



Office of the  
Commissioner of  
Official Languages

Commissariat  
aux langues  
officielles

# MODERNIZING

THE *OFFICIAL LANGUAGES ACT*:  
VISION OF THE COMMISSIONER OF OFFICIAL LANGUAGES

December 2018



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Cat. No.: SF31-140/2018E-PDF  
ISBN: 978-0-660-28918-2

*"I believe that Canada must continue to be a leader and beacon for linguistic duality and support for official language minority communities."<sup>1</sup>*

*Raymond Th  berge, Commissioner of Official Languages*

## **OVERVIEW OF THE CHANGES THAT HAVE SHAPED THE *OFFICIAL LANGUAGES ACT***

The first *Official Languages Act* was passed unanimously in July 1969 and came into effect on September 7 of the same year. A new Act was passed 19 years later, in July 1988, and came into effect on September 15 of that year. Therefore, other than an amendment to Part VII in 2005, the Act has not been reviewed in depth since 1988.

After five decades, we can safely say that linguistic duality is part of Canada's national narrative and that the Act has been instrumental in its growth. However, it is important to remember that linguistic duality as a national value has not always been something on which Canadians have agreed.

The 1969 and 1988 acts addressed the specific social contexts and realities of their times. In fact, when drafting the 1969 Act, the legislators' objective was to strengthen national unity by affirming the equal status of English and French, equal access to federal services in both official languages and equal opportunities for employment and advancement of English and French speakers in the Canadian federal administration.<sup>2</sup> By making English and French the official languages of Canada, the then government endorsed the spirit of the recommendations made by the Royal Commission on Bilingualism and Biculturalism.<sup>3</sup> The right to be heard before the federal courts<sup>4</sup> and to communicate with and receive services from the federal government in either official language<sup>5</sup> were enshrined in this first Act.

Language-related resolutions, policies and regulatory measures followed, including the *Resolution on Official Languages in the Public Service*,<sup>6</sup> which was adopted by Parliament in 1973 to ensure equal access to positions in the federal government and to enable public servants to work in the official language of their choice; the *Consumer Packaging and Labelling Regulations*,<sup>7</sup> which came into effect in 1974 and stipulated that certain product packaging information had to be in both English and French; and the 1977 government policy paper entitled *A National Understanding*,<sup>8</sup> which explained the historical reasons for Canada's language policy and presented an overview of its application. In 1982, the *Canadian Charter of Rights and Freedoms* constitutionalized not only the equal status of both official languages, but also language rights, including the educational rights of official language minority communities.<sup>9</sup> Collectively, these measures sought to put an end to over a century's worth of debate and ambiguity about whether Canada was an English-speaking country with a French-speaking Quebec or a bilingual country big enough for both official languages to thrive.<sup>10</sup>

The enactment of the *Official Languages Act* in 1969 and the years that followed resulted in significant advancements in terms of official languages and Canadian identity, despite the fact that the scope of the 1969 Act was still relatively limited—i.e., to the public's right to communicate with and receive services from the federal government in either official language.<sup>11</sup>

It was against this backdrop that the 1988 *Official Languages Act* gave new momentum to linguistic duality by defining language-of-work rights and recognizing the importance of advancing English and French and enhancing the vitality of official language minority communities. In fact, the addition of Part VII to the Act was partially an attempt to address the demographic challenges experienced by these communities<sup>12</sup> and to provide them with support after the tabling of the 1987 Meech Lake Accord, which would have amended the Constitution and recognized Quebec as a “distinct society” within Canada.<sup>13</sup> By being an extension of the constitutional language guarantees enshrined in the 1982 *Canadian Charter of Rights and Freedoms* and having quasi-constitutional status,<sup>14</sup> the 1988 Act substantially expanded the scope of linguistic duality.

The last major amendments to the Act were made in 2005, when the duty to implement the commitments set out in Part VII of the Act was added, making this part enforceable.<sup>15</sup> This meant that federal institutions now had specific obligations under Part VII of the Act and that an application could be made for a court remedy if these obligations were not met. As a result of these amendments, federal institutions now have to take positive measures to support the development of official language minority communities and to foster the full recognition and use of both official languages in Canadian society.

