would cause an injustice or a serious inconvenience to one of the parties to the litigation" [emphasis added]. It should be noted that the notion of public interest is totally absent from the English version. Mr. Snow rightly concludes that, in this case, it is the English version that is defective, since it allows the exception provided for in subsection (2) to be invoked in all cases, since the preparation of a text in two languages will **always** result in a delay.[219] (Emphasis added)

It should also be noted that sections 24, 25 and 26 of the *OLA* are inconsistent in their use of the French terms "décisions", "ordonnances" and "jugement" and the English equivalents "decision", "order" and "judgment".[220]

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[218] *Ibid*.
[219] *Ibid*.
[220] By comparison, the federal Act uses the term "décision" alone in French and "decision, order or judgment" in English. Snow points out that, by expressing itself in this way, the federal legislator clearly implies that there is no need to distinguish between decisions, orders and judgments. Snow, *supra* p 371.

To illustrate this inconsistency, Mr. Snow prepared the following table[221]:

Provision

English Version

French Version

24(1)
Any final decision, order or judgment…
Les décisions ou ordonnances définitives…

24(2)
the decision, order or judgment…
la décision…

25
All decisions of the Court of Appeal…
Les décisions de la Cour d'appel…

26
the judgment…
la décision

As he points out, "it is arguable that the New Brunswick legislature, like its federal counterpart, did not really intend to draw distinctions between these concepts … but, if so, it has done so in a curious way, for it has opened the door to potential arguments in favour of broadening or narrowing the scope of the various provisions".[222]

- **Given the vagueness surrounding sections 24, 25 and 26, I believe it is important that the current review of the Act be used to make the necessary corrections to these provisions.**

6. Judicial Decisions and the Equal AuthorityRule

If, as we saw in Part V, the equal authority of the both language versions of a legislative text is recognized in New Brunswick particularly because of the constitutional obligation set out in subsection 18(2) of the *Charter*, what about judicial decisions rendered and published in both official languages by the courts?

All lawyers know that the law in the common law system is not limited to legislation. An important part of the law is found in the judicial decisions rendered by the courts. A lawyer who ignores judicial decisions cannot claim to know the law. Thus, in a bilingual judicial system, it is legitimate

[221] Snow, *Ibid*. p 372.
[222] *Ibid*.

to ask whether problems interpreting bilingual texts also apply to interpretation of judicial decisions.

There is no constitutional obligation to publish judicial decisions in both official languages. As we have seen, there are provisions in the *Official Languages Act* that deal specifically with translation and publication of court decisions in both official languages, but they are silent as to the value to be given to each version.

Despite the existence of a statutory regime requiring the translation of certain decisions, there is no rule confirming the principle of the equal authority of the two versions of these decisions. Are we to conclude that only the original version is authoritative? If so, then what is the point of the translated version? If the two versions do not have the same value, does this not contravene the *Official Languages Act*, which states that no one shall be discriminated against on the basis of their choice of official language in a court proceeding?

However, it can happen that the two versions of a court decision do not say exactly the same thing. What should we do in such a case? Should we rely on the original version?

I repeat, the *Charter*, in subsection 18(2) recognizes the rule of equal authority as it relates to New Brunswick statutes. Whether this rule should also apply to judicial decisions has never been considered by the courts. Clearly, the obligation to publish decisions in the official languages differs from the obligation to publish legislative instruments in both languages, since the former originates in the *Official Languages Act* and the latter in a constitutional enactment. However, the source of the obligation should not influence the approach to be taken in interpreting decisions as long as the obligation to publish them in both languages exists.

With respect to the federal courts, Bastarache wrote:

> (Translation)"The requirement that authoritative legal texts be equally accessible to those who speak English and French derives its importance from Canada's commitment to the equal value of these languages and their importance to personal development. Thus, it is our contention that, regardless of the method used to develop bilingual judgments and regardless of the applicable legislative framework, it is undeniable that the English and French versions of judgments of the Federal Court, the Federal Court of Appeal and, most importantly, the Supreme Court of Canada are equally authoritative."[223]

We can draw the same conclusion for decisions of New Brunswick courts, at least since the adoption of the *Official Languages Act 2002*. Not all decisions of New Brunswick courts are translated into both official languages. I believe, however, that both published versions constitute "the statutes" within the meaning of subsection 18(2) of the *Charter*. The unqualified recognition of the equality of the two official languages in New Brunswick implies that the decisions of the courts are not only available in both official languages, but that they also are of equal authority. I do not

[223] M. Bastarache et al, *Le droit de l'interprétation bilingue*, Montréal, Lexis-Nexis, 2009 p 119-20.

draw this conclusion only for decisions where it is impossible to determine which version is a translation. The principle of equal authority must apply to all translated decisions, even those where it is clearly indicated that one of the two is a translation. In my view, this must be the case, since any other approach would have the effect of favouring one language at the expense of the other, thereby denying the principle of equality underlying language rights and violating the *Official Languages Act*, which provides that no one shall be placed at a disadvantage before a tribunal by reason of their choice of official language.

Some will argue that the application of the equal authority rule to translated court decisions is inappropriate, will create uncertainty and will be impractical. I am of the view that a legal system that aims at equality between the two official languages cannot entertain such arguments, or else the public will always be left with the impression that there is a primary language, that of the majority, and a secondary one, that of the minority, in judicial matters.

The public might well ask why translate court decisions, if the authenticity of the translated version cannot be trusted. Why would students at the Université de Moncton's Faculté de droit bother to read the French translation of a decision if they know it has no legal value? What about unilingual English-speaking students at UNB faced with a decision rendered in French and then translated into English? Should they simply ignore that such a decision exists?

The fact that the translated version of a court decision is not necessarily equal in wording to the original version should not be considered sufficient grounds for setting aside the equal authority rule. This same issue also occurs with legislation where one version is a translation of the other, but this does not cause the rule to be set aside. The Supreme Court of Canada was faced with this problem in *Doré v. Verdun (City)*.[224] In that case, the Court rejected the argument that the English version of the Civil Code of Québec was ignored because it was a "mere translation". Instead, the Court concluded that the quality of the translated version had no bearing on the rule of equal authority and that any differences must be resolved by applying to the rules of interpretation. Why couldn't a similar approach be applied in the case of judicial decisions? I recognize that the rules of statutory interpretation may not always be applicable to decisions, but there is nothing to prevent them from being adapted as necessary.

If languages and official language communities are equal in status, in law and in privilege, then litigants from either community should be able to receive equal treatment before the courts and should not be disadvantaged because of the official language they chose to use. The English-speaking legal community of New Brunswick would not accept, and rightly so, that important judicial decisions be rendered in French and their translation to English be an unofficial version on which it cannot rely. The English-speaking community would rightly consider this to be an obstacle to their right to fair access to justice. They would not accept that administrative or financial considerations would interfere with their rights. The same is true for the Francophone legal community. Equality of official languages means that both official language communities in the

[224] *Doré v Verdun (City)*, [1997] 2 SCR 862 para 25, 150 DLR (4th) 385.

province must have access in their own language to judicial decisions that have the same legal authority and in which they can have confidence.

It is important to recognize that the real obstacle to the recognition of the principle of equal authority for both versions of court decisions is far more political than legal: it is the refusal of the participants in the judicial system to recognize that a bilingual regime requires respect for the principle of equality. They must abandon the notion that one language is predominant, and the other only entitled to accommodation. Otherwise, we will no longer be able to speak of a bilingual legal system, but rather of a "dualist" legal system in which the law may be different, depending on whether a law or decision is read in one official language or the other.

That is why I propose that:

- **The *Official Languages Act* be amended to recognize that both language versions of court decisions or orders have equal force of law and equal standing.**

Finally, allow me one further comment. I believe sincerely that the authors of the Barry-Bastarache Report (to which I referred in "Historical Overview of Language Rights in New Brunswick (Part 4)" in this blog) were right: to have a true regime of legal and judicial bilingualism in New Brunswick, all lawyers and judges practicing in the province must be bilingual.

I have often said to my students, how can you give a legal opinion on a contract if you only read half the text? Similarly, how can you be sure of your opinion if you can only read half of a statute and only one language version of a decision?

That is not a bilingual judicial system!

PART VII- OLA REVIEW: COMMUNICATION AND SERVICES (PROPOSED AMENDMENTS)

To counter the phenomenon of assimilation, the government must be able to communicate with the public and offer its services in both official languages. On that subject, the Laurendeau-Dunton Commission wrote in 1967:

> "When it becomes usual for the language of the minority to receive little or no recognition in a given region, the minority reluctantly falls into line. It is especially in these situations that governments exert an influence on language: they bring all their weight to bear on the side of the majority language; thereby hastening the linguistic assimilation of the minority."[225]

More than 50 years after New Brunswick's adoption of our first *Official Languages Act*, can we, the only officially bilingual province in Canada, say that our government communicates with French-speaking citizens in their own language, without delay, everywhere in the province? Asking the question almost amounts to answering it, and some will call me naive for doing so.

Yet, the right for New Brunswick citizens to receive public services in either official language is law since 1969, with the adoption of the *Official Languages Act of New Brunswick*.[226] In 1982, this right was recognized in the Constitution, at subsection 20(2) of the *Canadian Charter of Rights and Freedoms*.[227] In 2002, a new *Official Languages Act* further clarified this right.[228]

In its language framework, New Brunswick chose a person-based approach, rather than a territory-based one thus recognizing that citizens have a right to use a minority language in a territory where the other language is the majority.

Under the "territory" concept, use of a language is linked to the number of its speakers in a geographic area. Thus, services are provided in the citizens' language only in defined regions, and nowhere else. The territorial approach favours unilingualism within a territory and is based on the phenomenon whereby speakers of the same language tend to be grouped together geographically, which should result in state borders and *linguistic* borders coinciding. And so, people living in the same area usually speak the same language and those who settle there would be required to use the dominant language in the public space, with any other language being restricted to the private space.

The "person-based" approach is more concerned with the ability to use a minority language in a territory where another language is the majority. Thus, the speaker is no longer limited in the use of their language by a territory, but can exercise the right anywhere, without territorial restriction. This is the option adopted by New Brunswick.

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[225] Davidson Dunton and André Laurendeau, *Report of the Royal Commission on Bilingualism and Biculturalism*, Ottawa, Queen's Printer, 1967-1970, p 89 [*Royal Commission Report*].
[226] *Official Languages Act of New Brunswick*, RSNB 1973, c O-1.
[227] *Part 1, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[228] *Official Languages Act*, SNB 2002, c O-0.5 [OLA].

However, things are not always so simple. *Territoriality* does not necessarily lead to unilingualism, and often the State still has to take into account the interests of the other language spoken within that territory. Moreover, the *person*-based approach is often limited by regional and demographic issues: there are too few speakers of the minority language in some regions to make its use possible in practice, although it is recognized in theory. This is the case in a number of regions of New Brunswick, even in some where there is a high proportion of minority language speakers.

A. The Official Languages Act and Delivery of Government Services in Both Official Languages

1. Delivery of public services

Sections 27 to 30 of the *Official Languages Act* pertain to the provision of services to the public in both official languages.

a). The right to receive services

Section 27 of the *Official Languages Act* repeats the wording of subsection 20(2) of the *Charter* and provides that members of the public have the right to communicate with and receive available services from any institution in the province in the official language of their choice. This applies without limitation throughout New Brunswick and to all institutions that fall within the definition of that word in section 1 of the Act. The obligation therefore applies not only to the head offices of these institutions, but also to all their offices, councils or boards. Thus, a Francophone is entitled, at least in theory, to expect that an office of one of these institutions located in Sussex will be able to offer them service in their language, and the same goes for an Anglophone in an office located in Caraquet.

To provide departments, organizations and Crown corporations with an idea of how the government planned to provide services in both languages, the government adopted an *Official Languages Policy and Guidelines - Language of Service* in 2009.[229] But what does "policy" mean? Can a policy have a legal effect? In French, the word "politique" has many meanings, but in this case, policy is intended to provide the public service with guidelines on how to proceed with respect to a specific subject. Understood in this way, a policy does not confer rights on individuals. Rather, it is a document that is intended to provide guidance about what to do in a specific context. That being said, to the extent that it is contrary to the constitution, the law or a regulation, it may be subject to legal sanction.

The *Language of Service Policy* aims to assist and guide departments, institutions and agencies of the province in fulfilling their obligations under the *Official Languages Act*. It is also intended to ensure that services of equal quality are offered and delivered in both official languages. *The Language of Service Policy* applies to government departments, agencies, the health sector, Crown

[229] *Official Languages - Language of Service Policy*, online: https://www2.gnb.ca/content/gnb/en/departments/finance/human_resources/content/policies_and_guidelines/language_service.html.

corporations, as well as institutions and private businesses that provide government services. However, given the duality of the school system, it does not apply to divisions of the Department of Education, which are organized based on either official language. Nor does it apply to schools and school district offices. It does apply to the Department of Post-Secondary Education, Training and Labour, but not to community colleges or universities.

As surprising as it may seem, it is the Department of Finance and Treasury Board who is responsible for the *Language of Service Policy*. One can doubt that this is high on this department's priority list. Even so, they have the responsibility to implement that policy and provide advice on its interpretation and administration. This situation appears to be contrary to the *Official Languages Act*, which grants this responsibility to the Premier.

The *Language of Service Policy* defines "equal quality service" as "service which is actively offered in both official languages and which is available in the language chosen by the member of the public *without undue delay*". It doesn't define what is meant by *undue delay*. The notion that services must be offered without undue delay suggests that a *delay* would be acceptable, as long as it is not "*undue*".

But the term "*delay*" does not appear in the *Charter*, nor the *Official Languages Act*, nor anywhere. In fact, the *Charter* (ss.20(2)) and the *Official Languages Act* (s.27) provide for the contrary - that the public has the right to communicate with and receive available services in their chosen official language without any time limit. It is not a question of *delay*, **undue or otherwise**. I want to make it clear and remind everyone that the *Language of Service Policy* cannot have the effect of limiting or changing the rights recognized by the *Charter* and the *Official Languages Act*.

It should be noted that the concept of substantive equality does not appear in the policy. Yet, the Supreme Court of Canada stated that substantive equality is the norm in language rights. Substantive equality is achieved when differences in the characteristics and circumstances of the minority community are taken into account by offering services with distinct content or through a different delivery method in order to ensure that the minority receives the same quality of services as the majority.

The standard that seems to be retained by the *Language of Service Policy* is that of formal equality, which means treating members of the minority and majority community identically, by offering them identical services, without taking into account the possible differences between the two communities.

The *Language of Service Policy* also states "where services are offered to the public by government, there is a legal obligation to offer and provide such services in the official language of choice of the public." There are no exceptions based on the existence of a minimum number of members of either linguistic community in an area. The public should therefore expect to receive services from a government institution in the official language of their choice, regardless of where they are provided in the province.

Service to the public includes, but is not limited to, "oral communication; correspondence; electronic service delivery channels (e-mail, internet, voicemail); staffing interviews; public forms and public documents; information material; signage; judicial and administrative tribunals; and public services provided by third parties". It was deemed appropriate to clarify:

> "This includes regular and specialized services normally provided to the public under government legislation and programs. This includes all government services offered to the public as well as technical, advisory and professional services. It also includes requests or inquiries to the government from individuals, groups or organizations seeking solutions to unusual problems relating to the provision of government services or the need for such services".

The policy specifically states that public servants should not normally use interpretation services to deliver the service. However, in cases where interpretation services are required, they must be immediately available.

In light of the above, I recommend:

- **That any amendment to the *Official Languages Act* that would impose the notion of "reasonable time" or "without undue delay" to obtain government services in the official language of one's choice be rejected and that this reference also be removed from the *Language of Service Policy*;**
- **That the *Language of Service Policy* be reviewed and corrected to bring it into line with the obligations assigned under the *Charter* and the *Official Languages Act*.**

I also note that the *Language of Service Policy* makes no provision for the use of social media or other technological means by provincial institutions. The provincial government must consider setting standards for their use. It is clear that, when using social media and other such technology, New Brunswick institutions must respect the *Official Languages Act* and must ensure that the services provided and the information given are of equal quality, in French and English. They may have two separate accounts, one in English and one in French, to present content, terms of use and messages in both official languages that are of equal quality. The public may, of course, interact on these social media in the official language of their choice, and the institution must respond in the official language of the citizen's choice, if they have a question or comment.

Due to the nature of social media, the content of English and French accounts may vary, particularly when it comes to the messages and comments posted by users. In addition, when the institution posts links to non-government websites, some of these links may lead to sites of organizations that are not subject to the *Official Languages Act* and whose sites are available in one language only.

The use of social media by provincial ministers and the Premier also raises questions. If they use it for personal or partisan purposes, it appears clear to me that they are not subject to the obligations of the *Official Languages Act*. However, when they use social media for departmental purposes, they must then comply with the *Official Languages Act* and provide information of equal quality in

both official languages. It can sometimes be difficult to draw a line between the use of these tools for political purposes and for official purposes. In such cases, they should exercise caution and provide information in both official languages.

- **That the government adopt a policy on language of service that is consistent with its obligations under the *Charter* and the *Official Languages Act* with respect to the use of social media and new technologies.**

b) Obligation of government institutions

Section 28 states that institutions must ensure that the public can communicate with and receive services from them in the official language of their choice. The provincial government must establish a mode of operation that will enable institutions to meet this obligation. This requires focusing on identifying needs, setting objectives, training employees and developing implementation and monitoring mechanisms. The provincial government must therefore adopt an official languages master plan for the entire government in order to fully meet its official languages obligations.

I will add that new technologies must not become a means of providing service in both official languages, except in exceptional cases that will have to be specified, and that they cannot replace service of equal quality, particularly in certain sectors such as health.

I therefore propose:

- **That the *Official Languages Act* provide for the development by the government of a strategy based on planning needs, setting objectives, training employees, and putting in place implementation and monitoring mechanisms to ensure the provision of services of equal quality in both official languages.**

c) Active offer

In 1967, the Royal Commission on Bilingualism and Biculturalism referred to the concept of active offer in its report:

"We begin by rejecting a proposition that in our eyes is unacceptable - that is, the provision of services in the minority language only to the extent that the minority requests. A system of that kind would constitute no real guarantee; it would be at the mercy of more or less arbitrary interpretation by the authorities of the day. Moreover, we have noted earlier that in a province where services have never or rarely been offered in the official language of the minority, the minority may by force of habit have resigned themselves to the situation even when they considered it unjust. We need more objective criteria than this, criteria founded on something more tangible."[230]

We too often forget that the government is a reflection of all its citizens. As a speaker of one of the country's two official languages, citizens should not feel that they are interfering with the

[230] *Royal Commission Report, supra*, pp 97-98.

functioning of the government apparatus when they wish to address it and receive its services in their own language. As the Royal Commission on Bilingualism and Biculturalism so aptly pointed out:

> "When it becomes usual for the language of the minority to receive little or no recognition in a given region, the minority reluctantly falls into line. It is especially in these situations that governments exert an influence on language: they bring all their weight to bear on the side of the majority language; thereby hastening the linguistic assimilation of the minority."[231]

Hence the importance of the right to service in one's language and the active offer of service, because the damage caused by a violation of the right and the obligation to actively offer services is real and of great importance to the minority community:

> "It is not easy to measure this influence; in fact, it can seem minimal, if each contact is considered separately. For a Francophone to be forced to exchange a few words in English, if he can, with a postal clerk or a railway employee may seem of no great concrete importance. But if we 'add up the number of times a citizen must use language when dealing with the various agencies of government - if we consider the decisive role language plays in the schools, if we think of the influence of the mass media controlled by the state - then we must conclude that the influence of public authorities on the use of language is deep and strong."[232]

The government plays a crucial role in maintaining the linguistic vitality of a minority community, which is why it is important for it to ensure the promotion of language rights at all times and in all places.

