

# A SOCIETAL PROJECT

**Proposals from the Acadian and Francophone community for establishing a French-language school system in New Brunswick that is democratic, accountable, stable and innovative and complies with subsection 16.1(1) and section 23 of the *Canadian Charter of Rights and Freedoms***

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**Francophone Nord-Est District Education Council  
Francophone Nord-Ouest District Education Council  
Francophone Sud District Education Council  
Fédération des conseils d'éducation du Nouveau-Brunswick  
Fédération des jeunes francophones du Nouveau-Brunswick  
Association francophone des parents du Nouveau-Brunswick  
Société de l'Acadie du Nouveau-Brunswick  
Association francophone des municipalités du Nouveau-Brunswick  
Association des enseignantes et des enseignants francophones du Nouveau-Brunswick  
Association acadienne des artistes professionnel.le.s du Nouveau-Brunswick  
Conseil pour le développement de l'alphabétisme et des compétences des adultes du Nouveau-Brunswick  
Conseil provincial des sociétés culturelles  
Association francophone des garderies éducatives du Nouveau-Brunswick  
Association des monitrices et des moniteurs à la vie scolaire du N.-B.**

**October 9, 2022**

*This report sets out general principles and broad lines. The signatories cannot foresee how this report would be interpreted in the context of legislative reform. Consequently, this report should not be cited to support unconstitutional aspects of school governance reform. In particular, although the Francophone New Brunswick district education councils have approved this document, it shall not be binding upon them.*

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## ABBREVIATIONS

AFC: Acadian and Francophone community

AFPNB: Association francophone des parents du Nouveau-Brunswick

DEC: District education council

EECD: Department of Education and Early Childhood Development

FJFNB: Fédération des jeunes francophones du Nouveau-Brunswick

JWG: Joint working group

LCDP: Linguistic and Cultural Development Policy

PCMM: Provincial co-management mechanism (DECs and other AFC organizations)

PPCCM: Permanent provincial co-construction mechanism (EECD/Acadie)

PSSC: Parent school support committee

## RECOMMENDATIONS

### Component 1: A school system that complies with subsection 16.1(1) and section 23 of the Charter

- 1.1 The French-language school system must respect the letter and spirit of subsection 16.1(1) and section 23 of the *Canadian Charter of Rights and Freedoms*
- 1.2 Acadie must have independent educational institutions in order to exercise its exclusive powers in education
- 1.3 The government must decentralize exclusive management powers to the DECs
- 1.4 EECD must undertake effective consultations with organizations and school institutions in the AFC before making important decisions having potential impact on its language and culture

### Component 2: A democratic school system

- 2.1 EECD and the DECs must undertake regular “effective consultations”
- 2.2 The DECs must expand and promote democratic participation in the district among parents, youth and the community, particularly by voting and running for positions
- 2.3 EECD and the DECs must expand and promote democratic participation in PSSCs among parents, youth and the community, particularly by voting and running for positions
- 2.4 The DECs must establish a student council at each high school and assign it a broader role that includes having a voice concerning issues related to students’ learning and overall educational experience

### Component 3: An accountable school system

- 3.1 The DECs must clearly communicate their plans and outcomes to parents, youth and the community
- 3.2 Each school administration must clearly communicate the school’s plans and outcomes to parents, youth and the community
- 3.3 EECD must equip stakeholders with effective accountability mechanisms

### Component 4: A stable, innovative school system

- 4.1 Any significant changes proposed to the French-language education system must be evidence and practice-based, that is, backed up by refereed or applied research and subjected to strict scrutiny
- 4.2 The institutional arrangements in place must protect the stability of the system

### Component 5: Collaboration mechanisms

- 5.1 A provincial (EECD/Acadie) co-construction mechanism must be established
- 5.2 The DECs must establish a provincial co-management mechanism for programs

## INTRODUCTION

This report sets out proposals from the signatory organizations for improving the French-language school system in New Brunswick to meet the expectations of students, their parents and the Acadian and Francophone communities (AFCs) that rely on it. Developed in accordance with the principles and fundamentals founded on the case law associated with section 23 of the *Canadian Charter of Rights and Freedoms*, they also relate to the democracy, stability and accountability of the school system. In this manner, they follow the recommendations of the joint working group (JWG) arising out of a retreat focused on education in Acadie in New Brunswick held in Miramichi on April 23 and 24, 2022. At this event, 34 delegates from 10 Acadian organizations carried out a comprehensive assessment of the current school management system in Acadie in New Brunswick against the system promised under section 23 of the *Canadian Charter of Rights and Freedoms* and the related case law. It identified a number of shortcomings, leading to the submission of a brief to the Department of Education and Early Childhood Development (EECD) on May 31, 2022, by seven Acadian organizations and institutions. EECD, for its part, invited these organizations to join it in improving French-language school governance based on documents including the Auditor General's report published in 2018<sup>1</sup> and the green paper published in 2019.<sup>2</sup> This report accepts the vast majority of the JWG's report but adds a number of points raised at the summit on education in Acadie held in Dieppe on October 5, 2022.

To more effectively grasp the proposals set out herein, it is important to have a good understanding of the case law related to section 23 and the particularities of the French-language school system. The rest of the report presents proposals related to the topics addressed in the JWG's report: compliance with subsection 16.1(1) and section 23 of the Charter, system democracy, accountability and stability, and two permanent provincial collaboration mechanisms for use by the partners.

## SUBSECTION 16.1(1) AND SECTION 23 OF THE CHARTER AND RELATED CASE LAW

It is impossible to discuss French-language schools or school governance in New Brunswick without considering sections 16.1 and 23. Consequently, it is important to devote the first part of this report to a description of the significance of these constitutional provisions in the context of the present reform of school governance in New Brunswick.

### Section 23

A major oversight at the time of Confederation in 1867, minority language instruction has figured prominently as part of language rights in Canada since 1982. However, it should not be inferred that the importance of this right was not recognized until that year. As early as in 1968, the Royal Commission on Bilingualism and Biculturalism (Laurendeau-Dunton Commission) held as follows:

Minorities, whether French or English, inevitably give priority to their own language. If the majority language is the sole language of instruction in the provincial schools, the survival of the minority as a linguistic group is menaced. Almost by definition a minority is exposed to a social environment in which the majority language is always present. The school must counterbalance this environment and must give priority to the minority language if the mother

tongue is to become an adequate instrument of communication. Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture.<sup>3</sup>

The Commission added:

For a minority group, equal partnership means the possibility of preserving its linguistic and cultural identity. Living in a milieu where the other language and the other cultural group are omnipresent, those in the minority face serious difficulties in retaining the vocabulary, the ease of expression, and the modes of thought of their own tongue. These difficulties are compounded for their children, who are often exposed to the majority language from the time they are able to play outside. The gradual loss of the mother tongue is inevitable without some institution to give formal instruction in the language and to enhance its prestige by according it some social recognition. At the same time, minority language schools can adapt the curriculum to stress the cultural heritage of the minority group. The importance of such schools can scarcely be exaggerated, and it is not surprising that both official-language minorities have been deeply concerned about the establishment of minority language schools.<sup>4</sup>

However, it was not until the Charter was adopted in 1982 that the constitutional right to instruction in the minority language was finally recognized. With respect to language, in sections 16 through 23, the Charter sets out a series of provisions addressing achievement of the equality of the two official languages at both the federal and provincial (New Brunswick) levels. However, section 23 is the sole provision that applies to all provinces and territories. The Supreme Court of Canada has characterized it as the “cornerstone of Canada’s commitment to the values of bilingualism and biculturalism,”<sup>5</sup> confirming the importance placed on it when it comes to seeking linguistic equality in our country. In *Mabé v. Alberta*, relying on the Laurendeau-Dunton Commission’s report,<sup>6</sup> the Court added, “These schools are essential for the development of both official languages and cultures;...the aim must be to provide for members of the minority an education appropriate to their linguistic and cultural identity...”<sup>7</sup> School is very often the only milieu for socialization in the minority language and, accordingly, takes on a role surpassing its conventional mandate or the responsibilities assigned to it in the Anglophone majority linguistic community.<sup>8</sup>

In *Solski*, the Supreme Court of Canada explained the reasons leading to the adoption of section 23:

The current wording of s. 23 undoubtedly reflects the difficulties encountered in the discussions and negotiations that led up to the patriation of the Canadian Constitution in 1982. In formulating those constitutional rights, the framers could not turn a deaf ear to the recognition sought by Francophones outside Quebec for substantive equality in education. It was also impossible to ignore the concern felt by Quebec’s Anglophone minority as a result of the language disputes arising out of the “Quiet Revolution”, which had culminated in the enactment of the [Charter of the French Language]. Finally, the anxiety of a significant segment of Quebec Francophones about the future of their language was a known fact, if only because of the upheavals it had caused in Canadian politics, and even more so in Quebec politics.

Section 23 provides a comprehensive code for minority language educational rights and accords special status to Anglophone minority language communities in Quebec and Francophone minority language communities in the rest of Canada.<sup>9</sup> The Supreme Court of Canada also recognized that this special status creates inequalities by granting Anglophones in Quebec and Francophones in the other territories and provinces rights denied to other linguistic groups in Canada.<sup>10</sup> It added that this section illustrates the case of a means supporting achievement of substantive equality in the particular context of minority language communities.<sup>11</sup>

Section 23 consequently recognizes the right of parents belonging to an official language minority in the province or territory in which they reside to have their children receive primary and secondary school instruction in the same language. However, this right is guaranteed only where “the number of those children so warrants.” If the number so warrants, this right to instruction also includes the right to “minority language educational facilities.” To exercise this right, parents must prove that they belong to one of the three categories of rights holders provided in that section. The first includes persons whose first language learned and still understood is that of the French or English linguistic minority of the province or territory. The second is parents who have received their primary instruction in Canada in the minority language of the province or territory in which they reside. The third, provided in subsection 23(2) of the Charter, depends on the child’s language of instruction.

This constitutional right gives rise to a series of obligations explored below. However, to grasp clearly the nature of section 23, it is necessary to focus first on the principles according to which it should be interpreted.

