

BRIEF

Submitted to the Senate Committee on Official Languages

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For Its Study of the Document *English and French: Towards a Substantive Equality of Official Languages in Canada*

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Introduction

1. To stem the decline of French in Canada, the document *Towards a Substantive Equality of Official Languages in Canada* (“the Document”) presents a series of legislative and regulatory reform proposals and changes to administrative practices that cover several areas under federal responsibility.

To its credit, it is an ambitious proposal that seeks to adapt many of the laws and institutions that fall under the jurisdiction of the government and Parliament of Canada to contemporary reality. In that sense, it is a comprehensive initiative that certainly requires action.

2. However, the Document has little to say about the fundamental causes of the weakening of French in Canada: a steadily declining demographic of French speakers, and an all-out anglicization driven by digital platforms that are almost exclusively in English and that now encompass all aspects of our lives, from daycare to retirement, while the pandemic has made working from home a part of everyday life. High speed internet now criss-crosses the country from east to west like the 19th century Intercolonial Railway.
3. The digital phenomenon has branched out so rapidly that it has completely transformed the way we live, bringing with it the ever-present English language. Essayist Mathieu Bélisle, in his Governor General’s Award-winning book *L’empire invisible - Essai sur la métamorphose de l’Amérique* (2020), put it succinctly: our freedom is being held captive by the talons of the American eagle, in all aspects of our lives, even those that are the most private.
4. This demographic and existential reality was completely unknown in 1969 when the *Official Languages Act* (OLA) was enacted, nor was it in 1988 when the OLA was updated, and little suspected in 2005 when the Senate amended Part VII of the Act on Senator Jean Robert Gauthier’s initiative.

5. The essential question is this: does the Document unveiled by the Minister Responsible for Official Languages, while including several worthwhile and necessary proposals (she deserves credit for the initiative), have a sufficiently clear understanding of the issues that will continue to undermine the place of French and significantly hinder the steady progress toward the substantive equality of status of the two languages?
6. Two of these issues appear to be of the utmost priority: immigration to deal with the inevitable decline in the number of French speakers; and the discoverability of French-language works on the major digital platforms exclusively in the hands of U.S. conglomerates, where the dominance of the English language is absolute.

Part 1: Immigration

7. *Maintaining a stable critical mass of French speakers is an essential objective for the vitality of French in Canada.*

- I- Canada's French-speaking population is in significant decline compared to the growth of the general population. Some of the causes are well known: the birthrate of francophones used to be one of the highest in the West. For the past 40 years, it has been among the lowest: birthrates are no longer able to keep pace with the number of deaths. In fact, Quebec is the most rapidly aging society among industrialized countries, joining Japan. In 2030, more than a quarter of Quebec's population will be over 65 (INSPQ). Workforce availability is a glaring problem.

According to the Institut de la statistique du Québec (2020), 10 years ago immigrants held 12.2% of all jobs; now this is 18%. This means that the number of employed immigrants has increased by 250,000 in 10 years, while the number of workers born here has decreased by 110,000. The pandemic revealed the vital importance of delivering essential services. The army had to be called in urgently, and workers recruited from among refugee claimants had to be hired and trained quickly.

- II- Linguistic transfers (a euphemism to describe the phenomenon of assimilation) have always had a greater impact from French to English than the other direction. In fact, without the immediate contribution of francophone immigration, demographic trends point only in one direction: French speakers across the country increasingly becoming a minority.

This is clearly illustrated by the results of the 2016 census released by Statistics Canada in 2017; by 2036, only 1.8% of Canada's minority population will be speaking French at home, whereas in 2006, it was 4.2% and is currently 4%.

