

Commissariat aux
services en français
de l'Ontario



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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 Committee on Official Languages,
in connection with its study about
modernizing the *Official Languages Act*

November 29, 2018





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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 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 Committee on Official Languages to 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,





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- (3) federal-provincial agreements,
- (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*,
- (5) the need for a central agency to govern the OLA, and
- (6) the role and powers of the commissioner of official languages.

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 responsible for 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.”¹ 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.²

[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.

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

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





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[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
- (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.³

[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.⁴

[9] That recommendation was soon acted on: in June 2009, the Ontario government's Office of Francophone Affairs⁵ 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."⁶ The new definition helps the Ontario government to plan the delivery of French-language

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

⁴ 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, 1st Session, 42nd Parliament) (Chair: The Honourable Denis Paradis), pp. 3-5.

⁵ The Office of Francophone Affairs was replaced by the Ministry of Francophone Affairs in the fall of 2017.

⁶ 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*





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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 province's population.⁷ 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.⁸

[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.⁹ For this reason, the Commissioner has repeatedly recommended that the IDF be enshrined in the *French Language Services Act*.¹⁰ 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.¹¹ The Commissioner also recommended that the IDF be revised periodically, by regulation, to reflect the sociological and demographic realities of Ontario's Francophone population.¹²

[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."¹³ 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.

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].

⁷ OFLSC, 2008-2009, *supra*, p. 10.

⁸ OFLSC, 2011-2012, *supra*, p. 26.

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

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

¹¹ OFLSC, 2015-2016 *supra*, p. 28.

¹² OFLSC, 2015-2016, *supra*, p. 26.

¹³ OFLSC, 2008-2009, *supra*, p. 11.





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1.1 The federal government recently announced a modification to the Regulation

[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*:¹⁴

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 importante¹⁵.

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 institution in Canada or elsewhere where there is significant demand for those services in that language.”¹⁶

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

- a) déterminer, pour application de l’article 22 ou du paragraphe 23(1), les circonstances dans lesquelles il y a demande importante ;
- b) en cas de silence de la présente partie, déterminer les circonstances dans lesquelles il incombe aux

- a) prescribing the circumstances in which there is significant demand for the purpose of paragraph 22(b) or subsection 23(1);
- b) prescribing circumstances not otherwise provided for under this Part in which federal institutions have

¹⁴ *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].

¹⁵ *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 22 (our underline) [OLA].

¹⁶ OLA, *supra*, s. 23 (1).





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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 ;

c) déterminer les services visés au paragraphe 23(2) et les modalités de leur fourniture ;

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) ;

e) définir « population de la minorité francophone ou anglophone » pour l'application de l'alinéa (2)(a)¹⁷.

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;

c) prescribing services, and the manner in which those services are to be provided or made available, for the purpose of subsection 23(2);

d) prescribing circumstances, in relation to the public or the travelling public, for the purpose of paragraph 24(1)(a) or (b); and

e) defining the expression “English or French linguistic minority population” for the purpose of paragraph (2)(a).

[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

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 indiqué¹⁸.

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

¹⁷ OLA, *supra*, s. 32 (1).

¹⁸ OLA, *supra*, s. 32 (2).





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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.¹⁹

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

[20] Ontario, Manitoba and Prince Edward Island have adopted inclusive definitions of the Francophone community. The provincial definitions are broad, 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

[21] As noted earlier, the IDF is inclusive 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 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*

[22] Since 2016, “Manitoba's Francophone community” has been defined as follows in subsection 1(2) of the *Francophone Community Enhancement and Support Act*:²⁰

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

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

¹⁹ 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].

²⁰ *Francophone Community Enhancement and Support Act*, C.C.S.M., c. F157, s. 1(2).





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spéciale avec le français et s'en servent couramment dans la vie quotidienne même s'il ne s'agit pas de leur langue maternelle. language and who use it on a regular basis in their daily life.

[23] Hence, Manitoba's definition of Francophone community is broad in scope. 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.

[24] 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."

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

[25] 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 française²¹ ;

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

[26] 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*.

