

# **Report of the Ombudsman into the Minister of Education's decision to modify the French Second Language Curriculum**

**Ombudsman and Child and Youth Advocate**



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## **Report of the Ombudsman into the Minister of Education's decision to modify the French Second Language Curriculum**

Over three hundred and fifty New Brunswickers have contacted the Ombudsman Office on the French Second Language issue and the vast majority of them are opposed to the Minister of Education's decision announced March 14, to significantly modify the French Second Language (FSL) curriculum in Anglophone schools in the province. In the Anglophone sector, the Minister has eliminated all French instruction from kindergarten to grade 4, has eliminated early French immersion and has made the five month intensive French program mandatory for all grade five students. For this single issue the total number of complaints received—39 of them positive comments on the Minister's decision—represent the equivalent of ten percent of my caseload for the entire 2007 year, far more complaints than on any other single issue since my appointment. Given the broad public interest in this subject, the referral of the matter to me by the Official Languages Commissioner, the strong criticism of the Croll-Lee study upon which the Minister was ostensibly to base his decision, all of these giving rise to serious issues of process, I decided to investigate.

Since March 25, 2008, I have had several private meetings with senior government officials, respectively as follows: the Minister of Education and his Deputy Minister; the Premier, his Chief of Staff and the Minister of Education; the Premier's Chief of Staff; and most recently with the Premier and his Chief of Staff. During these meetings, I recommended the postponement of implementation of the EFI decision for at least one year. In my view, fairness to the kindergarten pupils registered for EFI this fall, and fairness to the many parents who had requested an investigation by my office, required as much.

On June 11, Mr. Justice Hugh McLellan of the New Brunswick Court of Queen's Bench quashed the Minister's decision to cancel early French immersion and ordered the Minister to reconsider his decision after a full public consultation. A few hours after the judge's order the Minister announced his intention to abide by the order, consult New Brunswickers broadly over the course of the next six weeks and announce his decision on August 5<sup>th</sup>, 2008. In so doing the Minister stated he would not seek leave to appeal the decision. He said he would comply fully with the order while remaining open to all submissions New Brunswickers would choose to make. The Minister also reserved the possibility of implementing any path chosen as early as September 2008.

### ***Jurisdiction and Scope of Investigation***

On April 3, 2008, my notice of investigation summarized the main areas of investigation under the following headings:

- *Unfairness stemming from a lack of consultation*
- *Unfairness due to insufficient notice prior to implementation*

- *Decision premised upon a mistake of fact arising from errors in statistical analysis and other factual errors*
- *Failure to consider all the evidence before the Commissioners and before the Minister*
- *Bias arising from an alleged pre-determination of the consultation outcomes*
- *Determination of FSL policy on the basis of irrelevant grounds or considerations, or for an improper purpose*
- *Failure to consider commitments of citizen engagement in the government response to the Commission on Legislative Democracy*

Many other issues were raised within the complaints received, however, in the interests of efficacy, my investigators concentrated upon the matters outlined above which were largely representative of the majority of complaints received. Over the course of the past month we received over 2500 pages of material from the Department of Education, and have met with 18 witnesses. My office has continued to receive complaints and comments of concern or support for the decision from New Brunswickers, and tracked the voluminous record of public commentary on this issue.

In accordance with the *Ombudsman Act*, the Department is required under [Sections 19.1 (1) and (2)] to produce for the Ombudsman's review all documentation that, in the opinion of the Ombudsman, is relevant to an investigation. The considerable volume of documents is recognized, however, I do not believe that efforts were in keeping with the spirit of the legislation, as the disclosure was ill timed, did not show good faith, and did not meet the level of cooperation reasonably expected to facilitate the type of investigation envisioned under the *Act*. I note that despite assurances on June 3, that all documentation was in my hands as of that date, I continue as of June 16, 2008 to receive documents from the department.

