Brief on the proposed amendments to Canada’s Official Languages Act
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The Fédération des conseils d’éducation du Nouveau-Brunswick (FCÉNB) would like to use this brief to share its opinion on the important proposed amendments to Canada’s Official Languages Act. While it is aware that education is, under the Constitution Act of 1867, exclusively the responsibility of provinces and territories, the FCÉNB still believes that the federal government has an important role to play in education in the language of official language minorities. It is in that spirit that we present this brief.

The FCÉNB was founded in 2003 to support the Conseils d’éducation de district du Nouveau-Brunswick so that they could assume primary responsibility for managing francophone schools by organizing training and consultations on topics of common interest and acting as an advocate in provincial files related to advancing the cause of education.
Introduction

[1] Linguistic duality is a unique feature that characterizes and defines Canada, and the concept of “two founding peoples” has often been used to express the role played by francophone and anglophone communities in the Canadian federation’s development since its creation in 1867. We want to recognize the important role of Aboriginal peoples being part of Canada’s definition.

[2] In order to properly understand the place of New Brunswick’s Acadia in Canadian francophonie, we think it is important to provide a brief historical overview that will help those not familiar with Acadia better understand it.

A. Historical overview

1. From the birth of Acadia to the deportation of Acadians: 1604 to 1755

[3] Pierre Du Gua, sieur de Mons, joined by Jean de Biencourt, sieur de Poutrincourt, Samuel de Champlain, François Gravé, sieur du Pont, and 75 men, officially founded Acadia in 1604, on Sainte-Croix Island. Owing to hostile conditions, the colony would be moved next year to Port Royal, in the current province of Nova Scotia. However, it was only in the 1630s that a significant number of French settlers permanently settled on that land.

[4] Throughout its short history, Acadia would experience tumultuous times, most often both being victim to the wars fought on the old continent between England and France and being coveted by New England merchants anxious to get their hands on the rich and expensive lands inhabited by Acadians. Acadia would repeatedly change hands to finally be transferred to England in 1713, when the Treaty of Utrecht was signed. That treaty, which formalized Acadia’s transfer, should have normally

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established that England’s deed was the result of a conquest whose legal impact was to establish in the colony English public law and the continuation of existing private law. However, England would consider Acadia an inhabited territory and would introduce in 1719 English law throughout, contrary to what it did when it conquered New France.

[5] However, the Treaty of Utrecht recognized certain rights for Acadians, including to “trade freely” with the French, “assert their rights, actions and objectives pursuant to the laws and statutes of each country,” have “liberty to remove themselves, within a year to any other place, as they shall think fit, together with all their moveable effects,” “remain subject to the Kingdom of Great Britain” and “enjoy the free exercise of their religion, according to the usage of the Church of Rome, as far as the laws of Great Britain do allow the same.”

[6] Those few rights recognized in the treaty would not be enough to prevent the English, between 1755 and 1760, from going ahead with the expulsion of Acadians. Faragher, an American historian, accurately described the deportation’s goal:

The question Lawrence put to the council was “by what means we could, with the greatest security and effect, rid ourselves of a set of people who would forever have been an obstruction to the intention of settling this colony?” The “only practicable measure,” he proposed, was “to divide them among the colonies, where they may be of some use, as most of them are healthy strong people. And as they cannot easily collect themselves together again, it will be out of their power to do any mischief.” They would be dispersed in fragmented groups throughout the British North American empire in a deliberate attempt to destroy them as a people.

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3 Ibid.
4 “Droits linguistiques et culturels des Acadiens”, supra on p. 388. Regarding the legal value of a peace treaty such as the one signed in Utrecht, also see pp. 389-92.
To justify the deportation, some have evoked the state’s right to ensure the security of its territory and its citizens. Those who have held this position argued that the deportation was necessary because, in the event of an attack by the French, Acadians would have taken up arms against the English. Colonel Edward Lloyd III, member of the Maryland Governor’s Council, disagreed with that opinion. He considered the expulsion a violation of the international conventions of the time, which called for the respect of certain ethical principles in the case of conquered land:

[7] Under what British law, international convention or ethical principle, asked Lloyd, was it justified to drive Acadians out of their homes, take their possessions and spread them out throughout the empire? If they were not prisoners of war, what were they? “We cannot conceive any other honourable way,” he concluded, “to take the freedom of people who are all free beings.”

