BRIEF SUBMITTED TO THE STANDING SENATE COMMITTEE ON OFFICIAL LANGUAGES

FOR ITS STUDY ON THE MODERNIZATION OF THE OFFICIAL LANGUAGES ACT

Consortium national de formation en santé    Société Santé en français

Senate of Canada, Ottawa
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(A) Introduction

Founded in 2003, the Consortium national de formation en santé (CNFS) is a national group of 11 colleges and universities that offer French-language programs of study in various health-related fields and regional partners that work to improve access to these training programs across Canada.2

The Société Santé en français (SSF) is a dynamic national group of 16 provincial, territorial and regional networks that connects communities with governments.3 The SSF’s mission is to help improve the health status of francophones and Acadians.4 Since 2002, the SSF has helped coordinate partners seeking to improve access to French-language health services in the provinces and territories where French is not the majority language.

Together, the CNFS and the SSF strive to improve access to high-quality French health services and ensure more professionals can provide these services to francophone minority communities. The activities of the CNFS and SSF are complementary and synergistic.

The CNFS and SSF respectfully submit this brief to the Standing Senate Committee on Official Languages for its study on the modernization of the Official Languages Act (OLA).

The CNFS and SSF are members of the Fédération des communautés francophones et acadienne du Canada (FCFA) leaders’ forum. As such, both organizations were consulted by the FCFA on the modernization of the OLA. They fully support the FCFA’s recommendations, which were provided in the brief it submitted to the Committee on March 26, 2018, including those calling on Parliament to thoroughly rethink the following:

1. the implementation of the OLA, by making a central agency responsible for implementing it, giving official-language minority communities the right to participate in that implementation and adding new oversight and reporting mechanisms; and

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1 The members of the CNFS are as follows: Campus Saint-Jean (Alberta), University of Saint-Boniface (Manitoba), University of Ottawa (Ontario), Laurentian University (Ontario), La Cité (Ontario), Collège Boréal (Ontario), University of Moncton (New Brunswick), Centre de formation médicale du Nouveau-Brunswick (New Brunswick), Collège communautaire du Nouveau-Brunswick (New Brunswick), Collège de l’Île (Prince Edward Island) and Sainte-Anne University (Nova Scotia).
2 As of April 1, 2015, the CNFS is part of the Association des collèges et universités de la francophonie canadienne.
3 The members of the SSF are as follows: Partenariat communauté en santé (Yukon), Réseau TNO santé en français (Northwest Territories), Résefan (Nunavut), RésoSanté Colombie-Britannique (British Columbia), Réseau santé albertain (Alberta), Réseau Santé en français de la Saskatchewan, Santé en français (Manitoba), Réseau du mieux-être francophone du Nord de l’Ontario, Réseau franco-santé du Su de l’Ontario, Réseau des services de santé en français de l’Est de l’Ontario, Société Santé et Mieux-être en français du Nouveau-Brunswick (New Brunswick), Réseau Santé en français ÎPE (Prince Edward Island), Réseau Santé—Nouvelle-Écosse (Nova Scotia) and Réseau santé en français Terre-Neuve-et-Labrador (Newfoundland and Labrador).
4 Société Santé en français, Statuts et règlements, 2017, s. 2.1. [In French only]
2. the rights it confers, the duties it imposes and the principles underlying it.\(^5\)

This brief presents further, complementary recommendations from the CNSF and SSF for the Committee’s study on the modernization of the OLA.

**(B) Background**

Health care is not an enumerated legislative power in the *Constitution Act, 1867*. Instead, authority over health care is shared by the two orders of government exercising their respective legislative powers.\(^6\) For example, the provinces have the power to make laws in relation to “The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals,” “Property and Civil Rights in the Province” and “Generally all Matters of a merely local or private Nature in the Province.”\(^7\)

