Brief Submitted by the Office of the Commissioner of Official Languages for New Brunswick to the Standing Senate Committee on Official Languages
As Part of Its Study on Canadians’ Views about Modernizing the Official Languages Act

FINAL VERSION

October 26, 2018
INTRODUCTION

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PART II – The Office of the Commissioner urges Parliament to acknowledge the unique character of New Brunswick in a modernized federal OLA and to align the federal and New Brunswick language regimes wherever possible

A. The Office of the Commissioner recommends that the federal OLA require the federal government to offer its services and communicate in both official languages throughout New Brunswick

B. The Office of the Commissioner recommends that the federal OLA require the government to consider and support the equality of status and the equal rights and privileges of the English and French linguistic communities in New Brunswick, including the distinct institutions to which they are entitled

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c) Learn from the shortcomings of the New Brunswick regime: clarify the role of the Translation Bureau
INTRODUCTION

1. The Commissioner of Official Languages for New Brunswick is an independent officer of the Legislative Assembly of New Brunswick. His role is to investigate, report on and make recommendations with regard to compliance with the NB OLA. The Commissioner also promotes the advancement of both official languages in the province. It is under this promotion mandate that the Commissioner wishes to propose changes as part of the efforts to modernize the federal OLA.

2. The Office of the Commissioner of Official Languages for New Brunswick (Office of the Commissioner) is well placed to explain New Brunswick’s “unique character” and to share best practices from New Brunswick’s official languages experience.

3. The Office of the Commissioner believes the federal Official Languages Act (OLA, Appendix “A”) should be thoroughly modernized to reflect the sociolinguistic, demographic, technological and legal changes that have occurred since its overhaul in 1988. Since that time, New Brunswick’s Official Languages Act (NB OLA) has been modernized twice: in 2002 and 2013.

4. The federal OLA should also be modernized, particularly for two reasons specific to New Brunswick.

5. First, modernizing the federal OLA should correct Parliament’s historical lack of consideration for the “unique character of New Brunswick” and its constitutional uniqueness. It is unfortunate that the federal OLA has never reflected New Brunswick’s unique status with regard to official languages enshrined in the Constitution in 1982 by subsections 16(2), 17(2), 18(2), 19(2) and 20(2) of the Canadian Charter of Rights and Freedoms (“the Charter”) since it was overhauled in 1988.

6. Second, the federal OLA should be modernized to reflect the equality of status and equal rights and privileges of the English linguistic community and the French linguistic community in New Brunswick enshrined by Parliament and the Legislative Assembly of New Brunswick in the 1993 Constitutional Amendment (New Brunswick), which amended the Charter by adding section 16.1.

7. Part I of this brief describes New Brunswick’s legal uniqueness in terms of language rights and the shortcomings of the federal system created by the OLA in 1988 with regard to the province. The gap between the legislative objective pursued by Parliament in 1988 to modernize the federal OLA in light of the Charter and what was actually accomplished with respect to New Brunswick is illustrated by parliamentary debate raising (or failing to raise) New Brunswick’s uniqueness.

Furthermore, debate leading to the 1993 Constitutional Amendment (New Brunswick) should correct Parliament’s historical lack of consideration for the “unique character of New Brunswick” and its constitutional uniqueness. It is unfortunate that the federal OLA has never reflected New Brunswick’s unique status with regard to official languages enshrined in the Constitution in 1982 by subsections 16(2), 17(2), 18(2), 19(2) and 20(2) of the Canadian Charter of Rights and Freedoms (“the Charter”) since it was overhauled in 1988.

Second, the federal OLA should be modernized to reflect the equality of status and equal rights and privileges of the English linguistic community and the French linguistic community in New Brunswick enshrined by Parliament and the Legislative Assembly of New Brunswick in the 1993 Constitutional Amendment (New Brunswick), which amended the Charter by adding section 16.1.

Part I of this brief describes New Brunswick’s legal uniqueness in terms of language rights and the shortcomings of the federal system created by the OLA in 1988 with regard to the province. The gap between the legislative objective pursued by Parliament in 1988 to modernize the federal OLA in light of the Charter and what was actually accomplished with respect to New Brunswick is illustrated by parliamentary debate raising (or failing to raise) New Brunswick’s uniqueness.

Furthermore, debate leading to the 1993 Constitutional Amendment (New Brunswick) should correct Parliament’s historical lack of consideration for the “unique character of New Brunswick” and its constitutional uniqueness. It is unfortunate that the federal OLA has never reflected New Brunswick’s unique status with regard to official languages enshrined in the Constitution in 1982 by subsections 16(2), 17(2), 18(2), 19(2) and 20(2) of the Canadian Charter of Rights and Freedoms (“the Charter”) since it was overhauled in 1988.
Brunswick) shows that with respect to New Brunswick, the federal OLA already needed to be modernized shortly after it was enacted in 1988.

8. **Part II** calls on Parliament to address these gaps by recognizing New Brunswick’s uniqueness in a modernized federal OLA and, wherever possible, aligning the federal and New Brunswick language regimes.

9. **Part III** encourages Parliament to draw from the wealth of New Brunswick’s 50 years of experience with official languages, particularly the most recent version of the NB OLA.
PART I – Historical context\(^5\) and the OLA’s shortcomings regarding New Brunswick

10. On April 18, 1969, New Brunswick adopted Canada’s first *Official Languages Act* (the federal OLA was enacted a few months later), although many provisions did not come into force until 1977. The NB OLA of 1969 (*Appendix “B”*) laid the foundation for institutional bilingualism in New Brunswick.\(^6\)

11. The NB OLA of 1969 made English and French “the official languages of New Brunswick for all purposes to which the authority of the Legislature of New Brunswick extends” and stated that these languages “possess and enjoy equality of status and equal rights and privileges.”\(^7\) It set out a first regime of parliamentary,\(^8\) legislative\(^9\) and judicial\(^10\) bilingualism.

12. The first NB OLA also imposed linguistic obligations regarding communications with and services to the public, including the obligation to ensure that the public was able to obtain, on request, available services and to communicate regarding those services in either official language.\(^11\) It should be noted, however, that the NB OLA of 1969 authorized the provincial government to attach conditions to the exercise of this right, particularly with respect to the demand threshold, which would later be done away with:

16. Lorsque
(a) Le nombre des personnes en cause le justifie ;
(b) l’esprit de la présente loi l’exige ; ou
(c) si l’on juge qu’il est nécessaire de le faire pour assurer la bonne application de la présente loi ;
Le lieutenant-gouverneur en conseil peut édicter des règlements précisant l’application […]

16. Where
(a) warranted by reason of numbers of persons involved;
(b) the spirit of this Act so requires; or
(c) it is deemed necessary to so provide for the orderly implementation of this Act;
The Lieutenant-Governor in Council may make regulations determining the application of ….

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\(^5\) For the purposes of this brief, thousands of pages of parliamentary sources have been reviewed, including the minutes and evidence of the following committees: the Legislative Committee on Bill C-72; the Special Senate Committee on Bill C-72; the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (1980-1981); the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord (Meech Lake Accord); the House of Commons Special Committee on the Proposed Companion Resolution to the Meech Lake Accord (1989-1990); the Special Joint Committee on a Renewed Canada (1991-1992); the Senate Debates of the 33rd Parliament, 2nd Session (1986-1988); and the House of Commons Debates of the 33rd Parliament, 2nd Session (1986-1988).


\(^7\) *Official Languages Act*, NB OLA 1969, s. 3 [NB OLA 1969].

\(^8\) NB OLA 1969, *supra*, ss. 4-5, 15.

\(^9\) NB OLA 1969, *supra*, ss. 6-8, 15.


13. The NB OLA of 1969 also authorized municipal councils to declare that either official language or both could be used in council proceedings and provided certain education rights.\(^{12}\)

14. On July 17, 1981, the Legislative Assembly of New Brunswick adopted the precedent-setting Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick (Appendix “C”). This act acknowledged the unique character of New Brunswick, as well as the equality of status and the equal rights and privileges of its English linguistic community and French linguistic community. It went so far as to acknowledge that these communities had a right to “distinct institutions” within which “cultural, educational and social activities” could be carried out. This brief act reads as follows:

1. 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.

2. The Government of New Brunswick shall ensure protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on.

3. The Government of New Brunswick shall, in its proposed laws, in the allocation of public resources and in its policies and programs, take positive actions to promote the cultural, economic, educational and social development of the official linguistic communities.

