PART II

POLICY LEVERS AND LEGAL MEASURES: THE INTERPLAY OF ACTORS

Page left blank intentionally

CHAPTER 3

French-Language Health Services in Canada: The State of the Law

Pierre Foucher, Faculty of Law, *University of Ottawa*

Abstract

This analysis of the legal framework of the active offer of French-language health care in Canada will examine its constitutional and legislative elements. The first part will explore the constitutional dimension, looking at aspects related to the *Canadian Constitution* and the *Canadian Charter of Rights and Freedoms* enshrined therein. In the second part, we will consider language laws at the federal level and in the provinces and territories. The study will show the asymmetrical nature of the legal model and the challenges it engenders.

Key Words: legal framework, law, health care, *Canadian Charter of Rights and Freedoms*, *Canadian Constitution*.

Introduction: Law, Language, and Health Care

In a study of the active offer of health care in the user's official language, a legal analysis allows us to establish the framework within which health care services themselves are provided. The law can create obligations for the state to fulfill, but it can also confer powers on service providers and define the limits of the exercise of these powers. A legal obligation to actively offer users health care in their official language is generally linked to the right to receive services in this language, enshrined in legislation. This chapter examines the legal framework within which institutions can provide an active offer of health services in the language of the minority.

Contrary to international law, Canadian law does not explicitly recognize the "right to health"[1] in official documents. The state is not legally obligated to give universal and free access to health care. Instead, for the state, it is a political choice expressed legally in laws and regulations that create or recognize health institutions, give them powers, provide the means to finance them, structure their actions, and establish their limits. Laws also establish language rights. The law can impose requirements to provide services in the minority language, and can also add the obligation to actively offer these services, so people in vulnerable situations who need care do not have to engage in a language battle to receive them.

This chapter presents the general constitutional framework in which the active offer of health care services is positioned, then reviews the laws that do or do not create obligations in this area. Because the linguistic, legal, and constitutional situation of Quebec is very different from that of the other provinces, we have chosen to not include it here.

Constitutional Framework of the Active Offer of Health Care in the Language of the Minority

Two aspects of the *Canadian Constitution* underpin the right to health care services in the official language of the minority community: federalism and fundamental language rights.

Federalism and Health

Canada is a federal state. However, health is one of the areas under the jurisdiction of both federal and provincial laws[2] and federal authority is secondary; provinces have the primary responsibility for regulating health care. Moreover, language is also an area of shared authority.[3] Every jurisdiction can thus adopt different language laws. This aspect of federalism will be addressed in the second part of the chapter. First, we will examine the scope of federal laws in this area.

Federal Funding

The most obvious way the central Government intervenes in health care is through the funds it spends under the Equalization program and the Canadian Health Transfer program. The Equalization program, the principle of which is protected under Section 36 of the

Constitution Act, 1982,[4] is based on the redistribution of the wealth generated by revenue from federal income taxes. The funds given to the provinces under this program are unconditional; provinces are free to spend the money on whatever programs and services they want, including health care.

The Government of Canada also makes abundant use of what is often called its "spending power" to increase access to health care services in French. This is a discretionary power of the federal government; it is not explicitly recognized in the *Constitution* but its legitimacy has been confirmed by the Supreme Court of Canada.[5] It allows the Canadian government to spend money in sectors the *Constitution* has already conferred to the legislative bodies of the provinces. The federal spending power for health is best illustrated by two major interventions: the Canada Health Transfer, and official language programs.

The *Canada Health Act* associates federal payments with five principles: public administration; comprehensiveness; universality, portability; accessibility.[6] Each of these conditions must be related to a financial matter; otherwise, it runs the risk of being considered by the Supreme Court as a means of regulating the sector, which the *Constitution* does not allow, rather than a condition for granting funds, which is permitted under the *Constitution*. The Commission on the Future of Health Care in Canada, in its final report, recommended that "governments, regional health authorities, health care providers, hospitals and community organizations should work together to identify and respond to the needs of official language minority communities." However, the Commission refused to recommend that access to health care in both official languages be made the sixth principle of the federal *Act*.[7]

The second component of federal funding is special official language funding programs; the Government's intervention is indirectly linked to Section 41 of Canada's *Official Languages Act*.[8] The Government's approach, geared to cooperation and coordination in federal/provincial/community initiatives, certainly respects shared jurisdiction, but does not provide any strong legal guarantees about the actual right to receive health care in one's own official language.

There are only a few legal measures to ensure provinces are accountable for the funds transferred to them to provide French-language health services, and little recourse for the Court to obligate provinces to respect their agreements, let alone sign them in the first

place. It is not even certain that federal/provincial agreements are legal contracts; rather, they are political agreements.[9] In short, subject to the rights entrenched in the *Charter*, the *Constitution* does not seem to offer many binding legal solutions to the problem of whether there is a federal obligation to offer health care in French in Canada.

