August 14, 2018

Standing Senate Committee on Official Languages
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Chairperson and members of the Committee:

First, I would like to thank you for inviting me to appear before your committee on June 11, 2018.

I am sending you this letter to expand on my testimony.

If you have any questions about this letter or any other matter, please contact me through my assistant, Mary Jane Hee Fa Chung, at 416-847-1515 ext. 103 or maryjane.chung@csfontario.ca.

I will be happy to meet with you again at your convenience.

For reference, I am enclosing a French version of this letter for you and your staff.

Yours truly,

François Boileau
French Language Services Commissioner
1. Harmonization of the federal and provincial/territorial linguistic structures

Senator Rose-May Poirier asked Commissioner d’Entremont why:

the federal legislation doesn’t reflect the principles that make New Brunswick unique. Could you elaborate on that? If this deficiency were corrected, what would it mean for New Brunswick and the rest of Canada?1

The French Language Services Commissioner agrees with the response of his New Brunswick colleague: the residents of New Brunswick should be able to obtain federal services in both official languages anywhere in the province, as is the case for provincial services.2 The minority-language service delivery systems need to be harmonized. This applies not only to New Brunswick but also to the territories and the other provinces, such as Ontario. In his annual report entitled FLSA 2.0, the French Language Services Commissioner recommended that the Legislature remove the concept of “designated areas” from the French Language Services Act. Section 5(1) of the Act reads as follows:

A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule. (Our underline)

In other words, only members of the public in those areas3 have the right to receive services in French from the offices of government agencies. We note that members of the public also have the right to receive services from a government agency’s head or central office anywhere in Ontario.

In his 2015-2016 annual report, the Commissioner recommended that the Minister Responsible for Francophone Affairs propose the designation of the entire province of Ontario under an amended French Language Services Act. If the Ontario government makes the entire province a “designated area,” it will

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1 Canada, Standing Senate Committee on Official Languages, Minutes, 42nd Parliament, 1st Session (June 11, 2018) (Rose-May Poirier) [Committee, June 11, 2018].
2 See Canadian Charter of Rights and Freedoms, s. 20(2).
3 To be included in the Schedule of designated areas in the FLSA, an area must have a Francophone population that numbers at least 5,000 or makes up at least 10% of the total population. In fact, these statistical criteria come from the Royal Commission on Bilingualism and Biculturalism, whose members advocated the establishment of bilingual districts in which all three levels of government would have had an obligation to serve the public in both official languages.
then be able to do as the federal government does and identify the locations where there is significant demand by analyzing demographic statistics (bearing in mind the Inclusive Definition of Francophone) and taking institutional vitality criteria into consideration. Although Ontario does not have the same constitutional status as New Brunswick with regard to official languages, the federal *Official Languages Act* (OLA) must be flexible enough to accommodate extended and comprehensive delivery of federal services in the province when it enhances its legislative framework for provincial French-language services.

The two levels of government should be able to harmonize the provision of their particular services by working together where appropriate to keep costs down, through the creation of multiservice centres for example, and consequently improve the system of public services in general, as is currently the case in Manitoba with its Bilingual Service Centres.4

### 2. Amendment of the OLA to support the provinces and territories in creating new language rights

Senator Raymonde Gagné said that she thought the

> [...] proposal to create a voluntary regime for adopting official languages programs was interesting. One of the questions I asked myself was whether we are running the risk of the federal government investing more in areas the provinces are already involved in. Is there a risk of official language minority communities being disadvantaged and left out by the federal government?5

In some provinces, such as Ontario and Manitoba, Francophone communities enjoy language rights that are protected by a strong provincial legislative framework. However, that is not the case in every part of Canada.

The recommendation in Part 4 of our brief dealt with the creation of new rights through legislation, based on the principle of advancement set out in subsection 16(3) of the Charter. That subsection states that “[n]othing in th[e] Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.” Under the principle of advancement, constitutional provisions regarding the rights, status and privileges of English and French constitute minimum guarantees which

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5 Committee, June 11, 2018 (Raymonde Gagné).
Parliament and legislatures are free to improve upon, through their legislative action, in order to promote substantive equality of the official languages.