15. One year later, in 1982, Parliament adopted the Charter, the centrepiece of the “repatriation” of the Constitution. This now-iconic legislation carved out, for the first time, a very special place for New Brunswick in the constitutional order. Sections 16, 17, 18, 19 and 20 set out the following:

**Langues officielles du Canada**

**Official languages of Canada**

16(1) Le français et l’anglais sont les langues officielles du Canada ; ils ont un statut et des droits et privilèges égaux quant à leur usage

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\(^{12}\) NB OLA 1969, supra, ss. 12-13.

\(^{13}\) An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, supra.
dans les institutions du Parlement et du gouvernement du Canada.

**Langues officielles du Nouveau-Brunswick**  
16(2) Le français et l’anglais sont les langues officielles du Nouveau-Brunswick : ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick. […]

**Travaux du Parlement**  
17(1) Chacun a le droit d’employer le français ou l’anglais dans les débats et travaux du Parlement.

**Travaux du Parlement**  
17(2) Chacun a le droit d’employer le français ou l’anglais dans les débats et travaux de la Législature du Nouveau-Brunswick.

**Documents parlementaires**  
18(1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

**Documents de la Législature du Nouveau-Brunswick**  
18(2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

**Procédures devant les tribunaux établis par le Parlement**  
19(1) Chacun a le droit d’employer le français ou l’anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

**Procédures devant les tribunaux du Nouveau-Brunswick**  
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Communications entre les administrés et les institutions fédérales

20(1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services ; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante ;

b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

Communications by public with federal institutions

20(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications entre les administrés et les institutions du Nouveau-Brunswick

20(2) Le public a, au Nouveau-Brunswick, droit à l'emploi du français ou de l'anglais pour communiquer avec tout bureau des institutions de la législature ou du gouvernement ou pour en recevoir les services.

Communications by public with New Brunswick institutions

20(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

16. It was not by accident that the Charter recognized New Brunswick’s unique character. Parliament acted at the express request of New Brunswick Premier Richard Hatfield, who in 1980 said the following before the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada:

L'honorable Richard Hatfield (Premier ministre du Nouveau-Brunswick) :

[...] J'ai également fait distribuer un certain nombre de recommandations précises qui correspondent aux modifications que le gouvernement du Nouveau-Brunswick aimerait voir apporter à cette résolution [qui deviendra la Charte canadienne des droits et libertés] quand elle sera adoptée par le Parlement puis par le Parlement de la Grande-Bretagne. [...] 

Hon. Richard Hatfield (Premier of New Brunswick): Mr. Chairman. Senators, honourable members. I first of all thank you for granting me the opportunity to make representations on behalf of the government of New Brunswick with regard to this important matter of our nationhood [the amendment of the Constitution].

[...] I have also circulated a number of specific recommendations with regard to amendments which the government of New Brunswick would like incorporated in the resolution as it is passed in Parliament and as it is passed in the Parliament of Great Britain. [...] 

En effet, le gouvernement du Nouveau-Brunswick et sa population ont finalement reconnu cette volonté des fondateurs du pays qu'il soit possible et même utile au mieux-être et à l'avancement des gens que deux langues

[W]hat I believe has happened in the Province of New Brunswick whereby we have come to terms with this phenomena of our country, come to terms with this resolution, I think, of the founders of this country but certainly the
soient reconnues et utilisées, avec tous les avantages que cela comporte. Voilà ce dont nous avons pris conscience au Nouveau-Brunswick et même si la situation n’est pas idéale, nous continuons d’apporter des améliorations. D’ailleurs, si vous donnez suite à notre vœu, la constitution nous obligera à apporter des améliorations.

14. New Brunswick’s support for linguistic equality was impeccable:

L’honorable Richard Hatfield (Premier ministre du Nouveau-Brunswick) : […] Les gens qui parlent français au Canada ne constituent pas vraiment une minorité, c’est ce que stipule la Loi sur les langues officielles et c’est également ce que dit la Constitution. Ils ne constituent pas une minorité puisqu’ils sont Canadiens à part entière et ils ne font qu’exercer leur droit de parler l’une des langues du Canada. […]

L’un des problèmes du public, lorsqu’il s’agit de reconnaître les deux langues, c’est que les citoyens croient que les francophones seront déraisonnables. Je puis témoigner du fait que contrairement, ils sont peut-être trop patients, ils ne sont pas déraisonnables dans leurs demandes, ils sont réalistes, corrects et juste ; ils exercent toujours une pression sur le gouvernement, ce à quoi nous avons réagi, mais je crois que cette pression est nécessaire.

15. The federal government granted New Brunswick’s request, announced in 1981 by the Minister of Justice, Jean Chrétien, when he presented amendments to the draft Charter. Prior to Premier Hatfield’s appearance before the Committee in 1981, the Charter did not include specific provisions for New Brunswick:

L’honorable Jean Chrétien (ministre de la Justice) : […] J’aimerais présenter et exprimer les modifications que nous sommes prêts à accepter en ce qui concerne les dispositions sur les droits linguistiques à insérer dans la Charte des droits et libertés.

Hon. Jean Chrétien (Minister of Justice): […] I would like to explain the amendments which the government is prepared to accept to the language provisions of the Charter of Rights.
D’abord, le premier ministre Hatfield, agissant au nom du gouvernement du Nouveau-Brunswick, a demandé que la Charte affirme que le français et l’anglais constituent les langues officielles du Nouveau-Brunswick ; que l’usage de ces deux langues soit garanti dans les cours de justice, dans les textes de loi, comme à la législature ; et que les citoyens du Nouveau-Brunswick aient le droit de communiquer avec leur gouvernement et d’en recevoir les services dans l’une ou l’autre des langues officielles.

Je suis très heureux de pouvoir présenter ces propositions du premier ministre du Nouveau-Brunswick visant à modifier les article 16 à 20 en conséquence. Je les dépose devant le Comité dans ma déclaration supplémentaire. La vision que se fait monsieur Hatfield du Canada est celle d’un homme d’État et je l’en félicite. Son attitude devrait servir d’émulation aux autres provinces et, le temps venu, la procédure de modification, en sa version actuelle, leur permettra, après résolution de leurs législatures et du Parlement canadien, de progresser vers l’égalité de statut et d’usage du français et de l’anglais.

Et monsieur Hatfield nous a assurés que ce que nous plaçons devant le Comité aujourd’hui comme modifications sera approuvé par l’assemblée législative du Nouveau-Brunswick aussitôt que cette législature se réunira à nouveau16.

19. The coming into force of the Charter required an overhaul of the federal OLA:


The Hon. Ray Hnatyshyn (Minister of Justice and Attorney General of Canada): The reform of the official languages policy had to be undertaken. Parliament has a duty to bring the provisions of the Official Languages Act of 1969 into line with the Charter of Rights and Freedoms.

20. Parliament did not give New Brunswick special treatment in the new federal OLA, even though they readily recognized the heterogeneity of Canada’s linguistic landscape. Perhaps this was due to tensions at that time within the Canadian federation concerning the possibility of explicitly recognizing special constitutional status for Quebec. Bernard Valcourt, then an Acadian cabinet minister, said the following about the importance of amending the federal OLA:

L’hon. Bernard Valcourt (ministre d’État (Petites entreprises et Tourisme) et ministre d’État (Affaires indiennes et du Nord canadien)) : […] Je m’en voudrais, d’entrée de jeu, de ne pas souligner le caractère historique de la loi que nous nous proposons d’adopter. Ce projet de loi constitue, nous le savons, la première grande réforme de la Loi sur les langues officielles depuis son adoption en 1969, et aussi valable et avant-gardiste qu’elle ait pu être à cette époque, nul ne pouvait contester l’urgente nécessité de revoir et de reformuler cette loi pour l’adapter aux besoins changeants et aux circonstances nouvelles au pays.

Il fallait notamment l’adapter aux nouvelles réalités constitutionnelle et politiques de notre pays et faire en sorte qu’elle traduise mieux l’évolution de la société canadienne en matière linguistique. Il va sans dire, madame la Présidente, que le projet de loi C-72 [qui deviendra la Llo fédérale] va bien au-delà de ces deux exigences car il couvre tous les aspects importants de la question linguistique. Je voudrais cependant aujourd’hui me limiter à certains éléments de ce projet de loi qui me tiennent particulièrement à cœur à titre d’Acadien et de francophone originaire de l’est du Québec. Lorsque je dis cela, je pense plus précisément aux nouvelles responsabilités que se donne le gouvernement en matière de promotion et de développement des communautés de langues officielles et à la place privilégiée qu’occupe ce projet de loi dans l’affirmation et la concrétisation du fait français au Canada.