8. What has caused Quebecers to lose interest in the family and the value it represents? Would a natalist policy be enough to stem the decline of the francophone population? How could it be formulated and adapted so that it is compatible with the egalitarian aspirations of modern couples? The linguistic policy statement tabled on February 19 does not mention this highly sensitive issue, since it primarily concerns women. This presentation is too brief to analyze it or to suggest proposals at this stage. What concerns us here is the overall demographic trends.
9. The preferred solution would be to use immigration to narrow the gap and meet labour force needs. This approach offers encouraging prospects, but it also brings its share of challenges. First of all, recruitment must target the 50 member countries of the Organisation internationale de la Francophonie (OIF) that have French as a common language, as well as those whose labour force fits the needs of the Canadian labour market. Faced with the urgent need to fill certain jobs in Quebec, the Legault government is even willing to recruit unilingual anglophones for jobs in information technology (Statement of May 5, 2021, Radio-Canada). In other words, the acute need to fill positions in certain key sectors such as artificial intelligence is taking precedence over the ability of immigrants to communicate in French.
10. It is impossible to fill all these high-tech jobs without training a portion of the immigrant population to become proficient in French as a language of work.
11. The federal and provincial governments must invest heavily in providing these people with French training as soon as they arrive in Canada. Authorization to immigrate to designated francophone areas should actually come with a formal commitment to learn French. This commitment should come with temporary financial support measures also available to family members to facilitate the regular use of French at home and in the community.

12. This is where the heart of integration into French life lies. In fact, the entire family unit needs to be involved in this effort to gain proficiency in French.
13. A two-pronged approach is needed: first, immigrants must commit to and immerse themselves in effective training adapted to our francophone reality; second, the government must provide financial support during this transition toward integration into living and working in French.
14. The solution certainly involves boosting immigration rates to halt the demographic slowdown and the asphyxiation of important sectors of the economy, even in sectors where employment requires only basic skills, such as in farming or working with the elderly. In fact, all these workers are also needed, as the pandemic brutally revealed after the country's borders were closed.
15. What does the government have to say about francophone immigration in its document, *English and French: Towards a Substantive Equality of Official Languages in Canada*?
16. The Document clearly presents the scale of the challenge: less than 1% of immigrants to Canada settle in francophone communities outside Quebec. But it stops there without proposing specific measures, geographic targets, the development of recruitment criteria or the establishment of a network of specially trained immigration officers.
17. Although the Document states that “the desire to protect the demographic weight of Francophone communities was affirmed” (page 8), it does not go beyond this general objective statement. The magnitude of the demographic decline does not seem to provide the impetus for coming up with immediate, urgent measures in partnership with organizations, institutions and other levels of government. In other words, there is no plan, nor is there a specific,

comprehensive commitment that reflects the demographic reality of Canada's francophone communities.

18. The Document does not link this government obligation to Part VII of the OLA to take proactive measures to support the demographic weight of the communities.

19. It simply proposes that the Minister of Immigration “set up a new Francophone immigration corridor specifically aimed at recruiting Francophone and French-language teachers” and “support and enhance opportunities for newcomers to learn French” (page 14).

Obligation to ensure consistent and effective support for francophone immigration

20. While highly desirable, this “administrative” commitment is wholly inadequate. There must be a legal obligation clearly stated in the OLA, otherwise the decline will be irreversible, and 50 years from now we will be wondering whether it is still worthwhile to maintain the objective of progressing toward the equality of status of the two languages once the demographic weight of French speakers has dwindled to a point of no return (page 23).

21. This objective should be monitored annually by the ministers responsible and by the Commissioner of Official Languages in order to launch a sustained immigration movement in real numbers that would have a tangible impact on the vitality of the official language communities.

Part 2: Anglicization hastened by digital platforms

22. The Document *English and French: Towards a Substantive Equality of Official Languages in Canada* refers more generally to the socio-cultural context in which English and French are evolving in Canada and Quebec, but it says little about the various pervasive pressures from within and outside Canada on their use. One critical factor that was not even on the radar in 1969 or in 1988 but has since become a major issue is just how much of a role that the large digital platforms such as Google, Amazon and Facebook now play in every aspect of community and personal life. It seems that these new circumstances have much more of an impact on the future of the use of French than what the political debate is currently focused on, such as applying Bill 101 to federally regulated businesses in Quebec. The Document does say that just under 75,000 people would be affected by such a measure. Former CSN president and Chair of the Commission on the Future of French in 2000-2001 Gérald Larose described this proposal as a half-measure or trinket with little impact on the real causes of the decline of French (*Le Devoir*, March 29, 2021).