Section 12 of the *Ombudsman Act* gives the Ombudsman jurisdiction to investigate any complaint regarding "a decision or recommendation made, an act done or omitted or a procedure used with respect to a matter of administration". Interpreting a similar provision of the BC *Ombudsman Act*, the Court found that such terms "given their plain and ordinary meaning encompass virtually everything a governmental authority could do, or not do, that might aggrieve someone. It is difficult to conceive of conduct that would not be caught by these words." Looking specifically at the words "a matter of administration" the court held that:

The touchstone of administrative action, according to the above definitions, is the government's **adoption, formulation** or application of general public policy in particular situations.<sup>1</sup> (My emphasis)

While Canadian Parliamentary Ombudsman routinely review matters of departmental, regulatory, and occasionally legislative policy<sup>2</sup>, office holders should exercise caution

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<sup>1</sup> *British Columbia Development Corp. v. British Columbia (Ombudsman)* [1984] 2 S.C.R. 447

and use their discretion to be careful not to merely substitute their opinions for those of elected officials. Section 15 of the *Act* provides the Ombudsman with a discretion to refuse to investigate complaints in various circumstances, including the following:

15(1) The Ombudsman, in his discretion, may refuse to investigate or may cease to investigate a grievance if

...

(c) having regard to all the circumstances of the case, further investigation is unnecessary,

or

(f) upon a balance of convenience between the public interest and the person aggrieved, the Ombudsman is of the opinion that the grievance should not be investigated.

On balance, however, having regard to the serious issues of process raised and the great number of complaints received and the lack of other administrative remedies I concluded that it was essential to accept jurisdiction in this case. The focus of this investigation as outlined in my notification letter of April 3<sup>rd</sup> to Deputy Minister John Kershaw is primarily on issues of process. This report makes no comment on existing or proposed school curriculum. I *do* comment on the Minister's response to the recent court decision and the consultation process he has promised.

## **FINDINGS**

In assessing the Minister's decision-making regarding the FSL curriculum, before and after Mr. Justice Hugh McClellan's ruling, this investigation must focus on principles of administrative fairness. Public sector decision-making requires a scrupulous attention to fairness, and Ministers of the Crown are held to the highest standards of fairness. While some of the allegations advanced in the complaints received were not sufficiently founded to justify any recommendation on my part, a number of complaints do give rise to very serious fairness issues.

The *Ombudsman Act* guarantees the public's right to fairness in public administration by establishing a review process to protect the public from decision making that is "contrary to law"; "unreasonable, unjust, oppressive or improperly discriminatory", either because the administrative decision itself is flawed in these ways or because it is based upon a law or rule or practice that is similarly unreasonable or unjust. The Act also provides the public with a mechanism to challenge decisions that are "based in whole or in part on a mistake of law or fact, or on irrelevant grounds or considerations"; to challenge decisions that are based upon "arbitrary, unreasonable or unfair procedures" or "otherwise wrong".

My analysis is informed also by the guideline published by my office in 2007, entitled "*What's Fair? Government decisions and your rights*". This publication, produced with the New Brunswick Public Legal Education and Information Service, gives an overview of the Ombudsman Office's mission and mandate. It includes a Fairness Checklist which

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<sup>2</sup> *Re Ombudsman of Ontario and the Ministry of Financial Institutions and the Attorney General of Ontario* (1990), 71 O.R. (2d) 678

helps New Brunswickers determine whether they have been treated fairly by government. The fairness checklist sets out in layperson's terms the two fundamental rights of natural justice, or administrative law: the right to be heard and to be heard by an impartial decision-maker. The publication suggests that in order to determine whether they may have an Ombudsman complaint, citizens should ask themselves some of the following questions:

- Did those affected by a decision have a chance to give information and evidence to support their position?
- Were they told that a decision was going to be made which might affect them?
- Were they told what information the decision was based on?
- Did they have reasonable time and opportunity to respond effectively to the decision?
- Once a decision was made, were they told of the outcome of the decision and how it would affect them?
- The decision-maker made decisions that were impartial and appeared to be impartial?
- The people involved in a dispute, and the general public, felt that the process and actions of the decision-maker were fair.
- The people affected by the decision did not have concerns about the decision-maker's ability to make fair decisions?

My review of the Minister's decision identifies several issues of fairness. I would summarize my chief concerns as follows:

### **Lack of Consultation**

Many parents were caught unaware by the Croll-Lee report and its recommendation to eliminate Early French Immersion (EFI). There is virtually no indication in the terms of reference or other public record I have reviewed that clearly states that the elimination of EFI was being contemplated. The only intimation was statements by the Minister when the review was announced in July 2007, that "everything was on the table". However, records disclosed to my office show that the Minister replied to a November 27, 2007 e-mail from a parent by giving assurances that EFI was safe:

**[Parent]:** I'm delighted to hear that you are interested in making immersion more inclusive and are prepared to spend money on it –

...