J’ai dit que l’élaboration de ce projet de loi répondait à une urgente nécessité. D’une part, il fallait mettre à jour la Loi sur les langues officielles de 1969 pour rendre conforme aux exigences constitutionnelles de la Charte canadienne des droits et libertés, et à ce chapitre, d’importantes mesures viseront les politiques en matière de langue de travail dans la Fonction publique fédérale, en matière de services au public partout au pays, en matière de pleine participation des Canadiens d’expression française et d’expression anglaise au sein des institutions fédérales et en matière d’administration de la justice. D’autre part, il fallait, comme je l’ai mentionnée, adapter la législation en matière de langue(s) officielle(s) à l’évolution de la société canadienne en matière linguistique. Et d’aucuns constateront les changes and areas to which this Bill has a significant impact.

Hon. Bernard Valcourt (Minister of State (Small Business and Tourism) and Minister of State (Indian Affairs and Northern Development)) : […] I would be remiss if, from the outset, I failed to underscore the historic character of the legislation now under consideration. We all know that this Bill is the first major reform of the Official Languages Act since it was adopted in 1969, yet however valid and avant-garde it may have been at the time no one would question the urgent need for reconsidering and redrafting the law to reflect Canada’s changing requirements and new circumstances.

The legislation had to be adapted to the new constitutional and political realities of this country so that it would be a more satisfactory reflection of the linguistic changes that have taken place in Canadian society. Needless to say, Madam Speaker, Bill C-72 goes well beyond these two prerequisites, covering all major aspects of the language question. Today, however, I would prefer to highlight some aspects of the Bill that are particularly important to me as an Acadian and a Francophone from a region outside Québec. I am thinking more specifically of the Government’s new responsibility for promoting and developing official language communities and the special place this Bill has in the process of promoting and implementing the French fact in Canada.

I said that this Bill was drafted in order to provide urgently needed legislation. Actually, it was necessary to update the Official Languages Act, 1969, to bring it into line with the constitutional requirements of the Canadian Charter of Rights and Freedoms. In this respect, there are some important provisions regarding the language of work in the federal Public Service, service to the public across this country, full participation by French-speaking and English-speaking Canadians in federal institutions, and the administration of justice. Furthermore, as I said earlier, it was necessary to adapt our official languages legislation to the linguistic changes in Canadian society. In fact, tremendous progress has been made in this respect since 1969. Hence the need for a better definition of the roles and responsibilities
progrès énormes qui ont été réalisés à ce chapitre depuis 1969. De là le besoin de mieux préciser les rôles et les responsabilités des divers ministères chargés de la mise en œuvre de la nouvelle politique, de mieux cerner les avenues de coopération fédérale-provinciale quant à l’épanouissement des communautés de langues officielles et d’améliorer les possibilités d’apprentissage de l’une et l’autre des langues officielles\textsuperscript{18}.

21. As for the Official Opposition in Parliament, Official Languages Critic Jean-Robert Gauthier went even further:

This is the origin of the interplay of the national and regional dimensions to which I referred earlier. The broad goals are set at the national level. But each province has specific responsibilities through which the national goals are achieved […] It is the provinces that will have to establish within their borders the language regime best suited both to national objectives and to the particular needs of their provincial population. That is why Canada’s linguistic mosaic is so diverse. Quebec has its own language legislation, which reflects its unique linguistic and cultural situation. Alberta and Saskatchewan have also adopted language legislation, more or less forceful, more or less acceptable, but which reflects their realities; so have Ontario, my own province, and New Brunswick, the only officially bilingual province in Canada, a status enshrined in the Constitution. In each case, Mr. Speaker, we see different solutions […].

22. However, speeches by parliamentarians about Canada’s linguistic heterogeneity did not translate into recognition of New Brunswick’s unique character in the new federal OLA, despite it being a major topic on the agenda for constitutional talks surrounding the Meech Lake Accord.

23. The 1987 Constitutional Accord, better known as the Meech Lake Accord, proposed to amend the Constitution so that it would recognize (a) the roles of Parliament and provincial legislatures to protect the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in

\textsuperscript{18} \textit{Debates of the House of Commons}, 33\textsuperscript{rd} Parl., 2\textsuperscript{nd} Sess., No. 10 (February 8, 1988), p. 12740.

\textsuperscript{19} \textit{Debates of the House of Commons}, 33\textsuperscript{rd} Parl., 2\textsuperscript{nd} Sess., No. 14 (July 7, 1988), pp. 17225–26 [emphasis ours].
Quebec, as a fundamental characteristic of Canada; and (b) the role of the Quebec legislature and government to protect and promote the fact that Quebec constitutes within Canada a distinct society.\textsuperscript{20}

24. Several groups and individuals appeared before the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord to criticize this wording, particularly on the grounds that it would have risked condemning official language minorities to the status quo by entrenching their minority status. In New Brunswick, such a recognition was inconsistent with the equality of both official language communities enshrined into law in 1981. Perhaps this explains why Frank McKenna, then-leader of the opposition in the Legislative Assembly of New Brunswick, said the following:

M. McKenna: Une autre question d’importance : c’est le droit de la minorité. Et c’est une question d’une énorme importance pour les gens du Nouveau-Brunswick, et je le crois, pour tous les Canadiens également.

Mr. McKenna: There is another important matter: the rights of the minority. This matter has tremendous importance for the people of New Brunswick and, I believe, for all Canadians.

En vertu des modification proposées, les actions du Parlement du Canada seront jugées selon l’obligation qu’il aurait de protéger les caractéristiques fondamentales du Canada. Les actions du Québec seront jugées selon son obligation de promouvoir et de protéger la société distincte. L’obligation dévolue à une partie est plus importante que l’obligation dévolue à l’autre. Je pense que notre Constitution doit reconnaître l’obligation du Parlement de promouvoir l’existence des deux groupes linguistiques partout au pays. Se limiter à protéger une minorité, c’est la condamner éventuellement à l’assimilation. Ce n’est certes pas là la destinée que nous réservons à notre pays. Je vous exhorte à inclure une telle obligation pour le gouvernement du Canada.

Under these amendments, the actions of the Parliament of Canada will be judged against its obligation to preserve the fundamental characteristics of Canada. The actions of Quebec will be judged against its obligation to promote and preserve a distinct society. The obligations of the one are greater than those of the other. I believe that our Constitution must recognize the obligation of Parliament to promote the existence of both linguistic groups throughout our nation. To only preserve a minority, is to condemn it to eventual assimilation. Surely that is not the collective destiny which we intend for our country. I urge you to include such an obligation for the [Government] of Canada.

Le fait qu’il n’y ait pas une telle clause diminue sérieusement l’Accord. Cela laisse supposer que la minorité anglophone du Québec pourrait avoir moins de droits que la majorité francophone. Cela veut également dire que les francophones hors Québec pourraient avoir moins de droits que les francophones du Québec. Je suis d’avis que les minorités méritent une meilleure protection de leurs droits, qu’elles soient francophones ou anglophones. Il s’agit là d’un élément fondamental de justice.

The failure to contain such a clause seriously detracts from the Accord. The implication is that the minority anglophone population of Québec could well have lesser rights than the francophone majority. It means that francophones residing outside Quebec could have lesser rights than the francophones of Quebec. I believe that minorities deserve better protection of their rights whether these minorities are anglophone or francophone. It is a basic element of fairness.

\textsuperscript{20} House of Commons, Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord, \textit{Text of the Meech Lake Accord} (reproduced in Appendix “C”), 34\textsuperscript{th} Parl., 2\textsuperscript{nd} Sess., No. 21 (May 1990), p. 63.
Je vous encourage fortement à inclure dans la Constitution la protection et la promotion des minorités quelle que soient leurs provinces ou leurs groupes linguistiques.

My plea is that minorities in this country and in all provinces of whatever linguistic community be offered protection and promotion under this Constitution.

25. At the same hearing, Charles Hamelin asked whether Mr. McKenna intended to call for the Meech Lake Accord to be amended if he became premier of New Brunswick. The following exchange ensued:

**M. McKenna**: Je peux vous assurer que j'ai l'intention de négocier très fermement pour obtenir des amendements qui amélioreront l'accord [...].