23. Bill 96 tabled by the Quebec government does not include any measures targeting digital platforms, and in our view, this is a critical omission. Digital platforms reach almost 92% of all households in Quebec, or over 7 million people. There seems to be a distorted view of the importance of the measures to be taken that reveals more about the politics of the debate than the effectiveness of the strategic targets chosen.

24. The language used by the major U.S.-based digital platforms is almost exclusively English.

25. Some commentators and others involved in the debates on language in Quebec and Canada have pointed to the insidious influence of English through the continued use of digital platforms: [TRANSLATION] “Without real counterweights to the web giants and

the cultural steamroller they represent, and without ensuring greater appeal and ‘discoverability’ for our artists and our culture in general, all is lost” (*Le Devoir*, May 15 and 16, 2021, p. B13, Louise Beaudoin, *Ceux qui font les révolutions à moitié*).

26. Of the 13 large international servers that feed the major platforms (DNS), 10 are in the United States. Editorialist Brian Myles said that globalization, the flattening of cultural diversity of expression in the digital age and the trouble politicians are having understanding and acting on the algorithms that turn access to content on and off based solely on profit motivations require constant vigilance” (*Le Devoir*, May 15-16, 2021, page B12). The platforms offer an infinite choice of connections always determined by algorithms completely outside the user’s control, algorithms that systematically favour English.
27. The web giants dominate the entire planet, and the United States is demolishing the last remaining impediments, paving the way for a world entirely open to their influence and the American culture they exclusively carry. The U.S. has completely extended its sprawling dominance into the two key areas of community life: commerce and culture.
28. As President Bush’s senior advisor Karl Rove once said, “We’re an empire now, and when we act, we create our own reality.” (quoted by Mathieu Bélisle in *L’empire invisible*, 2020, p. 83).
29. However, a language, in this case French, is not just a tool for communicating with others. As stated by the Supreme Court in *Reference Re Manitoba Language Rights*: “The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us.” ([1985] 1 SCR 721, p.744).

30. By giving way to the English language promoted by the web giants, people are being acculturated into another identity and another way of thinking and seeing the world.
31. In a recent decision on the constitutionality of Quebec's Bill 21, Justice Marc-André Blanchard made this point abundantly clear when considering the scope of minority language education rights: [translation] "... language is an integral part of the identity and culture of the people who speak it, with this culture conveyed by that language ..." (2021 QCCS 1466, para. 941).
32. According to the Court, these two realities—language and culture—are inseparable and are enmeshed with a person's identity.
33. By unreservedly and fearlessly giving in to the pervasive influence of the web giants, a subtle, creeping yet effective anglicization is making its way into the cultural universe of individuals and society as a whole.
34. Everything is all about "likes" or not, and the younger generations are connected to their world, their family and friends with this one device—their phone—always in hand, which they unlock over 80 times a day and whose screen they touch on average 2,617 times each day, steadily feeding U.S.-based algorithms with personal data interpreted in the form of multiple messages, the vast majority drawn exclusively from American culture (Nicholas De Rosa, *Notifications – Prière de me déranger*, Radio-Canada, Online, September 10, 2020).
35. It is not surprising that more than 40% of young Quebeckers want to continue their education in an English-language CEGEP. Without realizing it, and without malice, they have been led to think in English and to express themselves in coded language written in English only.
36. Their world is focused primarily in the anglosphere.

35. The top priority, in our view, is the discoverability of French-language content, which means making sure that it is visible on platforms and is freely promoted and easily accessible. Canada cannot solve this problem alone, but with the help of Quebec and France, it can make its voice heard even more strongly within the OIF. The European Union is perhaps the only political entity that has the influence to demand anything from the web giants (Mathieu Bélisle, *L'empire invisible*, Éditions Leméac, 2020, p. 216, note 9).
36. However, a coalition of a majority of UNESCO member countries could be successful, as was the case in 2005 with the adoption of the Convention on Cultural Diversity, giving signatory countries greater protection for their respective cultural industries in free trade agreements. This priority should form a broad and robust consensus, first among the member countries of the Francophonie (OIF), then the EU and UNESCO.
37. The Document refers to Bill C-10, currently before the House of Commons. While this bill contains necessary provisions, C-10 should be much more explicit about requiring the institutions concerned to ensure the visibility of French, which is never given prominence on the major digital platforms and is always left on the margins.
38. This is the real Trojan horse undermining the importance and visibility of French for current and future generations. All political resources should be focused on this issue, not on some verbal fencing match about a small number of workers in federally regulated companies, who will in any case be able to assert their rights through a vigorous application of the OLA, as the Document rightly proposes.
39. We must keep our eye on the prize and not get sidetracked!