Direct Federal Jurisdiction

Aside from its spending power, certain matters under the jurisdiction of the federal government have an impact on health and it is these making it possible to regulate health and safety in a general sense.[10] Other areas under federal jurisdiction are secondary dimensions of access to health care. Because they are addressed to particular client groups who are under the responsibility of the Government of Canada—the military, veterans, detainees in federal penitentiaries, Aboriginals on and off reserves, marine hospitals, and young offenders in detention centres—health care may be offered through health facilities and medical centres established by the federal government of its own account. Services may also be provided to these "federal client groups" through agreements between the federal government and the provinces.

Language rights provided for by the *Charter* may also play a role in the area of health services.

Fundamental Language Rights and Language of Provision of Health Services

Since the *Lalonde* decision by the Ontario Court of Appeal, we would be justified in believing that Canadian constitutional law now recognizes the rights of linguistically homogenous health facilities.[11] In fact, nothing is less certain. First, the *Lalonde* decision deals with a government's decision to close an institution, not an obligation to create one. Next, *Lalonde* was based on Ontario's language law, supplemented by principles of interpretation, and not on a general constitutional right to linguistically homogenous health institutions. Finally, the Court was careful to mention that nothing in the text of the *Charter* stipulates that citizens have the right to health care in their own language, and that this omission was intended. However, certain language rights which are guaranteed under the *Charter* may apply indirectly to health care.

Language rights in the *Canadian Charter of Rights and Freedoms.* Subsection 16(1) of the *Charter* states that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and the Government of Canada. Subsection 20(1) of the *Charter* gives the public the right to receive services from and to communicate with federal institutions in English or French, either when dealing with the head office or in other cases: when there is a significant demand for services or when, because of the nature of the office, it is reasonable to expect them. Federal institutions delivering health services must respect those language rights. English and French are also the official languages of New Brunswick according to Subsection 16(2), and the public in New Brunswick has the right to receive services from the provincial government in English or French according to Subsection 20(2). Furthermore, Section 16.1 states that the English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities; this could include the institutions which provide health care, given the cultural dimension of health facilities. So far, no other province has recognized the constitutional right to government services in English and French.

Subsection 16(3) of the *Charter* authorizes federal and provincial laws to advance the equality of status or use of English and French. This protects laws that might include, for example, distinctions related to language (such as requiring the ability to speak one or both languages in public positions in the hospital, or guaranteeing the right to care in English or in French only, which is considered discriminatory when applied to other languages). Subsection 16(3) gives permission but does not impose an obligation, either to create institutions or to justify abolishing them.[12] Moreover, the *Charter* does not eliminate the model of Canadian federalism: constitutional language rights correspond to the division of powers.[13] This creates an asymmetrical model of rights, and asymmetry is a characteristic of modern federalism.

Unwritten constitutional principles. Certain constitutional principles are not written explicitly, yet they represent foundations of the *Constitution*, the "vital unstated assumptions upon which the text is

based," "major elements of the architecture of the *Constitution* itself"; these underlying principles are not invented by the Courts, but can rather be deduced or derived from the text. They can generate specific legal obligations on the state, but they cannot create new rights.[14] The protection of minorities, and in particular linguistic minorities, is one of the unwritten principles.[15] It can be used to interpret language guarantees explicitly written in legislation, and to protect linguistically homogenous health institutions designated under a law. However, in our opinion, it cannot be used to force the government to create new institutions.

This, then, is the constitutional framework within which the federal Parliament and the provinces and territories adopt laws concerning health services and the language in which they are provided. The *Charter* creates linguistic obligations at the federal level and in New Brunswick; besides these obligations, federalism allows federal and provincial language laws to be adopted as ancillary to the primary jurisdiction. Thus, as we will see, laws on the language of health services are generally made under the jurisdiction of the provinces, which can decide whether to establish rights in this matter.

The Legislative Framework of the Active Offer of Health Services in the Language of the Minority

Since language is ancillary to the primary jurisdiction, and since health involves both federal and provincial powers, both federal and provincial laws come into play. However, some jurisdictions, as we will see, are more active than are others in dealing with the matter of language of health care.

The *Official Languages Act* and Health Care

Two components of Canada's *Official Languages Act* (*OLA*) are particularly relevant in the context of this research: the obligation of federal institutions to offer services in English and French, and the obligation of the government to take measures to preserve and promote official language minority communities.

Services Offered by Federal Institutions

Part IV of the *OLA* specifies federal constitutional obligations in the area of language. Section 22 in the *OLA* repeats almost word-for-word

the text found in Section 20 of the *Charter*. It applies to offices of federal institutions, which may include those federal institutions delivering health care services (military hospitals, for example). It gives rights to the "public," which encompasses users of health care services. Finally, it sets out three different locations where services in the official language must be offered: in central or head offices, in areas where there is a significant demand for services, and where, because of the nature of the office, it is reasonable to expect services in both languages.[16]

Section 32 of the *OLA* delegates the responsibility for defining "significant demand" and "nature of the office" to the government, but provides for the definitions to be founded on certain criteria. The Regulation, which has been in effect since 1992,[17] sets out an essentially statistical method to assess the demand, calculated on the basis of a certain percentage or an absolute number of residents whose mother tongue is the minority official language in one of the census subdivisions served by that office.[18]