²¹ *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.2, s. 1.





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1.3 Official Languages (Communications with and Services to the Public) Regulations, modernized!

[27] 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.

[28] Many bills on this subject had 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.²² More recently, Bill S-209, *An Act to amend the Official Languages Act (communications with and services to the public)*, introduced in the Senate by the Honourable Maria Chaput in December 2015,²³ 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."²⁴

[29] 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,"²⁵ 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

²² Bill S-220, *An Act to amend the Official Languages Act (communications with and services to the public)*, 3rd Session, 40th Parliament; Bill S-211, *An Act to amend the Official Languages Act (communications with and services to the public)*, 1st Session, 41st Parliament; Bill S-205, *An Act to amend the Official Languages Act (communications with and services to the public)*, 2nd Session, 41st Parliament.

²³ Bill S-209, *An Act to amend the Official Languages Act (communications with and services to the public)*, 1st Session, 42nd 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.

²⁴ Bill S-209, *supra*, s. 5(2)(a)-(b).

²⁵ Bill S-209, *supra*; Senate, February 3, 2016, *supra*, p. 211.





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language, especially if the government offers the services actively; consequently, they must be included in the “significant demand” calculation.

[30] 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.”²⁶

[31] This past October, ministers Joly and Brison announced the federal government was modifying the Regulations. The new method of calculating significant demand in the Regulations is more inclusive and allows more Canadians to receive services; previously, a large portion of the population was excluded. Significant demand will grow, and so too will the number of government offices that will have to serve people in the language of their choice.

[32] However, as previously mentioned, this exercise is more than a mathematical calculation: the vitality of the official language minority communities must be taken into account when the government studies where services are to be provided in both official languages. In my annual report on the revision of the FLSA, I made precisely that point: any new method of calculating significant demand absolutely must include an assessment of the communities’ vitality. I highlighted that the number of minority-language schools is an important indicator of that vitality. These new Regulations do take into account the presence of schools when calculating significant demand.

[33] 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.

²⁶ Canada, Standing Senate Committee on Official Languages, 2nd Session, 41st Parliament (May 11, 2015) (Graham Fraser).





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

[34] 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 2007.²⁷ 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.²⁸

[35] 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 to ask for service in the other language more often.²⁹ 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,”³⁰ as many recipients of health, justice and social services are.

[36] 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.³¹ 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.³² Second, the

²⁷ OFLSC, 2007-2008, *supra*, p. 3.

²⁸ 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].

²⁹ 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.

³⁰ Special Report, *supra*, p. 29.

³¹ OFLSC, Special Report, *supra*, pp. 12-14.

³² 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,





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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.³³ 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.³⁴ Fourth, it goes without saying that active offer requires adequate allocation of financial and human resources.

[37] 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.³⁵

[38] 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.”³⁶ 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

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.”

³³ *Desrochers v. Canada*, 2009 S.C.R. 194 [*Desrochers*]; OFLSC, 2015-2016, *supra*, p. 45.

³⁴ 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*, 3rd edition, Cowansville, Quebec, Yvon Blais, 2014, p. 84; *Desrochers*, *supra*).

³⁵ OFLSC, Special Report, *supra*, p. 15.

³⁶ OFLSC, Special Report, *supra*, p. 16.





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Francophone.”³⁷ 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.”³⁸

[39] 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, the Royal Commission noted that it would be unacceptable to provide “services in the minority language only to the extent that the minority requests.”³⁹ 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.⁴⁰

[40] 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,”⁴¹ 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.”⁴²

³⁷ 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].

³⁸ OFLSC, 2009-2010, *supra*, p. 13; Deveau, Landry and Allard, *supra*, pp. 88-89.

³⁹ Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: Volume 1, Official Languages*, Ottawa, 1967, p. 95.

⁴⁰ *Ibid.*, p. 95.

⁴¹ OFLSC, 2009-2010, *supra*, p. 11. See also Michel Bastarache and Michel Doucet, eds., *Language Rights in Canada*, 3rd 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.

⁴² OFLSC, 2007-2008, *supra*, p. 15.





