MODERNIZATION OF THE OFFICIAL LANGUAGES ACT

Brief submitted to the Standing Senate Committee on Official Languages by Hélène Asselin, Official Languages Consultant

Introduction and summary

Canada’s official languages policy is rooted in the country’s history: it is at the heart of the social contract between English-speaking and French-speaking Canadians.

From Canada’s very beginnings, the two major linguistic communities laid the foundations for official bilingualism: the Constitution Act, 1867, permitted the use of English and French in the Canadian Parliament, in the Houses of the Quebec legislature, and in the federal and Quebec courts. The country’s bilingual image gradually emerged in a number of institutions, particularly the cultural sector (e.g., CBC/Radio-Canada, the National Film Board, the Canada Council for the Arts, etc.). But it was not until 1969, in response to the work of the Royal Commission on Bilingualism and Biculturalism and the major crisis the country was going through at the time, that Canada’s language regime as we know it was really put in place. In fact, it was in attempting to manage tensions relating to the coexistence of anglophones and francophones, to promote collaboration and to respond to demands arising from economic, political and institutional inequalities that this regime took shape. This response was embodied primarily in the 1969 Official Languages Act (“the Act”), which introduced bilingualism in federal institutions; the Canadian Charter of Rights and Freedoms (1982), which enshrined the rights set out in the Act, set out education rights and established official bilingualism in New Brunswick; and the 1988 Act and its 2005 enhancement, which spelled out the obligations of federal institutions and set out the government’s commitment to official language minorities and the promotion of both languages in Canadian society. Official bilingualism is also reflected in many federal statutes and regulations that include provisions relating to the use of English and French.

This legal framework has led to major advances. One of the outcomes of its most recent update (the 1988 Act and its 2005 enhancement) is increased support by federal institutions for the development of official language minorities, and it is imperative that this progress continue. However, we must ensure that the way in which such progress is achieved does not accentuate the provincialization of language issues, which is already very much a part of the current federal approach, as well as in society as a whole (given, among other things, Quebec’s political evolution and the disappearance of the notion of a “French Canada”). More specifically, we must ensure that language rights are not addressed just in terms of provincial minority rights; they must be fundamentally associated with the country’s two main languages, whether or not they are spoken in a minority context. To overlook this dimension is to set aside the very foundations of Canada’s language regime.

It is with this in mind that I am submitting this brief: in my opinion, the modernization of the Act must aim to ensure, before any other changes are made to the Act, that it
contributes to achieving the pan-Canadian objective of our language regime, which concerns all of Canada’s anglophone and francophone communities.

For the most part, this brief aims to

- illustrate the current provincialization of issues and its consequences:
  - action plans, regulatory review, parliamentary approach, etc., federal effort and approaches to official languages are oriented primarily to provincial minorities;
  - approached in this way, does this mean that Canada’s official languages no longer concern Quebec’s francophones? What a complete distortion of reality. Obviously, this approach cannot help but undermine Canada’s linguistic duality as a whole, including the status of provincial minorities;

- and to propose legislative amendments that could help rebalance the federal approach, in particular by
  - adding a Policy setting out the objectives of Canada’s language regime;
  - including specifications for horizontal governance;
  - strengthening institutional bilingualism; and
  - calling for regulations to implement Part VII and expand federal-provincial cooperation.

Provincialization of Language Issues: Some Examples

For several years, the Canadian government’s approach to official languages has focused largely on implementing the federal commitment in Part VII of the Act, and more specifically the first part of that commitment: support for the vitality and development of minorities. The need to provide such support need not be demonstrated. What is at issue here is the fact that the government’s approach has the effect of locking public policy discussion, and the resulting action, into a framework that is most often articulated in terms of provincial minorities, and the relationships between these minorities and their respective majorities. By weakening the founding pan-Canadian vision of Canada’s language regime in this way, this approach leads to a depreciation of the other parts of the Act and puts at risk the achievement of its fundamental objectives.

The most recent federal action plan, the Action Plan for Official Languages 2018-2023: Investing in Our Future, the document used for the related consultations, as well as the two previous action plans, 2008-2013 and 2013-2018, illustrate this approach: apart from

1 Some content also touches on second-language learning, but the main focus remains on minority development.
a few general statements on linguistic duality, these texts contain few references to issues involving parts of the Act other than Part VII, for example institutional bilingualism issues such as language of service (Part IV) or language of work (Part V). The latest plan is particularly striking in terms of its “minority” orientation: for example, in the chapter “Official Languages in Canada,” the demographic trends it presents focus only on provincial minorities, with the exception of those relating to the bilingualism rate of Canadians; there is no data on the changes to the country’s anglophone and francophone populations as a whole!