Subsection 24(1) of the *OLA* deals specifically with health services. A federal institution must ensure services are offered in both official languages in cases, specified in the Regulation, which are matters of health and safety. Section 8 of the Regulation contains detailed provisions on this subject. Paragraph (*a*) imposes bilingualism on services received in a clinic located in an airport, a train station, or a ferry terminal. As for services given by a federal institution outside these places, the general rule about significant demand applies. Meanwhile, Section 9 of the Regulation extends the linguistic obligation to services offered in national parks throughout Canada, subject to certain conditions: since the nature of the services is not specified in the regulation, the provision of emergency health care may or may not be included.

When a legal obligation to offer services in English and French exists, a federal institution must, according to Section 28 of the *OLA*, make an "active offer" of these services. This requires making it publicly known that services are available in the official language of the minority, by displaying signs, greeting people verbally in the language of their choice, or by introducing other relevant and appropriate measures. The institution must also ensure services are offered as promptly in the minority language as in the official language of the majority, and are of the same quality.[19]

In order to avoid a situation in which the federal government might indirectly evade its obligations by delegating a task to others, Section 25 of the *OLA* extends all federal linguistic obligations to anybody that acts "on its behalf." As a result, if a federal institution that must provide health services to a specific clientele (active military personnel, eligible veterans, First Nations, Métis, Inuit, inmates of federal penitentiaries, or others) chooses instead to make an agreement with a provincial institution to do so, Section 25 comes into play; the provincial institution has the same linguistic obligation as the federal institution itself. If the provincial language provisions are more favourable to the minority language, they will apply instead of the federal provisions.[20] And if a decision to delegate powers on a particular matter were to lead to a loss of language rights for its citizens, the federal institution would be in violation of the *OLA* and may be required to correct the situation.[21]

Positive Measures

The constitutional validity of federal spending powers was mentioned earlier: Section 41 of the *OLA*, which has been binding and actionable since 2005, entrenches this power in legislation. It specifies that the federal government is required to ensure that "positive measures" are undertaken to enhance the vitality of the English and French linguistic minority communities and assist their development, as well as to foster the full recognition of the equality of English and French, while respecting the jurisdiction and powers of the provinces. The Minister of Canadian Heritage can make agreements with the provinces to "encourage and assist provincial governments to support the development of English and French linguistic minority communities generally, and, in particular, to offer provincial and municipal services in both English and French," which includes health services; such agreements may also "encourage and cooperate with the business community, labour organizations, voluntary organizations and other organizations or institutions to provide services in both English and French and to foster the recognition and use of those languages."[22] Together, these provisions provide the legal foundation of the health component of the Action Plan for Official Languages.

The "positive measures" would probably include clauses on language in funding agreements the Government of Canada makes with provincial institutions or private entities requiring or urging

them to find the means to make their services available in the official language of the province's minority. The legal source of the obligation originates, in this case, in the agreement with the federal government. This case should be distinguished from that of agreements whereby the provinces become agents of the federal government, and act "on their behalf" by providing health services to "federal clients"; in the latter case, the *OLA* applies directly to the federal institutions involved.

Language Laws and Policies in the Provinces and Territories and Health Care

The provinces are responsible for regulating health professions, for creating, maintaining, and managing hospitals, clinics, and other locations where health services are provided, and for regulating private organizations operating in the field of health care.[23] Therefore, it is the provinces that have the primary responsibility for organizing health care and determining the way health services are delivered. Because language is an ancillary power in relation to a primary jurisdiction, the level with constitutional jurisdiction over health can also regulate the language in which health services are offered. Our study is limited to the legal framework of the language of health care, and we will set aside the regulation of health professions and labour rights relating to language.

New Brunswick

New Brunswick has the most extensive legal provisions for French-language health care. Sections 33 and 34 of New Brunswick's *Official Languages Act*[24] specify the rights of members of the public in terms of health care. Section 33 stipulates that a health facility is subject to the general obligations, set out in Sections 27 and 28, to offer services and to communicate with members of the public in the official language of their choice. This means that each individual has the right to receive care in French or in English in every hospital, health centre, or other health facility belonging to one of the Regional Health Authorities in the province. Furthermore, because of the particular demography of the province, which comprises regions with a high Francophone majority, a high Anglophone majority, and bilingual regions, Subsection 33(2) stipulates that the Minister of Health, when establishing a provincial health plan, shall ensure that obligations to provide services in both

official languages that arise from Sections 27 and 28 are met, as well as that the "language of daily operations" of the health facility are considered. Section 28.1 states that institutions subject to the obligation to serve the public in the official language of one's choice must make an "active offer" of these services, and take appropriate measures such as displaying signs or posters and communicating with the public in both languages. Section 34 indicates that, subject to the obligation to serve members of the public in the official language of their choice, Section 33 does not limit the use of one official language in "the daily operations" of a hospital or other facility. This concession to customs and language practices preserves the Francophone or Anglophone character of certain hospitals or medical centres, which must, nonetheless, serve the public in both languages. Indirectly, it recognizes linguistically homogenous health institutions.