**a. Principles of interpretation of section 23**

The common thread in the case law concerning the interpretation of section 23 emerges clearly: oversight by official language minority communities of the management of their school system and determination of their needs with a view to providing their students with high-quality instruction in their language. This section has given rise to numerous legal challenges. Since its adoption, the Supreme Court of Canada has been called upon multiple times to express an opinion in its regard, not to mention the many decisions rendered by provincial and territorial courts. In the case of New Brunswick, however, an initial observation stands out: among all these decisions, only one, *Société des Acadiens du Nouveau-Brunswick Inc. et l’Association des conseillers scolaires francophones du Nouveau-Brunswick v. Minority Language School Board No. 50*, rendered in 1983 by the Court of Queen’s Bench and confirmed by the Court of Appeal in 1988, invokes section 23.<sup>12</sup> Does this mean that section 23 is not necessary here? As the following analysis shows, the answer to this question is clearly no. It is true that given the context, disputes concerning section 23 are less necessary here than in other provinces. That said, it must be acknowledged that in some cases, opportunities to enforce compliance with section 23 rights have been missed and that the consequences continue to be felt today.

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. As the Supreme Court of Canada has stated, “[L]anguage bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.”<sup>13</sup> This is consequently the manner in which section 23 rights must be considered. In *Mahé*, the Supreme Court of Canada explained the provision’s purpose:

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

In *Solski*, it added:

The very presence of s. 23 in the *Canadian Charter* attests to the recognition, in our country's Constitution, of the essential role played by the two official languages in the formation of Canada and in the country's contemporary life... It also confirms that the need and desire to ensure that language communities continue to exist and develop represented one of the primary objectives of the language rights scheme that has gradually been implemented in Canada. Although the process of recognizing and defining those rights has at times been marked by difficulties and conflicts, some of which are still before the courts today, the presence of two distinct language communities in Canada and the desire to reserve an important place for them in Canadian life constitute one of the foundations of the federal system that was created in 1867...<sup>14</sup>

Section 23 therefore reflects a desire to protect and promote the development of Canada's Francophone or Anglophone linguistic minorities.<sup>15</sup> Accordingly, recognition of the right to education in the minority language contributes to preserving the minority language and culture as well as the minority itself.<sup>16</sup>

In *Reference re Public Schools Act*, the Supreme Court of Canada found as follows regarding the interpretive principles applicable to section 23:

Several interpretative guidelines are endorsed in *Mabe* for the purposes of defining s. 23 rights. Firstly, courts should take a purposive approach to interpreting the rights. Therefore, in accordance with the purpose of the right as defined in *Mabe*, the answers to the questions should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province.<sup>17</sup>

In *École Rose-des-vents*, the Court added that the right accorded under this section differs from other Charter rights:

The provision is an important marker of Canada's commitment to bilingualism, and to the bicultural founding character of this country. It imposes a constitutional duty on the provinces and territories to provide minority language education to children of s. 23 rights holders where numbers warrant. This commitment sets Canada apart among nations, as Justice Vickers of the Supreme Court of British Columbia explained in *Assn. des Parents Francophones*:

From its genesis, Canada brings to the world a unique history and culture of cooperation and tolerance. It is rooted in the commitment of French and English people, who had earlier been separated by geography, a history of divisive disputes, language and culture, to live together, to work together and to share the resources of a new nation. Section 23 restates a fundamental part of that commitment relating to language and culture and acknowledges the vision and faith of our nation's pioneers. Our distinct place in the world's family of nations is dependent on governments honouring the commitment entered into more than two centuries ago which has been reaffirmed by this generation of Canadians through the enactment of particular provisions of the *Canadian Charter of Rights and Freedoms*.<sup>18</sup>

According to the Supreme Court of Canada, a school is "the single most important institution for the survival of the official language minority, which is itself a true beneficiary under s. 23."<sup>19</sup> In *Mabé*, it stated further "that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the



minority community can meet and facilities which they can use to express their culture.”<sup>20</sup> By way of these comments, the Court confirmed this section’s collective character: while it recognizes individual rights insofar as each parent meeting the criteria may exercise the rights it confers, it also has a collective dimension in that ultimately, it is the minority community that truly benefits from the rights accorded under this section. It would therefore be hazardous to focus solely on the individual right to instruction to the detriment of the minority community’s linguistic and cultural rights. However, the importance of the collective dimension of section 23 notwithstanding, it is important to note here that the definition of rights holders is not collective but rather individual.

In this regard, the Supreme Court has written:

Section 23 is clearly meant to protect and preserve both official languages and the cultures they embrace throughout Canada; its application will of necessity affect the future of minority language communities. Section 23 rights are in that sense collective rights. The conditions for their application reflect this [...] Nevertheless, these rights are not primarily described as collective rights, even though they presuppose that a language community is present to benefit from their exercise. A close attention to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders.<sup>21</sup>

### 1. *A broad and generous interpretation*

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, the Supreme Court of Canada confirmed that the Charter and, by extension, the linguistic provisions it contains are to be given a broad, generous and purposive interpretation rather than a narrow, technical or legalistic one.<sup>22</sup>

In *Arsenault-Cameron v. Prince Edward Island*, referring to its decision in *R. v. Beaulac*, the Supreme Court of Canada held that linguistic rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.<sup>23</sup> It added that “[a] purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.”<sup>24</sup>

### 2. *Language, culture and education*

The Supreme Court of Canada has indicated that “[a] notion of equality between Canada’s official language groups is obviously present in section 23.”<sup>25</sup> As indicated previously, the general purpose of section 23 is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population.<sup>26</sup>

The reference to cultures is significant, as any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is much more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it.<sup>27</sup> This link between language, culture and education was described by the Supreme Court of Canada in *Arsenault-Cameron*: “It is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the government [...]”<sup>28</sup>

When analyzing section 23, it is important to always keep in mind the close bond inextricably linking language, culture and education. It is this lasting connection that supports determination of the scope of the instruction rights set out in section 23.

### 3. Remedial nature of section 23

The Supreme Court of Canada has also characterized section 23 as being remedial in nature in the sense that it was meant to correct the inadequacies of existing educational systems in Canadian provinces which impeded the promotion and preservation of an official minority language and culture.<sup>29</sup>

In *Reference Re Public Schools Act*, the Supreme Court added:

[T]he right should be construed remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights. As M. A. Green observed in “The Continuing Saga of Litigation: Minority Language Instruction” (1990-91), 3 *Education & Law Journal* 204, at pp. 211-12:

The Court conceded that the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority, and thus if section 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that the minority have a measure of control over both facilities and instruction.<sup>30</sup>

Section 23 is therefore meant to change the status quo; it is designed to “correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the ‘equal partnership’ of the two official language groups in the context of education.”<sup>31</sup>

In *Arsenault-Cameron*, the Court held that “[A] purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.”<sup>32</sup> In *École Rose-des-vents*, it added, “Section 23 was designed to correct and prevent the erosion of official language minority groups so as to give effect to the equal partnership of Canada’s two official language groups in the context of education.”<sup>33</sup>

### 4. Vulnerability of right to government inaction

In *Doucet-Bondreau*, the Supreme Court of Canada stated that the rights guaranteed under section 23 have another distinctive feature based on the *numbers warrant* requirement, which:

leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to “warrant”. Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own

failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected.<sup>34</sup>

In *Rose-des-vents*, it added:

One distinctive feature of s. 23 is that it is particularly vulnerable to government inaction or delay. Delay in implementing this entitlement or in addressing s. 23 violations can result in assimilation and can undermine access to the right itself. As this Court has noted before, for every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation and cultural erosion. Left neglected, the right to minority language education could be lost altogether in a given community. Thus, there is a critical need both for vigilant implementation of s. 23 rights, and for timely compliance in remedying violations.<sup>35</sup>

Section 23 provides for a novel form of legal right quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature. It confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.<sup>36</sup>

#### ***b. Rights holders: Eligible children***

Insofar as it has a specific aim, the development of official language minorities, section 23 defines the categories of persons on whom it confers rights. Accordingly, the right to have their children receive instruction in the language of the Francophone or Anglophone minority of a province is held by Canadian citizens:<sup>37</sup>

1. whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside;<sup>38</sup>
2. who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province;<sup>39</sup> or
3. whose child has received or is receiving primary or secondary school instruction in English or French in Canada.<sup>40</sup>

On reading these provisions, it is noted that to have the right to receive instruction in French, they do not require that children of rights holders be Francophone themselves. Thus, even if children of rights holders do not speak French, they cannot be denied access to a French-language school. In making this choice, legislators failed to consider the facts that rights holders are frequently not linguistically homogeneous and that this heterogeneity often obliges minority educational facilities to meet the needs of children who already speak the minority language alongside those who speak the language of the majority.<sup>41</sup>

It is also important to remember that section 23 is not intended to confer any particular rights on parents who are members of the majority. Accordingly, in *Gosselin*, Francophone parents in Quebec<sup>42</sup> were denied in their demand for access to English-language school for their children:

The appellants are members of the French language majority in Quebec and, as such, their objective in having their children educated in English simply does not fall within the purpose of s. 23.<sup>43</sup>

Similarly, the Court of Appeal for Ontario has observed that although this section makes no reference whatsoever to ethnic or historical affiliation,<sup>44</sup> it does not guarantee Anglophone parents in the province of Ontario the right to choose to have their children receive instruction in French.<sup>45</sup> The same finding applies to Anglophone parents in New Brunswick.

Let us examine each of the criteria stipulated in section 23 one by one.

1. *General citizenship criterion*

To claim any right whatsoever under section 23, the first criterion to be met is citizenship. Accordingly, only Canadian citizens may claim the rights recognized by this section. However, this does not mean that persons who are not Canadian citizens may not have access to French-language schools. That depends on the admission criteria in place. We will revisit this later.

2. *Three categories of rights holders*

Paragraphs 23(1)(a) and (b) and subsection 23(2) set out the criteria for determining who the rights holders recognized in section 23 are. Review of these provisions reveals that these rights belong to the parents. As some authors have noted, the issue of who is a parent and what role they may play in decisions regarding a child's instruction is to be determined based on the law in the parent's place of residence. As a rule, the word *parent* means a person vested with parental authority at the time section 23 is invoked.

