

Commissariat aux  
services en français  
de l'Ontario



Office of the  
French Language Services  
Commissioner of Ontario

800, rue Bay, bureau 402  
Toronto (Ontario) M5S 3A9

☎ 1 866 246-5262 / 416 847-1515  
☎ 416 847-1520  
ATS 416 640-0093  
✉ flsc-csf@csfontario.ca  
💻 csfontario.ca

800 Bay Street, Suite 402  
Toronto (Ontario) M5S 3A9

☎ 1 866 246-5262 / 416 847-1515  
☎ 416 847-1520  
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✉ flsc-csf@flscontario.ca  
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**Modernizing the *Official Languages Act*:  
Seeking areas of interjurisdictional harmonization**

François Boileau, Commissioner

Brief of the Office of the French Language Services Commissioner,  
submitted to the Standing Senate Committee on Official Languages,  
in connection with its study on Canadians' views about  
modernizing the *Official Languages Act*

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800, rue Bay, bureau 402  
Toronto (Ontario) M5S 3A9  
☎ 1 866 246-5262 / 416 847-1515  
☎ 416 847-1520  
ATS 416 640-0093  
✉ flsc-csf@fjsontario.ca  
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## Introduction

[1] An independent officer of the Legislative Assembly of Ontario (LAO) who reports directly to the LAO, the French Language Services Commissioner has been mandated by the LAO since 2007 to ensure compliance with the rights of Ontario's citizens and the obligations of the provincial government under the *French Language Services Act*. The Commissioner makes recommendations for improving the delivery of French-language services in Ontario and monitors progress. In executing his mandate, the Commissioner conducts independent investigations in response to complaints or on his own initiative, prepares investigation and audit reports, and provides the Ontario government and MPPs with advice in order to foster compliance with the *French Language Services Act*.

[2] The reason the Commissioner is following the study of the Standing Senate Committee on Official Languages is not solely that he shares its interest in the status of the French language in Canada. The Office of the French Language Services Commissioner (OFLSC) and the Office of the Commissioner of Official Languages of Canada (OCOL) are already engaged in interjurisdictional harmonization. Many people are unaware that the OFLSC has been working with the OCOL since 2012. A memorandum of understanding helps the two organizations maximize their support to individuals, communities and all the other stakeholders they serve. Obviously, the federal *Official Languages Act* (OLA) and Ontario's *French Language Services Act* apply to different jurisdictions, but citizens who communicate with the OFLSC and the OCOL are not always able to distinguish between federal government services and provincial government services. In addition to transferring complaint cases associated with lack of access to government services in both languages at the federal level and services in French in Ontario, the agreement allows the two organizations to exchange information about their investigations in cases that involve both jurisdictions and facilitates the preparation of joint reports, as was the case for immigration and access to justice in the official languages in superior courts. The two organizations can also cooperate on initiatives to promote and study their respective government's compliance with language obligations.

[3] The OFLSC is happy with the decision of the Standing Senate Committee on Official Languages to launch a study on modernizing the OLA. The OFLSC is following its work with great interest. In this brief, the French Language Services Commissioner humbly, and in keeping with the principle of cooperative federalism, offers analyses and suggestions for concrete action regarding **(1)** the definition of "official language minority community" in the OLA, **(2)** the entrenchment of the concept of the active offer of communications and services in the OLA, **(3)** federal-provincial agreements, and **(4)** advancement toward equality of the status or use of the French language encouraged by subsection 16(3) of the *Canadian Charter of Rights and Freedoms*.





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## 1. Toward an inclusive definition of the official-language minority communities in the *Official Languages Act*

[4] When it was established in 2007, the OFLSC immediately focused on the definition of the Francophone population in Ontario as a key issue, pointing out that the method used by the Ontario government to define and count its Francophone population was outdated. With its experience and expertise in this area, the OFLSC is in an excellent position to propose changes in the definition of the official-language minority communities in connection with the project to modernize the OLA.

[5] In his very first annual report, in 2008, the French Language Services Commissioner “recommend[ed] to the Minister [of Francophone Affairs] that she review the definition of the Francophone population of Ontario in order to ensure that it adequately reflects the new reality of this population.”<sup>1</sup> The method used at that time to count Ontario’s Francophone population included only those whose mother tongue was French; as a result, some 50,000 Ontarians who spoke French every day were not considered “Francophones” by the government.<sup>2</sup>

[6] That recommendation was based on the new sociological and demographic reality of Ontario’s Francophone community. That community is anything but homogeneous, as it includes such groups as recent immigrants, young people from exogamous families, and Francophiles. The restrictive definition of the time simply did not reflect the reality of those population groups. It also led to a systematic underestimate of the number of people who might make use of French-language services. Consequently, the government was unable to properly plan and deliver its services in French because it did not know how many potential users there were.

[7] The Commissioner’s recommendation that Ontario revise its definition of the Francophone population was based in part on Statistics Canada’s 2007 study on the vitality of official language communities. In that study, “French speakers outside Quebec” were defined as persons

- (a) who have French as their mother tongue, alone or with another language;
- (b) whose mother tongue is a non-official language and who, of the two official-languages, know only French; or

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<sup>1</sup> Ontario, Office of the French Language Services Commissioner, [Annual Report 2007-2008](#), 2008, pp. 3, 14 [OFLSC, 2007-2008].

<sup>2</sup> Ontario, Office of the French Language Services Commissioner, [Annual Report 2011-2012](#), 2012, p. 26 [OFLSC, 2011-2012].





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(c) whose mother tongue is a non-official language, who know both French and English, and who speak either a non-official language or French, alone or with another language, most often at home.<sup>3</sup>

[8] Under Statistics Canada's modernized definition, an immigrant family whose first language is Arabic, for example, and whose members know both English and French but speak either Arabic or French most often at home is considered to be part of Ontario's Francophone population. The same is true for young people from exogamous families who do not speak French most often at home but have French as one of their mother tongues.<sup>4</sup>

[9] That recommendation was soon acted on: in June 2009, the Ontario government's Office of Francophone Affairs<sup>5</sup> adopted what it referred to as an "Inclusive Definition of Francophone" (IDF). That definition is more inclusive than the one currently used in the federal government, because it captures more of the different realities of the Francophonie. It expands the mother tongue-based definition by including "those whose mother tongue is neither French nor English, but who have a particular knowledge of French as an Official Language and use French at home, including many recent immigrants to Ontario."<sup>6</sup> The new definition helps the Ontario government to plan the delivery of French-language services more effectively, since the IDF provides a more accurate estimate of the number of potential users of those services.

[10] After the adoption of the IDF, the total number of Francophones was 582,695, or 4.8% of Ontario's population. Before that, the total number of Francophones was 532,000, or 4.4% of the

<sup>3</sup> Canada, Statistics Canada, [Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities](#), Ottawa, Statistics Canada, 2007, p. 6.

<sup>4</sup> OFLSC, 2007-2008, *supra*, p. 14. However, it is important to note that the Census systematically underestimates the number of people whose mother tongue is French by discouraging respondents who would like to report more than one mother tongue from doing so. See Association canadienne-française de l'Alberta (ACFA), [Required changes to the Canadian census, as of 2021](#), brief submitted to the House of Commons Standing Committee on Official Languages for its study on the enumeration of rights-holders under section 23 of the *Canadian Charter of Rights and Freedoms* (February 2017), paras. 127-147; House of Commons, Standing Committee on Official Languages, [The Enumeration of Rights-Holders Under Section 23 of the Canadian Charter of Rights and Freedoms: Toward a Census that Supports the Charter](#) (May 9, 2017, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament) (Chair: The Honourable Denis Paradis), pp. 3-5.

<sup>5</sup> The Office of Francophone Affairs was replaced by the Ministry of Francophone Affairs in the fall of 2017.

<sup>6</sup> Ministry of Francophone Affairs, news release, ["Francophone Population Re-Defined: McGuinty Government Responds To Ontario's Changing Demographics"](#) (June 4, 2009); Ontario, Office of Francophone Affairs, *Profile of Ontario's Francophone Community*, Toronto, Office of Francophone Affairs, 2009, p. 31; see also Ontario, Office of the French Language Services Commissioner, [Annual Report 2008-2009](#), 2009, p. 60 [OFLSC, 2008-2009].





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province's population.<sup>7</sup> Figures aside, recognition of the reality of recent immigrants, exogamous families and Francophiles through the IDF generated and enhanced these groups' sense of belonging to the Franco-Ontarian community.<sup>8</sup>

[11] However, for the IDF to have the desired effects, it has to be applied systematically as a common and uniform calculation method by all government ministries and agencies in Ontario. This is unfortunately not the case.<sup>9</sup> For this reason, the Commissioner has repeatedly recommended that the IDF be enshrined in the *French Language Services Act*.<sup>10</sup> Such a legislative amendment would not only ensure greater compliance with the standard but also confirm “the presence of a diverse community recognized by the Legislature” and send a strong message to Francophone newcomers.<sup>11</sup> The Commissioner also recommended that the IDF be revised periodically, by regulation, to reflect the sociological and demographic realities of Ontario's Francophone population.<sup>12</sup>

[12] In his 2008-2009 Annual Report, the Commissioner expressed hope that “the new definition [would] be adopted not just by other provinces but by the federal government as well, ensuring that agreements such as the Canada-Ontario agreements are established or renewed using standardized data for the Francophone population.”<sup>13</sup> The IDF could be a component of a renewed cooperative federalism focusing on the specific interests and needs of Francophone communities.

[13] Manitoba and Prince Edward Island have adopted more inclusive definitions of their Francophone populations. The federal government, however, continues to count Francophones using a statistical method that is nearly 30 years old, despite the well-known problems associated with it.<sup>14</sup> The

<sup>7</sup> OFLSC, 2008-2009, *supra*, p. 10.

<sup>8</sup> OFLSC, 2011-2012, *supra*, p. 26.

<sup>9</sup> Ontario, Office of the French Language Services Commissioner, [Annual Report 2015-2016](#), 2016, p. 27 [OFLSC, 2015-2016].

<sup>10</sup> OFLSC, 2015-2016, *supra*, p. 28; Ontario, Office of the French Language Services Commissioner, [Annual Report 2016-2017](#), 2017, p. 40 [OFLSC, 2016-2017].

<sup>11</sup> OFLSC, 2015-2016 *supra*, p. 28.

<sup>12</sup> OFLSC, 2015-2016, *supra*, p. 26.

<sup>13</sup> OFLSC, 2008-2009, *supra*, p. 11.