This legislative process has consolidated and codified the legal foundation on which Canada's linguistic duality rests. The challenge now is to ensure complete implementation of the Act to give it full effect. Considering the Office of the Commissioner of Official Languages' experience and the current context, it is clear that this cannot be accomplished without making major amendments and structural changes to the Act.

## **WHY MODERNIZE THE *OFFICIAL LANGUAGES ACT*?**

Even today, people throughout the country are still asking questions about the importance of linguistic duality as a Canadian value. Despite the constitutional status of English and French and the major language rights advances made before the courts over the years, the perpetuity of Canada's official languages is at the mercy of the changing priorities of whichever government is in power. That is why modernizing the Act is an opportunity to breathe new life into linguistic duality, both to preserve its gains and to ensure its continued growth.

In 2009 on the 40th anniversary of the Act, then Commissioner of Official Languages Graham Fraser was already noticing that the *Official Languages Act* had reached a plateau in terms of its implementation. He described how institutional bilingualism within the federal government had made little progress in the preceding years:

Federal services are not always automatically offered in both languages everywhere in the designated bilingual offices, and the situation regarding language of work is stagnating. What is more, the problem of chronic under-representation of Anglophones in the federal public service in Quebec persists. All-too-frequent cutbacks and a continuing lack of leadership are causes for concern.<sup>16</sup>

These words are still as relevant today as they were a decade ago. This inertia has also had other significant consequences, particularly for the development of official language minority communities.

Although there has been significant progress, a number of recurring issues continue to impede the successful achievement of the Act's objectives. After nearly half a century, the Office of the Commissioner has found that federal institutions generally take a fragmented approach in applying the provisions of the Act. There are several reasons for this, including ambiguity and the difficulties that arise in trying to apply certain provisions, such as those based on geographic divisions that date back nearly 40 years. Beyond these considerations, the Act could include new provisions to address issues that were missed by the drafters of the 1988 Act.

The current Commissioner, Raymond Th  berge, believes that modernizing the Act is crucial in light of the many changes that have shaped Canadian society since the last major review in the late 1980s—changes such as demographic and identity shifts, as well as the growing importance of new technologies in government communications and service delivery. These changes alone demonstrate the very real need to modernize the Act so that it continues to be an effective tool for protecting and promoting Canada's linguistic duality.

More than simply an update, the modernization of the Act must generate results that have a real and tangible impact on the equal status and use of both English and French in Canadian society and on the vitality of official language minority communities. Canada needs a modern Act that reflects the reality of present and future generations, and this can be achieved only through legislative and regulatory changes.

## **THE COMMISSIONER OF OFFICIAL LANGUAGES' VISION: AN ACT THAT IS RELEVANT, DYNAMIC AND STRONG**

As Canadian society turns resolutely toward the future, the *Official Languages Act* must clearly do the same. The last time the Act underwent a major revision, there was no Internet or social media, and none of today's younger generations had been born yet. Today's youth dream of a country where living in English and French is the norm, and they are eager to learn about each others' cultures. They want the federal government to commit to long-term leadership in making this dream come true. There is no denying that the 1988 Act has aged and that the younger generations do not identify with it.

During the consultations on modernizing the Act conducted by the Office of the Commissioner in the spring and summer of 2018, many of the stakeholders said that the modernized Act would need to be designed in such a way as to be applied as a whole. They noted that a coordinated application of all parts of the Act would have a positive impact on every obligation contained therein and most especially on the duty to take positive measures to enhance the vitality of official language minority communities.

To make this vision a reality, the modernized Act must recognize that its parts are interdependent—that there are, for example, intrinsic links between the rights and obligations related to communications with and services to the public and those related to language of work within the public service, and that those rights and obligations have a broader impact on the other parts of the Act. Federal institutions that value the equality of English and French in their own workplaces are more likely to provide services to and communicate with the public in both official languages, to support official language minority communities with real action and to advance linguistic duality in Canadian society.

The changes the Commissioner will be proposing were not developed in isolation. On the contrary, most are designed to have a cross-cutting effect on the rest of the Act. Taken together, the recommendations being contemplated will result in an Act that is structurally logical and clearly consistent throughout all of its parts. This approach stems from the three pillars on which the Commissioner's vision is based: having an Act that is relevant, dynamic and strong.

## **AN ACT THAT IS RELEVANT**

The modernized Act should, in every aspect, reflect both the current needs of Canadian society and the future aspirations of that society to be a country that fully embraces linguistic duality. It must therefore be relevant to the environment in which it operates.