However, I remain concerned by the fact that a possible solution to the streaming problem (elimination of EFI) which would almost certainly be detrimental to the French skills of a significant minority of students (current and future EFI students) may be under consideration. A "fix" that benefits everyone (e.g. something that makes EFI completely accessible) seems so much better.

...

**[Minister Lamrock]:** "I have one child in EFI and another poised to start. I won't do anything that will disrupt children's education (at least, not deliberately - - I can make mistakes). Nor do I have anything in mind that would constitute an "elimination" of early immersion.

Once the Commission gives me some information I feel I'm missing I will put forward a proposal. And I look forward to corresponding and hearing your ideas once I can offer my own proposal, instead of the proposals that rumors have me making."

A number of complainants state that the Minister led them to believe that EFI would be safe. They also complain that the Minister failed to come forward with a proposal for discussion but simply announced a decision on March 14, 2008. They said they feel cheated and disempowered.

Finally, my review raises serious questions about an apparent lack of input from qualified experts within the Department and the school system in reviewing the proposed changes to the FSL curriculum. It is true that just prior to the Croll-Lee report being finalized the Department's FSL expert responsible for piloting the Intensive French program left the department to take up a three year assignment abroad. However, other officials with many years experience in piloting the FSL Curriculum and evaluating these programs were not consulted or included in the review process.

Commissioners Croll and Lee underscore in their report the strong interest in early French Immersion programming expressed by supporters of the program. They do not however, address the arguments or submissions of the proponents of EFI, other than in a footnote to their report where they state:

On a web site which the Department of Education created and publicized in order that the Commission might receive feed-back from parents and other interested stakeholders, of the over 450 responses, the majority of respondents wrote in defense of the Early Immersion program. Interestingly, a great many of these respondents also identified themselves as belonging to an association and their theme was vitriolic opposition to the Commission's supposed recommendation to cancel Early Immersion. Unfortunately, an overwhelming majority of these responses failed to provide any constructive thoughts as to how the Commission, and consequently the Department of Education, might proceed in order to effect positive changes to our existing programs.

The Minister has assured New Brunswickers repeatedly that he reached his decision reluctantly given the absence of any better or reasonable proposals. In the course of my investigation I have noted several submissions to the Croll-Lee Task Force that were largely or completely ignored by the Commissioners, where FSL experts, public authorities, teachers and parents put forward concrete ways to deal with the class composition problems associated with the early French immersion process. The Commissioners' report makes passing reference to only some of these submissions and fails to listen and analyze the full range of opinion. I can only conclude that the Commissioners acted unfairly to a good number of those who appeared before them.

### **Lack of Notice**

In my April 3 letter to the department, I urged the government to grandfather the kindergarten pupils who were enrolled in Early French Immersion this past January and February, mere weeks before the government announced it was eliminating the program. All other pupils currently enrolled in EFI were grandfathered and will continue in early

French immersion next year. In my view, the sudden nature of government's decision, so soon after the registration process in January, to cancel early immersion and the lack of adequate notice to registering parents that the program was under review and could be cancelled, are factors that raise urgent issues of fairness which government must address.

Parents of kindergarten students enrolled in EFI for September complained to me that with adequate notice they could have taken additional steps to provide their children with the necessary private instruction to enroll in the French school system, but that given the very tight timeframe, their children will not be able to acquire the requisite language skills to make that transition. In the absence of that alternative, I find that the Minister's decision has narrowed the options of young pupils to learn and develop a command of their second language at an advanced or superior level of oral proficiency. In light of the great value that many New Brunswick parents place upon this skill, the situation has caused a great deal of frustration for parents. It appears from the documentary record that the Department was well aware of the possibility of major changes coming when the EFI registration process occurred earlier this year.

The frustration for parents is very evident in a complaint that I received since the Minister announced the summer consultation process on June: "...I feel that Minister Lamrock's announcement that he may move ahead with changes this September, but we won't know what those changes are until August, puts many parents in an even worst position than previously. Not only may our (grade one) registrations not be respected, but we won't know whether they will be or not until August."