**Mr. McKenna**: Sir, I can tell you that I am going to negotiate very strongly for amendments that constitute improvements to the accord [...]

**M. Hamelin**: Vous allez le faire maintenant ou dans deux ans ?

**Mr. Hamelin**: Are you going to do it now, or two years from that?

**M. McKenna**: J'ai l'intention de le faire immédiatement après les élections, si la population me donne sa confiance [...].

Les préoccupations des groupes linguistiques minoritaires sont importantes. Vous me demandez si elles sont essentielles. Je peux vous dire que c'est important. C'est important pour ces groupes dans toutes les provinces du Canada. Et j'ai l'intention de faire appel à toute la marge de manœuvre dont je dispose pour défendre leur cause.

**Mr. McKenna**: I intend to do it immediately after an election, should the people judge me to be the premier [...]

The preoccupation of minority language groups is important. You have asked whether it is essential. I can tell you it is important. It is important to them in every province of Canada. I intend to use the bargaining leverage that I hope is available to me to try and advance their cause.

J'espère que la province de Québec se reconnaîtra un rôle de leadership pour protéger et promouvoir les droits de toutes les autres minorités linguistiques dans ce pays. J'espère que la province de Québec se reconnaîtra ce rôle pour elle-même.

**M. McKenna**: Nous ne sommes aucunement opposés à la reconnaissance du Québec à titre de société distincte.

I do hope that the Province of Quebec will see itself as a leader and will protect and promote the rights of all the other linguistic minorities in this country. I do hope that the Province of Quebec will take on this role for itself.

26. On March 21, 1990, then-premier McKenna introduced two resolutions in the Legislative Assembly of New Brunswick: the Meech Lake Accord and a companion resolution proposing a series of additional constitutional amendments that would take effect following the proclamation of the Meech Lake Accord, including an amendment to entrench the equality of New Brunswick's two official language communities in the Constitution. Brian Mulroney referred New Brunswick's companion resolution to a special House of Commons committee, whose hearings gave Premier McKenna the opportunity to make the Government of New Brunswick's position crystal clear:

**M. McKenna**: Nous ne sommes aucunement opposés à la reconnaissance du Québec à titre de société distincte.

**Mr. McKenna**: We do not object to the recognition of Quebec as a distinct society.

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This is an historical fact. We acknowledge the Government of Quebec must have a constitutionally recognized role to preserve that historical reality. However, the maintenance of the French language and culture throughout Canada can only be assured through active promotion. That is outside the province of Quebec. We must never forget that somewhere in the vicinity of 1 million francophones live outside the borders of the province of Quebec and that they, much more than francophones within the province of Quebec, face the constant danger of assimilation every day.

New Brunswick’s stake in this is inestimable. It is also a goal shared by francophones throughout the country, indeed by thoughtful Canadians from all backgrounds who recognize the importance and the legitimacy of our national heritage and bilingual character. The presence of francophone Canadians from coast to coast is a fact, and Quebec should not be held personally and totally responsible for the protection and preservation of these communities. […]

New Brunswick’s linguistic situation: In order to recognize New Brunswick’s situation within Canada, we became the only officially bilingual province and the only province which has legally and constitutionally committed itself to the total equality of our French and English-speaking communities.

Our companion resolution therefore proposes the addition of a further clause reflecting the principles of our Act recognizing the equality of the two official linguistic communities in New Brunswick, by adding the recognition that within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges.

The principles of New Brunswick’s Official Languages Act are already entrenched in sections 16 through 20 of the Charter of Rights. We propose the same entrenched protection.
concernant les dispositions sur l’égalité dont j’ai parlé.

Cette loi profite à nos communautés anglophones et francophones en leur accordant un statut et des droits et privilèges égaux. Elle pourrait dorénavant être modifiée seulement avec l’approbation de notre assemblée législative et celle du gouvernement du Canada.

The act benefits both our English and our French communities by giving them equal status, rights, and privileges. It could henceforth be amended only with the approval of our legislative assembly and the Government of Canada.

27. According to Premier McKenna, adding section 16.1 to the Charter would effectively make New Brunswick a distinct society:

M. McKenna : Il est vrai que la disposition que le Nouveau-Brunswick entend inclure dans la clause d’interprétation, les mesures touchant l’égalité, aurait effectivement pour effet de faire de nous aussi une société distincte. L’ironie veut que nous puissions aboutir à cela avec l’accord de seulement deux juridictions, le gouvernement du Canada et la province du Nouveau-Brunswick.

Mr. McKenna: Yes, the provision New Brunswick introduced in the interpretive section, the equality provisions, effectively in a sense makes us a distinct society as well. The really funny thing about it all is that we can do that with just two jurisdictions, the Government of Canada and the Province of New Brunswick.

28. Following the failure of the Meech Lake Accord, the federal government and several provinces, including New Brunswick, established constitutional commissions. The various reports of these commissions laid the groundwork for the Charlottetown Accord, which followed soon after. The New Brunswick Commission on Canadian Federalism recommended that the Constitution include a “clause recognizing the equality of status, equal rights and privileges of the English and French linguistic communities in New Brunswick and that this equality includes the right to distinct educational institutions and such distinct, cultural institutions as are necessary for the preservation and promotion of these communities.”

29. This was also the context in which the Special Joint Committee on a Renewed Canada, responsible for compiling the responses to federal constitutional proposals tabled in September 1991, was tasked with consulting Canadians, which took the form of constitutional conferences held in 1992 across Canada. When the committee visited Fredericton, Premier McKenna reiterated his desire to entrench An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick in the Constitution:

M. Nystrom (Yorkston – Melville) : […] Il y a deux ans, monsieur le premier ministre, I recall, Mr. Premier, a couple of years ago when

Mr. Nystrom (Yorkston – Melville): […] I

23 Parliament of Canada, Minutes of proceedings and evidence of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord, 34th Parl., 2nd Sess., No. 1 (April 1990), pp. 22-23.

24 Parliament of Canada, Minutes of proceedings and evidence of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord, 34th Parl., 2nd Sess., No. 1 (April 1990), p. 46.

lorsque vous avez suggéré la résolution d’accompagnement à l’Accord du lac Meech, vous parliez de renforcer par voie constitutionnelle la Loi sur les langues officielles au Nouveau-Brunswick, c’est-à-dire par le biais de l’article 43 de la Constitution et par l’adoption d’une résolution au Nouveau-Brunswick, puis à la Chambre des communes à Ottawa.

À cette époque-là, les trois partis et vous-même aviez convenu de le faire au moment le plus opportun. La communauté acadienne et d’autres groupes aussi ont également exercé des pressions pour que vous fassiez enchaîner dans la Constitution le projet de loi 88 de votre province [la Loi reconnaissant l’égalité des deux communautés linguistiques officielles au Nouveau-Brunswick], ou à tout le moins son idée maîtresse. Pouvez-vous nous dire ce que vous en pensez aujourd’hui, et s’il serait utile de recommander au Parlement d’élargir la notion de bilinguisme au Nouveau-Brunswick pour qu’elle ait une portée constitutionnelle ?

**M. McKenna** : Vous êtes fort bien informé, monsieur, et je répondrai avec plaisir.

Vous avez tout à fait raison en ce qui concerne l’article 43. Notre Commission s’y est arrêté longuement et elle recommande d’enchaîner dans la Constitution l’égalité des communautés de langues officielles du Nouveau-Brunswick : je trouverais utile que, dans vos contacts avec la Commission, vous en discutiez avec elle et que vous abordiez la recommandation dans votre rapport final, puisque la province du Nouveau-Brunswick a toujours pour programme de faire en sorte que la Constitution du Canada reconnaisse l’égalité de nos deux communautés linguistiques. D’ailleurs, la commission a déjà identifié plusieurs de nos institutions tant éducatives que culturelles qui sont la preuve vivante de cette égalité. C’est important. […]

**M. Ouellet (Papineau – Saint-Michel)** : […]

Quand et comment prévoyez-vous que cet enchaînement de la clause 88 puisse se faire ?

**M. McKenna** : L’enchaînement de l’égalité qui est recommandé par la commission de la province du Nouveau-Brunswick est une you suggested a companion resolution to the Meech Lake accord you were talking about strengthening in the constitutional sense, the Official Languages act in New Brunswick. We can do that, of course, through section 43 of the Constitution by passing a resolution in New Brunswick and also in the House of Commons in Ottawa.