To achieve this, a number of amendments need to be made to various parts of the Act. For example, the government must ensure better access to the federal justice system in English and in French; it must clarify the obligations regarding communications with and services to the public and make sure they meet the needs of Canadians; and it must update and clarify the rights and obligations regarding language of work within the federal public service.

With regard to access to justice, the Commissioner believes that everybody should be heard and understood in the official language of their choice before the Supreme Court of Canada and that the criteria used to determine which federal court decisions are made public in both official languages should be clarified.

With regard to communications and service delivery, the Commissioner raised a number of issues in his special report to Parliament on modernizing the *Official Languages (Communications with and Services to the Public) Regulations*, including the exclusively quantitative definition of "significant demand" and its exclusionary effect on official language minority communities, and the lack of detail that could facilitate the implementation of active offer. The Commissioner believes strongly in the importance of the five principles contained in this special report,<sup>17</sup> which are also relevant to a more comprehensive reflection on modernizing the Act.

With regard to language of work, there have been enormous changes in Canadian society and in federal public service workplaces. Part V of the Act needs a major update so that federal institutions can apply it consistently and effectively. For example, federal employees' language-of-work rights under Part V are based on defined geographical divisions dating back to 1977. These are completely disconnected from the changing results when calculating "significant demand" under Part IV, which determines where federal employees are required to communicate with and provide services to the Canadian public in either official language. This disconnect creates major inconsistencies in how these two parts of the Act are implemented and is just one of many examples that justify a reassessment of the geographic approach underlying Part V.

Lastly, the development of a regulatory framework to deliver on the federal government's commitments to enhance the vitality of official language minority communities and to foster the full recognition and use of both official languages has become necessary to ensure that federal institutions implement the Act proactively. Such a framework could, for example, clarify some of the concepts in Part VII and set parameters for implementing every federal institution's obligation to take positive measures.

## **AN ACT THAT IS DYNAMIC**

In the past few decades, there has been a growing number of challenges in implementing the Act. Modern methods of communication, new environments and work opportunities in the federal public service and even, more generally, the changing landscape of language rights, have all exposed its shortcomings. The Act must be able to adapt not only to the many changes that have occurred in the past few years, but also to the many changes to come.

This could be accomplished by entrenching in the Act the key principles that have changed the way language rights are interpreted and applied today, such as substantive equality, the remedial nature of language rights and the Act's quasi-constitutional status. The Act should also be able to be applied even as Canadian society changes. Drafting a technology-neutral Act to ensure its relevance as new technologies emerge, and requiring that the Act undergo a regular review are two solutions that would help to keep the Act dynamic.

## **AN ACT THAT IS STRONG**

The current modernization exercise is the first opportunity since 1988 to make structural changes to the Act. The Commissioner believes that, during this exercise, it will be crucial for the government to think seriously about changes that could be made to the Act in terms of governance and compliance.

With regard to governance, the Act identifies the Treasury Board as being the federal institution responsible for the general direction and coordination of the policies and programs of the Government of Canada relating to the implementation of parts IV, V and VI. Canadian Heritage is identified as the institution responsible for encouraging and promoting a coordinated approach to the implementation of Part VII. This legislative structure raises various issues, especially for a statute that requires horizontal application to achieve its objectives.

Because a variety of models can be used to help create a strong legislative structure, it would be difficult to suggest a single solution. Regardless of the governance structure provided for in the Act, defining everyone's responsibilities clearly and unequivocally will help ensure more comprehensible and coordinated official languages governance. The Commissioner is therefore proposing five principles that could help the government in its analysis of a new governance structure for the Act:

- Establish clear direction and leadership at the most senior levels of the federal government.
- Establish a consistent accountability framework.
- Make official languages a top priority and a key aspect of government planning and activities.
- Ensure effective stewardship of official languages.
- Address setbacks while ensuring ongoing progress toward the substantive equality of official languages.

With regard to compliance, the possibility of conferring enforcement powers on the Commissioner was the subject of debate even before the 1988 Act was passed. More recently, it was included in specific recommendations by the House of Commons Standing Committee on Official Languages.<sup>18</sup> In fact, even though the Act already provides for broad investigatory and judicial powers, it does not include enough tools for ensuring that federal institutions comply with the Commissioner's recommendations and meet their obligations.