[8] The deportation of Acadians was to cost thousands of lives and would result in years of suffering and wandering. Despite that horrible ordeal, many Acadians continued to live in the provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, and Quebec.

2. The return: 1755 to 1867

[9] Few texts focus on the period between 1755 and 1867. Yet despite the vagaries of history, Acadians would refuse to give up their language and culture during that period. Following the deportation, they would still have to face the arrival of several thousand loyalists who were fleeing the American Revolution and came to settle on the lands of former Acadia. Acadians would become a minority ignored by the ruling class in that new context. Anglophone historians of that era would lump Acadians together with Aboriginals. Historian Hugh Thorburn thus described Acadians:

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7 *Ibid*.
[The] deported Acadians re-established a community based upon the myth of their martyrdom... they have had to develop a rigorous folk myth in order to resist absorption. This myth has centered on the expulsion as the dramatic symbol of their martyrdom and their survival...⁹

[10] Somewhat in the same vein, W. Stewart MacNutt wrote that they were “permanently poor because of their improvidence, incapable of anything important because of their ignorance.”¹⁰ If Acadians lack education, as he said, it is probably because they were excluded from all teaching establishments.¹¹ In addition, a law passed in 1766 stated that no papist should think they are credible to the point of establishing a school in the province.¹² It implied that discrimination Acadians faced at the time did not just stem from their French language, but mostly from their Catholic religion. In addition, it was not until the 19th century that Catholic Acadians would be allowed to become public servants. Before that time, the test-oath—which denounced the Pope’s spiritual authority and recognized the British monarch as the only church leader—was required from all Catholic francophones who wished to be part of the public service. Therefore, Acadians, who were required to take that test-oath of allegiance found themselves excluded from those positions.

3. Acadians and the Confederation

[11] The Canadian Confederation was mostly the work of the governments of Upper and Lower Canada, but, as the maritime provinces had planned a meeting in Charlottetown in 1864 to discuss a potential merging of the provinces of New Brunswick, Nova Scotia and Prince Edward Island, the Canadian government decided to propose its confederation project at that meeting. New Brunswick and Nova Scotia decided to join the project along with Ontario and Quebec. However, the discussion surrounding the project generated a passionate response in New Brunswick and led to two referendums.¹³ At those two referendums, Acadians showed their disagreement with the project.

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⁹ Hugh Thorburn, Politics in New Brunswick, University of Toronto Press, 1961 on pp. 21-22.
¹⁰ W. S. MacNutt, New Brunswick, a History: 1784-1867, MacMillan of Canada, Toronto, 1984 [New Brunswick, a History].
¹¹ La politique et les Acadiens, supra note 86 on p. 244.
¹² Ibid.
¹³ La politique et les Acadiens, supra note 86 on p. 250.
[12] In 1865, then-Premier, Leonard Tilley, decided to ask the people of New Brunswick to give his government the mandate to negotiate the province’s entry into the new union. He would fail at that referendum. The defeat of the union project would be especially crushing in the province’s Acadian region. In 1866, New Brunswick’s population would be asked once again to vote on the issue of confederation and, this time, it supported the very same project it had rejected one year prior. However, Acadians remained strongly opposed to the Confederation, but they were alone in their opposition.

[13] Since Quebec had given its support to the Confederation project, it may have been expected that Acadians would do the same. But for Acadians, Quebec was a different country. The behaviour of New Brunswick’s Acadians at the time of Confederation what the manifestation of a will to assert their distinction from both the province’s anglophone community and Quebec, since they were a minority in their province and could not foresee receiving any special political status.