For section 23 to apply, it is not necessary for both parents to be eligible. It suffices for one parent or legal guardian to be a rights holder. It merits repeating: the provision also does not require that the children of rights holders be Francophone themselves in order to receive their instruction in French: “[C]hildren qualified under s. 23 are not required to have a working knowledge of the minority language, or to be members of a cultural group that identifies with the minority language.”<sup>46</sup> The fact that their children do not know the minority language or are not culturally a part of the minority language group does not create any barrier to the rights of parents who meet the eligibility criteria to claim the constitutional right for their children to receive instruction at minority schools.<sup>47</sup>

French-language schools in minority communities must therefore have the resources required to create classes that can accommodate these children to assist them in attaining a sufficient degree of language proficiency to continue their schooling in regular classes. Unfortunately, the additional financial resources required to fulfil this particular mandate are often nonexistent, and schools are forced to draw on their regular budgets to meet these needs. However, we are of the view that the provincial government is constitutionally bound to provide these additional credits to enable French-language schools to serve this mandate in terms of francization and cultural “upgrading.” Additionally, it should be pointed out that additional credits should also be made available to the minority school system to support its interventions among families before their children even enter the school system. Early intervention in the family setting, as is done for children with learning problems, is one approach to consider with a view to reinforcing the family's and child's attachment to the minority language and culture before schooling begins.

a) *Paragraph 23(1)(a)*

The first criterion that eligible persons must meet applies to those whose first language learned and still understood is that of the Francophone or Anglophone minority of the province in which they reside.

As indicated by the Court of King's Bench of New Brunswick, determining one's first language learned poses no problem in the vast majority of cases.<sup>48</sup> In rare cases where this determination presents difficulties, reliance is placed on the proof provided by the parents and any assessment conducted by the responsible parties. We consider that in New Brunswick, the criteria applicable in these cases should be defined in detail by the French-language school boards and made uniform across the province.

Parents whose first language learned and still understood is that of the majority may not demand that their children receive instruction in the minority language unless they can meet either of the two other criteria. However, this does not mean that free choice does not exist. As seen below, the New Brunswick *Education Act*<sup>49</sup> allows the admission to a French-language school of an Anglophone child whose parents are not rights holders on the condition that the child demonstrate sufficient linguistic proficiency in the French language at the time of admission.<sup>50</sup> Accordingly, although rights holders have a constitutional right to enrol their child in French-language schools even if they do not speak French, parents who are not rights holders have this right only if their child meets the criterion stipulated in the *Education Act*. That said, as is seen below, upon this child's admission, the child's brothers and sisters acquire the constitutional right to education in the minority language whether or not they speak it.

With respect to citizens whose first language learned and still understood is neither English nor French, the matter has yet to be brought before the courts, but in light of the remedial nature of section 23, one possible interpretation of paragraph 23(1)(a) in these cases would be to determine which official language a person learned and still understands. Such an interpretation would, for example, entitle parents who are Canadian citizens and of Senegalese origin and whose first language learned is Wolof but whose first official language learned and still understood is French to exercise the rights recognized in that paragraph.

b) *Paragraph 23(1)(b)*

Paragraph 23(1)(b) confers on parents who have received their primary school instruction in Canada in the minority language of the province where they reside the right to have their children receive instruction in that language.

It is noted that primary school instruction at an immersion school is not considered instruction at a minority language school. In *Solski*, the Supreme Court of Canada explained that immersion programs are designed to provide second language training to children attending schools designed for those adopting the language of the majority. Immersion programs occur in a majority setting where the majority language is spoken in the corridors and during extra-curricular activities. Immersion programs are run in majority schools that are a part of the majority school system. As a result, immersion programs lack the cultural element that is vital to minority language education. Therefore, it would be contrary to the purpose of section 23 to equate immersion with minority language education.<sup>51</sup>

c) *Subsection 23(2)*

Subsection 23(2) provides that parents of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada have the constitutional right to have all their children receive primary and secondary school instruction in the same language. In *Solski*, the Supreme Court of Canada described the purpose of this subsection as follows:

Section 23(2) [...] facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right. As noted, s. 23 is also meant to apply to some members of cultural communities that are neither French nor English.<sup>52</sup>

This subsection does not specify the duration of the instruction received, nor does it require that this instruction be received consecutively without interruption. It is also important to note that when a child is admitted to the minority language school, subsection 23(2) becomes effective and the child's brothers and sisters have a constitutional right to be admitted to the minority language school even if they do not have the necessary linguistic proficiency.

*c. Applicability of section 23*

Section 23 rights are applicable everywhere in the province where the numbers of children of citizens who are rights holders warrant. This makes it very important to determine the sufficient number before proceeding to enforce the provision or the level of service appropriate in the circumstances. However, it must be acknowledged that while the issue is fundamental, it has had little impact in New Brunswick and has never been subject to a court decision.

To our knowledge, there is no place in New Brunswick where children belonging to the linguistic minority are not present in sufficient numbers to warrant access to instruction in French. That said, there are nonetheless parts of the province where equitable access to a French-language school does not exist. For example, Francophone parents living in western and central New Brunswick, particularly in the region from Florenceville to Woodstock and on to Nackawic, have difficulty gaining access to this instruction, as the nearest French-language schools are up to a hundred or more kilometres away. It is simpler for these Francophone parents to place their children in English-language schools. In this case, the possibility of demanding enforcement of the rights provided in section 23 could be envisioned.

*d. Section 23 rights*

In addition to the right to instruction, the courts have recognized that a certain number of rights arise from section 23. These rights have given entire effect to the purpose of this section.

*i. Right to management and control*

Among the institutional requirements arising from section 23, it is essential to consider the role that rights holders or their representatives play in managing and controlling the education services provided in the minority language. Examining this issue in *Mabé*, the Supreme Court of Canada made reference to both the wording and the purpose of this section, indicating that management and control by rights holders or their representatives were necessary because a variety of management issues in education can affect linguistic and cultural concerns. Justice Dickson stated as follows in this regard:

I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.

Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.<sup>53</sup>

In *Arsenault-Cameron*, the Supreme Court of Canada added that section 23 was intended in part to protect the minority against the effect of measures adopted to suit the needs of the majority.<sup>54</sup> It thus recognized that minority language parents and their representatives are in the best position to identify local needs. To meet the needs of minority communities, a minority language education system consequently sets certain parameters from which the provinces may not deviate if they intend to honour their constitutional obligations.

Additionally, paragraph 23(3)(b) recognizes the right to instruction in the minority language in *minority language educational facilities*, a right recognized by the Supreme Court of Canada as necessarily encompassing the right to management and control. That court has indicated that if the term *minority language educational facilities* is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in section 23:

This common sense conclusion militates against interpreting “facilities” as a reference to physical structures. Indeed, once the sliding scale approach is accepted it becomes unnecessary to focus too intently upon the word “facilities”. Rather, the text of s. 23 supports viewing the entire term “minority language educational facilities” as setting out an upper level of management and control.<sup>55</sup>

The analysis of section 23 undertaken by the Supreme Court of Canada was based on examination of the overall purpose of that section, which is, it bears repeating, to preserve and promote the minority language and culture everywhere in Canada. It is therefore essential that, where the numbers warrant, minority language parents possess a certain measure of management and control over the educational facilities in which their children are taught, since a variety of management issues in education (e.g. curricula, hiring, expenditures) can affect linguistic and cultural concerns.<sup>56</sup> To uphold the purpose and remedial nature of this section, “[t]he participation of minority language parents or their representatives in the assessment of educational needs and the setting up of structures and services which best respond to them is most important.”<sup>57</sup>

In light of the courts’ interpretation of section 23, it seems inconceivable that a government could justify abolishing minority school boards. Such action would be contrary to this section, since it would prevent rights holders from exercising the right to management and control accorded to them by section 23. Although the provincial government has the right to reorganize the province’s school boards, it must always bear in mind that it may not take away the right of rights holders to the power of management and control over minority language schools.

The Supreme Court of Canada has found that where a minority language board has been established for the purpose of meeting the section 23 requirement, it is responsible, in its role representing the

official language minority, for deciding what is culturally or linguistically most appropriate. In this regard, the role of the Minister of Education is to put institutional structures in place, develop policies and make regulations that respond precisely to the province's specific linguistic dynamics.<sup>58</sup>

This control over instruction in the minority language and the facilities where it is provided also includes certain exclusive powers set out in *Mabé*. The specific degree of management and control entailed cannot be described precisely. However, according to the Supreme Court of Canada, the linguistic minority should, at minimum, have exclusive decision-making power concerning instruction in its language and the facilities where it is provided. It has added that this exclusive power to make decisions pertaining to minority language instruction includes:

- a) expenditures of funds provided for such instruction and facilities;
- b) appointment and direction of those responsible for the administration of such instruction and facilities;
- c) establishment of programs of instruction;
- d) recruitment and assignment of teachers and other personnel; and
- e) making of agreements for education and services for minority language pupils.<sup>59</sup>

In *Arsenault-Cameron*, it added three elements to this list: determination of the need to open a new school in a community, the choice of its location<sup>60</sup> and school transportation:

The travel considerations should have been applied differently for minority language children for at least two reasons. First, unlike majority language children, s. 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language. The decision of the Minister fostered an environment in which many of the s. 23 children were discouraged from attending the minority language school because of the long travel times. A similar disincentive would not arise in the circumstances of the majority. Second, the choice of travel would have an impact on the assimilation of the minority language children while travel arrangements had no cultural impact on majority language children.<sup>61</sup>

Finally, it is noted that in *Reference re Public Schools Act*, the Court pointed out that section 23 “constitutes a minimum and not a maximum in the area of management and control of French-language education.”

#### *ii. Role of the Minister of Education under the scheme of section 23*

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, the Supreme Court of Canada stated that while it is “true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces.”<sup>62</sup> It is therefore important to recall that section 93 of the *Constitution Act, 1867* accords provincial and territorial legislatures exclusive jurisdiction in relation to education.

That said, it is also indisputable, despite provinces' exclusive jurisdiction in this regard, that the Minister of Education is given a specific role under section 23. In *Mabé*, the Supreme Court of Canada explained that “the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met”.<sup>63</sup> In *Arsenault-Cameron*, it confirmed that the Minister retains significant power but noted that this discretion is subject to the obligation on the provincial government “to effectively ensure the provision of minority language instruction and facilities and parental control on the scale warranted by the relevant number of children of the minority.”<sup>64</sup>



The discretion of ministers of education must therefore be exercised in accordance with minority language rights and take into consideration their needs and priorities:

When the Minister exercises his discretion to refuse a proposal pursuant to the Regulations, his discretion is limited by the remedial aspect of s. 23, the specific needs of the minority language community and the exclusive right of representatives of the minority to the management of minority language instruction and facilities.<sup>65</sup>

Accordingly, the Minister's decision in *Arsenault-Cameron* not to approve a proposal from the Commission scolaire de langue française de l'Île-du-Prince-Édouard to establish a French-language school in Summerside was held by the Supreme Court of Canada to be unconstitutional since, in its view, the offer of a facility came within the exclusive right of management of the minority. The Minister's discretion was limited to verifying whether the board had met provincial pedagogical or financial requirements. The remedial nature of section 23 and the specific needs of the minority language community and exclusive right of management accorded to it consequently limit the exercise of the Minister's powers.