Section 28.1 of the *Official Languages Act* sets out the obligation of institutions to make an "active offer" of service in both official languages. Under this provision, government institutions must take *measures* to inform the public that their services are available in the official language of their choice. The active offer of service is the first step that must be taken by a representative of a provincial government institution.[233] It is no longer a matter of waiting for a member of the public to demand service in the official language of their choice, as was the case with the 1969 *Official Languages Act*. Whether or not someone understands English or French is irrelevant. In all cases, the public's choice of language of service must be respected after they have been given the opportunity to choose either official language. **Once the choice of language has been made, the institution must ensure that it has the necessary mechanisms in place to ensure that the member of the public can immediately receive service in the language of their choice, and this service must be of equal quality, regardless of the official language chosen.**[234] This concept of active offer, however, seems to be both frightening and very poorly understood by provincial

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[231] *Ibid*. p 91.
[232] *Ibid*. p 92.
[233] Office of the Commissioner of Official Languages for New Brunswick, *Investigation Report: Ambulance New Brunswick*, File no. 2013-1992, March 2014, p 6.
[234] See *DesRochers, supra*.

institutions. According to the reports of the Office of the Commissioner of Official Languages, from the first to the last, the majority of complaints deplore the lack of "active offer". Yet, as Chief Justice Richard of the Court of Queen's Bench pointed out in *Gautreau v. New Brunswick*, this concept is very important:

> (Translation) "If languages have equal status, one must therefore conclude that an *active* offer is necessary. It is a matter of dignity, pride and mutual respect of individuals in society. It cannot be accepted to encourage and justify different standards from one language to another."[235]

Justice Lavigne of the Court of Queen's Bench added in *R. v. Gaudet*:

> "Linguistic minorities will not always ask for the services to which they are entitled. (...) The notion of "active offer" is of the utmost importance in terms of progression towards the equality of status of the two official languages. This coincides well with the notion that *Charter* language rights are remedial in nature having regard to past injustices."[236]

In the foreword to its 2014-2015 annual report, the Office of the Commissioner of Official Languages of New Brunswick had this to say about the dynamics of active offer:

> "Institutions bound by the *OLA* have an obligation to inform citizens that their services are available in both official languages. As a result, it is not up to citizens to request services in their language, it is the institution's obligation to make that offer. Examples of active offer include answering the telephone or greeting someone in both official languages".[237]

The *Language of Service Policy* requires government employees to make an active offer of service in both official languages. In some situations, the institution believes that it is sufficient to use a sign to inform members of the public that, if they wish to communicate in French, they must notify the employee in charge and wait for an employee to come and serve them.[238] Clearly, such a practice does not comply with the obligations set out in the *Official Languages Act*. The institution cannot claim that it wants to respect its linguistic obligations by offering immediate service to English-speaking clients, while French-speaking clients must wait for a bilingual staff member to be available to offer service in their language.

In its 2015-2016 Annual Report, the Office of the Commissioner of Official Languages of New Brunswick reports on the results of a study that sought to verify the compliance of departments and agencies with the obligations of the *Official Languages Act*.[239] The study compared service

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[235] *Gautreau v. New Brunswick* (1989), 101 NBR (2) 1, p 28, [1998] NBJ 1005 (QL), overturned by the Court of Appeal on another issue (1990), 109 NBR (2) 54, [1990] NBJ 860 (QL), and leave to appeal to the Supreme Court of Canada denied, [1991] 3 SCR viii [*Gautreau*].
[236] *R v. Gaudet*, 2010 NBQB 27, 355 NBR (2) 277, para 42 [*Gaudet*].
[237] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2014-2015*, p 9.
[238] Office of the Commissioner of Official Languages for New Brunswick, *Systemic Investigation: Investigation into the delivery of security and reception services in both official languages in government buildings*, File no. 2015-2377; 2015-2586, March 2016, p 12 [*Investigation into the delivery of security...]*
[239] *Annual Report 2015-2016, supra*, p 16-36.

delivery in English and French at the provincial and regional levels. The results of this study demonstrated the low rate of active offer during in-person audits. "On average, auditors were greeted in both official languages by employees fewer than one in five times."[240] However, as the Commissioner points out, active offer of service is, for the citizen, "the first step in obtaining quality services in one's official language of choice."[241]

I propose:

- **That information and education campaign be undertaken with employees of the province's institutions to make them aware of the importance of the concept of "active offer" and the obligations that flow from it.**
- **That the necessary changes be made to the *Language of Service Policy* to ensure that it complies with the government's obligations regarding "active offer. "**

d) Public signage

According to section 29 of the *Official Languages Act*, "Institutions shall publish all postings, publications and documents intended for the general public in both official languages". Examples of government public signs are road signs (including tourist signs), signs in front of government buildings, and signs in government offices.[242]

One of the issues generally raised with respect to government public signage is that the order of presentation of the two official languages generally favours English, even in predominantly French-speaking regions: English is on the left or above; French is on the right or below. As the Commissioner of Official Languages pointed out, "given that we read from left to right and top to bottom, the current order of presentation does not help to promote the French language".[243] Such an order of presentation in majority Francophone regions appears "inappropriate, because it does not reflect the linguistic reality".[244]

In 2010, the Commissioner of Official Languages recommended to the Premier that the province adopt a balanced government signage policy that would fully respect the principle of equality of the two official languages and take into account the linguistic reality of the regions. The province has not acted on this recommendation.

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[240] *Ibid*. p 12.
[241] *Ibid*.
[242] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2009-2010*, p 17, online: https://officiallanguages.nb.ca/wp-content/uploads/2012/02/2009-2010_annual_report4.pdf.
[243] *Ibid*.
[244] *Ibid*.

I propose:

- **That the *Official Languages Act* include an obligation for the province to adopt a balanced policy on government signage that fully respects the principle of equality of the two official languages and takes into account the linguistic reality of the regions.**

e) Third-party services

Section 30 of the *Official Languages Act* requires the province and its institutions to ensure that services provided to the public by third parties on behalf of the province or its institutions are available in either official language. This section is obviously intended to apply to entities carrying on an activity that can be identified with the government.[245] The section specifies that the public must be able to communicate with and obtain services from the third party in the official language of their choice.

In this way, the *Official Languages Act* responds to concerns that certain government functions or activities may be privatized. While no New Brunswick decision has dealt with this section, this is not the case with respect to section 25, a similar provision found in Canada's *Official Languages Act*.[246] These decisions may eventually serve as a precedent for New Brunswick.

I note, however, that the Commissioner of Official Languages, Katherine d'Entremont, examined this issue in one of her investigations reports.[247] A truly relevant report, but one that was unfortunately misunderstood and misinterpreted by a portion of the population, certain media and the government of the day.

In this report, the Commissioner reiterated the fact that, under section 30 of the *OLA*, the provincial government is responsible for ensuring that third parties that provide a service on its behalf respect linguistic obligations in the same way as provincial institutions themselves.[248] Specifically, she analyzed the relationship between the Department of Transportation and Infrastructure and the Canadian Corps of Commissionaires, a third party within the meaning of section 30, and found that the contract governing this relationship did not contain a clause concerning the third party's responsibilities and obligations to provide services in both official languages in accordance with section 30.[249] She added that "the fact that the Department of Transportation and Infrastructure did not ensure its obligations were met by including such a provision in the contract has as a direct consequence to concede to the Canadian Corps of Commissionaires whether or not to conform to

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[245] These services include some that are privatized or contracted between the provincial government and a private service. See, for example, the services provided by Ambulance New Brunswick or the privatization of *extramural* medical services.
[246] Section 25 of the federal legislation: "Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language". For an analysis of the case law on this provision, see Klinck, «Le droit à la prestation des services publics», Les droits linguistiques au Canada, 3e éd, sous la direction de M. Bastarache et M. Doucet, les Éditions Yvon Blais pp 535-37.
[247] *Investigation into the delivery of security..., supra*.
[248] *Ibid*. p 9.
[249] *Ibid*.

the obligations prescribed by the *OLA*."[250] A provincial government institution cannot fail to carry out its statutory obligations by simply transferring its own responsibilities to a third party. It must ensure compliance with the *Official Languages Act* at all times.

With specific reference to the situation between the Department of Transportation and Infrastructure and the Canadian Corps of Commissionaires, the Commissioner's report makes the following observation:

> "The situation as it exists today makes it impossible to ensure uniformity among the services offered on behalf of the institution. For example, after reviewing the instructions between the Department and the third party for Chancery Place [a government building in Fredericton], the Victoria Health Centre, the Centennial Building, and Government House, we noted that only one of these buildings has developed orders for the delivery of service in both official languages. The second page of the document entitled *Commissionaires Post Orders ("the instructions") for Chancery Place* provides a vague guideline for commissionaires, and does not address service delivery, but is limited to the greeting only:
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> 'When clients come in, greet them in a bilingual manner.'
>
> This situation therefore illustrates why it is not an option to rely on the good faith of the third party to offer a service that meets the requirements of the *OLA*. Instructions do not have the same legitimacy as a contract provision. Without specific provisions set out in a contract and imposed by the institution, it is unrealistic to assume the language obligations will be met by the third party."[251]

We, like the Commissioner, must ask how the public can expect to receive service in the official language of their choice when the government institution itself does not require the third party to comply with the Act:

> "The Office of the Commissioner cannot overemphasize the fact that it is the responsibility of institutions to ensure the availability at all times of services in both official languages. A detailed contract clause would ensure that the third party meets its obligations to actively offer and provide the public with services of equal quality in both official languages at all times."[252] [Emphasis added].

Contrary to what some argued at the time, this report was not directed at the commissionaire in question, but rather at the government's failure to ensure compliance with the Act. Any consequences that the commissionaire may have suffered are due to decisions made by his employer or by the department that entered into the contract with his employer and not due to Commissioner d'Entremont. I consider that she was thus treated unfairly, when she was merely doing the job that a quasi-constitutional law mandated her to do.

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[250] *Ibid*. p 10.
[251] *Ibid*.
[252] *Ibid*. p 11.

The "active offer" requirement is also addressed in the *Language of Service Policy*, which states:

> "Where the initiative will result in government services being delivered to the public or to public service employees by a service provider external to government, the contract must include a compliance clause spelling out the parties' responsibilities and obligations under the *Language of Service Policy* to deliver service in both official languages. This extends to the third-party service provider the service requirements for government institutions as per the *Official Languages Act*." [Emphasis added].

However, the Policy later adds a qualification: "This does not mean that all individual third-party service providers must have bilingual service capacity. It does mean that the responsible government institution must ensure that the service is available to clients in the official language they choose. The service can be provided by either one service provider that has the bilingual capacity or from a number of service providers who function in one official language or the other."

This explanation does not seem to me to be consistent with section 30 of the *Official Languages Act*, which states that if a province or an institution engages a third party to provide services on its behalf, it is responsible for ensuring that the third party meets its obligations under the *Official Languages Act*. Instead, the policy seems to indicate that it is not necessary for the provider or a third party to comply with these obligations, as long as the services are available elsewhere. The *Official Languages Act* is clear that the provincial government or institution must ensure that the third party has this capacity, and in the event of an inconsistency between the law and the policy, the law prevails.

As the Commissioner Report states

"It is up to the institution to take positive measures...and to ensure that linguistic requirements are met in the delivery of services under contracts it concludes with third parties. This is the only conceivable approach to ensure that linguistic guarantees are no longer considered optional or symbolic by third parties."[253]

I therefore propose:

- **That the *Official Languages Act* be amended to include a provision requiring the government institution to ensure that contracts with third parties include detailed clauses clearly setting out the responsibilities and obligations of the parties under the *Official Languages Act*.**

If memory serves, I have not disagreed with an investigation report by Commissioner d'Entremont except in the following case. In one investigation report, the Commissioner concluded that the New Brunswick Liquor Corporation (NB Liquor) franchise stores did not have the same linguistic obligations as NB Liquor, a provincial Crown corporation that is responsible for the purchase, importation, distribution and retailing of all alcoholic beverages in the province.[254]

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[253] *Investigation into the delivery of security, supra*, p 14.
[254] See *New Brunswick Liquor Corporation Act*, RSNB 1974, c N-6.1.

Yet, according to the NB Liquor website[255], it is clearly stated that the Agency Store Program was established to provide better service to the public in communities where NB Liquor has decided not to establish a liquor store, to serve customers, to generate additional sales for NB Liquor and to assist in the development of the liquor sales industry in New Brunswick. Franchisees are permitted to sell beer, wine, spirits and other alcoholic beverages normally found in NB Liquor stores.

In addition, the Franchise Store Program Policy details the terms and conditions for obtaining a franchise license and the obligations of franchise stores. The policy states, among other things, that franchisees are free to choose the business configuration they prefer, subject to NB Liquor's approval, but a space must still be designated for the sale and storage of NB Liquor products. The Program also provides that NB Liquor will provide training to participants on the requirements of the *Liquor Control Act* [256] and any other relevant social responsibility issues. In addition, ongoing product training and portfolio management assistance will be provided to franchisees. NB Liquor is also committed to providing free indoor and outdoor signage. In accordance with the *Liquor Control Act*, all employees of Agency Stores who handle alcoholic beverages must be at least 19 years of age. However, the Policy does not contain any language of service provisions.

The Office of the Commissioner of Official Languages had received two complaints about the lack of bilingual services in franchise stores. With respect to the first complaint about the lack of French services at the franchise store in Saint-Antoine, Kent County, the Office of the Commissioner concluded that the franchise store had linguistic obligations: the franchise program presented these stores as agents of NB Liquor, providing service on their behalf, thereby demonstrating that they were operating as third parties to NB Liquor within the meaning of the *Official Languages Act*.

With respect to the second complaint, which again concerned the lack of French language services in the Memramcook franchise store, the Office of the Commissioner of Official Languages took a diametrically opposed position, refusing to accept the complaint. According to the Commissioner, in light of

> (Translation) "the fact that the franchise store program had evolved rapidly and that large surface grocery stores could now sell alcohol, the Office of the Commissioner then conducted a thorough review of the contractual relationship between [NB Liquor] and the franchise stores".[257]

This "analysis" led the Office of the Commissioner to conclude that the franchise stores were not third parties, but only outlets where NB Liquor products could be purchased. However, the Office does not report on the changes that it became aware of in its "comprehensive review" and how these changes differ from the Franchise Store Program.

The change in interpretation by the Office of the Commissioner of Official Languages is difficult to understand and follow, especially when one considers that the store that was the subject of the

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[255] New Brunswick Liquor Corporation, online: https://www.anbl.com/corporate
[256] RSNB 1973, c L-10.
[257] Email message from K. d'Entremont, Commissioner of Official Languages, July 18, 2016.

complaint is located in the francophone municipality of Memramcook, which is not serviced by any other NB Liquor store. Yet this store is operating under the NB Liquor banner (the sign outside the store reads "agent") and in accordance with the obligations set out in the Franchisee Store Program Policy. Based on these facts, there is no doubt that this store and others like it are third parties acting on behalf of NB Liquor.

With respect to "large surface grocery stores", I fail to see how this fact alone justifies a change in interpretation with respect to the language obligations of third parties providing services on behalf of the province or any of its institutions. Moreover, the Memramcook franchise store cannot be characterized as a "big box grocery store", and in any event, the question of the linguistic obligations of such large surface grocery stores will have to be addressed only if a complaint is filed against them. Moreover, I see no reason why certain language obligations, such as signage in both official languages and the availability of bilingual staff trained on NB Liquor products sold by the franchisee, could not be included in the contract with these "outlets".

The interpretation of the Office of the Commissioner of Official Languages seems to indicate that the statutory and constitutional language obligations could be circumvented by the adoption of a policy or by a contract that would qualify the third party not as an "agent" but as an "outlet". However, what is important is not how the third party describes itself in the contract, but whether it is acting on behalf of a provincial institution.

NB Liquor cannot deprive citizens living in communities, which do not have a retail outlet for alcoholic beverages, of their language rights simply by designating a franchisee as an "outlet"; section 30 of the *OLA* was enacted to deal with just such a situation.

I therefore propose:

- **That business franchises, whether agents or outlets, acting on behalf of a provincial institution be subject to the obligations set out in the *Official Languages Act*, and that this obligation be clearly defined in the franchise or outlet agreement.**

(f) Policing

Sections 31 and 32 of the *Official Languages Act* deal with police services. Subsection 31(1) provides that every member of the public has the right, when communicating with a peace officer, to be served in the official language of their choice and to be informed of that choice. The term "peace officer" is defined in section 1 as follows:

> ""peace officer" means a peace officer as defined under section 1 of the *Provincial Offences Procedure Act* who serves the public, whether on behalf of the Province, a municipality or under a contract for the delivery of policing services with the Province or its institutions and includes a police officer as defined under that Act.

Thus, sections 31 and 32 apply to the Royal Canadian Mounted Police, who, under contract with the province, provide policing services on behalf of the province,[258] and to municipal police forces.

Subsection 31(2) provides that if a peace officer is unable to provide services in the official language chosen under subsection (1), they shall, within a reasonable time, take the necessary steps to communicate in the chosen language. It should be noted that this concept of reasonable time undermines the substantive equality test imposed by section 20 of the Charter. Moreover, it is difficult to define what constitutes a "reasonable time. "

I therefore propose:

- **That subsection 31(2) of the *Official Languages Act* be amended to remove the phrase within a reasonable time.**
- **Subsection 31 (4)[259][35] be repealed.**

I recognize that some people believe that only peace officers have language obligations under the *Official Languages Act*, though I do not agree with that interpretation. According to this interpretation, non-peace officers who work in police stations would not be subject to the Act. It is difficult for me to imagine that these people who are part of the police service would not have language obligations while police officers do. However, in order to avoid any ambiguity in the interpretation of the language obligations of police and peace officers, I recommend:

- **that the wording of subsection 31(1) be amended to refer specifically to police services and include services provided by non-police officers**

In the next section, I will address the issue of language of work.

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[258] See *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. et Paulin v. Canada*, 2008 SCC 15, [2008] 1 SCR 383.

[259] Subsection 31 (4) states: "When determining if a peace officer has taken the measures necessary under subsection (2) within a reasonable time, a court shall consider the efforts made by the police force or agency to fulfill its obligations under subsection (3)".

PART VIII - REVISION OF THE OLA: LANGUAGE OF WORK (PROPOSED AMENDMENTS)

The Royal Commission on Bilingualism and Biculturalism wrote the following about the right to work in either official language in the public service:

> "Most of (our formal recommendations on the Public Service) are desirable on grounds of efficiency alone, but to this reason must be added the concept of the right to work in either of Canada's official languages. The main administrative need is to enlarge the range of situations in which French can be used for government work, particularly at the middle and higher levels, giving Francophone public servants a real possibility to work in their own language and to make their own positive cultural contribution to the work in hand."[260]

Such a requirement flows directly from the principle of linguistic equality. Since this principle is enshrined in section 16 of the *Canadian Charter of Rights and Freedoms*, it must be asked whether this provision constitutionally guarantees the right of public service employees to work in their language. The answer is even more important in New Brunswick because, unlike the federal *Official Languages Act*,[261] the New Brunswick *Official Languages Act* is silent on the issue of language of work.

The courts have not yet decided whether section 16 of the *Charter* guarantees public servants the right to work in the official language of their choice. Some have concluded that this section does not grant public servants this right, since it would impose onerous and unreasonable obligations on the government.[262] Others, including myself, have argued that this section gives public servants in the Federal Parliament and government and in the New Brunswick Legislature and government the right to use English and French as languages of work.[263] There is no doubt that this section, which enshrines the equality of the two official languages in federal and New Brunswick government institutions, is the only provision that can guarantee the right of public servants to work in the official language of their choice. Indeed, how can there be equality of the official languages if employees are permitted to work in one language and not the other. This right is not absolute, however, and must be reconciled with the right of the public to receive government services in the official language of their choice, which is guaranteed by section 20 of the *Charter*.

The right of the public under section 20 is in no way incompatible with the right to work in the official language of their choice. Section 20 clearly imposes a positive obligation on governments

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[260] Davidson Dunton and André Laurendeau, *Report of the Royal Commission on Bilingualism and Biculturalism*, Ottawa, Queen's Printer, 1967-1970, Book III, *Federal Administration*, p 180 [*Report of the Royal Commission.*

[261] See, *Official Languages Act*, RSC 1985, c. 31 (4th suppl), Part V – Language of Work.

[262] B. B. Pelletier, «Les pouvoirs de légiférer en matière de langue après la "Loi constitutionnelle de 1982"» (1984) 25 C de D 227.