There were talks at the time among the three parties and yourself about doing that at an appropriate time. There has also been some pressure from the Acadian community and others to enshrine what I believe is your provincial Bill 88 [An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick] into the Constitution, or certainly the important thrust of Bill 88. What advice do you have for us on that issue today, and would it be useful that we recommend to the Parliament expanding bilingualism in New Brunswick in the constitutional sense?

**Mr. McKenna** : You’re very well informed, Hon. Member, and let me respond to the concerns as they come.

With respect to section 43, you are absolutely right. Our commission has given a great deal of attention to that. Our commission is recommending that the equality of New Brunswick’s official language communities be entrenched in the Constitution, and yes, it would be helpful if, when you issue with them, and in your final report address that recommendation, because that is still on the agenda for the Province of New Brunswick to assure that the Constitution of Canada recognizes that our two language communities are equal. In fact, the commission has identified several of the institutions, educational and cultural, that represent important manifestations of that equality. That’s important. […]

**Mr. Ouellet (Papineau – Saint-Michel)** : […]

When and how do you think the entrenchment of clause 88 might be done?

**Mr. McKenna** : Entrenching the equality principle as recommended by the New Brunswick Commission is a bilateral matter
question bilatérale entre les deux gouvernements. Il est donc possible d'être à l'extérieur de cette ronde de discussions constitutionnelles, mais aussi d'en faire partie, parce qu'il n'est pas nécessaire d'avoir le consensus de tous les participants […]

30. In a 1992 referendum, the Charlottetown Accord was rejected by 54.3% of voters across Canada, although not in New Brunswick, where the “yes” side won with 62% of the votes.

31. The following year, 1993, section 16.1 was added to the Charter through a bilateral constitutional amendment, following resolutions adopted by the House of Commons and the Senate of Canada and by the Legislative Assembly of New Brunswick:

Communautés linguistiques française et anglaise du Nouveau-Brunswick

16.1 (1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d’enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

Rôle de la législature et du gouvernement du Nouveau-Brunswick

(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé.

English and French linguistic communities in New Brunswick

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

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

32. Unlike the federal OLA, which was modernized in 1988 to bring it in line with the Charter, the NB OLA did not go through such a process at that time. The provincial legislature did consider amending the NB OLA, but it ended up not doing so. Not until the validity of a municipal by-law adopted by the City of Moncton in English only was challenged did the Legislative Assembly of New Brunswick modernize

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29 *Charlebois v. Mowat*, 2001 NBCA 117. The Court ruled that the City of Moncton did not comply with its constitutional obligation under subsection 18(2) of the Charter when it failed to adopt, print and publish its municipal by-laws in both official languages of New Brunswick, and it invalidated them. However, the Court suspended the effect of its declaration of invalidity to allow the Legislative Assembly to update the NB OLA.
the NB OLA for the first time in 2002. Since then, the NB OLA was updated again in 2013 (Appendix “D”).
PART II – The Office of the Commissioner urges Parliament to acknowledge the unique character of New Brunswick in a modernized federal OLA and to align the federal and New Brunswick language regimes wherever possible

33. New Brunswick has a unique constitutional and legislative regime for language rights, which is currently not reflected in the federal OLA. Modernization of the federal OLA creates an opportunity to address this discrepancy and to attempt to align the federal and New Brunswick legislative regimes with respect to official languages in order to implement (or better implement) the constitutional rights of New Brunswickers.

34. The Office of the Commissioner recommends that the federal OLA be amended to (A) align the obligations of the federal and New Brunswick governments to offer services to and communicate with the public in both official languages and (B) ensure that the federal government takes into account and supports the equality of status and the equal rights and privileges of the English and French linguistic communities of New Brunswick, including the distinct institutions to which they are entitled.

A. The Office of the Commissioner recommends that the federal OLA require the federal government to offer its services and communicate in both official languages throughout New Brunswick

35. Section 20 of the Charter establishes the right of members of the public to use the official language of their choice with institutions of the Parliament or government of Canada and with institutions of the legislature or government of New Brunswick:

Communications entre les administrés et les institutions fédérales
20(1) Le public a, au Canada, droit à l’emploi du français ou de l’anglais pour communiquer avec le siège ou l’administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services ; il a le même droit à l’égard de tout autre bureau de ces institutions là où, selon le cas :

a) l’emploi du français ou de l’anglais fait l’objet d’une demande importante ;

b) l’emploi du français et de l’anglais se justifie par la vocation du bureau.

Communications by public with federal institutions
20(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications entre les administrés et les institutions du Nouveau-Brunswick
(2) Le public a, au Nouveau-Brunswick, droit à l’emploi du français ou de l’anglais pour communiquer avec tout bureau des institutions de la législature ou du gouvernement ou pour en recevoir les services.

Communications by public with New Brunswick institutions
(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
36. There is an obvious imbalance between both subsections of section 20: (a) at the federal level, members of the public have the right to use English or French to communicate with or receive services from the offices of institutions of Parliament or the government of Canada where there is a significant demand for communications with and services from that office in such language or due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French; and (b) in New Brunswick, members of the public have the unconditional right to use English or French to communicate with or receive services from any office of an institution of the legislature or government of New Brunswick.

37. As described by the Supreme Court of Canada, New Brunswick has a regime of “complete institutional bilingualism.” This regime, unique to New Brunswick, is a true social contract between the province’s two linguistic communities – a social contract based on the shared values of respect, equality and vitality – and a founding part of New Brunswick’s identity.

38. This constitutional uniqueness of New Brunswick in terms of the language of service and communication with the public is reflected in the NB OLA. Section 27 of the current NB OLA guarantees the public’s right to communicate with any institution of the legislature and government of New Brunswick (including courts, any agency, board, commission, council, office or other body established to perform a government function pursuant to provincial legislation, provincial departments, Crown corporations established pursuant to provincial legislation, etc.) and to receive services in the official language of their choice, while section 28 of the NB OLA codifies the corresponding obligation of these same institutions:

**Communication avec le public**

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

**Communication with the public**

27 Members of the public have the right to communicate with any institution and to receive its services in the official language of their choice.

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

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

39. Sections 21 and 22 of the federal OLA use the wording of subsection 20(1) of the Charter by making the concept of “significant demand” a condition for services to be offered by the offices of federal institutions in either official language across the country, including New Brunswick:

**Droits en matière de communication**

21 Le public a, au Canada, le droit de communiquer avec les institutions fédérales et

**Rights relating to language of communication**

21 Any member of the public in Canada has the right to communicate with and to receive

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d’en recevoir les services conformément à la présente partie

available services from federal institutions in accordance with this Part.

Where communications and services must be in both official languages

22 Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities (a) within the National Capital Region; or (b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

40. In New Brunswick, all federal institutions are subject to this obligation and therefore to the condition of “significant demand.”31 This means that the federal OLA allows several offices of federal institutions in New Brunswick to be unilingual. Currently, at least 2 federal offices offer services only in French and at least 51 federal offices offer services only in English. These data are made available by the federal government on its Burolis website, a database of federal offices providing services in English, French or both languages under the Official Languages (Communications with and Services to the Public) Regulations.32 Examples of these federal offices providing services in English only include 15 Canada Border Services Agency offices, the Correctional Service of Canada in Saint John, and the Saint John Airport.

41. It should be possible, in New Brunswick, to communicate with all provincial and federal institutions in the official language of one’s choice. The federal government should, at a minimum, be required to do the same as the provinces when they have a more generous language regime, as is the case in New Brunswick.

42. In New Brunswick, there is therefore a striking dissonance between “complete institutional bilingualism” in provincial communications and services and partial and localized bilingualism in federal institutions. The current wording of section 22 of the federal OLA has allowed for the imposition of “significant demand” consistently across the country.33 The only provincial institutions exempt from the obligations of the NB OLA are exempted out of respect for the right of the English and French linguistic communities of New Brunswick to distinct educational and

31 The definition of “federal institution” includes any federal court, any board, commission or council, or other body or office, established to perform a governmental function pursuant to an Act of Parliament, a department of the Government of Canada, and a Crown corporation established pursuant to an Act of Parliament (Official Languages Act, supra, subs. 3(1), under “federal institution.”

32 However, these data exclude Canada Post offices delivering services in only one language because they unfortunately fall outside the scope of the Burolis website.

33 Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48.
However, the federal OLA allows several offices of federal institutions in New Brunswick to be unilingual; this is a significant and unwarranted limitation on New Brunswick’s regime of “complete institutional bilingualism.”

