

Office of the Commissioner of Official Languages for New Brunswick

2019-2020 ANNUAL REPORT

*Protecting and Promoting
New Brunswickers'
Language Rights*

OFFICE OF THE COMMISSIONER
OF OFFICIAL LANGUAGES
FOR NEW BRUNSWICK



COMMISSARIAT AUX
LANGUES OFFICIELLES DU
NOUVEAU-BRUNSWICK

December 2020

Hon. Bill Oliver

Speaker of the Legislative Assembly

Mr. Speaker:

Pursuant to Section 43(21) of the *Official Languages Act*, I am pleased to submit the report concerning the activities of the Office of the Commissioner of Official Languages for New Brunswick for the period from April 1, 2019 to March 31, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Shirley C. MacLean'.

Shirley C. MacLean, Q.C.

Commissioner of Official Languages for New Brunswick

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FOREWORD

New Brunswick: Canada's only officially bilingual province

The Constitution of Canada states 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 the Government of New Brunswick.

The Official Languages Act

The *Official Languages Act* (OLA) of New Brunswick requires the following institutions and organizations to offer and provide their services in both official languages:

- institutions of the Legislative Assembly and the Government of New Brunswick,
- provincial departments,
- regional health authorities and hospitals,
- Crown corporations (e.g., NB Power, Service New Brunswick),
- the province's courts,
- policing services,
- any board, commission or council, or any other body or office established to perform a governmental function,
- professional associations that regulate a profession in New Brunswick.

In addition, the OLA imposes obligations on the following:

- cities (Bathurst, Campbellton, Dieppe, Edmundston, Fredericton, Miramichi, Moncton, and Saint John),
- municipalities with an official language minority of at least 20% of the population,
- Regional Service Commissions 1, 2, 3, 5, 6, 7, 9, and 11.

Exceptions

It should be noted that the OLA does not apply to distinct educational institutions or distinct cultural institutions. School districts, public schools, community centres, community colleges, and universities do not have to offer services in both official languages. Moreover, the OLA does not apply to the English and French sections of the Department of Education and Early Childhood Development.

Private sector

The OLA does not apply to private sector enterprises, except in cases where they offer services to the public on behalf of a public body which has obligations under the OLA.

Active offer

Institutions and organizations with obligations under the OLA have an obligation to inform citizens that their services are available in both official languages. To do so, staff must greet members of the public and answer the telephone in both official languages. It is not up to citizens to request services in their language, it is the institution's obligation to make that offer. The active offer must also be provided through bilingual signage.

The position of the Commissioner of Official Languages

The OLA established the position of Commissioner of Official Languages in 2002.

In November 2019, Shirley MacLean was appointed to the position. Her mandate began in January 2020. She became the third person to hold the position.

The Commissioner has a dual mission: to investigate and make recommendations with respect to compliance with the *Act*, and to promote the advancement of both official languages in the province.

The Commissioner of Official Languages is an officer of the Legislative Assembly and is independent of government.

Annual report

The OLA provides that the Commissioner of Official Languages must prepare and submit to the Legislative Assembly an annual report concerning the activities of the Office of the Commissioner. This report provides a description of the activities carried out between April 1, 2019 and March 31, 2020.

COMMISSIONER'S MESSAGE

LET'S UNDERSTAND EACH OTHER



Shirley C. MacLean, Q.C.

Commissioner of Official Languages

Let me introduce myself – I am the newest Commissioner of Official Languages having started my functions in January 2020. I am a lawyer by profession. I am originally from Cape Breton, Nova Scotia and I attended the University of New Brunswick Law School, graduating in 1990. I decided to stay in New Brunswick to live, work, and raise my family. I am the first anglophone Commissioner. Neither of my parents spoke French, nor did anyone else in my family. My grandmother spoke Gaelic, it was her first language, and my father understood Gaelic but did not speak it.

I wanted to learn to speak French. Our family was raised to value the importance of education and to be aware of the world around us. We were always aware of current events and the news of the day. Any of us who had any interest in the Canadian political landscape were aware of the constitutional talks in Canada that preceded the repatriation of the Constitution and the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. I was keenly aware of cultural and political tensions that appeared to exist between the federal government and Québec. I was aware of the linguistic duality that formed Canada's fabric. I noted with interest and excitement the positions that politicians like Pierre Trudeau and Richard Hatfield took in order to protect linguistic minorities.

These interests translated into a decision to complete a degree in political science and later to study law. After obtaining my undergraduate degree in political science, I attended Université Laval in Québec for French language training. I was in my early 20's. I did learn French. It was not always easy, and it was especially difficult to not speak the language of most of the people around me. I also worked while I was in school getting a part time job in a store in Old Québec where I lived. I will admit that sometimes I pretended to understand what people were saying.

It is difficult learning a language as an adult. When you try to express yourself, you sound like a child; and adults, and especially 20-year-olds, do not like sounding stupid. Also, Québécois were too nice and would switch to English at the first opportunity. I persevered. I kept trying and the language training at Université Laval was excellent.

The benefit of immersion is that you are forced to use the other language. I learned how to exist, work and thrive in a society where I was the minority language. After some months, I accepted that the only way I would learn the language was by using it and doing the best I could. I quickly learned one thing: no one cared whether what I said was grammatically perfect or not. The person at the coffee shop just needed to know what I wanted in my coffee. The cashier wanted to know how I wanted to pay. Sometimes people on the bus will ask you the time. My French was and is far from perfect but nobody in Québec seemed to care and everyone I have ever met in New Brunswick seems to forgive me my errors. Do you know what else? No matter how good my ability to speak French ever gets, francophones will always know I am an anglophone. But the key is that *we understand each other*.

Once I moved to New Brunswick, I quickly realized that if I moved home to Nova Scotia to work, I would never or very rarely have the opportunity to practice the French that I had learned. In New Brunswick I was able to use my French. My years in Québec provided me more than language skills. I learned another culture through music, theatre and a different way of living. There was *joie de vivre* living in Québec that I had not experienced to such an extent before. In moving to Fredericton, I quickly learned that I was again in an English milieu and I had to work a little harder to continue to have access to music and theatre in my second language but found there to be a very vibrant francophone presence.

That sentiment of vibrancy of a language exists for all of us; English and French. Without even knowing it, we have strong feelings for our cultural ties; where we came from, music that we identify with, recipes that awaken a memory of Christmases past – because it has been made by family members for many years. We are all the same in this way, and we need to foster understanding and respect of our respective cultures. Let's understand each other.

Role of the Commissioner

The *Official Languages Act* (OLA) clearly sets out that my role as Commissioner is twofold: 1) to investigate, report on and make recommendations regarding compliance with the *Act*, and 2) to promote the advancement of both official languages in the Province.

The *Canadian Charter of Rights and Freedoms* at 16(2) states 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 the Government of New Brunswick.

Section 1 of the *Act* also sets out that the purpose of the *Act* is to ensure the respect for English and French as the official languages of the Province, 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, as well as to set out the powers and duties of the institutions of the Province with respect to the two official languages.