As for Parliament, it has the power to make laws in relation to “Quarantine and the Establishment and Maintenance of Marine Hospitals” and more generally “for the Peace, Order, and good Government of Canada” respecting health issues of national import.\(^8\) Parliament is empowered to make laws respecting health benefits for employees in federally regulated sectors, such as banking, aeronautics and interprovincial transport. Parliament can also legislate on matters concerning veterans, patents, Aboriginal peoples and immigrants and therefore on issues relating to their health.\(^9\) Finally, Parliament can enact criminal law, which gives it the power to make laws governing dangerous behaviour such as the use of narcotics.\(^10\)

As the Supreme Court of Canada noted in the *PHS Community Services Society* case, this sharing of powers between Parliament and the provincial legislatures means that the “provincial health power is broad and extensive. It extends to thousands of activities and to a host of different venues.”\(^11\) That said, the federal government has the power to spend in whatever spheres of activity it chooses and to attach conditions to that spending, including conditions that would otherwise lie within provincial jurisdiction. This shows that the federal government is very influential in the health care sector.

\(^{5}\) Fédération des communautés francophones et acadiennes du Canada, *Giving New Momentum to Canada’s Linguistic Duality! For a Modern and Respected Official Languages Act*, Brief submitted to the Standing Senate Committee on Official Languages for its study on Canadians’ views about modernizing the *Official Languages Act*, March 26, 2018 [FCFA, Giving New Momentum to Linguistic Duality].


\(^{7}\) *Constitution Act, 1867*, (U.K.), 30 & 31 Victoria, c. 3, reprinted in RSC 1985, Appendix II, No. 5, ss. 92(7), 92(13) and 92(16).

\(^{8}\) Ibid., s. 91(11) and s. 91, Preamble.

\(^{9}\) Ibid., ss. 91(7), 91(22), 91(24) and 91(25).

\(^{10}\) Ibid., s. 91(27).

\(^{11}\) *Canada (A.G.) v. PHS Community Services Society*, 2011 SCC 44, para. 68.
As a result, the Canada Health Act, while recognizing the provinces’ jurisdiction over health care, sets out the “criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.”\textsuperscript{12} Payment of such a full cash contribution to a province is subject to the requirement that the health insurance plan meet a set of criteria: (a) public administration, (b) comprehensiveness, (c) universality, (d) portability and (e) accessibility.\textsuperscript{13} To meet the universality criterion, “the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan on uniform terms and conditions.”\textsuperscript{14} The accessibility criterion requires the provincial health insurance plan to “provide for insured health services on uniform terms and conditions and on a basis that does not impede or preclude, either directly or indirectly whether by charges made to insured persons or otherwise, reasonable access to those services by insured persons.”\textsuperscript{15}

Yet multiple studies conducted in Canada and elsewhere in the world show that language barriers have significant negative impacts on access to health services, quality of care, respect for basic rights, user and stakeholder satisfaction, health status and, above all, treatment outcomes.\textsuperscript{16} Unfortunately, we know that access to services of equal quality in both official languages is a major challenge for francophone communities and that francophone and Acadian minority communities are experiencing health care inequities.\textsuperscript{17} Yet the language barriers they face are avoidable and correctable.\textsuperscript{18} Promoting equity in health care in these communities means improving their access to permanent, regular provision of health services in French.\textsuperscript{19}

We also know that people who face language barriers are at higher risk of experiencing errors involving medication, complications and unwelcome events. Users who have limited knowledge of English often have their right to informed consent and privacy rights infringed.\textsuperscript{20} The negative impacts of language barriers on access to health care and user satisfaction therefore hurt service quality, put people at risk and affect the well-being of francophone and Acadian minority communities.

\textsuperscript{12} \textit{Canada Health Act}, RSC 1985, c. C-6, s. 4.
\textsuperscript{13} Ibid., ss. 7–12.
\textsuperscript{14} Ibid., s. 10.
\textsuperscript{15} Ibid., s. 12(1)[a].
\textsuperscript{17} Société Santé en français, “Cadre de mise en œuvre des services de santé en français,” 2018. Draft document. [In French only]
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
Accordingly, the conditions of universality and accessibility attached to certain federal health care grants and payments to the provinces do not seem to provide a remedy for francophone communities in Canada. That is why the late Mauril Bélanger introduced Bill C-407, An Act to amend the Canada Health Act (linguistic duality), which would have added “linguistic duality” as a criterion that provincial health insurance plans must meet in order to receive a full cash contribution.21 The bill was never passed.