And even when, in other contexts, the government addresses issues other than those involving Part VII of the Act, the approach or language used refers primarily to minorities rather than to the country’s two major linguistic communities. For example, the government announced the revision of its Official Languages Regulations, which concern the implementation of some provisions relating to service to the public (Part IV of the Act). I say some provisions because the Regulations do not involve the primary statement in this part of the Act: that “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.” According to this statement, the right to obtain service in English or in French from a head or central office is unconditional: it applies to all Canadians, whether or not they live in a minority community in a particular province. However, the documentation on the regulatory review process (Treasury Board Secretariat site) does not mention this primary right and could give the impression that the language of federal services is subject only to the various criteria set out in the Regulations, including significant demand. Moreover, this misunderstanding is reflected in the way the media approaches regulatory review: a journalist covering this issue on Radio-Canada recently presented the issue as though the availability of federal services in either official language depended exclusively on significant demand.

The vision put forward is not just talk. In concrete terms, the Treasury Board Secretariat, which is responsible for overseeing implementation of parts IV, V and VI of the Act, has seen its official languages resources decrease considerably over the past decade, meaning that it is barely able to fulfill a support and oversight role with federal institutions as effectively as in the past with it comes to institutional bilingualism.

It seems that Parliament is also influenced by this provincialist approach.

Bill S-209, which amends Part IV of the Act, seems to pursue objectives specific to Part VII, although these two parts have different objectives (Part IV refers to duties in terms of results while Part VII sets out duties pertaining to means).

The bill proposes, among other things, to

(i) subject the provision of bilingual services to an evaluation of how it leads to the “revitalization and advancement of the use of the language of the English or French
linguistic minority population”: does this not jeopardize the objective and quasi-constitutional nature of Part IV?²;

(ii) use the criterion of knowledge of the official languages in order to determine significant demand: even if this criterion is objective, I do not believe it is realistic. Who would wake up tomorrow and suddenly ask to be served in their second official language; and how could an outcry in Quebec be prevented—under this criterion, almost all federal offices in this province would be identified as bilingual, which would require employees to be bilingual, etc.; and

(iii) ensure that anglophone and francophone minorities are consulted on the quality of services: could we not refer to “anglophone and francophone populations” rather than just minorities?

Still with respect to S-209, during the Committee’s various debates, I noted one statement coming up again and again: “...the fundamental purpose of the Official Languages Act, which is to enhance the vitality and protect the rights of official language minority communities.” (This has also been adopted by other parliamentary bodies, such as the Office of the Parliamentary Budget Officer in its estimate of the bill’s cost.) Such language obviously does not reflect the legal reality that applies to all of the country’s two official language communities.

In the same vein, I recently re-read the press release accompanying the tabling of the 2016-2017 annual report of the Commissioner of Official Languages: it only deals with official language minority communities. Of course, the report itself addresses other issues, but is the absence of any mention of them in the press release not indicative of a certain imbalance?

Lastly, having read the Senate Committee’s recent interim report on the views of young Canadians on modernizing the Act, I note that a significant group of the population is not represented: among those whose vision and experience are reported are “French-speaking youth in minority communities outside Quebec,” “English-speaking youth in Quebec,” and “young francophiles outside Quebec and immigrants”; where are Quebec’s francophones?

Consequences of the provincialization of the federal approach

By failing to mention the country’s two major linguistic communities as such, and not only in the context of a provincial majority/minority report, by failing to refer to rights associated with language, by discussing only minority rights, the federal approach

² Under s. 82 of the Act, Parts I to V of the Act prevail over all other federal acts and regulations, except the Canadian Human Rights Act. It seems to me that the objective dimension of the provisions of these parts plays a role in the quasi-constitutional status conferred on them here.
excludes Quebec francophones from the issues and debates affecting the place of the French language within Canada’s language regime. In doing so,

- this overlooks that part of the Canadian population that has played a leadership role in establishing official bilingualism in the country, and whose contribution is crucial to the full achievement of the objectives of this system. In more political terms, this legitimizes the isolationist position of Quebec governments on the language issue, while Quebec should feel that it has a stake, not only in the situation of francophone minorities outside the province (which has been underway for quite a few years), but also in the federal language regime as a whole (e.g., Quebec could demand greater use of French in the federal public service, an issue that directly concerns the participation of French-speaking Canadians - therefore the majority of Quebeckers - in running the country);

- Quebeckers, including the political classes, continue to have a poor understanding of federal language rights; such ignorance has the effect of undermining full respect of these rights (it is difficult for someone to exercise their rights when they are unaware of them) and the proper functioning of a democratic society (for example, it is difficult to properly discuss the “national question” without knowing the facts); and

- this encourages civil society to embrace provincialization, which in turn legitimizes the vision of a Canada that does not include Quebec as the core of the country’s francophone community. Words are important: how, for example, can an Association des théâtres francophones du Canada, or an Association de la presse francophone, not include representatives from Quebec? An uninformed reader must have a lot of trouble navigating this language that insinuates the near-recognition of a separate Quebec.