A number of solutions have already been put forward to guide the government's reflection on this issue, such as creating an administrative tribunal or giving the Commissioner more tools to ensure that his recommendations are implemented. The ability to impose administrative monetary penalties, coupled with the option of entering into enforceable agreements, is another interesting way to encourage better compliance with the Act and greater cooperation between federal institutions and the Office of the Commissioner. The revenue collected through penalties could be paid into a linguistic duality fund. All of these solutions could be among those examined by Parliament.

Although our legislators have many options in terms of how they choose to modernize the Act, one thing is certain: limiting the review to a simple update of the provisions without examining the responsibilities of the various key stakeholders and the means they have to ensure compliance would be a missed opportunity to create a truly strong Act that inspires exemplary implementation.

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Everyone would like to see this modernization exercise result in a flawless application of the Act that respects its spirit and intent. To achieve this, the Act must be easy to understand and apply by the federal institutions that are subject to it. The Act must therefore both reflect Canadian society as it is and adapt to it as it changes. It must also set out a clear governance structure and mechanisms to help all stakeholders understand both their rights and their obligations and gain a better understanding of how the Act applies to them.

The celebrations for the 50th anniversary of the Act are a prime opportunity for the government to review the Act as a whole and to transform it into an instrument that can be fully applied by federal institutions and that can ensure that linguistic duality will continue to be a Canadian value for future generations.



## Endnotes

- <sup>1</sup> Commissioner of Official Languages, *Speech for the 23rd Ministerial Conference on the Canadian Francophonie*, Whitehorse, Yukon, July 5, 2018. On-line version ([www.officiallanguages.gc.ca/en/news/speeches/2018/2018-07-05](http://www.officiallanguages.gc.ca/en/news/speeches/2018/2018-07-05)) accessed December 4, 2018.
- <sup>2</sup> Gérard Pelletier, “1968: Language Policy and the Mood in Quebec,” *Towards a Just Society: The Trudeau Years*, Thomas S. Axworthy and Pierre Elliott Trudeau (eds), Markham, Ontario, Viking, 1990, pp. 207–225. See more specifically at page 223: “The goal of the policy, of course, was not only to generalize the use of both languages in the government’s relations with the public. It was also intended to attract more francophones to federal employment and make it possible for them to use their mother tongue as a language of work.”
- <sup>3</sup> *Official Languages Act*, S.C. 1968-69, c. 54, s. 2.
- <sup>4</sup> *Official Languages Act*, S.C. 1968-69, c. 54, s. 11.
- <sup>5</sup> *Official Languages Act*, S.C. 1968-69, c. 54, s. 9.
- <sup>6</sup> Parliament of Canada, *House of Commons Debates*, motion by Pierre Elliot Trudeau, 29th Parliament, 1st Session, Volume IV. June 6, 1973, motion adopted at p. 4,517. For the content of the Resolution, see p. 4,500. On-line version ([http://parl.canadiana.ca/view/oop.debates\\_HOC2901\\_04/1?r=0&s=1](http://parl.canadiana.ca/view/oop.debates_HOC2901_04/1?r=0&s=1)) accessed November 15, 2018.
- <sup>7</sup> Consumer Packaging and Labelling Regulations, C.R.C., c. 417.
- <sup>8</sup> Privy Council Office, *A National Understanding: Statement of the Government of Canada on the Official Languages Policy: The Official Languages of Canada*, Ottawa, 1977.
- <sup>9</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, ss. 16–23.
- <sup>10</sup> Parliament of Canada, *House of Commons Debates*, speech by Lester B. Pearson, 25th Parliament, 1st Session, Volume III, December 17, 1962, pp. 2,722–2,726. See more specifically on p. 2,722: “Confederation, however, also involved another price which too many of us either forget or do not wish to pay because perhaps it is inconvenient for us to pay it. Confederation meant the rejection not only of political and economic annexation by the United States but also of the American melting-pot concept of national unity. Confederation may not have been technically a treaty or a compact between states, but it was an understanding or a settlement between the two founding races of Canada made on the basis of an acceptable and equal partnership. That settlement provided that national political unity would be achieved and maintained without the imposition of racial, cultural or linguistic uniformity.”  
  
