Égalité Santé en Français

A Strong *Official Languages Act* That Protects Both of Canada’s Language Communities and New Brunswick in Particular
As part of the review of the federal *Official Languages Act* (OLA-CA), Égalité Santé en Français N.-B. Inc. (Égalité Santé) would like to offer its views on the debates surrounding this legislation and especially the proposed reforms to make it truly effective.¹

We will begin our brief by introducing our organization, then outline the characteristics of our province, which is the only officially bilingual province, and describe the problems with Part VII of the OLA-CA for the purposes of the federal-provincial health care agreements. We will conclude with specific recommendations.

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¹ We will use the abbreviations OLA-CA for the federal Act and OLA-NB for the provincial Act.
WHO ARE WE AND WHAT DO WE WANT?

Égalité Santé is an advocacy organization duly incorporated in New Brunswick whose main area of expertise and advocacy is health care. The organization was created following the reform of the health system carried out in 2008 by the Liberal government at the time, led by premier Shawn Graham. As part of the reform, which we called the “Murphy reform,” the health minister, Michael Murphy, proposed merging the then eight health authorities into two health authorities: Authority A, which became the Vitalité Health Network, and Authority B, which is now known as the Horizon Health Network.

Despite the representations made by the francophone community, Murphy proceeded with the reform and created the two authorities. This caused problems because he created one English authority and one bilingual authority. Owing to his stubborn refusal to recognize the French authority that already existed (the Beauséjour authority) and multiple French hospitals, mainly on the Acadian peninsula, Égalité Santé had to take legal action to protect the health care rights of the francophone community, particularly the right to a French health authority.

On April 8, 2010, Égalité Santé and the Government of New Brunswick reached an out-of-court settlement that included the following terms:

- The government recognized that francophones have the right to French health institutions.
- The government would recognize that Authority A was a French authority.
- The government recognized that health services for the francophone community were not equal to those for the anglophone community.
- The government would prepare a five-year plan to improve health services in French institutions until they reached the level of those available to the anglophone community in New Brunswick.
- Most of the authorities’ board members would be elected in 2012.
- Anglophone and francophone communities would be represented on the New Brunswick Health Council, and this organization would have to consider the needs and interests of the francophone community.

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2 [Missing]
5 http://www.beausejour-nb.ca/English/home/.
7 https://www.nbhc.ca/.
• Anglophone and francophone communities would be represented in FacilicorpNB (a non-clinical services agency that is now part of Service NB).  

• A review of the health authorities would be undertaken in order to address the needs of both linguistic communities.

• We agreed to withdraw our lawsuit against the province.

This agreement must be seen as a compromise between the two parties to the dispute. This agreement was clearly the most we could obtain from the government and the least we could accept under the circumstances.

The Government of New Brunswick later made the following changes:

• It recognized that both regional health authorities are responsible for improving French-language health services.

• Both regional health authorities were required to keep providing health services to residents in the official language of their choice.

• The amendments to the Regional Health Authorities Act would recognize Regional Health Authority A as an organization that operates in French, thus acknowledging that the authority is a francophone organization with a responsibility to serve residents in the official language of their choice.

• The health minister would have the authority to designate university hospital centres and affiliated university hospital centres.

• The New Brunswick Health Council Act would be amended to recognize that the New Brunswick Health Council must consider the needs of linguistic communities as it carries out its mandate.

• In addition, the provincial government would recommend that the New Brunswick Health Council consult with linguistic communities in the official language of their choice.

• Over half of the board members (8 of 15) of each authority would be democratically elected starting in 2012.

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• The rest of the board members would be appointed by the minister, taking into account communities of interest.

• Additional administrative changes would be made to improve health services for francophone residents.

• A five-year action plan would be developed to ensure equitable distribution of health services across the province’s two regional health authorities.

• The geographic areas assigned to each health authority would be reviewed in consultation with the communities served.

• The Department of Health would establish a committee responsible for implementing the Official Languages Strategic Plan in the health care sector.10

• The committee’s mandate would include providing advice about the needs of official-language communities for health care planning purposes.

• The committee would include representatives from both regional health authorities.

• The next provincial health plan would include specific measurable objectives for official languages issues.

• The mandate of FacilicorpNB would be changed to ensure the agency continues to communicate with regional health authorities and their facilities in the language of their choice.