A new UNESCO treaty

40. Given how pervasive they are, digital platforms are an inescapable factor in accelerated anglicization. Canada must take the lead at the international level to confront this insidious invasion that pushes back against any use of French and substantially and unconsciously transforms our identity, and argue for the adoption of a new UNESCO treaty to recognize the discoverability of works in French and other languages on the major digital platforms.

Part 3: Strengthened legislative and institutional support

41. Several amendments, other than those proposed in the Document, should be adopted to strengthen the legislative and institutional support for the language rights in the OLA and the *Canadian Charter of Rights and Freedoms* (Charter).
42. First, the principles of the OLA and section 16(1) of the Charter and their jurisprudential interpretation must find their place in the substance of the Act.
43. Section 16(1) of the Charter outlines the principle of equality of status of the two languages, and the underlying principle of advancing the substantive equality of status or use of English and French.

This wording suggests that this equality has not yet been achieved and that there is a long road ahead of us, with obstacles to address and overcome. It also includes a strict obligation to take proactive measures to support this steady advancement toward the equality of status.

44. There is therefore a clear obligation of means, a requirement to fulfill a duty if we want to achieve the substantive equality of status and use of the two languages. According to Supreme Court case law, these Charter rights are to be interpreted in a “purposive and liberal” manner.

Duty to redress wrongs

45. There is another aspect that the Document does not cover: consideration of the duty to redress wrongs caused by past neglect, to compensate for the effects of decades of measures that encouraged assimilation and a mean-spirited approach to the use of a language, French, that has now been recognized by the OLA for 50 years as

equal in status, while the language rights in the Charter have been in place for close to 40 years.

46. Applying this restorative principle means specific initiatives must be taken to achieve this objective.
47. The preamble of the OLA should be amended to reflect the remedial duty inherent in section 16(1) of the Charter in order to achieve equality of status, rights and privileges of both languages.

Official French version of *Constitution Act, 1867*

48. A second goal that should be shared by all parliamentarians is the adoption of an official French version of the *Constitution Act, 1867* (1867 Act). As we know, only the English version has the force of law.
49. As a result, when senators and members of Parliament need to refer to the Constitution, the supreme law of the land, they can only use or refer to the English version, even though a Department of Justice translation is available. This is also true for anyone else who must refer to or quote from the 1867 Act.
50. If Canada wants to live up to its status as an officially bilingual country, it must respect the commitment in section 55 of the *Constitution Act, 1982* and take all necessary steps to ensure that an official French version of the original text of the 1867 Act is adopted.
51. Given the government's past inaction, Professor François Laroque and I initiated legal proceedings in the Quebec Superior Court on August 30, 2019, with the objective of having the various governments adopt an official French version of the 1867 Act.
52. However, at this stage of the proceedings, it is important to mention that, as of February 5, 2021, the Attorney General of Canada denies

that he has an obligation to act, as does the Attorney General of Quebec.

53. At the very least, this is an embarrassing legal situation. The symbolism is difficult to ignore, and yet no one in power in the Canadian government is making the necessary change to affirm the country's bilingual character.
54. How can Canada claim to defend the equal status of the two languages when its constitution is in English only?
55. Recognizing in the preamble to the OLA the need to move quickly to adopt an official French version of the 1867 Act is a must.