Clearly, despite the significant powers of management and control bestowed on rights holders and their representatives, the provinces also retain their responsibility with regard to education. The powers they retain include that to regulate the application of objective standards concerning programs, school size, facilities, and transportation and assembly of students, but these standards must respect parents' constitutional rights:

The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.<sup>66</sup>

For provincial governments, it should be the rule that arrangements and structures which are prejudicial, hamper, or simply are not responsive to the needs of the minority are to be avoided,<sup>67</sup> while respecting the pedagogical needs of official language minority communities as well as their exclusive power of management over all factors related to the minority language and culture.<sup>68</sup> The provinces are therefore free to modify their school systems, the form of education management structures, funding terms and the powers granted to the institutions responsible for this management as long as they do not undermine the minority language and culture. The division of powers between the Department of Education and minority school boards must reflect the fact that decisions made by minority language school boards almost always have a linguistic and cultural component.

In summary, the Minister of Education has two specific obligations under the scheme established by section 23: first, to weigh the pros and cons of decisions for the minority community – to evaluate whether a decision will hamper teaching adapted to the community's children – and to consider the broader consequences of decisions on the minority community itself; and second, to recognize the preponderant role of minority school boards in relation to all aspects of language and culture.

## Conclusion regarding section 23

Full implementation of section 23 requires a comprehensive partnership among stakeholders in the education sector, particularly parents and their representatives. This corresponds perfectly to the judicial interpretation of section 23 already reviewed herein. This interpretation relates to the necessity for official language minority communities to assume management of educational facilities and the programs they offer from the preschool through post-secondary levels. In our view, this interpretation should lead to the recognition of a right to preschool education services, services that would include French-language support throughout the preschool period, such as early learning and child care facilities and an intake structure that promote the integration of rights holder children who have limited French-language proficiency.

At the same time, in a context in which the objective is an education system that will “best encourage the flourishing and preservation of the French language minority”<sup>69</sup> in the province, the issue of priorities evidently arises. For the Supreme Court of Canada, obviously, it has to be the priorities of the minority community because the determination of such priorities lies at the core of the management and control conferred on the minority language rights holders and their legitimate representatives, namely school board members, by section 23.<sup>70</sup> It is therefore clear that minority language parents and their representatives are in the best position to identify local needs.<sup>71</sup> They can thus identify the parameters of intervention beginning in early childhood so as to ensure that their community develops and flourishes.

The adoption of section 23 imposed new limits on provincial jurisdiction in relation to education. It has clearly had much greater impact on legislative authorities where the minority language is French. French-language schools and school boards can be found in all Canadian provinces and territories today due largely to the addition of this section to the Charter.

In New Brunswick in particular, section 23 serves as an essential tool to the official language minority community. Among other protections, it upholds duality in the education sector while conferring a specific mandate on rights holders and their representatives that majority parents do not necessarily need: ensuring that the minority linguistic community develops and flourishes.

## Section 16.1 of the Charter

In 1993, following pressure from New Brunswick’s AFC and the referendum on the Charlottetown Accord, section 16.1 was enshrined in the Charter as a result of the bilateral amendment process set out in section 43 of the *Constitution Act, 1982*<sup>72</sup>.

The decision to include the principle of equality between the official language communities in the Charter, thereby making it one of the province’s fundamental legal principles, was intended to clearly establish the commitment to reaching equality between the official language communities in the province. This unique provision for New Brunswick reaffirms and solidifies the commitment made by the lawmakers of this province in 1981<sup>73</sup> when enacting *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*. The content of the rights granted under section 16.1 can be summarized in three parts. First, this provision guarantees that Francophone and Anglophone communities have equality of status, rights and privileges. Second, it specifies that this equality “includes the right to such distinct educational and cultural institutions as are necessary for the preservation and promotion of those communities.” And third, it confirms the commitment and responsibility of the Government of New

Brunswick to protect and promote the equality of status, rights and privileges of the two linguistic communities.

*Charlebois v. Moncton*<sup>74</sup> is an excellent representation of the scope of this provision. In particular, the Court of Appeal indicates that, as with all other language rights recognized under the Charter, section 16.1 is of a remedial nature and imposes positive obligations upon the State. It therefore does not set out an abstract principle; it conveys a substantive right that requires concrete implementation:

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

In addition, it activates the principle of substantive equality, a dynamic concept:

The principle of the equality of the two language communities is a dynamic concept. It implies provincial government intervention which requires at a minimum that the two communities receive equal treatment but that in some situations where it would be necessary to achieve equality, that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.<sup>75</sup> (Our emphasis.)

In light of these provisions, it is clear that the purpose of section 16.1 is similar to that of the other constitutional language rights. It is a positive, remedial right that aims to establish substantive equality between the French and English linguistic communities in New Brunswick.

Furthermore, subsection 16.1(2) expressly provides that it is “the role of the legislature and government of New Brunswick to preserve and promote” the equal status, rights and privileges of the two official language communities. This provision imposes on the provincial government the obligation to positively intervene to ensure the strict compliance with and real application of these language guarantees.

[Section 16.1] encompasses, like section 23 of the Charter, a collective dimension and imposes on the government the obligation to act positively to ensure the respect and substantive application of these language guarantees. In addition, section 3 of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, the principles of which were entrenched in section 16.1 of the Charter, is more explicit about the commitment of the government and states that the government “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.”

This provision is the legislative confirmation of the obligation of the provincial government to act positively. By its legislative and constitutional commitments, New Brunswick has accepted that it has the responsibility to take all possible steps for the preservation and development of the two official language communities. By that, it recognizes that the two languages and the two cultures they transmit constitute the common heritage of all persons in New Brunswick, and they must be able to enjoy an atmosphere conducive to development.<sup>76</sup>

Consequently, as equality is set out in section 16.1, it imposes on the provincial government the positive obligation to work towards advancing the equality of the official language communities.

With regard to the education sector, section 23, as we have just seen, contains a fairly comprehensive framework of rights in this matter. Section 16.1 complements it by expanding the right to education in linguistically homogenous institutions — not just schools, but also post-secondary institutions and, most particularly in this case, early childhood facilities.

As we have just seen, section 23 sets out the right of parents who are rights holders “to have [their children] receive primary and secondary school instruction” in French. The question of whether this section also applies to preschool programs, including preschool and kindergarten classes, has not yet been conclusively determined by the Supreme Court of Canada.

However, in *New Brunswick’s* case, we believe section 16.1 answers this question. It is our view that educational preschool programs should be included under the protection provided by section 16.1. This conclusion applies to all programs funded by the Department of Education and Early Childhood Development or government agencies and that are intended to provide instruction to preschool-aged children or prepare them for school. In particular, we are referring to support services for young families or for children who are at risk or have special needs — programs commonly referred to as *early intervention*.

Government programs for preschool-aged children support the success of their subsequent school careers. In addition, these programs indisputably play an essential role in the transmission of the minority language and culture. They should serve as vehicles for recruitment and francization. Because a significant number of exogamous households exist in minority settings,<sup>77</sup> the school environment is often the ideal — and sometimes only — place where children may learn the minority language and culture. Early childhood programs in the minority language therefore sustain education programs in that language.

In 1982, when section 23 was adopted, there was very little research measuring the impact of school on the minority language and the vitality of official language minority communities. This section was therefore limited to recognizing parents’ right to have their children receive instruction in the minority official language in schools managed by the minority official language community. It also addressed a critical need, since this fundamental right did not exist in many provinces. Although the application of this section allowed Francophones across Canada to establish French-language schools, we are still very far from seeing these communities truly have jurisdiction in education. In light of demolinguistic data and research on the vitality of language communities, we can argue that it is essential today to propose a broader and more extensive right to education than what this section has historically provided — a right to education that includes early childhood.

The right to education under section 23 will have little influence over the growth of Francophone communities if a considerable proportion of the minority population does not attend the educational institutions of these communities. Currently, studies show that a large proportion of the children of rights holders do not attend French-language schools.<sup>78</sup> In New Brunswick, although its proportion is the lowest in the country, 32% of children of rights holders are from exogamous families.<sup>79</sup> However, the situation varies greatly from one region to another.<sup>80</sup>

This situation impacts not only the number of students in French-language schools, but also the vitality of the French-speaking community. Due to its linguistic fragility, the French-language minority community cannot afford, over the medium term, the loss of a large proportion of its population. In a study conducted in 2001, Angéline Martel highlights the potential and foreseeable loss of rights holders due to many Francophone parents not passing French on to their children or enrolling them in French-language schools.

Section 16.1 therefore fills a gap by providing the right to linguistically homogeneous educational institutions, not only at the school level, but also in early childhood.

### **Conclusions on section 16.1**

Sections 16.1 and 23 of the Charter limit New Brunswick's jurisdiction over education. The province cannot make decisions on this matter without advance consideration of the potential consequences on the minority community, particularly rights holders.

Parents' right to have their children receive instruction in their language is constitutionally protected. Although the provincial government may determine, in its view, which educational services children enrolled in the school system may be entitled to, it cannot in doing so deprive parents of their rights or their power of management and control recognized by case law. It is irrelevant that the majority of the province's population refuses to recognize the validity of the duality that exists in education. This right, protected by the Constitution, cannot be abolished without constitutional amendment.

To extend these rights into other areas, such as preschool and post-secondary, section 16.1 complements section 23. The French-speaking community of New Brunswick must remain aware of the value of these rights, which are essential to its development and growth, and must remain ever vigilant so as to ensure its sustainability.

## **THE NEEDS AND CHARACTERISTICS OF EDUCATION IN ACADIAN NEW BRUNSWICK**

New Brunswick's AFC is in a fragile and vulnerable state. With the exception of Quebec, New Brunswick is the province with the highest proportion of Francophones. However, figures from different censuses show that this proportion is shrinking year after year due to certain trends. This may seem irreversible to some, but it could be remedied if the provincial government finally recognized the fragility and vulnerability of the Francophone community and took concrete actions to support it.

In looking at the geographic distribution of those whose first official language spoken is French, it is apparent that more than half of this population is in the north of the province (Gloucester, Restigouche, Madawaska and Victoria counties), a little more than a third is in the southeast (Kent and Westmorland counties), and the remainder is throughout the other regions of the province. The province's Francophone population is located in primarily Francophone regions, bilingual regions and primarily Anglophone regions. This fact alone justifies the need for three Francophone education councils to meet the specific needs of these three different realities.

