

**MEMORANDUM SUBMITTED TO THE STANDING SENATE COMMITTEE ON SOCIAL
AFFAIRS, SCIENCE AND TECHNOLOGY ON BILL C-35: AN ACT RESPECTING EARLY
LEARNING AND CHILD CARE IN CANADA**

BY

FRANÇOIS LAROCQUE, PHD

Francophonie Research Chair on Language Rights and Issues
Full Professor, Faculty of Law (Common law Section), University of Ottawa

Counsel, Power Law

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**Collège des chaires de recherche
sur le monde francophone
de l'Université d'Ottawa**

**Chaire de recherche
Droits et enjeux linguistiques**

RECOMMENDATIONS (IN ORDER OF PRIORITY)

1. That section 8 be amended by adding the following highlighted text:

Funding Commitments

8. The Government of Canada commits to maintaining long-term funding for early learning and child care programs and services, including early learning and child care programs and services for Indigenous peoples **and official language minority communities**. The funding must be provided primarily through agreements with the provincial governments, Indigenous governing bodies and other Indigenous entities that represent the interests of an Indigenous group and its members.

Engagement Financier

8. Le gouvernement du Canada s'engage à maintenir le financement à long terme des programmes et services d'apprentissage et de garde des jeunes enfants, notamment ceux destinés aux peuples autochtones **et aux communautés de langues officielles en situation minoritaires**. Ce financement doit être accordé principalement dans le cadre d'accords avec les gouvernements provinciaux, les corps dirigeants autochtones et autres entités autochtones qui représentent les intérêts d'un groupe autochtone et de ses membres.

2. That the preamble be amended by adding the following text after the 9th paragraph:

Whereas the government of Canada is committed under the *Official Languages Act* to advancing formal, non-formal and informal opportunities for members of English and French linguistic minority communities to pursue quality learning in their own language throughout their lives, including from early childhood;

Qu'il s'est engagé dans la *Loi sur les langues officielles* à renforcer les possibilités pour les minorités francophones et anglophones de faire des apprentissages de qualité, en contexte formel, non formel ou informel, dans leur propre langue tout au long de leur vie, notamment depuis la petite enfance;

Submissions

1. Madam Chair, Senators, thank you very much for the invitation to appear before the Standing Committee on Social Affairs, Science and Technology to share my thoughts on Bill C-35: An Act respecting early learning and child care in Canada.
2. Like the other organizations and individuals who have testified before you on Bill C-35, I would like to emphasize the importance of creating and maintaining a national system of early learning and child care. I also welcome the bill's clear intention to ensure that this system is sustainable, inclusive and adapted to the specific realities of the communities it intends to serve, including Aboriginal peoples and official language minority communities (OLMCs).
3. As a professor and university researcher working in the field of language rights, I am particularly supportive of the amendments made to Bill C-35 in committee at the House of Commons. These amendments make direct reference to OLMCs, thereby ensuring that their collective rights and interests are taken into account when this legislation is eventually implemented.
4. More specifically, the House of Commons deemed it useful to make explicit reference to OLMCs on three (3) occasions in Bill C-35:

Section	References to OLMCs
7(1)c)	Guiding Principles. Federal investments must be inclusive of children from systematically marginalized groups, including those from French and English linguistic minorities.
7(3)	Guiding Principles. Federal investments in early learning and child care programs and services under agreement with a province are guided by the commitments set out in the <i>Official Languages Act</i> .
11(1)	National Advisory Council on Early Learning and Child Care. The Board's composition reflects the importance of creating a Board that is representative of the diversity of Canadian society, including official-language minority communities.

5. While these changes are beneficial, they are woefully incomplete in that they are not extended and reflected in the wording of section 8 of the bill, the provision that

codifies the federal commitment to long-term funding for early learning and child care programs and services.

6. Section 8 of Bill C-35 should include an explicit reference to "official language minority communities", as proposed above on page 2 of this memorandum.

7. Without the proposed amendment to section 8 - which echoes the proposal of Canada's Commissioner of Official Languages and the Commission nationale des parents francophones - OLMCs risk being deprived of the federal funding necessary for the long-term maintenance of early learning and child care programs and services.