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2.1 Active offer: A poorly understood OLA obligation

[41] 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.⁴³

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

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.

[43] 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."⁴⁴

2.2 Comparative law: Active offer in Canadian law

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

⁴³ *Official Languages Act*, S.N.B. 1969, c. 14, s. 10.

⁴⁴ OCOL, *Bilingual Greetings*, *supra* p. 1.





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[45] 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, avis ou documentation sur les services, que le service est offert en français, au choix⁴⁵.

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 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.

[46] **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."⁴⁶ 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:⁴⁷

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.

[47] 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

⁴⁵ 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.

⁴⁶ *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 28.1.

⁴⁷ *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 31(1) [our underline].





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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).

[48] 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."⁴⁸ 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:

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

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

⁴⁸ *Bilingual Service Centres Act*, C.C.S.M. c. B37, s. 2(1).





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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 immigrants⁴⁹.

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.

[49] 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.”⁵⁰ Active offer is defined as “the cornerstone for the provision of French 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.”⁵¹

[50] **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

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

⁴⁹ *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.

⁵⁰ *Francophone Community Enhancement and Support Act*, C.C.S.M. c. F157, s. 3.

⁵¹ *Francophone Community Enhancement and Support Act*, C.C.S.M. c. F157, s. 3.





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(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 tiers⁵².

(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.

[51] 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.

[52] 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."⁵³ 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 ; [...]⁵⁴

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; [...]

⁵² *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.2, s. 3.

⁵³ *Inuit Language Protection Act*, S.Nu. 2008, c. 17, s. 11.

⁵⁴ *Official Languages Act*, S.Nu. 2008, c. 10, s. 12(7).





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

[53] 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.

[54] **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, notices and other information on services and the initiation of communication with the public."⁵⁵ 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.

[55] **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.⁵⁶

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.

[56] **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

⁵⁵ OLA, *supra*, s. 28.

⁵⁶ OFLSC, Special Report, *supra*, pp. 29, 38.





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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.”⁵⁷ 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.

[57] **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 cornerstones of active offer is unquestionably human resources planning.”⁵⁸ 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.

[58] **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.

[59] **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.”⁵⁹ 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.

⁵⁷ OFLSC, 2015-2016, *supra*, p. 44; *Desrochers, supra*.

⁵⁸ Ontario, Office of the French Language Services Commissioner, [Annual Report 2012-2013](#), 2013, p. 29.

⁵⁹ OFLSC, Special Report, *supra*, p. 15.





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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.⁶⁰

[60] 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 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.⁶¹ 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.⁶²

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

[61] 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.

[62] 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.⁶³ 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

⁶⁰ OFLSC, Special Report, *supra*, p. 14.

⁶¹ OFLSC, Special Report, *supra*, p. 13.

⁶² OFLSC, Special Report, *supra*, pp. 40-41.

⁶³ 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.





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education via bilateral agreements adopted pursuant to the *Multilateral Early Learning and Child Care Framework*.⁶⁴

[63] 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.⁶⁵ 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.

[64] 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.”⁶⁶ 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.

[65] 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.”

[66] 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.”

⁶⁴ 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.

⁶⁵ 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 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.

⁶⁶ *Mahé v. Alberta*, [1990] 1 S.C.R. 342, p. 372.





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[67] 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.”

[68] 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 specific and particular obligations on federal institutions because nothing in the language used in subsection 41(2) evokes any specificity whatsoever.”⁶⁷

[69] 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.

[70] 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.”⁶⁸

[71] 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.”⁶⁹

[72] 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

⁶⁷ *Fédération des francophones de la Colombie-Britannique c Canada*, 2018 CF 530, para. 216.

⁶⁸ 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).

⁶⁹ 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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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 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.⁷⁰

[73] 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*;
- 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.

⁷⁰ 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.





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

[74] 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.”⁷¹ 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.

[75] 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.

[76] The principle of advancement was first recognized by the Supreme Court of Canada in *Jones v. New Brunswick*.⁷² 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.

[77] 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

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

⁷¹ *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.