Separately, the Official Languages Act requires federal institutions to take “positive measures” to carry out the federal government’s commitment to “enhancing the vitality of the English and French linguistic minority communities in Canada,” “supporting and assisting their development” and “fostering the full recognition and use of both English and French in Canadian society.”22

This general duty has likewise failed to force the federal government to take the lead in supporting francophone minority communities with health care matters.

Against this backdrop, the CNFS and SSF believed it was critical to appear before the Committee on November 6, 2017, to deliver their recommendations regarding the modernization of the OLA.23 The CNFS and SSF would now like to clarify their recommendations and add new ones.

(C) The CNFS and SSF’s recommendations

1. The OLA must be modernized so that it is implemented and enforced horizontally by a central agency of the government. This agency will ensure both the implementation of a federal official languages action plan and full application of and compliance with the OLA. It must require the federal government to play a leadership role on official languages.

   All it would take to implement this recommendation is to amend section 46 of the OLA. One option would be to adopt the approach used in section 2 of New Brunswick’s Official Languages Act, which specifically assigns responsibility for administering it to one person.24

   Under the federal OLA, Parliament could add a new subsection 46(1) providing that “the President of the Treasury Board is responsible for administering this Act.” In addition, rather than limiting this responsibility to “Parts IV, V and VI” as is currently the case, the OLA should make the President of the Treasury Board responsible for “the general direction and coordination of the policies and programs of the Government of Canada relating to the implementation of this Act.”

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22 Official Languages Act, RSC 1985, c. 31 (4th Supp.), s. 41 [OLA].
23 Standing Senate Committee on Official Languages, 1st Session, 42nd Parliament, November 6, 2017.
24 Official Languages Act, SNB 2002, c. O-0.5, s. 2.
Health care for official-language minority communities is funded by Health Canada through the Official Languages Health Contribution Program. This program is part of the 2018–2023 Action Plan for Official Languages: Investing in Our Future, coordinated by the Department of Canadian Heritage. Currently, the Department of Canadian Heritage must “encourage and promote” Health Canada’s compliance with Part VII of the OLA and take positive measures to enhance the vitality of francophone minority communities. Yet, the Treasury Board is the only central agency established by legislation that has the necessary coercive powers and influence to ensure implementation of and compliance with the OLA.  

Moreover, the Action Plan for Official Languages is clearly helping enhance the vitality of francophone minority communities in Canada. The SSF and CNFS receive funding from Health Canada under the Action Plan. In turn, they help Health Canada meet its obligations under Part VII of the OLA. 

To ensure greater certainty in the health care sector for francophone minority communities, the Action Plan should be included in a provision of the OLA, and this provision should expressly state that health care is a priority policy area. 

This section could be worded as follows: “The federal government shall adopt an Action Plan for Official Languages that addresses priority policy areas, including job creation, employability and economic development; service provision; immigration; education; health care; justice; culture; and language of work, and sets out mechanisms to enable the English and French minority communities to take charge of their development.” 

2. The OLA should require federal institutions to collect data on official languages and ensure that they are analyzed in a way that is useful to communities. 

Access to meaningful data on francophone minority communities is critical to implementing the OLA, not only in the health care sector, but in every other area. The CNFS and SSF therefore recommend that the OLA include a provision that stipulates a general data collection duty. 

This provision could be worded as follows: “Federal institutions are generally required to collect, compile, publish and support the analysis of data on the official languages and the English and French linguistic minority communities in Canada in order to inform the implementation of these institutions’ duties under this Act.” 

3. The OLA should provide that federal institutions must actively offer services in a linguistically and culturally appropriate way.

Many stakeholders have already condemned the implementation problems relating to federal institutions’ duty to “actively” offer their services. Active offer plays a vital role in breaking down language barriers, including in the health care sector.

The CNFS and SSF believe that one way to clarify this duty so that federal institutions better understand and implement it is to expressly provide in the OLA that services must be actively offered in a culturally and linguistically appropriate fashion.