8. I would like to think that OLMCs were inadvertently omitted from section 8, and that the current wording does not reflect Parliament's true intent. Fortunately, the Senate is there to correct the record and ensure that the rights and interests of OLMCs are not forgotten. Historically, the Senate has not shied away from intervening when proposed legislation "[translation] compromised collective language rights or minority rights".¹

The proposed changes are necessary

9. Some people may be tempted to believe that the proposed amendments are not necessary and that the changes made in the House of Commons are sufficient to guarantee long-term funding for OLMCs. These people, respectfully, are wrong.

10. In my view, a court could reasonably conclude that section 8, as currently drafted, only commits the federal government to guaranteeing long-term funding for early learning and child care programs and services "for Indigenous peoples". I base this view

¹ Serge Joyal, « Le Sénat : une incarnation du principe fédéral », dans (S. Joyal, dir) *Protéger la démocratie canadienne : le Sénat en vérité*, McGill-Queens University Press, 2003, p 326. Voir aussi Linda Cardinal et Sébastien Grammond, *Une tradition et un droit : Le Sénat et la représentation de la francophonie canadienne*, Ottawa, Presses de l'Université d'Ottawa, 2017.

on (a) Supreme Court of Canada jurisprudence and (b) ordinary principles of statutory interpretation.

(a) The case law insists on the explicit codification of language rights

11. In the Supreme Court's view, in the absence of clear direction from Parliament, the courts should not expand the scope of OLMC language rights. In *Caron v. Alberta*, the Supreme Court refused to recognize the existence of language rights in the absence of explicit guarantees in the relevant constitutional and legislative documents. "The Court must generously interpret constitutional linguistic rights, not create them".² The Court goes on to say that "When these rights were addressed [...] they were addressed explicitly."³ I was a lawyer in this case. It's a lesson that OLMCs have learned the hard way.

12. Consequently, if section 8 does not explicitly mention programs and services for OLMCs, a Court will not be able to find that the government has committed to providing them with long-term funding. On the other hand, this risk disappears completely if the Senate adopts the proposed amendment.

(b) Without explicit inclusion of OLMCs in section 8, principles of statutory interpretation allow for their exclusion

13. According to the principles of statutory interpretation, the courts must "*read the words of a statute in their entire context, following the ordinary and grammatical meaning that harmonizes with the scheme of the statute, the object of the statute and the intention of the legislature*".⁴ This rule is now an axiom of Canadian law.

² *Caron v Alberta*, 2015 CSC 56 at para 38.

³ *Caron v Alberta*, 2015 CSC 56 at para 41. See more generally the discussion at paragraphs 40-49.

⁴ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 RCS 27 at para 21; *Bell ExpressVu Limited Partnership c Rex*, 2002 CSC 42 at para 26.

14. Consequently, in interpreting the wording of section 8, it is necessary to place this provision in the overall context of the law. A judge seized with the question would note the absence of any reference to OLMCs in section 8, even though they are specifically mentioned in paragraph 7(1)(c), subsection 7(3) and subsection 11(1) of the same Act. It is in this context that the silence of section 8 with regard to OLMCs risks giving the impression that it is a deliberate and intentional choice on the part of the legislator.

15. In other words, the current section 8 would allow the government to argue before the courts that Parliament implicitly intended to exclude OLMCs, precisely because it explicitly included them elsewhere in the statute. As Professor Sullivan explains:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied.⁵

16. Parliament does not speak in vain, as the saying goes. However, when it says nothing, the courts can also take note. This is the danger facing OLMCs if section 8 is not amended.

17. It is therefore preferable to amend section 8 to dispel any ambiguity as to Parliament's intention to codify the government's commitment to provide long-term funding for OLMCs.

18. In addition, to make this intention to protect the rights of OLMCs even more explicit, it would also be desirable to amend the preamble to the Act, as suggested on page 2 of this memorandum.

⁵ Ruth Sullivan, *The Construction of Statutes*, 7th ed, LexisNexis, 2022, §8.09

19. The effect of this change would be to make more explicit Parliament's intention to provide OLMCs with the long-term funding they are seeking. In addition, the proposed amendment to the preamble would confirm the normative link between the guiding principle codified in subsection 7(3) of Bill C-35 and the federal commitment in the *Official Languages Act* to take positive measures to enable OLMCs to learn in their own language throughout their lives, beginning with early childhood.

20. For these reasons, I respectfully recommend that Bill C-35 be amended as described on page 2 of this memorandum.

END OF MEMORANDUM