<sup>14</sup> Bill S-220, *An Act to amend the Official Languages Act (communications with and services to the public)*, 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament, 2010; Michel Bastarache, Mark Power, Jean-Pierre Hachey and Mathieu Stanton, “[Au-delà des nombres : le droit du public canadien à des services fédéraux dans la langue officielle de son choix](#)” (2011) 35: 1 Man LJ 14; Mark Power, Marc-André Roy and Marion Sandilands, “Ajustons le kaléidoscope en ce 21<sup>e</sup> siècle ! Vers la modernisation du Règlement sur les langues officielles – communications avec le public et prestation des services,” Report prepared for the Honourable Claudette Tardif, 2017. In November 2016, the government announced a review of the regulations (see Government of Canada, “[Official Languages](#)”





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Commissioner therefore recommends that the *Official Languages Act* be modernized so that it defines and counts Francophone populations more inclusively.

1.1 The exclusionary definition of Francophone in the current OLA and provision of French-language services: A definition and numerical criteria that ignore the vitality of the official language communities

[14] In the federal regime, the definition of the potential users of services in the minority official language is instrumental in defining what constitutes “significant demand” for services under the OLA.

[15] Section 22 of the OLA deals with languages of communications and services; the roots of this section lie in section 20 of the *Canadian Charter of Rights and Freedoms*:<sup>15</sup>

**Langues des communications et services**

**22** Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés, pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante<sup>16</sup>.

**Where communications and services must be in both official languages**

**22** Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities (a) within the National Capital Region; or (b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

[16] Similarly, under section 23(1) of the OLA, federal institutions that provide services or make them available to the travelling public are required to “ensure that any member of the travelling public can communicate with and obtain those services in either official language from any office or facility of the

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[\(Communications with and Services to the Public\) Regulations Review](#),” November 17, 2016). That said, the definition of the Francophone population and how it is counted have horizontal implications in the OLA, since they also affect, at least, Parts III, VI, VII and IX of the Act. For this reason, the OFLSC believes that revision of the regulations is important but not sufficient.

<sup>15</sup> *Canadian Charter of Rights and Freedoms*, s. 20(1), Part I of the *Constitution Act, 1982*, constituting Schedule B of the *Canada Act, 1982* (UK), 1982, c. 11 [Charter].

<sup>16</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 22 (our underline) [OLA].





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institution in Canada or elsewhere where there is significant demand for those services in that language.”<sup>17</sup>

[17] Under subsection 32(1) of the OLA, the Governor in Council may make regulations

- |  |  |
|--|--|
| <p>a) <u>déterminer, pour application de l'article 22 ou du paragraphe 23(1), les circonstances dans lesquelles il y a une demande importante ;</u></p> <p>b) en cas de silence de la présente partie, déterminer les circonstances dans lesquelles il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leurs bureaux ou recevoir les services de ceux-ci, dans l'une ou l'autre langue officielle ;</p> <p>c) déterminer les services visés au paragraphe 23(2) et les modalités de leur fourniture ;</p> <p>d) déterminer pour le public et les voyageurs les cas visés à l'alinéa 24(1)a) et les circonstances visées à l'alinéa 24(1)b) ;</p> <p>e) <u>définir « population de la minorité francophone ou anglophone » pour l'application de l'alinéa (2)(a)</u><sup>18</sup>.</p> | <p>a) <u>prescribing the circumstances in which there is significant demand for the purpose of paragraph 22(b) or subsection 23(1);</u></p> <p>b) prescribing circumstances not otherwise provided for under this Part in which federal institutions have the duty to ensure that any member of the public can communicate with and obtain available services from offices of the institution in either official language;</p> <p>c) prescribing services, and the manner in which those services are to be provided or made available, for the purpose of subsection 23(2);</p> <p>d) prescribing circumstances, in relation to the public or the travelling public, for the purpose of paragraph 24(1)(a) or (b); and</p> <p>e) <u>defining the expression “English or French linguistic minority population” for the purpose of paragraph (2)(a).</u></p> |
|--|--|

[18] Subsection 32(2) of the OLA states that, in prescribing circumstances under paragraph (1)(a) or (b), the Governor in Council may have regard to

<sup>17</sup> OLA, *supra*, s. 23 (1).

<sup>18</sup> OLA, *supra*, s. 32 (1).





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a) de la population de la minorité francophone ou anglophone de la région desservie, de la spécificité de cette minorité et de la proportion que celle-ci représente par rapport à la population totale de cette région ;

b) du volume des communications ou des services assurés entre un bureau et les utilisateurs de l'une ou l'autre langue officielle ;

c) de tout autre critère qu'il juge indiqué<sup>19</sup>.

a) the number of persons composing the English or French linguistic minority population of the area served by an office or facility, the particular characteristics of that population and the proportion of that population to the total population of that area;

b) the volume of communications or services between an office or facility and members of the public using each official language; and

c) any other factors that the Governor in Council considers appropriate.

[19] Thus, under the federal regime, it is left to the discretion of the Governor in Council to determine both the extent of the demand for services and the size of the French or English linguistic minority population. That said, as noted in the 2005-2006 annual report of the OCOL, to help the government define in regulations what constitutes "significant demand", Parliament identified four criteria in subsection 32(2) of the Act: (i) the number of persons in the English or French linguistic minority and the proportion the minority represents of the population of the region served; (ii) the volume of communications or services; (iii) the particular characteristics of the minority community; and (iv) any other factors that the Governor in Council considers appropriate.<sup>20</sup>

[20] The *Official Languages (Communications with and Services to the Public) Regulations*<sup>21</sup> were made in 1991 and came into force in 1992. With regard to the "significant demand" criterion, various numerical and percentage thresholds that depend on the type of region concerned are set out in the Regulations. For example, in the case of census subdivisions, the minority community must consist of at least 500 people and make up 5% of the total population in order for communications and services to be provided in both official languages. Hence, it is clear that in 1991, the government chose to limit itself to one of the four criteria, the number and proportion of the Francophone or Anglophone minority community in the region served, ignoring, notably, the particular characteristics of the minority community.<sup>22</sup>

<sup>19</sup> OLA, *supra*, s. 32 (2).

<sup>20</sup> Canada, Office of the Commissioner of Official Languages, *Annual Report 2005-2006*, Ottawa, Public Works and Government Services Canada, 2006, p. 26 [OCOL, 2005-2006].

<sup>21</sup> Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48 [Regulations].

<sup>22</sup> OCOL, 2005-2006, *supra*, p. 26.





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[21] The definition of Francophone or Anglophone minority used in the Regulations is based on the estimate of first official language spoken arrived at with Statistics Canada's Method I:

Méthode d'estimation de la première langue officielle parlée qui est décrite comme la méthode I dans la publication de Statistique Canada intitulée *Estimation de la population selon la première langue officielle parlée*, en date de septembre 1989, qui tient compte, premièrement, de la connaissance des langues officielles, deuxièmement, de la langue maternelle et, troisièmement, de la langue parlée à la maison et qui comprend la répartition en parts égales entre le français et l'anglais des cas où les renseignements disponibles ne permettent pas à Statistique Canada de déterminer si la première langue officielle parlée est le français ou l'anglais<sup>23</sup>.

Method I means the method of estimating first official language spoken that is described as Method I in Population Estimates by First Official Language Spoken, published by Statistics Canada in September 1989, which method gives consideration, firstly, to knowledge of the official languages, secondly, to mother tongue, and thirdly, to language spoken in the home, with any cases in which the available information is not sufficient for Statistics Canada to decide between English and French as the first official language spoken being distributed equally between English and French.

[22] All the problems identified by the French Language Services Commissioner in 2008, when he recommended the adoption of an IDF in Ontario, are also present in the federal regime. The definition of Francophone or Anglophone minority used in the Regulations, which is based on estimating first official language spoken, ignores the new realities of Francophone minority communities. It fails to take account of many people who speak the minority language at home or at work or are receiving their education in that language but whose first official language is not French.<sup>24</sup> As was the case in Ontario until 2008, the definition of the Francophone community used in the Regulations at the federal level is unduly exclusionary, ignoring the changes in the Francophone space, which now includes exogamous families, newcomers, bilingual people and everyone capable of carrying on a conversation in French.

[23] Yet all of these groups can choose to receive their services from federal offices in French, especially if they are actively offered. For this reason, the members of those groups must be considered in assessing significant demand, on the same footing as people whose first official language spoken is the minority language.

[24] Moreover, in addition to using a calculation method that understates the number of people who may want to receive their services from federal offices in French, the federal government uses only numerical criteria in determining whether there is significant demand and consequently whether an

<sup>23</sup> Regulation, *supra*, *sub verbo* "Method I."

<sup>24</sup> Canada, Office of the Commissioner of Official Languages, [Annual Report 2015-2016](#), Ottawa, Public Works and Government Services Canada, 2016, p. 19 [OCOL, 2015-2016].





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office is obliged to communicate and provide services in both official languages. The government has ignored the “particular characteristics” of the official language minority communities, even though that is a criterion specified in paragraph 32(2)(a) of the OLA. As the Honourable Michel Bastarache pointed out in his testimony before your committee on February 2, 2015, the adoption of formal mathematical thresholds “is clearly unconstitutional.”<sup>25</sup> According to Senator Tardif, such an approach is inconsistent with the OLA’s objectives:

This mathematical, mechanical process for determining demand for service is not in line with the fundamental goal of the *Official Languages Act*, which is to promote the development of francophone and anglophone minorities and the full recognition and use of French and English in Canadian society.<sup>26</sup>

[25] By basing significant demand on the minority’s proportion of the population (the 5% rule), the Regulations generate situations of unfairness and inequality,<sup>27</sup> for example, when the minority population grows but its relative size decreases and, as a result, the minority community loses a service that was previously available in its language. As Senator Chaput pointed out, the relative size of Francophone minority communities in Canada can decline even when their absolute size increases:

In 2006, those 997,000 Canadians accounted for 4.2 per cent of the total population. Now the number is over 1 million, yet they account for only 4 per cent of the total population. It is therefore the relative size of francophone communities that is shrinking, through no fault of their own.<sup>28</sup>

[26] Quite simply, it is fundamentally wrong to use the majority’s growth rate to calculate a minority community’s vitality. According to the Commissioner of Official Languages, “the flourishing of a minority, whether in the context of North America, Quebec or the rest of Canada, does not depend on the rate of growth of the majority, but on the collective determination of that minority to thrive.”<sup>29</sup> He also stated that “using percentages to define the rights of the minority is unfair, as it allows the growth

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<sup>25</sup> Canada, Standing Senate Committee on Official Languages, *Minutes of Proceedings*, 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament, Issue 10 (February 2, 2015), p. 22 (Michel Bastarache).

<sup>26</sup> Canada, *Debates of the Senate*, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, Volume 148, Number 137 (February 13, 2013), p. 3270 (Claudette Tardif).

<sup>27</sup> OCOL, 2005-2006, *supra*, p. 27.