[14] It is difficult to draw any conclusions on the motives that led Acadians to oppose the Confederation project. However, it seems easy to establish certain parallels between that situation and the current one. To this day, Acadian identity is not defined in relation to Quebec. In addition, there is still a significant difference in the perception Acadians and the province’s anglophone community have in terms of their situation. Those differing perceptions are so deep that we sometimes wonder if they live in the same province.

4. Post-Confederation

[15] Acadians would quickly learn that Confederation gave them no protection either in terms of religion or language. When it came to religion, they thought they could count on section 93 of the Constitution Act of 1867. In addition to giving the provinces full jurisdiction over education, that section also protected religious education. That unique characteristic turned out to be significant, as, at the time of Confederation, language minorities thought that their right to an education in their language, which they strongly associated with the practice of Catholic religion, was protected by that provision. The inclusion of section 93 in the Constitution Act of 1867 also made New Brunswick’s francophone community believe that its education rights would be protected. However, that opinion was misguided. In 1871, the province’s Legislative Assembly adopted the

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Common School Act, and one of its objectives was to abolish religious education in new public schools. An attempt to legally challenge that act by invoking its incompatibility with the right recognized in section 93 of the Constitution Act of 1867 failed; the courts ruled that the section protected only the denominational education rights set out in the express legislative provisions previously adopted in the Confederation and that, since that was not the case in New Brunswick, the constitutional provision was of no recourse in the challenging of the act’s validity.

[16] The only provision of the Constitution Act of 1867 concerning language was section 133, which provided for the existence of the early stages of bilingualism at the federal level and in Quebec. That provision did not take into account Acadians from New Brunswick. However, on June 12, 1867, a petition signed by 173 Acadians was submitted in the Legislative Assembly by Robert Young, the member for Gloucester. It asked the Legislative Assembly of New Brunswick to publish its debates in English and French. Another petition was submitted calling for the government’s public notices to also be published in both languages. No further action was taken with respect to either petition. A resolution that had the same objective as the 1867 petition was submitted in 1874 by Théotime Blanchard, the member for Gloucester. It was also defeated.

[17] Although the Acadia of New Brunswick experienced a social and political renaissance of sorts in the years following the Confederation, it was only in the 1960s with the election of Louis J. Robichaud—the first Acadian to be elected Premier of New Brunswick—that the Acadian presence in the province received legal recognition.

5. The birth of language rights: 1960s and 1970s

[18] In the 1960s, the Confederation experienced another crisis that fueled tensions between the anglophone and francophone communities. The situation was not much better in New Brunswick. Even though Acadians accounted for a third of the population, they still had no right to speak their language within the provincial administration, be tried in French, manage their education system, or, in many cases, receive an education in French.

[19] The first true recognition of the official status of French in New Brunswick would come in 1969, when the first Official Languages Act was passed. The passing of that act was preceded by two fundamental steps by the government. On March 28, 1968,

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the Robichaud government submitted to the Legislative Assembly the resolution that the Assembly:

1. declares the principle that the English and French languages are the official languages of New Brunswick;

2. re-affirms that the English and French languages have full rights of usage in all the proceedings of this Assembly;

3. agrees that the Government take steps with appropriate speed to provide for the printing in both English and French of all records and proceedings of this Assembly, and of the provincial statutes and other public documents;

4. agrees that the Government introduce with appropriate speed such legislation as may be required to establish in New Brunswick the language regime appropriate to an officially bilingual Province, and in particular to introduce such measures in relation to Education, the public service, and the judicial system; and

5. recommends that the Government co-operate and consult with other provincial governments and with the Government of Canada to co-ordinate linguistic programs.16

[20] The resolution of March 1968 would be followed by the submission in the Legislative Assembly of the white paper titled Déclaration sur l’égalité des possibilités linguistiques au Nouveau-Brunswick.17 Finally, on April 18, 1969, the New Brunswick government passed the Official Languages of New Brunswick Act.

