

Commissariat aux
services en français
de l'Ontario



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Risking Trust, Transparency and Accountability

François Boileau, Commissioner

Brief of the Office of the French Language Services Commissioner,
submitted to the Standing Committee on Finance and Economic Affairs
in connection with
Bill 57, Restoring Trust, Transparency and Accountability Act, 2018

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1. Introduction

An independent officer of the Legislative Assembly of Ontario who reports directly to it, the Office of the French Language Services Commissioner (OFLSC) has been mandated by the Legislative Assembly 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 (FLSA)*. 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*. In addition to resolving complaints and advising government, the Commissioner consults the community and promotes the *FLSA*.

Schedule 20 of Bill 57, *Restoring Trust, Transparency and Accountability Act, 2018*, abolishes the OFLSC and the position of Commissioner as an independent officer of the Assembly, and folds its employees and part of its mandate into the Office of the Ombudsman of Ontario. It also creates the position of Deputy Ombudsman, French Language Services, who will report to the Ombudsman. The government released a possible amendment, stating it will

create the position of French Language Services Commissioner, under the auspices of the Office of the Ombudsman, to maintain independence in conducting investigations and, as part of that, make recommendations to improve the provision of French language services and encourage compliance with the *French Language Services Act*.¹

At this point, the Commissioner doesn't see a difference between both positions, deputy ombudsman or the new commissioner, since both must report to the Ombudsman, lack all independence, and are not officers of the Assembly.

In this brief, we will show that the Ombudsman of Ontario will not be able to discharge adequately his new mandate under the *FLSA*. Indeed, while these actions are based on purportedly fiscal and efficiency considerations, government will not be able to achieve its goals and will in fact deal a heavy blow to Ontario by abolishing the OFLSC and the position of the independent commissioner. Evidently, the Franco-Ontarian community will suffer the most, losing a strong, impartial voice in the Legislative Assembly to advocate for compliance of the *FLSA* and the consideration of its vitality.

The Commissioner has one recommendation: amend the bill and remove Schedule 20.

¹ Ontario, Newsroom, <https://news.ontario.ca/opo/en/2018/11/premier-ford-to-create-ministry-of-francophone-affairs.html>.



2. The Ombudsman of Ontario will not be able to effectively discharge its mandate under the *FLSA*

The Commissioner became an independent officer of the Legislative Assembly in 2014. Before then, he reported to the Minister Responsible for Francophone Affairs – at that time, the political independence of his Office could have been compromised by any change of minister or government.

The Commissioner must remain independent and impartial throughout the complaint resolution process and in preparing reports. The Commissioner's procedures must be transparent and fair. As an independent officer of the Assembly, the Commissioner bases his actions

[...] on moral imperatives, such as the active promotion of equity and exemplary ethical practices. [He] must carry out [his mandate] independently, objectively, impartially, responsibly and confidentially.²

With the objective of safeguarding its independence, the Commissioner indicated in his 2011-2012 annual report, *Straight Forward*, that he favoured the idea of reporting directly to the Legislative Assembly. The reasons were quite simple: ensure political non-interference and involve MPPs in the Commissioner's accountability. There was also the matter of his duty to be accountable to them, to obtain outside legal advice other than from the Attorney General of Ontario so as to ensure legal independence, to shelter the Office from potential budget cuts, and to maintain freedom of action and accountability for public funds. Lastly, the Commissioner's Office needed to gain administrative independence by separating itself from the Office of Francophone Affairs.

In December 2013, the Legislative Assembly unanimously passed Bill 106, which made the Commissioner an Officer of the Legislature. From that point in time, the Commissioner continued to strengthen his advocacy role and to be more proactive in the exercise of his functions.

Pursuant to the *FLSA*, the Commissioner “must encourage compliance with [the] Act by

- (a) conducting investigations into the extent and quality of compliance with this Act, pursuant to complaints relating to French language services made by any person or on the Commissioner's own initiative;
- (b) preparing reports on investigations, including recommendations for improving the provision of French language services;

² Roy Gregory et Philip Giddings, *The Ombudsman, the Citizen and Parliament*, Londres, Politico's Publishing, 2002, p 13; see also Roy Gregory et Philip Giddings, *Righting Wrongs: The Ombudsman in Six Continents*, Nieuwe Hemweg, IOS Press, 2000.