“I sometimes think that the understanding was more academic than actual. Outside Quebec, and as Canada grew from coast to coast, this understanding was more often honoured in the breach than in the observance and for reasons which any of us who know about the development of Canada can understand. As a result, there has grown up in this country two different interpretations of confederation. It is this difference in interpretation of confederation itself which has created and is creating today confusion, frustration and indeed some conflict.”  
  
“To French speaking Canadians confederation created a bilingual and bicultural nation. It protected their language and their culture throughout the whole of Canada. It meant partnership, not domination. French speaking Canadians believed that this partnership meant equal opportunities for both the founding races to share in all phases of Canadian development.”  
  
“English speaking Canadians agree, of course, that the confederation arrangements protected the rights of French Canadians in Quebec, in parliament and in federal courts; but most felt—and I think it is fair to say this—that it did not go beyond those limits, at least until recently. This meant that, for all practical purposes, there would be an English speaking Canada with a bilingual Quebec. What is called the ‘French fact’ was to be provincial only.”
- <sup>11</sup> Office of the Commissioner of Official Languages, *Annual Report 2008–2009: Two Official Languages, One Common Space – 40th anniversary of the Official Languages Act*, Ottawa, 2009, p. 7. On-line version ([www.officiallanguages.gc.ca/html/ar\\_ra\\_2008\\_09\\_e.php](http://www.officiallanguages.gc.ca/html/ar_ra_2008_09_e.php)) accessed November 15, 2018.
- <sup>12</sup> See, for example, the following annual reports of the Office of the Commissioner of Official Languages:  
Office of the Commissioner of Official Languages, *Annual Report 1983*, Ottawa, 1984, pp. 16–17.  
Office of the Commissioner of Official Languages, *Annual Report 1984*, Ottawa, 1985, p. 179.
- <sup>13</sup> Office of the Commissioner of Official Languages, *Annual Report 1988*, Ottawa, 1989, pp. 6 and 28.  
See also:  
Michael Behiels, *Canada’s Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance*, Montreal, McGill-Queen’s University Press, 2004, pp. 245–284.

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<sup>14</sup> Canada (Attorney General) v Viola, [1991] 1 F.C. 373 (CA).

<sup>15</sup> Amendments were also made to section 77 to make Part VII of the *Official Languages Act* enforceable.

<sup>16</sup> Office of the Commissioner of Official Languages, *Annual Report 2008–2009: Two Official Languages, One Common Space – 40th anniversary of the Official Languages Act*, Ottawa, 2009, p. 18. On-line version ([www.officiallanguages.gc.ca/html/ar\\_ra\\_2008\\_09\\_e.php](http://www.officiallanguages.gc.ca/html/ar_ra_2008_09_e.php)) accessed November 15, 2018.

<sup>17</sup> Office of the Commissioner of Official Languages, *Special Report to Parliament – A Principled Approach to the Modernization of the Official Languages (Communications with and Services to the Public) Regulations*, Ottawa, 2018, p. 5. On-line version ([www.officiallanguages.gc.ca/en/publications/other/2018/special-report-to-parliament-ol](http://www.officiallanguages.gc.ca/en/publications/other/2018/special-report-to-parliament-ol)) accessed November 26, 2018:

“Pursuant to sections 57 and 67 of the *Official Languages Act*, I hereby submit this special report to Parliament listing the shortcomings of the present regulations and urging that the following five principles be incorporated into the government’s forthcoming draft regulations:

1. Increase access to services of equal quality in both official languages.
2. Seek to achieve substantive equality, taking into account the particular characteristics of official language minority communities.
3. Consider the remedial nature of language rights, including the fact that these rights are designed to counter the gradual decline of official language minority communities.
4. Include incentives to ensure that services are provided by federal institutions in both official languages.
5. Reflect a clear and simplified regulatory approach.”

<sup>18</sup> Parliament of Canada, House of Commons Standing Committee on Official Languages, *Air Canada’s Implementation of the Official Languages Act: Aiming for Excellence*, Recommendations 6(1)(a) and 6(1)(b), Ottawa, 2017, p. 26. On-line version ([www.ourcommons.ca/DocumentViewer/en/42-1/LANG/report-6/page-81](http://www.ourcommons.ca/DocumentViewer/en/42-1/LANG/report-6/page-81)) accessed November 15, 2018.