1. The recognition of constitutional rights: from 1980 to 1990

[21] The 1980s would be marked by the recognition of new language rights for New Brunswick Acadians. So, on July 16, 1980, on the last day of the Legislative Assembly’s session, Richard Hatfield’s government proposed a bill that would become the Act recognizing the equality of the two official linguistic communities in New Brunswick (Act recognizing the equality of the two communities). On July 17, 1981, the Act recognizing

the equality of the two communities\textsuperscript{18} was passed unanimously by the Legislative Assembly.

[22] Early 1980s were also marked by another major linguistic event—the adoption of the Canadian Charter of Rights and Freedoms. While the Charter would constitutionalize a number of traditional fundamental rights, it would also innovate while constitutionalizing language rights, for the first time since section 133 of the Constitution Act of 1867 and section 23 of the Manitoba Act, 1870, were passed. Sections 16 to 20 and section 23 of the Charter recognizing the rights applicable to the federal government and, concerning the right to education, to all provinces and territories. New Brunswick would also be a pioneer as the only province agreeing to be linked constitutionally to sections 16 to 20.

[23] From 1986 to 1993, Canada would participate in a constitutional debate to get Quebec to adhere to the Constitution Act of 1982. The debate would culminate in the signing of the Constitutional Agreement of June 3, 1987, commonly known as the Meech Lake Accord. During the Meech Lake Accord debate, the Acadian civil society would call for the constitutionalization of the principles in the Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick. Although politicians were initially opposed to that request, they would end up agreeing to it due to pressure from the francophone community. Owing to a lack of support from certain provinces, the accord would never be ratified, and, on June 23, 1990, its defeat would be confirmed.

[24] The failure of the Meech Lake constitutional conference would not, however, put an end to the federal government’s attempts to find a solution to the dilemma posed by Quebec’s refusal to support the Constitution Act of 1982. Following further negotiations, premiers reached a new accord in 1992: the Charlottetown Accord, which took up many of the themes covered in the Meech Lake Accord, in addition to addressing the concerns of certain provinces.

[25] Concerning New Brunswick, a provision to include the principles of the Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick was part of that accord. The Charlottetown Accord would be put to a Canada-wide referendum. Nationally, 54.3% of voters would oppose it, and it would, therefore, be defeated. In New Brunswick, the electorate voted yes at a rate of over 62%. Ridings

\textsuperscript{18} Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, RSN-B 2011, c 198.
with a high concentration of francophones give it very favourable support, while the results were tighter in anglophone ridings, with a slight advantage for the no side.

[26] With this support, the Government of New Brunswick used section 43 of the Constitution Act of 1982, to add section 16.1 to the Charter. Here is the text of the section:

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

16.1 (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.

(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.

(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.

[27] In legal terms, it would take a few years for the Supreme Court of Canada to overturn the restrictive interpretation of the 1986 trilogy and to advocate a more generous interpretation of language rights. In New Brunswick, this new approach to the interpretation of language rights would be met with hope by linguistic equality advocates. It would help the francophone linguistic community acquire judicial channels to ensure the respect of its rights. The next step would consist in a complete overhaul of the OLA of 1969, which in many regards no longer met the province's constitutional obligations. On June 7, 2002, the new act, more in line with the province’s constitutional obligations, was unanimously passed by the Legislative Assembly of New Brunswick.

[28] Concerning public education in French in the province of New Brunswick, it should be noted that, in the early 20th century, that education was provided entirely in
English starting in 4th grade. Any public education in French that did exist built on and was inspired by English textbooks. In addition, there was a flagrant imbalance between the financial conditions of public education in francophone regions and the financial situation of schools in anglophone regions.

[29] In 1963, the Report of the Royal Commission on Finances and Municipal Taxation of New Brunswick issued a number of recommendations on the education system’s administration. From 1965 to 1967, the provincial government addressed those recommendations through the Equal Opportunity Program. Following that reform, the province adopted a centralized education system. The biggest change came from the restructuring of the province’s school districts, whose numbers went from 422 to 33.

