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[Home](#) ▶ [Publications](#)

Position of the Commissioner of Official Languages of Canada on the draft *Regulations on the Use of French in Federally Regulated Private Businesses*

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The Commissioner of Official Languages (the Commissioner) has noted that the draft *Regulations on the Use of French in Federally Regulated Private Businesses* (the Regulations) are **highly complex**, raise **several interpretation issues** and seem to foreshadow that **they will be particularly difficult to apply in Quebec**, while also posing **uncertainties for regions with a strong Francophone presence**. The Commissioner is therefore of the opinion that it is essential for both parliamentary standing committees on official languages to conduct a thorough review of the draft Regulations to ensure that they fully reflect Parliament's intent in adopting the *Use of French in Federally Regulated Private Businesses Act* (the UFPBA).

The Regulations are intended to provide a framework for and ensure the implementation of the UFPBA. This new language regime is designed to foster and protect the use of French in federally regulated private businesses (FRPBs) operating in Quebec and in regions with a strong Francophone presence (RSFPs) outside Quebec. FRPBs include companies that operate in the banking sector, passenger and freight transportation, and other areas under federal jurisdiction.

For the first time, this new language regime applies to private sector operations under federal jurisdiction. Given that the Office of the Commissioner of Official Languages (the Office of the Commissioner) now has a key role in overseeing its implementation, additional resources will inevitably be needed.

Importance of an up-to-date public registry of FRPBs subject to the UFPBA

For the UFPBA to achieve its objective, the Commissioner believes that there must be a reliable and regularly updated public registry of FRPBs subject to the UFPBA. The draft Regulations in their current form state that the Minister of Canadian Heritage "may" publish certain lists of these FRPBs; however, they do not require the Minister to do so. Furthermore, the Regulations do not require publication of a separate, up-to-date list of exempted FRPBs or that the list be shared with the Commissioner. To ensure its effectiveness, the public registry must contain reliable and accurate information and therefore must be updated regularly, at least once a month.

The public registry would provide clarity on which FRPBs are subject to the regulations and which are exempt, and it would serve as the sole reliable source of information for consumers, employees and the Commissioner. The registry would also demonstrate the government's transparency and its commitment to the Canadian public, particularly the consumers and employees affected by the Act and the Regulations. The Commissioner therefore recommends that the Regulations make it mandatory to publish an up-to-date public registry of FRPBs subject to the UFPBA in order to ensure the effectiveness and integrity of the complaint-handling process.

Applying the UFPBA in Quebec

One of the distinctive elements of this language regime is that it allows FRPBs in Quebec to choose to be subject to Quebec's *Charter of the French Language* (the Charter) instead of the UFPBA. Letting FRPBs in Quebec choose whether to be subject to the UFPBA or the Charter means that certain rights, obligations and remedies will vary, depending on which legislation they choose. Both include the predominance of French.

For example, an FRPB that provides services in more than one province, such as an airline that transports passengers between provinces, may be subject to the Charter in Quebec and to the UFPBA in RSFPs. Similarly, if two competitors are in the same industry, one could choose to be subject to the UFPBA and thereby fall under the jurisdiction of the Commissioner, and the other could choose to be subject to the Charter and thereby fall under the jurisdiction of the Office québécois de la langue française (OQLF). However, although the UFPBA offers the option to choose to be subject to the Charter instead, the opposite option does not appear to be available under the Charter. This further underscores the importance of a public registry of FRPBs subject to the UFPBA and the complexity of applying the new act.

The inclusion of this choice in the UFPBA means that it will be difficult for the public and the Commissioner to know which FRPBs are subject to the UFPBA. It also means that processing complaints and conducting investigations will be more complicated because the Commissioner will have to determine whether the complaint concerns an FRPB subject to the UFPBA before launching an investigation. It will be necessary to coordinate with the OQLF to ensure the effectiveness and integrity of the investigation process.

The draft Regulations require FRPBs to provide certain key information to the Minister of Canadian Heritage, which is essential for determining the scope of the obligations and exemptions applicable to FRPBs. However, they do not require FRPBs to provide this information to the Commissioner, nor do they require the Minister to disclose it to the Commissioner or to the public, which will inevitably make the investigation process more complicated.

Applying the UFPBA in regions with a strong Francophone presence

The Commissioner applauds the recognition of New Brunswick's unique status as Canada's only officially bilingual province, as well as the specific recognition of certain Francophone communities in Alberta, Manitoba and Nova Scotia as RSFPs. However, she is disappointed that there is not at least one FRPB in each province and territory where the Canadian public will have the right to receive services in French from FRPBs.

There are several approaches that could have been used to identify RSFPs, but they must allow for the vitality and distinctiveness of Francophone minority communities to be taken into account, as well as their evolving nature over time. However, the draft Regulations currently list specific regions. Take, for example, the way in which significant demand is established for the public's right to communicate with and receive services in either official language from federal institutions under the *Official Languages Act* (the OLA). Under the *Official Languages (Communications with and*

Services to the Public) Regulations, there is significant demand for communications and services for the travelling public in all railway stations and airports located in a provincial or territorial capital. This ensures that each province and territory has a minimum level of service in both official languages for the services in question. As another example, a key part of Immigration, Refugees and Citizenship Canada's (IRCC's) Policy on Francophone Immigration is an initiative that recognizes 24 Welcoming Francophone Communities outside Quebec. According to IRCC, these communities will provide French-speaking newcomers with equitable access to services and resources in French in every province and territory, while also recognizing, valuing and leveraging their expertise to strengthen the region's economic vitality.