<sup>28</sup> Canada, *Debates of the Senate*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, Volume 150, Issue 11 (February 3, 2016), p. 212 (Maria Chaput) [Senate, February 3, 2016].

<sup>29</sup> Canada, Office of the Commissioner of Official Languages, [Annual Report 2011-2012](#), Ottawa, Public Works and Government Services Canada, 2012 à la p IV [CLO, 2011-2012].





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of the majority to define the rights and services of the minority, even if the minority is growing.”<sup>30</sup> He reiterated that criticism in his special report to Parliament, pointing out that

[a] criterion based on a percentage of the population establishes unwarranted inconsistencies in service between official language communities of equivalent size.<sup>31</sup>

[27] Instead of depending on the minority’s proportion of the population, the determination of significant demand for services should be based on an official language community’s “signs of vitality.”<sup>32</sup> As noted by the Commissioner of Official Languages, census data provide an overview of the linguistic situation in Canada; they do not give us a complete picture of the vitality of the official language communities.

[28] As early as 1988, in the deliberations of the legislative committee on the new OLA, the Honourable Ray Hnatyshyn, then minister of justice, recognized the importance of the vitality criteria in assessing significant demand. He stated that it was better to determine “significant demand” with qualitative rather than numerical criteria:

Dans les deux cas, en vertu de ces dispositions-cadres, le gouvernement pourra fixer les critères en tenant compte, premièrement, de la population minoritaire de la région desservie : le nombre d’anglophones ou de francophones minoritaires, certaines caractéristiques de cette population telles que ses institutions religieuses, sociales, culturelles ou d’enseignement, qui donnent-mieux que le font les chiffres seuls-une bonne indication de sa vitalité et de ses possibilités, ainsi que le pourcentage que constitue ce groupe de la population totale de la région. Il pourra tenir compte, deuxièmement, du volume de communications établies ou de services rendus par le bureau dans chaque langue officielle et, dernièrement, d’autres éléments qu’il pourra désigner au moyen d’un règlement<sup>33</sup>.

[29] The OCOL’s studies have shown that the vitality of an official language community depends not just on its size but on a number of factors, which vary from region to region. During the study of Bill S-205, *An Act to amend the Official Languages Act (communications with and services to the public)*, the Commissioner of Official Languages also pointed out that the institutional vitality criterion is “extremely

<sup>30</sup> Canada, Standing Senate Committee on Official Languages, *Minutes of Proceedings*, 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament, Issue 12 (May 11, 2015), p. 12:97 [Committee, May 11, 2015].

<sup>31</sup> Canada, Office of the Commissioner of Official Languages, [Special Report to Parliament – A Principled Approach to the Modernization of the Official Languages \(Communications with and Services to the Public\) Regulations](#), Ottawa, Public Works and Government Services Canada, 2018, p. 10 [OCOL, Special Report].

<sup>32</sup> OCOL, 2015-2016, *supra*, p. 19.

<sup>33</sup> Canada, House of Commons, *Minutes of Proceedings*, 2<sup>nd</sup> Session, 33<sup>rd</sup> Parliament, Issue 1 (March 22, 1988), p. 37 (our underline).





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important” and that it is based on the existence of such elements as a school, a community centre, community media and other community institutions such as an association of lawyers or business people.<sup>34</sup> In his 2007-2008 Annual Report, the Commissioner of Official Languages mentioned other indicators of a community’s vitality, including the economy, early childhood services, health care, arts and culture, and postsecondary education.<sup>35</sup> In other words, a community’s vitality is not measured exclusively with demographic data. It also hinges on the community’s capacity to establish and sustain the institutions or official and unofficial organizations required for its survival. A community grows on many different levels, including the educational, political, legal, economic, social and cultural dimensions.<sup>36</sup>

[30] Similarly, the Fédération des communautés francophones et acadienne has emphasized the importance of considering “qualitative criteria in determining ‘significant demand,’ including increasing community diversity and community vitality as exemplified by the presence of a minority school or cultural centre.”<sup>37</sup>

[31] In the absence of a qualitative criterion, an official language minority community that is receiving funding from the Department of Canadian Heritage for the establishment or maintenance of a school-community centre, for example, could find itself in a situation where it no longer meets the numerical threshold in the Regulations or no longer makes up 5% of the total population in the region served. Despite the vitality shown by the community, particularly with regard to education, it could lose federal services in its language.<sup>38</sup> In his Special Report, the Commissioner of Official Languages provides a concrete example of this problem:

the official language community in St. Paul, Alberta, is composed of 615 people, which represents 11% of the total population, and they are entitled to receive all services in their language. The 640 members of

<sup>34</sup> Committee, May 11, 2015, *supra*, p. 12:97.

<sup>35</sup> Canada, Office of the Commissioner of Official Languages, [Annual Report 2007-2008](#), Ottawa, Public Works and Government Services Canada, 2008, p. 80.

<sup>36</sup> Canada, Office of the Commissioner of Official Languages, [Annual Report 2003-2004](#), Ottawa, Public Works and Government Services Canada, 2004, p. 31 [OCOL, 2003-2004].

<sup>37</sup> Fédération des communautés francophones et acadienne du Canada, [Giving New Momentum to Canada’s Linguistic Duality! For a Modern and Respected Official Languages Act](#), Brief submitted to the Standing Senate Committee on Official Languages for its study on Canadians’ views about modernizing the *Official Languages Act* (March 26, 2018), para. 129.

<sup>38</sup> Canada, Office of the Commissioner of Official Languages, [Bill S-205: Brief submitted to the Standing Senate Committee on Official Languages](#), Ottawa, April 20, 2015, p. 4.





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the official language community in Brandon, Manitoba, however, constitute only 1.3% of the population, so they are entitled to receive only key services in their language.<sup>39</sup>

[32] Services to the official language minority community are provided on the basis of its size relative to that of the majority. Hence, even though their populations are almost the same numerically, the Francophone community in one city has rights, while the Francophone community in the other city, because its percentage of the total population is smaller, does not have rights – despite the existence of vitality indicators such as schools, seniors’ residences and community cultural centres.

[33] In using numerical criteria as the only criteria to decide whether there is significant demand, the federal government “too often dismisses the specific characteristics of the community and the role federal institutions could play in its development, [thus] ignor[ing] the community’s vitality, its history, particular circumstances and factors that may be changing it.”<sup>40</sup>

[34] In summary, the Canadian government needs to count potential users of services in an inclusive way, but counting is not enough: it also has to consider the vitality of official language minority communities. At the moment, the federal government is doing neither when it determines who is likely to want to receive services from federal offices in French. The Government of Canada needs to catch up to Ontario in this regard.

## 1.2 Comparative law: The different definitions of the Francophone community in Canadian law

[35] Ontario, Manitoba and Prince Edward Island have adopted more inclusive definitions of the Francophone community than the one used at the federal level, which is based on estimating first official language spoken. The provincial definitions are broader, providing greater access to French-language services by including more people in the group that might ask for such services or at least take advantage of them if the government offered them “actively.”

### 1.2.1 Ontario’s IDF

[36] As noted earlier, the IDF is more inclusive than the federal definition of the Francophone community, because it is not based on first official language spoken. The IDF considers three factors: (1) mother tongue or mother tongues, (2) knowledge of official languages, and (3) language or languages spoken at home. In this way, the IDF identifies and counts exogamous families, Francophiles or Anglophiles, and Francophone newcomers. As a result, more people who speak the minority language

<sup>39</sup> OCOL, Special Report, *supra*, p. 10.

<sup>40</sup> OCOL, 2005-2006, *supra*, p. 28.





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are included in the Francophone community. In addition, the government has access to a more accurate picture of the users who might choose to receive services in French, especially if the government offers them actively. One particular criterion in Ontario's IDF is that Francophones must have a knowledge of French and speak it at home, regardless of whether it is the language used most often.

### 1.2.2 The definition of the Francophone community under Manitoba's *Francophone Community Enhancement and Support Act*

[37] Since 2016, "Manitoba's Francophone community" has been defined as follows in subsection 1(2) of the *Francophone Community Enhancement and Support Act*:<sup>41</sup>

**Sens de « francophonie manitobaine »**

**1(2)** Pour l'application de la présente loi, « francophonie manitobaine » s'entend de la communauté au sein de la population manitobaine regroupant les personnes de langue maternelle française et les personnes qui possèdent une affinité spéciale avec le français et s'en servent couramment dans la vie quotidienne même s'il ne s'agit pas de leur langue maternelle.

**Interpretation: Manitoba's Francophone community**

**1(2)** For the purpose of this Act, "Manitoba's Francophone community" means those persons in Manitoba whose mother tongue is French and those persons in Manitoba whose mother tongue is not French but who have a special affinity for the French language and who use it on a regular basis in their daily life.

[38] Hence, Manitoba's definition of Francophone community is much broader in scope than the federal definition of Francophone community. Manitoba's definition includes not only people whose mother tongue is French, but also people "who have a special affinity for the French language and who use it on a regular basis in their daily life." Moreover, while Ontario's IDF includes Francophiles, exogamous couples and newcomers, Manitoba's definition seems to be slightly more inclusive: in addition to these groups, it encompasses people who do not necessarily speak French at home but use it on a regular basis elsewhere, for example at work or in their daily lives.

[39] That said, Manitoba's approach could make it more difficult to count Francophones, unless everyone who has a knowledge of French is identified and included in the definition. The questions asked in the Census do not provide precise information about the moments in daily life mentioned in Manitoba's definition when French is spoken. However, is it really about counting? The example of Manitoba forces us to think about the real objective in implementing section 20 of the *Canadian Charter of Rights and Freedoms*: whether a particular community has potential speakers and therefore users of services in numbers constituting "significant demand."

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<sup>41</sup> *Francophone Community Enhancement and Support Act*, C.C.S.M., c. F157, s. 1(2).





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### 1.2.3 Definition in Prince Edward Island's *French Language Services Act*

[40] Since 2013, Prince Edward Island's Acadian and Francophone community has been defined as follows in section 1 of the province's *French Language Services Act*:

« **communauté acadienne et francophone** » Les personnes de la province qui ont une connaissance et une compréhension communes de la langue française<sup>42</sup> ;

“**Acadian and Francophone community**” means the community of people within the province who have a common knowledge and understanding of the French language;

[41] Hence, the Francophone and Acadian community in Prince Edward Island includes everyone who has a common knowledge and understanding of the French language. This definition is very inclusive, as it does not even require people to speak French at home or in their daily lives. The comments made previously regarding the Manitoban model also apply here, *mutatis mutandis*.

### 1.3 Recommendations of the French Language Services Commissioner on modernizing the OLA: A new definition for official language minority communities

[42] As Ontario's experience shows, a new definition of official language minority community in a modernized OLA must take that community's new sociological and demographic reality into account; it is inconceivable that in 2018, the definition still includes only people who, for example, have French as their first official language spoken. Furthermore, the right to services in the minority language cannot be based on simple mathematical formulas or reference to the size of the majority; rather, it must reflect the vitality factors of the official language minority communities.