[30] In 1964, two deputy ministers—one francophone and the other one anglophone—were appointed to the Department of Education. The francophone minority also started calling for linguistically homogenous schools and school districts. The victory would be gained in small steps and through vocal demands. Those demands forced the government to create study committees. For example, in 1973, the study committee on education planning in New Brunswick proposed the merging of certain school districts, the development of provisions to create unilingual districts, where the population demanded it, and the election of all commissioners. In 1974, an internal study led to the reorganization of the Department of Education into three divisions: administration and finance, francophone education services, and anglophone education services. In 1979, the Report of the Committee on the Organization and Boundaries of School Districts in New Brunswick proposed the implementation of two parallel and linguistically homogenous school networks. Therefore, New Brunswick accepted the principle of duality as a foundation of its education system’s organization. The passing of section 23 of the Charter in 1982 constitutionally confirmed the legitimacy of this process.

2. Conclusion of the historical overview

[31] This historical overview is used to demonstrate New Brunswick’s special linguistic place in Canada. The recognition of those rights is largely due to the perseverance and determination of the francophone community. However, we must recognize that the implementation of those rights is still facing numerous difficulties, and the community must remain vigilant to avoid any setbacks. We believe that the federal government could play a significant role in that area. That is why we would like to recommend a few amendments to the Official Languages Act.
B. Recommended amendments to the Official Languages Act

3. Recognizing New Brunswick’s linguistic specificity

[32] As we have just shown, New Brunswick has a special linguistic place in Canada. The province decided in its language planning to reject the approach based on “territory” or on the nebulous concept of “significant demand.” It rather chose an approach based on the “individual.”

[33] According to the territory-based approach, the use of a language is closely related to the concentration of its speakers in a given geographic region. Therefore, services would be provided in the citizen’s language only in one or several defined regions and nowhere else. Consequently, the territorial approach promotes unilingualism within a specific area. It originated with the phenomenon whereby speakers of the same language tend to live close to each other, which should normally make state borders overlap with linguistic borders. So, people living in the same area should usually speak the same language, and those who settle there would have to use the dominant language of the area in the public space, with the use of any other language being limited to the private space. That is somewhat the approach of Canada's Official Languages Act, which limits the right to use both official languages through elements like the concept of “significant demand.”

[34] The approach inspired by the second notion rather focuses on the possibility for a minority language to be used in an area where another language is used by the majority. In theory, the individual is no longer limited in the use of their language by a given geographic area, but can use their right everywhere, without any territorial restrictions. That is the solution New Brunswick adopted.

[35] The issue of discrepancy between the federal approach and New Brunswick’s approach was flagrant in Société des Acadiens et Acadiennes du Nouveau-Brunswick and Paulin v. Canada. In that case, the Supreme Court of Canada was supposed to decide whether RCMP officers, when acting as New Brunswick’s provincial police, have to respect the most extensive linguistic obligations imposed on New Brunswick.

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19 Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada, 2008 SCC 15, [2008] 1 S.C.R. 383 [Paulin]. In this case, we prefer to use the name of the complainant, Marie-Claire Paulin, as she is the one who initiated the lawsuit.
institutions by subsection 20(2) of the Charter or the more limited obligations imposed on the federal government in subsection 20(1). In fact, in New Brunswick’s unique situation, if the federal provision was applied, the members of the minority francophone community would be denied a right they would have if the service was provided by a provincial institution.

[36] According to the Supreme Court of Canada, even when acting as the provincial police, there is no doubt that the RCMP remains a federal institution at all times. However, the court made sure to say that the fact that, in light of its nature and by virtue of its constitution, the RCMP is and remains a federal institution does not answer the question before the court. In the specific case raised in Paulin, there is no transfer of responsibility from the province to the federal institution. Under the agreement between the RCMP and New Brunswick, the province’s Minister of Justice is responsible for setting the objectives, priorities and goals of the provincial police service.