4. The OLA should define the population of a francophone minority community more flexibly and broadly, and go beyond a quantitative calculation when determining whether services are provided in French.

In this case, the CNFS and SSF are merely reiterating the position taken by the FCFA, which has been very clearly stated: “Most of the changes proposed by [Bill S-209, An Act to amend the Official Languages Act (communications with and services to the public)] should be incorporated into a modernized OLA to better regulate the government’s duties under parts IV and XI, with respect to consultations and draft regulations.” These amendments would also have a major impact in the health care sector, as they would enable the government to better determine who has a right to receive services in French.

5. The OLA should provide for accountability mechanisms, performance measures and effective and ongoing mechanisms for consulting with francophone minority communities.

The OLA includes only one duty to consult. Under subsection 42(2), the Minister of Canadian Heritage “shall take such measures as that Minister considers appropriate to ensure public consultation in the development of policies and review of programs relating to the advancement and the equality of status and use of English and French in Canadian society.” The format and scope of these consultations depends on what the Minister considers “appropriate.” The OLA provides for other consultations, but these are optional and do not in fact take place.

The CNFS and SSF therefore recommend that Parliament add a general duty to consult under which “federal institutions must consult the English and French minority communities, the

26 See, for example, Standing Senate Committee on Official Languages, *Modernizing the Official Languages Act: Seeking areas of interjurisdictional harmonization*, Brief submitted by the French Language Services Commissioner to the Standing Senate Committee on Official Languages for its study on the modernization of the *Official Languages Act*, June 11, 2018, paras. 53–79 [French Language Services Commissioner, *Seeking areas of interjurisdictional harmonization*].

27 FCFA, *Giving New Momentum to Linguistic Duality*, para. 128; French Language Services Commissioner, *Seeking areas of interjurisdictional harmonization*, paras. 4–52.

28 See, for example, sections 45 and 84 of the OLA.
anglophone and francophone minorities, certain organizations or the general public, as the case may be.”

Finally, many stakeholders have asked you to recommend that the OLA better regulate federal-provincial/territorial agreements. While these agreements are a major source of funding and financial support for the provinces and territories, they do not necessarily serve the needs of francophone minority communities. They are not transparent, and communities are not consulted while they are being negotiated.

The CNFS and SSF therefore recommend that a new provision be added to the OLA stipulating the following: “Any agreement between the federal government and a province or territory that provides for a transfer of funds must contain a binding language clause that advances the equality of status and use of English and French in Canadian society and enhances the vitality of English and French minority communities and supports and assists their development.” This provision should also include the following wording: “These clauses shall (a) allocate specific funds for English and French minority communities; (b) provide for consultations with community representatives; and (c) set out the accountability responsibilities of both levels of government.”

6. Finally, the OLA should provide support for French-language post-secondary education.

French-language education is the key to ensuring respect for the official languages and their viability. Including this support in the OLA would strengthen the ability of French colleges and universities to build their capacity to train more professionals to provide services in both official languages, including in the health care sector.

Conclusion

One of the OLA’s goals is to enhance the vitality of official-language minority communities. Access to services in one’s language is an essential part of community vitality. We have demonstrated in this brief that the modernization of the OLA could significantly improve access to French-language services in the health care sector. It is time to realize the full potential of the OLA by considering its impact on every issue that affects the vitality of official-language communities.

The SSF and CNFS reiterate their support for the recommendations of the FCFA and add their own, which are as follows:

1. Make a central agency responsible for implementing the OLA.

2. Require federal institutions to collect official-languages data.
3. Require federal institutions to actively offer services in a linguistically and culturally appropriate way.

4. Define the population of a francophone minority community more flexibly and broadly, and go beyond a quantitative calculation when determining whether services are provided in French.

5. Provide for accountability mechanisms, performance measures and effective and ongoing mechanisms for consulting with francophone minority communities.


The SSF and CNFS hope to see the OLA modernized and would like to be partners in this process. We will continue to support national efforts in this regard and will share this brief with all other stakeholders.