Of course, the provincialist approach reflects the way French Canada has evolved, mainly with respect to Quebec nationalism; but the federal government must respect its role and its constitutional/legislative mandate regarding the pan-Canadian principle of official languages policy.

Proposals for amending the Act

Here I will only discuss possible amendments that I believe would be the most promising in terms of the general objective of this brief, namely a rebalancing of the federal approach.

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3 For example, the recent Policy on Québec Affirmation and Canadian Relations states that the Canadian Constitution “does not distinguish between the minority French-speaking and English-speaking communities.” Such an assertion is false: section 59 of the Constitution Act, 1982, which concerns language rights in education, provides for a different implementation for Quebec: the “first language learned and still understood” (mother tongue), as a criterion for access to official language minority schools, applies to Quebec only if Quebec authorizes it, which it never has. Applying such a criterion in Quebec would considerably increase the number of English-language school rights holders, so the Constitution has therefore taken into account the province’s linguistic reality in this area.
1) **Insertion of an Official Languages Policy**

The language issue is a sensitive one in Canada and can often result in political positions that influence the implementation of the Act, which is probably behind the provincialization of the current federal approach. It is important, of course, for governments to have some flexibility in implementing policies on complex issues, but not to the point where the spirit and fundamental intent of the legislation is lost. So, in order to ensure full compliance with the Act in this regard, would it not be appropriate to include a vision statement and broad policy objectives to clarify the context in which the government is to act?

Such an approach has been adopted, for example, in the case of the *Broadcasting Act*. The general provisions of this legislation include a Canadian Broadcasting Policy, which clearly sets out, among other things, the objectives that the Canadian broadcasting system must strive to achieve.

For its part, an Official Languages Policy could certainly **include the content of the preamble to the current Act**⁴ (should the preamble then be removed?), which sets out the objectives specific to each part of the Act. But also, **ahead of that, it could present the elements constituting the fundamental raison d’être of Canada’s language regime**. These would mainly refer to

- the presence of two major linguistic communities in the country, defined on the basis of an open and inclusive vision of the official language (official language does not necessarily mean mother tongue; once established, the official languages belong to all Canadians);
- the government’s desire to ensure peaceful and effective coexistence between the two groups; and, to this end,
- the primary need to ensure that federal government institutions are truly bilingual, meaning that their structures and practices fully reflect both languages.

Only such institutions can respect their role and mandate as

- the cornerstone of official bilingualism (in parliamentary proceedings, in legislative and other instruments, in the administration of justice, language of service, language of work), and
- providers of effective support for the advancement of English and French in Canadian society (support for minorities, enhancement of linguistic duality).

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⁴ Of particular note is the pan-Canadian approach in the preamble: for example, it states the federal government’s commitment to enhancing the vitality and supporting the development of English and French linguistic minority communities “as an integral part of the two official language communities of Canada.”
I would also think it appropriate to include in the Policy the **need to adequately inform Canadians of their language rights under the Act, and of the vision behind them.** As studies in psycholinguistics show, the relationships between different linguistic groups in a given society are complex and often sensitive. Consequently, it is all the more necessary for everyone to know and understand the extent of the rights they enjoy and the nature of the communities involved. Too often - on the ground, in the media - there is a lot of ignorance about this dual reality. I repeat, how can someone exercise a right if they are not aware of it? How can we support communities whose existence or vitality we are not even aware of?

2) **Horizontal governance**

The preceding aims to put forward an overall vision while reinforcing the respective importance of each component of the Act’s various parts. **Consequently, this requires clearly defined horizontal governance/coordination within the federal government.** The way this governance has evolved has been particularly difficult to follow in recent years. Different models could be examined here, the essential being that the model chosen be sufficiently defined to ensure the effective alignment of key institutions (Canadian Heritage, Treasury Board, Justice), both in terms of policy directions and accountability. Thus, not only would the institution responsible for ensuring such a linkage be specified, but its powers and obligations as well, similarly to what is set out in Part VIII of the Act for Treasury Board.

I would suggest that these responsibilities and obligations include **the need to ensure that better coordination of the implementation of the various parts of the Act is also promoted within each institution, and not just across the government as a whole.** Better integration - or alignment - of the functions related to the implementation of the Act within each institution would help instill an organizational culture that is systematically conducive to considering official languages issues, whether they relate to service to the public, language of work, support for official language minorities or the advancement of both languages in Canadian society.