[263] See J. Klinck, «Le droit à la prestation des services publics», in M. Bastarache and M. Doucet, ed. *Les droits linguistiques au Canada*, 3rd ed. Cowansville (Qc), Yvon Blais, 2013, p 523; P. Hogg, *Constitutional Law of Canada*, 5th ed, loose sheets, Scarborough (ON) Thomson/Carswell, 2007, para 56.6(a); and M. Doucet, «Langues et droit constitutionnel», Fascicule 12, *Droit constitutionnel*, JurisClasseur Québec, LexisNexis, p 12314, para 21.

to provide services in the language of choice of their recipients. This provision clearly favours the public's language choice at the expense of that of government officials. As some authors point out:

> "The idea of conflict raised here arises from a conception of the state that is reduced to its individual agents. It requires, moreover, that the public's right in this area be found to conflict with an analogous right of public servants. The very notion of conflict implicitly precludes the idea that the government has broader obligations than those of its officials. The conflict is eliminated when the government is no longer conceived of as simply the collective of its officials. In other words, in language rights, the government's obligations are not imposed on individual public servants, but on the government as a whole. In this way, the government is required to organize services in such a way as to be able to accommodate users in their own language, and it thus becomes possible to respect the language choice of citizens without infringing the individual rights of public servants."[264]

Although the right of New Brunswick public servants to work in their language is guaranteed by section 16 of the *Charter*, it is not yet recognized in the *Official Languages Act*. With respect to language of work, successive provincial governments have instead chosen policies and guidelines that have no legal effect.

New Brunswick's first official languages policy, adopted in 1988, was based on a two-pronged approach: language of service and language of work. The provisions dealing with language of work were so general and non-binding that they did not pave the way for francophones to be able to work in their language within the government apparatus. In 1996, a study on the effectiveness of the 1988 policy concluded that (Translation)"it is much more difficult to use French than English as a language of work in government. The report notes that there is a gap between the intentions of the policy to create a workplace conducive to the use of both official languages and the reality".[265] Is it not alarming that the authors of the *2015 Official Languages Plan*, almost twenty years later, come to the same conclusion: "it is very difficult, if not impossible, to work in one's language of choice if that language is French"?[266]

The authors of the 1996 Report also noted that, in the course of their work, English-speaking public servants, on average, (Translation) "read in English 96% of the time, write in English 98% of the time, and speak in English 95% of the time. Francophone public servants, on the other hand, (Translation) "read in French 40% of the time, write in French 51% of the time, and speak in French 60% of the time".[267] These figures would be even lower if one were to exclude from this statistic those public servants who work in the francophone sector of the Department of Education.

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[264] Klinck, «Le droit à la prestation des services publics», *Ibid*. p 524.
[265] New Brunswick, *Government of New Brunswick, Bonjour! A Study on the Effectiveness of New Brunswick's Language Policy*, 1996, pp 6-7 [1996 Report].
[266] New Brunswick, *Government of New Brunswick, Plan on Official Languages- Official Bilingualism: A Fundamental Value*, 2015, p 12 [2015 Plan].
[267] *1996 Report, supra*, p 6.

The authors go on to say that (Translation) "19% of French-speaking employees reported that they had lost some or a great deal of skill in their first language. The vast majority of representatives of both language groups said they had improved or maintained their English skills. On the other hand, 18% of Anglophones also indicated that they had lost skills in their second language".[268] Another telling finding is that "Francophone public servants feel that there is a serious lack of bilingualism in the senior public service".[269]

The Commissioner of Official Languages, Katherine d'Entremont, made a similar finding in her *2014-2015 Annual Report*. I have discussed the findings of this report in a previous blog text dealing with the implementation of the Act, but I think it is important to repeat them here. Commissioner d'Entremont said that official bilingualism has never meant that all government employees must speak both official languages. Based on the latest government data, she showed that only 41% of provincial public service employees are required to be bilingual.[270] She expressed surprise at such a state of affairs: "However, one would expect those primarily responsible for applying the OLA, i.e., senior public servants, to be required to speak both languages. But, in Canada's only officially bilingual province, no policies or guidelines make it a requirement".[271] She listed several reasons for this phenomenon, grouping them into four categories, justifying the fact that bilingualism is an essential skill for senior public service positions:

- Communicating with the two linguistic communities[272]
- Ensuring the quality of bilingual services provided to the public[273]
- Creating a bilingual work environment[274]
- Embodying one of the province's fundamental values[275]

The authors of the *2015 Plan* noted that one of the reasons Francophone public servants have difficulty working in their language is " the presence of unilingual senior officials".[276] Unfortunately, the message does not seem to have been heard in Fredericton.

When one considers the negative consequences of a unilingual workplace, the inaction of successive provincial governments in the area of language of work is difficult to explain, other than the political motives behind their refusal to act. As the authors of the 1996 Report noted, such a situation risks causing French-speaking public servants to lose their first language, and English-speaking public servants to lose their second language.

Moreover, a unilingual English-speaking work environment is detrimental to the vitality of the minority language. Indeed, its speakers come to consider that their language has no place in the

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[268] *Ibid*.
[269] *Ibid*.
[270] *Annual Report 2014-2015*, p 18.
[271] *Ibid*.
[272] *Ibid*. p 20.
[273] *Ibid*. p 21.
[274] *Ibid*.
[275] *Ibid*. p 22.
[276] *2015 Plan*, p 12.

workplace. The resources devoted to training English-speaking public servants in their second language are wasted if they do not have the opportunity to speak or use it in the course of their duties.

Despite the findings of the *1996 Report*, it was not until 2009 that the government amended the *Language of Work Policy*.[277] According to the provincial government, the new policy "clarifies the policy direction with the addition of guidelines for its application".[278] The policy is intended to "assist and guide provincial departments, institutions and agencies in providing a work environment that encourages and enables employees to work and pursue a career in their official language of choice".[279] The objective is "to promote the use of both official languages by employees in provincial departments, institutions and agencies".

While this policy is a step in the right direction, nowhere does it specify the right of public servants to work in the official language of their choice, a right that flows, as I have indicated, from section 16 of the Charter. Moreover, as the authors of the *1996 Report* and the *2015 Plan* pointed out, the language of work in the provincial government generally remains English. Change in this regard will require greater leadership from senior government and policy-makers, which is still sorely lacking today. It will also require that policy-makers fulfill their responsibilities and clearly define in the *Official Languages Act* the responsibilities of provincial institutions in this area. Recognition in the *Official Languages Act* of the right to work in one's own language would provide a remedy for those whose rights are being infringed upon that does not exist at all in the current policy.

In her *2013-2014 Annual Report*, Commissioner of Official Languages d'Entremont asked: "How does government provide bilingual services?" Her findings are revealing and reflect a lack of government commitment in this area.

To provide bilingual services to the population, the policy calls for a "team approach". This involves grouping employees into functional teams and using their language skills to provide services to the public in both official languages. The language capacity of each team may vary. The policy states, for example, that teams that have a lot of interaction with the public, provide specialized services, or work in areas where English and French communities coexist will require greater English and French language capacity than teams that have little interaction with the public or work in areas where one language predominates.

Once the bilingualism requirements have been identified, the language profile is determined, i.e., the number of bilingual and unilingual individuals needed to provide services in both official

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[277] Government of New Brunswick, Administration Manual, no AD-2919, vol 2, Official Languages - *Language of Work Policy and Guidelines*, online: https://www2.gnb.ca/content/gnb/en/departments/finance/human_resources/content/policies_and_guidelines/language_work.html [*Policy – Language of Work*].

[278] New Brunswick, *Official Languages: Straight Talk on Language of Work*, online: https://www2.gnb.ca/content/gnb/en/departments/finance/human_resources/content/policies_and_guidelines/talk_language_work.html.

[279] *Policy – Language of Work, supra*.

languages. According to the 2013-2014 Annual Report of the Commissioner of Official Languages, as of March 31, 2013, the linguistic profile required 39% of employees to speak both official languages, 51% of employees to speak English, 5% of employees to speak French, and 5% to speak English or French.[280]

It should be noted that bilingualism requirements are related to the composition of the work team, and not to specific positions. Strangely, there is no mention of the level of second language proficiency required for employees who must be bilingual.

There is indeed a *Staffing Policy Manual*[281] dealing with language requirements. This *Manual* states:

> "When recruiting for a position with a bilingual requirement, departments must ensure that a level of language proficiency necessary for the position is selected prior to evaluating candidates (…) This level must be based on the requirements of the position as well as the ability of the position's linguistic profile team to meet its obligations with respect to the policies on Language of Work and Language of Service."[282]

The *Staffing Policy Manual* also states that candidates must present or have obtained a certificate in oral proficiency before they can receive a job offer. Only the oral interaction assessment is mandatory. Written language assessments are not required.

The Commissioner of Official Languages noted in her *2013-2014 Report* that while the *Staffing Policy Manual* requires departments to determine the level of language proficiency required for bilingual positions, it does not mandate that this level be indicated on the competition notice.[283] Establishing the required level of bilingualism appears to be related primarily to the language profile of the team, rather than the nature of the position. In other words, the bilingualism requirement is a condition that is established to respect a number of bilingual employees on a team and not to ensure the provision of service of equal quality in the other official language.[284]

The only monitoring of language skills is to review the language profiles of teams. Since these profiles only indicate the number of unilingual and bilingual individuals on a team and not the language skills required of each team member, they do not allow for an assessment of the quality of services provided in each official language.[285]

With respect to required levels of second language proficiency, Commissioner d'Entremont noted that there is no expertise within the government to guide departments in setting them. The

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[280] Office of the Commissioner of Official Languages for New Brunswick, *Annual Report 2013-2014*, online: https://officiallanguages.nb.ca/wp-content/uploads/2012/02/2013-2014_annual_report.pdf, p 18.
[281] Department of Human Resources, AD-4100: *Staffing Policy Manual*, effective date: December 1, 2009 (last updated: August 25, 2015), online: https://www2.gnb.ca/content/dam/gnb/Departments/ohr-brh/pdf/other/staffing_policy_manual.pdf.
[282] *Annual Report 2013-2014*, p 22.
[283] *Ibid*.
[284] *Ibid*. p 25.
[285] *Ibid*. p 26.

provincial scale[286] describes in general terms the abilities of each level, but does not provide any indication of the recommended levels for various categories of positions.[287] The Commissioner noted that "Although no official document prescribes it, it seems that the Intermediate Plus (2+) level of language proficiency is the minimum level that a department can use in a job posting".[288] While this level of proficiency may be sufficient for some job categories, "professionals and other employees who must provide substantive information to clients require advanced or superior proficiency in the second language."[289]

Second language certificates are valid for a three-year period. However, once that period has expired, there is no requirement for the employee to retake a proficiency test.[290] The lack of a rule regarding renewal therefore may result in an employee holding a level of language proficiency that is no longer accurate.

I therefore propose:

- **that the provincial government's policy on language proficiency requirements for its employees be reviewed to ensure equal quality of service in both official languages, and to ensure its compliance with legislative and constitutional obligations**
- **that the *Official Languages Act* be amended to recognize:**
  - **English and French are the languages of work in provincial institutions and public servants have the right to use either official language in the performance of their duties.**
  - **it is the responsibility of institutions to ensure that the work environment is conducive to the effective use of both official languages**
  - **it is incumbent upon institutions:**
    - **to provide their staff with work tools and documentation that respect the official language chosen by the employee;**
    - **to ensure that computer systems can be used in either official language;**
    - **to ensure that supervisors are able to communicate with their subordinates in the official language chosen by the latter and that senior management is able to function in both languages;**
    - **to ensure that all other possible measures are taken to create and maintain a work environment conducive to the effective use of both official languages and that employees are able to use either official language in the performance of their duties.**

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[286] *Ibid*. p 21.
[287] *Ibid*. p 26.
[288] *Ibid*
[289] *Ibid*. p 26-27.
[290] *Ibid*. p 27.

- that the Government commits to ensuring that English-speaking and French-speaking New Brunswickers have equal opportunities for employment and advancement in provincial institutions.
- that the Government commits to ensuring that the workforce of provincial institutions tends to reflect the presence in New Brunswick of both official language communities.
- that the Government commits to ensuring that the language skills of its employees are regularly assessed through objective proficiency testing.
- that the Government commits to ensuring that language proficiency for a position is determined in advance based on objective criteria and not on the proficiency of the work team.
- that the right of the public to be served in the language of their choice takes precedence over the right of the public servant to work in the official language of their choice.

PART IX - OLA REVIEW: HEALTH AND NURSING HOMES (PROPOSED AMENDMENTS)

A. Health Services

Health care facilities play a vital role in the maintenance and development of official language minority communities. They are not mere public service points, they are true institutional hubs for these communities. For members of these communities, they are a reflection of their identity. They perform a symbolic function and that is their value. Although health care facilities are not places of socialization, and people do not usually stay in them for long periods of time, they are full of symbolic meaning that have a real effect on people's thinking, attitudes, feelings and motivations.

Access to health services in French is of concern to Francophone communities throughout Canada. Studies show that language can be a barrier to accessing quality health services.[291] This is even more concerning when combined with research that shows how language is highly significant in the delivery of health care services. Lack of access or limited access is highly detrimental to the vitality of these communities. Hence the importance of ensuring equal quality service in both official languages in all areas of health services.

In *Lalonde v. Ontario* (*Health Services Restructuring Commission*), the Ontario Court of Appeal expressed the opinion that the Montfort hospital was an asset for the francophone community of that province. In overturning the decision of the Ontario Health Services Restructuring Commission, which had proposed the closure of the French-language Montfort Hospital, the Court wrote:

> "Montfort has a broader institutional role than the provision of health care services. Apart from fulfilling the additional practical function of medical training, Montfort's larger institutional role includes maintaining the French language, transmitting francophone culture, and fostering solidarity in the Franco-Ontarian minority."[292]

Over the past few decades, there has been a growing body of research on the impact of language barriers in health care. The research has increasingly highlighted the impact of these barriers on access to health care, on patient safety and on the quality of care provided. It also revealed that the importance of language in health care is generally not well understood and that there are still many misconceptions about how to overcome the barriers that language may pose. Many administrators, service providers and health professionals are unaware of the risks to patients of not properly addressing the concerns posed by language barriers, and they continue to view the provision of health services in both official languages as no more than an accommodation and not as an essential service.

As a result of this lack of understanding, many health care institutions continue to provide services to the official language minority community in ways that pose risks to the patient. The most common misconception is that if a patient speaks some English, they can be served in that

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[291] Sarah Bowen, *Barrières linguistiques dans l'accès aux soins de santé*, Ottawa, Health Canada, 2001, p 1, online: http://www.francosante.org/documents/sarah-bowen-barrieres-linguistiques.pdf.

[292] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 577, [2001] OJ no 4767 (QL) (CA), para 71.

language without problem. Yet research clearly shows that the risk of miscommunication is often very high in these cases. The reason is simple: there is a presumption, which unfortunately can be false, that the French-speaking patient who speaks English understands without difficulty all the linguistic nuances of what the health care professional is explaining to them.

One misconception that is all too common in New Brunswick is that because francophones are bilingual, access to health services does not present a barrier to them even if those services are offered in English. It is true that most francophones in New Brunswick are bilingual, but many bilingual people who interact in English on a daily basis may find themselves lacking in English in situations of emotional stress or crisis, to the point where they are unable to understand what the health professional is saying. This can be difficult to understand for an English speaker who has never experienced it. Being forced to communicate in one's second language in a crisis situation can increase stress and discomfort. Since health care is generally provided in a stressful or crisis environment, language becomes an important consideration.

It is with this understanding that the issue of official languages in health care must be considered.

1. The Official Languages Act and Health

Sections 33 and 34 of the *Official Languages Act* deal with official languages and health services. These sections provide:

> 33(1) For the purposes of the provision of health services in the Province and notwithstanding the definition of "institution" in section 1, an institution in sections 27 and 28 refers to the network of health establishments, facilities and programs under the jurisdiction of the Department of Health or the regional health authorities under the Regional Health Authorities Act.
>
> 33(2) When establishing a provincial health plan under the Regional Health Authorities Act, the Minister of Health shall
>
> (a) ensure that the principles upon which the provision of health services are to be based include the delivery of health services in both official languages in the Province;
>
> (b) consider the language of daily operations under section 34.
>
> 34 Subject to the obligation to serve members of the public in the official language of their choice, section 33 does not limit the use of one official language in the daily operations of a hospital or other facility as defined in the Regional Health Authorities Act.

The wording of subsection 33(1) of the *Official Languages Act* leaves me wondering about the true intent of legislators. Is it really the intention of the Legislature to narrow the scope of the word "institution" in the context of health care facilities?

The word "institution" is defined in section 1 of the *Official Languages Act* as follows

"institution" means an institution of the Legislative Assembly or the Government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant Governor in Council, a department of the Government of New Brunswick, a Crown corporation established by or pursuant to an Act of the Legislature or any other body that is specified by an Act of the Legislature to be an agent of Her Majesty in right of the Province or to be subject to the direction of the Lieutenant Governor in Council or a minister of the Crown."

The definition of "institution" in section 1 is, in my view, broad enough to encompass all health facilities[293] in the province, including the two regional health authorities and hospitals.

However, subsection 33(1) states that, for the purposes of providing these services to the public, it is the "network" that must provide services in both official languages. That suggests that the intention of the Legislature was, for the purposes of sections 27 and 28 (language of service and communication), to impose no direct obligations on health facilities, installations and programs under the jurisdiction of the Department of Health or the Regional Health Authorities, but to impose these obligations only on Horizon and Vitalité networks. Furthermore, section 33(1) makes no mention of either active offer (section 28.1) or posting (section 29).

This would mean that health care facilities, facilities and programs, which obviously include hospitals, would not have obligations under sections 27 and 28 (language of service and communication), but would have obligations under sections 28.1 (active offer) and 29 (signs).

Evidently, subsection 33(1) raises many questions. Is the obligation to provide services in the official languages imposed on the health facilities defined in the *Regional Health Authorities Act*, or is it imposed only on the two health networks? If this obligation is imposed on the health networks, then does this mean that if a hospital or health centre is not able to offer services in both languages, this does not contravene the *Official Languages Act*, provided that the "network" is able to provide this service in another health facility? Put simply, does this mean that if the Fredericton hospital is not able to offer a service in French, it does not necessarily contravene the Act if the service is offered in both languages in Moncton, since it is the Horizon network that has the obligation and not the health institution? The Fredericton hospital would only have an obligation to make an "active offer" of services and to post signs in both languages, but would have no obligation to actually offer the service, according to this interpretation.

Health care stakeholders and the Office of the Commissioner of Official Languages of New Brunswick have consistently acted as if subsection 33(1) makes no difference, as if these facilities

[293] The word « facility » is defined in the *Regional Health Authorities Act*, RSNB 2011, c. 217 as "a building or premises in or from which health services are provided".

and programs were legally "institutions" under the OLA. If this is the case, then what is the purpose of subsection 33(1)?

Subsection 33(2) of the *Official Languages Act* says that the Minister of Health, in establishing a provincial health plan under the *Regional Health Authorities Act*, shall ensure that the principles on which services are based take into account the provision in both official languages, and shall consider the language in which the institution normally operates. The purpose here is twofold. First, it is to ensure that the availability of health services in both official languages is a consideration in the development of a provincial health plan. If a health program can only be offered in one facility, the Minister, in determining the functions of that facility, must consider its capacity to offer a program of equal quality in both official languages.

The second objective concerns respect the usual language of work in an institution under section 34 of the *Official Languages Act*. This confirms the right of hospitals and other types of health care facilities to use one official language in their daily operations, subject to the obligation to serve the public in the official language of its choice. To my knowledge, only the Beauséjour Regional Hospital Authority, which at the time of the adoption of section 34 operated the Dr. Georges-L.-Dumont Hospital in Moncton, the Stella-Maris Hospital in Sainte-Anne-de-Kent, the Shediac Regional Medical Centre and two units of the Extra-Mural Hospital, took advantage of this provision and designated French as the language in which its facilities normally operated. When it was amalgamated into the new Vitalité Health Authority, this designation remained unchanged and was extended to the Caraquet and Tracadie hospitals and the Lamèque Health Centre. It appears that the other Vitalité hospitals are not affected by this designation.

Section 34 presents certain points to be kept in mind when read in conjunction with subsection 33(1). We have seen that subsection 33(1) provides that "institutions", for the purposes of sections 27 and 28, means not health care facilities but their networks. Section 34 provides otherwise: a hospital or health facility may, subject to the obligation to serve the public in the official language of its choice, designate a language in which it ordinarily operates. It would therefore appear from this provision that hospitals and health care institutions have obligations under sections 27 and 28 of the OLA. As can be seen, the entire section of the *Official Languages Act* is ambiguous and should be reviewed and clarified.