Also, the special status of the OLA is confirmed in section 3(1) of the *Act* which provides that no other act can be interpreted as limiting a provision of the OLA and in the case of conflict the OLA prevails.

In *Charlebois v. City of Saint John* 2004 NBCA 49, the New Brunswick Court of Appeal recognized the quasi-constitutional status of the *Official Languages Act*. The Court pointed out that the preamble to the *Act* states the purposes of the *Act* and expressly ties those purposes to language guarantees and obligations contained in the *Canadian Charter of Rights and Freedoms*.

Language rights take precedence due to the importance they play in our society. Language rights are crucial in preserving and promoting the vitality of both official languages and to ensure that those constitutionally guaranteed rights are respected.

Many of us are already familiar with these concepts, but now I will be working every day to ensure that these obligations are met.

COVID-19

As I turn my mind toward my first message as Commissioner of Official Languages, we are potentially in the throes of the second wave of COVID-19 here in Canada and we have experienced other outbreaks in New Brunswick. It feels like COVID-19 has taken over our world and every aspect of our life!

I began my term as Commissioner in January 2020 and not long after that, our workplaces, restaurants, hair salons and all things that made our lives “normal” were shut down, moved online, or done differently. All New Brunswickers have had their lives and employment interrupted in some way and we have all felt the fear and uncertainty that COVID-19 brought us in March 2020 and onward. As the Office of the Commissioner of Official Languages moved to working from home, I felt that I had not really had the chance to get started as Commissioner.

Issues of language rights quickly arose in the context of the daily COVID-19 news conferences held by the government. My office received a number of complaints mainly related to the government’s failure to provide messaging to francophones in their language. Indeed, on one occasion a journalist was asked to pose her question in English when she asked a question in French. It is crucial that all New Brunswickers receive equivalent messaging from their government institutions and this cannot be diminished in times of crisis. In fact, government should plan for times or incidents of crises in order to ensure that communication in both official languages is clear and provided in an equivalent manner. I have advocated and will continue to advocate for the use of a French-speaking spokesperson during government news conferences, rather than relying on simultaneous interpretation.

It is noteworthy that in late October 2020, the federal Commissioner of Official Languages filed a report, *A Matter of Respect and Safety: The Impact of Emergency Situations on Official Languages*. This report was an analysis of language infractions relating to emergency situations in Canada over the last decade, including the COVID-19 pandemic. The federal Commissioner made three recommendations centering around government developing systemic action plans to ensure simultaneous delivery of emergency communications in both languages and developing a strategy to encourage, support and work with the various levels of government to integrate both official languages in communications during emergency or crisis situations.

At all times the governing principle must be equality of both official languages and as the Supreme Court of Canada stated in *R v. Beaulac* 1999 CanLII 684,

“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.”

I must point out that Premier Higgs, the Premier’s Office and the Chief Medical Officer of Health and her staff were very open and accessible for me to express my concerns and demonstrated a willingness to assist.

Promotion

COVID-19 restrictions have limited my promotional abilities, but I have met with many government officials in many departments and am pleased to find not only an awareness of legislative obligations, but also a willingness and openness to work with our office to ensure these obligations are met.

I truly feel that education is key to understanding. Let’s find out about each other! My team and I will be looking for ways to build bridges between our linguistic communities and to share our mutual experiences. We are so incredibly lucky in New Brunswick. Having two linguistic communities makes us so much richer. We know we have a unique constitutional place in Canada. We have always known that we are unique and strong. How New Brunswickers dealt with the COVID-19 pandemic is further evidence of our ability as New Brunswickers to support each other such that we are the envy of other Canadian communities.

I feel an intense pride to be entrusted with this position and undertake to fulfill my role as protector of the official language rights of all New Brunswickers and I hope to be able to facilitate many conversations so - let’s understand each other!

LANGUAGE MATTERS

OVERVIEW OF THE PROPOSED AMENDMENTS TO THE OLA

Greater respect for language rights through improvements to the Act

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

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

In June 2002, the members of the Legislative Assembly of New Brunswick unanimously adopted a new, long-awaited *Official Languages Act* (OLA). The first *Act*, adopted in 1969, had become seriously outdated in the intervening years. To prevent a recurrence of this situation, the new OLA contains a clause stipulating that the Premier must initiate his or her review within a prescribed timeframe. At the time of the last review of the OLA in 2013, the review provision was reaffirmed. Subsection 42(1) of the *Act* states: The Premier shall initiate a review of this *Act*, and the review shall be completed no later than December 31, 2021.

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

The Office of the Commissioner of Official Languages for New Brunswick conducts investigations and studies to fully identify the strengths and weaknesses of the OLA, as well as its inconsistencies and ambiguities, and to propose elements to increase its impact. The following pages provide a glimpse of the amendments that will eventually be proposed by the Commissioner of Official Languages for New Brunswick in the upcoming review of the OLA.

Ensuring that the basic obligations apply to all institutions

The OLA applies to a very large number of institutions, particularly provincial government departments, Crown corporations, the courts, etc.

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

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

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

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

RECOMMENDATION

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

The importance of basic linguistic obligations: the active offer of service

[Translation] “If the languages have equal status, it must therefore be concluded that an active offer must be made. It is a question of dignity and of mutual respect for individuals in society. It cannot be acceptable to encourage and to justify various standards from one language to another.”

Court of Queen's Bench, *R. v. Gautreau* (1989)

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

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

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

Eliminating any ambiguity about the obligations of police departments

A large section of the OLA deals with the obligations of peace officers. It should be noted that these obligations pertain specifically to police officers and not to police services. A single subsection covers police forces and is intended to ensure that peace officers comply with their obligations to serve the public in both official languages.

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

This restrictive interpretation of the obligations of police departments has not had serious consequences because most police departments report to a city or municipality that has certain linguistic obligations under Regulation 2002-63 of the OLA. Consequently, their police departments inherit the same basic linguistic obligations. However, some police departments report to municipalities that do not have linguistic obligations.

RECOMMENDATION

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

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

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

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

RECOMMENDATION

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

Local governments

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

The OLA and its regulations do not define “official language minority population” and do not specify the procedures for determining the percentage of this population.

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

The most recent statistics provided by the Department of Environment and Local Government show that the English mother tongue population in two municipalities, Atholville and Eel River Crossing, which in the past had been above the at-least-20% limit, had decreased to 10.5% and 16.1%, respectively, by 2016. Should these two municipalities continue to have linguistic obligations?

It should be pointed out that these two municipalities implemented measures to comply with the OLA. In accordance with the regulations, they invested time and effort in developing bilingual services and communications. These regions already have the necessary infrastructure and workforce to serve both linguistic communities. Would it therefore be logical for these municipalities to no longer have linguistic obligations?

RECOMMENDATION

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

The case of rural communities

Under section 1 of the OLA, a municipality “means a municipality within the meaning of subsection 1(1) of the *Local Governance Act*”. Under the *Local Governance Act*, a municipality “means a city, town or village”. Consequently, the eight rural communities are local governance structures that have no linguistic obligation when they reach the at-least 20% limit. It is worth noting that English is the mother tongue of 19.3% of the population of the rural community of Beaubassin-Est. Should rural communities have the same linguistic obligations as municipalities and regional service commissions when they reach the at-least-20% limit? It should be noted that under the *Local Governance Act*, “local government” means a “municipality, rural community or regional municipality.”