In his sworn affidavit filed in a recent court application to quash or delay the Minister's decision, Deputy Minister John Kershaw stated that following receipt of the final report in the Department on February 18, 2008 it "was immediately circulated within the Department of Education for study and review" and "subsequently made public on February 27, 2008". The Deputy Minister of Education further said that the Minister engaged in many consultations over the ensuing two weeks before making his decision.

In fact, the records disclosed to my office suggest that on February 11 of this year Deputy Minister Kershaw e-mailed a small group of his senior departmental and district staff to advise them that the final copy of the Croll-Lee report had been received and that they were named to a committee to review the report. The Deputy Minister stressed that:

The Department must, within the next two weeks, review and formulate a response to the report. This timeframe is necessary given our intent to respond in time to allow for decisions relative to the 08/09 budget year.

The Deputy's concern to be able to implement the report's recommendations as early as September 2008, is also well documented in other internal correspondence. On February 5 of this year, well before the final Croll-Lee report was received, Deputy Minister Kershaw e-mailed his Assistant Deputy Minister (ADM), David Roberts as follows:

David,

You and I cannot lose sight of the fact that we need to deliver to Kelly asap a plan to operationalise the elimination of early immersion, this coming school year.

Let's discuss before the end of the day.

I certainly don't want to lose the opportunity to act this school year because Kelly says we don't have a plan articulated well enough

Mr. Roberts forwarded on this message to two officials in Curriculum Branch noting:

I think we're talking about a 1 page plan that articulates the tasks that need to be done, by when and at what cost.

Remarkably, on February 1<sup>st</sup>, 17 days before receipt of the report of the Commissioners, and six full weeks prior to the minister's announcement of the decision to cancel Early French Immersion, the ADM, Mr. Roberts, had e-mailed his Deputy Minister concerning staff meetings from the day before "about the ramifications operationally with early immersion being phased out (placement of immersion teachers, new English teachers, class space, busing, in-service, material resources, PD, etc.)"

These e-mails make clear that the department was at the very least seriously contemplating the elimination of EFI at roughly the same time as kindergarten pupil registrations for September 2008 were being accepted. It is a matter of fairness that I believe current kindergarten students who are registered for Early French Immersion, should, along with students of other grades, be grandfathered into the early immersion system.

### **Undue Haste**

The great speed with which officials had to respond to the report's recommendations undoubtedly impacted the quality and thoroughness with which the review was done. For instance on Saturday March 1<sup>st</sup> there is an exchange between a senior official involved in the review of the Croll-Lee Report and the Deputy Minister regarding the level of support for the report's recommendations offered by the experts retained by the Department to develop the Intensive French program. This official reported that these experts, Joan Netten and Claude Germain, who are the developers of the Intensive French program, were supportive of the report. When the Deputy Minister asked "how so" the e-mail response received stated as follows:

Although they recognize the strength of French Immersion, they support the recommendation to eliminate Early FI and to go with intensive French and Post-Intensive and to strengthen Late Immersion.

However, in an open letter to Minister Lamrock that appeared in the Daily Gleaner on March 19<sup>th</sup> 2008, Netten and Germain took pains to write in part as follows:

We have not been involved in discussions about early immersion nor were we consulted about the decision to abolish it.

...

...we wish to make it clear we were not associated with the government's decision to eliminate early French immersion.

I have met subsequently with Joan Netten and was very impressed with her detailed exposition of the promise that an improved Intensive French curriculum may hold. I note, however, that she also pointed out that New Brunswick is the only province in Canada that has adopted Intensive French and that has eliminated Early French Immersion. For instance, in Newfoundland where Intensive French was pioneered by Netten and Germain 10 years ago, Early French Immersion continues to be offered. My conclusion is that if Intensive French offers the advantages that Netten, its developer, and the Minister believe it does and that there is still such strong opposition to the program proposed, it only underscores an important failure of process.