• The provincial government would modify the shareholder structure of FacilicorpNB to include representatives from both regional health authorities.

On November 30, 2012, we witnessed a historic event when the government published what it called the “Action Plan for Equitable Health Services,” which stemmed from the out-of-court settlement of 2010.11 We publicly stated that this was the first time the government had recognized that the two health authorities did not offer the same range of health services and that the French authority was disadvantaged.12 We also noted that it was a first step and that, even by the end of the plan, the two health authorities would not offer the same range of health services. The inequities would be reduced but still there.

10 https://www2.gnb.ca/content/gnb/en/departments/health.html.
12 http://www.egalitesante.com/communique-de-presse-egalite-sante-plan-de-repartition-equitable-des-services-de-soins-de-sante/. [In French only]
The plan came to an end on March 31, 2018, and, as we predicted, health services are still not equal across both health authorities—far from it—as shown in the table our organization prepared in September 2017.\(^{13}\)

After the out-of-court settlement of 2010, the Alward government (2010–2014) amended the **Regional Health Authorities Act** (RHAA), which reduced the power of the board of directors by legislating that the chief executive of the authorities be appointed by and serve at the discretion of the health minister. In addition, the minister now has the power to appoint the chair of an authority’s board of directors. Subsequently, the Gallant government (2014–2018), which had criticized the Conservatives’ amendments, took advantage of the changes to terminate the chief executive of the Vitalité French health authority without even consulting its board of directors.\(^{14}\) The Court of Queen’s Bench ruled in favour of the fired chief executive, finding that he was terminated without just cause.\(^{15}\) Recently, on January 1, 2018, Brian Gallant’s Liberal government contracted out management of the Extra-Mural Program to a private firm, Medavie Health Services,\(^{16}\) despite widespread opposition from both the English and French communities.\(^{17}\) This decision has weakened the French health authority.

On June 13, 2017, Égalité Santé filed a notice of action against the Province of New Brunswick with the Court of Queen’s Bench.\(^{18}\) We asked the court to recognize the following:

- **a.** the constitutional right of the Acadian and francophone community to distinct health care institutions that it can fully, entirely and exclusively manage; and

- **b.** that the Acadian and francophone community has the right to health care institutions of equal quality to those of the anglophone linguistic community.

Since then, we have been waiting for our day in court, but the provincial government is currently challenging our right to act on behalf of the francophone community, even though we were so recognized in 2008 and we signed the out-of-court settlement in 2010. Many Acadian individuals and organizations support our court case.

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17 [https://www.medaviebc.ca/](https://www.medaviebc.ca/).
NEW BRUNSWICK’S UNIQUE SITUATION

Canada’s *Official Languages Act* (OLA-CA) does not reflect the legal reality in New Brunswick. In the OLA-CA, official-language communities are identified and defined using the same legal jargon used for English and French minorities (section 2(b)). The term “minority” does not apply in New Brunswick; in fact, it is contrary to the *Canadian Charter of Rights and Freedoms* and An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.  

Since 1981, New Brunswick has under that Act granted equal legal status to both the anglophone and francophone linguistic communities. Section 1 of this Act could be any clearer:

> Acknowledging the unique character of New Brunswick, the English linguistic community and the French linguistic community are officially recognized within the context of one province for all purposes to which the authority of the Legislature of New Brunswick extends, and the equality of status and the equal rights and privileges of these two communities are affirmed.

Even now, 37 years after our provincial law was enacted, the OLA-CA still does not recognize the equal status of our province’s two linguistic communities. This oversight is particularly incomprehensible given that the principles of the 1981 Act (Bill 88) were enshrined in the Charter in 1993 by a constitutional amendment. 21 It is therefore surprising that the federal government’s own laws do not reflect this fact.

The equality of our two linguistic communities should not simply be reflected in the term the federal government uses for the two communities in the OLA-CA, but also in the services it provides to the people of New Brunswick. It is absurd that the condition “where the number so warrants” is applied to New Brunswick, as both communities in our province have the right to receive government services in the language of their choice. This is a requirement for all provincial government services, as well as those of federal departments and agencies. The RCMP provides a good example of the language duties that must be met because our province is the only officially bilingual province. 22 These duties were confirmed in the *Paulin* decision.