I therefore propose that:

- **that subsection 33(1) be replaced by a provision that provides that, for the purpose of providing health care in the province, all health facilities, institutions and programs under the jurisdiction of the Department of Health or regional health authorities established under the *Regional Health Authorities Act* shall ensure that they are able to provide all services to the public in both official languages at all times.**
- **third parties, including Ambulance New Brunswick, Extra-Mural Services or any other organization providing services to the public on behalf of the Department of Health or**

Regional Health Authorities established under the *Regional Health Authorities Act*, must ensure that such services are available in both official languages without delay.

Regional health authorities have undergone several structural reforms in recent years, some of which affect the language of service and operations.

For example, the *Regional Health Authorities Act* states, in section 16, that there will be two regional health authorities: the Vitalité Regional Health Authority and the Horizon Regional Health Authority. Subsection 19(1) provides that Vitalité operates in French and Horizon in English, thus recognizing a certain form of duality in health management. Subsection 19(2) adds that, notwithstanding subsection 19(1), the regional health authorities shall respect the language in which the institutions[294] under their jurisdiction ordinarily operate and shall, through the network of health facilities, installations and programs, provide health services to members of the public in the official language of their choice.[295]

Then subsection 19(3) states that the two regional health authorities are responsible for improving the delivery of health services in French. This is unique in New Brunswick's legislative scheme as it is the only provision that applies to only one of the official languages. It recognizes that French language health services are deficient and that there is a pressing need for improvement in order to achieve substantive equality.

In order to provide a remedy for non-compliance with this provision, I propose:

- **That subsection 19(3), which provides that the two regional health authorities are responsible for improving the delivery of health services in French, be incorporated into the *Official Languages Act*.**

2.. Nursing Homes

In New Brunswick, services for seniors are governed by the Department of Social Development. Staff of the Department and its Long-Term Care Program determine the level of care required by seniors who apply for services. Seniors, sometimes in conjunction with their families, decide whether to go to a home.

After an assessment by social workers or nurses in the long-term care field, seniors choose the most suitable nursing home. Distance and language criteria are acceptable reasons for refusing an available nursing home placement. However, the situation remains problematic for French-speaking seniors in areas where there are few or no French-speaking or bilingual nursing homes.[296] If there are few nursing homes in an area, it is difficult to find a good fit for the senior. Waiting lists for French-speaking homes can be longer, sometimes leading seniors to make choices that are not

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[294] We refer here to section 34 of the *OLA*.
[295] The wording here is similar to subsection 33(1) of the *OLA*.
[296] There is no definition of what is meant by bilingual homes. Is it a nursing home that offers all its services in both official languages on an equal basis? The province has never defined this term, yet it is commonly used.

always linguistically and culturally appropriate for them, because they fear losing their place on the waiting list.

When health care facilities where seniors live do not have French language services, then it is the seniors who must adapt to the language of the facility, not the other way around. A phenomenon that English-speaking seniors in the province do not experience.

Studies show that the effects of aging from a nursing home perspective are primarily disadvantageous to Francophone minority communities.[297] But what are the legal obligations of the Government of New Brunswick to provide services in both official languages in these nursing homes?

The Nursing Homes Act [298]defines a nursing home as " residential facility operated, whether for profit or not, for the purpose of supervisory, personal or nursing care for seven or more persons who are not related by blood or marriage to the operator of the home and who by reason of age, infirmity or mental or physical disability are not fully able to care for themselves."

The operation of these facilities is closely regulated by the *Nursing Homes Act*. Section 3(1) of the Act states: " Without the prior written approval of the Minister, no person shall incorporate a company for purposes of, or one of the objects of which is, establishing, operating or maintaining a nursing home". The Act also provides, in subsection 4(4): "The Minister may refuse to issue or renew a licence under this section if he is not satisfied that it is in the public interest..." to do so. The Minister may also prescribe such terms and conditions as he or she considers appropriate in issuing the permit. Section 24 provides that the operator of a nursing home shall not add a building or facilities to a nursing home or alter the facilities or buildings in whole or in part without the prior written approval of the Minister.

The *Nursing Homes Act* includes provisions relating to the financial assistance that the province may provide to a nursing home. It provides, among other things, that the Minister may, with the approval of Cabinet and in accordance with the regulations, provide financial assistance "to aid and encourage the establishment, operation and maintenance of nursing homes".[299] It also provides that the Lieutenant Governor in Council may make regulations respecting the licensing, management and operation of nursing homes.[300] New Brunswick Regulation 85-187 under the *Nursing Homes Act* contains a series of provisions relating to the operation of nursing homes.

(i) Do nursing homes have language obligations?

There is no provision in the *Nursing Homes Act* that imposes language obligations on the operators of nursing homes with respect to the services that are provided to residents. I am also not aware of

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[297] Éric Forgues *et al.*, «La prise en compte de la langue dans les foyers de soins pour personnes âgées» (2012) Canadian Institute for Research on Linguistic Minorities, Moncton, p 19 [Forgues *et al.*].
[298] RSNB 2014, c 125.
[299] *Ibid.*, art 22(2).
[300] *Ibid.* art 31.

any government regulation, policy or directive that would define the obligations of nursing homes that describe themselves as bilingual. Yet we have often heard in recent years that some of these facilities, including Le Faubourg du Mascaret in Moncton, are bilingual facilities, but it is difficult to say what this means. In the case of Le Faubourg du Mascaret, we are told that the contract between the company managing the institution and the Université de Moncton contains provisions concerning the linguistic character of the institution. If this is the case, it does not give rights to the residents, but to the Université de Moncton, which if the clause is not respected, would have to take legal action to obtain compensation. Is the Université de Moncton ready and able to ensure that this provision is respected? I doubt it.

Why are there no provisions in the legislation that give language rights to residents of these nursing homes? Is it not true that under the *Nursing Homes Act*, the provincial government, through the Minister of Social Development, monitors the operation and management of nursing homes. Could it not then be argued that these facilities, given their organic and financial relationship to the provincial government, though privately owned, are institutions of the government of New Brunswick, in the same way as municipalities, for example, and that therefore language obligations under the *Charter* and the *Official Languages Act* apply to their operations?

I am not convinced of the merits of such an argument and am not prepared to conclude that these facilities are institutions within the meaning of the *Official Languages Act* or the *Charter*. However, this does not mean that they do not have linguistic obligations.

Nursing homes, while not strictly speaking institutions of the province, are third parties that provide services on behalf of the province or its institutions and therefore fall within the definition of section 30 of the *Official Languages Act*. Therefore, they are required to meet the obligations under sections 27 to 29 of that Act. Since the province, under the *Constitution Act, 1867*, is responsible for "the establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions", it is constitutionally responsible for these homes and the care of seniors in them. However, the province has decided, by law, to entrust this task to private institutions. However, by doing so it cannot abdicate its linguistic responsibilities.

It is important to recall that on March 24, 2011, the Association francophone des aînés du Nouveau-Brunswick (AFANB) filed a complaint with the Office of the Commissioner of Official Languages of New Brunswick expressing its concerns about the absence or inadequacy of long-term care services for francophone seniors in certain regions of New Brunswick.

A similar complaint had been filed by an individual in 2008. The Commissioner of Official Languages, Michel Carrier, had then concluded that nursing homes are part of the private sector and are not institutions within the meaning of the *Official Languages Act*. He had also concluded that the Act did not provide that these institutions were officially mandated by the provincial

government to provide services to the public and that section 30 of the Official Languages Act did not apply to these institutions.[301]

Following the 2011 complaint, the Office of the Commissioner considered the findings of a study on the language capacity of nursing homes in New Brunswick prepared by the *Canadian Institute for Research on Linguistic Minorities*, and of a legal analysis submitted by the AFANB. Contrary to the conclusions in his 2008 report, he concluded in 2011 that: (Translation)"**There is no longer any doubt that the Government of New Brunswick, through the Department of Social Development, plays a significant role in the area of nursing homes**"[302] [my emphasis]. He added that the Department of Social Development is, at the very least, "an active observer" in this area.[303] Since the Department is responsible for the administration and enforcement of the *Nursing Homes Act*, it has indisputable authority in the operation and management of these facilities.

The Commissioner of Official Languages notes that the provincial government's interest and concern for the situation of seniors is clear. He notes, among other things, that the Department's website outlines the mandate of the Home Services Branch in the following terms:

> "The Nursing Home Services branch is responsible for the planning, design, monitoring and inspection of the services provided to residents in nursing homes. This branch ensures the safety of residents through the licensing and monitoring of nursing homes, liaises with nursing homes and the NB Association of Nursing Homes on relevant issues and provides professional and program advice to directors of nursing homes".[304]

Commissioner Carrier adds:

> (Translation) "According to a November 17, 2012, article in Fredericton's Daily Gleaner titled "Nursing Home Association Urges Solution Unique to Province", the New Brunswick Association of Nursing Homes believes that "it's time New Brunswick creates a model for aging-care that will uniquely address this province's needs".
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> (Translation)"There are many components to consider, but in our view, bilingualism remains a critical component of New Brunswick's uniqueness. As such, **language should be an unavoidable factor in the various levels of nursing home management in our province** [emphasis added]."[305]

In July 2018, the Office of the Commissioner of Official Languages released another report regarding services in nursing homes. In this report, Commissioner d'Entremont concluded that nursing homes are third parties within the meaning of section 30 of the *Official Languages Act*, given that

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[301] Office of the Commissioner of Official Languages, Investigation Report (November 2012), File no 2011 – 1389, p 6 [*Report COL*].
[302] *Ibid*., p 14.
[303] *Ibid*., p 15.
[304] «Nursing Home Services (Unit)», online: Department of Social Development https://www2.gnb.ca/content/gnb/en/departments/social_development/contacts/dept_renderer.140.html#mandates.
[305] *Report COL, supra*, p 16

nursing homes in New Brunswick are closely regulated by the province, as evidenced by the following:

- the establishment and operation of nursing homes are governed by the *Nursing Homes Act*, and Regulation 85-187
- admissions to nursing homes must be approved by the Department of Social Development
- nursing home residents with low income are subsidized by the province
- the province provides financial assistance to facilitate and encourage the establishment, operation and maintenance of nursing homes, under the *Nursing Homes Act*
- the Department of Social Development manages the size, structure and overall operations of nursing homes and ensures that nursing homes comply with the *Nursing Homes Act*, Regulations and departmental standards and policies. (New Brunswick Department of Social Development website; accessed February 14, 2018.)

This decision by the Commissioner is based on the fact that the Province of New Brunswick has an obligation to ensure that nursing home residents can receive services in the official language of their choice.

With these comments in mind, a strong argument can be made that section 30[306] of the *Official Languages Act* applies to nursing homes because of their relationship to government. It is therefore incumbent upon the government, including the Department of Social Development, to ensure that services provided by nursing homes are available in both official languages. Also, for reasons I set out below, I believe the province has a positive obligation to clarify the situation and ensure that the language rights of seniors living in nursing homes are respected.

(ii) Does the province have a positive obligation to act?

While nursing homes as private entities do not have direct linguistic obligations, this does not mean that the provincial government does not have a linguistic responsibility in regard to them. In his report, the Commissioner of Official Languages Carrier concluded that the lack of a clear policy or assumption of responsibility by the provincial government on this issue "fuels the problem observed'. He emphasized the importance of making language a priority in elder care. He added that any move in this direction would constitute a positive measure within the meaning of section 3 of the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* [307]. He called on the provincial government to commit to take the measures necessary to ensure that Francophone seniors have equal access to nursing home services in their official language.[308] To date, the provincial government has not taken action as a result of the recommendations of the Commissioner.

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[306] Section 30 of the OLA states: « 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. »
[307] RSNB 2011, c 198.
[308] *Report COL, supra*, p 14.

While I do not conclude with certainty that nursing homes have language obligations, I do draw certain conclusions from the analysis.

First, since the province has exercised its constitutional jurisdiction over the care of the elderly through private facilities, these are third parties within the meaning of section 30 of the *Official Languages Act*. As third parties providing services on behalf of the province, they must provide those services in a manner consistent with the government's linguistic obligations.

Second, the province cannot escape its obligations under the Charter, the *Official Languages Act* and the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* simply because the activity within its jurisdiction is being carried out by a third party. It is obliged to adopt legislation or regulations providing for positive measures to respect the equality of the official languages and the equality of the official language communities with respect to the delivery of services to seniors. It must ensure that it provides everyone, regardless of their official language, with access to nursing homes that offer services in their language. If legislative changes are required to achieve this goal, then New Brunswick must take the necessary steps.

I therefore propose the following amendments to the *Official Languages Act*

- **that the Act provides that the province has an obligation to ensure that nursing homes provide services in either official language in all health regions of the province to meet the needs of both official language communities.**
- **that the government adopt the necessary measures to clearly define the linguistic obligations of nursing homes that wish to define themselves as bilingual and that these obligations ensure equal treatment of the two official languages and that the government ensures that the designated bilingual facility has separate space where cultural, recreational or educational activities can take place in either official language**
- **that where possible, the government promotes the establishment of linguistically homogeneous nursing homes.**
- **that in placing a person in a nursing home, consideration be given to the person's language preferences.**

PART X: - OLA REVIEW: PROFESSIONAL ASSOCIATIONS (PROPOSED AMENDMENTS)

Section 92(13) of the *Constitution Act, 1867* [309] grants provinces jurisdiction over property and civil rights. The licensing and regulation of a profession fall within this provincial jurisdiction.[310] The provinces therefore have the power to regulate professional associations. However, instead of exercising this power, they have preferred to delegate this responsibility to professional associations.

A. The Nature of a Professional Association

Subsection 41.1(1) of the *Official Languages Act* defines a professional association as " an organization of persons that, by an Act of the Legislature, has the power to admit persons to or suspend or expel persons from the practice of a profession or occupation or impose requirements on persons with respect to the practice of a profession or occupation".

A professional association is therefore a body created by the provincial statute to which the province has delegated the authority to regulate the entry and practice of a profession. The body is composed of the members of the profession who are responsible for governing the profession. The professional association generally sets its own by-laws, ensures its own funding and disciplines its members. In addition to the privilege of being the only ones entitled to use a title and to have exclusive rights to do certain acts, incorporation as a "professional association" also carries with it significant responsibilities, prerogatives and constraints on the group for the protection of the public.

Instead of legislating itself on matters that may seem complex, delicate and technical, or that evolve too quickly to be fixed in final legislation, or be the subject of parliamentary discussions, the government sometimes prefers to delegate its constitutional power to an administrative body. This is precisely the case with professional associations, especially since the legislator is often reluctant to encroach on the autonomy or independence of the professions. The state therefore entrusts these bodies with powers that it would normally be entitled to exercise.

Thus, professional associations have the right to regulate their internal affairs, the manner of elections and the powers of officers. In addition, legislators may also expressly or implicitly delegate to them the power to regulate other aspects of a profession, such as

- the content of training and probationary period prior to admission
- the conditions for admission to practice the profession
- the examination for admission to the practice of the profession
- the conditions of practice of the profession
- the rates of fees

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[309] (U.K.), 30 & 31 Vic, c 3, reproduced in RSC 1985, Sch II, No 5.

[310] See P. W. Hogg, *Constitutional Law of Canada* (looseleaf ed.), vol 1 at 21-10; *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 at paras 38-43 and 46; and *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at para 33.

- professional ethics and derogatory acts
- the creation of disciplinary bodies and disciplinary procedure
- disciplinary penalties.

English-speaking lawyers have aptly described these associations as "self-governments".[311] In a sense, as bodies exercising significant regulatory, supervisory, administrative and disciplinary powers, professional associations can be considered public authorities.

Without claiming to have undertaken an exhaustive analysis of the constituent Acts of each, there are at least 43 organizations in New Brunswick that can be defined as professional associations.[312] This includes:

- New Brunswick Home Economics Association (NBHEA);[313]
- Cosmetology Association of New Brunswick (CANB);[314]
- Association of New Brunswick Massage Therapists (ANBMT);[315]
- New Brunswick Podiatry Association (NBPA);[316]
- New Brunswick Real Estate Association (NBREA);[317]
- Architects' Association of New Brunswick (AANB);[318]
- Association of New Brunswick Land Surveyors (ANBLS);[319]
- New Brunswick Dental Assistants Association (NBDAA);[320]
- New Brunswick Registered Barbers Association (NBRBA);[321]
- New Brunswick Chiropractors Association(NBCA);[322]
- Interior Designers of New Brunswick (IDNB);[323]
- New Brunswick Association of Dietitians (NBAD);[324]
- New Brunswick Funeral Directors and Embalmers Association (NBFDEA);[325]
- New Brunswick Association of Occupational Therapists(NBAOT);[326]
- New Brunswick Association of Real Estate Appraisers(NBAREA);[327]

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[311] See, among others, J.K. Lieberman, "Some Reflections on Self-Regulation" in *The Professions and Public Policy*(Toronto: University of Toronto Press, 1976) at 89.
[312] This list was compiled following a survey conducted by the provincial government in January 2015.
[313] In spite of my research, I was unable to find the statute creating this association which was, however, included in the list prepared by the provincial government.
[314] *An Act to incorporate the Cosmetology Association of New Brunswick* (*Cosmetology Act*), SNB 1998, c. 48.
[315] *An Act to incorporate the College of Massage Therapists of New Brunswick* (2009).
[316] *An Act respecting Podiatry*, SNB 1983, c. 101.
[317] *An Act to Incorporate the New Brunswick Real Estate Association*, N.B. 1994, c. 115.
[318] *An Act respecting the Architects' Association of New Brunswick*, SNB 1987, c. 66.
[319] *An Act to Incorporate the Association of New Brunswick Land Surveyors*, SNB 1986, c. 91.
[320] *Act Respecting Dental Technicians*, SNB 1957, c. 71.
[321] *An Act to Incorporate the Registered Barbers Association of New Brunswick*, SNB 2007, c. 82.
[322] *An Act to Incorporate the New Brunswick Chiropractors' Association*, SNB 1997, c. 69.
[323] *An Act respecting the Registered Interior Designers Association of New Brunswick*, SNB 1987, c. 67.
[324] *An Act respecting the New Brunswick Association of Dietitians*, SNB 1988, c. 75.
[325] *Embalmers, Funeral Directors and Funeral Providers Act*, SNB 2004, c. 51.
[326] *An Act respecting the Association of Occupational Therapists of New Brunswick*, SNB 1988, c. 76.
[327] *An Act to Incorporate the Real Estate Appraisal Association of New Brunswick*, SNB

- Association of Registered Professional Foresters of New Brunswick (ARPFNB);[328]
- Association of New Brunswick Licensed Practical Nurses (ANBLPN);[329]
- Nurses Association of New Brunswick (NANB);[330]
- Association of Professional Engineers and Geoscientists of New Brunswick (APEGNB);[331]
- New Brunswick Veterinary Medical Association(NBVMA);[332]
- Construction Association of New Brunswick (CANB);[333]
- Opticians Association of New Brunswick (OANB);[334]
- New Brunswick Association of Optometrists (NBAO);[335]
- New Brunswick Association of Speech-Language Pathologists and Audiologists(NBASLPA);[336]
- Paramedic Association of New Brunswick (PANB);[337]
- New Brunswick Society of Medical Laboratory Technologists (NBSMLT);[338]
- New Brunswick Association of Medical Radiation Technologists(NBAMRT);[339]
- New Brunswick Association of Respiratory Therapists (NBART);[340]
- New Brunswick Association of Social Workers (NBASW);[341]
- Law Society of New Brunswick (LSNB);[342]
- College of Physicians and Surgeons of New Brunswick (CPSNB);[343]
- College of Physiotherapists of New Brunswick (CPNB);[344]
- College of Psychologists of New Brunswick (CPNB);[345]
- Certified Professional Accountants of New Brunswick (CPANB);[346]
- Corporation of Translators, Terminologists and Interpreters of New Brunswick (CTINB);[347]

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[328] *New Brunswick Association of Registered Foresters Act*, 2001, c. 50.
[329] *Licensed Practical Nurses Act*, SNB 1977, c. 60.
[330] *Nurses Act*, SNB 1984, c. 71.
[331] *Engineering and Geoscience Professions Act*, SNB 1986, c. 88.
[332] *An Act respecting the New Brunswick Veterinary Medical Association (Veterinarians Act)*, SNB 1990, c. 70.
[333] *An Act respecting Construction Officials and the New Brunswick Association of Construction Officials*, SNB 2002, c. 56.
[334] *Opticians Act*, SNB 2002, c. 58.
[335] *Optometry Act*, 2004, SNB 2004, c. 50.
[336] *An Act to Incorporate the New Brunswick Association of Speech-Language Pathologists and Audiologists*, SNB 1987, c. 71.
[337] *An Act respecting the Paramedic Association of New Brunswick*, SNB 2006, c. 33.
[338] *Medical Laboratory Technologists Act*, SNB 1991, c. 67.
[339] *An Act to Incorporate the Medical Radiation Technologists Association of New Brunswick*, SNB 2004, c. 45.
[340] *Respiratory Therapists Act*, SNB 2009, c. 18.
[341] *An Act to Incorporate the New Brunswick Association of Social Workers Act*, 1988, SNB 1988, c. 78.
[342] *Law Society Act*, 1996, SNB 1996, c. 89.
[343] *An Act respecting the New Brunswick Medical Society and the College of Physicians and Surgeons of New Brunswick*, SNB 1981, c. 87.
[344] *An Act respecting the College of Physiotherapists of New Brunswick*, SNB 2010, c. 7.
[345] *College of Psychologists Act*, N.B. 1980, c. 61.
[346] *Chartered Accountants Act*, 1998, SNB 1998, c. 53, replaced by the *Chartered Professional Accountants Act*, SNB 2014, c. 28, s. 1: "previous Acts" means the *Chartered Accountants Act*, 1998, being chapter 53 of the Statutes of New Brunswick, 1998, the *Certified General Accountants Association of New Brunswick Act*, being chapter 86 of the Statutes of New Brunswick, 1986, and the *Certified Management Accountants Association of New Brunswick Act*, 1995, being chapter 55 of the Statutes of New Brunswick, 1995, as amended.
[347] *An Act respecting the New Brunswick Translators, Terminologists and Interpreters Corporation*, SNB 1989, c. 66.