The other piece of legislation affecting the language of health care in the province is the *Regional Health Authorities Act*.[25] Following a major restructuring exercise, New Brunswick established two Regional Health Authorities (RHAs). "Horizon" Network covers the south, west, and centre of the province, regions with strong Anglophone majorities, as well as a few facilities in southeastern New Brunswick which are primarily Anglophone. "Vitalité" Network covers the northwest, the north, and the northeast, where there are strong Francophone majorities, and the facilities in southeastern New Brunswick which are primarily Francophone. Thus, a form of linguistic duality has been preserved by the legislature. Subsection 19(1) recognizes that Horizon Network operates in English and Vitalité Network operates in French. Subsection 20(8) states that the board of the RHA should conduct their affairs in the language of operation of the RHA. Paragraph 19(2)(*a*) specifies that, despite this, RHAs must "respect the language of daily operations of the facilities under its responsibility." And Paragraph 19(2)(*b*) further specifies that the RHAs "provide health services to members of the public in the official language of their choice" throughout the network. Subsection 19(3), to our knowledge unique in legislation, charges the two RHAs with the responsibility to "improve the delivery of health services in the French language." Subsection 20(1) specifies the composition of the RHA boards (some of whose members are elected), and Subsection 20(1.1) instructs the Minister to "have regard to . . . the overriding interests of the official linguistic communities" when making appointments. Section 40 requires RHAs to provide

simultaneous interpretation for any public meetings they hold. The regulation stipulates that meeting minutes be made available to the public in both official languages; as an exception, the minutes of meetings that are closed to the public are not published.[26]

Services referred to as "shared services" (supplies, clinical engineering, information technology, laundry) are provided by a Crown Corporation called "Service New Brunswick."[27] This agency provides Regional Health Authorities and hospitals with financial services, information technology, and supplies. It is subject to the *Official Languages Act*.

Ambulance services have also been a source of irritation for some. The *Ambulance Services Act*[28] gives the Minister of Health the responsibility to issue permits and make agreements for the delivery of ambulance services. Ambulance New Brunswick is a private corporation that offers front-line health services through a contract with the Department of Health; Ambulance New Brunswick acknowledges it is bound by the provisions of New Brunswick's *Official Languages Act*.[29]

In summary, the active offer of French-language health services in New Brunswick is subject to legal provisions that establish a model of judicial duality in health facilities and institutions. The facilities providing services are subject to the condition that the public has the right to receive care in the official language of one's choice anywhere in the province and at all times. There are still some grey areas, however: the true status of nursing homes, for example, which are private facilities regulated by the provincial government, remains undefined.

Ontario

Ontario represents the other provincial jurisdiction with a language framework for health care more favourable than most other provinces, although there is still work to be done. In the *French Language Services Act*,[30] Ontario opted for a system of designated services in designated regions, combined with the opportunity for facilities that are not government-based to apply to be self-designated if they offer services in a designated region. Section 5 of the *Act* states its principle that any member of public has the right receive services in French from any head or central office of "a government agency or institution" as defined under Section 1 of the *Act*; that section extends the definition of a "government agency" to include "a non-profit corporation or similar entity [or even an individual service provider]

that provides a service to the public, is subsidized in whole or in part by public money, and is designated as a public service agency by the regulations." Finally, Subsection 8(a) allows the Lieutenant-Governor in Council to designate any "public service agency" through a regulation. This mechanism can apply to hospitals, clinics, nursing homes and special care homes, children's aid services, or any other organization that meets the criteria and asks to be designated. Regulation 398/93, as amended, includes a list of organizations designated according to these provisions, which are required to meet the obligations set out in Section 5. The designated organizations include several hospitals, community health clinics, seniors' centres operating programs on behalf of the Ministry of Health, and children's aid centres delivering services on behalf of the Ministry of Health.

The designation mechanism thus makes it possible to offer health care services to Francophones in their own language, through a wide range of semi-public, private, or community agencies. Many of these organizations are operated "by and for" Franco-Ontarians. The right to receive health services in French is not automatic, as it is in New Brunswick; instead it depends on a designation. A designation is made at the discretion of the Lieutenant-Governor in Council, but the Office of Francophone Affairs, which makes recommendations to the Government of Ontario, uses the following criteria. A designated agency must:

- offer French-language services on a permanent basis by employing people with requisite level of French-language skills
- guarantee French-language services can be provided for all or some services and during business hours
- ensure Francophones sit on boards of directors and committees in proportion to the Francophone population in the community
- have Francophones in senior management in proportion to the local Franco-Ontarian population
- make directors and senior managers accountable for the quality of French-language services
- demonstrate, every three years, how they have maintained this level of service. The board of each agency must submit a report detailing how this was accomplished to the ministry for which they are working.[31]

