BILL C-13

Brief submitted to the Senatorial Standing Committee on Official Languages by:

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PRELIMINARY REMARK

The short title of the bill,* An Act for the Substantive Equality of Canada's Official Languages*, causes confusion with regard to legal and public policy issues.

The substantive equality of language rights already exists*, as confirmed by the Supreme Court (*Beaulac decision, 1999*). In fact, this principle of "substantive equality" is the norm in Canadian law, and clause 7 of Bill C-13 confirms that this principle is the norm for the interpretation of language rights. Such a principle requires taking into account the specific contexts of the individuals and groups covered by these rights.*

This alternative title and use of the term "substantive equality" in political discourse imply that the official languages acts of 1969 and of 1988 were not founded on the principle of the substantive equality of rights and that, in fact, this legislation dealt with the francophone and anglophone realities symmetrically. Nothing could be further from the truth. The symmetry of rights most often requires asymmetrical measures, i.e., measures that take into account the sociological realities of each language, and it is within this framework that the previous acts were implemented.

Therefore, since 1969, most of the measures taken by the various federal governments, as well as the actions of the commissioners of official languages, have been aimed at strengthening the presence of the French language. Whether these measures and actions have been fully effective is another question, and it is precisely this question that must be the focus of a debate on legislative reform in this area.

INTRODUCTION

Bill C-13 adds and clarifies duties that will help strengthen certain institutional and societal aspects of Canada's linguistic duality. I am referring mainly to the obligations concerning the bilingualism of Supreme Court judges, the responsibilities of the Treasury Board, and the measures taken by federal institutions to promote both official languages in Canadian society. As well, the new powers granted to the Commissioner of Official Languages will certainly promote better compliance with the entire *Official Languages Act* (the Act).

However, the bill is not revolutionary: it contains no new provisions on the language of service of federal institutions (Part IV of the Act) and no significant provisions on the language of work within these institutions (Part V of the Act); the governance mechanisms proposed in the bill are confusing and could lead to a duplication of effort by Canadian Heritage and the Treasury Board; and it risks introducing legal inconsistency and tensions between the country's anglophone and francophone communities.

Therefore, the amendments to Bill C-13 proposed in this brief are aimed at:

I. **Extending the duties of federal institutions and the powers of the Commissioner of Official Languages;**

II. **Clarifying governance mechanisms;**

III. **Mitigating the negative effects of certain recognitions, particularly those that affect the minority status of the French language; and**

IV. **Mitigating the negative effects of rights reserved for francophones in federally regulated private businesses.**

Overall, my point is based on a vision that is truly pan-Canadian, one that advances the primary objective of a federal policy on official languages, namely, a robust and effective social contract between the country's two major language communities. This vision does not seem to be as prominent as it should be in Bill C-13.

PROPOSED AMENDMENTS

I. EXTENDING THE DUTIES OF FEDERAL INSTITUTIONS AND THE POWERS OF THE COMMISSIONER OF OFFICIAL LANGUAGES

A. Duties relating to institutional bilingualism (Parts I to V of the Act)

Under section 82 of the Act, the provisions of Parts I to V of the Act (Proceedings of Parliament, Legislative and Other Instruments, Administration of Justice, Communications with and Services to the Public, and Language of Work) take precedence over all other federal Acts and regulations, except the *Canadian Human Rights Act*. Bill C-13 does not amend this precedence, and that is good, as we are talking about provisions regarding key individual rights pertaining to official bilingualism.

These parts of the Act are virtually untouched by Bill C-13, except, of course, for the requirement that Supreme Court judges be bilingual. There are no new provisions on language of service and no significant provisions on language of work.

Therefore, the following additions are proposed:

- **Communications with and Services to the Public (Part IV of the Act)**

  - The requirement for bilingual federal service should extend to all provincial and territorial capitals, regardless of the size of the official language minority. These capitals have a resolutely pan-Canadian character: their high visibility/symbolism and their high level of interaction with the rest of the country make this bilingualism requirement entirely legitimate.

  - Under "Regulations," a criterion should be added regarding the existing vitality of the English or French linguistic minority population in the area served. Numbers cannot be the only criterion for a legitimate request for bilingual service by an official language minority; the presence of an institution (school or other), for example, reflects the importance of a minority in a given area and can certainly warrant the provision of bilingual service. The current *Official Languages Regulations* include such a vitality criterion, but it would be even more significant to include it in the text of the Act.