[43] Many bills on this subject have been introduced in the Senate, all with the aim of amending the definition of the Francophone population in the OLA, but they died on the Order Paper.<sup>43</sup> More recently, Bill S-209, *An Act to amend the Official Languages Act (communications with and services to the public)*,

<sup>42</sup> *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.2, s. 1.

<sup>43</sup> Bill S-220, *An Act to amend the Official Languages Act (communications with and services to the public)*, 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament; Bill S-211, *An Act to amend the Official Languages Act (communications with and services to the public)*, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament; Bill S-205, *An Act to amend the Official Languages Act (communications with and services to the public)*, 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament.





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introduced in the Senate by the Honourable Maria Chaput in December 2015,<sup>44</sup> proposed two new criteria for subsection 32(2) of the OLA, to be used in prescribing the circumstances in which federal institutions are required to provide services and communications in both official languages. Those criteria, which would replace the current paragraphs 32(2)(a) and (b), are as follows: (a) “the number of persons able to communicate in the language of the English or French linguistic minority population” and (b) “the particular characteristics, including the institutional vitality, of the English or French linguistic minority population of the area served.”<sup>45</sup>

[44] This proposed amendment to section 32 of the OLA has the advantage of killing two birds with one stone. First, “first official language spoken” would no longer be the criterion used in determining the size of the official language minority community. It would be replaced by the more inclusive and relevant criterion of “knowledge of the official language,”<sup>46</sup> which reflects the changing demographics of the minority language communities and the purpose of Part IV of the OLA. People who have a knowledge of the official language may indeed choose to receive public services in the minority language, especially if the government offers the services actively; consequently, they must be included in the “significant demand” calculation.

[45] Second, Bill S-209 recognizes that qualitative criteria, rather than simply quantitative criteria, are needed to assess a community’s vitality and the right to services in the minority language. In this connection, the Commissioner agrees with Senator Tardif’s statement that identifying the elements of vitality is not a difficult task and that “[f]inding institutions is no more difficult than calculating the percentage.”<sup>47</sup>

[46] Considering Ontario’s experience, the many studies concerning the definition of the Francophone community and Senator Chaput’s bill, in addition to the comparative study of various provincial definitions of the Francophone community, the Commissioner makes the following recommendations for enshrining an inclusive, modern definition of the Francophone community in a modernized OLA.

[47] **First**, the French Language Services Commissioner recommends the addition to the Preamble of the OLA a definition of the minority language communities that, like the models used in Ontario,

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<sup>44</sup> Bill S-209, *An Act to amend the Official Languages Act (communications with and services to the public)*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 2015 (sent to committee on November 17, 2016) [Bill S-209]. On November 17, 2016, the bill passed second reading in the Senate and was referred to the Standing Senate Committee on Official Languages.

<sup>45</sup> Bill S-209, *supra*, s. 5(2)(a)-(b).

<sup>46</sup> Bill S-209, *supra*; Senate, February 3, 2016, *supra*, p. 211.

<sup>47</sup> Canada, Standing Senate Committee on Official Languages, 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament (May 11, 2015) (Graham Fraser).





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Manitoba and Prince Edward Island, would promote openness, inclusion and flexibility. The new definition should recognize and celebrate the new demographic and sociological reality of the minority language communities, which is in part a product of immigration and exogamy. A definition that is so fundamental, both from a symbolic perspective and for the import of the OLA, should not be left to political discretion or buried in a regulation. It should be placed in the Preamble of the OLA.

[48] **Second**, as proposed by Senator Chaput in 2010 in Bill S-220, whose provisions were recently revived in Bill S-209, the French Language Services Commissioner recommends the insertion of two new criteria in subsection 32(2) of the OLA to replace the current paragraphs 32(2)(a) and (b). The two new criteria are as follows: (a) the number of persons able to communicate in the language of the English or French linguistic minority population, and (b) the particular characteristics, including the institutional vitality, of the English or French linguistic minority population of the area served.

[49] **Third**, the French Language Services Commissioner recommends that Parliament amend the wording of subsection 32(2) of the OLA to read that, in making regulations, the Governor in Council “shall” (instead of “may”) have regard to the new criteria in paragraphs 32(2)(a) and (b). In other words, the regulations “shall” be founded on an inclusive definition of the minority language communities (based on the number of people able to communicate in the language); similarly, the determination of “significant demand” for the purposes of the regulations “shall” depend in part on the communities’ institutional vitality.

[50] **Fourth**, to assist Parliament in developing criteria for determining whether there is significant demand, the French Language Services Commissioner recommends the inclusion of examples of institutional vitality in subsection 32(2). For instance, the new paragraph 32(2)(a) could be worded as follows (additions are underlined):

#### Critères

(2) Le gouverneur en conseil doit, pour déterminer les circonstances visées aux alinéas (1)a) ou b), tenir compte :

a) de la population de la minorité francophone ou anglophone de la région desservie, de la spécificité de cette minorité, incluant la vitalité institutionnelle, signalée notamment par l’existence d’une école, d’un centre culturel ou communautaire ou d’autres institutions appartenant à la minorité, et de la proportion que celle-ci représente par rapport à la population totale de cette région ; [...]

#### Where circumstances prescribed under paragraph (1)(a) or (b)

(2) In prescribing circumstances under paragraph (1)(a) or (b), the Governor in Council shall have regard to (a) the number of persons composing the English or French linguistic minority population of the area served by an office or facility, the particular characteristics of that population, including its institutional vitality, as evidenced namely by the existence of a school, a cultural center or other an institution belonging to the minority, and the proportion of that population to the total population of that area; [...]





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[51] **Fifth**, the French Language Services Commissioner supports the recommendation made by some witnesses from New Brunswick that in modernizing the federal OLA, Parliament expressly require the federal government to communicate and provide its services in both official languages in every part of New Brunswick.<sup>48</sup>

[52] Furthermore, the Commissioner believes that, in the event that the Ontario government accepts the Commissioner's recommendation that it modernize its own *French Language Services Act* and move from having 27 designated areas to having a single designated area covering the entire province, it is important to give the federal government the flexibility it needs so that it can make adjustments and provide services in areas where the province is providing them, as long as that is more convenient for the minority official language communities. This also applies to any other province or territory that passes similar legislation.

## 2. A better framework for active offer of services in the OLA

[53] The active offer of services in French has been a priority issue for the Office of the French Language Services Commissioner since it was established in 2007.<sup>49</sup> In 2016, it submitted to the Legislative Assembly of Ontario a special report on active offer and its importance for achieving the objectives of the *French Language Services Act*. Having developed genuine expertise regarding this concept, the OFLSC is in a good position to offer the Committee some suggestions on how to modernize the OLA in the area of active offer.<sup>50</sup>

[54] The active offer of services in minority language communities serves to stimulate underlying demand for French-language services, or even create the demand, and not to meet previously communicated demand. Active offer fosters the use of services in the other language. When it leads to a satisfactory experience (which is not always the case, unfortunately), active offer encourages recipients

<sup>48</sup> Société de l'Acadie du Nouveau-Brunswick, [Let's Finally Recognize the Specificity of New Brunswick in the Official Languages Act!](#), Brief submitted to the Standing Senate Committee on Official Languages for its study on Canadians' views about modernizing the *Official Languages Act* (April 16, 2018), paras. 43-52; Association francophone des municipalités du Nouveau-Brunswick, [Brief submitted to the Standing Senate Committee on Official Languages for its study on Canadians' views about modernizing the Official Languages Act](#) (April 23, 2018).

<sup>49</sup> OFLSC, 2007-2008, *supra*, p. 3.

<sup>50</sup> OFLSC, 2015-2016, *supra*, p. 49; Ontario, Office of the French Language Services Commissioner, [Special Report - Active Offer of Services in French: The Cornerstone for Achieving the Objectives of Ontario's French Language Services Act](#), 2016, p. 37-38 [OFLSC, Special Report].





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to ask for service in the other language more often.<sup>51</sup> Active offer is thus an essential element of the provision of services in both official languages, especially when “[d]ifficulties in accessing services in French jeopardize the safety and well-being of Francophones who are vulnerable,”<sup>52</sup> as many recipients of health, justice and social services are.

[55] The obligation to “actively” offer a service is the obligation to inform members of the public of their right to communicate and receive services in either official language. The concept of active offer has several components.<sup>53</sup> First, active offer implies that service providers must be proactive, either orally or in writing. Members of the public have to know, on their initial contact with the government and its service providers, that they can choose the language of service or communication.<sup>54</sup> Second, the quality of the services offered “actively” must be genuinely equal to the quality of the services offered in the majority language. Active offer of services that actually prove to be of equal quality encourages the public; the opposite deters people from making further efforts to exercise their rights.<sup>55</sup> Third, active offer produces the desired results only when there is an environment suited to the reality of the minority language community, an environment that recognizes the equal status of the two official languages, particularly with signage, and anticipates their specific needs.<sup>56</sup> Fourth, it goes without saying that active offer requires adequate allocation of financial and human resources.

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<sup>51</sup> OFLSC, [Annual Report 2009-2010](#), 2010, p. 12 [OFLSC, 2009-2010]; Linda Cardinal, Nathalie Plante and Anik Sauvé, *From Theory to Practice: Mechanisms for the Offer of French Language Services in Ontario's Justice Sector. Volume 2: Perceptions by public servants and users*, Ottawa, Chaire de recherche sur la francophonie et les politiques publiques, 2010; Kenneth Deveau, Rodrigue Landry and Réal Allard, *Utilisation des services gouvernementaux de langue française, Une étude auprès des Acadiens et francophones de la Nouvelle-Écosse sur les facteurs associés à l'utilisation des services gouvernementaux en français*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2009.

<sup>52</sup> Special Report, *supra*, p. 29.

<sup>53</sup> OFLSC, Special Report, *supra*, pp. 12-14.

<sup>54</sup> Louise Bouchard, Marielle Beaulieu and Martin Desmeules, “L’offre active de service de santé en français en Ontario : une mesure d’équité,” *Reflets : revue d’intervention sociale et communautaire*, Vol. 18, no. 2, 2012, p. 46: [translation] “At first glance, active offer can be seen as an oral or written invitation to speak in the official language of one’s choice. The offer to use the official language of one’s choice must precede the request for services. For active offer to exist, the offer must be visible, audible, accessible (by speaking) and obvious [...], and greetings and services to Francophones must be automatic, like a reflex, and without delay.”

<sup>55</sup> *Desrochers v. Canada*, 2009 S.C.R. 194 [*Desrochers*]; OFLSC, 2015-2016, *supra*, p. 45.