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- (c) monitoring the progress made by government agencies in providing French language services;
- (d) advising the Minister on matters related to the administration of this Act; and
- (e) performing such other functions as may be assigned to the Commissioner by the Lieutenant Governor in Council.”³

The Commissioner’s Office is an ombudsman. It receives complaints and uses different mediation and investigative tools to resolve them. However, as a language Commissioner, dealing with complaints is a component, not the entirety, of his mandate as protector of the rights in the FLSA.

As currently drafted, Schedule 20 of Bill 57 either mandates the Ombudsman or a Deputy Ombudsman to manage the resolution of complaints stemming from the *FLSA*:

Deputy Ombudsman, French Language Services

12.9 (1) The Ombudsman may appoint a Deputy Ombudsman from among the employees of the office of the Ombudsman, who shall be known as the Deputy Ombudsman, French Language Services.

Duties

(2) The Deputy Ombudsman, French Language Services may exercise the powers and perform the duties of the Ombudsman under this Act, subject to the direction of the Ombudsman.

We note here that appointing a Deputy Ombudsman is not mandatory – the Ombudsman may choose to leave this position vacant.

The bill doesn’t amend the functions under 12.2 of the *FLSA* – the Ombudsman or deputy ombudsman if appointed, will encourage compliance of the act using the same tools the independent Commissioner had prior to the introduction of the bill.

The Commissioner’s role transcended the resolution of complaints and included other tasks such as consulting the community, promoting the Act to the community and other relevant partners, and advising government on the best course of action.

Referring to the Commissioner of Official Languages, the Royal Commission described his role as follows:

In the first place, he will be the active conscience—actually the protector—of the Canadian public where the official languages are concerned. His duty will be to examine particular cases in which the federal authorities have failed to respect the rights and the privileges of individuals or groups of Canadians. The Commissioner will in a sense play the role of a

³ FLSA, subsection 12.2.



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federal “linguistic ombudsman” by receiving and bringing to light the grievance of any residents concerning the official languages.⁴

Interpreted liberally⁵, in consideration with the objectives of the *FLSA* and the principles associated with language rights, the Commissioner also has the mandate to consult the Franco-Ontarian community and promote the rights protected in the *Act*. The Ombudsman or deputy ombudsman will never be able to discharge effectively the mandate prescribed by the *FLSA*.

2.1 The Commissioner is an Advisor

Subsection 12.2 d) of the *FLSA* mandates the Commissioner to advise “the Minister on matters related to the administration of this Act.” This function is crucial and central to the Commissioner’s vision of an effective cog in the public system. At the heart of this concept is proactivity – a complaint is a reaction to a defect in the public service machine, one that can be remedied by expert advice and pragmatic recommendations to public policies.

The current Commissioner champions a proactive approach to discharging his mandate. Through consulting communities, revising academic studies about the state of French-language services and maintaining a professional network of stakeholders who work in the field, the Commissioner can prevent pre-emptively violations of the *FLSA* and complaints.

Being proactive can take many forms. For example, from 2015 to 2018, the Commissioner had 13 meetings with ministers, 21 meetings with deputy ministers, and 22 meetings with assistant deputy ministers, in addition to 52 meetings with other public servants in different ministries. In total, 108 high-level meetings on strengthening French-language services. The Commissioner advises the executive and other high strata of the government on a variety of issues regarding the *FLSA*. Either by advising on upcoming bills, or recommending effective public policy, the Commissioner has an important role to play.

In addition to high-level meetings, the Commissioner’s office published 11 annual reports containing recommendations, and 16 special reports and studies, with the goal of always proactively counselling on the best course of action to take in terms of French-language services.

⁴ Ibid, pp 146-47.

⁵ *R. c. Beaulac*, [1999] 1 RCS 768, 1999 CanLII 684 (CSC).