RECOMMENDATION

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

Linguistic obligations to be reviewed for cities, municipalities and RSCs

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

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

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

RECOMMENDATION

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

The right of provincial public servants to work in English or French

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

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

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

When the OLA was adopted in 2002, the government at the time justified its actions primarily by explaining that the OLA had to adhere to the constitutional principles of the *Canadian Charter of Rights and Freedoms*. Under subsection 16(2) of the *Charter*, English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the Legislature and Government of New Brunswick. In addition, subsection 16.1(1) states that both of New Brunswick's official language communities have equality of status and equal rights and privileges. Pursuant to these constitutional principles, it is clear that every provincial public servant in New Brunswick should be able to work in the official language of his or her choice. The ability of employees to work in their preferred official language is subject to the government's duty under the *Official Languages Act* to offer and provide services in the official language chosen by the public. In other words, there is a line between public servants' right to work in their choice of official language and the right of members of the public to be served in the official language of their choice.

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

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

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

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

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

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

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

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

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

Achieving advancement by including the right to work in one's choice of official language

The use of a language at work has a considerable effect on the overall vitality of that language. This is not surprising when one considers the amount of time that the labour force spends working. Because the provincial public service is a major employer, it understandably has a key role to play with respect to the vitality of the French language.

RECOMMENDATION

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

The implementation of the Act

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

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

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

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

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

During the OLA review process in 2013, the Select Committee on the Revision of the OLA recommended that provisions be added to the OLA so that the provincial government has the obligation to develop and implement an OLA implementation plan. The Legislative Assembly accepted the Committee's recommendations and section 5.1 of the OLA came into being. A review of all the provisions in this section shows that they correspond in large part with the Committee's recommendations.

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

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

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

RECOMMENDATION

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

Requiring institutions to act upon the Commissioner's investigation report

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

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

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

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

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

RECOMMENDATION

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

Authorization to enter into enforcement agreements with institutions that contravene the *Act* on a regular basis

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

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

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

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

RECOMMENDATION

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

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

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

RECOMMENDATION

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

Medical records

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

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

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

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

RECOMMENDATION

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

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

IMMIGRATION AND OFFICIAL LANGUAGES

One of the responsibilities of the Commissioner of Official Languages for New Brunswick is to promote the advancement of English and French in the province. In this regard, immigration plays an increasingly important role in the vitality of the two official languages. The Commissioner's interventions with respect to immigration are therefore aligned with this promotional role. Also, it should be noted that the *Canadian Charter of Rights and Freedoms* affirms that New Brunswick's Anglophone and Francophone linguistic communities have equality of status. Government immigration policies and programs must therefore benefit both communities equally.

Provincial immigration results

On July 3, 2014, the provincial government released its first *Francophone Immigration Action Plan (2014-2017)*. The aim of the *Plan* is for immigration to better reflect the linguistic makeup of the province. New Brunswick will therefore try to ensure that 33% of newcomers under the New Brunswick Provincial Nominee Program (NBPNP) are Francophones or Francophiles by 2020. To do this, an annual increase of 3% is planned, with an intermediate target of 23% for 2017.

The NBPNP is the main provincial immigration program. It is made possible through an agreement with the Government of Canada. Through the NBPNP, New Brunswick can select qualified business people and skilled workers from around the world who want to live in New Brunswick and contribute to the provincial economy.

In March 2017, the provincial government signed the Canada-New Brunswick Immigration Agreement. This agreement includes an annex directed at increasing the number of French-speaking immigrants destined to New Brunswick.

Since 2017, the provincial government also administers the Atlantic Immigration Pilot (AIP). The pilot helps employers in New Brunswick hire foreign skilled workers who want to immigrate in the province and international graduates who want to stay in the region after they graduate.

In August 2019, the provincial government launched *New Beginnings: A Population Growth Strategy for New Brunswick 2019-2024*, which includes, amongst other measures, a continued target of two percent annual increase in its French-speaking nominations (to reach 33% by 2024).

The table below shows the percentage of nominee certificates delivered through the NBNP and AIP, broken down according to the official language(s) spoken by candidates.

It should be noted that the provincial government has aligned its immigration-related reporting to the federal practice of following the calendar year, which explains the reporting differences that can be seen in the table below.

New Brunswick Provincial Nominee Program (by fiscal year)		
French-speaking nominees	Bilingual nominees (English and French)	English-speaking nominees
2013-2014: 1.3%	2013-2014: 6.9%	2013-2014: 91.8%
2014-2015: 7.4%	2014-2015: 5.3%	2014-2015: 87.3%
2015-2016: 18%	2015-2016: 2%	2015-2016: 80%
2016-2017: 11%	2016-2017: 6%	2016-2017: 81%
2017-2018: 8.1%	2017-2018: 12.8%	2017-2018: 79.1%
Atlantic Immigration Pilot and New Brunswick Provincial Nominee Program (by calendar year)		
French-speaking nominees	English-speaking nominees	
2018: 19%	2018: 81%	
2019: 24%	2019: 76%	

**COMPLIANCE WITH THE
*OFFICIAL LANGUAGES ACT***

ROLE OF THE COMMISSIONER WITH REGARD TO COMPLIANCE WITH THE OLA

The Commissioner conducts investigations concerning the application of the *Official Languages Act* (OLA), either pursuant to a complaint made to the Commissioner or on the Commissioner's own initiative. If the Commissioner determines that a complaint is founded, recommendations may be made in the investigation report to improve compliance with the OLA. The Commissioner makes every effort to follow up on complaints as soon as possible by first determining the admissibility of each complaint and then, when appropriate, by intervening with the institutions concerned. The Commissioner works discreetly and in a spirit of co-operation with the institutions concerned and favours a supportive and collaborative approach. However, the Commissioner will not, if confronted by a blatant lack of co-operation on the part of an institution, shy away from publicly denouncing such resistance.

Filing of complaints

Anyone wishing to file a complaint may do so either in person, in writing, or by phone. The Office of the Commissioner's website describes the procedure for filing a complaint. All complaints received are considered confidential, and the Office of the Commissioner takes all necessary steps to safeguard the anonymity of complainants.

Under subsection 43(11) of the OLA, the Commissioner may refuse to investigate or cease to investigate any complaint if, in the Commissioner's opinion, the complaint:

- is trivial, frivolous, or vexatious;
- is not made in good faith;
- does not involve a contravention or failure to comply with the *Act*;
- does not come within the authority of the Commissioner.

In such cases, the Commissioner must provide the complainant with reasons for such a decision.

If the complainant is not satisfied with the Commissioner's findings after carrying out an investigation, he or she may seek a remedy before the Court of Queen's Bench of New Brunswick. A judge may decide on the remedy that is deemed fair and appropriate in the circumstances. It should be noted that nothing in the OLA precludes a complainant from applying directly to the Court of Queen's Bench instead of filing a complaint with the Office of the Commissioner. However, such a process entails costs for the person initiating it.