⁷² *Jones v. New Brunswick (AG)*, [1975] 2 S.C.R. 182, pp. 192-193 [*Jones*].





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compétence de la législature légiférant en ce sens⁷³.

relation to matters within the competence of the enacting Legislature.

[78] 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*.⁷⁴ This is precisely what Parliament did when it passed the federal OLA.

[79] 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.⁷⁵ Thus, through Part VII of the OLA, the "authority" mentioned in subsection 16(3) of the Charter became a duty for the federal government.

[80] 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.

[81] 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,⁷⁶ today the province can be justifiably proud of

⁷³ Jones, *supra*, pp. 192-193.

⁷⁴ *Constitution Act, 1867* (UK), 30 & 31 Victoria, c. 3, reproduced in R.S.C. 1985, Schedule II, no. 5, s. 133.

⁷⁵ OLA, *supra*, s. 41.

⁷⁶ 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.





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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

- made English and French the official languages of the courts of justice in 1984;⁷⁷
- passed the French Language Services Act in 1986;
- passed the Franco-Ontarian Emblem Act;
- established the Provincial Advisory Committee on Francophone Affairs in 2004;⁷⁸
- established the French Language Health Services Advisory Council in 2006;⁷⁹
- made the English and French versions of Ontario's laws equally authoritative in 2006;⁸⁰
- established the Office of the French Language Services Commissioner in 2007;⁸¹
- passed the Franco-Ontarian Day Act;
- amended the *French Language Services Act* to make the French Language Services Commissioner an independent officer of the Ontario Legislature in 2013;⁸² and
- established the Attorney General's Access to Justice in French Advisory Committee in 2018.⁸³

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.

⁷⁷ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 125.

⁷⁸ Government of Ontario, "Les francophones de l'Ontario pourront mieux se faire entendre," news release, June 24, 2004.

⁷⁹ *Local Health System Integration Act*, S.O. 2006, c. 4, s. 14.

⁸⁰ *Legislation Act, 2006*, S.O. 2006, c. 21, s. 65.

⁸¹ *Budget Measures and Interim Appropriation Act, 2007*, S.O. 2007, c. 7, Schedule 16, s. 1-4.

⁸² *French Language Services Amendment Act (French Language Services Commissioner)*, 2013, S.O. 2013, c. 16.

⁸³ 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.





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[82] In addition, following the province's example, some institutions that come under the jurisdiction of the Ontario Legislature – such as municipalities⁸⁴ and universities⁸⁵ – 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.⁸⁶ All of these measures contribute to implementing the spirit of subsection 16(3) of the Charter.

[83] 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,⁸⁷ Nova Scotia,⁸⁸ Prince Edward Island,⁸⁹ Manitoba,⁹⁰ Nunavut,⁹¹ the Northwest Territories,⁹² Yukon,⁹³ Saskatchewan⁹⁴ and Alberta⁹⁵ 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, 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.

[84] 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

⁸⁴ 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.

⁸⁵ 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).

⁸⁶ Law Society of Upper Canada, By-Law 2, Part V (guarantees the provision of certain French-language services to licensees and the public).

⁸⁷ *Official Languages Act*, S.N.B. 2002, c. O-0.5.

⁸⁸ *French-language Services Act*, S.N.S. 2004, c. 26.

⁸⁹ *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.2.

⁹⁰ *Francophone Community Enhancement and Support Act*, C.C.S.M. c. F157.

⁹¹ *Official Languages Act*, S.Nu. 2008, c. 10.

⁹² *Official Languages Act*, R.S.N.W.T. 1988, c. O-1.

⁹³ *Languages Act*, R.S.Y. 2002, c. 133.

⁹⁴ *Language Act*, S.S. 1988-89, c. L-6.1.

⁹⁵ *Languages Act*, R.S.A. 2000, c. L-6.





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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.

[85] 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.

[86] 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.