As for the management of health care services itself, besides the Ministry of Health, which falls directly under the definition of public services agency, health care is planned, organized, and funded by Local Health Integration Networks (LHINs) mandated to improve access to care. The *Local Health System Integration Act, 2006*[32] provides for the creation and operating structures of the LHINs. The *Act* stipulates LHINs respect the requirements of the *French Language Services Act* if they are in locations where they serve Francophone communities. It also provides for a French Language Health Services Advisory Council,[33] which was established by Regulation[34] and groups together organizations working in the area of, or with a special interest in, the delivery of French-language health services in the province. The council advises the Minister on matters related to "health and service delivery issues related to francophone communities" and on priorities to be integrated into the provincial plan. Furthermore, Article 16(1) states an LHIN "shall engage the community of diverse persons and entities involved with the local health system," while Subsection 16(4) stipulates that while doing so, it "shall engage the French language health planning entity" in its region. This was recommended by the French Language Services Commissioner in a special report published in May 2009.[35] Regulation 515/09 did, in fact, create "prescribe a French language health planning entity for the geographic area" of each LHIN.[36] It should be noted that these entities have a mandate to advise LHINs concerning, in particular, "the identification and designation of health service providers for the provision of French language health services in the area."[37]

Finally, Regulation 284/11 extends the obligations under Section 5 to any third-party entity that provides the public with a service "on behalf of" a government agency must do so according to the *Act*, subject to an agreement between the third party and the government.

Therefore, various acts prescribe mechanisms for formal consultations with Francophone communities regarding the active offer of French-language health services in the province,[38] but it is the designated health facilities themselves that ensure the direct delivery of health care and that must be designated in order for a true right to apply.

Manitoba

Section 23 of the *Manitoba Act*, 1870[39] created the obligation for the province to legislate in French and English, and the right to use either

official language in the legislature and before the provincial courts. A language policy has been adopted; it applies to designated organizations "which provide health services, social services, or both," as well as designated regional health authorities. Regulation 131/2013[40] adopted under the *Regional Health Authorities Act*[41] lists the institutions and organizations designated for this purpose. A "Francophone" facility or program is defined as one in which "services are provided in both English and French, or in French only, and whose primary language of operation is French." Section 4 specifies that services in designated facilities "must comply with the government's French Language Services Policy." Moreover, a regulation obligates all Regional Health Authorities to submit to the Minister of Health "a proposed plan of French language services."[42] This plan lists the Francophone and bilingual facilities and programs offered in its region.[43] The Health Authorities must consult with the community and service providers before developing their plan.[44] The plans are approved by the Minister and the Health Authorities present that Minister with a report on the progress they have made.[45] Hence, there is a legal recognition of the provision of French-language services; in designated institutions, services must be offered actively, and in other Health Authorities and facilities, a plan must indicate what the organization intends to do. The Bill for the *Bilingual Service Centres Act*[46] foresees the creation of bilingual centres in each of the six regions designated under the policy; these centres will be able to offer a wide range of provincial services, including health services. Last, the *Francophone Community Enhancement and Support Act*[47] creates a more permanent legal framework for French-language services in the province. It establishes a Francophone Affairs Secretariat and a standing Francophone Affairs Advisory Council, and imposes the adoption of French-language services plans by government agencies, including those designated to offer health services in French.[48] It prescribes the active offer of French-language services whenever they are required.[49] In short, the legal situation in Manitoba is evolving and its policy on French-language services in the health system is gaining legal recognition.

Prince Edward Island and Nova Scotia

Prince Edward Island and Nova Scotia operate on the same legal model as Ontario, a *French Language Services Act*.[50] This type of law and the regulations accompanying it designate regions where designated services are offered in French.

On the Island, the designation would create a legal obligation to offer these services.[51] Although health services as such are not yet designated, the Department of Health already offers certain services in French, in accordance with Section 2 of the *Act*. All government institutions must respond in French to correspondence they receive in that language. They are obligated to hold at least one public consultation in French, or, if there is only one consultation, it must be bilingual. In addition, all government institutions have a French-language services coordinator.[52] Each institution must submit plans for the provision of French-language services, as well as an annual report on their progress. The Regulation identifies the "Department of Health and Wellness" as well as "Health PEI," the province's health authority, as government institutions subject to the *Act*, and therefore required to develop plans for French-language services. The *Act* also establishes a "French-language Services Co-ordinating Committee" that informs the institution of its priorities; health is one of them.

The legal structure is very similar in Nova Scotia. Institutions are designated pursuant to the *French-language Services Act* (*FLSA*) and the Regulation; this applies to the Department of Health and Wellness, as well as the nine former health authorities. The latter have been folded into a single entity, which is responsible for the provision of health care services throughout the province. Nevertheless, the *Act* that creates the new provincial health authority does not actually designate it under the legislation. On the other hand, the *FLSA*, which had previously designated the nine health authorities existing at the time, has not yet been modified and does not reflect the change.[53] Designated institutions submit plans to develop French-language services and the Minister responsible for overseeing them files an annual report on their progress. French-language service coordinators are appointed in each department and office of the government. It should be noted that these laws do not give people a right to receive services in French from the designated institutions; rather, it obliges the institutions to develop implementation plans and to report on them each year.

