

February 25, 2021

Honourable Members of Parliament,

Introduction

On Friday, February 19, 2021, the government presented a Paper setting out its legislative and policy intentions with respect to official languages in Canada. It means we can consider, not options or hypotheses for reflection, but a clear direction.

The Paper presents several positive and long-awaited proposals. It should be analyzed with that in mind, and specific comments and proposals should be submitted to address its shortcomings or points that were overlooked.

I will follow the structure of the document and list the topics I would like to address.

1. First, the principles of the *Official Languages Act* and section 16(1) of the *Canadian Charter of Rights and Freedoms*, and how they must be interpreted in tandem.
2. Section 16(1) of the Charter outlines the principle of equality of status of the two languages, and the underlying principle of advancing the equality of status or use of English and French.

This wording suggests that we are not there yet, that there is a long road ahead of us, with obstacles to address and overcome. It also includes a strict obligation to take proactive measures to support this advancement toward the equality of status.

3. There is therefore a clear obligation of means, a requirement to fulfill a duty if we want to achieve the equality of status and use of the two languages.

According to Supreme Court case law, these Charter rights are to be interpreted in a “purposive and liberal” manner.

4. There is another aspect that the government document does not cover: reparations for past neglect, to compensate for the effects of decades of measures that encouraged assimilation and a dictatorial approach to the use of a language that has now been recognized by the Act (OLA) for 50 years as equal in status.
5. Applying this restorative principle means specific initiatives must be taken to achieve this objective.

Recommendation 1

6. The preamble of the OLA should be amended to reflect the remedial aspect inherent in section 16(1) of the Charter in order to achieve equality of status, rights and privileges of both languages.
7. One goal that should be shared by all should be to adopt an official French version of the *Constitution Act, 1867*. As we know, only the English version is legally binding.
8. As a result, when members of Parliament and senators need to refer to the Constitution, the supreme law of the nation, they can only use the English version, even though a translation is available from the Department of Justice. Anyone else who must refer to it encounters the same issue.
9. If Canada wants to live up to its status as an officially bilingual country, it must respect the commitment in section 55 of the *Constitution Act, 1982* and take all necessary steps to ensure that an official French version of the text of the 1867 Act is adopted.
10. Since the government was not taking action, Professor François Laroque and I initiated legal proceedings in the Quebec Superior Court on

August 30, 2019, with the objective of having the parties adopt an official French version of the 1867 Act.

11. However, at this stage of the proceedings, it is important to mention that, as of February 5, 2021, the Attorney General of Canada denies that he has an obligation to act. The Attorney General of Quebec has taken the same stance.

12. At the very least, this is an embarrassing legal situation. The symbolism is difficult to ignore, and yet no one in power at the highest level of the Canadian government is taking action on this matter. How can it be ignored in a country that calls itself bilingual?

13. How can Canada claim to defend the equal status of the two languages when its constitution is in English only?

Recommendation 2

14. Recognize in the preamble to the OLA the need to move quickly to adopt an official French version of the Constitution Act, 1867.

15. The Paper also fails to recognize that the OLA is quasi-constitutional in nature (as the highest courts in Canada have recognized), which affirms the obligation to recognize and respect the equal status and use of both languages. This legislation must be interpreted together with section 16(1) of the Charter.

16. The OLA is a concrete legislative representation of the principle of advancing toward the equality of status or use of both languages. It is not, as was argued in 1976 before the courts (*Joyal v. Air Canada*, 1976 QCCS 1211), a statute declaring intent but not conferring justiciable rights. The Commissioner of Official Languages also made that argument at the time. Subsequent case law has confirmed that the OLA is an obligation and that

the courts have a responsibility to punish violations.

Recommendation 3

17. An amended preamble should clearly recognize the legal nature of the OLA, creating corresponding rights and obligations for the government.
18. This leads to a key observation. The Government of Canada should not be able to sign administrative agreements with the provinces and territories that would transfer the management or delivery of services (whether or not they are funded solely by the Government of Canada), depriving users of their right to obtain services in French or employees of their right to work in French.
19. A Federal Court decision in 2018 (involving Employment Canada) concluded that these agreements do not mean that the obligation to respect the rights of Canadians under the OLA is transferred to the province when these programs are administered by the federal government. It should be clearly communicated that such a loophole is invalid and that the Canadian government cannot abdicate responsibility for its constitutional obligations.

Recommendation 4

20. In other words, the Canadian government cannot outsource its general responsibilities to another level of government, shirking its obligations under the OLA and undermining the language rights of Canadians.
21. Part VII of the OLA, in section 43(1), requires the federal government to take proactive measures to advance the equality of status of the two languages through the principles outlined in section 16(1) of the Charter. It was undermined by a decision of the Federal Court, which ruled that, since regulations had not been made by the federal government to outline how this responsibility should be fulfilled, it was therefore of no effect, other than the

obligation to do no harm. The obligation contained in Part VII must be reformulated in a clear and unambiguous manner in order to create an irrefutable obligation for the Canadian government and to close the loophole identified by the Federal Court.

22. This section was adopted in 2005 following a legislative initiative by the late Senator Jean Robert Gauthier. The government resisted implementing it because it did not want to have to assume onerous obligations. The Federal Court decision gutted section 43(1) of any real substance, and simply “elevated” it to the level of good intentions.

Recommendation 5

23. It is high time to amend Part VII of the OLA and to recognize the government’s formal, enforceable obligation to take proactive measures to advance the equality of status of the two languages and the vitality of official language minority communities.
24. This leads into another key point for advancing the equality of status of the two languages, namely the use of a holistic approach encompassing all means, institutions, bodies, regulatory powers and programs under the responsibility of the Canadian government, both at home and abroad, to serve the underlying principle in section 16(1) of the Charter.