<sup>56</sup> Especially with regard to the culturally appropriate provision of services (see OFLSC, 2009-2010, *supra*, p. 11; Michel Bastarache and Michel Doucet, eds., *Language Rights in Canada*, 3<sup>rd</sup> edition, Cowansville, Quebec, Yvon Blais, 2014, p. 84; *Desrochers*, *supra*).





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[56] When minority Francophones are not “actively” offered services in both official languages, they often do not ask for service in French, even when they are entitled to demand it. Hence, active offer helps combat assimilation pressure by the majority language, English, in the public sphere. It is, so to speak, a condition of the effective exercise of a number of language rights:

Even where there are language rights, social relationships continue to influence behaviours in the social spaces where they apply. The Legislature must bear this in mind and adopt measures to increase the effectiveness of language rights. From this perspective, the active offer obligation of public service providers becomes a key measure for redirecting social norms and ensuring that the language rights enacted by the Legislature are fully in force.<sup>57</sup>

[57] Studies show a direct correlation between active offer of services in French in minority settings and the use of French in public: “Weak supply of services in French results in weak demand for those services, and this prompts service providers to no longer offer services in French.”<sup>58</sup> The opposite is also true: active offer is a relief to members of the public, as they no longer feel obliged to ask for service in French. “Requesting service in French is relatively difficult for a person who has been socialized to believe that English is the main – if not the only – language to be used in public. Requesting service in French reflects the behaviour of an individual who has chosen to identify himself or herself as a Francophone.”<sup>59</sup> Because of the linguistic reality and social pressures, “[e]ven when a person is very aware of the community’s linguistic and cultural situation and the importance of French-language services, asking for service in French can be awkward and difficult.”<sup>60</sup>

[58] These observations are not new, however. The Royal Commission on Bilingualism and Biculturalism pointed out – in 1967! – the importance of actively offering services in both official languages to offset the imbalance of power between the majority and minority languages. In particular,

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<sup>57</sup> OFLSC, Special Report, *supra*, p. 15.

<sup>58</sup> OFLSC, Special Report, *supra*, p. 16.

<sup>59</sup> OFLSC, 2009-2010, *supra*, p. 12; Kenneth Deveau, Rodrigue Landry and Réal Allard, *Utilisation des services gouvernementaux de langue française, Une étude auprès des Acadiens et francophones de la Nouvelle-Écosse sur les facteurs associés à l'utilisation des services gouvernementaux en français*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2009, pp. 88-89; Office of the Commissioner of Official Languages of Canada, [Bilingual Greetings in Federal Institutions: Let's Talk About It!](#), Public Works and Government Services Canada, 2016, p. 5 [OCOL, Bilingual Greetings].

<sup>60</sup> OFLSC, 2009-2010, *supra*, p. 13; Deveau, Landry and Allard, *supra*, pp. 88-89.





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the Royal Commission noted that it would be unacceptable to provide “services in the minority language only to the extent that the minority requests.”<sup>61</sup> According to the Royal Commission,

[a] system of that kind would constitute no real guarantee; it would be at the mercy of more or less arbitrary interpretation by the authorities of the day. Moreover, [...] in a province where services have never or rarely been offered in the official language of the minority, the minority may by force of habit have resigned themselves to the situation even when they considered it unjust. We need more objective criteria than this, criteria founded on something more tangible.<sup>62</sup>

[59] Active offer is not only about preserving official language minority communities, but also about enhancing their vitality and supporting their development. “Active” offer of services sends a message to the members of those communities that “their language is both used and useful,”<sup>63</sup> and that it has a legitimate place in the public sphere. For the members of the official language minority communities, it is uplifting “to see [their] language recognized not only symbolically, but also as a useful, modern, and effective language.”<sup>64</sup>

## 2.1 Active offer: A poorly understood OLA obligation

[60] In 1969, the initial version of the OLA was silent on the matter of active offer, despite the exceedingly clear ideas expressed by the Royal Commission on Bilingualism and Biculturalism. At the time, only members of the public who requested services in the other official language were entitled to receive them. New Brunswick’s first *Official Languages Act* was even clearer in this regard, expressly stating that members of the public had to ask to be served in the official language of their choice.<sup>65</sup>

[61] In 1988, the new OLA passed by Parliament specified, for the first time, the obligation to actively offer services in both official languages:

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<sup>61</sup> Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: Volume 1, Official Languages*, Ottawa, 1967, p. 95.

<sup>62</sup> *Ibid.*, p. 95.

<sup>63</sup> OFLSC, 2009-2010, *supra*, p. 11. See also Michel Bastarache and Michel Doucet, eds., *Language Rights in Canada*, 3<sup>rd</sup> edition, Cowansville, Quebec, Yvon Blais, 2014, p. 6, citing Thomas W. Pogge, “The Rights of Hispanics in the United States” in Will Kymlicka and Alan Patten, *Language Rights and Political Theory*, New York, Oxford University Press, 2003, p. 121.

<sup>64</sup> OFLSC, 2007-2008, *supra*, p. 15.

<sup>65</sup> *Official Languages Act*, S.N.B. 1969, c. 14, s. 10.





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### Offre active

**28** Lorsqu'elles sont tenues, sous le régime de la présente partie, de veiller à ce que le public puisse communiquer avec leurs bureaux ou recevoir les services de ceux-ci ou de tiers pour leur compte, dans l'une ou l'autre langue officielle, il incombe aux institutions fédérales de veiller également à ce que les mesures voulues soient prises pour informer le public, notamment par entrée en communication avec lui ou encore par signalisation, avis ou documentation sur les services, que ceux-ci lui sont offerts dans l'une ou l'autre langue officielle, au choix.

### Active offer

**28** Every federal institution that is required under this Part to ensure that any member of the public can communicate with and obtain available services from an office or facility of that institution, or of another person or organization on behalf of that institution, in either official language shall ensure that appropriate measures are taken, including the provision of signs, notice and other information on services and the initiation of communication with the public, to make it known to members of the public that those services are available in either official language at the choice of any member of the public.

[62] However, as the Commissioner of Official Languages of Canada observed in 2016, that obligation, though crucial, remains poorly understood by federal institutions, which are “struggling to provide an active offer routinely and consistently in situations where they are in direct contact with the public.”<sup>66</sup>

## 2.2 Comparative law: Active offer in Canadian law

[63] A review of the active offer provisions in the various Canadian jurisdictions provides some ideas regarding best practices in this area.

[64] Unfortunately, to date, despite the OFLSC's efforts, Ontario's model has not been very inspiring. The laws of **Ontario** say nothing about active offer. However, Regulation 284/11, Provision of French Language Services on Behalf of Government Agencies, requires government agencies to ensure that third parties acting on their behalf actively offer their services in French. The Regulation does not impose an active offer obligation on government agencies themselves:

2(2) Au plus tard le jour précisé au paragraphe (3), chaque organisme gouvernemental veille à ce que tout tiers qui fournit un service en français au public pour son compte prenne des mesures appropriées pour informer ce dernier, notamment par entrée en communication avec lui ou encore par signalisation,

2(2) By the day specified in subsection (3), every government agency shall ensure that a third party providing a service in French to the public on its behalf shall take appropriate measures, including providing signs, notices and other information on services and initiating communication with the

<sup>66</sup> OCOL, Bilingual Greetings, *supra* p. 1.





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avis ou documentation sur les services, que le service est offert en français, au choix<sup>67</sup>.

public, to make it known to members of the public that the service is available in French at the choice of any member of the public.

[65] **New Brunswick's** new *Official Languages Act* contains two provisions requiring the active offer of services. Section 28.1 states that, in general, institutions "shall ensure that appropriate measures are taken to make it known to members of the public that [their] services are available in the official language of their choice."<sup>68</sup> The Act also contains a specific active offer obligation for peace officers, who must inform any member of the public with whom they communicate that he or she has the right to receive service in the official language of his or her choice.<sup>69</sup>

#### Services de police

31(1) Tout membre du public a le droit, lorsqu'il communique avec un agent de la paix, de se faire servir dans la langue officielle de son choix et il doit être informé de ce choix.

#### Policing services

31(1) Members of the public have the right, when communicating with a peace officer, to receive service in the official language of their choice and must be informed of that right.

[66] At first glance, it might seem like a good idea to impose an active offer obligation on a specific institution (policing services in this case). However, the federal OLA goes further than New Brunswick's *Official Languages Act* by providing examples of ways in which federal institutions can ensure that measures are taken to inform the public that services are available in both official languages (in this case, initiation of communication with the public, signs, notices or other information about services).

[67] Things seem more promising in **Manitoba**. The province's *Bilingual Service Centres Act* states that "[o]ne or more bilingual service centres are to be maintained for each bilingual service region to provide access to and delivery of a broad range of government programs and services in a person's choice of either French or English."<sup>70</sup> Then, subsections 2(2) and 2(3) of the *Bilingual Service Centres Act* specify a series of active offer obligations regarding the services available in bilingual service centres and an obligation to deliver the services in a linguistically and culturally appropriate manner, taking into account the needs of the population:

<sup>67</sup> Ontario Regulation 284/11, Provision of French Language Services on Behalf of Government Agencies. Section 2 makes no explicit reference to the concept of active offer, but it is widely agreed that the substance of the concept is there.

<sup>68</sup> *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 28.1.

<sup>69</sup> *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 31(1) [our underline].

<sup>70</sup> *Bilingual Service Centres Act*, C.C.S.M. c. B37, s. 2(1).





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## Offre active

**2(2)** Dans les centres de services bilingues :

- a)** chaque employé du gouvernement qui a des rapports directs avec le public doit bien maîtriser le français et l'anglais et doit pouvoir communiquer avec les membres du public dans l'une ou l'autre de ces langues, selon ce qu'ils choisissent ;
- b)** le public doit être informé au moyen de mesures appropriées qu'il peut avoir accès à un large éventail de programmes et de services gouvernementaux et en obtenir la prestation en français ou en anglais ; à cette fin, des affiches, des avis et d'autres renseignements lui sont communiqués et les employés s'adressent à lui dans les deux langues ;
- c)** l'utilisation du français à titre de langue de travail doit être encouragée.

## Programmes et services offerts d'une manière appropriée sur les plans linguistique et culturel

**2(3)** Dans les centres de services bilingues, les programmes et les services gouvernementaux sont offerts d'une manière appropriée sur les plans linguistique et culturel, compte tenu des besoins de la population de la région de services bilingues, notamment des besoins particuliers de la population métisse et des immigrants<sup>71</sup>.