[87] This is what the new sections might look like:

A province or territory may freely agree to adopt the provisions of this section for the benefit of the official language minority community.

a) a province or territory that agrees to adopt a or multiple provisions of this section must pass a law or modify an existing law to that effect.

b) a province or territory that agrees to adopt a or multiple provisions of this section must enter into an agreement with the Department of Tourism, Official Languages and La Francophonie to that effect. The agreement must refer to the adopted provisions in accordance with this section.

When it enters into an agreement in accordance with subsection 46. b), the Department of Tourism, Official Languages and La Francophonie ensures appropriate financial and logistical support.

A province or territory may notify at any time thereafter the Minister of Tourism, Official Languages and La Francophonie that it accepts the obligations arising from the provisions of any other subsection in this part that was not specified in its ratification agreement.





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No provision in this part shall be construed as limiting or derogating from the other rights guaranteed by the Act.

Justice

The parties agree to translate provincial and territorial statutes into the minority official language.

The parties agree, in civil proceedings,

- (a) to ensure that courts, at the request of either party, conduct the proceeding in the minority official language;
- (b) to ensure that any party to a proceeding that is required to appear in court may use the minority official language without incurring additional costs;
- (c) to allow documents and evidence to be produced in the minority official language,

if necessary through the use of interpreters and translations.

The parties agree, in proceedings before administrative tribunals,

- (a) to ensure that the tribunals, at the request of either party, conduct the proceeding in the minority official language;
- (b) to ensure that any party to a proceeding that is required to appear in person may use the minority official language without incurring additional costs;
- (c) to allow documents and evidence to be produced in the minority official language,

if necessary through the use of interpreters and translations.

Public Services

The parties agree to improve the provision of provincial or territorial public services in the minority official language in person or in writing.

The provision of new provincial or territorial public services shall be preceded by active offer of the service.

Media





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The parties agree to encourage and facilitate the production and distribution of audio and audiovisual works in the minority official language.

The parties agree to extend existing financial supports to include audiovisual productions in the minority official language.

The parties agree to encourage and facilitate the establishment and maintenance of at least one minority-official-language media outlet.

Health

The province or territory improves the delivery of health services in the minority official language in health care facilities such as hospitals, community care centers, and long-term care facilities.

Accountability

Provinces and territories that adopt a standard provision and receive financial and logistical support from the Minister shall submit to the Minister periodically, in a form to be jointly determined, a report on the policy implemented and on the measures taken to apply the provisions adopted.⁹⁶

[88] 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.

[89] 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.

[90] 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

⁹⁶ It should be noted that this part is incomplete and is provided only as an example. We encourage the Committee, and subsequently Parliament, if such a part is deemed useful, to include additional standard provisions.





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to receive financial and logistical support and, in general, greater cooperation to increase Francophone immigration.

[91] 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.

[92] 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.

5. A central agency should have governance of the OLA

[93] The OLA assigns responsibility for its implementation to the Treasury Board and to Canadian Heritage,⁹⁷ but it does not impose any specific obligations on them. The OLA merely stipulates what the Treasury Board may do – it does not set out any concrete obligations. In other words, the OLA merely suggests that the Treasury Board implement the Act, but does not compel it to do so.

[94] This causes a number of problems since, if the Treasury Board does not give priority to implementing the OLA, it becomes Canadian Heritage's responsibility.⁹⁸ Canadian Heritage does not have, and has never had, the authority or influence over other departments needed to do the job.

[95] When the Honourable Stéphane Dion was President of the Privy Council, that central organization was able to play a more decisive role. Either the Privy Council or the Treasury Board, as central agencies, may ensure that federal government departments and other institutions fulfil their obligations under the OLA. At that time, the President of the Privy Council, also the minister of official languages, used the official languages prism when evaluating all cabinet decisions – new laws, regulations, directives, policies, programs and services.

⁹⁷ Due to the ministerial reassignment, the new Ministry of Tourism, Official Languages and la Francophonie might potentially take this role.

⁹⁸ We are aware the government adopted a decree transferring the responsibility of the OLA from the Minister of Canadian Heritage to the Minister of Tourism, Official Languages and la Francophonie.