43. The federal government’s commitment to “enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and fostering the full recognition and use of both English and French in Canadian society” did not prevent such a limitation from being placed on New Brunswick’s “complete institutional bilingualism” and the equality of status of its English and French linguistic communities, even though it has been enshrined in the Constitution since 1993.

44. Neither did section 32 of the federal OLA prevent such a limitation. It reads as follows:

**Règlements**

32(1) Le gouverneur en conseil peut, par règlement :
   a) déterminer, pour l’application de l’article 22 [...], les circonstances dans lesquelles il y a demande importante ; […]

**Critères**

(2) Le gouverneur en conseil peut, pour déterminer les circonstances visées aux alinéas (1)a) ou b), tenir compte :
   a) de la population de la minorité francophone ou anglophone de la région desservie, de la spécificité de cette minorité et de la proportion que celle-ci représente par rapport à la population totale de cette région ;
   b) du volume des communications ou des services assurés entre un bureau et les utilisateurs de l’une ou l’autre langue officielle ;
   c) de tout autre critère qu’il juge indiqué.

**Regulations**

32(1) The Governor in Council may make regulations:
   a) prescribing the circumstances in which there is significant demand for the purpose of paragraph 22(b) or subsection 23(1); […]

1. Where circumstances prescribed under paragraph (1)(a) or (b):
   a) the number of persons composing the English or French linguistic minority population of the area served by an office or facility, the particular characteristics of that population and the proportion of that population to the total population of that area;
   b) the volume of communications or services between an office or facility and members of the public using each official language; and
   c) any other factors that the Governor in Council considers appropriate.

45. Section 32 of the federal OLA did not lead the federal government to consider New Brunswick’s “complete institutional bilingualism” or the constitutional protection of the equality of status of its English and French linguistic communities in determining the circumstances in which “demand” is significant.

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34 Under section 4 of the NB OLA, “distinct educational institutions and distinct cultural institutions and, without limiting the generality of the foregoing, the school system in New Brunswick including the English and French sections of the Department of Education including schools and their committees, councils and boards, community centres and universities and, where applicable, community colleges” are excluded from the definition of “institution.”

35 Official Languages Act, supra, s. 41.

36 Charter, supra, s. 16.1.
Parliament should therefore adjust the wording of section 22 of the OLA to reflect, in New Brunswick, the constitutional framework in which it operates and to ensure that the federal system is consistent with (not opposed to) it and New Brunswick’s “complete institutional bilingualism”. The Office of the Commissioner calls on Parliament to modernize the federal OLA in order to expressly require that the federal government offer its services and communicate in both official languages throughout New Brunswick. To achieve this, all that is required is to provide that the obligations set out in section 22 of the federal OLA apply to all offices of federal institutions in New Brunswick (emphasis indicates the proposed addition to the federal OLA):

**Languages of communications and services**

> 22 Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l’une ou l’autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés, pour l’application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans la région de la capitale nationale et au Nouveau-Brunswick, soit là où, au Canada comme à l’étranger, l’emploi de cette langue fait l’objet d’une demande importante.

**Where communications and services must be in both official languages**

> 22 Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities (a) within the National Capital Region and New Brunswick; or (b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

B. The Office of the Commissioner recommends that the federal OLA require the government to consider and support the equality of status and the equal rights and privileges of the English and French linguistic communities in New Brunswick, including the distinct institutions to which they are entitled

Section 16.1 of the Charter entrenches the equal rights and privileges of the English and French communities in New Brunswick, including their right to “distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities."

The Office of the Commissioner explains the rationale for this constitutional guarantee as follows:

**To flourish, any linguistic community needs places where its members can live fully in their language.**

**To flourish,** any linguistic community needs places where its members can live fully in their language. That’s the reason for having distinct cultural and educational institutions. By ensuring the development of each community, these institutions promote the equality of the two groups. And equality fosters unity.

**However, distinct institutions do not prevent dialogue between the two linguistic groups.**

**However,** distinct institutions do not prevent dialogue between the two linguistic groups. They come together regularly, in many areas of activity, for example, at work or at play.

> Pour s’épanouir, toute communauté linguistique a besoin de lieux où elle peut vivre pleinement dans sa langue. C’est la raison d’être des institutions culturelles et éducatives distinctes. En assurant le développement de chaque communauté, ces institutions favorisent l’égalité des deux communautés. Et l’égalité favorise l’unité.

**Des institutions distinctes n’empêchent toutefois pas le dialogue entre les deux groupes linguistiques.**

**Des institutions distinctes n’empêchent toutefois pas le dialogue entre les deux groupes linguistiques.** Ils se côtoient régulièrement dans plusieurs domaines.
49. This constitutional recognition, unique in Canada, is not reflected anywhere in the current federal OLA. Yet, the equal rights and privileges of New Brunswick’s official language communities must influence federal public policies generally and must also govern, more specifically, the exercise of federal spending power, particularly in education and culture.

50. The right under section 16.1 to distinct educational institutions begins in early childhood, unlike in section 23 of the Charter, which deals with the right of citizens to have their children receive primary and secondary school instruction. Section 16.1 does not contain such an internal limitation, nor does it contain the numerical requirement set out in section 23. As the Office of the Commissioner noted earlier, if the government wishes to give children, including francophone children, every chance of success, it must fully implement the principle of duality in early childhood services. The same is also true for postsecondary education. The substantive equality of the rights of New Brunswick’s English and French linguistic communities depends on it.

51. Moreover, as per the broad and non-exhaustive wording of section 16.1 of the Charter, not only are homogeneous educational settings - from early childhood to postsecondary - necessary to protect and promote a linguistic community, but also, each official language community has the right to its own cultural institutions.

52. Parliament should modernize the federal OLA, in light of the addition of section 16.1 to the Charter in 1993, to provide for and regulate the federal government’s obligation to consider the equal rights and privileges of New Brunswick’s English and French linguistic communities. Such modernization could be achieved by providing in Part VII of the federal OLA an additional commitment – along with an obligation to take positive measures to implement it – by the federal government to recognize and promote the equality of status and the equal rights and privileges of New Brunswick’s English and French linguistic communities, including the right of these communities to the distinct educational and cultural institutions necessary for their protection and promotion. Such a regime would regulate the federal government’s spending power.

53. For example, the Department of Canadian Heritage has been signing agreements with provincial and territorial governments under its Official Languages in Education Program since 1970. These agreements set out the terms and

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Office of the Commissioner of Official Languages for New Brunswick, news release, “Let’s Set the Record Straight - Myths and Realities about Official Languages in NB” (September 14, 2016).


conditions for the transfer of federal funds to cover the additional costs of minority language education and second language instruction. The amendment to the federal OLA recommended by the Office of the Commissioner would require the Department of Canadian Heritage to adopt a “New Brunswick lens” and to consider the rights of its English and French linguistic communities to distinct educational and cultural institutions when negotiating such agreements.

54. The Canada–New Brunswick bilateral agreement under the Multilateral Framework on Early Learning and Child Care is another example of an agreement that should be negotiated by the federal government taking into account the equal rights and privileges of New Brunswick’s English and French linguistic communities.40

55. The right of New Brunswick’s English and French linguistic communities to distinct cultural and community institutions, necessary for their protection and promotion, should be taken into account when negotiating collaboration accords between the Department of Canadian Heritage and official language minority communities.41

56. Lastly, the constitutional equality of both official linguistic communities in New Brunswick must also inform the development and implementation of the federal government’s immigration policies. The federal OLA should require the federal government to take into account New Brunswick’s specific linguistic balance and the recognition of the equality of status and equal rights and privileges of the province’s English and French linguistic communities in its immigration policies so as to maintain the existing linguistic balance.

PART III – Parliament should draw on New Brunswick’s experience with official languages in modernizing the federal OLA

57. New Brunswick has a long and rich experience in official languages, which should be considered as part of the modernization of the OLA. Ever since the province adopted the country’s first official languages legislation in April 1969, it has seen many developments in language rights and has been able to test various proposals for advancing the rights of its francophone minority. New Brunswick is a kind of “testing ground” that can inform the modernization of the federal OLA with respect to necessary or promising legislative changes. In this section, the Office of the Commissioner makes recommendations based on New Brunswick’s rich experience in official languages.

a) Learn from the NB OLA implementation model

58. While the country’s first official languages legislation, the NB OLA of 1969, did not give responsibility for its implementation to any specific authority, in 2002, the new

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40 Canada, Employment and Social Development Canada, *Multilateral Early Learning and Child Care Framework*, June 12, 2017; Canada, Employment and Social Development Canada, *Canada–New Brunswick Early Learning and Child Care Agreement*, signed on August 30, 2017, in Moncton.