Other departmental experts raised concerns in early January about the risks in proceeding too hastily. But the written record disclosed to me by the department is silent with respect to what follow-through was given to these concerns. For instance the Senior official in the Department of Education responsible for developing the Intensive French curriculum wrote to her directors on January 11, 2008, as follows:

I have always thought that we were not quite ready for full implementation next year and that a gradual roll-out model would be a desirable model to pursue. This is for Intensive French alone, let alone Post-Intensive French, where I have grave concerns. We are not nearly ready to face that one head on. Sure, the development of resources is well under way, but there is a tremendous amount of work to do with the middle level teachers, as much pedagogically as linguistically speaking. Our sad but true reality is that a great many of our Core French teachers do not have the level of proficiency required to carry on this approach. ...

This reality came somewhat as a shock to Jim [Croll] and Patricia [Lee], but better now than later, I say... Might as well have all the facts before diving off the cliff. My concern, and I will be very candid with all of you, is that while it is 100% tested and true that IF works incredibly well, and I am a great believer in the program, a leap of faith was made, somehow, somewhere, that it was the magic bullet to bilingualism, but the question as to how and especially WHY does IF (Intensive French) work so well was perhaps not explored as ... "intensively" as it ought to have been. There are several variables that will create challenges for all of us and it would be wise to explore them sooner rather than later.

### **Independence of Review Process**

Several complaints alleged that the Commissioner's review process was pre-determined. While the documentary record reveals a scrupulous regard at the outset for the arms length nature of the reporting relationship between the Commissioners and departmental officials, the e-mail exchanges late in the process suggest that the lines may have been blurred in such a way as to call into question the independence of the review process. Towards the end, even before the report's publication the tone in e-mail exchanges had more of a sense of common enterprise. For example, Commissioner Croll wrote to the Deputy-Minister on February 10<sup>th</sup> as follows:

John,

...

Perhaps, if you get an opportunity, you might wish to mull over the following issue which occurred while revising the Late Immersion Data.

When we calculated the Late Immersion Costs, we included the student's costs related to their taking 5 years of Core French prior to their 7 years of immersion. This cost is quite substantial (\$984,300/00) and represents 31% of the total Late French Immersion cost. Were we to disregard this cost, we would lower the net cost of the Late Immersion Program, thus creating a very different and much more impressive picture when comparing the attributes of the Late to Early Immersion programs. Also, this would entail shifting the nearly \$1million into the Core Cost, presenting this program in even a worse light.

On the other hand, having buried the \$1 million in the Late Immersion program, it would be a rather large saving with the elimination of the first four years of FSL training and, in itself provide a major addition to the annual savings for other programs or training.

The bottom line is, in all of our discussions we haven't touched upon the millions in savings which the recommendations insinuate. Should we have addressed this issue in the study and in the report and, is there merit in dropping the Core costs for the Late Immersion Program and revising this report?

### **Financial Considerations**

The record also shows financial considerations were a significant factor in the department's decision to press ahead with all the changes adopted, yet I have seen no evidence of detailed costings. On March 1<sup>st</sup> 2008 the Deputy wrote to his staff regarding a draft Memo to Executive Council that set out three options for the Minister to take to Cabinet. The Deputy Minister stated that the down-side of waiting one more year was that "we need the money saved and teachers freed up from Option 2 to allow IF roll-out/strengthening Late immersion."

I have sought detailed disclosure of the financial implications and all costings produced by the Department of Education with respect to any aspect of the proposed changes. The answer I have been given is that no costings or financial forecasts with respect to the implications of the changes were done, other than what is contained in the Croll-Lee report.

### **Decision Based Upon Alleged Flawed Analysis**

Several groups have raised publicly their concerns about both the statistical analysis as well as the research process used in the Croll Lee Report. Professors from Mount Allison University and the University of New Brunswick prepared an analysis of the statistical report that has not been contradicted by the Department. Twenty-two members of the Math and Stats Department at the University of New Brunswick came out in support of this analysis, as have professors at the Université de Moncton and St. Thomas University

As an example, in their ‘Notes Concerning Selected Recommendations’ section of the Croll/Lee report, the two authors provide the reasons for choosing late immersion as the sole entry point (at page 87):

*“For various reasons... the Late Immersion program is clearly superior to the Early Immersion program in both its efficacy measured in student persistence and student achievement plus its sustainability and economy of program time and resources.”*

The critics point out that in order to do the calculations correctly, i.e. ‘student persistence’ one would need to follow a group of students over a number years. When these and other issues were raised with Commissioner Croll, he agreed, yet the analysis in the final report still stands uncorrected.