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- *Annual Report 2007-2008, Paving the Way, 2007-2008, 17 June 2008*
- *Special Report on French Language Health Services Planning in Ontario, 7 May 2009*
- *2008-2009 Annual Report: One Voice, Many Changes, 21 October 2009*
- *Investigation Report: Peel-Halton French-language health services, 30 March 2010*
- *2009-2010 Annual Report: Open for solutions, 3 June 2010*
- *Study on French-Language Community Radio, 21 April 2011*
- *An Investigation Report Regarding an English-Only H1N1 Flyer: From communication crash to communication coup, 25 May 2011*
- *2010-2011 Annual Report: A shared engagement, 31 May 2011*
- *2011-2012 Annual Report: Straight forward, 6 June 2012*
- *Investigation Report - The State of French-Language Postsecondary Education in Central-Southwestern Ontario: No access, no future, 27 June 2012*
- *Investigation Report - French-language schools in the Greater Toronto Area: When the most elementary becomes secondary, 28 June 2011*
- *Conference on 25 Years of the French Language Services Act: Summary of Panel Discussions, 11 July 2012*



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- *2012-2013 Annual Report: A New Approach*, 5 June 2013
- *Study Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, 16 August 2013
- *Investigation Report – Cancellation of the Fellowships for Studying in French: It pays to do your homework*, 9 October 2013
- *Annual Report 2013-2014: Rooting for Francophones*, 10 July 2014
- *Joint Report: Time to Act for the Future of Francophone Communities: Redressing the Immigration Imbalance*, 18 November 2014
- *Annual Report 2014-2015: A Voice for the Voiceless*, 4 June 2015
- *Investigation Report - Centre Jules-Léger*, 30 July 2015
- *Special Report - Active Offer of Services in French: The Cornerstone for Achieving the Objectives of Ontario's French Language Services Act*, 26 May 2016
- *2015-2016 Annual Report: FLSA 2.0*, 2 June 2016
- *Follow-up on the report - When the most elementary becomes secondary: Homework Incomplete*, 4 July 2016
- *2016-2017 Annual Report: Taking a stand*, 30 May 2017
- *Study on Designation: Revitalizing the Provision of French Language Services*, 7 March 2018
- *A Directive without Direction: Challenges of Advertising in the Francophone media of Ontario*, 11 April 2018
- *2017-2018 Annual Report: Looking ahead, getting ready*, 18 July 2018

These reports were all influential in their own right. For example, the 2009 *Special Report on French Language Health Services Planning in Ontario* identified the obligations and responsibilities of the key players in the healthcare system with respect to the delivery of French health services. The Commissioner's message in this regard was clear: make the Francophone community and its organizations true partners in the planning of French health care and use these organizations, which actively offer services that have been adapted to a community with distinctive needs, as models. He



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recommended an overhaul of the French-language health system, affecting LHINs and the newly created French language health planning entities.

The OFLSC publishes in 2012 an investigative report on the status of postsecondary studies in Central-Southwestern Ontario, *The State of French-Language Postsecondary Education in Central-Southwestern Ontario: No access, no future*. It was monumental for the government and the community – it confirmed the debilitating lack of access in this region and the dire need for the creation of more programs.

Following the publication of the Commissioner's investigation report, the government announced the establishment of the Expert Panel on French-Language Postsecondary Education in Central and Southwestern Ontario. The Panel submitted its report, entitled *Moving Forward*,⁶ to the government in 2013. The Commissioner welcomed the Panel's conclusions, as they were consistent with his own recommendations.

The current debate about the Université de l'Ontario français stems from the Commissioner's work in this field and his investigative report.

Finally, the OFLSC recently published its 2017-2018 Annual Report. It projected the status and realities of the French-language population of Ontario 10 years in the future. Although completely different from past reports, it served as an alarm signal for the community and for government: most notably, although the actual number of Francophones will continue to rise, the proportional weight will continue to fall to below 4%. With this report, the Commissioner sought above all to enlist decision-makers to adopt practical measures for the provision of French language services tailored to the needs of the Francophone community. He also gave communities tools and ensured to involve them in equally strong collective initiatives.

The report's final recommendation is its most important:

The Commissioner recommends that the Minister Responsible for Francophone Affairs work with Cabinet colleagues to initiate the process, including consultations, to provide the government of Ontario with an Action plan on the development of Francophone communities and the promotion of the French language in Ontario for 2020-2025 that includes measurable objectives, along with performance indicators.