COMPLAINTS RECEIVED BETWEEN APRIL 1, 2019 AND MARCH 31, 2020

Between April 1, 2019, and March 31, 2020, the Office of the Commissioner received **133** complaints. Of that number, **62** were admissible, with **9** based on lack of service in English and **53** on lack of service in French. A total of **71** complaints were deemed inadmissible on the grounds that they did not come under the Commissioner's authority or did not concern an institution within the meaning of the OLA. In addition, the Commissioner's office received **99** requests for information.

Main steps in the complaint-handling process

- The Office of the Commissioner receives the complaint and determines if it is admissible for investigation.
- If the complaint is admissible for investigation, the Commissioner notifies the institution concerned of the intention to investigate. It should be noted that the Commissioner may, when considered appropriate, attempt to resolve a complaint without conducting an investigation (see the alternative resolution process below).
- The investigation is carried out.
- At the end of the investigation, the Commissioner forwards the report to the Premier, the administrative head of the institution concerned, and the complainant. The Commissioner may include in the report any recommendations deemed appropriate as well as any opinion or reasons supporting the recommendations.
- If the Commissioner considers it to be in the public interest, the Commissioner may publish an investigation report.

THE ALTERNATIVE RESOLUTION PROCESS

The Commissioner may attempt to resolve a complaint without conducting an investigation. Various situations may lend themselves to such an approach. For example, it may be used in cases that have already been investigated by the Office of the Commissioner and resulted in the institution taking corrective action. This approach can also be used in cases when typical investigation timelines might be prejudicial to complainants. Use of this approach is made on a case by case basis. It is contingent on the cooperation of the targeted institution and the institution's willingness to take corrective action.

INADMISSIBLE COMPLAINTS

Each year, the Office of the Commissioner of Official Languages receives a number of complaints that are not admissible for investigation because they do not involve a contravention or failure to comply with the OLA or do not come within the authority of the Commissioner. These complaints are grouped in the following categories:

General comments and complaints not within mandate

These complaints are not admissible on the basis that the subject matter of the complaint does not involve a contravention or failure to comply with the OLA or does not come within the authority of the Commissioner.

Management of human resources in the public sector

Complaints reported in this category are not deemed admissible on the basis that the Commissioner does not have the mandate for the management of human resources in the public sector.

Private sector

The OLA does not apply to private sector enterprises, except in cases where they offer services to the public on behalf of a body which has obligations under the OLA. Therefore, it is not within the authority of the Commissioner to conduct an investigation targeting a private enterprise that, for example, distributes flyers or displays signs in only one official language.

Education sector

The OLA does not apply to distinct educational institutions. Therefore, school districts, public schools, community centres, community colleges, and universities do not have to offer services in both official languages. Moreover, the OLA does not apply to the English and French sections of the Department of Education and Early Childhood Development.

Excluded municipalities

Under the OLA, only the eight cities in the province (Bathurst, Campbellton, Dieppe, Edmundston, Fredericton, Miramichi, Moncton and Saint John) and municipalities with an official language minority of at least 20% of the population have language obligations. Thus, complaints targeting municipalities without obligations under the OLA are not deemed admissible.

Federal institutions

Federal institutions are subject to the federal *Official Languages Act*; it is not within the mandate of the Commissioner of Official Languages for New Brunswick to investigate complaints with respect to those institutions.

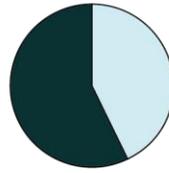
Medical records

Legislative provisions regarding the language used in medical records are included in section 9 of the *Personal Health Information Privacy and Access Act*. The Commissioner of Official Languages does not have jurisdiction with respect to section 9 of this *Act*. A person who feels that his or her rights have not been respected under this *Act* can file a complaint with the New Brunswick Ombud.

STATISTICS 2019-2020

232 COMMUNICATIONS

133 COMPLAINTS
(57 %)



99 INFORMATION
REQUESTS (43 %)

62 ADMISSIBLE COMPLAINTS

LANGUAGE TARGETED BY ADMISSIBLE COMPLAINT

15%
Service in English

85%
Service in French

REGIONS TARGETED BY ADMISSIBLE COMPLAINTS (IN %)

Region	Percentage
1 Moncton and South-East:	31%
2 Fundy and Saint John:	5%
3 Fredericton and River Valley: (5% regional offices) (47% central offices)	52%
4 Madawaska and North-West:	5%
5 Restigouche:	0%
6 Bathurst and Acadian Peninsula:	6%
7 Miramichi:	2%



ADMISSIBLE COMPLAINTS BY SERVICE TYPE



19% In-person
service



6% Signage



6% Telephone
communications



23% Written
documents



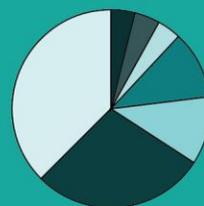
34% Online information
and services,
social media



11% Other

INADMISSIBLE COMPLAINTS BY CATEGORY OF ELEMENTS EXCLUDED FROM THE OLA

37%
General comments
and complaints not
within mandate



28% Private sector

4% Medical records
4% Education sector
4% Excluded municipalities

11% Management of human resources
11% Federal institutions

STATUS OF ADMISSIBLE COMPLAINTS — FROM APRIL 1, 2019 TO MARCH 31, 2020

Status	Service in French	Service in English	Total
Complaints under investigation, completed or resolved informally	27	2	29
Investigations not initiated (pending additional information from the complainant or from the institution)	18	1	19
Complaints withdrawn by the complainant	6	6	12
Cessation of the investigation (complaint does not come within the jurisdiction of the commissioner)	2	0	2
Total	53	9	62

STATUS OF ADMISSIBLE COMPLAINTS HANDLED – FROM APRIL 1, 2019 TO MARCH 31, 2020

Institution	Number of admissible complaints		Status of admissible complaints			Conclusion	
	Complaints received in 2019-2020	Complaints carried over from the previous year	Investigations under way	Completed investigations	*Resolved informally	Founded complaints	Unfounded complaints
Executive Council Office	1	0	0	0	1	0	0
Fredericton (City)	1	1	0	0	2	0	0
Horizon Health Network	4	4	0	1	7	1	0
Moncton (City)	1	0	0	0	1	0	0
NB Liquor (includes Cannabis NB)	2	4	0	2	4	2	0
Office of the Premier	10	0	0	0	10	0	0
Post-Secondary Education, Training and Labour	2	1	0	0	3	0	0
Public Safety	2	1	1	1	1	1	0
Service New Brunswick	3	0	0	0	3	0	0
Social Development	1	0	1	0	0	0	0
Tourism, Heritage and Culture	1	0	0	0	1	0	0
Transportation and Infrastructure	0	2	0	0	2	0	0
Vitalité Health Network	1	0	0	1	0	1	0
Total	29	13	2	5	35	5	0
	42		42			5	

* When the alternative resolution process is used, the Office of the Commissioner does not seek to determine whether the complaint is founded or not, but directs all its efforts towards preventing an incident similar to the one that was brought to its attention. The Commissioner will determine if a complaint is founded only if an investigation is undertaken.