Departmental officials have indicated to my staff that some of this questionable analysis was pointed out to the Commissioners on a draft version of the report. Despite corrections of some errors made by the Commissioners in subsequent versions, some of these departmental officials remained uncomfortable with the analysis leading to the Commissioners’ conclusions and recommendations.

In my view these matters should not be minimized or dismissed as a “debate among statisticians” or quibbling over numbers. Brown and Evans, leading Canadian legal scholars in matters of administrative law and procedural fairness emphasize that Ministers and public policy-makers must engage in consultation chiefly for two reasons: a) to guarantee the quality of decision-making and b) to guarantee the acceptability of decisions made.

If the report contains material errors of fact and flawed analysis, that, in itself, could have been reason enough in itself for the Minister to undertake a new consultation. Failing such, it places a much higher onus upon the Minister to explain and defend his decision.

### **Perception of Bias**

The Minister announced the Intensive French program publicly in the spring of 2007. He then reconsidered his position in July 2007 and put the whole matter to outside reviewers, Commissioners Croll and Lee. The external review was plagued from the outset by allegations of bias and pre-determination. Part of the reason for this was that the terms of reference inferred elimination of EFI as a possible solution, but did not expressly invite the Commissioners to consider this possibility. Throughout the consideration of this issue, the Minister and department of Education have not acted in a transparent way with the public. As noted by Justice McLellan, the government on Mar. 14, 2008, issued “another positively worded news release headlined “Improvements being made to French language programs and services (Anglophone sector). Again, that news release did not use plain language such as “Early French immersion to be cut.”

The Minister has been strongly criticized for his early immersion decision and he has defended it in equally strong terms, claiming the moral high ground by stating that

although it is politically unpopular, his approach is the “Christian” thing to do, that a silent majority of New Brunswickers approve of his decision and that defenders of early French immersion are “elitist”. He also has said that should anyone criticize a possible decision in August to stay the course that he is prepared to stand firm as he and his government colleagues have a high threshold for “abuse”

John Kershaw, the Deputy Minister of Education, stated in his recent affidavit to Mr. Justice McLellan that an extensive series of preparations were underway in the anglophone schools sector. These included the training of up to 260 teachers in Intensive and Post-Intensive programs, various curriculum changes including a new math curriculum for several grades, as well as placement of new physical education and music specialists who had already been hired and who would have to be laid off. This points to the significant amount of preparation required to implement any new option. Given that Senior departmental officials have testified that the March decision had to be taken to ensure implementation by September 2008, one must question whether the department is truly considering any other option than the one it has already decided upon. If that were the case, it would render this further consultation meaningless and fly in the face of Judge McLellan’s decision.

The Minister’s decision to press on with more consultations this summer with a decision point early in August, is in my view, dismissive of the serious flaws leading up to his March 14<sup>th</sup> announcement. My review of the decision-making process over this past winter suggests that the minister and department appear to have planned for only one contingency.

Part of the Minister’s difficulty is that many of the changes recommended by Croll and Lee basically endorse the Core French and Intensive French program changes that the Minister has previously announced. In July of 2007, when he asked Commissioners Croll and Lee to review the FSL curriculum in general, the Minister had already played a good part of his hand, leaving himself open to the perception of bias and having pre-determined the issue. He has decided to take six weeks this summer to consult and then announce, one month prior to teachers returning to their classrooms, what assignments they will be given. In view of the Minister defending so strongly the decision he announced last March, the new process makes him open, once again, to accusations of bias. This perception could be removed if the Minister were to take the time to engage the public thoroughly, meaningfully and energetically.

### ***Public Engagement***

As the government and New Brunswickers seek a resolution of this matter, I believe it is critical that a public engagement process be adopted that is genuine, participatory and free from any predetermination. The road map is clear and was provided by the government early last month.