NB OLA provides in section 2 that its implementation is the Premier’s responsibility.\footnote{NB OLA, supra, s. 2.}


60. In 2013, the Select Committee on the Revision of the NB OLA expressed the importance of requiring the government to come up with a comprehensive plan for ensuring compliance with the NB OLA.\footnote{Legislative Assembly of New Brunswick, Report of the Select Committee on the Revision of the Official Languages Act, p. 21: “This plan should present a variety of ways to meet challenges and contain innovative actions to promote the creation of a bilingual culture within the civil service and to advance the substantive equality of both official linguistic communities. This comprehensive plan should also identify mechanisms to put in place so that government can reflect the specific reality of each linguistic community when developing its programs and policies.”} In response to this recommendation, when the NB OLA was renewed in 2013, the Legislature Assembly provided in new section 5.1 a legal obligation for the Government of New Brunswick to develop an implementation plan and to develop the parameters for such a plan. The section gives the Premier ultimate responsibility for coordinating and implementing the comprehensive plan, while mandating the various components of the public service to develop their own action plans, which should contribute to the comprehensive plan:

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**Plan de mise en application**

5.1(1) La province élabore un plan établissant les modalités de respect des obligations que lui impose la présente loi, lequel énonce notamment :

a) les buts et les objectifs afférents à ses obligations ;

b) les mesures propres à assurer l’égalité de statut des deux communautés linguistiques ;

c) les mesures propres à assurer l’égalité d’usage du français et de l’anglais dans les services publics ;

d) les mesures propres à assurer la prise en compte de la langue de travail dans la détermination des équipes de travail au sein des services publics et l’élaboration des profils linguistiques des postes dans les services publics ;

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**Implementation plan**

5.1(1) The Province shall prepare a plan setting out how it will meet its obligations under this Act, and the plan shall include the following:

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

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

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

d) measures to ensure that language of work is considered when identifying work groups within the public service and when developing language profiles for positions in the public service;
e) les mesures propres à améliorer la capacité bilingue de la haute direction au sein des services publics ;

f) les mesures propres à prévoir la révision et l’amélioration, au besoin, de ses politiques en matière d’affichage public en tenant compte des deux communautés linguistiques et de la composition linguistique d’une région ;

g) les mesures de rendement affectées à l’évaluation de l’efficacité des mesures appliquées dans le cadre du plan et aux délais impartis pour leur mise en application.

5.1(2) Le premier ministre est chargé d’assurer la coordination gouvernementale centrale du plan élaboré tel que le prévoit le paragraphe (1) et de veiller à sa mise en application.

5.1(3) Chaque élément des services publics élabore un plan d’action énonçant les modalités d’atteinte tant des buts et des objectifs que prévoit le plan élaboré tel que le prévoit le paragraphe (1) que de la mise en application des mesures y prévues.

5.1(4) Dans les plus brefs délais après la fin d’un exercice financier, chaque élément des services publics présente au premier ministre un rapport des activités entreprises dans le cadre de son plan d’action.

5.1(5) Dans les plus brefs délais après la fin d’un exercice financier et après réception des rapports que prévoit le paragraphe (4), le premier ministre présente à l’Assemblée législative le rapport des activités entreprises dans le cadre du plan élaboré en vertu du paragraphe (1).

61. In comparison, the federal OLA does not give any government entity authority or responsibility over its implementation. Instead, responsibility for implementing certain parts of the OLA are given to two federal institutions: Treasury Board (for Parts IV, V and VI) and the Minister of Canadian Heritage (for Part VII).47

62. Not only does the federal OLA not impose a legal obligation on the federal government to develop a comprehensive plan for implementing the federal OLA, as is the case in New Brunswick, but it also does not require either the Treasury Board or the Minister of Canadian Heritage to adopt master plans for implementing their respective commitments. It deals even less with the objectives and coordination of such plans to come up with practical ways to respect and promote language rights. The federal OLA merely allows the Treasury Board (the Treasury

47 See the Official Languages Act, supra, ss. 42–44 (Canadian Heritage) and ss. 46–48 (Treasury Board).
Board may”) to decide to take action in order to implement its obligations. This legislation does not give the Minister of Canadian Heritage any enforcement powers with respect to other federal departments.

63. The New Brunswick experience suggests that the OLA should give one government entity ultimate responsibility for its implementation. In particular, the Office of the Commissioner recommends that the entity responsible for implementing the federal OLA be a central agency with the horizontal powers necessary to carry out this role, including the power to take the lead in regulatory matters, access to government-wide funds and clear statutory powers to guide its role with respect to various components of the government. Without this central agency exercising an increased oversight role, implementation by institutions may be inadequate. This is reflected in the evaluation of New Brunswick’s Official Languages Plan, commissioned by the provincial Executive Council Office in 2014.48

64. As is the case with the NB OLA, the federal OLA should provide for and govern the production of a master implementation plan and require federal institutions subject to the OLA to prepare their own action plans that specifically indicate how they will achieve the objectives and measures set out in the federal plan. That said, the New Brunswick experience shows that it is not enough for the various components of the public service to be responsible for developing action plans and reporting on the activities undertaken to the central coordinating agency. Better oversight of the master plan’s implementation by the various institutions is needed. The Office of the Commissioner believes that the federal OLA should also require all institutions subject to it to submit regular progress reports to the central coordinating agency so that progress on implementing the plan can be better monitored.

65. Moreover, as revealed by the evaluation of New Brunswick’s 2014 Government Plan on Official Languages, it is very difficult to measure progress in official languages without systematic data collection.49 The Office of the Commissioner recommends that the federal OLA provide for the creation of effective tools to measure various indicators of the quality of bilingual services and the vitality of languages.

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b) Draw from specific obligations under the NB OLA

Require a periodic review of the NB OLA

66. Unlike the NB OLA of 1969, the NB OLA of 2002 required the Premier to conduct a review of the NB OLA ten years later.\footnote{NB OLA, \textit{supra}, s. 42(1).}

67. This 10-year revision was important to address some of the shortcomings of the NB OLA and to make adjustments based on the experience of implementing it. Although not all of the recommendations of the Office of the Commissioner and representatives of the province’s official language communities would be reflected in the new version of the NB OLA in 2013, the review exercise provided an essential forum for sharing these recommendations.

68. For example, in addition to providing a framework for its implementation by the Premier (as discussed in the previous section) in new section 5.1 of the NB OLA, the 2013 revision led to the following important additions:

i. The NB OLA now allows the Office of the Commissioner, after carrying out an investigation, to publish a report if it is considered to be in the public interest.\footnote{NB OLA, \textit{supra}, s. 43(17.2).}

ii. The NB OLA now prohibits reprisals against a person who made a complaint to the Office of the Commissioner or cooperated in an investigation.\footnote{NB OLA, \textit{supra}, s. 43.1.}

iii. The NB OLA requires the Premier to conduct a new review by 2021.

69. The Office of the Commissioner recommends to Parliament that the federal OLA be reviewed at least every ten years. The current federal OLA will soon be turning 30; society has changed so much since then that it is not surprising that the OLA no longer meets the needs of official language communities.

70. In light of the New Brunswick experience, it is also important to involve the community in these periodic reviews. During the NB OLA review, the francophone and Acadian communities were consulted, which included a public symposium held in November 2010 in Moncton. In December 2011, 29 Acadian and francophone organizations made a valuable contribution by sharing their ideas for amending the NB OLA. The Office of the Commissioner recommends having these consultation and community engagement processes formalized in the federal OLA to ensure transparency and effectiveness.

71. Lastly, the review period should include a time limit so that it is not unreasonably extended. This was in fact one of the Office of the Commissioner’s recommendations prior to the most recent NB OLA review.\footnote{Office of the Commissioner, \textit{2010-2011 Annual Report}, \textit{supra}, p. 19.}

Require government institutions to publish notices and advertisements in both official languages

72. With respect to the publication of notices and advertisements by government institutions, the federal OLA does not currently require all texts to be published...
simultaneously in English and French. The obligation under subsection 11(1) of the federal OLA is much weaker:

**Avis et annonces**

11(1) Les textes — notamment les avis et annonces — que les institutions fédérales doivent ou peuvent, sous le régime d’une loi fédérale, publier, ou faire publier, et qui sont principalement destinés au public doivent, là où cela est possible, paraître dans des publications qui sont largement diffusées dans chacune des régions visées, la version française dans au moins une publication d’expression principalement française et son pendant anglais dans au moins une publication d’expression principalement anglaise. En l’absence de telles publications, ils doivent paraître dans les deux langues officielles dans au moins une publication qui est largement diffusée dans la région.