**SUMMARY OF ACTIONS
TAKEN IN RESPONSE
TO COMPLAINTS**

GOVERNMENT NEWS BRIEFINGS ON COVID-19

Using both official languages to convey the message to both linguistic communities

Institution in question: Office of the Premier

Brief summary of complaints

Between March 23 and 29, 2020, the Office of the Commissioner received 10 complaints about government news briefings on COVID-19. Overall, the complainants expressed their dissatisfaction with three points:

- the Premier speaks little or no French;
- the Premier asked a Francophone reporter to ask him her questions in English;
- the English language is used predominantly, showing a lack of respect for the French language.

Key issues

Government news briefings on COVID-19 are important events, not only for reporters, but also for many New Brunswickers from both official linguistic communities. Broadcast live on the Government of New Brunswick's social media accounts, these news briefings are highly anticipated because they provide information on the status of COVID-19 and the latest government measures to deal with a most exceptional situation.

English and French have constitutional equal status in the province. Therefore, it is not acceptable for English to be the main language used and French to be accessible only through simultaneous interpretation. The current practice reduces the impact of the government's message to Francophones.

Outcomes

Deeming this situation urgent, the Commissioner used the provisions of the *Official Languages Act (OLA)* that enable her to try to resolve a complaint without conducting an investigation. She immediately contacted the Premier's Chief of Staff on March 25 and 26 to convey the following points:

- under the OLA, reporters have the right to ask their questions in the official language of their choice, during a public announcement or news conference held by the Government of New Brunswick;
- the institution responsible for the public announcement or news conference must ensure that the master of ceremonies makes the active offer to the reporters by informing them that they can ask their questions in either of the two official languages;
- there must be a balanced use of the official languages during updates and news conferences of the Government of New Brunswick by virtue of the equal status of the two official languages and the two official linguistic communities of New Brunswick; and
- the institution should encourage participants to speak more slowly to enable the public to clearly understand the simultaneous interpretation.

During these conversations, the Chief of Staff confirmed to the Commissioner that the necessary measures were in place to comply with the linguistic obligations under the OLA and that the master of ceremonies would be asked to make an active offer.

With respect to the fact that the Premier struggles to speak French, the Commissioner deems that this part of the complaint is not admissible, because under the OLA, the institutions have linguistic obligations, not the elected officials. Indeed, it is the institutions that must make an active offer of service and provide service in both official languages. In the case of government news briefings on COVID-19, the institution uses simultaneous interpretation so the public can understand the Premier's remarks in the official language of their choice. This is in compliance with the OLA.

Excerpt from the letter from the Commissioner to Premier Blaine Higgs (this letter was sent to the Premier after two telephone discussions between the Premier's Chief of Staff and the Commissioner):

[Translation] On Friday, March 27, my team and I watched the COVID-19 update on the Government of New Brunswick YouTube channel and on its Facebook account, both of which were available in both official languages.

We were able to hear the master of ceremonies invite the reporters to ask their questions in either of the two official languages. That day, the Francophone reporters took advantage of their rights and asked their questions in French.

I recognize the openness shown by the Premier's Chief of Staff to work with me to resolve this matter. I am also pleased with the speedy action taken by your institution and I sincerely thank you.

I should nonetheless remind you that, because of the equal status of the two official languages in our province, institutions must make balanced use of English and French at news conferences and in public announcements.

The purpose of the Official Languages Act is to ensure equal treatment of the province's two official languages. Making one language available through interpretation only would therefore not be equal treatment of this language compared to the other.

I would remind you that a balanced use of the two official languages in a government announcement, whether made through traditional means, social media, or new tools like Facebook Live, is very important, because this use influences the perceptions that the members of each official linguistic community have of their own language.

We realize that all participants cannot necessarily be bilingual, and there is nothing forcing them to use both official languages during public announcements or at news conferences. However, it would be important to ask participants, who have the ability, to express themselves more often in French to ensure a balanced use of the two official languages at such events.

In light of the foregoing, I would remind you to continue your efforts to:

- ensure a balanced use of the official languages during updates, news conferences, and public announcements of the Government of New Brunswick by virtue of the equal status of the two official languages and the two linguistic communities; and*
- encourage participants to speak more slowly to enable the public to understand the simultaneous interpretation clearly.*

GOVERNMENT VIDEOS IN BOTH OFFICIAL LANGUAGES

Institution in question: Executive Council Office

Brief summary of complaint

The complainant received a tweet from the Government of New Brunswick including a hyperlink to a government video. She noticed that this video and several others were in English with French subtitles. No one with the ability to speak French seemed to be in these videos. The complainant believes that, under the *Official Languages Act* (OLA), French is a spoken language and not just a language used in translation and subtitling.

Key issues

The use of a language in public greatly influences the perception that its speakers may have of it. How does the Francophone public perceive its language when it has to view government videos in English with French subtitles? The equality of New Brunswick's two official languages requires equal treatment of these two languages.

Outcomes

An examination of government videos shows that many of them are in English with French subtitles. Low participation by Francophone speakers is also noted in these videos.

In a letter to the Clerk of the Executive Council, the Commissioner asked that:

- the Executive Council Office (ECO) review all of its official language usage practices to ensure that, when videos intended for the public are produced, they comply not only with the letter but also with the spirit of the OLA;
- the Executive Council Office report to the Office of the Commissioner on the implementation of this recommendation by February 1, 2020.

The ECO recognizes the deficiencies in this matter and makes a commitment to review and update its practices so that all videos shot by the Corporate Communications Branch are available in both official languages. Furthermore, to respect the spirit of the OLA, the ECO agrees to seek the participation of members of the two official linguistic communities in its videos. When the participants in a video are speaking only one official language, the institution will dub it so that the public can choose to listen to the video in the official language of their choice.

During a meeting on January 29, 2020, in Fredericton, representatives of the ECO confirmed to the Office of the Commissioner that dubbing will be used in the future rather than subtitling.

The Office of the Commissioner wishes to underscore the excellent cooperation of the ECO in this matter.

LACK OF AN ACTIVE OFFER OF SERVICE DESPITE A BILINGUAL CAPACITY

Institution in question: Vitalité Health Network

Brief summary of complaint

In May 2019, the complainant called the Stella-Maris-de-Kent Hospital and an employee answered in French only. The complainant questioned the employee on her right to receive an active offer of service in both official languages. The employee replied that Stella-Maris-de-Kent is a French hospital.

Key issues

Active offer

The active offer of service is the invitation whereby an employee of an institution invites the citizen, as of the initial contact, to take advantage of a service in the official language of his or her choice. This offer consists in welcoming members of the public or answering the telephone in both official languages (*Hello, Bonjour*).

The active offer is the access key to quality service in the official language of one's choice because the citizens do not have to ask for service in their language, it is offered to them. The choice is accordingly made easier for the person. Without an active offer, the whole dynamic changes. It is up to the citizen to request service in his or her language and the person often hesitates to demand this right.