### **1) Language transfer**

The factors influencing the evolution of a language group depend on the combined impact of natural population growth (fertility and mortality) and the migration of its members. Another factor is the

component of intergenerational continuity, namely that of mother tongue transmission to children.<sup>81</sup> In this case, linguistic assimilation is also a factor. Rodrigue Landry, researcher and specialist in linguistic vitality in minority settings, says linguistic assimilation occurs when members of a language group stop using their language and adopt the language of another group.

Not all Francophone families are passing French on to their children. This phenomenon is called *language transfer*, and it occurs when “the main language used at home differs from the individual’s mother tongue.” While there is “no direct bearing on the evolution of language groups . . . , insofar as the language that dominates in the home is generally the one that is passed on to the children, it has a long-term influence on the future of language groups.”<sup>82</sup>

Researchers have detected a slight increase in language transfer among New Brunswickers whose first language is French. In 1971, about 9% of New Brunswickers whose first language was French said they spoke another language most often at home. In 2006, it was 11%.<sup>83</sup> In 2011, according to a report by the Canadian Institute for Research on Linguistic Minorities, 87.3% of individuals whose mother tongue was French spoke French most often at home.<sup>84</sup> The rate of linguistic transfer therefore increased between 2006 and 2011 from 11% to 12.7%. We were not able to obtain the figures from the 2016 and 2021 censuses, but we are not confident that this situation has improved.

The tendency of parents to pass their language on to their children varies based on a few factors, and “one of the most important of these is the geographic concentration of the population comprising a given language group.”<sup>85</sup> The more geographically concentrated a minority language group is within a given setting, the more likely parents are to pass on the minority language, and vice versa. Therefore, in certain areas in the north of the province, almost 100% of people use their mother tongue at home, while in the south and other areas of the province, the situation is much more concerning.

Researcher Rodrigue Landry explains that the linguistic attraction index may also be considered when calculating the rate of language use among all people speaking the language most often at home. According to him, it is possible that people whose mother tongue is not an official language still speak an official language most often at home. This phenomenon may have a positive impact on minority language communities that, despite being a demographic minority, speak a language with an elevated status in society. Rodrigue Landry provides the example of Quebec, where many people whose mother tongue is not English or French (allophones), or whose mother tongue is French, speak English most often at home. He adds that this phenomenon is not so much the result of a strong presence of English in Quebec as it is of the elevated social status of English in Canada, North America and around the world. When the linguistic attraction of a language is strong, the linguistic attraction index value is above 1.00, meaning the number of people speaking the language most often at home is higher than the number of people who speak the language as their mother tongue.

In the 2011 census, according to Rodrigue Landry, English in Quebec was assigned a linguistic attraction index value of 1.29, while the value for French spoken outside Quebec under the same index was only 0.61. In Quebec, people whose mother tongue is English constitute only 8.3% of the population, while people speaking English most often at home constitute 10.7% of the population. Rodrigue Landry adds that the situation for La Francophonie outside Quebec is less encouraging. In effect, in that community, the number of people whose mother tongue is not French does not come close to offsetting the number Francophones who do not speak French most often at home. Rodrigue Landry draws the evident conclusion that French in minority settings outside Quebec is far from reaching a level of social attraction similar to that of English in Quebec.

Using the same index for New Brunswick, Rodrigue Landry determined that the linguistic attraction value for French in this province is 0.90, which is much higher than that of French outside Quebec but much lower than that of English in Quebec. In Canada's only officially bilingual province, although 32% of the population's mother tongue is French, only 28.8% of the province's population speaks French most often at home, and according to the 2021 census, this percentage has likely decreased even further, to 26%.

## 2) Fertility rate

Between 1956 and 1961, the individual fertility rate in New Brunswick's Francophone community was 5.91 children, whereas it was 4.27 in the Anglophone community. The rate among Francophone families in New Brunswick was so high that there was some expectation that, at that rate, Francophones would become the majority group in the province by the end of the century. However, beginning in 1981, the fertility rate among Francophones became lower than that among Anglophones, and it would reach its all-time low, 1.34, between 2001 and 2006.<sup>86</sup> With demographers having established the generational renewal rate of 2, we can conclude that the fertility rate among the Francophone population is below the renewal rate. Although the rate of 1.54 for the province's Anglophone population is also below the renewal rate, this community can nonetheless depend on the integration of a higher number of people speaking foreign languages and on the assimilation of a portion of the Francophone population to come closer to or reach the renewal rate.

## 3) Mother tongue transmission and the impact of exogamy

Another factor having a considerable impact on linguistic continuity and exogamy is that people choose partners whose mother tongues are different from their own. This phenomenon is increasing across Canada.<sup>87</sup> Studies show that, in exogamous couples, the smaller the geographic concentration or relative proportion of a language group in a given setting, the less likely parents are to pass on the minority language. In New Brunswick, the proportion of couples with at least one partner whose mother tongue is French and passes French on as a mother tongue to their children varies considerably from one region to another. Among Francophone endogamous couples (consisting of two parents who speak the same language), the rate of French transmission to children is very high at 98%. However, for exogamous couples consisting of a mother whose mother tongue is French and a father whose mother tongue is English, this rate has been slowly declining and sits at 50%. If the father's mother tongue is French and the mother's is English, however, this rate falls to 28%.<sup>88</sup> Women are therefore much more likely than men to pass on their mother tongue.

Exogamy in couples is on the rise among Francophones in New Brunswick. The number of children born of exogamous couples consisting of at least one Francophone parent rose from 16% in 1971 to a little over a third today. These rates also vary significantly between regions: 16.6% in the north, 34.4% in the southeast and 63.4% in the rest of the province. Rodrigue Landry explains that the impact of exogamy is also apparent when taking into account the province's large urban centres. In Saint John and Fredericton, where Francophones make up 5% to 7% of the population, he estimates the percentage of children born of exogamous couples is between 80% and 90%. Among exogamous couples in Saint John, he estimates that only a quarter of exogamous parents pass French on to their children. In Fredericton, the percentage would be 33%. In Moncton, where Francophones make up about a third of the population, he estimates that 6 out of 10 children are born of exogamous couples and that only a little over half of those children speak French as their mother tongue.

This situation places a burden on the Francophone school system that is not placed on the Anglophone system.

#### 4) Institutional participation

According to Rodrigue Landry, another contributor to the vitality of French in New Brunswick is the institutional participation of Francophones — the degree of French presence and vitality in various institutions.

The rate of participation in New Brunswick's French-language schools varies significantly by region. The overall attendance rate for French-language school is 83% across the province. However, when divided by region, the rates are 91% in the north, 86% in the southeast and 55% in the rest of New Brunswick.<sup>89</sup> Moreover, the percentage of parents who believe their children are likely to complete their post-secondary studies in French is 82% in the north, 75% in the southeast and 33% in the rest of New Brunswick.<sup>90</sup>

These figures demonstrate that there is still a lot of work to be done to attract all of the province's Francophones to the French-language school system.

#### 5) Migration

New Brunswick receives few international immigrants whose first official language is French. According to the *Esquisse de la situation linguistique au Nouveau-Brunswick* [Profile of Linguistic Situation in New Brunswick] study, 85.7% of immigrants in New Brunswick declared English as their first official language spoken, whereas 11% declared French as their first official language spoken.<sup>91</sup> In this context, it is difficult to safely conclude that immigration can help maintain the demographic weight of the Francophone community in New Brunswick unless there is a drastic change in the province's approach. For that to be the case, a major shift in the province's immigration policy would need to take place.

In 2014, the provincial government released its first *Francophone Immigration Action Plan*.<sup>92</sup> Its objective was to promote immigration to the province that would better reflect its linguistic composition. The aim was for 33% of newcomers to be Francophone by 2020. To do this, an annual increase of 3% was expected, with an intermediate target of 23% for 2017. This target was never met.

Regarding interprovincial migration, the *Francophones in New Brunswick* report established that the net migration rate between New Brunswick and the other provinces is negative. Since 1981, the number of individuals leaving for another province has generally varied between 7,000 and 10,000, while the number of migrations to New Brunswick has varied between 7,000 and 8,000.<sup>93</sup>

These demographic figures demonstrate the special challenges faced by the Francophone community of New Brunswick. These challenges are reflected in our school system and must be considered during all revisions to the *Education Act*. If they believe in the future of New Brunswick's Francophone community, our political leaders must adopt policies that take this reality into account.



## 6) Particular needs in education

While there is no doubt that the school districts, both English and French, face challenges and that some of those challenges are common to them both, it is our opinion that the unique mandate of the Francophone education sector places burdens on that sector unlike those placed on the Anglophone sector. In addition to its educational mandate under the *Education Act*, the Francophone sector must also fulfil its unique mandate under sections 16.1 and 23 of the Charter and owing to the situation of vulnerability of the Francophone community.

Unfortunately, the Francophone sector suffers from a severe lack of human and material resources for fully carrying out its mandate and achieving substantive equality in education.

New Brunswick's two school systems share many identical or similar conditions, but there are also many significant differences between them. The rights granted under section 23 of the Charter are reserved for the French-language school system. The *Linguistic and Cultural Development Policy* (LCDP) targets the French-language school system. While the Université de Moncton's education faculty deems it important to offer the *Éducation en milieu minoritaire* [education in a minority setting] course, no course on education in a majority setting is offered to students at any of the English-language universities in the province. The French language is in danger; English is not.

The *Report on Recommendations 1 and 2 in the Report of the Panel of Experts on the Funding of Francophone Schools* (2012) asks the following question: "Do the circumstances of New Brunswick's Francophone community make its needs [in education] different from those of the majority?" Its response: "They do indeed." The report therefore puts forward several recommendations to promote the French-language school system based on the differences between the two school systems.<sup>94</sup> For example,

- 70% of Francophones live in rural settings while 70% of Anglophones live in urban settings;
- schools in rural areas often face bigger challenges with regard to resources that support education than schools in urban areas;
- there is a high rate of assimilation among the Francophone population into the Anglophone population, particularly in urban areas;
- educational resources and ICT tools are primarily in English, while those in French are often not available and are more expensive;
- children from exogamous families entering kindergarten often need francization services;
- in addition to offering children a quality education, Francophone schools must also, due to the nature of their minority context, ensure and promote identity building to help students develop an Acadian and linguistic cultural identity; and
- literacy rates among Francophones are much lower than among Anglophones.