## Requirements to ensure active offer of language choice at centres

**2(2)** At a bilingual service centre,

- (a)** each government staff member who deals directly with the public is to be proficient in French and English and able to communicate with the public in the person's choice of either French or English;
- (b)** it is to be made known to the public through the taking of appropriate measures that access to and delivery of a broad range of government programs and services is available in either French or English at their choice, including measures such as
  - (i)** providing signs, notices and other information about the programs and services, and
  - (ii)** initiating communication with the public in both French and English; and
- (c)** the use of French is to be encouraged as the language of work.

## Delivery in linguistically and culturally appropriate manner

**2(3)** The government programs and services delivered at a bilingual service centre are to be delivered in a linguistically and culturally appropriate manner taking into account the needs of the population, including the specific needs of the Métis population and immigrants, within the bilingual service region.

[68] In addition, the *Francophone Community Enhancement and Support Act* sets out several principles, including active offer, to provide guidance “[i]n administering th[e] Act and in fulfilling the responsibilities under it.”<sup>72</sup> Active offer is defined as “the cornerstone for the provision of French

<sup>71</sup> *Bilingual Service Centres Act*, C.C.S.M. c. B37, s. 2(2)-(3). See also *Desrochers, supra; Inuit Language Protection Act*, S.Nu. 2008, c. 17.

<sup>72</sup> *Francophone Community Enhancement and Support Act*, C.C.S.M. c. F157, s. 3.





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language services whereby these services are to be made evident, readily available and easily accessible to the public and are to be of comparable quality to English language services.”<sup>73</sup>

[69] **Prince Edward Island's French Language Services Act** also contains an active offer obligation, but only for designated services:

#### Services désignés

3. Services désignés en français ou en anglais.

(1) Les institutions gouvernementales font en sorte que tous les services désignés qu'elles fournissent soient offerts au public en français ou en anglais au choix de la personne.

#### Offre active, qualité comparable

(2) Les institutions gouvernementales font en sorte :

(a) que des mesures soient prises, conformément aux règlements, pour informer le public que leurs services désignés sont offerts en français ou en anglais au choix de la personne ;

(b) que les services désignés dont elles assurent la prestation soient de qualité comparable en français et en anglais.

#### Service direct ou indirect

(3) Il est entendu que le présent article s'applique aux institutions gouvernementales, que celles-ci fournissent leurs services désignés directement ou par l'entremise de tiers<sup>74</sup>.

#### Designated Services

3. Designated services in French or English

(1) Every government institution shall ensure that each designated service provided by that government institution is provided to any member of the public in the person's choice of French or English.

#### Active offer, comparable quality

(2) Every government institution shall ensure that

(a) measures are taken, in accordance with the regulations, to make it known to the public that a designated service of the government institution is provided in a person's choice of French or English; and

(b) a designated service of the government institution is provided with comparable quality in French and English.

#### Direct or indirect service

(3) For greater certainty, this section applies to a government institution whether the government institution provides a designated service directly or through a third party.

[70] The active offer obligation in Prince Edward Island's *French Language Services Act* applies to both government and third-party activities. The Act also contains the specific obligation to provide comparable quality of services in both languages. In addition, it leaves it up to the government to make regulations on what measures are to be taken to inform the public that services are available in both official languages.

<sup>73</sup> *Francophone Community Enhancement and Support Act*, C.C.S.M. c. F157, s. 3.

<sup>74</sup> *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.2, s. 3.





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[71] In **Nunavut**, both the *Inuit Language Protection Act* and the *Official Languages Act* contain provisions concerning active offer. Under the former, active offer “means a clear explanation in the Inuit Language of an individual's right to use the Inuit Language during recruitment or employment, delivered in a manner that is culturally appropriate and non-coercive.”<sup>75</sup> Under subsection 12(7) of Nunavut's *Official Languages Act*, the administrative heads of Nunavut territorial institutions that have a duty to provide their services in the territory's official languages are required to

prend[re] des mesures appropriées compatibles avec la présente loi, notamment en ce qui concerne l'affichage des enseignes et panneaux, la remise des avis ou la prise d'autres mesures selon ce qui est approprié :

a) pour faire une offre active des services en question, informant le public de son droit de communiquer dans sa langue officielle préférée et de recevoir les services disponibles dans cette langue ;

b) pour veiller à ce que :

- (i) les services en question soient disponibles sur demande pour le public,
- (ii) la prestation des services en question soit faite en portant attention à la pertinence et à l'efficacité culturelles,
- (iii) les services en question soient de qualité comparable ; [...]<sup>76</sup>

take appropriate measures consistent with this Act, including

posting such signs, providing such notices or taking such other measures as are appropriate

(a) to provide an active offer of the services in question, making it known to members of the public that they have the right to communicate and receive available services in their Official Language of choice;

(b) to ensure that the services in question are

(i) available to members of the public on request,

(ii) delivered with attention to cultural appropriateness and effectiveness, and

(iii) of comparable quality; [...]

### 2.3 Recommendations for a more robust active offer framework in the federal OLA

[72] Considering Ontario's experience, the various studies carried out by the OFLSC on the subject of active offer, and the analysis of the various active offer obligation models in Canada, the French Language Services Commissioner recommends the following amendments to modernize the concept of active offer in the OLA.

[73] **First**, the French Language Services Commissioner recommends that Parliament explicitly define the concept of active offer. Section 28 of the current OLA does not say what “active” offer of services is; it only specifies some of the ways of ensuring compliance with the principle: “the provision of signs,

<sup>75</sup> *Inuit Language Protection Act*, S.Nu. 2008, c. 17, s. 11.

<sup>76</sup> *Official Languages Act*, S.Nu. 2008, c. 10, s. 12(7).





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notices and other information on services and the initiation of communication with the public.”<sup>77</sup>

However, the concept of active offer remains poorly understood by federal institutions almost 30 years after it was added to the OLA. That is a serious impediment to achieving the OLA’s objectives. What has to be done, therefore, is to establish a more robust active offer framework. The logical starting point for creating that framework is to put a clear definition of active offer into the OLA.

[74] **Second**, the French Language Services Commissioner recommends that Parliament expand the range of services covered by active offer and specify that the services must be of equal quality in the two official languages. Section 28 of the OLA establishes the obligation to actively offer the services provided under Part IV, thereby excluding the justice sector (Part III). Yet justice is one of the areas where the active offer of services in French is fundamentally important, because it often affects people who are vulnerable:

Service users who find themselves in a particularly vulnerable and urgent position may not request services in French if they think it would risk delaying the resolution of their problem or hurt them, and this is why it is so important to take the lead and actively offer the services that people in situations where they are vulnerable need.<sup>78</sup>

To achieve the OLA’s objectives and support the development and enhance the vitality of the official language minority communities, the French Language Services Commissioner recommends that Parliament remedy this deficiency in the OLA by expanding the active offer obligation to include the justice sector.

[75] **Third**, to ensure that the services provided are of substantively equal quality, the French Language Services Commissioner recommends that the OLA require federal institutions to take the reality and full development of Francophone communities into account when actively offering those services. For example, “substantive equality in service delivery may require, depending on the nature of the service being provided, not only different content but also community participation in developing and delivering the service in question.”<sup>79</sup> In this respect, a page could be taken from Manitoba’s *Bilingual Service Centres Act* and Nunavut’s *Inuit Language Protection Act*, which require services to be delivered in a linguistically and culturally appropriate manner.

[76] **Fourth**, the French Language Services Commissioner recommends that the OLA require the federal government to allocate the necessary resources to the active offer of services. “One of the

<sup>77</sup> OLA, *supra*, s. 28.

<sup>78</sup> OFLSC, Special Report, *supra*, pp. 29, 38.

<sup>79</sup> OFLSC, 2015-2016, *supra*, p. 44; *Desrochers, supra*.





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cornerstones of active offer is unquestionably human resources planning.”<sup>80</sup> It is impossible to actively offer and deliver services if there are not enough French-speaking employees capable of providing the services in an equitable manner.

[77] **Fifth**, the French Language Services Commissioner recommends that Parliament indicate explicitly that third parties acting on behalf of federal institutions have the same active offer obligations as those institutions. It is essential that language obligations be maintained when the government withdraws from areas of jurisdiction or privatizes services. In this regard, the relevant provision in Prince Edward Island’s *French Language Services Act* could be instructive.

[78] **Sixth**, the French Language Services Commissioner recommends that the OLA require the government to adopt active offer regulations. The obligation to actively offer services in both official languages must be accompanied by clear criteria that have to be met. It is impossible to achieve the OLA’s legislative objectives “if it is left to the discretion of [institutions] to provide services in French or English,” because that merely reinforces “a social dynamic that favours the majority language.”<sup>81</sup> However, inasmuch as it is not possible (or desirable) to include the level of detail required for the effective fulfilment of the obligation to actively offer services in both official languages, it is preferable to put into the OLA a provision requiring the government to make regulations spelling out those details. A general, operational definition of active offer could include the following elements:

1. Ensure that the necessary measures are taken to inform the public of the availability of the services.
2. Make the offer of service in both languages, starting with the first contact.
3. Assure the person that he or she has the choice of using either language of service.
4. Ensure that the service is provided in a culturally appropriate manner.
5. Ensure that the person feels comfortable with how the services are provided.
6. Ensure that the service provided is of equal or equivalent quality to the service provided in English.<sup>82</sup>

[79] The French Language Services Commissioner therefore recommends that the new OLA require the making of regulations that would set out the parameters of an active offer policy for federal

<sup>80</sup> Ontario, Office of the French Language Services Commissioner, [Annual Report 2012-2013](#), 2013, p. 29.

<sup>81</sup> OFLSC, Special Report, *supra*, p. 15.

<sup>82</sup> OFLSC, Special Report, *supra*, p. 14.





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institutions, including the development of a communications strategy and a bilingual signage and greeting policy, the creation of a work environment and culture of respect for official languages, and the development of a human resources plan for the implementation of the OLA.<sup>83</sup> Active offer regulations could also provide for a mechanism for the evaluation of federal institutions' active offer policies, by Treasury Board for example, and accountability measures.<sup>84</sup>

### 3. New sections of the *Official Languages Act* should provide a framework for federal-provincial-territorial agreements

[80] For many years, the federal government has been transferring large sums of money to the provinces and territories to support a variety of activity areas, including some areas that otherwise come under provincial jurisdiction.

[81] Transfers of this kind, which involve the exercise of federal spending authority, are regulated through federal-provincial-territorial agreements. For example, Canadian Heritage enters into agreements with provincial and territorial governments to implement its Official Languages in Education Program since the 1970s.<sup>85</sup> The latter frame the parameters for the federal funds transfer to finance the additional costs associated with minority language teaching and second language teaching. Employment and Social Development Canada also transferred funds to provinces to support early childhood education via bilateral agreements adopted pursuant to the *Multilateral Early Learning and Child Care Framework*.<sup>86</sup>

[82] These agreements play a fundamental role in the Canadian federation. Yet the OLA only talks about the language in which the agreements are written; it has nothing to say about their content.<sup>87</sup>

<sup>83</sup> OFLSC, Special Report, *supra*, p. 13.