- New Brunswick Institute of Agrologists (NBIA);[348]
- Atlantic Planners Institute (AIP);[349]
- New Brunswick College of Dental Hygienists(NBCDH);[350]
- New Brunswick College of Pharmacists (NBCP);[351]
- New Brunswick Dental Society (NBDS);[352]
- New Brunswick Denturists Society;[353]
- New Brunswick Society of Certified Engineering Technicians and Technologists (NBSCETT);[354]
- New Brunswick Society of Cardiology Technologists (NBSCT).[355]

In creating these associations, the New Brunswick legislature was not only concerned with protecting their members, but also the public who are in contact with the professional. The legislators justify the autonomy it grants to these associations by assuming that only the professionals concerned have the knowledge necessary to carry out the functions of the profession. The autonomy it granted is essentially the power to decide who will be entitled to practice a profession. However, members of a professional association are not the only ones who may be affected by the services rendered by a professional. Others may also be concerned, for example, workers in related fields, members of a profession whose scope of practice is closely related to that profession, aspiring professionals, educational institutions and educators, and the public who receive the services of these professionals.

Professional associations were therefore established primarily for reasons of public interest. A few years ago, the Royal Commission Inquiry on Civil Rights in Ontario - the McRuer Commission - saw this as the only reason to legitimize such a broad delegation of authority to these bodies."

> "The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status. The question is not, "Do the practitioners of this occupation desire the power of self-government?" but "Is self-government necessary for the protection of the public?". No right of self-government should be claimed merely because the term "profession" has been attached to occupation. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it."[356]

In New Brunswick, professional associations are created by a statute commonly referred to as a "private bill". The procedure for the passage of "private bill" legislation differs from that for "public

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[348] *An Act to Incorporate the New Brunswick Institute of Agrologists*, SNB 2004, c. 46.
[349] *Certified Professional Planners Act*, SNB 2005, c. 34.
[350] *College of Dental Hygienists of New Brunswick Act*, SNB 2009, c. 10.
[351] *Pharmacy Act*, SNB 1983, c. 100.
[352] *New Brunswick Dental Society Act (New Brunswick Dental Act, 1985)*, SNB 1985, c 73.
[353] *Denturists Act*, SNB 1986, c. 90.
[354] *An Act respecting the New Brunswick Society of Certified Engineering Technicians and Technologists*, SNB 1986, c. 92.
[355] *An Act respecting the New Brunswick Society of Cardiology Technologists*, 2004, c. 49.
[356] *Royal Commission Inquiry into Civil Rights* (McRuer Commission), 1968, Report No. 1, Vol. 3 at 1162 [*Inquiry into Civil Rights*].

bill" legislation. A "public bill" is simply drafted and introduced, but there are several steps before a "private bill" can be introduced in the Legislature. A "private bill" deals with local or private matters or is for the benefit or in the particular interest of a person or group of persons, a corporation or a municipality. Therefore, before any such favour is granted, the Legislative Assembly must be satisfied that the legislation in question will not prejudice other rights or interests.[357] A first point to note is that the Province of New Brunswick, in authorizing the creation of these associations, has an obligation to ensure that they comply with its constitutional and statutory linguistic obligations.

B. The Role of the Professional Association

The purpose of a "private bill", as the name implies, is to look after the interests or benefits of an individual or a number of individuals, as opposed to a "public bill" which deals with a matter or contains measures that affect society as a whole. As a rule, a law constituting a professional association is for the benefit of its members. However, while these statutes confer managerial authority over the internal administration of professional associations, they also have the effect of regulating their relationship with society.

The legislature must therefore ensure, in creating these associations, that some control is retained over their activities. This control can be exercised in a few ways:

- the Lieutenant Governor in Council or a minister may appoint one or more members of the board of directors that conducts the affairs of the association
- it may be provided that bylaws adopted by the association shall be approved by the Lieutenant Governor in Council
- the Lieutenant Governor in Council may reserve the right to revoke or repeal any bylaw made by the association
- the Act may contain detailed provisions relating to the conditions for the admission of members, to which the association may add specific conditions
- the legislature may provide for the publication in the Royal Gazette of bylaws adopted by the association.

I will not analyze in detail all the powers that the Legislature has granted to the professional associations in the province. However, I can say that the regulatory power usually assigned to these associations generally revolves around internal administration, admission to the profession and regulation of the profession. The professional association has the power to license a profession, establish academic and competency standards, set admission procedures, enforce discipline and adopt principles of professional ethics. It may also establish rules concerning meetings of its members, the manner of electing its officers, the creation of internal committees, the amount of membership dues, etc. The association's board of directors is generally given the power to make

[357] See Legislative Assembly of New Brunswick, " The Procedure for a Private Bill", online: https://www.gnb.ca/legis/publications/billbecomeslaw/bill4-e.asp.

regulations. The bylaws, once finalized, must then be approved by the members at a general meeting.

Professional associations therefore have a **monopoly** over the practice of a profession. They are responsible for ensuring that the persons they license are qualified and meet the standards of competence required to practice the profession. These powers are not delegated to the association to enable it to protect the economic interests of its members, but rather to ensure that they have the necessary skills and competencies to practice a profession.

Professional associations have an obligation to maintain standards of competence for their members. However, controlling admission to a profession is not the only way to achieve this. In fact, professional associations regulate themselves on an ongoing basis. The legislature considers them to be in a better position to judge violations of professional ethics and, therefore, has delegated to them significant authority to regulate professional discipline. To this end, the McRuer Commission identified three distinct groups that have a special interest in the control of a profession:

(1) The public, who should be the primary beneficiaries of the entire process

(2) The members of the association whose failures may be subject to discipline; and

(3) The profession itself, which has a general interest in maintaining high standards of professional competence.[358]

One of the most important powers of an association with respect to its members is the power to impose discipline in the event of a breach of professional standards. Generally, the governing statute of an association does not determine the procedure that will be followed before the disciplinary tribunal; this is often left to the discretion of the association. However, no one would dispute the fact that the disciplinary penalties imposed by an association can have severe consequences. Penalties can range from a simple reprimand, to suspension and, in the most serious cases, expulsion from the profession. In exercising its disciplinary power, the professional association acts in a quasi-judicial manner. The law therefore requires it to respect certain fundamental principles of natural justice.

C. The Linguistic Obligations of Professional Associations

As we have seen, professional associations control admission to a profession and the conditions of its practice. In this sense, they exercise part of the powers of the state, and can therefore be considered part of the provincial public administration. They deal with their members but also with the public. In doing so, the associations must take into account the language rights of the public and the obligations imposed on them by those rights. The language obligations of these

[358] *Inquiry into Civil Rights, supra* at p 1183.

associations stem from the *Canadian Charter of Rights and Freedoms*[359] and the *Official Languages Act*.[360]

1 - The Canadian Charter of Rights and Freedoms

The first question that arises is whether professional associations are institutions within the meaning of the *Canadian Charter of Rights and Freedoms*.[361] I will set aside immediately the argument that, because they were created by private legislation, these associations are not subject to the language obligations of the *Charter*. In *R. v. Losier*,[362] McIntyre J. of the New Brunswick Court of Queen's Bench held that subsection 18(2) of the *Charter* did not apply to the *New Brunswick Chiropractors Act* [363] because that law was a private initiative and so did not fall within section 32 of the *Charter*. I cannot agree with this conclusion which, in my view, is wrong in law.

Under section 32(1), the *Charter* applies "to the Parliament and government of Canada" and "to the legislature and government of each province". Both levels of government are therefore bound by the provisions of the *Charter*. In addition, anybody that exercises statutory authority is also bound by the *Charter*. In this category, we might include the Governor General or Lieutenant Governor in Council, ministers, public servants, municipalities, courts and police officers. However, the *Charter* also applies to bodies other than those listed above.

In order to identify the other bodies to which the *Charter* applies, it is appropriate first to distinguish between private corporations, which are incorporated by statute and whose existence and powers depend on an enabling statute, and bodies created by statute which, in addition to their existence, confer on them a power of coercion related to government action. Both are legal persons with the rights of a natural person, but only the second type of body is subject to the provisions of the *Charter*.

For example, in *McKinney v. University of Guelph*[364] and *Stoffman v. Vancouver General Hospital* [365], the Supreme Court of Canada held that the mandatory retirement policies of a university and a hospital could not be challenged under the *Charter*. Although both the university and the hospital were created and given certain powers by statute, neither institution had powers beyond those of an individual.

However, in *Eldridge v. British Columbia*[366] the Supreme Court of Canada held that an entity that "implements a specific government policy or program"[367] is bound by the *Charter*. Indeed, if the activity carried out by a non-governmental entity is governmental in nature, that activity will be

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[359] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11
[360] SNB 2002, c. O-0.5 [*OLA*].
[361] Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11 [*Charter*].
[362] (1992), 130 NBR (2d) 53, [1992] NBJ No 672 (QL).
[363] SNB 1958, c 64.
[364] [1990] 3 SCR 229, 76 DLR (4th) 545.
[365] [1990] 3 SCR 483, 76 DLR (4th) 700.
[366] [1997] 3 SCR 624, 151 DLR (4th) 577.
[367] *Ibid*. at para 43.

subject to the obligations of the *Charter*, although for other activities the entity is not bound by the *Charter*.

It is also important to remember that s. 32(1) of the *Charter* applies not only to Parliament, legislatures and government, but also to all matters within the purview of these institutions. In *Godbout v. Longueuil (City)*, Justice La Forest explained the rationale for the broad scope of section 32 as follows:

> "Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are - as a simple matter of fact - governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender." [Emphasis added].[368]

It is therefore clear from case law that the *Charter* does apply to a body for either of the following reasons:

1. The entity is part of the "government" within the meaning of section 32, either by its very nature or because the government exercises substantial control over it. In such a case, all activities of the entity are subject to the *Charter*.

2. A particular activity of an entity may be subject to the *Charter* if that activity can be attributed to government. In this case, it is appropriate to examine not the nature of the entity whose activity is being challenged, but rather the nature of the activity itself.[369]

This is the criteria which we must use to determine whether the *Charter* applies to professional associations. We note that in *Andrews v. Law Society of British Columbia* [370] the Supreme Court of Canada, relying on s. 15(1) of the *Charter*, struck down a condition of admission to the bar that the Law Society of British Columbia had added. There was no reference in that decision to section 32 of the *Charter*. The Court appears to have concluded, de facto, that the Law Society is a government entity within the meaning of section 32(1).

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[368] [1997] 3 SCR 844 at para 48, 152 DLR (4th) 577 [*Godbout*].
[369] *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Chapter*, 2009 SCC 31, [2009] 2 SCR 295 at para 16.
[370] [1989] 1 SCR 143, 56 DLR (4th) 1.

In *Klein and Dvorak v. Law Society of Upper Canada*,[371] the Ontario Divisional Court found that the Law Society of Upper Canada was a statutory body exercising its powers in the public interest. In the Court's view, the Law Society was performing a regulatory function on behalf of the "legislature" and "government" within the meaning of s. 32(1) of the *Charter*, when it made rules relating to advertising by lawyers or to the relationship between lawyers and the media. Even though the rules and observations contained in the Code of Conduct were not adopted by regulation, the Court said this did not prevent them from being subject to the provisions of the *Charter*. Indeed, the Law Society, through its disciplinary procedure, enforces the provisions prohibiting lawyers from advertising fees and making statements to the media, thereby incorporating these provisions into Ontario law and making them subject to the *Charter*.

The same logic applies in the case of other professional associations. In exercising the powers conferred on them by their constituent Acts, these bodies perform a regulatory function on behalf of the "legislature" and "government" within the meaning of section 32(1) of the *Charter*. Through their disciplinary procedures, they ensure compliance with the provisions of their constituent Acts, which give them enforcement powers specific to government action.

The activities of professional associations cannot be equated with those of a private entity, such as a provincial sports association. For example, in *Blainey v. Ontario Hockey Association et al.*,[372] the Ontario Court of Appeal held that the mere fact that the association in question was receiving grants under provincial legislation was not sufficient to make its activities governmental acts for the purposes of the *Charter*. According to the Court of Appeal, there is no delegation of authority from the Legislature or grant of power by the government in the relationship between the sports association and the province. In such a case, the association is not performing any governmental function. This is not the case with professional associations to which the government and the Legislature have delegated a number of powers that would otherwise be exercised by the government or the Legislature.

Given that analysis, I conclude that professional associations are entities performing governmental functions within the meaning of s. 32(1) of the *Charter*. Any other conclusion would be illogical, as it would allow the provincial government and the Legislature to offload linguistic obligations to these associations, by granting powers which would normally be exercised by the state.

While this may seem odd in light of the analysis under subsection 32(1) concerning language rights under the *Charter*, a further analysis must be undertaken to determine whether the body is an institution within the meaning of sections 16 and 20. Evidently, in matters of language rights, two evaluations must be conducted in order to qualify an organization as an "institution" and thus have it subjected to the language obligations contained in the *Charter*.

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[371] 50 OR (2d) 118, 16 DLR (4th) 489.
[372] 54 OR (2d) 513, 26 DLR (4th) 728 (Ont CA).

In *Charlebois v. Mowatt*,[373] apart from its analysis of subsection 32(1), the New Brunswick Court of Appeal considered the meaning to be given to the expression "institutions of the legislature or government" in subsections 16(2) and 20(2) of the *Charter*. In Charlebois, municipalities were identified as "institutions" within the meaning of these provisions. The Court of Appeal noted that municipalities are created by an Act of the Province and exercise the powers conferred on them by that Act.

The Court then referred to *Godbout v. Longueuil* (City)[374], where the issue was a motion passed by the City of Longueuil. The city had objected to its motion being subject to the *Charter*. La Forest J. found that the Charter did apply to the activities of the municipality. Having reviewed previous case law related to the scope of the Charter of the Supreme Court of Canada, La Forest J. reaffirmed some important principles relating to the Charter's applicability to entities other than legislatures or governments. He emphasized their "governmental nature", either by virtue of the degree of governmental control over them, of the functions they perform or of the actions they take.

La Forest J. said acts must be "governmental" and not simply "public". Concerning municipalities, La Forest J. relied on four factors to conclude that municipalities cannot escape the application of the *Charter*. The third factor is particularly relevant for our purposes:

Municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction.[375]

This made it clear that municipalities are creatures of the provinces from which they derive lawmaking powers, that is, they exercise powers and perform functions conferred by the provincial legislatures that the legislatures would otherwise have to perform. Since the *Charter* applies to provincial legislatures and governments, it applies to these entities which provinces vest with governmental powers; otherwise, provinces could simply avoid the application of the *Charter* by vesting certain powers in municipalities.[376]

In *Charlebois*, the New Brunswick Court of Appeal concluded that municipalities in New Brunswick are subject to the *Charter* and so, the actions of the City of Moncton are reviewable under the *Charter*. In short, New Brunswick municipalities are creatures of the province, they exercise governmental powers conferred upon them by the Legislature or the Government, and derive their powers from the law. They must act within the limits of that legislation. Their functions are clearly governmental. The Court concluded that they are "institutions" within the meaning of sections 16(2) and 20(2) of the *Charter*. The Court also strongly emphasized the soundness of the reasoning in

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[373] 2001 NBCA 117, 242 GNI (2d) 259 [*Charlebois*].
[374] *Supra*.
[375] *Ibid*. at para 51.
[376] See also *Nanaimo (City) v. Rascal Trucking Ltd* [2000] 1 SCR 342 at para 31, 183 DLR (4th) 1; *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084, 106 DLR (4th) 233; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras 32-36; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 SCR 409 at para 33; *Freitag v. Town of Penetanguishene* (1999), 47 OR (3d) 301, 179 DLR (3d) 150 (CA); and in particular the passage of Linden J. at p 663 in *Re McCutcheon and City of Toronto* (1983), 41 OR (2d) 652, 147 DLR (3d) 193 (SC), cited with approval in *Godbout*, *supra* at para 52.

Godbout that stated that governments could avoid language obligations imposed by the *Charter* if those obligations did not apply to other governmental entities.

Can the same argument be used to conclude that professional associations are "institutions of government and of the Legislature" within the meaning of sections 16(2) and 20(20) of the *Charter*? We have seen that these associations are created by statutes passed by the Legislature, and that they exercise powers conferred on them by those statutes. However, it is also reasonable to ask whether these associations are governmental in nature, given the degree of governmental control over them, or the functions they perform. We know that the Supreme Court of Canada in *Godbout* said that these acts must qualify as "governmental", not merely "public". In some cases, these professional associations have the power to establish rules of law, and to apply and enforce them. In the exercise of these actions, they are institutions within the *Charter*, since their actions can be characterized as "governmental".

It is also true that these associations are created by private laws, which generally relate to local or private matters, or are in the interest of a person, a group or a municipality. However, in New Brunswick, these "private laws" also regulate the relationship between professional associations and society, which means these associations must also protect the public interest. Evidently, we must distinguish between the actions of these associations that are private in nature and those that are public. Therefore, it is important to ask the following questions:

- Does the action involve the public interest?
- Does the action modify a law of public interest or defeat the application of some general rules of law?
- Does the action affect a range of interests?

When these criteria are applied, only a few of the actions of professional associations can be considered private in nature and thus be exempted from the *Charter*'s language obligations. By allowing the establishment of these professional associations, the legislator gives them a monopoly with respect to the administration of professional services, to the admission to a profession and to the services that the public can obtain. The granting of this monopoly and autonomy can only be justified for reasons of public interest. They are not granted to reinforce or consolidate the status of the professions, but rather to ensure the protection of the public interest. The mere fact that individuals practice a profession does not give them the right to claim this monopoly. Only the protection of the public interest should justify its granting.

The professional association, by virtue of the powers conferred upon it by the provincial legislature, has the right to regulate the affairs of the association, the manner of the election of its officers, the powers of its officers, and all other matters of internal administration. These powers may be considered private in nature and may, in the end, be outside the scope of the *Charter*. In addition to this power to regulate internal affairs, Parliament has also expressly or implicitly delegated to professional associations the power to regulate many aspects of a profession. As bodies with significant regulatory, supervisory, administrative and disciplinary powers, professional associations

can be considered public authorities and an essential part of the structures of government. They are part of the administrative machinery of the state and represent much more than a mere association of individuals engaged in the same profession.

Therefore, because of the broad and liberal rules of interpretation that must be applied in linguistic matters,[377] the nature and role of professional associations make them closely linked to government. They are part of the state structure and are institutions of government and the legislature within the meaning of the *Charter*.