**Notices, advertisements and other matters that are published**

11(1) A notice, advertisement or other matter that is required or authorized by or pursuant to an Act of Parliament to be published by or under the authority of a federal institution primarily for the information of members of the public shall,
(a) wherever possible, be printed in one of the official languages in at least one publication in general circulation within each region where the matter applies that appears wholly or mainly in that language and in the other official language in at least one publication in general circulation within each region where the matter applies that appears wholly or mainly in that other language; and
(b) where there is no publication in general circulation within a region where the matter applies that appears wholly or mainly in English or no such publication that appears wholly or mainly in French, be printed in both official languages in at least one publication in general circulation within that region.

73. Amending the wording of subsection 11(1) of the OLA to require simultaneous publication at all times would promote the equality of status and the use of both official languages. Parliament could base the wording on section 15 of the NB OLA, which sets out this strict obligation:

15 Les avis, pièces ou documents dont la présente loi ou toute autre loi exige la publication par la province ou ses institutions sont imprimés et publiés dans les deux langues officielles.

15 Notices, announcements and other documents required to be published under this Act or any other Act by the Province or its institutions shall be printed and published in both official languages.

**Protect complainants from reprisal**

74. When the NB OLA was renewed in 2013, the Legislature included protection from reprisal for anyone who files a complaint with the Office of the Commissioner or cooperates in an investigation by the Office:

**Protection contre les représailles**

43.1 Il est interdit d’exercer des représailles contre un plaignant ou d’en ordonner l’exercice du fait qu’il a déposé de bonne foi une plainte auprès du commissaire ou collaboré à l’enquête que prévoit la présente loi.

**Protection from reprisal**

43.1 No person shall take a reprisal against a person or direct that one be taken against a person because the person has made a complaint in good faith to the Commissioner or cooperated in an investigation under this Act.
75. In addition, any contravention of this provision is an offence punishable under the Provincial Offences Procedure Act.\(^{54}\) This protection was recommended by the Office of the Commissioner prior to the NB OLA review in 2013, after it found that people were reluctant to file complaints with the Office for fear of possible reprisals.

76. The Office of the Commissioner recommends that an equivalent provision be included in the federal OLA.

**Make investigation reports public**

77. Since the renewal of the NB OLA in 2013, subsection 43(17.2) authorizes the Office of the Commissioner to make its investigation reports public:

\[43(17.2)\] After carrying out an investigation under subsection (10), if the Commissioner considers it to be in the public interest, the Commissioner may publish a report on the results of his or her investigation and on any recommendations made as a result of the investigation.

78. The Office of the Commissioner recommends that Parliament provide in the federal OLA, as the NB OLA already does, that investigation reports prepared by the Commissioner of Official Languages of Canada may be published at the conclusion of an investigation. At present, it is only through specific reports to Parliament that the Commissioner can disclose certain elements necessary to establish the grounds for his recommendations.\(^{55}\)

79. The authority to make the Office of the Commissioner’s investigation reports public has made the NB OLA’s implementation more consistent and effective by fostering a climate of government transparency and accountability, while also helping the public better understand their language rights. In New Brunswick, the publication of investigation reports allows the Office to highlight problematic situations in a timely manner, while respecting anonymity unless the complainant requests otherwise.\(^{56}\)

**Spell out the Commissioner’s appointment process**

80. The federal OLA only provides that the Commissioner of Official Languages for Canada is appointed by the government after consultation with party leaders.\(^{57}\) The appointment process is not otherwise regulated.

81. However, in New Brunswick, before the Commissioner of Official Languages is appointed, a selection committee is established for the purpose of identifying...

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\(^{54}\) **SNB 1987, c P-22.1**; see **General Regulation, NB Reg 2015-67**.

\(^{55}\) **Official Languages Act, supra**, s. 68.


\(^{57}\) **Official Languages Act, supra**, s. 49(1).
candidates.\textsuperscript{58} The NB OLA specifies not only the composition of this selection committee (composed of the Clerk of the Executive Council and the Clerk of the Legislative Assembly or individuals they designate, a member of the judiciary and a member of the university community), but also the steps in the Commissioner appointment process.\textsuperscript{59}

82. The independence and legitimacy of the Office of the Commissioner benefit from such a regulated appointment process. The Office of the Commissioner encourages Parliament to spell out the steps for appointing the Commissioner of Official Languages for Canada, based on section 43 of the NB OLA.

**Extend the right to appeal to all rights guaranteed by the OLA**

83. The Office of the Commissioner recommends that the right to apply for a court remedy under the federal OLA be extended to all rights under the OLA, as is the case in New Brunswick. Currently, the right to apply for a court remedy under the OLA is limited to complaints under certain sections:

- **Recours**
  
  77(1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

- **Application for remedy**
  
  77(1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

84. In New Brunswick, a complainant who is dissatisfied with the results of the Commissioner’s investigation or the disposition of the complaint may apply for a court remedy, regardless of the rights or sections on which the complaint was based.\textsuperscript{60}

**Clarify the primacy of the federal OLA**

85. According to section 82 of the federal OLA, only certain provisions of the OLA prevail over inconsistent provisions of any other act:

- **Primauté sur les autres lois**
  
  82(1) Les dispositions des parties qui suivent l’emportent sur les dispositions incompatibles de toute autre loi ou de tout règlement fédéraux :
  
  a) partie I (Débats et travaux parlementaires);
  b) partie II (Actes législatifs et autres);
  c) partie III (Administration de la justice);
  d) partie IV (Communications avec le public et prestation des services);
  e) partie V (Langue de travail).

- **Primacy of Parts I to V**
  
  82(1) In the event of any inconsistency between the following Parts and any other Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:
  
  a) Part I (Proceedings of Parliament);
  b) Part II (Legislative and other Instruments);
  c) Part III (Administration of Justice);
  d) Part IV (Communications with and Services to the Public); and
  e) Part V (Language of Work).

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\textsuperscript{58} NB OLA, *supra*, s. 43(2.1).
\textsuperscript{59} NB OLA, *supra*, ss. 43(2.1) to (2.4).
\textsuperscript{60} NB OLA, *supra*, s. 43(18).
86. The Office of the Commissioner encourages Parliament to consider amending the federal OLA to ensure that the entire OLA takes precedence over other acts. The quasi-constitutional status of the federal OLA has been recognized by the Canadian courts, as it is “an extension of the rights and guarantees recognized in the Charter.”

87. Parliament could draw from the NB OLA, which unequivocally states that it takes precedence in the event of a conflict with any other legislation:

3(1) Toute loi ou ses règlements d’application, autre que la présente loi, ne peuvent être interprétés de manière à supprimer, restreindre ou enfreindre une disposition de la présente loi et, en cas de conflit, la présente loi l’emporte.

3(1) No act, or regulation under it, other than this Act, shall be interpreted so as to repeal, limit or contravene a provision of this Act and, in case of conflict, this Act prevails.

c) Learn from the shortcomings of the New Brunswick regime: clarify the role of the Translation Bureau

88. Learning from New Brunswick’s experience with official languages also means learning from the shortcomings of its legislative regime. Like the New Brunswick Translation Bureau, the federal Translation Bureau provides government institutions with the translation and interpretation services necessary for official bilingualism. However, at present, there is no mention of these services in the federal or NB OLA; their roles are not regulated.

89. The Office of the Commissioner recommends that the federal OLA define the role of the Translation Bureau and allow all organizations subject to the OLA to use its services. The New Brunswick experience shows that, without such legislative enhancement, the Translation Bureau’s mandate and revenues can erode. Strengthening and expanding the role of the Translation Bureau in the federal OLA would ensure the viability and effectiveness of this institution, which is so fundamental to ensuring quality government communications in both official languages. As the Office of the Commissioner has already pointed out, the government’s constitutional obligations with respect to official languages are such that it cannot rely solely on the private sector to provide translation services. There is a need to strengthen the role of the Translation Bureau through a legislative amendment to the federal OLA.

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