Newfoundland and Labrador, British Columbia, Saskatchewan, and Alberta

In Newfoundland and Labrador, a new French-language service policy was adopted in 2016.[54] A very brief document, it establishes the French Services Office, which coordinates French-language services within

the government. It provides for training and translation services for provincial departments and institutions. Interpretation services are available in St. John's and in Labrador City; in other locations, the *Réseau Santé en français (*French health network) offers written material in French. In British Columbia, the *RésoSanté* health network publishes an online directory of health professionals who can provide services in French and who have self-identified by registering. Some institutions provide French-language services as well, including *La Boussole* community centre in Vancouver and the *Foyer Maillard* nursing home in Coquitlam. These resources have been supported financially by the federal government using its spending power. There are no laws or policies on French-language services in this province.

The policy framework for services in Saskatchewan is rather modest.[55] The province's *French-language Services Policy* applies to "the provincial government, its ministries, crown corporations, and other agencies." It specifies that correspondence with individuals or groups will be carried out in the official language preferred by the client, and signs and documents will be made available in both languages "when appropriate." As for services, it mentions that "the designation of bilingual positions [shall] be considered as a means to more effectively provide French-language services," and that "the inclusion of a French-language services component [shall] be considered when new Government of Saskatchewan programs and services are being developed." Nothing specific to health care is included. The Francophone Affairs Branch operates the French-language Service Centre, which serves as a single window for the public to access services and programs of the Government of Saskatchewan in French, particularly through Internet and telephone communication. Written materials on health issues have been published in French but there are no formally designated organizations. The application form for the provincial health insurance card is available in French. Any delivery or active offer of health care in Saskatchewan stems from administrative arrangements and partnerships between the French health network and provincial health authorities.

The same is true for Alberta. At the time of writing this chapter, a policy on French-language services was under way. A Francophone health centre, the *Centre de santé communautaire Saint-Thomas*, is located in the Francophone district of Edmonton, near the Campus Saint-Jean, the French-language faculty of the University of Alberta. The community health centre provides services from

family physicians, nurses, dietitians, a social worker, a psychiatrist and an exercise specialist.

The Three Northern Territories

Canada's three territories, located in the North, are distinct in their structure from the provinces. However, the Government of Canada treats them as provinces in several respects, including matters related to health care delivery.

Yukon adopted a *Languages Act* in 1986.[56] Although it does not recognize official languages for Yukon itself—simply recognizing in Subsection 1(1) that French and English are the official languages "of Canada"—the *Act* sets out the language requirements of institutions of the Legislature and the Government of Yukon. Subsection 6(1) reproduces Subsection 20(1) of the *Charter*, simply adapting it to refer to Yukon: "Any member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French," and in other places when it is justified by a "significant demand" or "the nature of the office." Subsection 6(2) specifies that regulations can prescribe "circumstances in which . . . significant demand shall be deemed to exist or in which the nature of the office is such that it is reasonable that communications with and services from that office be in English and French." The *Prescribed Offices Regulation*, YOIC 2003/79, established the list of offices included in this category; no health institution is on the list. The *Hospital Act*[57] creates a "Yukon Hospital Corporation" and gives it a bilingual name ("*Régie des hôpitaux du Yukon*"), charged with operating the three hospitals in the territory "by a board independent of the Government." Section 10 of that legislation specifies that the *Languages Act* applies to the Corporation. The Yukon Hospital Corporation is responsible for providing medical and hospital care, pursuant to Section 2. Consequently, and at least in theory, Franco-Yukoners have the right to receive services in their own language in the health facilities in Whitehorse managed by the Yukon Hospital Corporation; to this point, only the Whitehorse General Hospital is included. Elsewhere, the institution would have to be designated by a regulation, and that has not yet been the case for other facilities.

In the Northwest Territories (NWT), the *Official Languages Act*[58] provides for nine Aboriginal languages as official languages, as well

as English and French. Only measures related to French and English will be analyzed here. As in the Yukon legislation, Subsection 11(1) reproduces Subsection 20(1) of the *Charter*: The head office of government departments or agencies, as well as any other office where it is justified by "significant demand" or "the nature of the office" are required to offer services in French. A Regulation identifies four regions with a significant demand for French-language services: Yellowknife, Hay River, Fort Smith, and Inuvik.[59] The Health and Social Services Authorities of Fort Smith, Hay River, and Yellowknife are among the institutions designated in the Regulation. Eight Health Authorities, created by the Minister, offer health care to the population in facilities under their jurisdiction in accordance with Section 10 of the *Hospital Insurance and Health and Social Services Administration Act*. As a result, health facilities located in the four designated regions where there is "significant demand" for French-language health services are subject to the obligations set out in Section 11 of the *Act*. The *Fédération franco-ténoise* case[60] sheds light on some of the difficulties the Francophone community faced regarding the implementation of the *Official Languages Act* in the NWT at the time, and health care was one of the sectors subject to Judge Moreau's order in the first case. This aspect of the case was confirmed by the Court of Appeal, as health services are "confidential" services for which a direct, in-person, and immediate service is required.