The quasi-constitutional nature of the OLA

56. The Document also fails to recognize that the OLA is quasi-constitutional in nature (as the highest courts in Canada have recognized), which affirms the obligation to recognize and respect the equal status and use of both languages. The OLA must be interpreted together with section 16(1) of the Charter.
57. The OLA is a concrete legislative representation of the principle of advancing toward the equality of status or use of both languages. It is not, as was argued in 1976 before the courts (*Joyal v. Air Canada*, 1976 QCCS 1211), a statute declaring intent but not conferring justiciable rights. That is what the Commissioner of Official Languages argued at the time. Subsequent case law has confirmed that the OLA is an obligation and that the courts have a responsibility to punish violations.
58. An amended preamble should clearly recognize the legal nature of the OLA as creating corresponding rights and obligations for the government that are enforceable by the courts.

Limit on transfers of responsibility

59. An important observation needs to be added. The Government of Canada should not be able to sign administrative agreements with the provinces and territories that would transfer the management or delivery of services (whether or not they are funded solely by the Government of Canada), depriving users of their right to obtain services in French or employees of their right to work in French.
60. A Federal Court decision in 2018 (involving Employment Canada) concluded that these agreements do not mean that the obligation to respect the rights of Canadians under the OLA is transferred to the province when these programs are administered by the federal government. It should be clearly communicated that such a loophole is invalid and that the Canadian government cannot abdicate responsibility for its constitutional obligations.
61. In other words, the Canadian government cannot outsource its general responsibilities to another level of government, shirking its obligations under the OLA and undermining the language rights of Canadians. Any transfers should also include the corresponding rights under the OLA.

Obligation of means under Part VII of the OLA

62. Part VII of the OLA, in section 43(1), requires the federal government to take proactive measures to advance the equality of status of the two languages through the principles outlined in section 16(1) of the Charter. It was undermined by a decision of the Federal Court, which ruled that, since regulations had not been made by the federal government to outline how this responsibility should be fulfilled, this section was therefore of no effect, other than the obligation to do no harm. The obligation contained in Part VII must be reformulated in a clear and unambiguous manner in order to create an irrefutable

obligation for the Canadian government and to close the loophole identified by the Federal Court.

63. This amendment was adopted in 2005 following a legislative initiative by the late Senator Jean Robert Gauthier. The government resisted implementing it because it did not want to have to assume onerous obligations. However, the Federal Court decision gutted section 43(1) of any real substance, and simply “elevated” it to the level of good intentions.
64. It is high time to amend Part VII of the OLA and to recognize the government’s formal, enforceable obligation to take proactive measures to advance the equality of status of the two languages and the vitality of official language minority communities.
65. This leads into another key point for advancing the equality of status of the two languages, namely the use of a holistic approach encompassing all means, institutions, bodies, regulatory powers and programs under the responsibility of the Canadian government, both at home and abroad, to serve the underlying principle of steadily advancing toward substantial equality in section 16(1) of the Charter.
66. The importance of recognizing this should be emphasized in the Document, and it should also be reflected in the body of the OLA.
67. The Document addresses several points, such as the statutory recognition of the Court Challenges Program, which is certainly a step in the right direction, but it fails to address others that, given their strategic value, should have been included in the new OLA.

Formation of an official languages committee

68. First, there should be recognition in the *Parliament of Canada Act* that the Senate and House of Commons standing committees on official languages should meet no later than six months after Parliament reconvenes following a general election to ensure that the

objectives set out in the OLA and in section 16(1) of the Charter continue to be monitored and implemented.

69. It sounds simple, but as it stands there is no guarantee. It should be noted that it took until 1982, well over a decade after the OLA was passed, before a private member's bill was introduced in the House of Commons by MP Pierre De Bané and myself to create a committee on official languages. The government of the day finally agreed to amend the *Standing Orders of the House of Commons* and the *Rules of the Senate* to recognize the existence of a standing (joint) committee responsible for official languages. In the past, there were significant delays of up to two years in forming the committee; this shortcoming must now be avoided.

70. The time has come to give permanent recognition in the Act to this committee, which acts as an essential institutional support to ensure that their oversight roles cannot be easily diluted, merged or put off by a reckless majority.

Limit on Treasury Board discretion

71. The Document proposes giving a single entity the responsibility to coordinate all federal government policies and programs that support the OLA and section 16(1) of the Charter. This proposal fits well with the holistic approach that the Document advocates. It would ensure the coherence and effectiveness of the objective in question. The President of the Treasury Board was identified as the authority.