Only an interministerial, wide-ranging public policy will have the required weight and momentum to reverse the tide and give the French-language community the necessary opportunities to continue striving.

The purpose of the annual, investigative and special reports is twofold: first to demonstrate transparency and inform the public, and second to advise government. Most of the work done to draft these reports is independent and on the Commissioner's own initiative. His expertise and his

⁶ For more details, see <http://www.tcu.gov.on.ca/eng/postsecondary/schoolsprograms/MovingForward.pdf>.



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community consultations allow him to better understand current challenges that often require systemic recommendations and continued follow-ups.

The current commissioner benefits from being an independent officer of the Assembly, which allows him or her the freedom to choose the vision, priorities and strategies for the OFLSC. The new commissioner or deputy will not enjoy similar freedoms.

The Ombudsman will not be able to continue this work – it is not in his mandate or DNA to proactively consult communities, draft special reports on improving the application of the FLSA and advise government through constant high-level meetings on all subjects, from health, to children, to justice. In this fact we understand the difference between an ombudsman of general jurisdiction and of last resort, and an independent language commissioner tasked with safeguarding the application of its home statute, in this case the *FLSA*.

Furthermore, the Office of the Ombudsman only deals with complaints if it is the last resort – complainants must use all available remedy within the organization at fault before benefiting from the resolution or investigative teams at the Office of the Ombudsman. In other words, they are an ombudsman of last resort. The OFLSC, on the other hand, can receive, resolve and investigate complaints without having complainants go through internal procedures – it is an ombudsman of first resort. Considering the internal architecture of both statutes and procedures, the Commissioner does not know how *FLSA* complaints will be resolved.

In sum, the government will lose a trusted advisor and cost-effective expert on the adequate creation and implementation of public policies regarding the Franco-Ontarian community. The 108 meetings with Ministers and other ranking public servants in the past years yielded concrete and positive results.

2.2 Consultation and Promotion

Through consultation and dialogue, the Commissioner is able to better understand the communities and the systemic problems that plague vast numbers of vulnerable Francophones in areas such as health and hospitalization, mental health, social services and access to justice.

From 2014 to 2018, the Commissioner took part in 85 meetings with representatives from Eastern Ontario, 17 meetings in the Central region, three meetings in the North, and 168 meetings in the South-West. A minimum of 273 community meetings across the province. I promised in my first annual report that I would



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spare no effort to ensure that the Office of the Commissioner is as visible as possible, in order to increase awareness of the French Language Services Act which is still not clearly understood.⁷

Furthermore, the Commissioner crisscrosses the province to discuss the implementation of *FLSA*-obligations by service providers such as legal clinics, children aid societies and community health centers. The latter are at the forefront of service delivery, which means they must fully understand the impact of the *FLSA*. It is in these cases that the principles of active offer, and equal and tailored services take their full meaning and scope.

2.3 An independent commissioner

The driving force behind the OFLSC's success is its independence. As an independent officer of Parliament, the current Commissioner bases his actions

[...] on moral imperatives, such as the active promotion of equity and exemplary ethical practices. [He] must carry out [his mandate] independently, objectively, impartially, responsibly and confidentially.⁸

Schedule 20 removes all notion of independence, subjugates the new deputy or commissioner to the Ombudsman, and removes his role of officer of the Assembly. In our view, this is a devastating setback.

A deputy ombudsman - French-language services, as proposed under subsection 12.9 (1) of the amended *FLSA* of Schedule 20, or a new French-language services commissioner mentioned in the government's press release, are not independent – they must answer to the Ombudsman.

This new deputy or commissioner will not have authority over their budget, human resources or priorities. They will not have the liberty to choose their projects. Finally, as further explained in this brief, the hallmarks of an effective commissioner are the ability to consult, promote and advise – in this new scenario, burdened by hierarchical absence of independence, the new deputy or commissioner will not be able to achieve these functions. Even in the best of conditions, the new deputy or commissioner will never be as effective as the current officer of the Assembly, and both government and the French-language community will suffer.