However, some provinces and territories do not have the know-how or resources to advance language rights; in those cases, section 16(3) of the Charter has less impact. The OLA needs to be amended to include standard clauses that those provinces and territories can adopt and implement in their jurisdiction, with the federal government’s support. For the federal government, in contrast to the provinces and territories, advancing language rights is not a suggestion: by virtue of Part VII of the OLA, the “authority” mentioned in subsection 16(3) of the Charter actually becomes a duty for the federal government. Even though language rights are not its private preserve, the federal government has a quasi-constitutional obligation to do more to encourage the provinces and territories to take measures to advance the substantive equality of English and French in Canada.

The purpose of the French Language Services Commissioner’s recommendation is, first of all, to assert that language rights can be specified in legislation and operationalized at both the provincial and federal levels. The second purpose is to recognize that not all provinces and territories have the resources to develop new rights. With a view to enhancing section 16(3) of the Charter and cooperative federalism, the federal government could provide those provinces and territories with logistical and financial support.

The French Language Services Commissioner therefore recommended that Parliament add some new sections to Part VII of the OLA to establish an opt-in system of new language rights and obligations for the provinces and territories. The new sections would contain standard clauses, which the provinces and territories could decide to include in their own legislation, in whole or in part, subject to their own priorities, in order to guarantee new language rights for their official language minority communities, particularly in health, public services and access to justice. The federal government, for its part, would be required under those new sections to guarantee some level of financial and logistical support for the

6 This position is based on our interpretation of language rights case law. However, we are aware that, in the view of some experts, this position may be constrained by subsection 82(1) of the OLA (which does not mention Part VII).

82 (1) In the event of any inconsistency between the following Parts and any other Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:
(a) Part I (Proceedings of Parliament);
(b) Part II (Legislative and other Instruments);
(c) Part III (Administration of Justice);
(d) Part IV (Communications with and Services to the Public); and
(e) Part V (Language of Work).

7 These areas were identified as top priority in the Action Plan for Official Languages 2018–2023: Investing in Our Future.
provinces and territories to ensure greater consistency in the delivery and quality of provincial services provided in both languages.

This is what the new sections might look like:

46. A province or territory may freely agree to adopt the provisions of this section for the benefit of the official language minority community.

   a) a province or territory that agrees to adopt a or multiple provisions of this section must pass a law or modify an existing law to that effect.

   b) a province or territory that agrees to adopt a or multiple provisions of this section must enter into an agreement with the Department of Tourism, Official Languages and La Francophonie to that effect. The agreement must refer to the adopted provisions in accordance with this section.

47. When it enters into an agreement in accordance with subsection 46. b), the Department of Tourism, Official Languages and La Francophonie ensures appropriate financial and logistical support.

48. A province or territory may notify at any time thereafter the Minister of Tourism, Official Languages and La Francophonie that it accepts the obligations arising from the provisions of any other subsection in this part that was not specified in its ratification agreement.

49. No provision in this part shall be construed as limiting or derogating from the other rights guaranteed by the Act.

Justice

50. The parties agree to translate provincial and territorial statutes into the minority official language.

51. The parties agree, in civil proceedings,

   (a) to ensure that courts, at the request of either party, conduct the proceeding in the minority official language;

   (b) to ensure that any party to a proceeding that is required to appear in court may use the minority official language without incurring additional costs;

   (c) to allow documents and evidence to be produced in the minority official language,

   if necessary through the use of interpreters and translations.

52. The parties agree, in proceedings before administrative tribunals,

   (a) to ensure that the tribunals, at the request of either party, conduct the proceeding in the minority official language;

   (b) to ensure that any party to a proceeding that is required to appear in person may use the minority official language without incurring additional costs;

   (c) to allow documents and evidence to be produced in the minority official language,

   if necessary through the use of interpreters and translations.
Public Services

53. The parties agree to improve the provision of provincial or territorial public services in the minority official language in person or in writing.

54. The provision of new provincial or territorial public services shall be preceded by active offer of the service.

Media

55. The parties agree to encourage and facilitate the production and distribution of audio and audiovisual works in the minority official language.

56. The parties agree to extend existing financial supports to include audiovisual productions in the minority official language.

57. The parties agree to encourage and facilitate the establishment and maintenance of at least one minority-official-language media outlet.

Health

58. The province or territory improves the delivery of health services in the minority official language in health care facilities such as hospitals, community care centers, and long-term care facilities.