72. However, this proposal should be setting off alarm bells and appropriate measures should be taken. The President of the Treasury Board is responsible for expenditure control. If he also becomes responsible for coordinating official languages policies for the entire federal administration, he will be both judge and jury. How could he play both of these roles well in the context of generalized budget cuts, as will inevitably happen at some point?

73. This is not a hypothetical question: it cropped up in the mid-1990s, when cutbacks were imposed by the then-President of the Treasury Board, the Hon. Marcel Massé. I personally intervened by writing to Prime Minister Jean Chrétien asking that official languages support programs be spared. The groups representing francophones also made their voices heard. But spending was maintained only for programs involving Indigenous communities, as decided by the Prime Minister.
74. However, the dispute involving the Montfort Hospital was triggered by an administrative decision to consolidate the services of Ottawa-area hospitals with the stated goal of saving money. Clear principles recognizing the non-negotiable constitutional obligations regarding official languages must be incorporated into the OLA, as articulated in a 2019 Supreme Court ruling specifically aimed at resolving such a situation, the case involving Rose Des Vents School in Vancouver (2020 SCC 13).

Substantive powers for the Commissioner of Official Languages

75. The status of the Commissioner of Official Languages is addressed in general terms in the Document. However, the proposed amendments continue to fall short of what is required to truly bring in meaningful rights to use French after more than 50 years of an oversight framework that has repeatedly shown how ineffective it is in bringing about the measures needed to ensure tangible equality. There is a lesson to be learned from Air Canada's perpetual delinquency(!) if we still need an example.
76. The conclusion is simple: the Commissioner must have the ability to take matters to court, to intervene directly before the courts, and also especially the ability to make binding orders. This is where Canada stands after 50 years of having a system that has proven to be of limited effectiveness.

77. Any other excuse for prevarication would be tantamount to denying the real nature of the constitutional obligation contained in section 16(1) of the Charter.
78. Section 24 of the Charter provides that the courts, in adjudicating Charter rights, may award exemplary damages in special circumstances. The Supreme Court in *Vancouver (City) v. Ward*, 2010 SCC 27, set out the guidelines to be followed.
79. If a citizen can seek recourse for having their general Charter rights violated, why is this same recourse not available for violations of language rights under the Charter? It is understandable that in the first decades following the adoption of the OLA in 1969, there was a preference for the path of quiet persuasion, but since 1982 a culture of fundamental rights and freedoms has prevailed, and the Court Challenges Program supported its legal recognition, which changed the paradigms of Canadian society.
80. The Commissioner should immediately be given the power to make orders, and users the ability to claim damages, when there is a clear pattern of chronic indifference to remedying the situation within a reasonable period of time or the repeated failure to make the required corrections.

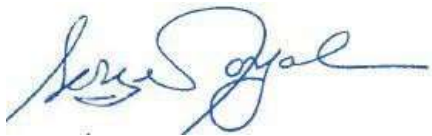
Ottawa: An officially bilingual capital

81. The Document refers to the initiative taken in 2017 by the Ontario government to recognize Ottawa's status as a bilingual city. This is a step forward that had been anticipated for over 50 years, and which had been the subject of numerous parliamentary initiatives to give effect to this essential reform for a country that touts itself as bilingual. As Secretary of State in 1982, I intervened with the Bill Davis government to offer the required help and financial assistance. I was unsuccessful.

82. It is now time to amend the *Constitution Act, 1867*, at section 16, to add a subsection 16.1 stating that “Ottawa, the seat of the Government of Canada, is a bilingual city within the meaning of the *Official Languages Act*.”

Conclusion

83. This set of 11 recommendations should help guide discussions to create a more rigorous framework and to continue to move toward substantive equality of the two languages that is more tangible and significant for all Canadians and for all those in Quebec and elsewhere in the country who believe in a Canada that can better reflect its bilingual image and the value of its French character.

A handwritten signature in blue ink, appearing to read "Serge Joyal". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Hon. Serge Joyal, P.C., Jurist, Retired Senator