In this regard, Égalité Santé fully supports the first two objectives that the Société de l’Acadie du Nouveau-Brunswick 24 set out in the brief it submitted to the Standing Senate Committee on

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24 http://sanb.ca/english/.
Official Languages for its study on Canadians’ views about modernizing the OLA-CA. The two objectives are as follows:

Objective 1: Recognize New Brunswick’s linguistic specificity in the preamble and purpose section of the federal OLA

Objective 2: Recognize an exception for New Brunswick with regard to “significant demand” in Part IV of the OLA

26 Ibid., p. 12.
27 Ibid., p. 13.
RECENT AGREEMENTS BETWEEN THE GOVERNMENTS OF CANADA AND NEW BRUNSWICK

Over the past few years, the federal government and the New Brunswick government have signed a number of agreements. These agreements led us to examine the OLA-CA in detail. Here is a partial list of the agreements:

- The Canada-New Brunswick Home and Community Care and Mental Health and Addictions Services Funding Agreement of June 15, 2018

- The bilateral agreement providing for over $7 million in funding to address opioid abuse of August 15, 2018

- The 10-year housing agreement between the federal and New Brunswick governments

The federal and New Brunswick governments also signed an infrastructure agreement on March 15, 2018.

But the two agreements that drew most of our attention were the following:

- The bilateral agreement between New Brunswick and the federal government respecting health transfers signed in late December 2016

- The bilateral agreement between New Brunswick and the federal government respecting funding and reporting in the areas of home and community care, mental health and addiction services announced in December 2017

These two agreements drew our attention for several reasons. For one, the first agreement breached the provinces’ united front to obtain more than what the federal government was offering. Second, since our province had a Liberal government at the time, and the federal government was Liberal, we wanted to know whether this would help us or hurt us relative to the other provinces.

As an advocacy organization seeking better health care for the francophone community, we also wanted to know whether our French health authority, Vitalité Health Network, was receiving its fair share.

While studying these two agreements, we wondered what the respective responsibilities of the federal and New Brunswick governments for the development of our linguistic community’s institutions were. Furthermore, at the time of the agreements, education stakeholders were suing the government to obtain equal funding for education.34

Therefore, we took the time to carefully read and reread the OLA-CA and came to the following conclusion:

EVERY AGREEMENT BETWEEN THE FEDERAL AND NEW BRUNSWICK GOVERNMENTS SHOULD INCLUDE SPECIFIC FUNDING FOR THE DEVELOPMENT OF THE INSTITUTIONS OF OUR LINGUISTIC COMMUNITY, WHICH MAY BE EQUAL UNDER THE LAW AND IN STATUS, BUT IS NOT AT THE SAME LEVEL OF DEVELOPMENT.

This duty arises from subsections 41(1) and 41(2), which read as follows:

Marginal note: Government policy

41 (1) The Government of Canada is committed to

(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and

(b) fostering the full recognition and use of both English and French in Canadian society.

Marginal note: Duty of federal institutions

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.35

We also contacted our health authority, Vitalité Health Network, to confirm whether it had received specific funding for its development. It had not.

34 https://ici.radio-canada.ca/nouvelle/1007622/education-enveloppe-egalitaire-nouveau-brunswick-21-4-millions-dollars-deux-ans. [in French only]
In 2017, Égalité Santé and other organizations, both anglophone and francophone, launched a campaign opposing our provincial government’s plan to privatize the management of the Extra-Mural Program by contracting it out to Medavie, a private company that had managed the ambulance program for 10 years.

Even though the board of directors of the francophone health authority spoke out against the privatization plan on multiple occasions and took part in information sessions hosted by Acadian organizations to rally opposition to the project, the province decided to privatize this hospital program.

The francophone community already had problems with the ambulance service, which Medavie had managed for over a decade. Francophones were all too often not served in their language, even though being understood is very important in health care and even more so in emergencies. Moreover, the ambulance service was also deficient in francophone rural areas.

Without going into detail, on January 1, 2018, management of the Extra-Mural Program was placed in the hands of a division of Medavie called Medavie Health Services NB Inc.

We also learned that funding from the federal-provincial agreements would be used to place the Extra-Mural Program, Ambulance New Brunswick and Tele-Care under Medavie management.

We can only conclude that not only did the francophone linguistic community not receive specific funding from the health agreements—funding that should have gone to enhance its vitality and support its development—but our province also used funding from these agreements to harm our institutions, with federal consent. As some have said, federal funding was used to “fleece” us.