Accountability

59. Provinces and territories that adopt a standard provision and receive financial and logistical support from the Minister shall submit to the Minister periodically, in a form to be jointly determined, a report on the policy implemented and on the measures taken to apply the provisions adopted.

It should be noted that this part is incomplete and is provided only as an example. We encourage the Committee, and subsequently Parliament, if such a part is deemed useful, to include additional standard provisions.

3. A central agency should have governance of the OLA

Senator Raymonde Gagné also asked the following question:

What institution should be entrusted with implementing the Official Languages Act?8

The Commissioner’s response at the hearing was as follows:

We need a central agency. When we had what we called the “Dion plan,” it worked, as Mr. Dion was President of the Treasury Board. Everything that came into cabinet went through the Treasury Board, so any project or initiative had to have that lens. Otherwise, the project was returned before being added to the binder presented to cabinet.

That responsibility should be entrusted to a central agency. That is clearly important. That is why Ontario recommended what we refer to as the “francophone lens,” which is a tool developed by the Ontario’s

8 Committee, June 11, 2018 (Raymonde Gagné).
Ministry of Francophone Affairs. We recommend that this lens now be imposed by cabinet to any initiative and any regulations or bill presented to cabinet. We are not quite there yet, but we are working toward it.9

The OLA assigns responsibility for its implementation to the Treasury Board and to Canadian Heritage,10 but it does not impose any specific obligations on them. The OLA merely stipulates what the Treasury Board may do – it does not set out any concrete obligations.11 In other words, the OLA merely suggests that the Treasury Board implement the Act, but does not compel it to do so.

This causes a number of problems since, if the Treasury Board does not give priority to implementing the OLA, it becomes Canadian Heritage’s responsibility.12 Canadian Heritage does not have, and has never had, the authority or influence over other departments needed to do the job.

When the Honourable Stéphane Dion was President of the Privy Council, that central organization was able to play a more decisive role. Either the Privy Council or the Treasury Board, as central agencies, may ensure that federal government departments and other institutions fulfil their obligations under the OLA. At that time, the President of the Privy Council, also the minister of official languages, used the official languages prism when evaluating all cabinet decisions – new laws, regulations, directives, policies, programs and services.

In the French Language Services Commissioner’s opinion, the real work of implementing the OLA should rest with the Treasury Board for a number of reasons, including the fact that it turns public policy into concrete action, its enabling legislation gives it broad oversight powers, and it is ultimately responsible for budgets. If the new obligations in the OLA are clear regarding the introduction of new programs and services, in harmony with the provinces and territories, the Treasury Board’s oversight powers and the other powers mentioned in Part VIII might be sufficient, as long as the word “may” in subsection 46(2) is replaced with “shall.”

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9 Committee, June 11, 2018 (François Boileau).
10 In view of the cabinet shuffle, the new Department of Tourism, Official Languages and La Francophonie may inherit this role.
11 OLA, s. 46(2).
12 We are aware that the government recently passed an order-in-council transferring responsibility over the OLA from the Minister of Canadian Heritage to the Minister of Tourism, Official Languages and the Francophonie.
4. Immigration is essential to the full development of Francophone communities

At the hearing, Senator Paul McIntyre said the following:

There is another important point: immigration and its impact on New Brunswick’s linguistic immigration. According to the SANB, and I quote: New Brunswick’s francophone community has not benefited from immigration as much as the Anglophone community. How could the federal Official Languages Act help remedy the situation?13

Immigration by French-speakers is essential to ensure the growth of Ontario’s Francophone community. Greater co-operation between all levels of government will help maximize the services available to immigrants at every stage of the immigration process.

It is crucial for Ontario, the other provinces and the territories to extract specific commitments from the federal government in this area of shared jurisdiction. The two levels of government must take concerted action to maximize their efforts to promote, recruit, select, settle, integrate and retain Francophone newcomers.

In March 2017, at the Ministerial Conference on the Canadian Francophonie, the French Language Services Commissioner pointed out that without concrete action plans and timetable, Canada would never be able to meet the national Francophone immigration target, especially in Ontario. Hence, it is critical for the various levels of government to join forces and immediately start work on developing and implementing pragmatic, measurable solutions.

