

## **Official Languages Act Review Submission**

*Submitted on Behalf of the New Brunswick Association of Nursing Homes on August 31, 2021*

### **Introduction**

In their brief, the Office of the Commissioner of Official Languages for New Brunswick includes a quote from the Supreme Court of Canada in *R. v Beaulac*, [1999] 1 S.C.R. 768, which is also quite fitting for this submission. It reads:

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

Nursing Homes in New Brunswick are more than just long-term care facilities. They are the home of its residents and a hub of activity within the greater community it serves. They are a cultural institution of their community, founded by its community members, religious organizations, or community and service organizations. Nursing Home residents and their community members experience more than just their linguistic presence in the nursing home. They are enriched by the culture and identity attached to the language of their community in all aspects of life at the nursing home. It is with this cultural significance of nursing homes in mind that this submission is made.

### **Who we are**

The New Brunswick Association of Nursing Homes is an entity created by nursing homes across the province in 1972 for the purpose of representation. The main objectives of the Association are to promote a high standard of care and efficiency in nursing homes, to provide an opportunity for consultation and to take united action on all matters of common interest and concern to the Association.

This group was originally comprised of 9 nursing homes and has since grown to include every licensed nursing home in the province, both francophone and anglophone. Today the New Brunswick Association of Nursing Homes continues to provide advocacy and a broad range of services to nursing homes (both not for profit and private) as their chosen representative.

## **Section 1: History of Nursing Homes in New Brunswick**

Nursing homes have been providing care to the elderly and vulnerable members of their communities in New Brunswick for generations. Being creatures of their communities, nursing homes have a distinct use of either English or French which is reflective of the community of interest they serve. This linguistic usage stems from their varied origins with most being founded by either religious groups, community members, or service organizations.

At the time of Confederation, religious institutions were providing care for the “poor, destitute and the disabled”. Over the course of many years, care provided to the “poor, the destitute and the disabled” would transition to caring for the elderly. With the passage of time, religious institutions and community based organizations would also convey their property rights and the mandate for providing care to the elderly to their respective communities and volunteer organizations. This tradition continues today.

Nursing homes in New Brunswick were never created by an Act of the Legislature. Nursing home ownership has never belonged to the Province. This is evident by the fact that non-profit nursing homes in New Brunswick are private organizations incorporated under the *Companies Act*. These nursing homes are governed by volunteer boards ranging from 10-15 people representing the demographic and geographical area. They are creatures founded and owned by their respective communities, and as such embody the language and culture of that community.

## **Section 2: Application of 16.1 to Nursing Homes as Distinct Institutions**

### *Distinct Cultural Institutions and Section 16.1 of the Canadian Charter of Rights and Freedoms*

The language rights regime of New Brunswick is founded on two distinct rights: the right to receive services in the language of choice and the right to distinct English and French educational and cultural institutions as are necessary for their protection and promotion. The highlight of New Brunswick’s distinctive linguistic situation is enshrined in section 16.1 of the *Canadian Charter of Rights and Freedoms*, a provision enacted in 1993 which applies uniquely to New Brunswick. Following this, the *Official Languages Act* was adopted by the Province in 2002 to provide a roadmap for the implementation of these *Charter* rights conferred on New Brunswickers.

Section 16.1 of the *Charter* reads as follows:

*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 these communities.*

*16.1(2) The role of the legislature and the government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.*

This section of the *Charter* is more than a declaration of principle. It entrenches guaranteed rights which are to be interpreted in a purposeful and effective way consistent with the preservation and development of the linguistic communities it protects.

#### *Applicability of Section 16.1 of the Charter to Nursing Homes*

As stated above, non profit nursing homes in New Brunswick are private entities incorporated under the *Companies Act*. These organizations are governed by a volunteer board comprised of 10-15 community members. Nursing homes are subject to the *Nursing Homes Act* which imposes regulations and standards designed to protect the individual residents of nursing homes as is the Province's responsibility to ensure. This *Act* does not confer upon the Province a right of management and control of the nursing homes – the right management and control of the nursing homes rests with their board of directors and staff, and by extension their community. This is an important distinction for the purposes of establishing non profit nursing homes as distinct cultural institutions of their respective linguistic community.

The right of management and control of nursing homes is further evidenced by facts surrounding their history and operations. A clear illustration of this principle is the flow of financing for these nursing homes. Funding attached to long term care is often thought to flow directly from the Province of New Brunswick to the long term care facility providing care to a resident. This is not the case. Nursing home operations are not subsidised by the Government. Rather, residents are subsidised by the Government for long term care services. Again, this distinction is key in determining the right of management and control of a distinct cultural institution.

Financing of major assets and real estate is another example of the nursing homes' independence from the Province and an exercise of management and control. Any loan obtained to finance infrastructure is directly obtained by the nursing home through a private financial institution. Title to these assets are retained by the nursing home during this process.