The two health networks

New Brunswick has two health networks: Vitalité and Horizon. Each network has an internal working language (English for Horizon and French for Vitalité). However, the two networks must offer services of equal quality in both official languages at all times to the public.

Outcome of investigation

The institution recognized not having made the active offer of service to the complainant, in violation of the *Official Languages Act (OLA)*.

In the context of the investigation, the Stella-Maris-de-Kent Hospital provided the Office of the Commissioner with the internal audit results on the use of the active offer by its staff. The results of these audits conducted in 2017 are very weak, both for telephone and in-person service. That is all the more disappointing since the institution has always been able to communicate with the auditor in both official languages.

The Office of the Commissioner does not doubt that most of Vitalité's staff members understand what is expected of them, but it seems, according to the audits of the institution, that they fail or choose not to follow the institution's instructions on the active offer of service. The institution must determine if it is a problem of organizational culture, and if so, it must take the necessary measures to correct the situation. It is incumbent upon the institution to ensure that all employees understand not only the importance of the OLA, but also, in the spirit of the *Act*, that they have the utmost respect for the language rights of all New Brunswickers.

The Commissioner therefore makes the following recommendations:

- THAT the institution continue to conduct unexpected audits, on a regular basis, to ensure its staff are fully compliant with the OLA; and
- THAT if the audits continue to demonstrate a lack of conformity in the area of the active offer, the institution develop and implement a strategy which addresses this matter and assures that all personnel act in accordance with its policy on official languages.

LACK OF SERVICES IN FRENCH AT HORIZON HEALTH NETWORK

Institution in question: Horizon Health Network

Brief summary of complaint

The complaint comprises 13 incidents that occurred mainly at the Moncton Hospital (psychiatric unit) between February and June 2019. The incidents pertain to the lack of an active offer of service in both official languages and deficiencies with respect to delivery of service (in person and by telephone) in the complainant's language of choice, that is, French.

Key issues

An organizational culture of respect and valuing of language rights is at the heart of effective service delivery in both official languages. This matter clearly illustrates that procedures, resources, and tools have their limits if the staff do not use them.

Outcome of investigation

The investigation by the Office of the Commissioner concluded that the complaint was in large part founded; in 12 of the 13 incidents, the institution did not respect the complainant's language rights.

The Office of the Commissioner notes that some employees have not developed the reflex of making an active offer of service and using the contingency plan if they are unable to speak the official language of the recipient of the service. More seriously still, employees of the institution insisted that the complainant speak English. Furthermore, and this is troubling at the very least, the *Official Languages Act* (OLA) violations occurred over more than three months. Why did the institution not take immediate action to remedy the violations after the complainant expressed in February 2019 that his rights had not been respected? The institution seems to be in reactive rather than proactive mode with regard to respecting official languages.

In many respects, all the measures, tools, and protocols needed for delivering services in both official languages by the Horizon Health Network are in place but are not being used or complied with by some employees. We note once again that employees do not seem to adhere to a culture of respect for language rights.

In a previous matter, the Chief Executive Officer (CEO) of the institution made a commitment to review the Horizon Health Network's official languages plan to ensure full compliance with the OLA. On March 19, 2019, she submitted a modified plan (2019-2021) to the Commissioner and we commend this measure.

In the context of this investigation, we examined this plan and noticed that it has relevant elements, including staff awareness and organizational culture. However, we believe that the plan should specify the different stakeholders and their role in implementing the plan to ensure greater accountability on the part of the Horizon Health Network. It should also be accompanied by a timetable and assessment measures.

The institution is aware of its shortcomings in this matter and states that it is taking action to correct the situation. For example, the nurse manager in intensive care in the psychiatric unit is making visits to ensure that the staff comply with the OLA. In addition, the institution states that corrective action will be determined to rectify the problems related to the lack of active offer and non-use of the contingency plan.

We are taking careful note of these measures. While waiting for the plan and corrective action taken by the institution to produce the anticipated effects, the institution must see that all employees make an active offer of service and immediately find a bilingual co-worker if they do not speak the official language of the person receiving the service.

The Commissioner therefore makes the following recommendations:

- THAT the *2019-2021 Official Languages Action Plan* be modified so that those responsible for its implementation are identified, a timetable is established, and the means to measure the achievement of the objectives of the action plan are defined;
- THAT the Horizon Health Network's Official Languages Department carry out monthly audits with the psychiatric unit of the Moncton Hospital regarding the active offer of service and the use of the contingency plan by employees and that the results of these monthly audits be sent to the director of this unit as well as to the CEO of the Horizon Health Network;
- THAT the Horizon Health Network CEO forward the results of the monthly audits described above to the Commissioner of Official Languages every six months so that the progress of the file can be monitored;
- THAT the Horizon Health Network review the contingency plan for the psychiatric unit in order to guarantee the delivery of quality service in both official languages;
- THAT satisfaction surveys dealing with official languages be made available to visitors in clearly visible areas of the psychiatric unit.

LEGAL MATTERS

CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE V. BRITISH COLUMBIA, 2020 SCC 13

This chapter presents a case related to language rights at the national level. The Office of the Commissioner of Official Languages for New Brunswick played no role in this case. The information below is presented for information purposes only.

Background

The facts

The Conseil scolaire francophone de la Colombie-Britannique (CSF) is the sole French-language school board in British Columbia. In June 2010, the CSF, along with the Fédération des parents francophones de Colombie-Britannique (FPFCB) and three parents, initiated a legal action against the Province of British Columbia, claiming an infringement of section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Paragraphs 23(3)(a) and (b) of the *Charter*, which is at the heart of this matter, reads as follows:

Section 23(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province:

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

The claimants alleged infringements of section 23 of the *Charter* relating to the education system that penalized the official languages minority and their section 23 rights. These involved systemic claims around funding for building maintenance, capital projects, lack of funding for school transportation and lack of space for cultural activities. In addition, there were claims with respect to lack of funding for new schools and for improvements to existing schools in 17 communities. In response, the Province of British Columbia countered that student numbers did not justify building new schools and costs would be too high to offer the services sought.

Trial decision

The trial judge allowed in part the application. The trial judge “set out an approach to be taken in order to situate the number of students in a given community on the sliding scale, which serves to determine the level of services to which an official language minority is entitled”. In applying the sliding scale based on the number of students in a given community, the trial judge concluded that the children of official language minorities, in regard to several communities, are entitled to an educational experience that is substantively equivalent to the experience of the majority. With regard to certain other communities, the children were held to be entitled to a proportionately equivalent educational experience to that of the majority and not a substantively equivalent one. Furthermore, the trial judge awarded damages against the Province of British Columbia for inadequate funding of school transportation.

In determining infringements of the official language minorities’ rights under section 23 of the *Charter*, the trial judge concluded that several of the infringements were justified under section 1 of the *Charter*.