Professional associations are therefore subject to the obligations of sections 16 to 20 of the *Charter*. Accordingly, it can be said that the English and French languages are the official languages of professional associations and that these languages have equal status and equal rights and privileges as to their use within these bodies (s. 16(2)). The constituting acts and bylaws of these professional associations must be enacted in both official languages (s. 18(2)). Disciplinary committees of professional associations must respect the right of individuals to use the official language of their choice in disciplinary proceedings (s. 19(2)). They are also required to communicate and provide services to the public and their members in the official language of their choice (s. 20(2)).

2. The Official Languages Act

New Brunswick's first Official Languages Act[378] did not include any provisions with respect to professional associations. The *Official Languages Act*, 2002 also made no mention of professional associations, except for their judicial activities. Indeed, the Act defines the term "court" to mean the courts and administrative tribunals in the province. The disciplinary committees of Associations are obviously "tribunals" within the meaning of the Act. Given the nature of their actions and the coercive effect of their decisions, they must apply the principles of procedural fairness and natural justice in their proceedings. They are "administrative tribunals" and therefore "courts" within the meaning of the *Official Languages Act*. In this regard, they are required to comply with the provisions of sections 16 to 24 of the *Official Languages Act*.

Thus, English and French are the official languages of these disciplinary "tribunals", and members have the right to use the official language of their choice in matters before them, including pleadings and proceedings.[379] It is also incumbent upon these courts to understand the official language chosen by a party, without the assistance of an interpreter or any technique of simultaneous translation or consecutive interpretation.[380] Witnesses appearing before these tribunals also have the right to be heard in the official language of their choice and, upon the request of a party or witness, the tribunals must ensure that simultaneous translation or

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[377] See, among others, *R v Beaulac*, [1999] 1 SCR 768, 173 DLR (4th) 193.
[378] *Official Languages of New Brunswick Act*, RSNB 1973, c. O-1.
[379] *OLA, supra*, ss 16 and 17.
[380] *Ibid.*, s 19.

consecutive interpretation services are provided.[381] It should be noted that section 21 only gives the right to request translation or interpretation to parties and witnesses, not to lawyers or members of the court. Section 24 provides that final decisions or orders of the courts, including reasons and summaries, shall be published in both official languages if the point of law at issue is of interest or importance to the public or if the proceedings were conducted in whole or in part in both official languages.

It was when the *Official Languages Act* was amended in 2013 that the legislature adopted section 41.1 which deals with professional associations. Subsection 41.1(1) defined professional associations as "an organization of persons that, by an Act of the Legislature, has the power to admit persons to or suspend or expel persons from the practice of a profession or occupation or impose requirements on persons with respect to the practice of a profession or occupation." Subsection 41.1(2) provided that professional associations shall provide prescribed services to "their members" in both official languages. I note, first, two flaws in this provision: first, it purports to apply only to "members" of professional associations and not to the "public" and, second, it refers to "regulatory services" that were never defined.

With respect to the first flaw, I will not repeat the argument that I have already made in earlier sections of this paper. Suffice it to say that any attempt to limit the scope of the language obligations of professional associations to their members is both futile and contrary to their constitutional language obligations. The province cannot justify such a limitation on the right of the public to receive services from these associations in the official language of their choice. Were it to do so, the province would be contravening its obligation to enhance the vitality and development of the minority language community, a principle that underlies the language rights it has recognized for that community. It was therefore imperative to make an amendment so that subsection 41.1(2) would also refer to the "public" and not only to members.

Section 41.1 of the *Official Languages Act*, 2013 was scheduled to come into force in June 2015 following the adoption of regulations that would implement it. However, these regulations were never developed, and, on the eve of the June 2015 deadline, it was clear that they never would be. At the time, the province was also involved in a lawsuit brought by a citizen who claimed that her language rights had been violated because a professional association, in this case the College of Psychologists of the province, had not been able to provide her with equal access to the professional entrance exams in French. With Michel Bastarache, I represented this citizen. After lengthy negotiations with the representatives of this association and with those of the government, it was agreed, among other things, that section 41.1 of the *Official Languages Act* of 2013 had to be amended and replaced by a new provision.

On June 5, 2015, Bill 49, *An Act to Amend the Official Languages Act*, which resulted from these negotiations, received Royal Assent. This new version of section 41.1 is now in the Act. It maintains the definition of professional association in subsection 41.1(1) that was present in the 2013 version.

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[381] *Ibid.*, s 21.

Subsection 41.1(2) is, however, amended to provide that when a professional association exercises its powers to admit, suspend or expel a person, it must provide the services and communications related to that exercise in both official languages and, with respect to its power to impose requirements, it must ensure that any person can meet those requirements in the official language of his or her choice. In addition, subsection 4.1(3) provides that no person shall be disadvantaged because they have exercised the right to choose the official language in which they meet the requirements of the professional association.

These new provisions are important because they address the criticisms that have often been levelled by Francophones at professional associations with respect to the quality of the entrance examinations and continuing education courses offered to members. Many French-speaking applicants to a profession, faced with the poor quality of some translations, chose to write their entrance exams in English. This put them at a disadvantage compared to their English-speaking colleagues. In addition, in many cases, the documents allowing applicants to prepare for the entrance exams were only available in English. Such situations should now be contrary to the obligations imposed on associations by the *Official Languages Act*. We will see that unfortunately this is not yet the case with respect to the Nurses Association of New Brunswick.

Subsection 41.1(4) rectifies an important omission by Parliament in the 2013 version. It provides that professional associations must not only offer their services and communications in both official languages to their members, but also to the public that interacts with them. Associations will therefore have to ensure that they provide equal access to services of equal quality to both official language communities.

Returning to the situation with the Nurses Association of New Brunswick, the Commissioner of Official Languages d'Entremont produced an excellent report in 2018 on the situation faced by Francophone students when it came time to write the nursing entrance exam[382]. I will first recall the facts.

In that case, the complainants, French-speaking student nurses, alleged that they had been disadvantaged because they had chosen to use French to meet the requirements imposed by the Association for access to the right to practice nursing. They mentioned problems with the translation and adaptation into French of the English version of the National Council Licensure Examination-Registered Nurse (NCLEX-RN). In addition, the complainants criticized the lack of resources in French for the preparation for the exam. This exam, designed and prepared in the United States, is used by all Canadian provinces except Quebec.

Following its investigation, the Office of the Commissioner of Official Languages concluded that the association had violated the *Official Languages Act* by adopting an entrance exam that clearly disadvantaged Francophone candidates. Indeed, there is a significant gap in terms of the exam

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[382] Office of the Commissioner of Official Languages of New Brunswick - *Investigation Report - Nurses Association of New Brunswick - May 2018*, https://officiallanguages.nb.ca/wp-content/uploads/2014/04/2016-3071-investigation_report-web.pdf

preparation resources available to the English-speaking community compared to what is available to French-speaking people. Commissioner d'Entremont noted that there is only one French-language question bank - with no mock exams and only a limited number of preparatory questions, whereas there is a wide range of high-quality English-language mock exams on the market. Therefore, French-speaking candidates are not on an equal footing with English-speaking candidates.

I recognize that the association has no control over these preparatory resources. However, as the Commissioner noted, the NCLEX-RN exam does not exist in a vacuum and the association knows the situation with these resources and their availability. The Commissioner concluded that since the association made the decision to use the NCLEX-RN exam, Francophone and Anglophone candidates are no longer on an equal footing.

This situation has resulted in many French-speaking nursing students deciding to take this exam in English. Not all these students have the language skills to do so and those who must write the exam in French continue to feel disadvantaged and often are denied the opportunity to practice the profession for which they were trained due to their inadequacy in the English language. English-speaking students do not experience this stress.

At the conclusion of her investigation, the Commissioner made the following recommendations:

- that the association take the necessary steps to ensure that the requirements for admission to practice nursing in New Brunswick fully comply with subsection 41.1(3) of the *Official Languages Act of New Brunswick*
- that regardless of the entrance exam chosen by the association, any translation of the exam and any amendments to it be done by a certified translator
- that the association report to the Office of the Commissioner on the steps taken to comply with subsection 41.1(3) by September 4, 2018.

Since that report was filed, nothing has changed. The Association refuses to take steps to correct the violation of the *Official Languages Act* and continues to maintain the position that the exam is fair. The provincial government refuses to fulfill its responsibilities and demand that the Association comply with the law. I wonder if the government would hide behind the so-called "independence" of professional associations if one of them violated a provision of the *Human Rights Act* in the application of its entry-to-practice criteria. I would hope not. Why is it any different for the *Official Languages Act*, a quasi-constitutional law that takes precedence over all other laws, including the constituting laws of these Associations?

There is a simple solution to this issue. There is currently an exam that would correct the situation if adopted by the Association. This exam created by the Canadian Association of Schools of Nursing was developed in both French and English. All the New Brunswick Association would have to do is accept this exam, and if they want to keep the NCLEX exam for those nurses who wanted to take it, they could do that as well. If the Association does not act on this issue, I maintain that the

provincial government has a constitutional and moral responsibility to ensure that they do, or else they will have to do it for them.

In light of the above, I propose that the provisions of the *Official Languages Act* dealing with professional associations be amended to add:

- **a requirement that professional associations file an annual report with the Premier and the Office of the Commissioner of Official Languages listing the means by which they have ensured compliance with their language obligations;**

- **that a professional association that fails to comply with its linguistic obligations may have its activities suspended until the necessary corrections are made.**

PART XI - OLA REVIEW: OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES AND REMEDIES

The fundamental nature and constitutional origin of the *Official Languages Act (OLA)* are meaningless without access to an authority with jurisdiction to ensure compliance. The famous Latin maxim "*Ubi jus, ibi remedium* - where there is a right, there is a remedy"[383] applies to language rights as it does to any other branch of law. If rights are recognized, appropriate remedies must be provided in cases whenever the exercise or full enjoyment of one of those rights is impeded. In any event, it is unthinkable that one could imagine a right without a remedy, for the two go hand in hand, and the absence of one necessarily entails the absence of the other.[384]

Thus, when provincial institutions fail to meet their obligations with respect to official languages, the citizens of the province must have access to a judicial or administrative authority that is able to determine the violation of these rights and order an appropriate remedy.

Moreover, I believe that the importance that the legislator attaches to a law can be assessed by analyzing the effectiveness of the sanction mechanisms designed to ensure compliance. In this regard, it should be recalled that the *Official Languages Act of New Brunswick 1969*[385] made no express provision for remedies for violations of the rights guaranteed therein. While complainants whose rights had been violated could seek redress through the courts, the absence of any provision for remedies in the Act discouraged many from doing so.

It is also important to note that going to court is a time-consuming and potentially expensive process. Any legal action that citizens must take to force the government to respect rights entails substantial human and financial costs for the complainant. The burden of proof and the cost of the proceedings make it difficult to exercise these rights. Often, such actions require expert testimony, which can mean even more expense. Moreover, a citizen is facing the government apparatus and its almost unlimited financial and human resources.

In New Brunswick, the usual practice in such cases is for the Attorney General to call upon large private law firms, while also having access to the plethora of lawyers in government. When citizens say they feel like David before Goliath when they decide to try to have their rights respected, they are right. Add to this the financial burden of such a process - we know why many hesitate to call on the courts to have the law actually applied.

Given the lack of recourse, we question the effectiveness of the 1969 *Official Languages Act*. As Justice Lavigne said in *R. v. Gaudet*: "[I]t 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.[386] Indeed, what good is a

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[383] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 25.
[384] *Ashby v White* (1703), 2 Ld Raym 938 at 953. Holt C.J.'s quote is from the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v Bhadauria*, [1981] 2 SCR 181 at 191. See also, *Doucet-Boudreau, ibid* at 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*].
[385] *Official Languages Act of New Brunswick*, R.S.N.B. 1973, c. O-1 [1969 OLA].
[386] *R. v. Gaudet*, 2010 NBQB 27, 355 NBR (2d) 277, at para 24.

law if there is no recourse to enforce it? It was only in 2002, with the adoption of the new *Official Languages Act*, that the New Brunswick legislator agreed to create a remedy for violations by establishing the Office of the Commissioner of Official Languages.

The creation of the Office of the Commissioner of Official Languages has provided New Brunswickers with a less onerous and more accessible procedure to resolve issues stemming from a violation of the *Official Languages Act*. However, despite this, the Office of the Commissioner of Official Languages of New Brunswick still does not have the powers necessary to fully carry out its mandate. Given the importance of the *Official Languages Act* in the hierarchy of New Brunswick legislation, it is difficult to understand that there are no effective recourses to any violation of those rights. This is why I believe that we must take advantage of the current legislative revision to give the Office of the Commissioner of Official Languages the means to actually carry out its mandate and to provide New Brunswickers with a panoply of remedies that will give them the perception that the Act has some effectiveness.

A. The Office of the Commissioner of Official Languages

Section 43 of the *OLA* created the Office of the Commissioner of Official Languages of New Brunswick and the position of Commissioner of Official Languages. This position did not exist before the new Act came into force in 2002.

The Commissioner of Official Languages is appointed by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly. To ensure the independence of the position, a selection committee is established to nominate candidates for appointment. The selection committee must consist of the Clerk of the Executive Council or their designate, the Clerk of the Legislative Assembly or their designate, a member of the judiciary, and a member of the academic community.

The mandate of the committee is to develop a list of qualified candidates. After receiving this list, the Premier, who is the Minister responsible for the *Official Languages Act*, must consult with the Leader of the Official Opposition and the leaders of the other political parties in the Legislative Assembly on one or more candidates on the list.

The process of appointing the Commissioner of Official Languages to replace Katherine d'Entremont raised questions that I feel are important to address. We will recall that on April 13, 2018, the Commissioner of Official Languages announced she would be retiring on July 22, 2018, before the end of her mandate, in accordance with subsection 43(4.1) of the *Official Languages Act*. The government then appointed Michel Carrier as Acting Commissioner, as provided for in subsection 43(5.5) of the *Official Languages Act*. Mr. Carrier was to serve in this interim capacity until a person could be selected through the independent process provided for in the Act.

Section 43(5.5) of the *Official Languages Act* provides that:

"The Lieutenant Governor in Council may appoint an acting Commissioner for a term of up to one year if:

(a) the office of Commissioner becomes vacant during a sitting of the Legislative Assembly, but the Legislative Assembly does not make a recommendation under subsection (2) before the end of the sitting, or

(b) the office of Commissioner becomes vacant while the Legislative Assembly is not sitting."

This seems clear enough that the term of office of the Acting Commissioner is for a **maximum** of one year. We assume that Commissioner d'Entremont notified the Speaker in writing of her intention to retire during the current session. Therefore, under paragraph (a), the Lieutenant Governor in Council was required to make a recommendation for the appointment of an interim commissioner before the end of the session, which was scheduled for June 2018. The selection process for the new commissioner did not begin until July 23, 2018, a date coinciding with the acting commissioner taking office. The candidates who applied for the commissioner position were invited, according to the information obtained, to an interview in late October 2018. The entire process would normally have been completed in the fall of 2018 and the acting commissioner's term would have ended in early 2019 with the new commissioner taking office.

However, to the surprise of many including myself, on May 28, 2019, the Premier announced that he was cancelling the selection process for the next Commissioner of Official Languages for New Brunswick, that a new selection committee would be created and that a new announcement of candidacies would be issued.

I read with interest the explanations given by one of the members of the selection committee to justify the decision to terminate the committee's work and to restart the selection process, and I must admit that I was puzzled for several reasons.

First, this person states that the committee had made the decision to "disband" at the end of March 2019. I have to wonder where they got the authority for such a decision. There is nothing in the *Official Languages Act* that gives the committee the right to "disband." Its mandate under the Act is clear: to compile a list of qualified candidates and submit it to the Premier, who must then consult with the Leader of the Opposition and the leaders of the parties represented in the Assembly before appointing the new Commissioner. If the Committee determined that it could not fulfill its mandate, for example, because there were no qualified candidates, it was obliged to report immediately to the Premier on the reasons for this conclusion and to recommend that the selection process be restarted immediately.

Was such a report made? I doubt it. If the Premier had received such a report, why did he not say so when he relaunched the hiring process? Why did he not immediately inform the opposition parties of the situation? That would have avoided a lot of confusion. It appears from the Premier's own words that he never received a report from the committee. In fact, he did not know how many candidates had applied for the job. If the Premier knew in late March or early April 2019, of the

committee's decision to "disband", why did he wait until late May to announce that the process would be restarted?

Second, let us say that the selection committee had the authority to "disband" in March, then why did one of the committee members resign from the committee in April? It seems odd to resign from a committee that is disbanded!

Third, when we are told that the committee was hampered in its work by the provincial election and the change in government, I am puzzled. Election or not, change of government or not, a Commissioner of Official Languages had to be appointed and the formation of an independent committee was intended to avoid these political issues. Moreover, the deadline for applications in the announcement of the position was August 10, 2018! So the committee had plenty of time in the fall to conduct seven interviews since we now know that seven candidates had been selected for interviews! It appears that none of these candidates had the qualifications to fill this position.

What is involved here is the appointment of an independent officer of the Legislature to ensure compliance with a quasi-constitutional law. I cannot accept that the committee, charged with such an important legislative mandate, took this task lightly and did not act with due diligence. The reasons given for the dissolution of this selection committee do not convince me that it could not have fulfilled its mandate. This is why the legislation must be amended to ensure that the integrity of this selection process is maintained.

The other particularity of the selection process for the replacement of Commissioner d'Entremont was the appointment of the Acting Commissioner. Indeed, as I mentioned, Premier Higgs announced on July 23, 2018, the appointment of an Acting Commissioner. The law states that this commissioner may remain in office for a maximum of one year. His mandate was to end no later than July 23, 2019. However, on June 14, 2019, the Prime Minister announced that the Acting Commissioner would remain in office beyond July 23, 2019. No amendment was made to the *Official Languages Act* to extend the term of the interim Commissioner. We can therefore question the legality of this extension. In any event, on November 22, 2019, the Prime Minister announced the appointment of Shirley MacLean as Commissioner of Official Languages.

Some people will probably consider the imbroglio that led to the appointment of the new Commissioner to be theoretical. However, we should remember that this selection process is the same as that for all other officers of the Legislative Assembly: the Access to Information and Privacy Commissioner, the Conflict of Interest Commissioner, the Child and Youth Advocate, the Consumer Advocate for Insurance, the Chief Electoral Officer, the Ombudsman and the Auditor General. This process is intended to maintain the independence of the appointees to these positions. It is therefore important that the process set out in the Act be followed to the letter and that any deviations occur only in exceptional cases with supporting rationale and that they be discussed in the Legislative Assembly.

I therefore propose:

- **That any deviations from the selection process for the Commissioner of Official Languages be justified and approved by the Legislative Assembly;**

- **That if the selection committee must terminate its work, that it provides reasons for this decision and that a new committee be appointed within ten (10) days;**

- **That the term of office of an Acting Commissioner of Official Languages shall not exceed one year, except for exceptional reasons which shall be tabled in the Legislative Assembly.**

It is also important to remember that the **Commissioner of Official Languages is an officer of the Legislative Assembly**, not of government. They are appointed for a seven-year, non-renewable term. The Commissioner holds office during good behaviour and can only be removed for incapacity, neglect or misconduct upon an address approved by two thirds of the members of the Legislative Assembly. **The position is therefore independent of government, individual departments and other government institutions.**

According to section 43 of the *Official Languages Act*, the role of the Commissioner is to investigate, report and make recommendations with respect to compliance with the Act and to promote the advancement of the two official languages in the province. The Commissioner conducts investigations in response to complaints received from the public. They may also investigate on their own initiative. Following their investigations, the Commissioner may make reports and recommendations. The Commissioner may also attempt to resolve a complaint prior to investigating it when they consider it appropriate. The Commissioner may also, at their discretion, refuse or discontinue the investigation of a complaint if they are of the opinion that the complaint is trivial, frivolous, vexatious or made in bad faith or if the matter of the complaint does not constitute a contravention of the *Official Languages Act*.

Under subsections 43(16) and (17), if the Commissioner decides to investigate a complaint, they must give notice of their intention to the deputy head or other administrative head of the institution concerned. Upon completion of the investigation, the Commissioner shall forward the results of the investigation and any recommendations, including any opinions or reasons for the recommendations, to the Premier, the deputy head or other administrative head of the institution concerned and the complainant. Under subsection 43(17.2), if the Commissioner considers it to be in the public interest, he may publish a report on the results of their investigation and any recommendations made as a result of that investigation.