  - Making regulations should be mandatory, taking into account (i) the importance of the purpose of the Act, namely to ensure effective coexistence between the country's two major linguistic communities; (ii) the complexity of the sociological realities to which the legislation applies and, consequently, the fact that its implementation depends largely on the political will of the various governments; regulations could help mitigate such a risk of inaction; and (iii) the evolution of the country's linguistic realities, to which regulatory amendments could respond more quickly than a legislative amendment process.

- **Language of Work (Part V of the Act)**

  - In September 2017, the government (Privy Council Office) released a situational review report entitled *The Next Level: Normalizing a Culture of Inclusive Linguistic Duality in the Federal Public Service Workplace.* This report contains very useful recommendations, some of which should result in legislative amendments requiring federal institutions to:

    - Ensure the accountability of managers, including through the use of performance evaluations.

    - Identify measures that can help create a "workplace conducive to the effective use of both official languages," such as reviewing the language requirements of positions in order to promote receptive bilingualism.

    - Take into account changes in electronic communications, which may help increase opportunities to use both languages.

  - Making regulations should be mandatory. (See above, under "Communications with and Services to the Public.")

B. Duties relating to the advancement of English and French (Part VII of the Act)

The bill clarifies existing duties that could have significant positive impacts, including the establishment of evaluation and monitoring mechanisms; the adoption of concrete positive measures taken with the intention of having a beneficial effect on the implementation of commitments; consideration of the potential for positive measures and the possible direct negative impacts that structuring decisions may have on advancement; a francophone immigration policy; and the advancement of French in the conduct of Canada's external affairs.

However, it seems that new duties should be added to this part of the Act:

- Given the practical and symbolic importance of the nation's capital, the Act should require advancement measures aimed specifically at the City of Ottawa's private and voluntary sectors.

- Federal-provincial/territorial collaboration: The Act should expand the range of possible collaborations. This should include the sharing of best practices. For example, the federal government already has a great deal of experience in this area and has developed administrative policies and tools. Could it not share its expertise with some of the provinces? And of course, this could also work the other way around. The intention here is to require the federal government to promote collaborations that take into account the country's vast potential of existing knowledge in this area. In so doing, the language policies of the country's various governments would support, rather than ignore each other.

- Francophone immigration policy: While fully respecting the Quebec government's jurisdiction over immigration, should the Act not refer to such a policy in a

pan-Canadian context, that is, a context that includes Canada's entire francophone community, and therefore Quebec francophones? Instead of stating that a francophone immigration policy is aimed at "enhancing the vitality of the French linguistic minority communities in Canada," should it not state that it is aimed at "strengthening the French fact throughout the country"? The same change should also apply to the Preamble, where the same reference to a francophone immigration policy appears.

- Making regulations should be mandatory. (See above, under "Communications with and Services to the Public.")

In addition, the bill incorporates many recognitions into this part of the Act, some of which carry risks; this is discussed in section III.

C. Powers of the Commissioner of Official Languages

The increased powers granted to the Commissioner by the bill will certainly promote better compliance with the entire Act. I am referring to the powers relating to compliance agreements, orders and monetary penalties regarding language of service to the travelling public for Crown corporations and private companies subject to the Act.

However, with respect to monetary penalties for Crown corporations and private companies subject to the Act, **I think it would be appropriate to extend the possibility of such penalties to duties relating to language of work.** We know very well—given the complaints filed with the Commissioner—that this aspect of official bilingualism is still a problem in companies such as Air Canada and Canadian National.

II. CLARIFYING GOVERNANCE MECHANISMS

The bill expands the scope of the Treasury Board's powers to certain aspects of Part VII of the Act (Advancement of English and French), and the Board's "responsibilities" become "duties" (the Board "must" instead of "may"), which should make the Act's implementation more effective.

However, the establishment of clear, government-wide coordination is not forthcoming given the dual involvement of the Minister of Canadian Heritage and the Treasury Board in many respects: the two departments will have to further interfere in each other's affairs, which undermines effective governance.