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[96] In the French Language Services Commissioner's opinion, the real work of implementing the OLA should rest with the Treasury Board for a number of reasons, including the fact that it turns public policy into concrete action, its enabling legislation gives it broad oversight powers, and it is ultimately responsible for budgets. If the new obligations in the OLA are clear regarding the introduction of new programs and services, in harmony with the provinces and territories, the Treasury Board's oversight powers and the other powers mentioned in Part VIII might be sufficient, as long as the word "may" in subsection 46(2) is replaced with "shall."

6. The role and powers of the Commissioner of Official Languages

[97] The Commissioner of Official Languages, like the French Language Services Commissioner, is first and foremost an ombudsman. He or she is not the spokesperson of the official language communities.

[98] An ombudsman was what Parliament had in mind when it created the position of Commissioner of Official Languages. In the parliamentary debates on the first *Official Languages Act*, the Honourable Gérard Pelletier, then Secretary of State, stated that the Commissioner of Official Languages of Canada would be "the guardian of the language rights of the citizen in the latter's dealings with parliament or the federal government, or, to borrow a term used by the Royal Commission, he [would] act as a 'linguistic ombudsman'."⁹⁹ In establishing the Office of the Commissioner of Official Languages, the government was acting on the recommendation of the Royal Commission on Bilingualism and Biculturalism "that the Governor in Council appoint a Commissioner of Official Languages charged with ensuring respect for the status of French and English in Canada."¹⁰⁰ The Royal Commission described the Commissioner's 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 federal "linguistic

⁹⁹ Debates, House of Commons, 28th parl, 1st sess, vol 8 (May 16, 1969), at p 8789 (Hon. Gérard Pelletier, Sec of State).

¹⁰⁰ Report of the Royal Commission on Bilingualism and Biculturalism. General introduction, Book 1 : the official languages, Part 2, chapter V (1967), p 148.





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ombudsman” by receiving and bringing to light the grievance of any residents concerning the official languages.¹⁰¹

[99] While ombudsmen take different forms and have different roles and functions around the world, the following definition, proposed by professors Roy Gregory and Philip Giddings,¹⁰² sets out the essential elements of an ombudsman’s office:

An Office headed by an independent, non-partisan and high level public official or officer of the legislature, provided for by statute or in the constitution, which supervises the administration and deals with complaints from any person or body of persons about alleged administrative injustices and maladministration, or acts on its own motion; has the power to investigate, issue reports, criticise, publicise, conciliate and make recommendations for remedial and corrective action; but is not a court of tribunal and is not authorised to give instructions, make awards or reverse administrative action.¹⁰³

[100] The Commissioner must therefore 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 Parliament, 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.¹⁰⁴

[101] Independence and impartiality are necessary if the Commissioner is to properly execute his mandate of ensuring that the government fulfils its obligations under the OLA:

56 (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.¹⁰⁵

¹⁰¹ Ibid, pp 146-47.

¹⁰²

¹⁰³

¹⁰⁴ 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 Continent*, Nieuwe Hemweg, IOS Press, 2000.

¹⁰⁵ OLA, ss 56 (1).





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[102] Acting as a “watchdog” and ensuring that federal institutions comply with their obligations under the OLA is one of the Commissioner’s responsibilities; another is to serve as a mediator between complainants and the government and help the parties find common ground. For these purposes, the OLA gives the Commissioner the power to receive complaints (OLA, section 58), conduct investigations (OLA, section 62) and produce reports containing recommendations (OLA, sections 63 and 65 to 67).

[103] The commissioner’s mandate, pursuant to subsection 12.2 d) of the French Language Services Act, includes providing advice to the Minister responsible for Francophone Affairs on matters related to the administration of the Act. The Commissioner of Official Languages has a similar mandate, since it is his or her duty to

take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.¹⁰⁶

[104] The role of advisor is vital to the commissioner’s duties. The French Language Services Commissioner meets and talks with individuals in their communities, and attempts to understand their interests, their difficulties, their aspirations – he’s therefore well placed to advise ministries on the best course of action. By being proactive, by meeting with ministers and other high ranking public servants, the commissioner can influence the conception and implementation of public policy that have an impact on Francophones in Ontario.