<sup>84</sup> OFLSC, Special Report, *supra*, pp. 40-41.

<sup>85</sup> See for example: Canada, Council of Ministers of Education (Canada), *Protocol for Agreements for Minority-Language Education and Second-Language Instruction, 2013-2014 to 2017-2018*, August 14 2013, Canada, Canadian Heritage, *The Canada–Ontario Agreement on Minority-Language Education and Second Official-Language Instruction 2013–2014 to 2017–2018*, March 2014.

<sup>86</sup> Canada, Employment and Social Development Canada, *Multilateral Early Learning and Child Care Framework*, June 12, 2017; Canada, Canadian Heritage, *Canada-Ontario Early Learning and Child Care Agreement*, June 2017.

<sup>87</sup> OLA, s. 10(2). However, even in this respect, the OLA could do more by specifying that “the federal government has the duty to ensure that federal-provincial/territorial agreements are made in both official languages and that both versions are equally authoritative, regardless of the official or unofficial status of English and French in the relevant jurisdiction” (see Fédération des communautés francophones et acadiennes du Canada, [Giving New](#)





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Hence, there is no guarantee that the interests of the official language minority communities will be taken into account in developing, adopting or implementing these agreements.

[83] Nevertheless, as the Supreme Court of Canada explained in *Mahé v. Alberta*, “minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns [since] the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.”<sup>88</sup> Since the official language minority communities are never a party to federal-provincial-territorial agreements, only a legislative framework can guarantee that their interests are taken into account.

[84] Of course, the OLA does provide some general guidelines regarding what the federal government should do in its relations with the provinces with respect to official languages. For example, the Preamble of the OLA states that the federal government “is committed to cooperating with provincial governments and their institutions to support the development of English and French linguistic minority communities, to provide services in both English and French, to respect the constitutional guarantees of minority language educational rights and to enhance opportunities for all to learn both English and French.”

[85] Under section 25 of the OLA, federal institutions have “the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public [...] can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.”

[86] In addition, under section 41 of the OLA, the federal government is required to take positive measures for the implementation of its commitment to “enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development [and] fostering the full recognition and use of both English and French in Canadian society.”

[87] Nevertheless, it would appear that these legislative provisions, expressed in general terms, do not provide an adequate framework for the negotiation or implementation of federal-provincial-territorial agreements. For example, on May 23, 2018, the Federal Court ruled in *Fédération des francophones de la Colombie-Britannique c. Canada* that [translation] “section 41 does not impose any

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[Momentum to Canada's Linguistic Duality! For a Modern and Respected Official Languages Act](#), Brief submitted to the Standing Senate Committee on Official Languages for its study on Canadians' views about modernizing the *Official Languages Act* (March 26, 2018), para. 112.

<sup>88</sup> *Mahé v. Alberta*, [1990] 1 S.C.R. 342, p. 372.





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specific and particular obligations on federal institutions because nothing in the language used in subsection 41(2) evokes any specificity whatsoever.”<sup>89</sup>

[88] The Federal Court pinpoints the problem: the wording of the OLA, including Part VII, is defective. The OLA should therefore provide an explicit framework for the federal government’s role in the adoption and implementation of federal-provincial-territorial agreements.

[89] The House of Commons Standing Committee on Official Languages has been recommending precisely this since at least 2003. Following a study on immigration, the committee recommended “that from now on a language clause be included in all federal-provincial-territorial agreements on immigration, providing for the input of official language communities on all issues involving promotion, recruitment and immigration of new arrivals whose first language is that of the minority.”<sup>90</sup>

[90] In 2007, the same committee observed that “the statutory requirement that the federal government foster the vitality of official language minority communities should also be reflected by a firm commitment in the form of transfer payments to the provinces” and therefore recommended that “all federal transfer payments to the provinces or territories for a sector under provincial jurisdiction or shared jurisdiction include a clause allocating separate funding in order to work towards equality of services for francophone language minority communities.”<sup>91</sup>

[91] In 2018, in the context of a study on education and skills development, the House of Commons Standing Committee on Official Languages recommended once again that language clauses be included in federal-provincial-territorial agreements, but it went further with regard to having a framework for federal-provincial-territorial agreements:

That, in the area of intergovernmental cooperation, the Minister responsible for adult literacy and essential skills development ensure the following:

a) that bilateral agreements with provinces and territories include binding clauses concerning official language minority communities (OLMCs), including clauses respecting consultations with community

<sup>89</sup> *Fédération des francophones de la Colombie-Britannique c Canada*, 2018 CF 530, para. 216.

<sup>90</sup> House of Commons, Standing Committee on Official Languages, *Immigration as a Tool for the Development of Official Language Minority Communities* (May 2003), p. 10 (Chair: Mauril Bélanger); see also House of Commons, Standing Committee on Official Languages, *Recruitment, Intake and Integration: What does the future hold for immigration to official language minority communities?* (November 2010), p. 56 (Chair: Steven Blaney).

<sup>91</sup> House of Commons, Standing Committee on Official Languages, *Communities Speak Out - Hear Our Voice: The Vitality of Official Language Minority Communities* (May 2007), pp. 129-130 (Chair: Guy Lauzon).





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representatives (identifying the interlocutors and the frequency of consultations) and the accountability obligations of the two levels of government;

b) that provincial and territorial action plans be public and clearly demonstrate how provincial and territorial governments will meet their respective commitments to OLMCs; and

c) that the accountability provisions enable OLMCs to determine how much of the federal and provincial or territorial investments are allocated to them.<sup>92</sup>

[92] Recently, in the context of its study on access to early childhood education minority language services, this Committee recommended that the Treasury Board adopt a policy to frame the federal-provincial agreements:

That the Treasury Board Secretariat create a new policy instrument to require that all bilateral agreements, no matter the subject matter, include the following:

a) initiatives and programs specific to official language minority communities (OLMCs) that deliver services equal in quality to those received by the majority;

b) binding provisions that require the provinces and territories to hold official consultations with OLMCs;

c) targets and performance measures tailored to OLMCs; and

d) explicit accountability provisions that require the provinces and territories to disclose exactly how much funding is owed to OLMCs under the bilateral agreements.<sup>93</sup>

[93] In view of the foregoing, **the French Language Services Commissioner recommends** that Parliament add to Part VII new sections that would provide a framework for the federal government's role in adopting and implementing federal-provincial-territorial agreements. They could include the following:

- i) a detailed section that would enshrine the adoption and elements of a Multi-Year Action Plan for Official Languages in the *Official Languages Act*;

<sup>92</sup> House of Commons, Standing Committee on Official Languages, [Adult Literacy and Skills Development: An Essential Component of the Education Continuum in Official Language Minority Communities](#) (April 2018), pp. 20-21.

<sup>93</sup> House of Commons, Standing Committee on Official Languages, [Growing Up in French in Western Canada: A Review of Federal Support for Early Childhood Education](#), (April 2018), p. 37.





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- ii) a section that would require the inclusion of a “language clause” in every federal-provincial-territorial agreement;
- iii) a section that would set out explicit requirements for consultations with official language minority communities regarding federal-provincial-territorial agreements; and
- iv) a section that would set out the accountability obligation of the governments party to the agreements.

#### **4. Toward genuine implementation of subsection 16(3) of the *Canadian Charter of Rights and Freedoms***

[94] Subsection 16(3) states that “[n]othing in th[e] Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French”; it entrenches a fundamental principle of language rights, commonly known as the “principle of advancement.”<sup>94</sup> Under this principle, constitutional provisions regarding the rights, status and privileges of English and French constitute minimum guarantees which Parliament and legislatures are free to improve upon, through their legislative action, in order to promote substantive equality of the official languages.

[95] Implicit in the principle of advancement is the recognition that Canada’s linguistic duality and language rights fall within the purview of both the provincial legislatures and the federal Parliament, and that all levels of government have a duty to advance them in their respective areas of jurisdiction.

[96] The principle of advancement was first recognized by the Supreme Court of Canada in *Jones v. New Brunswick*.<sup>95</sup> In that case, the Mayor of Moncton, Leonard Jones, challenged the constitutionality of some language laws, including the federal OLA and New Brunswick’s *Official Languages Act*, on the grounds that they were *ultra vires*, that section 133 of the *Constitution Act, 1867* was exhaustive in its codification of constitutional power with respect to the status and use of English and French in Canada, and that a constitutional amendment was needed to enable any provincial and federal legislation that would enhance the legal guarantees in section 133, as the federal OLA does.

<sup>94</sup> *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, p. 579; *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 22.

<sup>95</sup> *Jones v. New Brunswick (AG)*, [1975] 2 S.C.R. 182, pp. 192-193 [*Jones*].





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[97] On behalf of the Supreme Court of Canada, Chief Justice Bora Laskin rejected these arguments, introducing *ipso facto* the principle of advancement of language rights into the Canadian constitutional picture:

À coup sûr, ce que l'art. 133 lui-même donne ne peut être enlevé par le Parlement du Canada, mais si ses dispositions sont respectées il n'y a rien dans cet article-là ou ailleurs dans l'*Acte de l'Amérique du Nord britannique* [...] qui empêche l'octroi de droits ou privilèges additionnels ou l'imposition d'obligations additionnelles relativement à l'usage de l'anglais et du français, si cela est fait relativement à des matières qui relèvent de la compétence de la législature légiférant en ce sens<sup>96</sup>.

Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the *British North America Act* (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.

[98] In accordance with the principle of advancement, the federal government can lawfully propose statutes and other measures that entail greater language obligations and guarantees than those specified in section 133 of the *Constitution Act, 1867*.<sup>97</sup> This is precisely what Parliament did when it passed the federal OLA.

[99] Moreover, although the principle of advancement and subsection 16(3) of the Charter recognize legislatures' power to expand the scope of existing language rights, in the case of the federal government, it is actually an obligation. In endorsing Part VII of the OLA, Parliament made it the federal government's responsibility to enhance the vitality and support the development of the official language minority communities, foster the full recognition and use of English and French in Canadian society, and take positive measures to achieve those goals.<sup>98</sup> Thus, through Part VII of the OLA, the "authority" mentioned in subsection 16(3) of the Charter became a duty for the federal government.

[100] Yet official languages and language rights are not the exclusive preserve of the federal government. Provincial legislatures and entities subordinate to them are also free to expand the scope of the language guarantees in Canada's Constitution, and even to create new language rights within their respective areas of jurisdiction. That is the principle enshrined in subsection 16(3) of the Charter in 1982.

<sup>96</sup> Jones, *supra*, pp. 192-193.