⁷ OFLSC, *Annual Report 2007-2008*.

⁸ Roy Gregory, Philip Giddings, *The Ombudsman, the Citizen and Parliament*, Londres, Politico's Publishing, 2002, p 13; see also Roy Gregory et Philip Giddings, *Righting Wrongs: The Ombudsman in Six Continents*, Nieuwe Hemweg, IOS Press, 2000.



3. The Franco-Ontarian community will suffer severe damage by abolishing the OFLSC

For many years, Ontario was a figurehead in the protection of language rights. In 1986, when it adopted the *FLSA*, it was seen as a great advancement. This was further confirmed when it created the commissioner's position in 2007 and made it an independent officer of the Assembly in 2014. Now, Ontario rejects the way of innovation and doubles down on regression. Although dynamic, the French-language community is nonetheless fragile. If Schedule 20 is passed, and the OFLSC is abolished, it will suffer serious damage.

Section 16 (3) of the *Charter of Rights and Freedoms* stipulates that

Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

In fact, the Charter encourages and pushes provincial parliaments to advance the status and use of minority official languages. Long held as the sole purview of the federal government, language rights and the fulfillment of official language minority communities must be a joint venture. In fact, language rights can be at the forefront of cooperative federalism, asking both levels of government to collaborate, in the respect of the distribution of powers, on initiatives and projects, such as cultural centres, access to justice and postsecondary institutions.

Eliminating the independent OFLSC is a step backwards and a rejection of one the Charter's objectives. It is an unintelligible decision that seriously jeopardizes the Franco-Ontarian community's ability to stop the effects of assimilation. The Commissioner proved to be one of the community's staunchest defender in this regard, especially considering its power to be proactive and advise government on the development of the most effective public policy.

Citing the Divisional Court decision, the Court of Appeal stated in *Lalonde v Ontario* that

the language and culture of the francophone minority in Ontario "hold a special place in the Canadian fabric as one of the founding cultural communities of Canada and as one of the two official language groups whose rights are entrenched in the Constitution". If implemented, the Commission's directions would greatly impair Montfort's role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. This would be contrary to the fundamental constitutional principle of respect for and protection of minorities.⁹

⁹ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA), au para 181.



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If Bill 57 is passed without removing Schedule 20, the Franco-Ontarian community will suffer important damage to their language and fundamental rights. The Franco-Ontarian community will lose their voice in the Assembly, within government offices, advocating for a proactive and tailored approach to French-language services. The new Commissioner will no longer have the necessary latitude to launch proactive investigations or studies to resolve systemic problems.

This fact will not change if the government amends the schedule and installs a new commissioner that can report to the Assembly, since he or she will remain an employee of the Ombudsman. The commissioner is no longer an independent officer of the Assembly, and is no longer master of his or her vision, priorities or procedures.

4. Conclusion

In my first annual report, I described a community meeting in Casselman:

At the annual general meeting of the Union des cultivateurs franco-ontariens in Casselman, I was asked what I thought the community would look like in 50 years' time, if it still exists. This is an excellent question and honestly I do not know the answer. What I said was that 50 years ago, other people had asked themselves the same question. And even though they did not know the answer, like so many people before them, they took up the challenge of creating institutions for the development of their community in the area of education, health, the economy, and culture, with the result that the Francophone community may be smaller than Ontario as a whole, which is constantly growing, but it is vibrant and dynamic.¹⁰

These words resonate now more than ever. To survive, to fight back assimilation, Franco-Ontarians need institutions. They need to create them, maintain them, protect them. Montfort is an institution. It continues to be a rallying point for Francophone patients and medical professionals from all over the province.

The Office of the French Language Services Commissioner is also an institution. Vital institution. By abolishing it, the Franco-Ontarian community are losing a pillar for their future aspirations, their voice in halls of government, and a symbol of the contribution of their cultural heritage, to the great detriment of future generations.

To ensure a vibrant and dynamic Franco-Ontarian community, the Office of the French Language Services Commissioner, like all other institutions, like Montfort, must endure.

The Commissioner has one recommendation: amend the bill and remove Schedule 20.

¹⁰ OFLSC, Annual Report 2007-2008.