On May 12-13, I attended along with members of my staff an international conference in Fredericton at which Premier Graham unveiled the Final Report of the Public Engagement Initiative. This year-long effort was begun by the Premier as part of the

government's response to the Commission on Legislative Democracy. The report produced is entitled *It's more than Talk: Listen, Learn and Act, A New Model for Public Engagement*. One of the Premier's key messages when he addressed the conference, which was well-attended by the senior ranks of the New Brunswick Civil Service, was that "Trust takes time to build." In the case of the French Second Language issue being considered here, the future actions of the Minister, the department and the government have a great deal to do with building that trust. As set out in the *It's more than talk* document it is essential that the Minister take the role of convener, participant and enabler in any engagement process that is followed. The stance of the Minister and Department should now be one of listening. Any public forums called for discussion must have a facilitator who is scrupulously fair and neutral on the matters to be discussed. For his part, the minister expresses and works for the goals of the government but he does not wield the gavel. He must have a genuine desire to listen and benefit from the discussions. The report *It's more than talk* makes very clear that the decision should not lie upon the Minister's shoulders alone.

As I listened to the Premier at the Engagement conference I was struck by the seeming disconnect between the vision heralded there and the policy development process under review in this investigation. There is an "engagement gap" that has become critical.

## **CONCLUSION**

Having now had eight weeks to consider the complaints and comments made to my office, to question officials from the Department of Education, to review the recent Court of Queen's Bench decision, and to consider other public arguments made by citizens ranging from Measha Brueggergosman to Donald Savoie, I am convinced that Government must now postpone any changes to the FSL curriculum until the Fall of 2009, at the earliest. Fairness requires as much and this reprieve would have the added benefit of allowing a more thorough and true consideration of the options.

From this investigation, it is clear that there is far more agreement on the fundamental issues such as French Second Language learning, streaming and testing, than there is disagreement. Given the broad understanding of problems and possibilities, there is good reason to believe that a proper public engagement process could devise alternative curriculum proposals that could serve as the basis of a broader social consensus. Considering the various proposals put forward already, I remain very hopeful that there may be a better way forward: one that includes and respects all opinions, one that honors New Brunswick's unique contribution to Canada, and one that can address the Minister's sincere concerns and laudable goals without leaving any child behind and without disenfranchising any parent.

The Minister has stated that there is no magic solution and, regrettably, that there is no better path forward. I do not share this pessimism but even those who do, I believe, should continue to seek a decision based on a fair process. If there is a better way forward, not only could we improve bilingualism, pupil achievement and inclusive education, as the Minister had hoped, but we could do it together without asking some

pupils to suffer a loss, so that others may profit. A consensus decision on an alternate plan could be win-win in many more ways than one. That, I believe, is a goal deserving of our joint and unswerving efforts. As one complainant to my office stated, discussion can lead to understanding or acceptance: “Honest disagreements can stem from open, thorough debate, and due process.”

In my view, the consultation process proposed by Minister Lamrock does not conform to the Court of Queen’s Bench order of June 11, 2008. Waiting until August 5<sup>th</sup> to decide what kind of resources should be put in place to deliver EFI, or Core French class or other option may appear to be administratively feasible, but it gives rise to a serious apprehension of bias in light of the timeline and the Minister’s previous decision regarding the status of EFI. Furthermore, a six week consultation period on this highly sensitive issue of educational reform, beginning on the eve of the summer vacation period is not adequate to provide the Minister or the citizens of New Brunswick with informed analysis of the best ideas and feedback available on this issue. Fairness requires that the Minister do something more. As Mr. Justice McLellan wrote in his judgment, “...Any further decision should be made in accordance with the principles of fairness after an appropriate opportunity for interested citizens and organized groups to be heard to satisfy the Minister’s representation that there would be time to ‘allow for a full debate’.”

## **RECOMMENDATIONS**

**It is recommended that:**

- 1. The Minister immediately confirm plans with the school districts to allow parents to register Grade one students in French immersion in September.**
- 2. The Government defer the consultation announced by Minister Lamrock and delay implementation of the elimination of early French immersion until September 2009, pending the outcome of a public engagement process as outlined in the provincial government’s recent report, authored by the province’s Advisor on Public Engagement, Don Lenihan, and entitled: “It’s More than Talk: Listen, Learn and Act: A New Model for Public Engagement.” Further, that the services of a highly qualified consultant, such as Mr. Lenihan, be retained to carry out the process, concluding in time for the next (2009-2010) school year.**