This creates a lack of consistency, because the draft Regulations identify RSFPs without guaranteeing that services will be available in all provinces and territories. Moreover, the list of RSFPs will remain static over time because it can be updated only through regulatory and JLEPBA amendments, despite potential demographic changes. It is clear that the approach used in the draft Regulations relies solely on the number of Francophones in a region as a proportion of the region's total population, without regard for the other criteria set out in the JLEPBA, including the number of Francophones and the vitality and specificity of Francophone minority communities. Surprisingly, this excludes the Greater Toronto Area, Canada's largest urban region. This exclusion is significant because the Greater Toronto Area is Canada's financial hub and the second-largest RSFP outside Quebec in terms of numbers. The Commissioner has reservations about the rationale behind this exclusion and is of the opinion that this region should not be omitted. She recommends revising the formula to recognize the federal government's commitments to foster and protect the French language, to protect Francophone minority communities and to support the advancement of equality of status and use of French and English.

It is important to note that with the information currently available to the Office of the Commissioner, it cannot form an accurate picture of how the new legislation will actually be implemented in the RSFPs. The Commissioner hopes that the number of RSFPs subject to the JLEPBA in the RSFPs will be included in the government's impact assessment when it is published in the *Canada Gazette*, Part I. If not, it will be very difficult to estimate the scope of the JLEPBA's application, the potential number of complaints, the impact on Francophone minority communities, and the resources that the Office of the Commissioner will require.

Interpretation issues

The wording choices and the definitions of certain terms, or the absence thereof, in the draft Regulations could lead to confusion and create ambiguity with regard to the scope of rights and obligations.

First, the definition of "communications" lists very specific and restrictive examples, which could cause confusion and increase the risk of disputes. It would be preferable to have a more general and inclusive definition, such as the one in the QLA, which simply states that it means "any form of communication, whether oral, written, electronic, virtual or other communications." The definition of "services" is another example that would benefit from being more general, such as the one in the QLA, which states that it means "any form of service provided or made available, including oral, written, electronic, virtual or other services."

Second, "consumer" is left undefined, despite the fact that it is one of the key elements in the JLEPBA. It would be preferable to have either a precise definition or a clearer term, as is the case with "public" in the QLA, that includes experiences that do not necessarily result in a purchase transaction. Clarifying certain definitions and adding others could prevent disputes and misunderstandings before the JLEPBA comes into force.

It is also clear that the draft Regulations in their current form fail to define the parameters that are required to effectively frame certain obligations. For example, it is important to note that, unlike the QLA, the JLEPBA does not specifically address the rights of the travelling public, who would be considered consumers under the JLEPBA. However, because the Regulations do not define "consumer," it is difficult to understand who is meant by this term. This is one of the issues that could create a two-tiered system regarding the rights of the travelling public under the QLA and the JLEPBA. Also, neither the JLEPBA nor the Regulations address situations where RSFPs use third parties to provide some of the services they offer to consumers. It is essential that the JLEPBA include a provision that specifies RSFPs' language obligations when they use third parties.

Furthermore, unlike the QLA, the JLEPBA does not include clear details regarding RSFPs' obligations in terms of communications with the public, such as signage and displays. There is a vague reference to the concept of the active offer, but it is less specific than what is in the QLA, even though this type of guidance is crucial to ensuring that consumers are proactively informed of their language rights. This is all the more important given the fragmented application of RSFPs' obligations that depends on whether they are subject to the JLEPBA, the Charter or the QLA.

In order to foster a common understanding and the application of the rights and obligations arising from the JLEPBA and its Regulations, the Commissioner is of the opinion that there is a need, where appropriate, to ensure a certain degree of harmony or consistency with concepts that are already well established in the QLA. This consideration should not prevent us from taking the opportunity to skillfully design and regulate new rights and obligations aimed at protecting and promoting the French language, which is in a minority situation in Canada and in North America.

Operational challenges

The coming into force of the JLEPBA will add an entirely new additional mission to the Commissioner's mandate. This will bring with it new powers regarding the language rights and obligations under the JLEPBA, involve new stakeholders and generate extra work for which the Office of the Commissioner does not currently have the necessary organizational and operational capacity. The Commissioner is aware of the current budget constraints and is fully committed to the government's priorities of fiscal discipline and expenditure optimization. However, implementing the Regulations cannot reasonably be done without additional financial support. This expanded role also requires greater clarity regarding institutional coordination between the Office of the Commissioner and Canadian Heritage, and subsequently between the Office of the Commissioner, the Canada Industrial Relations Board and the QLF, which are essential for the consistent, credible and effective implementation of the new act and regulations.

Conclusion

For all the reasons mentioned above, the Commissioner is of the opinion that it is essential for communities, parliamentarians and RSFPs to take the time over the coming months to carefully consider the impact of the JLEPBA and its Regulations on the Canadian public. The Commissioner recognizes that the JLEPBA was created with the express purpose of fostering and protecting French both in Quebec and in the rest of Canada, but the draft Regulations are disappointing in a number of respects. The Commissioner has also taken note of the concerns of Quebec's English-speaking community, which were raised during the drafting of the JLEPBA, about the potential impact of the JLEPBA on the vitality of that community. She is therefore committed to monitoring the effects of the JLEPBA on the state of French language use and on both of Canada's official language minority communities, but more particularly on Quebec's English-speaking community, given the focus on the predominant use of French. The objective of the JLEPBA is to remedy the lack of a linguistic framework for RSFPs by establishing language rights for consumers who do business with them and for the employees who work for them. There is still time to take full advantage of this historic opportunity to ensure the successful implementation of this new language regime by clarifying and simplifying the draft Regulations.



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