[37] In that relationship, New Brunswick retains control over policing activities, and the RCMP remains responsible for its internal management. The Supreme Court of Canada concluded that the New Brunswick Minister of Justice, as the provincial institution representative, discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation. The provision of those services must, therefore, under the circumstances, be consistent with the obligations arising under subsection 20(2) of the Charter and not the more limiting obligations that apply to federal institutions set out in subsection 20(1). Therefore, in New Brunswick, the RCMP is supposed to provide services in both official languages throughout the province and not only in the regions where those services are subject to significant demand, as set out in subsection 20(1) of the Charter.

[38] That being said, we find it incongruous that federal institutions in New Brunswick are failing to respect the province’s unique character by providing services in both official languages throughout the province. That is why we are asking that this uniqueness be recognized either in the Official Languages Act or in the Official Languages “Communications with and Services to the Public” Regulations, SOR/92-48.

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20 Ibid to para. 14. Also see Doucet v. Canada, 2004 FC 1444, [2005] 1 RCF 671. This conclusion is important, as it prevents the RCMP, as a federal institution, from avoiding the linguistic responsibilities arising under subsection 20(1) of the Charter or the Federal Official Languages Act in the exercise of the role of provincial police service in a province with few or no linguistic obligations.

21 Paulin, supra note 186 in para. 15.

22 Ibid to para. 16. Also see Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 [2001] FCJ No. 431 (QL).
In other words, we are asking that, for the purposes of applying Canada’s *Official Languages Act*, the entire province be recognized as a region with a significant demand and that all federal institutions operating in the province be expected to provide services in both official languages.

4. Asserting the federal government’s role in education for official language minorities

The courts have played a key role in the interpretation of section 23 of the *Canadian Charter of Rights and Freedoms* and in the rights to an education in the official language minority’s language. We now have French language schools and school boards in all the provinces and territories thanks in large part to the interpretation the courts, and especially the Supreme Court of Canada, have given to section 23. However, we argue that the courts are not the only guardians of constitutional rights. Governments and legislatures, including the federal Parliament, are also responsible for ensuring the respect of those rights, especially concerning education in the official language minority’s language. When it comes to the federal government, we argue that this also carries a positive duty to act to ensure that the full potential of section 23 can be realized.

In that sense, it is important for the federal government to know the needs of francophone minority communities and to consider their priorities to help realize the full potential of section 23. As a key player in the protection of official language minorities, the federal government must take the necessary steps to ensure the respect of the constitutional right of Acadian and francophone communities in education.

We are aware that most of the programs for supporting education in minority settings already existed before part VII of the *Official Languages Act* was adopted. However, it must be ensured that those programs are in line with the situation and the needs of minority communities, and that the money provided by those programs is indeed used for what it was allocated for.

In such a context, the federal government’s implementation of constitutional and quasi-constitutional (*Official Languages Act*) obligations seems essential to us to ensure compliance with section 23 of the *Charter* and ensure that its full potential is realized. We feel that failure to take action in that respect would have serious consequences on the development and enhancement of Canada’s duality, and on the progression toward true equality for minority Acadian and francophone communities.
That is why we are asking the federal government to ensure:

- That part VII of the *Official Languages Act* clearly reflect the federal government’s commitment to promoting and supporting the development of education in the minority’s language in compliance with the obligations recognized in section 23.
- That this commitment be based on the right to an education throughout life—in other words, from preschool to post-secondary education.
- That the government require that priorities for official languages programs in education be developed after consultation with minority communities.
- That provincial governments be required to report on the money allocated for those purposes to ensure that it is being used for what it was intended for.

**Conclusion**

Clearly, we could talk about a number of other amendments, including the one proposing the creation of a Canadian tribunal on language rights, based on the Canadian Human Rights Tribunal. However, we will leave those issues to be covered in briefs submitted by other experts and organizations of Canada’s Acadian and francophone civil society.

Thank you for your attention.