The *Official Languages Act* also provides that the Commissioner shall submit an annual report to the Speaker of the Legislative Assembly. The annual report includes, amongst other matters, an account of the activities of the Office of the Commissioner and makes recommendations to improve the delivery of services in both official languages.

Thus, to monitor and ensure the implementation of the *Official Languages Act*, the Commissioner's powers consist of conducting investigations and making recommendations. These powers, while important, are, in my opinion, insufficient to ensure full compliance with the Act.

The experience of the past 20 years shows that the power to make recommendations has its limits and can sometimes be ineffective. The reluctance of certain government institutions to implement recommendations and the delays in their implementation, which can sometimes be of several years, are frustrating for complainants and have the effect of diminishing the credibility of the *Official Languages Act* in the eyes not only of government institutions but also of the public.

In the following paragraphs, I will propose modifications to the *Official Languages Act* that I believe would correct some of the Act's shortcomings with respect to the remedies available to complainants and the powers of the Commissioner of Official Languages.

B. Proposed Amendments

1. Powers of the Commissioner of Official Languages: investigation report

The role of the Commissioner, as mentioned, according to subsection 43(9) of the *Official Languages Act*, is to investigate, report and make recommendations with respect to compliance with the Act and to promote the advancement of the two official languages in the province. To fulfill part of this role, the Commissioner conducts investigations, either as a result of complaints received or on his or her own initiative.

The complaints received by the Commissioner of Official Languages generally raise two types of problems: ignorance of the rights recognized by the Act, or an endemic disregard for these rights. With respect to ignorance of rights, I have seen in my reading of the various investigations reports that complaints often stem from the fact that institutions and agencies subject to the *Official Languages Act* are unaware of, or unfamiliar with, the language rights enjoyed by citizens of the province. Yet these rights are simple to understand. They boil down to the right of the public to receive from provincial institutions, throughout the province, services of equal quality in the official language of their choice. Unfortunately, after more than 50 years of official bilingualism, there are still many who seem to believe that the obligation is only to provide accommodation within a reasonable time and not to immediately offer services of equal quality in both official languages.

I have also observed that often, either through ignorance, carelessness or indifference, certain institutions or organizations subject to the *Official Languages Act* make decisions without considering the impact they will have on the official language minority community or their ability to offer services of equal quality in both official languages.

It also happens that a member of the official language minority community who requests services in their language finds themself powerless or uncomfortable when the public servant or official to whom they are speaking is unable or unwilling to offer the service in their language. If this happens frequently, the citizen will come to consider their language as not being an official language, but

rather as having an inferior status and will hesitate, despite the *Official Languages Act*, to demand services in it. It is therefore important, in this context, that government departments and other provincial institutions and agencies subject to the Act establish an official languages culture so that every employee understands that serving citizens in their chosen official language is neither a burden nor a privilege, but rather a right that constitutes one of the fundamental values that define our collective will to live.

The *Official Languages Act* gives the Commissioner the important task of ensuring that the provincial government and its institutions respect the obligations set out in the Act. Through their investigation reports, the Commissioner seeks to establish a dialogue with provincial institutions, a dialogue that will promote the full and complete implementation of the Act. In addition, investigation reports serve to raise awareness and educate public opinion about language rights. We note that, despite a certain amount of goodwill on the part of some institutions, some others are reluctant to engage in this dialogue and seem to consider the Commissioner's reports and recommendations as obstacles rather than tools that will help them improve their performance in terms of official languages.

Despite their power to conduct investigations and make recommendations, the Commissioner of Official Languages does not have the authority to order provincial institutions to comply with the *Official Languages Act*. Their influence remains persuasive, not coercive. Although the Commissioner is the protector of the New Brunswick public in matters of official languages, their power to act remains quite limited. If the Commissioner's powers are insufficient to ensure compliance with the *Official Languages Act*, the very relevance of the position may be called into question.

The primary objective of investigation reports is to determine whether rights recognized by the *Official Languages Act* have been violated. The most common problems with the Commissioner's investigations are that the recommendations made are not always implemented by the institution in question or are implemented too slowly, which can be frustrating and discouraging for the complainant, as their rights continue to be violated. Repeated violations following the conclusion of an investigation report undermine public confidence in the effectiveness of the law and seriously undermine the credibility of the Office of the Commissioner of Official Languages. It is unacceptable, regardless of the law, that a violation can be repeated after a judicial or administrative authority has sanctioned it. This should be all the more true for a law that is quasi-constitutional in nature, as is the case with the *Official Languages Act*.

The recommendations that the Commissioner makes in their investigation reports are intended to shed light on the facts and practices that gave rise to the complaint. In doing so, the Commissioner seeks to resolve the issue raised through pragmatic recommendations. While the recommendations address a specific problem raised by the complaint, they also provide suggestions on how to prevent the same type of violation from occurring elsewhere. In addition,

where systemic problems are found, the Commissioner's report may recommend changes to government practices and policies and, where appropriate, legislation.

To increase the effectiveness of investigation reports, I suggest that the *Official Languages Act* be amended to provide that the institution subject to an investigation be required to respond in writing to the reports within 30 days of receiving them and that this response includes, among other things, the measures it has taken or intends to take to comply with the recommendations made in the report. If an institution does not comply with the time limit, a financial penalty, of an amount to be set by regulation, may be imposed.

With respect to the requirement to respond to investigation reports within a specific time, my research revealed the existence of a similar requirement in two other pieces of legislation. In the *Welsh Language Act*, which governs the use of the Welsh language in Wales, subsection 4(3) provides that institutions subject to an investigation "must have due regard" to any recommendations or advice issued by the Commissioner. The *Official Languages Act* of the Territory of Nunavut, for its part, provides in subsection 32(3) that the Commissioner may require the head of the institution to inform the Commissioner, within such time as the Commissioner may specify, of the measures taken or proposed to be taken to give effect to the recommendations of the Commissioner and, if no measures have been taken or proposed to be taken, of the reasons for not giving effect to the recommendations.

Requiring institutions to report on their actions after an investigation report is tabled is not, therefore, a novel or unusual amendment.

I therefore propose that the *Official Languages Act* be amended by adding the following provisions:

- **That, within thirty (30) days of receiving the results of the investigation, the deputy head or other administrative head of the institution concerned send the Commissioner of Official Languages a written response specifying the measures taken or to be taken to comply with the recommendations of the investigation report or, if no measures have been taken or are contemplated, the reasons for not acting on the recommendations.**
- **That any failure to comply with this requirement may be subject to a monetary penalty to be established by regulation or that the Commissioner may apply to the Court of Queen's Bench for an order directing the institution to provide the response.**

Section 43(21) of the *OLA* also provides that as soon as possible after the end of each year, the Commissioner shall submit an annual report to the Legislative Assembly summarizing the activities of the Office of the Commissioner for that year and making recommendations for improving the effectiveness of the Act. These annual reports are often forgotten as soon as they are tabled and the recommendations are frequently rejected or ignored without any valid reason being given for this decision.

To give effect to the annual reports, I suggest that the *Official Languages Act* be amended to provide:

- **That the Premier, being the minister responsible for the administration of the Act, shall, within thirty (30) days after the tabling of the annual report, table in the Legislative Assembly a written response explaining what the government intends to do in response to the annual report or, if applicable, explaining why it does not intend to do so.**

2. Compliance Agreement

A compliance agreement is an agreement by which an institution or agency undertakes to take certain actions to comply with the recommendations contained in an investigation report. The agreement therefore includes commitments to implement the conditions necessary for compliance with the *Official Languages Act*. It also provides that the institution or organization has a duty to report at regular intervals on its efforts to meet the commitments made.

An example of such an arrangement can be found in the agreement reached on November 20, 2017, by the parties in a dispute involving Ambulance NB, the provincial government and civil parties. This agreement provided for commitments by Ambulance NB and the government to comply with their obligations under the *Official Languages Act*. It also provided that Ambulance NB and the government were to report annually to the Commissioner on the status of the implementation of these commitments. While it is true that the Office of the Commissioner of Official Languages was not a party to this agreement, we believe it is nevertheless a good example of what an enforceable agreement could look like.

In its bill to modernize the *Official Languages Act of Canada*, the Canadian government is proposing that compliance agreements be put in place. New Brunswick could use this as a model for doing the same.

I therefore suggest that the *Official Languages Act* be amended to provide that:

- **institutions and organizations that are in recurring breach of their obligations under the Act may be required to enter into compliance agreements with the Office of the Commissioner of Official Languages in the manner proposed in the Canadian government's bill.**

3. The power to sue

With respect to the power to sue, it should be noted that subsection 43(18) of the *Official Languages Act* confers this right only on the complainant. It states that a complainant who is dissatisfied with the findings of an investigation or with the disposition of their complaint may apply to the Court of Queen's Bench of New Brunswick.

Subsection 43(18) is silent as to the procedure that a complainant may use to bring their case before the Court of Queen's Bench. I am of the view that in the case of an action involving a language issue of public interest, it would be more efficient to allow the action to be commenced by way of a Notice of Application rather than a Statement of Claim. A provision could be made in the *Official Languages Act* to permit the use of the application procedure in all cases falling under subsection

43(18). Evidence in such proceedings could, unless the court directs otherwise, be given by affidavit. Upon the filing of the Notice of Application, the court would act as manager and ensure that the proceedings advance within a reasonable time frame. Parties would be entitled to cross-examine the authors of an affidavit with leave of the managing judge and in accordance with a procedure approved by the managing judge. We believe that this would have the effect of reducing the length of trials and greatly reduce costs.

I therefore propose:

- **That an action for a violation of a right under the *Official Languages Act* may be brought by Notice of Application as provided for in the New Brunswick Rules of Court.**

A court action can be very costly for a citizen. It is true that the Court Challenges Program of Canada funds actions that raise issues relating to the *Canadian Charter of Rights and Freedoms*, which includes the language provisions that apply in New Brunswick and the provisions of the *Official Languages Act of Canada*, but it does not support applications that involve a violation of New Brunswick's *Official Languages Act*. So a New Brunswicker who cannot link his claim against the provincial government to a violation of a provision of the *Charter* will not obtain funding from the Court Challenges Program if one of their rights under the *Official Languages Act* has been violated.

To address this shortcoming in part, I suggest that the *Official Languages Act* be amended to include a provision similar to that found in section 81 of the *Official Languages Act* (Canada).

That section provides:

> 81 (1) Costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.
>
> (2) Where the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Thus, a citizen could, in an action raising a violation of a right under the *Official Languages Act*, at least be awarded costs, which would cover part of their expenses. I would, however, amend the first paragraph to indicate that the government, government institutions or third parties acting for the government cannot recover costs against a citizen unless the action is frivolous or vexatious.

I therefore propose that the *Official Languages Act* be amended by adding the following:

- **Costs may not be awarded against the government, any of its institutions, municipalities, or third parties acting on behalf of the government in a case involving a violation of the *Official Languages Act* unless it is shown that the action is frivolous or vexatious.**
- **Where the court is of the opinion that the subject matter of the action has raised an important and novel principle in relation to this Act, the court shall award costs to the applicant, notwithstanding that the applicant is unsuccessful.**

On the legal nature of the Commissioner's reports, the Federal Court in *Rogers v. Canada (Correctional Service)* stated:

> (Translation) While the Act does not state that the Commissioner's report is binding on the court, it is undoubtedly evidence that must be considered in an application for relief under the Act.[387]

In order to give more legal weight to the reports of the Commissioner of Official Languages, I am of the view that the *Official Languages Act* should be amended to provide that the investigation file and report establish a *prima facie* case of a violation of the *Official Languages Act* and that, once this has been established, the burden of proof is shifted to the institution under investigation to establish, on a balance of probabilities, that it has not violated the Act. Such an approach would, in our view, strike a balance between complainants and government institutions.

I therefore propose that the *Official Languages Act* be amended by adding the following:

- **That the Commissioner's report and record of investigation, once filed in court, shall be prima facie evidence of a violation of the Act and the onus shall then be on the institution to establish that it did not violate the Act.**

The *Official Languages Act* (Canada) gives the federal Commissioner the right to seek recourse before the courts.[388] Similar provisions are found in the *Nunavut Act*, the *Northwest Territories Act* and the *Welsh Language Act*.

The New Brunswick *Official Languages Act* does not expressly recognize this power for the New Brunswick Commissioner. I believe this power should be included in the *Official Languages Act* to avoid any ambiguity. In fact, in its 2011-2012 annual report, the Office of the Commissioner of Official Languages recommended that the Commissioner be given this power to resort to the courts,[389] but this recommendation, like many others, has not been acted upon.

I therefore propose that the *Official Languages Act* be amended to add the following:

- **That the Commissioner may seek recourse before the courts to enforce the *Official Languages Act***

4. Immunity of Complainants and the Commissioner

Section 43.1 of the *Official Languages Act* is intended to protect a complainant from any act of reprisal as a result of filing the complaint. This section provides:

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[387] *Rogers v. Canada (Correctional Service)*, [2001] 2 F.C.R. 586, 2001 CanLII 22031 at para 59 (FC). See also *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, 2018 FC 530 (CanLII), [2019] 1 FCR 243 at paras 75-77.

[388] *OLA Canada*, s 78.

[389] New Brunswick Commissioner of Official Languages, *From Words to Actions: Annual Report 2011-2012*, Fredericton at p 18.

43.1 No person shall take a reprisal against a person or direct that one be taken against a person because the person has made a complaint in good faith to the Commissioner or cooperated in an investigation under this Act.

However, I believe that more is needed. To better protect complainants, I recommend that this section be amended to specify not only that complainants shall not be subject to reprisals, but also that they shall not be threatened or discriminated against because of the complaint they have made. A similar provision is found in paragraph 62(2)(a) of the *Official Languages Act* of Canada.

Moreover, in its current form, section 43.1 offers little recourse to the complainant in the event that they are subjected to reprisals, threats or discrimination as a result of filing a complaint. The only recourse is to file a complaint with the Office of the Commissioner of Official Languages. To send a clear message that such actions will not be tolerated, we suggest adding a new subsection imposing a monetary penalty of between $5,000 and $25,000 on the offending party or institution.

I therefore propose that the *Official Languages Act* be amended to add the following:

- **No person shall retaliate against, discriminate against, or threaten a complainant or any other person on the basis that the complainant has made a complaint in good faith to the Commissioner or that the complainant or any other person has cooperated in an investigation under this Act.**
- **Any person or institution that violates the preceding subsection is liable on summary conviction under the procedure set out in the *Provincial Offences Procedure Act*, SNB 1987, c. P-22.1, to a fine of not less than $5,000 nor more than $25,000.**

Section 43.2 grants immunity to the Commissioner while they are performing an act within the scope of their duties. This section provides:

> 43.2 No proceedings lie against the Commissioner or against a person holding an office or appointment in the Office of the Commissioner for anything he or she may do, report or say in the course of the exercise or intended exercise of his or her functions under this Act regardless of whether that function was within his or her jurisdiction, unless it is shown the person acted in bad faith.

Since, pursuant to subsection 43(15) of the *Official Languages Act*, the Commissioner of Official Languages is a commissioner under the *Inquiries Act*,[390] they are also immune from liability under subsection 12(1) of that Act. That subsection states:

> 12(1) No action shall be brought or maintained against a commissioner by reason of an act purporting to be done by the commissioner in his or her capacity as a commissioner, unless it appears that the act was done by the commissioner without reasonable cause and with actual malice and wholly without jurisdiction.

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[390] *Inquiries Act*, RSNB 2011, c 173.

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The *Official Languages Act* (Canada) also grants immunity to the federal Commissioner. Section 75 of that Act provides as follows:

> 75(1) No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.
>
> 75(2) For the purposes of any law relating to libel or slander, a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Commissioner under this Act is privileged; and b) any report made in good faith by the Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

The *Official Languages Act* (Nunavut) provides in subsection 34(1) that reports and information provided by the Commissioner are final and not subject to review by a court. The *Official Languages Act* (NWT) provides, in section 25, that the Commissioner or any person acting on behalf or under the direction of the Commissioner is immune from civil or criminal liability for anything done, reported or said in good faith in the course of the performance or purported performance of the Commissioner's duties.

In light of our research and to clarify the immunity granted to the Commissioner, I suggest the following addition to the *Official Languages Act*:

- **No civil or criminal proceeding or judicial review shall be instituted against the Commissioner or any person holding an office or performing duties under the Commissioner for anything done, reported or said by the Commissioner in the course of the performance or purported performance of any duty or function under this Act, whether or not that duty or function was within the jurisdiction of the Commissioner, unless there is evidence that the Commissioner acted in bad faith.**

In *New Brunswick v. Canadian Union of Public Employees, Local* 4848,[391][9] the Court of Queen's Bench confirmed that a report of the Commissioner can only be reviewed within the provisions of subsection 43(18) of the *Official Languages Act*. Therefore, according to this decision, only the complainant can request that a Commissioner's report be reviewed by the courts. Thus, our proposed amendment should not prevent a complainant who is not satisfied with the Commissioner's findings from challenging them in court. However, a government institution or a third party acting on behalf of the government should not have the right to challenge a report of

[391] *New Brunswick v. Canadian Union of Public Employees, Local 4848*, 2019 NBQB 097.

an investigation by the Commissioner's office unless it can demonstrate that the Commissioner acted in bad faith.

The next text will be the conclusion, finally. Although I doubt that my texts will make a difference and though they may seem naive and unreasonable, they will at least have allowed me to let off steam.

PART XII - NB OLA REVIEW: CONCLUSION AND LIST OF RECOMMENDATIONS

New Brunswick has made tremendous progress with language rights over the past 50 years. Some other provinces recognize some language rights and have legislative or constitutional obligations, but New Brunswick remains the only officially bilingual province in Canada.

New Brunswick is bilingual because the Constitution and the legislation give official language status to both English and French. The province also recognizes the principle of the equality of these two languages as well as that of their respective community. These legislative and constitutional provisions impose particular obligations on the province.[392]

In 1969, the *Official Languages Act of New Brunswick*[393] recognized, for the first time, that English and French have equal status in law and privilege and provided for the exercise of certain language rights. In 1981, the provincial government passed the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*[394], which officially recognized the existence and the equality of the two official language communities and their right to distinct educational, cultural and social institutions. The following year, the federal government repatriated the Canadian Constitution and adopted the *Canadian Charter of Rights and Freedoms*.[395] The New Brunswick government decided to include language rights in the *Charter*, which apply exclusively to New Brunswick. These language rights are guaranteed in sections 16(2) to 20(2) of the *Charter*. In 1993, the provincial government constitutionalized the principles of the *Act Recognizing the Equality of the Two Linguistic Communities* by including section 16.1 in the *Charter*. This section provides for the equality of the two linguistic communities, English-speaking and French-speaking, and defines the role of the legislature and of the government of New Brunswick in protecting and promoting the equal status of the official linguistic communities. In 2002, after many years of dithering, the provincial government finally adopted a new *Official Languages Act*[396], which would better respect the province's constitutional obligations.

The bilingualism framework adopted by New Brunswick is not based on personal bilingualism - it does not require individuals to acquire both official languages. Rather, it is institutional bilingualism, which refers to the use of two languages by the province and some of its institutions in the delivery of public services. Under such a plan, individuals have the choice of using English or French in their dealings with government institutions.

To understand the nature of these rights, it is necessary to revisit a few basic principles. The first is the rule of interpretation applicable to these rights. According to the Supreme Court of Canada, "language rights must in all cases be interpreted purposively, in a manner consistent with the

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[392] *Charlebois v. Moncton (Town)*, 2001 NBCA 117, 242 RNB (2th) 259 at para 8 [*Charlebois v. Moncton*].
[393] *Official Languages Act of New Brunswick*, RSNB 1973, c. O-1.
[394] *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, RSNB 1981, c O-1.1.
[395] Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[396] *Official Languages Act*, RSNB 2002, c O-0.5.

preservation and development of official language communities in Canada".[397] Moreover, the interpretation of language rights must take full account of the relevant social context.[398]

The second principle is that language rights impose positive obligations on the state: "[t]his is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees".[399]

Moreover, the Supreme Court of Canada has reiterated that the applicable standard in Canada with respect to language rights is substantive equality - not formal equality.[400] The principle of substantive equality is in fact the common thread running through all constitutional and statutory language guarantees. This principle is essential, since the courts thereby reject the notion that the right to service in an official language is merely a right to be accommodated.[401] Moreover, the courts recognize that the right to receive services of equal quality is not only the right to receive identical service but includes the right to receive service that takes into account and responds to the particular needs of the minority community.[402]

The principle of linguistic duality, or the collective nature of these rights, is another essential component of language rights whose wording, at first reading, often reveals only an individual dimension. Many rights are exercised as a member of a community or because of the existence of the community. Indeed, one of the purposes of language rights is to prevent linguistic and cultural assimilation, if only because assimilation threatens not only the individual, but also the linguistic community to which that individual belongs. Two approaches have been favoured to counter pressures to assimilate: the development and maintenance of a network of institutions, and the exercise, by the representatives of an official language community, of the authority to manage and control these institutions, thus enabling them to exert a real influence on the protection and development of the community.

