Effective Representation, Active Offer and Positive Measures:
Possible Approaches to Modernizing the *Official Languages Act*

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Effective Representation, Active Offer and Positive Measures: Possible Approaches to Modernizing the Official Languages Act

The objective of any modernization of the Official Languages Act (OLA) must be to increase federal institutions’ compliance with the obligations listed in the OLA. New, more substantial regulations would give concrete directions to federal institutions to help them commit to their obligations. At the moment, a large part of the language obligations still depend upon political will, and political will certainly cannot be legislated. However, hopefully a stronger OLA would increase the ability of official language minority communities to act in favour of their collective future (Léger 2014). One tool that should be taken into consideration to strengthen the OLA is adding a new dimension that goes back to effective representation. This dimension is a missing link in the current Act. My speech is divided into three parts. First, I will define the concept of effective representation to explain why it could be added to the OLA. Then I will discuss how effective representation could take place under Part IV and Part VII of the OLA.

1. Effective representation

The starting point for this speech is a proposal to add to the objective of the Official Languages Act. Currently, paragraph 2b) stipulates that the objective of the OLA is to support the development of English and French linguistic minorities. I suggest that this paragraph be amended so that the OLA must also provide the necessary mechanisms for effective representation of official language minorities across the country.

Effective representation of minorities is a principal by which society ensures that the aspirations and needs of minorities are taken into consideration in a decision-making process. Effective representation is often evoked in the context of elections in democratic societies, in the sense that an electoral system can be organized to ensure balanced representation of the different components of society within elected assemblies. Furthermore, Canadian courts have already had to decide on issues of effective representation among electors.
However, effective representation goes beyond the electoral system, as indicated by international minority protection instruments. For example, the Council of Europe’s *Framework Convention for the Protection of National Minorities* and the UN’s *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992) stipulate that States are responsible for creative favourable conditions for minority participation in social, cultural, economic and political life at all levels of the public sphere. The Organization for Security and Co-operation in Europe’s *Lund Recommendations on the Effective Participation of National Minorities in Public Life* includes two types of recommendations: the first deals with minority participation in managing public affairs, and the second concerns independence in the management of certain local or internal affairs by minorities (Cardinal, Léger and Normand 2018).

By including the effective representation of official language minorities in the objective of the OLA, this would open up the debate on new methods of ensuring the participation and independence of these minorities within Canada’s language policy. Participation and independence are not innovations in the policy; they have already been implemented in varying degrees, whether through institutionalized consultation mechanisms or through the management of school boards, for example. In this particular case, participation and independence should be included in the implementation of Part IV and Part VII of the OLA, to give substance to the effective representation of official language minorities. In both cases, this could be done through stronger regulations.

2. **Part IV on communicating with the public and providing services, and the idea of active offer**

As for **Part IV**, I will limit myself to Section 28 of the OLA, which states that federal institutions are responsible for adhering to the principle of active offer. The Treasury Board Secretariat’s *Policy on Official Languages* also stipulates that federal institutions must “clearly indicate visually and verbally that members of the public can communicate with and obtain services from a designated office in either English or French” and lists various ways to do so. The active offer has been the subject of much research and debate in recent years, and this definition of the principle, which appears to be the lowest common denominator, has not followed the trend toward more dynamic
definitions, referring in particular to a culturally appropriate service offer in an environment that generates demand. Furthermore, it is also possible to imagine ways to firmly plant the active offer within the notion of effective representation.

As for participation, even as early as 1978 the Office of the Commissioner of Official Languages (OCOL) stated that “it would be a good idea to consult potential clients […] and to really take their views into consideration when determining the scope of services that the federal government can ‘reasonably’ offer in the minority language” (OCOL 1978:11) [translation]. After the Special Joint Committee on Official Languages’ report (1981), the Treasury Board announced a new directive that entered into force on April 1, 1982. The directive states that “members of the official language minority population must be able to make their opinions known to the relevant departmental officers concerning the linguistic aspects of the services being offered” [translation]. The Treasury Board therefore calls upon departments to implement “feedback systems for all locations that provide services to the public in both official languages, in order to allow the public to comment on the various linguistic aspects of the services being offered” (Treasury Board 1982:4-5) [translation]. In other words, departments were called upon to let language minorities comment on the quality and availability of federal government services. This suggestion could be taken up today so that users of public services in the minority language can define their needs and evaluate services in official consultation sessions, and even determine where and how these services will be offered.