[105] The Commissioner will also meet with service providers – organizations that work in mental health, child protection, or legal services, for example – to explain the Francophone community’s reality to increase awareness and convince them to increase and strengthen the delivery of French-language services.

[106] The Commissioner may also intervene in complainants’ applications for court remedies (OLA, subsection 78(3)). In such cases, the complainants must bear the financial burden, which can be heavy, of ensuring that institutions fulfil their obligations under the OLA.

[107] The Commissioner may also take legal action against federal institutions in the Federal Court (OLA, subsection 78(1)), which may grant such remedy as it considers appropriate and just in the circumstances (OLA, subsection 77(4)). However, the Commissioner has seldom used this power since its introduction in 1988.

¹⁰⁶ Ibid.





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[108] We note that the French Language Services Commissioner and many other ombudsmen do not have the power to initiate legal action.

[109] A few groups that have testified before the committee in the other place have pointed out that the Commissioner does not have enough “teeth” and have suggested that he should be given more powers so that he can carry out his statutory mandate more effectively. For example, the organization Santé en français and the Société de la francophonie manitobaine asked to recommend that Parliament give the Commissioner the power to fine particularly recalcitrant federal institutions. The Fédération culturelle canadienne-française asked to give the Commissioner the ability to impose disciplinary measures.

[110] The French Language Services Commissioner does not support these proposals. The power to impose sanctions is inconsistent with the Commissioner’s role as an ombudsman, since he would then be “judge, jury and executioner.” Rather, the tools available to the Commissioner need to be modernized and enhanced so that he can maintain his role as mediator, solution-seeker, investigator and champion of the advancement of official languages. We believe that granting the Commissioner the authority to impose sanctions would deprive him of the ability to be a mediator seeking the best solution. He would have to follow the rules of natural justice and listen to both sides at the same time, as in an adjudicatory tribunal, thereby losing his current procedural flexibility. He would then have to choose between the complainant’s version and the respondent government agency’s version, with no middle-ground option, like an adjudicatory tribunal. This scenario is not useful or necessary for the purposes of improving the OLA’s implementation.

[111] On another note, some witnesses have asked for the creation of an administrative tribunal similar to the Canadian Human Rights Tribunal. According to the Fédération des communautés francophones et acadienne, there should be an option to take a complaint to an official languages administrative tribunal before seeking a remedy in the Federal Court. This would enable litigants to obtain compensation and remedy without having to apply to the Federal Court and initiate a proceeding, which usually takes a great deal of time and money.

[112] If Parliament decides to create a separate administrative tribunal to deal with complaints about possible violations of the OLA, the Commissioner of Official Languages could be summoned to appear before the tribunal as an amicus curiae to guide the adjudicators in interpreting the OLA, the obligations that it places on federal institutions, and their potential violations. In contrast to the authority to impose sanctions, broadening the Commissioner’s role in this way would be consistent with his mediation role.

[113] The difficulties that arise from the desire to force federal institutions to comply with their obligations are associated not only with the Commissioner of Official Languages and his powers (whether they are inadequate or not), but also, and perhaps mainly, with deficient implementation of





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the OLA by a central agency. Only a central agency can establish directives and an internal audit process regarding fulfilment of federal institutions' obligations under the OLA. As the French Language Services Commissioner pointed out in his testimony before your committee,

[i]f a central agency is responsible for ensuring that everything works in a piece of legislation, that everything is well oiled, there would already be a punitive power on an internal basis.

[114] In other words, your committee should recommend that Parliament give priority to improving the OLA's implementation structure instead of modifying the Commissioner's powers by giving him new authorities which would not be feasible, such as imposing sanctions, without fundamentally transforming his ability to act as an ombudsman and mediator, seeking the best solution for the common good, not just for the benefit of the complainant.

Conclusion

[115] 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.

[116] The French Language Services Commissioner recommended five 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. Fourthly, 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. Finally, I recommended that the application of the OLA fall under the purview of a central agency like the Treasury Board.

[117] 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.



Commissariat aux
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