The protection and development of minority language communities are intricately linked to the control and management they exercise over their institutional network. The principle of duality provides political and legal justification not only for French-language school boards managed by the province's French-language community, but also for French-language universities, French-language community colleges, municipalities that identify themselves as Francophone, and health care institutions managed by the minority language community for the benefit of the minority language community.

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[397] *R v. Beaulac*, [1999] 1 RCS 768, para 25, 173 DLR (4th) 193 [*Beaulac*].
[398] *Charlebois v. Moncton, supra*.
[399] *Beaulac, supra*, para 20.
[400] *Ibid*., para 22.
[401] See, generally, *Beaulac, ibid*.
[402] See for example *Arsenault-Cameron v. Prince Edward Island*, 2000 1 SCR 3; *DesRochers v. Canada (Industry),* 2009 SCC 8, [2009] 1 SCR 194.

Whether language rights are expressed as individual rights or as collective rights, the fact remains that what justifies their existence is not necessarily the protection of the individual, but rather the preservation of a cultural heritage and of the cultural security of the group. To the extent that they are exercised in common with other members of the community, these rights, by their very nature and purpose, are linked to collective activities. Their purpose is to give the minority community the opportunity to participate fully in public life on an equal footing with the majority group. They are also intended to avoid the arbitrariness of certain government decisions made without considering the reality of the minority community.

Language rights serve to enhance the vitality and development of a community, which includes all speakers of the same language. If this was not the case, we might very well question the need to recognize these rights, since individual members of a minority community can generally express themselves in the language of the majority. Language rights must therefore necessarily serve first and foremost to enhance the vitality and development of official language minority communities and to advance real equality.

However, the heart of the issue of linguistic equality, and probably the most delicate and difficult to address, is the commitment of New Brunswick's Acadian community to language rights. In fact, a linguistic community exists when its members feel the need to commit to a common identity. Language rights seek to formalize the existence of this community, but they are only effective if the members of this community adhere to and believe in them.

Since the 1960s, New Brunswick's linguistic minority has been gradually integrated into the operation of government. This integration has undoubtedly led to the enactment of language rights as we know them today. However, these rights require vigilance and courage on the part of members of the minority community, since the risks of assimilation and non-respect of language rights are pervasive. Language rights are certainly an essential tool in balancing the balance of power between the majority language and the minority language groups. The state grants rights to individuals and, in turn, is charged with corresponding obligations, but perhaps the most important is the duty of everyone in the minority language group to live their culture, to speak their language proudly, and not to hesitate to demand, on a daily basis, that their rights be respected.

Beyond the indifference of politicians to our rights, what may hurt us the most is our complacency and tolerance of the status quo. If we still believe in linguistic equality, we must say so loud and clear and demand that our rights be respected. But perhaps it is too late. I have often wondered whether the Acadian community in New Brunswick still believes in the principle of equality of official languages and equality of official linguistic communities, and whether the English-speaking community in the province, given its lack of interest in these issues, really wanted this equality.

I often get the impression that Acadians behave not as equals, but rather as tenants who do not dare hang a picture or paint the living room wall without the permission of the landlord, which in this case is the majority community. We have yet to understand as a community that this province is as much ours as it is theirs, and that we have the right to demand that the government respect

our constitutional and legislative rights, without first having to ask permission from anyone or apologize for exercising our rights.

With respect to the majority community, it has never had a real culture of official languages. There does not seem to be much belief in linguistic equality. There is little interest in official language issues, much as if they had nothing to do with them. Many members of this community believe in myths about official languages that are untrue. Some politicians, including Premier Higgs, perpetuate these myths.

But is it not true that the backbone of the relationship between our official linguistic communities is the *Canadian Charter of Rights and Freedoms*' sections 16 to 20 and 23, the *Official Languages Act* and the *Act Recognizing the Equality of the Two Official Linguistic Communities*? Do these not constitute our social contract? These texts were adopted by our legislators, most often unanimously. They define our rights and the government's obligations towards us. They are not heresies or fabrications. They are not divisive but unifying. Asking for the respect of these provisions is not a shameful thing.

If New Brunswick believes in the principle of substantive equality as laid out in these texts, then it must stop giving the impression that the linguistic majority is vested with priority rights, exclusive rights; it must stop acting as if one language is more official than the other; it must accept the fact that in this province the two official language communities are equal in rights, privileges and status with all that this entails.

I often feel like I am preaching in the wilderness. I have the impression that Acadie in New Brunswick is on a path of self-destruction. There is so little going on in Acadie in the pursuit of linguistic equality that one might think that the community is sleeping soundly. Of course, there are the cultural activities, the World Congress and other festivals. Those looking for entertainment take to the streets on August 15 to prove that they are still alive. But when it comes to political issues that could have a significant impact on the community, Acadians seem to be absent. We need to make sure that our language and culture are alive and well every day of the year and everywhere, and not just a historical curiosity that is displayed once a year on August 15.

If we seem to sleep so well these days, it is perhaps because hypnotists have worked well. Indeed, there are many of them and they have never hesitated to combine their efforts to keep us in a sweet lethargy. As I said, the progress of New Brunswick's Acadian community since 1960 is certainly remarkable. No other minority community in Canada, with the possible exception of the English-speaking community in Quebec, has as many institutions and legal protections. However, we must remember that simply because we affirm our desire to be considered equal partners does not mean that equality exists. Equality does not magically appear because we decide it should. Equality is built, and since the government recognizes its importance by enshrining it in the supreme law of the land, it must not make it a meaningless political gesture, but a goal to be achieved. It must take positive measures to ensure the development and growth of the Acadian community, its language and its culture.

However, in listening to political speeches, I realize that they do not have equality as an objective. For the proponents of these addresses, there is no linguistic inequality in the province and should we witness an example of inequality, it would only have happened by chance and regardless of whether one is a Francophone or an Anglophone.

Yet when we legislate on the issue of equality, it is usually because we recognize, at least in principle, that inequality exists, otherwise why do it? When we talk about equal pay for men and women or gender equality, it is because we recognize that for too long women have not been treated equally. It is certainly not to allow men to perpetuate inequality. The change sought is clear: to ensure that every citizen, whether male or female, is treated equally. The mere recognition of this objective does not in itself ensure that real equality exists. It takes positive action on the part of our governments to make this equality happen.

Comfortable with the official political discourse, Acadians seem to forget the principle of substantive equality. More and more of them are losing interest in the linguistic dimension. They bathe in a false sense of linguistic and cultural security. They feel comfortable in the debate of bilingualism presented to them by a misleadingly and unifying discourse. In their eyes, there is no longer any difference between a New Brunswicker from Caraquet and one from Sussex. They are both equal in rights, status and privilege. Yet we know that the reality is different.

What is very peculiar is that it is the courts that seem to have played the dominant role in developing the basic philosophy behind language rights. It is the courts that have defined the community of values to which we adhere. It is the courts that have defined the cultural realities and the heritage that we want preserved. The courts have established the philosophical underpinnings of language guarantees. But shouldn't that be the role of government? But for that to happen, the government must believe in these values. I am not convinced that it does.

What we need now are politicians who are prepared to act in accordance with the constitutional and legislative rights that have been recognized. I am convinced that if the province's linguistic obligations were fully respected, if our governments stopped acting illegally towards us, then we could start building towards substantive equality.

In fact, all our demands are expressed in this one phrase: substantive equality, no more, no less. We must, as a community, demonstrate a firm, unwavering and united will to achieve, against all odds, this equality. Otherwise, we will have to look back in the not-too-distant future with sadness at what we could have been…

I have no choice but to address the issue of second-language learning for young Anglophones. I repeat that this issue has nothing to do with the review of the *Official Languages Act*. It is an issue that must be addressed by the English-speaking community. The community must ask itself why, more than 50 years after the adoption of the first Act, French-language learning has not improved. I will add that if I were a young Anglophone, I would feel no pressure to learn French. Indeed, with a unilingual Anglophone lieutenant governor, premier, ministers and senior public servants, what

is the point of learning French, a language that, furthermore, is completely absent from the linguistic landscape and the media in many regions of the province? If we want to make learning French attractive to these young people, we must start by changing the culture of unilingualism that dominates our province. We must cease to perceive French as a simple language of translation and consider it to be on an equal footing with English.

I hope that the thoughts I have shared will have convinced some of the importance of language rights as well as the importance of the current process of reviewing the *Official Languages Act*. This opportunity to revise the Act only arises every ten years and we must not miss the boat, although in the current process it could be said that the boat is about to drop its moorings and we don't yet have the vessel's registration. The law is only revised every ten years. In 2031, who knows where our community will be?

Before summarizing the recommendations that I have made in the previous eleven parts, allow me, perhaps for one last time, to express my love of my language, my culture, my acadienneté and to say that during my 65 years, I have done all I could to ensure its sustainability. Everything else is beyond my control…

LIST OF RECOMMENDATIONS FOR AMENDMENTS TO THE OFFICIAL LANGUAGES ACT

Introductory statements

- Acknowledgement that the French language is vulnerable in the province and commitment by the government and its institutions to protect and support the French language and the institutions of the Francophone community.
- Commitment by the provincial government to support key sectors for the vitality of the Francophone community (e.g. education, post-secondary, health, nursing homes, culture, justice, etc.) and to protect and promote strong institutions for the Francophone community in these sectors.
- Adoption by the provincial government of a policy on Francophone immigration in collaboration with representatives of the Francophone community in the province.

Merging the Act Recognizing the Equality of the Two Linguistic Communities and the Official Languages Act

- Recognizing the unique character of New Brunswick, the French linguistic community and the English linguistic community are officially recognized as one province, for all purposes to which the authority of the Legislature of New Brunswick extends; the equality of status and the equal rights and privileges of the two communities are affirmed.
- The Government of New Brunswick is committed to ensuring the protection of the equality of status and the equality of rights and privileges of the official linguistic communities and in particular their rights to distinct institutions where cultural, educational, and social activities can take place.

- The Government of New Brunswick will, in its proposed legislation, in its allocation of public resources and its policies and programs, take positive measures to ensure the cultural, economic, educational and social development of the official language communities.

Implementation of the Official Languages Act

- Revision of section 5.1 of the Official Languages Act to ensure compliance and full implementation.
- That for the years 2022 to 2025, all competitions and staffing processes for deputy ministers, assistant deputy ministers and senior managers include as a prerequisite the ability to speak and understand both official languages, or a commitment to acquire this ability within three years of the date of appointment, failing which the appointment will be revoked.
- That, as of 2025, the ability to speak and understand both official languages be a prerequisite for appointment to any of these positions.
- That the minimum language proficiency for these positions be set at 3.

Parliamentary Bilingualism

- That during Government of New Brunswick announcements and press conferences, a balanced use of the province's two official languages be ensured.
- That the ability to speak and understand both official languages be a prerequisite to the appointment of a person to any of the legislative officer positions listed above.

Legislative Bilingualism

- That sections 9 and 10 of the Official Languages Act be reviewed to remove any ambiguity and to ensure that the intent is clearly to encompass all legislation, including statutes and regulations.
- That section 11 of the Official Languages Act be reviewed to ensure that in interpreting an official document, bill, statute, bylaw, writing, minute, report, motion, notice, advertisement, exhibit, collective agreement or other writing referred to in this Act, both official language versions shall be equally authoritative.
- That a Standing Committee on Official Languages be established. The Committee will be composed of representatives of the political parties represented in the Legislative Assembly.

Judicial Bilingualism

- That the Official Languages Act state that a test must be developed to assess the language skills of persons wishing to be appointed to the judiciary in New Brunswick.
- That in a civil case before a court to which Her Majesty in right of New Brunswick, an institution or a municipality designated under section 35[23] of the Act is a party, Her Majesty, the institution or the municipality shall use the official language chosen by the civil party in oral and written pleadings and in any pleadings arising from it.
- That the necessary corrections be made to sections 24, 25 and 26 of the Official Languages Act.

- That The Official Languages Act be amended to recognize that both language versions of court decisions or orders have equal force of law and equal standing.

Communication with the Public

- That any amendment to the Official Languages Act that would impose the notion of "reasonable time" or "without undue delay" to obtain government services in the official language of one's choice be rejected and that this reference also be removed from the Language of Service Policy.
- That the Language of Service Policy be reviewed and corrected to bring it into line with the obligations assigned under the Charter and the Official Languages Act.
- That the government adopt a policy on language of service that is consistent with its obligations under the Charter and the Official Languages Act with respect to the use of social media and new technologies.
- That the Official Languages Act provide for the development by the government of a strategy based on planning needs, setting objectives, training employees, and putting in place implementation and monitoring mechanisms to ensure the provision of services of equal quality in both official languages.
- That information and education campaign be undertaken with employees of the province's institutions to make them aware of the importance of the concept of "active offer" and the obligations that flow from it.
- That the necessary changes be made to the Language of Service Policy to ensure that it complies with the government's obligations regarding "active offer".
- That the Official Languages Act include an obligation for the province to adopt a balanced policy on government signage that fully respects the principle of equality of the two official languages and takes into account the linguistic reality of the regions.
- That the Official Languages Act be amended to include a provision requiring the government institution to ensure that contracts with third parties include detailed clauses clearly setting out the responsibilities and obligations of the parties under the Official Languages Act.
- That business franchises, whether agents or outlets, acting on behalf of a provincial institution be subject to the obligations set out in the Official Languages Act, and that this obligation be clearly defined in the franchise or outlet agreement.
- That subsection 31(2) of the Official Languages Act be amended to remove the phrase within a reasonable time.
- That subsection 31 (4)[35] be repealed.
- That the wording of subsection 31(1) be amended to refer specifically to police services and include services provided by non-police officers.

Language of Work

- That the provincial government's policy on language proficiency requirements for its employees be reviewed to ensure equal quality of service in both official languages, and to ensure compliance with legislative and constitutional obligations.

- That the Official Languages Act be amended to recognize:
  - English and French are the languages of work in provincial institutions and public servants have the right to use either official language in the performance of their duties
  - it is the responsibility of institutions to ensure that the work environment is conducive to the effective use of both official languages
  - it is incumbent upon institutions:
    - to provide their staff with work tools and documentation that respect the official language chosen by the employee;
    - to ensure that computer systems can be used in either official language;
    - to ensure that supervisors are able to communicate with their subordinates in the official language chosen by the latter and that senior management is able to function in both languages;
    - to ensure that all other possible measures are taken to create and maintain a work environment conducive to the effective use of both official languages and that employees are able to use either official language in the performance of their duties.
- That the government commit to ensuring that English-speaking and French-speaking New Brunswickers have equal opportunities for employment and advancement in provincial institutions while respecting the rights of citizens to receive services in the official language of their choice.
- That the Government commit to ensuring that the workforce of provincial institutions tends to reflect the presence in New Brunswick of both official language communities.
- That the Government commit to ensuring that the language skills of its employees are regularly assessed through objective proficiency testing.
- That the Government commit to ensuring that language proficiency for a position is determined in advance based on objective criteria and not on the proficiency of the work team.
- That the right of the public to be served in the language of their choice takes precedence over the right of the public servant to work in the official language of their choice.

<u>Health Care and Nursing Homes</u>

- -That subsection 33(1) be replaced by a provision that provides that, for the purpose of providing health care in the province, all health facilities, institutions and programs under the jurisdiction of the Department of Health or regional health authorities established under the Regional Health Authorities Act shall ensure that they are able to provide all services to the public in both official languages at all times.
- That third parties, including Ambulance New Brunswick, Extra-Mural Services or any other organization providing services to the public on behalf of the Department of Health or Regional Health Authorities established under the Regional Health Authorities Act, ensure that such services are available in both official languages without delay.
- That subsection 19(3), which provides that the two regional health authorities are responsible for improving the delivery of health services in French, be incorporated into the Official Languages Act.

- That the Act provide that the province has an obligation to ensure that nursing homes provide services in either official language in all health regions of the province to meet the needs of both official language communities.
- That the government adopt the necessary measures to clearly define the linguistic obligations of nursing homes that wish to define themselves as bilingual and that these obligations ensure equal treatment of the two official languages and that the government ensures that the designated bilingual facility has separate space where cultural, recreational or educational activities can take place in either official language.
- That where possible, the government promotes the establishment of linguistically homogeneous nursing homes.
- That in placing a person in a nursing home, consideration be given to the person's language preferences.

Professional Associations

- That professional associations be required to file an annual report with the Premier and the Office of the Commissioner of Official Languages listing the means by which they have ensured compliance with their language obligations.
- That a professional association that fails to comply with its linguistic obligations may have its activities suspended until the necessary corrections are made.

Office of the Commission of Official Languages and Remedies

- That any deviations from the selection process for the Commissioner of Official Languages be justified and approved by the Legislative Assembly.
- That if the selection committee must terminate its work, that it provides reasons for this decision and that a new committee be appointed within ten (10) days.
- That the term of office of an Acting Commissioner of Official Languages shall not exceed one year, except for exceptional reasons which shall be tabled in the Legislative Assembly.
- That, within thirty (30) days of receiving the results of the investigation, the deputy head or other administrative head of the institution concerned send the Commissioner of Official Languages a written response specifying the measures taken or to be taken to comply with the recommendations of the investigation report or, if no measures have been taken or are contemplated, the reasons for not acting on the recommendations.
- That any failure to comply with this requirement may be subject to a monetary penalty to be established by regulation or that the Commissioner may apply to the Court of Queen's Bench for an order directing the institution to provide the response.
- That the Premier, being the minister responsible for the administration of the Act, shall, within thirty (30) days after the tabling of the annual report, table in the Legislative Assembly a written response explaining what the government intends to do in response to the annual report or, if applicable, explaining why it does not intend to do so.

- That institutions and organizations that are in recurring breach of their obligations under the Act may be required to enter into compliance agreements with the Office of the Commissioner of Official Languages in the manner proposed in the Canadian government's bill.
- That an action for a violation of a right under the Official Languages Act may be brought by notice of motion as provided in the New Brunswick Rules of Court.
- That costs may not be awarded against the government, its institutions, municipalities, or third parties acting on behalf of the government in a case involving a violation of the Official Languages Act unless it is shown that the action is frivolous or vexatious.
- That when the court is of the opinion that the subject matter of the action has raised an important and novel principle in relation to this Act, the court shall award costs to the applicant, notwithstanding that the applicant is unsuccessful.
- That the Commissioner's report and record of investigation, once filed in court, shall be prima facie evidence of a violation of the Act and the onus shall then be on the institution to establish that it did not violate the Act.
- That the Commissioner may seek recourse before the courts to enforce the Official Languages Act
- That no person shall retaliate against, discriminate against, or threaten a complainant or any other person on the basis that they made a complaint in good faith to the Commissioner or that the complainant or any other person has cooperated in an investigation under this Act.
- That any person or institution that violates the preceding subsection is liable on summary conviction under the procedure set out in the Provincial Offences Procedure Act, SNB 1987, c. P-22.1, to a fine of not less than $5,000 nor more than $25,000.
- That no civil or criminal proceeding or judicial review shall be instituted against the Commissioner, or any person holding an office or performing duties under the Commissioner, for anything done, reported or said by the Commissioner in the course of the performance or purported performance of any duty or function under this Act, whether or not that duty or function was within the jurisdiction of the Commissioner, unless there is evidence that the Commissioner acted in bad faith.

<u>Concerning the Next Review of the OLA</u>

- Finally, for the next review of the Act, an amendment to subsection 42(1) is required, which would provide that the next review must be completed by December 31, 2031.