In his 2016-2017 annual report, the French Language Services Commissioner recommended the establishment of an advisory committee and the development of comprehensive and interministerial strategies regarding Francophone immigration to Ontario.14 In his 2017-2018 annual report, he repeated this recommendation and also pointed out that without such a strategy, which would include federal-provincial co-operation, the demographic weight of Ontario’s Francophone communities would continue to decline at an alarming rate. The situation is obviously the same for other provinces’ Francophone communities.

In Part 3 of his brief, the French Language Services Commissioner called for the addition of new sections to the OLA to revamp the system of federal-provincial-territorial agreements. We recommend a more

13 Committee, June 11, 2018 (Paul McIntyre).
robust framework for the federal government’s role in the adoption and implementation of federal-provincial-territorial agreements. Such agreements could formalize the cooperative relationship that exists (or should exist) between the levels of government, particularly with respect to immigration.

5. The role and powers of the Commissioner of Official Languages

Senator Lucie Moncion and Senator Ghislain Maltais both asked questions about the Commissioner’s role and powers:

Senator Moncion: Could you talk to us about your powers in terms of complaints, and the province’s judicial power compared to the power set out in the Official Languages Act?

[...]

Senator Maltais: When a piece of legislation does not provide punitive power, how can it be enforced?15

It is important to understand that the Commissioner of Official Languages, like the French Language Services Commissioner, is first and foremost an ombudsman. He or she is not the spokesperson of the official language communities.

An ombudsman was what Parliament had in mind when it created the position of Commissioner of Official Languages. In the parliamentary debates on the first Official Languages Act, the Honourable Gérard Pelletier, then Secretary of State, stated that the Commissioner of Official Languages of Canada would be “the guardian of the language rights of the citizen in the latter’s dealings with parliament or the federal government, or, to borrow a term used by the Royal Commission, he [would] act as a ‘linguistic ombudsman’.”16 In establishing the Office of the Commissioner of Official Languages, the government was acting on the recommendation of the Royal Commission on Bilingualism and Biculturalism “that the Governor in Council appoint a Commissioner of Official Languages charged with ensuring respect for the status of French and English in Canada.”17 The Royal Commission described the Commissioner’s role as follows:

In the first place, he will be the active conscience—actually the protector—of the Canadian public where the official languages are concerned. His duty will be to examine particular cases in which the federal

15 Committee, June 11, 2018 (Lucie Moncion, Ghislain Maltais).
authorities have failed to respect the rights and the privileges of individuals or groups of Canadians. The Commissioner will in a sense play the role of a federal “linguistic ombudsman” by receiving and bringing to light the grievance of any residents concerning the official languages.\textsuperscript{18}

While ombudsmen take different forms and have different roles and functions around the world, the following definition, proposed by professors Roy Gregory and Philip Giddings,\textsuperscript{19} sets out the essential elements of an ombudsman’s office:

An Office headed by an independent, non-partisan and high level public official or officer of the legislature, provided for by statute or in the constitution, which supervises the administration and deals with complaints from any person or body of persons about alleged administrative injustices and maladministration, or acts on its own motion; has the power to investigate, issue reports, criticise, publicise, conciliate and make recommendations for remedial and corrective action; but is not a court of tribunal and is not authorised to give instructions, make awards or reverse administrative action.\textsuperscript{20}

The Commissioner must therefore remain independent and impartial throughout the complaint resolution process and in preparing reports. The Commissioner’s procedures must be transparent and fair. As an independent officer of Parliament, the Commissioner bases his actions

[...] on moral imperatives, such as the active promotion of equity and exemplary ethical practices. [He] must carry out [his mandate] independently, objectively, impartially, responsibly and confidentially.\textsuperscript{21}

Independence and impartiality are necessary if the Commissioner is to properly execute his mandate of ensuring that the government fulfils its obligations under the OLA:

56 (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.\textsuperscript{22}

Acting as a “watchdog” and ensuring that federal institutions comply with their obligations under the OLA is one of the Commissioner’s responsibilities; another is to serve as a mediator between complainants and the government and help the parties find common ground. For these purposes, the OLA gives the Commissioner the power to receive complaints (OLA, section 58), conduct investigations (OLA, section 62) and produce reports containing recommendations (OLA, sections 63 and 65 to 67).