Finally, Nunavut now has an *Official Languages Act*[61] that creates obligations on the part of the Government of Nunavut as well as the public organizations in the territory. The Department of Health is subject to the *Official Languages Act*. For the purposes of the *Act*, a "public agency" is an institution that meets the following three criteria: it is established by the laws of Nunavut, is subject to the direction of a Minister or the Executive Council, and is identified as a public agency under the *Financial Administration Act*. Because the *Financial Administration Act* does not designate health institutions, one of the three conditions is missing, so hospitals and clinics are not public agencies as defined by the *Act*. Nevertheless, the Government of Nunavut, through the Department of Health, can make agreements with hospitals for the provision of health services covered by insurance, certify health facilities, and authorize the creation of health facilities. Through these provisions, health centres and hospitals can be subject to the Nunavut's *Official Languages Act*.

Conclusion

The Canadian government has constitutional responsibility only for "federal client groups" and for federal institutions, which must offer services in the official language of the client's choice in accordance with the *Charter*. Institutions often delegate this responsibility to provincial institutions, and, in this case, the provincial institution must also offer services in the minority language, under the same conditions as in the federal institution. Furthermore, the Government of Canada uses its spending power to fund health care services in the language of the minority.

The provinces and territories are primarily responsible for the provision of health services, and for the linguistic dimension of these services. There are three basic models, characterized by different geometric structures. First, New Brunswick offers a general right to health care services in the language of the user's choice, in every region, in linguistically homogenous institutions. Next, some provinces have adopted laws making it possible to designate regions, services, and institutions. Finally, provinces that are less advanced in their progress towards language equality appear to be satisfied with an administrative policy creating an Office of Francophone Affairs that basically offers advice, information, and translation or interpretation services.

An active offer of health services in the language of the minority calls for an encompassing legislative framework. Besides health authorities, hospitals and clinics, we need to consider health professionals, their education and training, the designation of positions as bilingual or French, and staffing. Thus, a strategy for legislative progression can be imagined. It would start with mechanisms for designation (making it easier to identify points of service), continue through the right to work in health institutions that integrate a linguistic dimension, and finally reach the full right to health services in the language of one's choice, entrenched in an *Act* and, ultimately, in the *Canadian Constitution*.

While we are waiting for this to happen, official language minority communities are doing the best they can with the existing constitutional structure.

Notes

1. Art. 12 of the *International Covenant on Economic, Social and Cultural Rights*, GA XXI, /2200A, December 16, 1966, in effect since January 3,

1976, recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

2. *Reference re Assisted Human Reproduction Act,* [2010] 3 SCR 457.
3. *Jones v. A.G. of New Brunswick*, [1975] 2 SCR 182.
4. Section 36 guarantees the principle of providing public services at reasonably comparable levels of taxation.
5. *Reference re Canada Assistance Plan*, [1991] 2 SCR 525.
6. *Canada Health Act*, R.S.C., 1985, c. C-6 art. 7.
7. Commission on the Future of Health Care in Canada, "Building on Values: The Future of Health Care in Canada," Saskatoon, Commission on the Future of Health Care in Canada, November 2002. Retrieved from http://publications.gc.ca/collections/Collection/CP32-85-2002E.pdf. Accessed February 18, 2017, pp. 171–172, Recommendation 28.
8. *Official Languages Act*, R.S.C., 1985, c. O-1, art. 41(1) and (2).
9. See Foucher, P., "Les droits linguistiques dans le secteur privé," in Michel Bastarache and Michel Doucet, ed., *Les droits linguistiques au Canada*, 3rd edition, Montréal: Yvon Blais Inc., pp. 840–842.
10. A rapid search reveals there are more than 300 different legislative or regulatory provisions at the federal level that impose obligations or offer choices regarding language in these matters.
11. *Lalonde v. Restructuring Commission* (2001), 56 OR 3d 577. The Court agreed that institutional completeness is a principle applying to the provision of services in the language of the minority. It overturned the decision to close Ottawa's Hôpital Montfort, the only French-language hospital in Ontario, because the decision violated provincial language laws.
12. *Lalonde, supra,* note 16, paragraphs 90–95.
13. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* [2013] 2 SCR 774; *Caron v. Alberta*, [2015] 3 SCR 511.
14. *Reference re Secession of Quebec,* [1998] 2 SCR 217, par. 54
15. *Id.* par. 79–82
16. See Klink, J., Ravon, P., Dubois, J., & Hachey, J.-P., *Le droit à la prestation des services publics dans les deux langues officielles,* in Bastarache and Doucet, *supra* note, pp. 451–471.
17. *Official Languages (Communications with and Services to the Public) Regulations* (SOR/92–48).
18. At the time of writing, the criteria identifying significant demand were being contested before the Federal Court.
19. Section 26 of the *OLA* deals with federal regulations in the area of health and safety. This provision does not seem to apply directly to the provision of health care as such, but rather to the regulation of health and safety. A quick search in the electronic data base of federal regulations, with the string "français anglais," generated 334 entries: http://laws-lois.justice.gc.ca/Recherche/Avancee.aspx. Accessed April 14, 2015.