The CSF, FPFCB and the parents appealed the decision, arguing several errors of law in the trial judge’s analysis of the alleged section 23 infringements, as well as her approach and test in making her determinations. Additionally, the Province of British Columbia cross appealed the trial decision.

Court of Appeal decision

The appeal was dismissed, the award of damages for inadequate funding of school transportation was set aside and the province’s cross appeal was allowed. The CSF, FPFCB and the parents therefore took the matter to the Supreme Court of Canada (SCC).

Decision of the SCC

The SCC allowed the appeal in part. The SCC concluded that the trial judge and the Court of Appeal adopted a very narrow interpretation of section 23 of the *Charter*. In a lengthy decision, the SCC applied a collective and individual interpretation of section 23 and emphasized that, in interpreting this section, courts must also consider the social context, demographics and history relative to each language group. Moreover, the SCC restored the trial judge's award of damages for the inadequate funding of school transportation.

Analysis of the SCC

Justice Wagner succinctly states the focus of the appeal at paragraph 2:

This appeal concerns the scope of section 23 and the interplay between section 1, as well as between it and the remedial provisions of Canada's Constitution. The appeal affords an opportunity to identify the approach to be taken in order to determine the level of services that is guaranteed to rights holder parents on the basis of a given number of students, consider the test to be applied in order to determine whether the educational experience of the children of those rights holders is equivalent to the experience provided to the majority, discuss the justification under section 1 of infringements of language rights, and decide whether damages can be awarded as a remedy in the event of an infringement.

In addition, Justice Wagner explains the concepts of the "sliding scale" and "substantive equivalence" used by the courts in interpreting section 23 of the *Charter*, pointing out that they "were developed to compensate for the silence of section 23 regarding the level of services and the quality of instruction it guarantees to official language minorities."

In terms of the sliding scale, at paragraph 24 of the judgment he notes:

The low end of the scale corresponds to the right only to instruction that is provided for in paragraph 23(3)(a), while the high end corresponds to the "upper level of management and control" provided for in paragraph 23(3)(b) (Mahe, at p.370). In other words, at the low end, section 23 rights holders are entitled to have their children receive instruction in the official language minority, but the extent to which the minority exercise control over the provision of instruction rises with the number of children of rights holders. At the low end of the scale, the minority is entitled only to instruction in its language.

In reference to substantive equivalence, Justice Wagner points out in paragraph 26 that section 23 is silent with respect to the quality of instruction that must be provided and notes:

"In Rose-des-vents, this Court affirmed that an official language minority is entitled to an educational experience that is substantively equivalent to that of the majority" and that the appeal would permit the court to determine if that substantive equivalence test applies, "regardless of the number of the minority language students in question, or whether the assessment of equivalence must vary with the number of such students."

The SCC analyzed the trial judge's approach with the sliding scale in detail, to determine the level of services to which official language minority communities are entitled.

In its analysis, the SCC established a three-step methodology based on pedagogical needs, costs and the level of services to be provided to the official language minority starting with determining the number of students that require the services.

The SCC explained that the second step is to decide if the school or proposed program is appropriate, taking into consideration pedagogical needs and whether the level of services proposed by the minority will make it possible to meet the knowledge and skills the students must acquire while in school, in light of the number of students at issue. The SCC concluded that considerations of costs are less important than pedagogical considerations, though they are interlinked and can be assessed simultaneously using a comparative approach to determine whether the school considered by the minority is appropriate from a pedagogical and costs standpoint. At paragraph 69, the Court states:

I thus find that the existence of majority language schools that serve a given number of students, regardless of where they are located in the province, supports a presumption that it is appropriate from the standpoint of pedagogy and cost to create a comparably sized school for the minority. The province can, however, rebut this presumption by showing on a balance of probabilities either that the majority language schools used as comparators are not appropriate for that purpose or that the school proposed by the minority is not appropriate from the standpoint of pedagogy or cost.

Determining the level of services to be provided to the official language minority, which is the third step in the test, is dependant on the determination of the second step. If the court has found at the second step that the number of students is comparable based on a province-wide comparison, and that the presumption stated above has not been rebutted, that number is at the high end of the sliding scale and the minority is entitled to have its children receive instruction in a homogeneous school. If there is no comparable number, the number of minority language students falls below the high end of the sliding scale, that is, at the low end or in the middle. A minority at the lower levels of the scale is still entitled to a range of services and the court must show deference to the level of services proposed by the minority language school board.

In applying this three-step approach, the SCC determined that the appellants were entitled to eight homogenous schools that were denied by the courts below.

Furthermore, the majority decision of the SCC concluded that section 23 provides an official language minority the right to instruction/education that is equivalent in quality to the instruction/education provided to the majority, regardless of the size of the school or programs in question. The majority held that even where the number of minority students falls at the lower end of the sliding scale, such that there is a right to instruction alone, the right to instruction, as can be seen in paragraph 113 of the decision, “cannot be entirely severed from the overall educational experience.”

The SCC further elaborated that the substantive equivalence test serves to determine whether the instruction and facilities accessed by the minority are of sufficient quality, when compared to the majority, in the context of a heterogeneous school or program.

In applying the above test, the majority held that the approach adopted by the courts below, based on a proportionality test rather than on a substantive equivalence test, must be rejected. This means that the children attending CSF schools or participating in its programs are entitled to an educational experience that is substantively equivalent to the experience of nearby majority language schools.

Finally, the SCC, at paragraph 157, clarified the purpose of section 23 is “to ensure the sustainability of the country’s linguistic communities [...] [and] to make it possible for those communities to develop their own language and culture.” In other words, citizens of official language minority communities “have a right to achieve fulfillment in their own language in everyday life.” The SCC further elaborated that cost saving measures by governments cannot be considered relevant when linked to an infringement of section 23.

**PROMOTING THE
ADVANCEMENT OF
BOTH OFFICIAL LANGUAGES**

THE PROMOTION MANDATE: A KEY ELEMENT OF PROGRESS

Context

The Commissioner of Official Languages has a dual mandate: to investigate, report on, and make recommendations regarding compliance with the *Official Languages Act* and to promote the advancement of both official languages in the province.

Activities intended to promote the advancement of the two official languages in the province are very important for progressing towards real equality of the two languages and the two official language communities.

These promotional activities aim to:

- demonstrate the importance of bilingual services for the two linguistic communities;
- debunk in a more systematic way the myths surrounding official bilingualism and linguistic duality;
- better respond to citizens' questions regarding duality and official bilingualism;
- highlight the social and economic benefits of the bilingual character of the province; and
- promote dialogue between our two linguistic communities.

43(9) In accordance with the authority provided to the Commissioner under this Act, it is the role of the Commissioner to investigate, report on and make recommendations with regard to compliance with this Act and to promote the advancement of both official languages in the Province.

43(9) Conformément aux pouvoirs qui lui sont conférés en vertu de la présente loi, le rôle du commissaire est d'enquêter, présenter des rapports et de faire des recommandations visant le respect de la présente loi et de promouvoir l'avancement des deux langues officielles dans la province.