<sup>97</sup> *Constitution Act, 1867* (UK), 30 & 31 Victoria, c. 3, reproduced in R.S.C. 1985, Schedule II, no. 5, s. 133.

<sup>98</sup> OLA, *supra*, s. 41.





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[101] Some provinces, including Ontario, have answered the invitation of subsection 16(3), notably with financial support from the federal government. In fact, even though Ontario has been hostile toward its Francophone minority at times in the past,<sup>99</sup> today the province can be justifiably proud of the measures it has taken since the 1980s to remedy the errors of the past and advance the status, rights and privileges of the French language in the public sphere. Of particular note, Ontario

- i. made English and French the official languages of the courts of justice in 1984;<sup>100</sup>
- ii. passed the French Language Services Act in 1986;
- iii. passed the *Franco-Ontarian Emblem Act*, 2001, S.O. 2001, c. 5;
- iv. established the Provincial Advisory Committee on Francophone Affairs in 2004;<sup>101</sup>
- v. established the French Language Health Services Advisory Council in 2006;<sup>102</sup>
- vi. made the English and French versions of Ontario's laws equally authoritative in 2006;<sup>103</sup>
- vii. established the Office of the French Language Services Commissioner in 2007;<sup>104</sup>
- viii. passed the *Franco-Ontarian Day Act*, 2010, S.O. 2010, c. 4;
- ix. amended the *French Language Services Act* to make the French Language Services Commissioner an independent officer of the Ontario Legislature in 2013;<sup>105</sup> and

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<sup>99</sup> A good example of this is Regulation 17 of 1912, which prohibited the teaching of French in schools in the province. For general information, see Michel Bock and François Charbonneau, eds., *Le siècle de Règlement 17 : regards sur une crise scolaire et nationale*, Sudbury, Prise de Parole, 2015.

<sup>100</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 125.

<sup>101</sup> Government of Ontario, "Les francophones de l'Ontario pourront mieux se faire entendre," news release, June 24, 2004.

<sup>102</sup> *Local Health System Integration Act*, S.O. 2006, c. 4, s. 14.

<sup>103</sup> *Legislation Act, 2006*, S.O. 2006, c. 21, s. 65.

<sup>104</sup> *Budget Measures and Interim Appropriation Act, 2007*, S.O. 2007, c. 7, Schedule 16, s. 1-4.

<sup>105</sup> *French Language Services Amendment Act (French Language Services Commissioner)*, 2013, S.O. 2013, c. 16.





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- x. established the Attorney General's Access to Justice in French Advisory Committee in 2018.<sup>106</sup>

These legislative and political measures reflect the will of successive governments to respond to subsection 16(3) of the Charter by progressively expanding Franco-Ontarians' language rights.

[102] In addition, following the province's example, some institutions that come under the jurisdiction of the Ontario Legislature – such as municipalities<sup>107</sup> and universities<sup>108</sup> – made by-laws giving Franco-Ontarians new language rights, either by subscribing to the voluntary regime of the *French Language Services Act* or, in the case of the Law Society of Upper Canada, by setting standards for itself.<sup>109</sup> All of these measures contribute to implementing the spirit of subsection 16(3) of the Charter.

[103] Ontario is not the only province that has passed laws to advance the equality of status or use of English and French in its territory. New Brunswick,<sup>110</sup> Nova Scotia,<sup>111</sup> Prince Edward Island,<sup>112</sup> Manitoba,<sup>113</sup> Nunavut,<sup>114</sup> the Northwest Territories,<sup>115</sup> Yukon,<sup>116</sup> Saskatchewan<sup>117</sup> and Alberta<sup>118</sup> have all adopted legislation that, to varying degrees, grants certain language rights to the members of French-speaking minority communities. Though decidedly modest in some cases, these provincial measures,

<sup>106</sup> Ontario, Ministry of the Attorney General, Attorney General's Access to Justice in French Advisory Committee, [https://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french\\_language\\_services/french\\_advisory\\_committee.php](https://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french_language_services/french_advisory_committee.php).

<sup>107</sup> For example, the municipalities of Ottawa, West-Nipissing and Hearst have passed by-laws of the type described in section 14 of the *French Language Services Act* guaranteeing access to certain services in French.

<sup>108</sup> For example, in accordance with subsection 9(2) of the *French Language Services Act*, the Université de Hearst, Laurentian University and the University of Ottawa have given their consent to be bound by the Act and guarantee access to certain services in French. In addition, a number of initiatives consistent with the principle of advancement enshrined in subsection 16(3) of the Charter have received federal funding since it came into force (for example, see Canada, Council of Ministers of Education, Canada, [Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018 between the Government of Canada and the Council of Ministers of Education, Canada](#), signed in Ottawa on August 14, 2013).

<sup>109</sup> Law Society of Upper Canada, By-Law 2, Part V (guarantees the provision of certain French-language services to licensees and the public).

<sup>110</sup> *Official Languages Act*, S.N.B. 2002, c. O-0.5.

<sup>111</sup> *French-language Services Act*, S.N.S. 2004, c. 26.

<sup>112</sup> *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.2.

<sup>113</sup> *Francophone Community Enhancement and Support Act*, C.C.S.M. c. F157.

<sup>114</sup> *Official Languages Act*, S.Nu. 2008, c. 10.

<sup>115</sup> *Official Languages Act*, R.S.N.W.T. 1988, c. O-1.

<sup>116</sup> *Languages Act*, R.S.Y. 2002, c. 133.

<sup>117</sup> *Language Act*, S.S. 1988-89, c. L-6.1.

<sup>118</sup> *Languages Act*, R.S.A. 2000, c. L-6.





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some of which were partly funded by the federal government, all help consolidate the principle of advancement of language rights entrenched in subsection 16(3) of the Charter.

[104] Even though language rights are not its private preserve, the federal government has a quasi-constitutional obligation to do more to encourage the provinces to take measures to advance the substantive equality of English and French in Canada. In addition, the federal government has the moral authority, know-how and means to launch a new era of cooperative federalism in the area of official languages with a view to realizing the aspirations of section 16 of the Charter.

[105] More specifically, to operationalize subsection 16(3) of the Charter, **the French Language Services Commissioner recommends that Parliament add new sections to Part VII of the OLA** that would establish an opt-in system of language rights and obligations for the provinces. The new sections would contain standard clauses, which the provinces could decide to adopt, in whole or in part, to guarantee new language rights for their official language minority communities. The federal government, meanwhile, would be required under the new sections of the OLA to guarantee some level of financial and logistical support for the provinces that accept the opt-in system to ensure greater consistency in the delivery and quality of provincial services provided in both languages. This would essentially be a framework for federal spending authority regarding certain measures.

[106] These new sections of the OLA would contain standard clauses that the provinces could adopt *à la carte*, respecting their freedom to identify the sectors and scope of the services that they would agree to provide in both official languages with financial support from the federal government. The standard clauses could cover, for example,

- i. parliamentary and legislative language rights;
- ii. language rights in respect of the administration of justice;
- iii. language rights in respect of services to the public;
- iv. language rights in respect of health care;
- v. financial and logistical support in the area of immigration;
- vi. language rights in respect of language of work; and
- vii. an advancement commitment and obligation similar to Part VII (and sections 41 and 42) of the OLA.





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[107] The idea of circumscribing the exercise of federal spending authority is not new. For example, the Department of Canadian Heritage has been entering into agreements with the provincial and territorial governments under its Official Languages in Education Program since the 1970s, and those agreements govern the terms and conditions for federal funding transfers to cover the additional costs of minority-language education and second-language instruction.

[108] Provinces that opt in to the new system and pass the necessary legislation would receive financial and logistical support from the federal government, more permanent and predictable support than in the past, so that they can fulfil their new language obligations. For example, in the case of a province that opts in to the parliamentary and legislative bilingualism regime, the federal government could assist with the costs of translating the province's laws and training jurists and legal translators (which has previously been done in some provinces over the years, on an ad hoc basis). In the case of provinces that make a commitment to expand access to justice in French, the federal government could help with the production of bilingual forms and legal documents and with language training for provincially appointed judges and administrative staff of courts and tribunals.

[109] With regard to immigration, the federal government obviously has some responsibility for the required procedures, but it is also clear that solid federal-provincial partnerships are needed to ensure that Francophone immigration will support the development and enhance the vitality of the Francophone minority communities. The new sections of the OLA should make it possible for a province to receive financial and logistical support and, in general, greater cooperation to increase Francophone immigration.

[110] Each province would be free to determine the nature and scope of its language obligations in keeping with its own distinct priorities. However, once a province makes a commitment to advance the equality of English and French in a particular sector, it would be obligated to provide active offer of those services in both official languages and to delivery equal quality.

[111] Such an opt-in regime under the OLA recognizes the province's powers in their areas of jurisdiction and at the same time enlists them, in a more ordered fashion, in a common cause: the constitutional project of advancing the rights, status and privileges of English and French in Canadian society. Such an innovation would demonstrate the federal government's moral authority in respect of official languages and strengthen the bonds of national unity.





800, rue Bay, bureau 402  
Toronto (Ontario) M5S 3A9

☎ 1 866 246-5262 / 416 847-1515  
📞 416 847-1520  
ATS 416 640-0093  
✉ flsc-csf@fjsontario.ca  
🌐 csfontario.ca

800 Bay Street, Suite 402  
Toronto (Ontario) M5S 3A9

☎ 1 866 246-5262 / 416 847-1515  
📞 416 847-1520  
TTY 416 640-0093  
✉ flsc-csf@fjsontario.ca  
🌐 fjsontario.ca

## Conclusion

[112] The OLA has the ability to be a beacon in the pursuit of a renewed cooperative federalism. Through modernization, the act can promote fruitful partnerships between all levels of governments for the benefit of Canadian society.

[113] The French Language Services Commissioner recommended four novel and targeted modifications to the OLA that could serve as a basis for this new collaboration. First, the OLA and its Regulation must use a more inclusive definition of the official-language minority communities, based on diverse data parameters and the vitality of the communities. Second, the sections in the OLA concerning active offer must be bolstered to clarify the federal institutions' obligations. Thirdly, the French Language Services Commissioner recommends the addition of new sections in Part VII pertaining to federal-provincial-territorial agreements. These sections will include notably obligations of strong, actionable linguistic clauses, and consultation and reporting obligations. Finally, to further strengthen language rights at the provincial and territorial levels, the French Language Services Commissioner recommended the addition of new sections to Part VII that would frame federal support towards new language rights initiatives – provinces and territories will be able to opt-in and adopt new sections pertaining to justice, health and immigration, for example.

[114] Looking back to 1969 and 1988, Canadian society is today significantly different: official-language minority communities are more diverse, active offer is undoubtedly the basis of the delivery of services to linguistic minorities, and the federal government interacts with the population in different ways. To remain relevant and effective, Parliament must modernize the OLA.