In addition, equal importance is not given to the integration of early childhood into the collective education project in both systems. Francization services are required, under section 23, for students whose parents are rights holders, whereas anglicization and francization services for students whose parents are immigrants are offered on a utilitarian rather than legal basis.

Education in a Francophone minority setting differs from that in an Anglophone majority setting. A review of the literature on the subject published in 2005<sup>95</sup> outlines these significant differences. First, it demonstrates how French-language schools in a minority setting operate in a unique demographic, historical and ideological context, making school and teaching staff needs unique as well. It also

demonstrates that education in this context must begin with the individual, shift towards the community and then return to the individual, and it must develop a positive relationship with the language and optimize French-language production and reception. Beyond that, it requires an education that surmounts linguistic insecurity, legitimizes vernacular language, embraces spoken language and the use of the language, maximizes literacy activities and promotes a communicative approach, active enculturation, the development of self-determination, identity negotiation, school/home/community partnerships and community entrepreneurship.

Many other studies, such as the following, demonstrate these unique educational characteristics:

- *Le personnel enseignant face aux défis de l'enseignement en milieu minoritaire francophone* (2004)<sup>96</sup> (French only)
- *Francophonie, minorités et pédagogie* (2008)<sup>97</sup> (French only)
- “Apprendre en français en milieu francophone minoritaire” (2009)<sup>98</sup> (French only)
- *La direction d'école et le leadership pédagogique en milieu francophone minoritaire* (2010)<sup>99</sup> (French only)
- “Travail pédagogique et construction identitaire en milieu francophone minoritaire” (2016)<sup>100</sup> (French only)

The signatories are of the opinion that these unique characteristics explain and justify the recommendations of this report.

## COMPONENT 1: A school system that complies with subsection 16.1(1) and section 23 of the Charter

### 1.1 The French-language school system must respect the letter and spirit of subsection 16.1(1) and section 23 of the *Canadian Charter of Rights and Freedoms*

The *Education Act* must respect the case law relating to subsection 16.1(1) and section 23. The government must adopt a French-language education act, specific to New Brunswick's Acadie, that specifies the particular purpose and needs of the French-language school system and indicates the exclusive powers of rights holders<sup>101</sup> and the obligations of the government under section 23. This act must be updated as relevant case law evolves. Any changes of political or public origin made to the French-language school system must be accepted with open arms, as is required in a democracy within which all public education systems are funded by taxpayers, pursuant to section 93 of the federal *Constitution Act*. However, to protect the rights granted under section 23 and subsection 16.1(1) and ensure the stability and efficacy of the system, any amendments must *first* be examined to determine whether the bill complies with the case law relating to section 23 and subsection 16.1(1). It must recognize the administrative duality in education and maintain that any proposed changes to the French-language system need not necessarily apply to the English-language system, and vice versa. EECD must carry out effective consultations with the DEC's, the Fédération des jeunes francophones du Nouveau-Brunswick (FJFNB) and the Association francophone des parents de Nouveau-Brunswick (AFPNB) when introducing a bill on education and amendments to the *Education Act*.

The act must specify how DEC's should govern the French-language school system, including decision-making and accountability procedures, and provide them with the opportunity to adopt innovative accountability measures. It must outline important concepts for regulating school governance, including "total school management," "co-construction" and "effective consultations." It must indicate that school buses are educational facilities under section 23, just as schools are. It must grant the DEC's the power to name schools and choose the exact location of new schools, without interference from EECD, while ensuring their decision is based on the needs of rights holders and analyses by engineers and that it is communicated to EECD before the final decision is announced. The cooperation of all institutions is required to ensure the optimal use of public funding. Lastly, it must indicate that the DEC's have the right to establish the location of their administrative offices.

Furthermore, the *Early Childhood Services Act* must also be reviewed and updated to comply with subsection 16.1(1) and section 23 of the Charter and to specify that administrative duality applies in early childhood as well, to better ensure the vitality of Acadie.

### 1.2 Acadie must have independent educational institutions in order to exercise its exclusive powers in education

A minimum of three independent DEC's must be maintained. An analysis taking section 23 into account must also be conducted to determine whether additional DEC's could help better ensure substantive equality in the province. This analysis must also determine the number of councillors to be elected per DEC.

DEC councillors will be elected by the whole community, with the exception of the student representatives, who will be elected by their peers. The DEC's will follow a strict policy when filling any council vacancies.

The DEC's must exercise their exclusive powers and receive the resources required. Each DEC must establish the needs of its community (its district), spend the funds earmarked for instruction and educational institutions, recruit and assign its teaching personnel, appoint and manage its administrative personnel, reach agreements on instruction and services provided, determine the location of its schools and establish its curricula. However, to establish (and evaluate) curricula, the DEC's must work together and with EECD. Cooperation between the DEC's requires a formal mechanism, which we will revisit in a later section. The DEC's must be given the funds required, as needed, to consult with students, parents, school personnel, organizations and other members of the AFC in order to determine their educational and identity needs, and they must be given the funds required to evaluate the education plan, the LCDP, the system's funding and other key components of the system. DEC's must do what is necessary to involve organizations and members of the AFC in students' learning and involve students in the vitalization of their community.

While section 23 does not grant any rights to students,<sup>102</sup> measures allowing them to play an important role in school governance are required. For instance, a student council must be established in each school, particularly in high schools. The mandate of these student councils will be threefold: help ensure student needs are met by organizing activities that are for youth, by youth; support students in building their Acadian and Francophone identities; and encourage student participation in school and community decisions while representing student needs to the school administration, the PSSC (parent school support committee) and the community. Administrations must provide the student councils with the support needed for this triple mandate.

### **1.3 The government must decentralize exclusive management powers to the DEC's**

In terms of education, culture and community, French-language schools in New Brunswick must be managed by the DEC's. This is particularly the case with curricula because "a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns." "Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority." The courts added that it would be "foolhardy to assume that Parliament intended to ... leave the sole control of the program development and delivery with the English majority. If such were the case, a majority language group could soon wreak havoc upon the rights of the minority and could soon render such a right worthless." It would also be foolhardy to assume that EECD is better equipped than rights holders to fulfil the cultural and community mandate of Acadian schools. That is why the Supreme Court of Canada decided that these schools "belong" to rights holders and that the Province must equip its institutions (DEC's) to ensure rights holders take on sole school management.

It should be kept in mind that the government's constitutional obligation to "guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns" and that the content and qualitative standards of educational programs support "the legitimate linguistic and cultural concerns of the minority." It must meet "the pedagogical requirements of the minority ... in an identical way to those of the majority" while avoiding the standardization of programs that "interfere with the legitimate linguistic and cultural

concerns of the minority.” To meet its obligations, it must allow rights holders to determine and address their own needs. To reiterate, case law justifies these obligations: “the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.”

The DECs must determine rights holder needs and partake in the development of educational programs and approve them before they are implemented. They must receive the financial, material and human resources required to assume sole school management as part of their exclusive powers. They must also be given more leeway with respect to implementing their sole school management. For example, the DECs must have the right to delegate the development and evaluation of programs.

Besides these exclusive powers, the JWG recognizes that the cooperation of EECD is essential for ensuring the success of the French-language school system. EECD and the DECs (and other AFC organizations) must work closely together to adopt and implement a provincial education plan and the LCDP. Therefore, a permanent co-construction mechanism must be established to ensure this cooperation and for the continuous improvement of the sole school management and the democracy, stability and accountability of the French-language school system, for the children, their parents and the community. This will be further discussed under Component 5.

#### **1.4 EECD must undertake effective consultations with organizations and educational institutions in the AFC before making important decisions having potential impact on its language and culture**

EECD must consult the superintendent of each school district when preparing collective agreements to identify and integrate — into the school calendar, for example — their needs with regard to the vitality of the language, culture and community. It must consult with the DECs when preparing for negotiations with the federal government on bilateral agreements relating to official languages in education, early childhood and immigration. It must also consult with the Association francophone des parents du Nouveau-Brunswick (AFPNB) and the Fédération des jeunes francophones du Nouveau-Brunswick (FJFNB) on matters regarding official languages in education, the Association francophone des garderies éducatives on matters regarding early childhood, and the Réseau en immigration francophone on matters regarding immigration.

## **COMPONENT 2: A democratic school system**

The signatories support the four key recommendations presented by the JWG to reinforce school democracy.

#### **2.1 EECD and the DECs must undertake regular “effective consultations”**

EECD must conduct an “effective consultation” with the AFC, particularly the DECs and the FJFNB, when it introduces a bill on education or an amendment to the existing act. It must adopt a directive to define the “effective consultation,” its terms and its obligations.

The DECs must adopt and implement policies on parental, student and community involvement. These will specify how the DECs are to carry out effective consultations with these diverse clienteles,

such as newcomers, visible minorities, First Nations members, illiterate adults, single-parent families and individuals living below the poverty line.

However, EECD, in cooperation with the DEC, the AFPNB and the FJFNB, must establish a mechanism for consulting with parents, PSSCs, parents' committees, students and student councils to determine how parent and student involvement in school governance may be increased and improved. These consultations must cover all major issues, including required training, necessary tools, cooperation between PSSCs and student councils, the cooperation of those organizations with school principals and parents' committees, the balance between standardization and rules and procedures, and local flexibility.

In addition to complying with case law relating to section 23, the *Education Act* must respect the rights of children and the rights and role of parents, particularly with regard to the involvement and participation of students and parents in the school system's decision making.

## **2.2 The DEC must expand and promote democratic participation in the district among parents, youth and the community, particularly by voting and running for positions**

All rights holders who can effectively communicate in French can run in DEC elections. DEC members, except for student representatives, must be elected by popular vote. The popular vote must be expanded by lowering the voting age for school elections from 18 to 16 years and by allowing newcomer parents who are not yet Canadian citizens to vote in school elections after residing in the country for three years. One seat on each DEC must be reserved for a high-school student. Student DEC members will not be able to vote except on issues permitted under existing statutes. A legal opinion is required to determine these limitations. Students will have the right to appoint a second council representative, who will have the right to speak but not to vote. The intention of adding the second student councillor is to prepare them to succeed the other.

We must ensure that, to assume their responsibilities, DEC members receive quality training, particularly regarding section 23 and applicable case law. They must be given fair compensation for their responsibilities, which are similar to those assumed by elected municipal officials. As much as possible, the DEC will distribute the locations of their public meetings over the year across the entire district to meet all of the district's PSSCs and discuss major issues with members. The DEC's public meetings must be shared via an accessible, public electronic platform, such as the district's website.