However, this representation in the active offer could go even further, in the event that federal institutions make excuses to justify their inability to offer services in the minority language. This is where independence comes into play. In its 1977 annual report, the OCOL suggested that in these cases, “the government might need to re-examine the location of its offices. This way, the majority of French-language communities located in English-majority provinces would have institutions that are essential for community activities” (OCOL 1978:10) [translation]. These institutions “could well receive communications centres and maybe even some federal office responsible for serving the population in French” (OCOL 1978:10) [translation]. The OCOL went even further in its 1979 report, where it says that “a good number of federal services could be contracted out to non-governmental organizations, which would
occasionally allow the federal government to meet the needs of official minorities more easily (OCOL 1980:48) [translation]. It could be said that at the time, the OCOL was already proposing independent management of government services or the “by and for” principle, which in this case means that government services intended for an official language minority community would be planned, offered and evaluated by institutions within this community.

Active offer is more than a management technique; it is also a dynamic principle that opens the door to innovations in the way that these services are offered. A new regulation for Part IV could focus on this representation in the active offer and give a glimpse of two possibilities: co-construction of service delivery methods through the increased participation of a variety of stakeholders – in other words, an obligation for consultation with feedback mechanisms – and community governance of government services – or in other words, an active offer using the “by and for” principle.

3. Part VII on the promotion of French and English and the idea of positive measures

I will now move on to Part VII of the OLA, which specifies in Section 41 that the federal government is committed to fostering the expansion of the official language minorities and supporting their development, and which since 2005 has called upon federal institutions to implement positive measures to fulfil this commitment. It has already been noted on several occasions that this part of the OLA is poorly understood in the federal public service. However, this is not a new phenomenon since even during the analysis of Bill C-72 (the bill that would become the OLA) by the Legislative Committee in 1988, several bodies, including the OCOL, the Fédération des francophones hors-Québec (today the Fédération des communautés francophones et acadienne du Canada) and Canadian Parents for French, noted the weaknesses in this part, which was not enforceable at the time. When the bill was adopted by the committee, some members of Parliament admitted that they did not understand its content and they doubted that it could be implemented (Normand 2012a). Rather than helping to clarify Part VII, the 2005 amendment seems to have complicated the picture, as shown by the debates about defining or not defining the idea of positive measures, but also by the fact that this new
legal instrument has never been successfully used, which Linda Cardinal and I had anticipated when we appeared before the House of Commons Standing Committee on Official Languages on September 29, 2005, just before the amendment was adopted. Regulation for Part VII are now essential for ensuring that all of the commitments contained therein are implemented, in order to respect the intentions of the legislature.

As with Part IV, these new regulations could also be in keeping with effective representation. First of all, as with the active offer, the idea of positive measures should be accompanied by an obligation for substantial consultation, i.e. an obligation that must go beyond a simple consultation meeting, that must go as far as co-construction and joint evaluation of official language programs and policies. This obligation would be part of the objectives for participation that are required for effective representation. Furthermore, the jurist Serge Rousselle (2007) indicated that a generous interpretation of Part VII necessarily involved the obligation for consultation, but also that federal institutions should take the concerns of the community into account and act on them using the positive measures that they are required to take.

However, in the spirit of other international minority protection instruments, the idea of positive measures could go even further and be included in the objectives concerning independence. A positive measure could be defined as a measure that would provide official language minority communities with the tools to define their own standards and the content of the rights to which they are entitled. It should ensure that these communities can take control of their own expansion and development, and that they are responsible for their institutional completeness. In time, the government would recognize these communities’ capacity for self-determination, and they would become the masters of their own vitality (Normand 2012b). Regulations clearly stipulating that “by and for” may be preferable for implementing positive measures would allow communities to act in the areas that they consider priorities for their expansion, instead of having to comply with priorities defined elsewhere, particularly by the federal government itself.

In conclusion, it is essential that spaces, such as this committee, think about the possibility of modernizing the OLA. These opportunities for dialogue will help specify the underlying objectives of this modernization. The approaches that I am proposing –
effective representation, participation, independence, the active offer and positive measures – could be integrated into your work in order to ensure that federal institutions fully comply with the OLA and to ensure that the OLA responds to the aspirations of official language minority communities.

References