Recommendation 6

25. The importance of recognizing this should be emphasized in the Paper, and it should also be reflected in the preamble of the OLA.
26. The Paper addresses several points, such as the statutory recognition of the Court Challenges Program, that are steps in the right direction, but it fails to address others that, given their strategic value, should have been included in the new OLA.

27. First, the existence of standing committees on official languages in the Senate and the House of Commons should be recognized in the Act to ensure that the objectives listed in the OLA and in section 16(1) of the Charter continue to be monitored and implemented.

28. It sounds simple, but as it stands there is no guarantee. It should be noted that it took until 1982, well over a decade after the OLA was passed, before a private member's bill was introduced in the House of Commons by MP Pierre De Bané and myself to create a committee on official languages. The government of the day finally agreed to amend the Standing Orders of the House of Commons and the Rules of the Senate to recognize the existence of a standing (joint) committee responsible for official languages.

Recommendation 7

29. The time has come to recognize the status of official languages committees in the Act to ensure that their oversight roles cannot be easily diluted, merged or abolished by a reckless majority.

30. The Paper proposes giving a single entity the responsibility to coordinate all federal government policies and programs that support the OLA and section 16(1) of the Charter. This proposal fits well with the holistic approach that the Paper advocates. It would ensure the coherence and effectiveness of the objective in question. The President of the Treasury Board was identified as the authority.

31. However, this proposal should be setting off alarm bells. The President of the Treasury Board is responsible for expenditure control. If he also becomes responsible for coordinating official languages policies for the entire federal administration, he will be both judge and jury. How can he play both of these roles well in the context of generalized budget cuts, as

will inevitably happen at some point?

32. The question is not theoretical: it cropped up in the mid-1990s, when cutbacks were imposed by the then President of the Treasury Board, the Hon. Marcel Massé. The groups representing francophones made their voices heard. But spending was maintained only for programs involving Indigenous communities, a decision of the then Prime Minister.

Recommendation 8

33. The dispute involving the Montfort Hospital was triggered by an administrative decision to consolidate the services of Ottawa-area hospitals with the stated goal of saving money. The OLA should include an arbitration mechanism based on well-understood principles with respect to the constitutional obligations relating to official languages, as expressed by the Supreme Court in decisions aimed at resolving such situations.
34. The Paper refers to the socio-cultural context in which the English and French languages are evolving in Canada and Quebec, and to the various pressures both from within the country and from abroad. It is a factor that was not even on the radar in 1969, but it has quickly become a major issue since large digital platforms (GAFAM) were established. It seems that these circumstances will determine the future of the use of the French language while political debate is focused on how Bill 101 applies to federal enterprises in Quebec.
35. The Paper mentions that just under 75,000 people will be affected. Meanwhile, digital platforms reach almost 92% of all households in Quebec, or nearly 7 million people. The disparity in these numbers reveals that the political focus of the debate is tied to national options rather than the significance of the strategic target to hit.

Recommendation 9

36. Major American platforms use English. People can make an infinite number of connections determined by algorithms that leave users completely in the dark.
37. In our opinion, the priority is to make it easier to discover French cultural products, i.e. to increase their visibility on online platforms and ensure they can be promoted freely and easily. Canada cannot solve this problem on its own, but with Quebec's help, it can amplify its voice.
38. A coalition of a majority of UNESCO member countries could be successful, as was the case in 2005 with the adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in free trade agreements. This is a priority that many countries should rally around, first the member countries of La Francophonie (OIF), then the EU and UNESCO.
39. This is the real Trojan horse that undermines the importance and visibility of the French language for contemporary and future generations. Our political resources should be focused on this issue, and not on a verbal fencing match about a small percentage of workers whose rights would already be recognized if the OLA were properly enforced.
40. We must keep our eye on the prize and not get sidetracked!
41. The status of the Commissioner of Official Languages is addressed in general terms in the Paper. The proposed amendments fall far short of what is required to truly give Canadians the right to use the language of their choice after more than 50 years of an oversight framework that has repeatedly shown how ineffective it is in bringing about substantive equality. There is a lesson to be learned from Air Canada's perpetual delinquency(!) if

we need an example...

42. The conclusion is simple: the Commissioner must have the ability to take matters to court, to intervene directly before the courts, and especially the ability to make binding orders. This is where Canada stands after 50 years.
43. Taking any other action would effectively deny the nature of the obligation in section 16(1) of the Charter.
44. Section 24 of the Charter provides that the courts, in adjudicating Charter rights, may award exemplary damages in special circumstances. The Supreme Court in *Vancouver (City) v. Ward*, 2010 SCC 27, set out the guidelines to be followed.
45. If a citizen can seek recourse for having their Charter rights violated, why is this same recourse not available for violations of language rights under the Charter? It is understandable that in the first decades following the adoption of the OLA in 1969, there was a preference for the path of quiet persuasion, but since 1982 a culture of fundamental rights and freedoms has prevailed, and the Court Challenges Program supported its legal recognition, which changed the paradigms of Canadian society.

Recommendation 10

46. The Commissioner should immediately be given the power to make orders and award damages, as there is clearly a need to address the lackadaisical attitude in making amends within a reasonable period of time.
47. This set of 10 recommendations should help guide discussions to create a more rigorous framework and to continue to move toward a substantive equality of the two languages that is more tangible and significant for all Canadians and for all those in Quebec who believe in a Canada that can better reflect its bilingual character and the value of its French side.

[signed]

The Hon. Serge Joyal, P.C., Lawyer, Retired Senator