Following this reform, research will need to be carried out to establish additional strategies for increasing the number of candidates and the rate of participation in school elections. For instance, voters must be allowed to exercise their right to vote electronically, ensuring that those elected receive adequate initial and continued training and compensation, etc. Additional measures must be taken to improve non-Francophone parent participation in the educational success of their children and of the dual mandate of French-language schools.

## **2.3 EECD and the DEC must expand and promote democratic participation in PSSCs among parents, youth and the community, particularly by voting and running for positions**

Each school must have a PSSC. PSSCs must be granted increased authority and responsibility, allowing for a greater contribution in the establishment of school priorities and in the approval and

review of the school improvement plan. This authority and responsibility must not, however, lessen that imparted to the DEC under section 23, which confers the right to manage a network of several schools, not individual schools. PSSCs must receive the annual financial report from the school's principal on the budget and use of the funding allocated to the school and raised for it, including revenue derived from early learning and child care facilities, daycare centres, cafeterias, etc.

To improve parent participation in PSSC elections and meetings, virtual voting and participation must be permitted, and the required resources must be provided. The DEC and their partners, particularly the AFPNB, must ensure PSSC members receive quality training and must regularly promote school volunteering, the role of parents and the importance of PSSCs.

Furthermore, each high-school PSSC must include one student with the right to vote.

#### **2.4 The DEC must establish a student council at each high school and assign it a broader role that includes having a voice concerning issues related to students' learning and overall educational experience**

Students must be able to choose their student council's governance model. They should therefore be able to choose between an organizational model with a president, vice president and treasurer; a governmental model with ministers; an Indigenous talking circle; or any other governance model. The student council must be able to set and manage its annual budget, which it must present to the students, PSSC and principal, and must receive the school's annual financial report from the school's administration. The student council must be able to participate in the administration's yearly assessment. School administrations must consult student councils when preparing school improvement plans and must present those plans and performance reports to the student councils. Furthermore, there must be a minimum of one annual meeting between a school's PSSC and its student council.

The DEC and their partners, particularly the FJFNB, must ensure members of the student councils receive quality training and regularly promote their volunteering, the role of students and the importance of student councils.

If these measures do not lead to improved democratic participation among students, the DEC and the FJFNB should consider establishing a youth council within each DEC, consisting of one representative from each of its high schools, as was done in the Francophone Sud DEC.

### **COMPONENT 3: An accountable school system**

The signatories support the recommendations of the JWG for improving the accountability of the school system and ensuring transparency regarding the use of public funds and actions taken.

#### **3.1 The DEC must clearly communicate their plans and outcomes to parents, youth and the community**

The DEC must be held accountable by EECD for their activities, results and spending, following the format and procedures imposed by the Legislative Assembly. As a consequence, the DEC will send their respective superintendents to accompany the Deputy Minister of EECD, as needed, to meetings



of the The Standing Committee on Public Accounts to answer the Committee's questions regarding DEC financial transactions.

Barring this accountability to legislators, it is most important that the CEDs are accountable to rights holders for their activities, to address rights holders' needs, the exclusive power granted to them under section 23. The DEC's must be accountable to parents, students and the community for their activities, results and spending, and for all other relevant information (e.g. balanced scorecards, operational dashboards, compliance with organizational policies, improvement plans, etc.). Each DEC's accountability will be ensured via the format and procedure preferred by its clientele, to ensure clientele comprehension.

The DEC's accountability must be included in their parent, student and community engagement policies. These policies must set out all appropriate means, including question periods during public council meetings; the publication of an annual report of activities, results and expenditures; an annual general meeting open to the public; meetings with the district's PSSC, etc. Regulations must be modified to allow DEC's to reduce their number of formal public meetings while making sure to maintain the minimum effective number to allow for meetings with parents, students and the community, to report on the past year, present an outline of the priorities for the coming year and discuss major issues.

EECD and the DEC's will be accountable to each other for their plans, activities, results and expenditures relating to the Official Languages in Education Program (OLEP) activities and how those activities and results contribute to the objectives of the OLEP, including identity building for Francophone students.

### **3.2 Each school administration must clearly communicate the school's plans and outcomes to parents, youth and the community**

PSSC's must ensure accountability documents relating to the objectives set out by the school administration (e.g. school improvement plan, school profile, scorecards) are presented to parents and include the activities of the PSSC and all revenue and expenditures of the funds provided to or raised for the school, including revenue derived from early learning and child care facilities, daycare centres, cafeterias, etc. The student councils must present an annual report of their activities, revenue and expenditures to the PSSC and school administration.

### **3.3 EECD must equip stakeholders with effective accountability mechanisms and tools**

The Act must be amended to enable the use of additional or alternative accountability tools, such as balanced scorecards and operational dashboards. The CARVER matrix must be used, and current audit reports evaluated to determine whether there is room for improvement or more effective accountability methods, such as the use of balanced scorecards and operational dashboards instead of audit reports. If there is a decrease or change in current audit reports, the DEC's must be able to, at a minimum, preserve their right to request an audit report from their superintendent at any time and on any of the district's issues. Public DEC and PSSC meetings must be offered virtually to provide all parents in the community with the opportunity to participate. EECD will meet with all members of each DEC at least once per year.



## COMPONENT 4: A stable, innovative school system

The signatories accept the recommendations of the JWG for improving the stability of the school system.

### **4.1 Any significant changes proposed to the French-language education system must be evidence- and practice-based, that is, backed up by refereed or applied research and subjected to strict scrutiny**

Any major changes to the French-language education system must

- respect case law relating to section 23;
- be supported by several peer-reviewed, scientific/fundamental studies (articles in well-recognized journals, chapters in peer-reviewed books, doctoral or master's theses, etc.) and/or applied research studies (action research, field testing, etc.);
- be approved within a school, a district, a community (e.g. a pilot project); and
- have clearly demonstrated in advance compliance with the plans in effect (provincial education plan, the LCDP, DEC strategic plans, school improvement plans, etc.) or why these plans do not apply.

Any proposed reform of any component of the school system — curricula, teaching, governance, etc. — must be subject to the stability and continuous improvement requirements outlined in the preceding paragraph. Nonetheless, where circumstances warrant under section 23, the DEC may modify the school system they manage without requirements relating to evidence-based practices and data. Readers are invited to reread the section of this report on the unique characteristics of the French-language school system to appreciate why the DEC must be given greater discretion in their powers.

### **4.2 The institutional arrangements in place must protect the stability of the system**

At least three DEC and the four-year electoral mandate must be maintained. Elections New Brunswick must ensure polling stations are present across New Brunswick, particularly in isolated rural regions. The *Education Act* must be amended to formalize the stability measures proposed in this report.

## COMPONENT 5: Collaboration mechanisms

### 5.1 A provincial (EECD/Acadie) co-construction mechanism must be established

To ensure the continuous improvement of school democracy, the accountability and stability of the education system and compliance with section 23, a permanent provincial co-construction mechanism (PPCCM) is required. EECD and the organizations of the AFC taking part in this mechanism will need to define their mandate, but the signatories believe that the following are essential components:

- Ensuring the joint development of and overseeing the implementation of the French-language school system's key documents, such as the education plan and the PALC
- Ensuring the alignment of the preschool, school and post-secondary systems in New Brunswick's Acadie
- Providing an overview of the French-language system's funding

The PPCCM will not make any decisions that interfere with the responsibilities of EECD or the exclusive powers of the DECs. To avoid such interference, the PPCCM will meet with key French-language education system partners to better ensure their activities are aligned with their plans. The PPCCM will consist of delegates from groups including but not limited to EECD, the DECs, the Association des enseignantes et des enseignants francophones, the AFPNB, the FJFNB, the education faculty at the Université de Moncton, the early childhood education program of the Collège communautaire du Nouveau-Brunswick, the Conseil pour le développement de l'alphabétisme et des compétences des adultes, the Réseau en immigration francophone, the Association francophone des garderies éducatives and the Société de l'Acadie du Nouveau-Brunswick.

### 5.2 The DECs must establish a provincial co-management mechanism for programs

In sections 1.2 and 1.3, we suggest that the DECs establish a formal mechanism for properly handling the development and implementation of school programs. We also recommend the identification of community and school support funding expenditures and community needs and of bilateral agreements on early childhood, immigration and French first language instruction. The DECs should specify the mandate, the composition and the operating procedures of the provincial co-management mechanism (PCMM), but it would be wise for them to focus on decision making (majority vote, unanimity, right of veto, etc.) to minimize decision-making challenges.

Cooperation between partners ultimately depends on the goodwill of stakeholders, as determined by the signatories based on the experience of the JWG. However, we believe that this would be better ensured through a clear and precise framework and the implementation of formal and permanent mechanisms. We have outlined the major points in this report but cannot lay out every detail. We are putting our trust in EECD, the DECs and the other key stakeholders.

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- <sup>2</sup> *Succeeding at Home: A Green Paper on Education in New Brunswick* (Fredericton: New Brunswick Department of Education and Early Childhood Development, 2019), online: <https://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/promo/summit/GreenPaper.pdf>.
- <sup>3</sup> Royal Commission on Bilingualism and Biculturalism, *Education* (Ottawa: Queen’s Printer, 1968), at 8.
- <sup>4</sup> Royal Commission on Bilingualism and Biculturalism, *Education*, at 9.
- <sup>5</sup> *Mabé v Alberta*, [1990] 1 SCR 342 at para 2, 68 DLR (4th) 69 [Mahé]. In *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 SCR 201 at para 3, the Court described section 23 as “the cornerstone of minority language rights protection” [Solski].
- <sup>6</sup> Royal Commission on Bilingualism and Biculturalism, *Education*, at 19.
- <sup>7</sup> *Mabé v Alberta*, [1990], at para 32.
- <sup>8</sup> See R. Landry and R. Allard, “L’assimilation linguistique des francophones hors Québec, le défi de l’école française et le problème de l’unité nationale” (1988) *Revue de l’Association canadienne d’éducation de langue française* 38.
- <sup>9</sup> *Mabé v Alberta* [1990], at para 45.
- <sup>10</sup> *Mabé v Alberta* [1990], at para 45.
- <sup>11</sup> *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3 at para 31 [Arsenault-Cameron].
- <sup>12</sup> *Société des Acadiens du Nouveau-Brunswick Inc et al v Minority Language School Board No. 50* (1983), 48 NBR (2d) 361 (QB); *Société des Acadiens du Nouveau-Brunswick Inc et al v Minority Language Board No. 50 et al.* (1987), 82 NBR (2d) 360 (CA).
- <sup>13</sup> *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 46, 19 DLR 9 (4th) 1.
- <sup>14</sup> *Solski v Quebec* [2005], at para 6.
- <sup>15</sup> The only Anglophone community that may avail itself of section 23 is the Anglophone community in Quebec, as it is a minority in that province. The Anglophone minority in a region of a province where it constitutes a majority may not. Accordingly, Anglophone parents in Edmundston or the Acadian Peninsula may not invoke section 23 to call for schools in their language where they do not exist.
- <sup>16</sup> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 26.
- <sup>17</sup> *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 SCR 839 at 850.
- <sup>18</sup> *Association des parents de l’école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at para 25.
- <sup>19</sup> *Arsenault-Cameron* [2000], at para 27; *Doucet-Boudreau* [2003], at paras 4, 28; *Solski* [2005], at para 23.
- <sup>20</sup> *Mabé* [1990], at para 33.