\textsuperscript{18} Ibid., p. 140.
\textsuperscript{19} Roy Gregory was Emeritus Professor of Politics at the University of Reading and Director of the Centre for Ombudsman Studies. Philip Giddings is a retired Professor of Politics, a lecturer and a member of the Centre for Ombudsman Studies.
\textsuperscript{22} OLA, s. 56(1).
The Commissioner may also intervene in complainants’ applications for court remedies (OLA, subsection 78(3)). In such cases, the complainants must bear the financial burden, which can be heavy, of ensuring that institutions fulfil their obligations under the OLA.

The Commissioner may also take legal action against federal institutions in the Federal Court (OLA, subsection 78(1)), which may grant such remedy as it considers appropriate and just in the circumstances (OLA, subsection 77(4)). However, the Commissioner has seldom used this power since its introduction in 1988.23

We note that the French Language Services Commissioner and many other ombudsmen do not have the power to initiate legal action.

A few groups that have testified before your committee have pointed out that the Commissioner does not have enough “teeth” and have suggested that he should be given more powers so that he can carry out his statutory mandate more effectively. For example, the organization Santé en français and the Société de la francophonie manitobaine asked you to recommend that Parliament give the Commissioner the power to fine particularly recalcitrant federal institutions.24 The Fédération culturelle canadienne-française asked you to give the Commissioner the ability to impose disciplinary measures.25

The French Language Services Commissioner does not support these proposals. The power to impose sanctions is inconsistent with the Commissioner’s role as an ombudsman, since he would then be “judge, jury and executioner.” 26 Rather, the tools available to the Commissioner need to be modernized and enhanced so that he can maintain his role as mediator, solution-seeker, investigator and champion of the advancement of official languages.27 We believe that granting the Commissioner the authority to impose sanctions would deprive him of the ability to be a mediator seeking the best solution. He would have to follow the rules of natural justice and listen to both sides at the same time, as in an adjudicatory tribunal, thereby losing his current procedural flexibility. He would then have to choose between the complainant’s

23 Mark C. Power and Justine Mageau, “Réflexions sur le rôle du Commissaire aux langues officielles devant les Tribunaux” (2011) 41:1 Revue générale de droit 179.
24 Canada, Standing Senate Committee on Official Languages, Minutes, 42nd Parliament, 1st Session (February 15, 2018).
25 Canada, Standing Senate Committee on Official Languages, Minutes, 42nd Parliament, 1st Session (February 15, 2018).
27 OLA, s. 56.
version and the respondent government agency’s version, with no middle-ground option, like an adjudicatory tribunal. This scenario is not useful or necessary for the purposes of improving the OLA’s implementation.

On another note, some witnesses have asked your committee to recommend the creation of an administrative tribunal similar to the Canadian Human Rights Tribunal. According to the Fédération des communautés francophones et acadienne, there should be an option to take a complaint to an official languages administrative tribunal before seeking a remedy in the Federal Court. This would enable litigants to obtain compensation and remedy without having to apply to the Federal Court and initiate a proceeding, which usually takes a great deal of time and money.\(^{28}\)

If Parliament decides to create a separate administrative tribunal to deal with complaints about possible violations of the OLA, the Commissioner of Official Languages could be summoned to appear before the tribunal as an *amicus curiae* to guide the adjudicators in interpreting the OLA, the obligations that it places on federal institutions, and their potential violations. In contrast to the authority to impose sanctions, broadening the Commissioner’s role in this way would be consistent with his mediation role.

The difficulties that arise from the desire to force federal institutions to comply with their obligations are associated not only with the Commissioner of Official Languages and his powers (whether they are inadequate or not), but also, and perhaps mainly, with deficient implementation of the OLA by a central agency. Only a central agency can establish directives and an internal audit process regarding fulfilment of federal institutions’ obligations under the OLA. As the French Language Services Commissioner pointed out in his testimony before your committee,

> [j]f a central agency is responsible for ensuring that everything works in a piece of legislation, that everything is well oiled, there would already be a punitive power on an internal basis.\(^{29}\)

In other words, your committee should recommend that Parliament give priority to improving the OLA’s implementation structure instead of modifying the Commissioner’s powers by giving him new authorities which would not be feasible, such as imposing sanctions, without fundamentally transforming his ability to act as an ombudsman and mediator, seeking the best solution for the common good, not just for the benefit of the complainant.

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\(^{28}\) *Ibid.*, paras. 84 and 89.

\(^{29}\) Committee, June 11, 2018 (François Boileau).