37 https://www.medaviebc.ca/.
SUBMISSION TO THE STANDING SENATE COMMITTEE ON OFFICIAL LANGUAGES

In April 2017, our organization submitted a brief to the Standing Senate Committee on Official Languages on the state of governance and management, and clinical and non-clinical services in the Vitalité Health Network of New Brunswick’s Acadian and francophone community, along with its recommendations.39

In our brief, we wrote the following:

The federal government’s role

In Part VII of the Official Languages Act, the Government of Canada commits to “(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and (b) fostering the full recognition and use of both English and French in Canadian society.”

Égalité Santé submits that the Government of Canada must help the Province of New Brunswick meet its constitutional duties to the French linguistic community.

Section 16.1 guarantees the equality of the official-language communities of New Brunswick, including their right to distinct institutions, which are necessary to preserve and promote them.

Égalité Santé believes that the institutions referred to in section 16.1 include health care institutions. Substantive equality of the official-language communities cannot be achieved unless the French linguistic community can fully and entirely manage its health care institutions.

Obviously, Égalité Santé’s recommendations regarding the governance and equality of health care institutions have been resisted by the New Brunswick government.

It is often assumed that implementing Égalité Santé’s recommendations would impose additional costs on the province. While that is not always true, the duties of the governments of Canada and New Brunswick respecting the equality of the official-language communities are duties to achieve results.

Assuming that New Brunswick’s health care spending is higher because of its constitutional duties means that it is up to the federal government to take these duties into account when it funds New Brunswick’s health care system.

In Égalité Santé’s view, this is a way for the federal government to contribute that is consistent with its constitutional duties, as well as with its commitment to official-language minority communities under Part VII of the *Official Languages Act*.

We know that the federal government has committed to enhancing the vitality of the official-language communities. We are delighted by the restoration of the Court Challenges Program, which is essential to ensuring that governments uphold the constitutional rights of Canada’s and New Brunswick’s two official-language communities.

The federal government holds the health care purse strings. It could pressure the New Brunswick government to establish governance structures that enhance this vitality. The federal government needs to take the substantive equality of New Brunswick’s communities and any resulting additional costs into account in its health care funding agreements and transfer payments. [Translation]

The development and vitality of minority communities should never be at the mercy of federal or provincial balanced budgets. When a government acknowledges that it has a duty, it must provide the funding necessary to fulfil that duty. What is happening right now in Ontario should never happen. In our province, we might go through the same thing, even if our language rights are better recognized in the law and even entrenched in the Constitution.

Accordingly, the federal government should take all necessary measures to ensure Part VII of the OLA-CA has force of law. To that end, the federal government should make the regulations required and provided by Part VII of the OLA-CA.

The recent decision from Judge Gascon of the Federal Court in *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)* is a strong signal that the government needs to move quickly to draft regulations that are consistent with section 41 of the OLA-CA. The court’s message could not have been clearer: “It is undeniable, in my opinion, that the scope of the duty contained in section 41 is hamstrung by the absence of regulations.”40

THE OFFICIAL LANGUAGES ACT

This section lists the comments we prepared on reading the OLA-CA, along with our recommendations.

Purpose of the Act

This section is already causing us problems, as it does not reflect the legal situation in New Brunswick. As we wrote above, we do not have a majority community and a minority community, unlike the other provinces and territories. We believe all federal legislation—and especially the OLA-CA—should account for the situation in New Brunswick, as well as the rights enshrined in section 16.1 of the Charter.

PURPOSE OF THE ACT

Recommendation 1

That the OLA-CA be amended to reflect the legal situation of New Brunswick’s two linguistic communities, which have equal status and equal rights and privileges.

Recommendation 2

That the federal government recognize that New Brunswick is an officially bilingual province and that therefore all federal services and bodies be automatically required to be bilingual.

Recommendation 3

That the term “linguistic minority community” be used to describe the francophone linguistic community of New Brunswick.

PART II

LEGISLATIVE AND OTHER INSTRUMENTS

Recommendation 4

That all documents or instruments concerning New Brunswick or a federal body or institution located or operating in New Brunswick be made simultaneously in both of Canada’s and New Brunswick’s official languages.
PART III
ADMINISTRATION OF JUSTICE

Recommendation 5

That all judges appointed to the Supreme Court of Canada, Federal Court of Appeal, Federal Court and Tax Court of Canada be bilingual.