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- 21 *Solski* [2005], at para 23.
- 22 *Solski* [2005], at para 25. See also *R v Beaulac*, [1999] 1 SCR 768 at para 25, 173 DLR (4th) 193; *Reference re Public Schools Act* [1993], at para 16; and *Arsenault-Cameron* [2000], at para 27.
- 23 *Beaulac*, [1990], at para 25.
- 24 *Arsenault-Cameron* [2000], at para 27.
- 25 *Mabé* [1990], at para 45.
- 26 *Mabé* [1990], at para 31; *Reference re Public Schools Act* [1993], at para 13.
- 27 *Mabé* [1990], at para 32; see also *École Rose-des-vents* [2020], at para 26.
- 28 *Arsenault-Cameron* [2000], at para 27.
- 29 *A.G. (Quebec) v Quebec Protestant School Boards*, [1984] 2 SCR 66 au para 30; *Mabé* [1990], at para 34; and *Solski* [2005], at para 20.
- 30 *Reference re Public Schools Act* [1993], at para 16.
- 31 *Mabé* [1990], at para 34-35.
- 32 *Arsenault-Cameron* [2000], at para 25.
- 33 *École Rose-des-vents* [2020], at para 27.
- 34 *Doucet-Boudreau* [2003], at para 29.
- 35 *École Rose-des-vents* [2020], at para 28.
- 36 *Mabé* [1990], at para 37.
- 37 *Canadian Charter of Rights and Freedoms*, s 23(1).
- 38 *Charter*, s 23(1)(a).
- 39 *Charter*, s 23(1)(b).
- 40 *Charter*, s 23(2).
- 41 See, among others, R. Landry, *Libérer le potentiel caché de l'exogamie: Profil démographique des enfants des ayants droit francophones selon la structure familiale*, study carried out on behalf of the Commission nationale des parents francophones, 2003 [*Libérer le potentiel caché de l'exogamie*].
- 42 In Quebec, contrary to the situation prevailing in the nine other provinces and the three territories, it is the rights of the Anglophone community, a minority in that province, that are protected under s 23.
- 43 *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 30.
- 44 *Abbey v Essex County Board of Education* (1999), 42 OR (3d) 481 at para 24.
- 45 *Abbey* [1999], at para 27.
- 46 *Solski* [2005], at para 33.

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- 47 *Mabé* [1990], at para 67.
- 48 *Société des Acadiens*, QB, [1983], at para 66.
- 49 *Education Act*, SNB 1997, c E-1.12.
- 50 *Loi sur l'éducation*, s 5. The same condition applies to Francophone children whose parents request admission to an English-language school. Before being admitted to an English-language school, it must be demonstrated that a child has sufficient proficiency in that language.
- 51 *Solski* [2005], at para 50.
- 52 *Solski* [2005], at para 33.
- 53 *Mabé* [1990], at para 51-52.
- 54 *Arsenault-Cameron* [2000], at para 38.
- 55 *Mabé* [1990], at para 48.
- 56 *Mabé* [1990], at para 51. See also *Arsenault-Cameron* [2000], at paras 45-46.
- 57 *Reference re Public Schools Act* [1993], at para 45.
- 58 *Mabé* [1990], at para 43.
- 59 *Mabé* [1990], at para 61.
- 60 *Arsenault-Cameron* [2000], at para 55.
- 61 *Arsenault-Cameron* [2000], at para 50.
- 62 *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42, [2013] 2 SCR 774 at para 56.
- 63 *Mabé* [1990], at para 96.
- 64 *Arsenault-Cameron* [2000], at para 52.
- 65 *Arsenault-Cameron* [2000], at para 44.
- 66 *Arsenault-Cameron* [2000], at para 53.
- 67 *Reference re Public Schools Act* [1993], at para 47.
- 68 *Arsenault-Cameron* [2000], at para 31, 49.
- 69 *Arsenault-Cameron* [2000], at para 51.
- 70 *Arsenault-Cameron* [2000], at para 51.
- 71 *Arsenault-Cameron* [2000], at para 57.
- 72 *Constitution Amendment, 1993 (New Brunswick)*, effective March 12, 1993, SI\93-54.
- 73 New Brunswick, Legislative Assembly, *Journal of Debates (Hansard)*, 52nd Leg, 1st Sess, vol 11 (December 4, 1992) 4708-4721.

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- <sup>74</sup> *Charlebois v Moncton (City)*, 2001 NBCA 117, 242 NBR (2d) 259.
- <sup>75</sup> *Charlebois* [2001], at para 80.
- <sup>76</sup> *Charlebois* [2001], at paras 115-116.
- <sup>77</sup> Rodrigue Landry, *Libérer le potentiel caché de l'exogamie*, 2003.
- <sup>78</sup> Rodrigue Landry, *Libérer le potentiel caché de l'exogamie*, 2003.
- <sup>79</sup> Rodrigue Landry, *Petite enfance et autonomie culturelle: Là où le nombre le justifie*, 2010, report prepared for the Commission nationale des parents francophones, Canadian Institute for Research on Linguistic Minorities, at 32.
- <sup>80</sup> Rodrigue Landry, *Vitalité ethno-linguistique et développement psycholinguistique en milieu minoritaire francophone au Canada*, Canadian Institute for Research on Linguistic Minorities, paper presented as part of the DROI 3120 – Droits linguistiques course, Faculté de droit, Université de Moncton, Moncton, 2006. The percentages of children of exogamous families in different cities across the province, according to the figures compiled by Landry, are as follows: Saint John, 88%; Fredericton, 81%; Moncton, 60%; Dieppe, 20%; Shediac, 18%; Edmundston, 9%; and Caraquet, 2%.
- <sup>81</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick* (Ottawa: Statistics Canada, 2011), at 19.
- <sup>82</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 15.
- <sup>83</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 15.
- <sup>84</sup> *Esquisse de la situation linguistique au Nouveau-Brunswick* (Ottawa: Canadian Institute for Research on Linguistic Minorities, 2013), at 4.
- <sup>85</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 21.
- <sup>86</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 19.
- <sup>87</sup> *Vitalité ethno-linguistique et développement psycholinguistique en milieu minoritaire francophone au Canada*, Canadian Institute for Research on Linguistic Minorities, paper presented as part of the DROI 3120 – Droits linguistiques course, Faculté de droit, Université de Moncton, Moncton, 2006, at 12.
- <sup>88</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 23-24.
- <sup>89</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 55.
- <sup>90</sup> Rodrigue Landry, “From Preschool to Post-Secondary Education: Enrolments of OLMC’s Children in Minority Language Institutions” in Rodrigue Landry, ed, *Life in an Official Minority Language in Canada* (Moncton: Canadian Institute for Research on Linguistic Minorities, 2014) 95.
- <sup>91</sup> *Esquisse de la situation linguistique au Nouveau-Brunswick*, at 8.
- <sup>92</sup> *New Brunswick Francophone Immigration Action Plan 2014-2017*, online: Government of New Brunswick <https://www2.gnb.ca/content/dam/gnb/Departments/petl-epft/PDF/PopGrowth/FrancophoneImmigrationPlan2014-17.pdf>.
- <sup>93</sup> *Portrait of Official-Language Minorities in Canada: Francophones in New Brunswick*, at 43.
- <sup>94</sup> Pierre-Marcel Desjardins, *Report on Recommendations 1 and 2 in the Report of the Panel of Experts on the Funding of Francophone Schools* (2012), online: <https://canadacommons.ca/artifacts/1217740/report-on-recommendations-1-and-2-in-the-report-of-the-panel-of-experts-on-the-funding-of-francophone-schools/1770831/>.

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<sup>95</sup> Marianne Cormier, *La pédagogie en milieu minoritaire francophone: une recension des écrits* (2005), online: Canadian Institute for Research on Linguistic Minorities [http://icrml.ca/images/stories/documents/fr/cormier\\_marianne\\_recension.pdf](http://icrml.ca/images/stories/documents/fr/cormier_marianne_recension.pdf).

<sup>96</sup> Anne Gilbert et al, *Le personnel enseignant face aux défis de l'enseignement en milieu minoritaire francophone – Rapport final de la recherche* (Ottawa: Centre for Interdisciplinary Research on Citizenship and Minorities, University of Ottawa, Canadian Institute for Research on Linguistic Minorities and Canadian Teachers' Federation, 2004).

<sup>97</sup> Sylvie Roy and Phyllis Dalley, ed, *Francophonie, minorités et pédagogie* (Ottawa: University of Ottawa Press, 2008).

<sup>98</sup> (2009) 21:1-2 *Cahiers franco-canadiens de l'Ouest*, online: <https://www.erudit.org/en/journals/cfco/2009-v21-n1-2-cfco3975/>.

<sup>99</sup> Jules Rocque, ed, *La direction d'école et le leadership pédagogique en milieu francophone minoritaire* (Winnipeg: Presses universitaires de Saint-Boniface, 2010).

<sup>100</sup> François Lentz, "Travail pédagogique et construction identitaire en milieu francophone minoritaire: quelques observations à l'occasion d'un anniversaire", online: (2016) 28:2 *Cahiers franco-canadiens de l'Ouest* 317-386 <https://www.erudit.org/fr/revues/cfco/2016-v28-n2-cfco02605/1037178ar/>.

<sup>101</sup> The signatories must specify that, to ensure the proper governance of the French-language school system in New Brunswick, the needs of the Acadian and Francophone community must include those of the clientele served who are not rights holders due to not yet having received Canadian citizenship.

<sup>102</sup> To specify, a student may qualify as a rights holder if that student becomes a parent while in school.