20. *Société des Acadiens et Acadiennes du Nouveau-Brunswick and Paulin v. Canada (RCMP),* [2008] 1 SCR 383.
21. *Canada (Commissioner of Official Languages) v. Canada (Department of Justice),* [2001] FCT 239 *[Contraventions case].*
22. *Official Languages Act,* para. 43(1) (*d*) and (*f*).
23. *R. v. Morgentaler,* [1993] 3 SCR 463; *Reference re Assisted Human Reproduction Act*, *supra* note 2.
24. *Official Languages Act*, SNB 2002, c O-0.5
25. *Regional Health Authorities Act*, RSNB 2011, c 217.
26. *Board Regulation*, *Regional Health Authorities Act,* NB Reg 2012-7, s. 5.
27. *Service New Brunswick Act*, SNB 2015, c 44.
28. *Ambulance Services Act*, SNB 1990, c A-7.3.
29. Office of the Commissioner of Official Languages for New Brunswick, Investigation Report, File Number: 2013–1992, Ambulance New Brunswick (ANB), March 2014.
30. *French Language Services Act*, R.S.O. 1990, c. F.32. The *Act* is scheduled to be revised in 2017, and it is possible that the entire province becomes a designated region (editor's note: information on revision not available at time of writing).
31. Office of Francophone Affairs, designation criteria. https://www.ontario.ca/page/government-services-french#section-2. Retrieved February 21, 2017. Note: the English version of the reference page does not mention "active offer" explicitly, as the French does.
32. *Local Health System Integration Act*, 2006, S.O. 2006, c. 4.
33. *Id.* para. 14(2)(2).
34. O. Reg. 162/07: French Language Health Services Advisory Council.
35. Office of the Commissioner of French Language Services, Ontario, *Special Report on French Language Health Services Planning in Ontario,* May 7, 2009.
36. Ontario Regulation 515/09.
37. *Id.,* para. 3(1)(*d*).
38. In March 2015, the *Regroupement des entités de planification* and the *Alliance des réseaux ontariens de santé en français* published a position statement on the active offer of French-language health services in Ontario. This "*Énoncé de position commune sur l'offre active des services de santé en français en Ontario*" can be found at: http://rssfe.on.ca/upload-ck/Enonce_OffreActive_10mars15_FR.pdf. Accessed February 21, 2017.
39. *An Act to amend and continue the Act 32–33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba,* 1870, 33 Vict., c. 3 (Can.).
40. *Bilingual and Francophone Facilities and Programs Designation Regulation,* Manitoba Regulation 131/2013.
41. *The Regional Health Authorities Act*, C.C.S.M. c. R34.

42. *French Language Services Regulation*, Manitoba Regulation 46/98 amended by Regulation 2013/138, s. 2.
43. *Id.,* para. 2(2)*a.1*).
44. ss. 2(3).
45. S. 6.
46. Bill 31, *Bilingual Service Centres Act*.
47. *The Francophone Community Enhancement and Support Act, Manitoba*, S.M. 2016, c. 9, adopted June 30, 2016.
48. *Id.,* Subsection 11(3).
49. *Id. ss.* 3(3).
50. *French Language Services Act, PEI*, SPEI 2013, c. 32; *General Regulations*, PEI Reg. EC845/13; *French-language Services Act*, SNS 2004 c. 26; Amended *An Act Respecting the Delivery of French-language Services by the Public Service*, SNS 2011 c. 9; *French-Language Services Regulations*, NS Reg 233/2006.
51. *French Language Services Act, PEI*, s. 3.
52. *Id.,* art. 9.
53. *Health Authorities act,* S.N.-S. 2014, c. 32.
54. *French Language Services Policy, Newfoundland and Labrador.* http://www.exec.gov.nl.ca/frenchservices/english/french_languages_services_policy.PDF. Accessed February 21, 2017.
55. *French-language Services Policy, Government of Saskatchewan*: https://www.saskatchewan.ca/government/government-structure/executive-council-and-office-of-the-premier/francophone-affairs-branch. Accessed February 21, 2017.
56. *Languages Act,* LRY 2002, c. 133.
57. *Hospital Act,* LRY 2002, c. 111.
58. *Official Languages Act,* RSNWT 1988, c. 56.
59. Regulation R-082-2006, as amended by R-079-2013.
60. *Fédération franco-ténoise v. Northwest Territories,* 2006 NWTSC 20 (Supreme Court), 2008 NWTCA 5 (Court of Appeal), application for leave to appeal dismissed on March 5, 2009 [2008] C.S.S.A. no. 432.
61. *Official Languages Act, Nunavut,* L.Nun. 2008, c. 10.