QUESTION PERIOD AT THE LEGISLATIVE ASSEMBLY

The vitality of a language is not only related to the number of its 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. In addition, public use of a language, particularly within important 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. Question period is definitely one of the highlights of the Legislature’s activities. Webcast and closely monitored by journalists, it has a direct impact on current affairs in the province. 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.

A review of the question period transcripts from May 7, 2019, to March 13, 2020 (35 daily sittings), shows that, on average, debates were carried on 85% of the time in English and 15% in French.

The Commissioner recognizes and respects the right of Members of the Legislative Assembly (MLAs) to use their language of choice during debates. However, she notes the important role elected officials can play in the vitality of both official languages in the province and encourages all MLAs to strive for a more balanced use of English and French in the Legislature.

Use of English and French during Question Period	
	2019-2020
English	85%
French	15%

CELEBRATING FIFTY YEARS OF OFFICIAL LANGUAGES

Videos to celebrate the 50th anniversary of the *Official Languages Act*

For the 50th anniversary of the adoption of the first *Official Languages Act*, the Office of the Commissioner created two series of promotional videos that were shared online as well as broadcast on television.

Because the fundamental purpose of an act on official languages is to ensure the vitality of both languages and both official linguistic communities, the promotional campaign invited people, more specifically the members of both communities, to “talk” about official languages.

The first two videos featured about 30 New Brunswickers, Anglophone and Francophone, from across the province. These men and women kindly accepted the Office of the Commissioner’s invitation to highlight the many benefits of having two official languages as well as the importance of accessing public services in one’s language of choice. Amongst the video participants, we can find well known New Brunswickers Don Darling, Randy Dickinson, Graydon Nicholas, James D. Irving, Adam Lordon, Cyrille Simard, Frank McKenna, and Dawn Arnold. It should be noted that in total, both videos were viewed a little over 80,000 times.

Four shortened versions of these videos were subsequently broadcast on Radio-Canada, CBC, and CTV during the first few months of 2020.



The second video series consisted of three short humorous videos aimed at paying tribute to all who put in considerable effort to learn the other official language. One of the videos was broadcast on television at the beginning of 2020. These videos were viewed approximately 30,000 times.

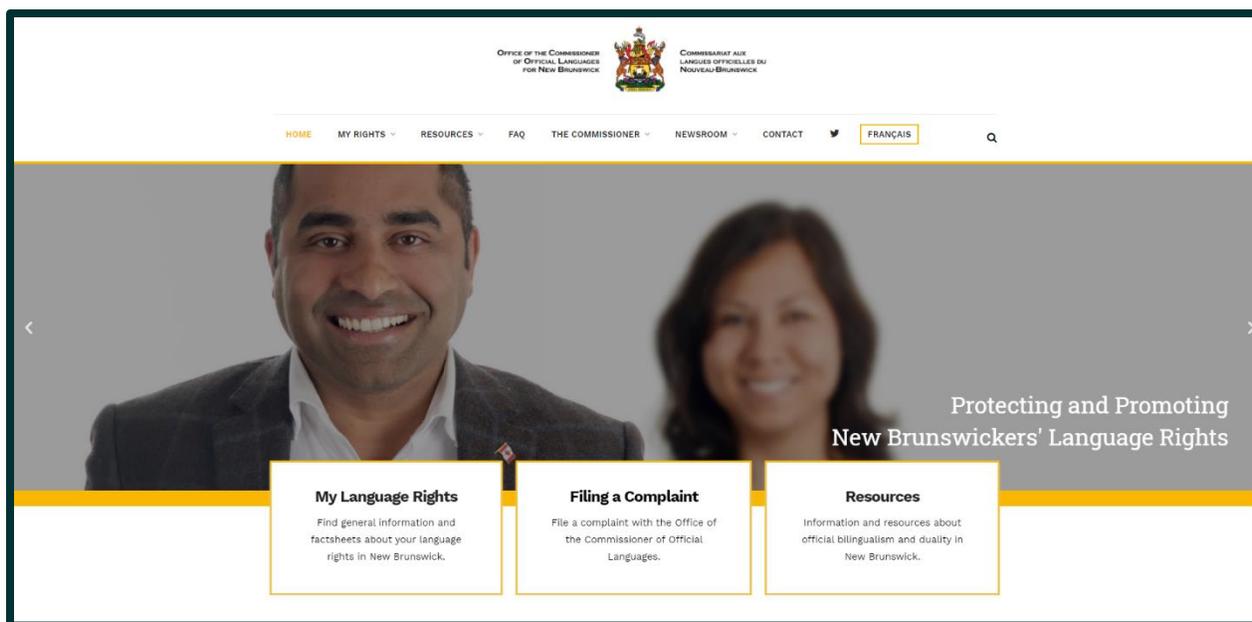


All these videos were produced by Brainworks from Moncton thanks to a grant received under the Canada-New Brunswick Agreement on the Provision of French-Language Services.

NEW WEBSITE AND SOCIAL MEDIA PRESENCE

Website

For the 50th anniversary of the *Official Languages Act*, the Office of the Commissioner also took the opportunity to revamp and redesign its website. The new website went live in December 2019.



YouTube

Two YouTube channels were also created to share the above-mentioned videos. The Office of the Commissioner can be found on YouTube at the following links:

In English: bit.ly/YouTubeOCOLNB

In French: bit.ly/YouTubeCLOduNB

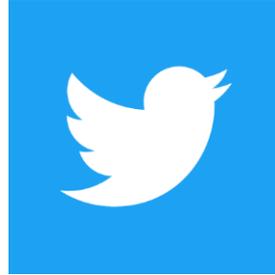


Twitter

The Office of the Commissioner also joined the world of Twitter in August 2019. Two separate English and French accounts can be found at the following handles:

In English: **@OCOLNB**

In French: **@CLOduNB**



PRESENTATIONS BY COMMISSIONER CARRIER

Two Commissioners shared the 2019-2020 reporting period – Commissioner Carrier (April to December 2019) and Commissioner MacLean (January to March 2020). Below are the main events during which Commissioner Carrier gave a speech during the 2019-2020 fiscal year.

May 8, 2019	<p>Group of students from the Faculty of Education, University of New Brunswick, Fredericton</p> <p>Interview for a documentary examining the history of official bilingualism in New Brunswick and residents' views on bilingualism</p> <p>Fredericton</p>
June 6, 2019	<p>Members of the Liberal Caucus</p> <p>Presentation on the <i>Official Languages Act</i>, bilingualism, and duality</p> <p>Fredericton</p>
August 16, 2019	<p>2019 conference of the Réseau des villes francophones et francophiles d'Amérique</p> <p>Roundtable discussion – Resurgo: Bilingualism as a driver for economic (re)development</p> <p>Moncton</p>
October 8 and 9, 2019	<p>Financial and Consumer Services Commission</p> <p>Presentation and discussion regarding the commissioner's mandate and official languages in New Brunswick</p> <p>Saint John and Fredericton</p>
October 24, 2019	<p>Delegation from Vanuatu</p> <p>Presentation and discussion regarding the commissioner's mandate and official languages in New Brunswick</p> <p>Fredericton</p>