Therefore, the following clarifications are proposed:

- The Act should assign government-wide coordination responsibilities to a single entity. The Treasury Board would obviously be a preferred institution in this regard, given its status as a central agency and the importance of its current role in implementing the Act. Such centralization would not preclude the Minister of Official Languages from working with the Treasury Board. However, other options could be considered, such as the creation of a department of Official Languages.

- In addition, the Act could specify the need for centralized coordination within each institution, not just within the federal government. Official languages issues—whether related to service to the public, language of work, support for official language minorities, or the promotion of both languages in Canadian society—are not airtight. Currently, however, implementation responsibilities associated with these issues are very often dispersed within a single institution. Centralized coordination would be more effective and would foster the development of an organizational culture that is systematically conducive to the consideration of all official languages issues.

III. MITIGATING THE NEGATIVE EFFECTS OF CERTAIN RECOGNITIONS, PARTICULARLY THOSE THAT AFFECT THE MINORITY STATUS OF THE FRENCH LANGUAGE

A. Recognition of the minority status of the French language

The bill adds numerous recognitions of the minority status of the French language to the legislation. A number of these recognitions refer to this minority status as being related to the "predominant use of English." **It seems to me that such provisions run the risk of being legally inconsistent with the fundamental paradigm of equal rights and equal importance of the two language groups. They also run the risk of creating tensions between the two communities and therefore undermining harmonious coexistence.**

Similarly, the wording added to Part VII that calls for measures to "support the development and promotion of francophone culture in Canada" (s. 22(1)) does not seem to reflect the fact that **the country's English-language cultural community also faces significant challenges given the American neighbour and giant.**

However, one of the proposed additions to Part VII seems to reflect more accurately, that is, innocuously, the issue at stake here: the equal importance of the two official language communities and the need to take into account the specific needs of each.

Consequently, I think that it is particularly important to amend the bill so that the Preamble and Purpose of the Act—the most significant sections in terms of statutory interpretation—clearly reflect the foundations of official bilingualism. Therefore:

- The Preamble should include wording that conveys the equal importance of the two official language communities and the need to take into account the specific needs of each.

- The wording of the Purpose of the Act that makes reference to taking into account "that French is in a minority situation in Canada and North America due to the predominant use of English" should be replaced by a statement that would refer instead to taking into account "the specific needs of each language community."

B. Other recognitions

The legislative effect of the recognitions relating to the role of the Canadian Broadcasting Corporation (CBC) or to provincial and territorial legislation and policies does not seem significant: CBC's role in language matters is already the subject of specific legislative provisions (*Broadcasting Act*) and the provincial and territorial realities mentioned are respected by the federal government. **Therefore:**

- Such provisions have no place in a part of the Act as important as the Preamble.

- Furthermore, it should be noted that one of the recognitions in the Preamble refers to the fact that "each province and territory has adopted laws, policies or programs guaranteeing service in French or recognizing the contribution of the English or French linguistic minority community to Canadian society." This wording seems to imply that Quebec does not grant rights to anglophones, which is false, of course (such rights are set out in the *Charter of the French Language*, the *Act respecting health services and social services*, etc.); **consequently, in any case, this part of the Preamble must be amended**.

IV. MITIGATING THE NEGATIVE EFFECTS OF RIGHTS RESERVED FOR FRANCOPHONES IN FEDERALLY REGULATED PRIVATE BUSINESSES (FRPBs)

The provisions relating to FRPBs confer rights only on francophones, which I believe is legally risky given the possible inconsistency with the primary paradigm of the Act. The purpose of all this is to strengthen the French language, something that will likely have a very minimal impact in Quebec (most of these businesses already allow for service or work in French) and whose impact is still far from clear outside Quebec.

- In my opinion, **the intention to encourage greater use of French in FRPBs should ideally take the form of a duty on the part of the federal government to promote such a practice, rather than a duty to respect individual rights.** Refraining from an individual-rights approach would avoid two major challenges: the current challenge of granting rights only to francophones or, if rights were to granted to both language groups, the challenge of a real conflict with Quebec's *Charter of the French Language*, with which many FRPBs already comply.

- **However, if an individual rights approach remains**, it will be all the more important to emphasize, in various parts of the Act and as mentioned earlier, the **premise of the equal importance of the two official language communities and the need to take into account the specific needs of each.**