On a more visible note, another example of the exercise of management and control is the expansion of the nursing home in the community through self-generated projects. Many non profit nursing homes have expanded into corollary services, such as meals on wheels programs, building and maintaining seniors apartments and special care homes, operating adult and child day cares, and launching special initiatives such as "nursing home without walls". These are also wonderful examples of how nursing homes act as distinct cultural institutions of their communities by seeking opportunities to expand their role of helping seniors and other members of their community in new and innovative ways. Further to expanding their services, they are also partners in other community endeavours by offering educational

partnership with local schools and colleges, and offering space and resources to other local non profits groups and organizations.

Another key element to demonstrate that an entity is a “distinct cultural institution” is how the cultural of the linguistic group is present in the particular institution. Nursing homes across the province demonstrate perfectly how this is done. Nursing homes are not comparable to institutions like hospitals or municipalities as it relates to language and culture – we must not forget that nursing homes are not institutions but rather a place where residents live and communities flourish. This is evidenced by examining the unique aspects of each non profit nursing home in the province.

As demonstrable evidence of management and control is each nursing home’s ability to tailor its facility and activities to be uniquely representative of the community it serves. Each nursing home has particular physical features, foods, cultural entertainment, etc which is fundamentally a manifestation of the cultural of the linguistic group it serves. For it is not sufficient to speak the language of a resident to fulfil their needs as identified in the *Charter*; rather the resident must be surrounded in the culture of the linguistic group they identify with. This is not the same in every community which shares a language. For example, a nursing home in the north west of the province which serves francophone residents will often be serving their residents “poyes”, while a nursing home in the Acadian peninsula which also serves francophone residents may instead often serve their residents “poutine rapé”. While both nursing homes serve francophone residents, the manifestation of the linguistic group differs, which is a manifestation of *culture*, not merely language. The ability of nursing homes to cater beyond linguistic need by also offering and ensuring cultural needs is exemplary of their status as a distinct cultural institution of their community.

From a contrasting lens, we can identify a nursing home as being a distinct cultural institution of the community by looking at the involvement of the community within the nursing home. Non profit nursing homes are able to offer their services and enrichment to resident life in part by services offered by local volunteers and community groups. These volunteers assist residents with activities of daily living, entertainment, and companionship. Local community groups even sometimes host events for the residents and communities in the nursing home to provide activities, entertainment, and even fundraising to improve quality of life. It can be said that nursing homes have a symbiotic relationship with their communities.

#### *Recognizing Nursing Homes as Distinct Cultural Institutions per Section 16.1 of the Charter*

It cannot be repeated enough that both francophone and anglophone non profit nursing homes belong to their respective community. Some have been in existence for over a hundred years. They are incorporated under the *Companies Act* and as required by incorporation have had their own board of directors comprised of all volunteer community members. To ensure a united voice and the provision of

excellence in care, in 1972 they created the *New Brunswick Association of Nursing Homes* to represent their interests. They were not created by legislation and do not belong to the Province. They are not operated, managed, or governed by the Province. Finally, they are an extension of their community of interest and provide not only care but a home where the elderly live out their lives. Nursing Homes are on the high end of the scale of cultural representation. It is clear that nursing homes are indeed distinct cultural institutions as per section 16.1 of the Charter.

In acknowledging that non profit nursing homes are distinct cultural institutions of their communities as envisioned in section 16.1 of the *Charter*, the corresponding protections associated with this status must be considered. Non profit nursing homes are to be respected and protected as distinct cultural institutions. Anything less would be an erosion of the rights of the affected linguistic group represented by the nursing home. As such, it is imperative that any modification to the *Official Languages Act* consider and uphold these *Charter* rights.

It is essential that the nursing home's status as a distinct cultural institution is a primordial consideration in any aspect of the *Official Languages Act* which concerns the institution. It is also essential that further clarity and protection of the distinct cultural institution is explored in the review of the *Official Languages Act*. The current regime does not expressly consider the status of nursing homes as a distinct cultural institution. Without proper consideration, erosion of rights gained under this status can occur, such as imposing obligations designed for third parties of government on nursing homes without consideration for this unique situation.

#### *Section 30 of the Official Languages Act: Services Provided by Third Parties*

As currently defined and obligated, "third parties" of government, as defined in section 30 of the *Official Languages Act*, are incompatible with the status of distinct cultural institution as per section 16.1 of the *Charter*. Third parties of the government have linguistic obligations as outlined in sections 27 through 29 of the *Official Languages Act*:

##### **Communications with government and its institutions**

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.*

##### **Obligations of institutions**

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.*

28.1 *An institution shall ensure that appropriate measures are taken to make it known to members of the public that its services are available in the official language of their choice.*

### **Posting of signs and publications intended for the public**

29 *Institutions shall publish all postings, publications and documents intended for the general public in both official languages.*

### **Services provided by third parties**

30 *When the Province or an institution engages a third party to provide a service on its behalf, the Province or the institution, as the case may be, is responsible for ensuring that its obligations under sections 27 to 29 are met by the third party.*

The imposition of third party status onto non profit nursing homes would require them to provide bilingual services to any member of the public. This is problematic for many reasons:

- It erodes the linguistic and cultural identity of the nursing home as a distinct cultural institution. This dilutes the uniqueness of its community and jeopardizes its very health and survival.
- It erodes the right of management and control of the distinct cultural institution by placing restrictions and obligations on the hiring of personnel
- It ignores that nursing homes serves its residents and not just any member of the public
- It would negatively impact the community by significantly impairing local employment

Fundamentally, imposing the standards of a third party and obligation of “bilingual” nursing homes is not sufficient to ensure the protection and survival of the linguistic community as envisioned and protected by the *Charter*. Only the continuation of the current nursing home structure will ensure such protection.