3) **Institutional bilingualism**

As mentioned above, only strong institutional bilingualism can meet the basic needs for the country’s English-speaking and French-speaking communities to co-exist. **Moreover, I suppose it is in this spirit that Parliament has specified, in the current version of the Act, that parts I to V of the Act take precedence over the inconsistent provisions of any other federal Act and regulations, with the**

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5 The official languages action plans illustrate some confusion in this regard. If only minorities and second-language learning are discussed, should these plans not be presented as action plans concerning only Part VII of the Act, rather than as general action plans, submitted by a Minister of Official Languages?
exception of the *Canadian Human Rights Act* (s. 82). I believe it is essential to keep this provision in its current form, i.e., in particular, not to include Part VII. This part sets out obligations of means, rather than of results, and the complexity of its interpretation may not respond very well to the nature of section 82.

With regard to additions, my proposals concern parts IV and V of the Act: language of service and language of work.

- **Language of service**
  
  o As has already been suggested by other stakeholders, the obligation of bilingual federal services 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 high level of interaction with the rest of the country make the requirement for bilingualism entirely legitimate.

  o Under section 32, which concerns regulations and criteria, a criterion should be added relating to the existing vitality of the English or French linguistic minority population in the area served. Numbers alone cannot be the only criterion for determining whether there is legitimate demand for bilingual service by an official language minority. Having a school or other institution, for example, reflects the importance of a minority in a given region and can certainly justify the provision of bilingual service. This proposal is already contained in Bill S-209.

- **Language of work**
  
  I believe that the current weaknesses of institutional bilingualism are particularly acute when it comes to language of work. **This situation calls into question a reality of great political and symbolic importance: the ability of federal institutions to guarantee Canadian citizens the opportunity to participate, in their preferred official language, in determining how their country is run. Nothing less.**

  However, language of work represents a highly complex world, involving a wide variety of situations on a daily basis, which may require different approaches in order to ensure full respect for both languages. Given this complexity, often of a psychosocial nature, the implementation of this part of the Act requires, more than any other, **the use of awareness-raising, promotion, oversight and other tools.** Clearly, the government has not kept up in recent years, particularly because Treasury Board’s increasingly limited resources have not allowed it to play a strong support role with each federal institution. However, in September 2017, the government (Privy Council Office) released a situation review report, *The Next Level: Normalizing a Culture of Inclusive Linguistic Duality in the Federal Public Service Workplace.* This report contains highly appropriate recommendations, some
of which could be turned into legislative amendments, which would, among other things, require federal institutions to

- strengthen manager accountability, including through performance reviews;
- identify measures that can help create work environments that are “conducive to the effective use of both official languages,” such as reviewing the language requirements of positions to promote receptive bilingualism practices; and
- take into account the evolution of electronic communications, which can help expand opportunities to use both languages.

4) Advancement of English and French

Part VII of the Act focuses on provincial minorities and the enhancement of English and French in Canadian society. In both cases, and as reflected by the title of this part, the federal government is called upon to advance both languages. **There is broad latitude for these advancement activities, with this part referring to taking action rather than achieving specific results, and that is why the Act must be as prescriptive as possible here to ensure that the “positive measures” taken are truly meaningful.**

As a result:

- **the Act should require regulations to be made:** these would specify interdepartmental coordination measures and consultation mechanisms in keeping with what would be stated under horizontal governance; it would also identify positive measures (the *Guide for Federal Institutions on Part VII* could certainly be used as a model in this regard);

- **Section 43 of the current Act lists a series of measures that the Minister of Canadian Heritage can consider “appropriate to advance the equality of status and use of English and French in Canadian society.”** However, there seems to be something missing from this list: a measure that would encourage **greater federal-provincial cooperation in anything that could have an impact in terms of strengthening linguistic duality.**

One example of such cooperation is, of course, the Ministerial Conference on the Canadian Francophonie. But I suggest here that the federal government be called upon to promote other types of cooperation. These could include the **sharing of good practices:** the federal government is already quite experienced in this area and has developed policies and administrative tools; could it not share its expertise with certain provinces? Of course, this also applies the other way around.

I wish to note that the new legislation should not necessarily define a specific spectrum of possible collaborations. The intent here is to require the federal government to promote these collaborations more broadly, a promotion that would
take into account the vast potential of existing knowledge in the country in this area. In fact, could the language policies of the country’s various governments not support each other rather than ignore each other?6

Conclusion

I hope that it has been clear that my brief is in no way intended to create competition between the need for high-level institutional bilingualism and the need for greater support for official language minorities. It simply states that an effective federal official languages policy, which of course includes minorities, must be part of a pan-Canadian approach. It seems to me that legislative amendments can help provide such assurance.

That way, modernizing the Act can also mean restoring its original, pan-Canadian orientation.

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6 For example, just recently, I was struck to hear experts discuss the issue of legislative bilingualism in Quebec - an issue that has caused a flurry of nationalist sentiment - without really being able to describe, in concrete terms, what such bilingualism could imply. More frequent exchanges between subject-matter experts in both levels of government could perhaps facilitate discussions, help calm emotions and move this issue forward.