Recommendation 6

That all decisions of the Supreme Court of Canada, Federal Court of Appeal, Federal Court and Tax Court of Canada be published simultaneously in both of Canada’s official languages.

PART IV
COMMUNICATIONS WITH AND SERVICES TO THE PUBLIC

Recommendation 7

That all federal institutions that have offices in New Brunswick or that serve residents of that province from other offices provide their services in both official languages and deliver them in residents’ language of choice.

Recommendation 8

That all contracts with third parties that affect New Brunswick or a resident of that province include a duty to provide that service in both languages at all times, in any location.

For more than a decade, federal institutions have been increasingly publicizing their programs and information for the public using Internet sites rather than the newspapers of linguistic communities. Community newspapers are central to the development of those communities because they report on community life to their residents. By using large companies’ websites, the government is only enriching these companies instead of supporting the development of the communities.

Recommendation 9

That federal institutions use media in linguistic minority communities to inform residents about their programs or other information and thereby support their development.
PART V
LANGUAGE OF WORK

Recommendation 10

That federal departments and agencies in New Brunswick establish work teams and appoint managers who encourage and make it easier for public servants to use the language of their choice.

PART VI
PARTICIPATION OF ENGLISH-SPEAKING AND FRENCH-SPEAKING CANADIANS

Recommendation 11

That, while ensuring the equitable participation of both linguistic groups in the federal public service in New Brunswick, the federal government also ensure the linguistic duties of every federal institution in that province are fulfilled.

PART VII
ADVANCEMENT OF ENGLISH AND FRENCH

Recommendation 12

That the federal government make the regulations necessary to give section 41 force of law as soon as possible.

Recommendation 13

That the Commissioner and the government appeal the decision of Judge Gascon in Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development).
PART VIII
RESPONSIBILITIES AND DUTIES OF TREASURY BOARD IN RELATION TO THE OFFICIAL LANGUAGES OF CANADA

Recommendation 14

That this part of the OLA-CA be amended to account for the unique nature of New Brunswick, its bilingual status and the equality of its two linguistic communities.

Recommendation 15

That federal funding spent at the provincial level be trackable, particularly funds spent on each linguistic community. Provinces should detail the allocation, particulars and justification for federal funding spent on each linguistic community.

Recommendation 16

That the allocation and justification of federal funding for provinces and the two linguistic communities be accessible on the federal and provincial government websites and be provided for each federal-provincial agreement.

Recommendation 17

That paragraph 43(1)(c) be amended to specify that the goal is to “support the development of official-language minority community institutions.”

Recommendation 18

That the regulations pursuant to Part VII be made and implemented as soon as possible.

PART IX
COMMISSIONER OF OFFICIAL LANGUAGES

Recommendation 19

That the Commissioner be able to review all new bills or pieces of legislation that the federal government brings in, both before and after they are enacted, to ensure they are consistent with the OLA-CA, particularly the provisions of Part VII.
Recommendation 20

That the Commissioner conduct regular awareness campaigns about the importance of the OLA-CA and the usefulness of filing complaints with the Commissioner’s Office.

Recommendation 21

That the Commissioner provide a training session on the OLA-CA to all Members of Parliament following a general election and every Member elected in a byelection.

Recommendation 22

That the Commissioner have the authority and funding to appear in court to ensure his or her recommendations are implemented in cases where the federal government, a department or a federal agency is violating the OLA-CA.
CONCLUSIONS

Égalité Santé knows and recognizes the importance of the OLA-CA, but it also realizes that a law with no teeth is not worth the paper it is written on. We also believe that the Commissioner’s role is extremely important. The Commissioner must be the watchdog for our language rights, for both the anglophone and francophone communities when they are in the minority. To do so, the Commissioner needs the power to enforce the OLA-CA when stakeholders or violators remain non-compliant after being informed of their duties.

We must also conclude that we need a well-established process to ensure politicians and especially ministers and officials follow the spirit and letter of the OLA-CA. Compliance must be written into our federal-provincial agreements, as we cannot rely on provincial politicians and officials to adhere to the OLA-CA. New Brunswick has demonstrated this fact in recent years.
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HEALTH
Our Rights
Our Survival

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