The finding that nursing homes are third parties of government within the definition of section 30 of the *Official Languages Act* does not displace the status of non profits nursing homes as distinct linguistic and cultural institutions of their respective communities. This calls for tailored obligations which protects that status.

In their brief concerning the review of the New Brunswick *Official Languages Act*, the Office of the Commissioner of Official Languages for New Brunswick recommends a proposed modification which would apply uniquely to nursing homes (page 23):

#### **PROPOSED MODIFICATION**

#### **NEW BRUNSWICK OFFICIAL LANGUAGES ACT**

##### *Nursing Homes*

*It is the responsibility of the province to ensure that there are, at all times, in all health regions of New Brunswick, nursing homes capable of serving the public in either official language.*

*The Lieutenant-Governor in Council may make regulations for the administration of this section.*

This recommendation is compatible with the rights of non profit nursing homes as distinct cultural institutions. It strikes a balance between maintaining the distinct cultural institution's rights and the Province's obligation to ensure that the needs of linguistic communities and nursing home residents are met.

However, this recommendation is merely one part of the equation in respecting the rights of non profit nursing homes as distinct cultural institutions. There must be provision for the unique nature of nursing homes identified as third parties while holding the status of a distinct cultural institution as per 16.1 of the *Charter*. There currently is no provision for an institution of this nature in the *Official Language Act* and this gap must be addressed to ensure that the rights of the nursing homes as distinct cultural institutions are protected.

### **Section 3: Interpretation and Standards**

Should the Province choose to go in the direction of qualifying non profit nursing homes as third parties of government as per the *Act* rather than identifying them as distinct cultural institutions of their communities, a subsidiary issue arises relating to the standards found in the linguistic obligation imposed on the nursing homes. The *Official Languages Act* does not clearly define the standard imposed on third parties subject to section 30 in terms of defining bilingualism in service, nor does it consider how this could be applied in a nursing home context.

It is important to note that unlike many entities which would be subject to section 27 through 29 of the *Official Languages Act*, nursing homes do not exist to serve the public. On the contrary, nursing homes exist to serve their respective residents. It would follow that if we were to accept that nursing homes were subject to third party linguistic obligations that sections 27 through 29 do not adequately accomplish their intended purpose, and we must explore what should be accomplished by imposing linguistic obligations.

To do this, the *Official Languages Act* must answer the following two questions:

1. What is the linguistic standard in service to achieve?
2. Whom is entitled to benefit from this standard?

The first question can be simplified by answering "what is bilingualism?". Currently, this is undefined in the *Act*. For an institution to meet its obligations, it must know precisely what the obligation is. Is it that every employee in the nursing home must be able to serve in both official languages? Is it that there must be an employee in each department or classification that can serve in the other official language? Must all management be bilingual? Is it that at least one person in the building must be available to

serve in the other official language, or that one member of the entire organization can do so? This is further complicated by the practical realities many corners of our province encounter. To illustrate, it would not be realistic to expect that every employee working at a nursing home in Campobello would be bilingual. In fact, this standard would be difficult to reach anywhere in the province.

The second question is also important to consider – whom is entitled to benefit from the linguistic obligations imposed on nursing homes? As mentioned, nursing homes serves its residents, not the general public. One could possibly extend this service to the residents’ families. In many parts of this province, extending this obligation to the public rather than just residents and their families could produce a different outcome. Going back to Campobello where there are no francophone residents today, it would follow that they would currently meet its linguistic obligations under the Act despite possibly having no “bilingual” staff.

To impose any linguistic obligations on nursing homes by identifying them as third parties per section 30, these two questions must be answered in the scheme of the *Official Languages Act*.

#### **Section 4: Recommendations for the Official Languages Act**

In conclusion, the New Brunswick Association of Nursing Homes submits the following recommendations to be considered during the review of the *Official Languages Act*:

1. Any modification to the Act which touches on nursing homes must respect their status as a distinct cultural institution per section 16.1 of the *Charter* and their corresponding rights.
2. Further, that nursing homes are clearly identified as distinct cultural institutions of their communities and not third parties of government as identified by section 30 of the *Official Languages Act*
3. The linguistic and cultural identity of the nursing homes must be protected and the existence of a positive obligation to protect these distinct cultural institutions must be recognized.
4. The management and control of the nursing homes must remain with its linguistic community it serves.
5. Should nursing homes not be recognized as distinct cultural institutions of their communities in the *Act*, and instead be identified as third parties under section 30, that the linguistic obligations imposed must be clearly defined in light of their unique situation and the residents they serve.



Further, we request standing to make oral submissions to the commissioners to make our opinion and recommendations known for the review of the Official Languages Act.

All of this being respectfully submitted,



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Interim Executive Director