

QCGN Analysis of Quebec's Five Orientations to Modernize Canada's *Official Languages Act*

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Last week the Government of Quebec released its position related to the modernization of Canada's *Official Languages Act* ("OLA"). Quebec's position is grounded on five orientations:

1. Recognition that French is the only official minority language in all of Canada;
2. Introduction into the *OLA* of an asymmetric approach to the promotion and protection of official languages that takes into account the reality of languages in Canada, including in Quebec, and the real needs of the communities;
3. Taking into account and respecting the specificity of the linguistic situation of Quebec within the *OLA*;
4. Respect for the rights, situation, issues and real needs of English-speaking Quebecers; and,
5. Respect for the role and responsibilities of Quebec towards Francophone and Acadian communities on a pan-Canadian scale.

Quebec places these orientations within a framework of three guiding principles:

1. The protection and promotion of the French language in Quebec;
2. Taking into account the specific needs of English-speaking Quebecers; and,
3. The assumed leadership of Quebec with regard to French in Canada and in support of Francophone and Acadian communities.

Summary

Quebec's proposal belies a fundamental misunderstanding of the history, purpose, and application of the *OLA*. It takes direct aim at the division of powers contained in the *Constitution Act, 1867*, seeking to extend Quebec's legislative jurisdiction. The Government of Quebec is demanding exclusive authority to act in matters of language, "on its territory". This poses an existential threat to the official language rights of all Canadians, French and English.

There are dire implications of ceding federal responsibility to a province on questions related to Canada's official languages. If one province is allowed to impose its language laws on entities operating within federal jurisdiction, the door is thrown open for a patchwork of provincial and territorial language regimes. Provincial and territorial language regimes reflect different language priorities, and only New Brunswick is constitutionally bound to respect French and English as official languages. Manitoba is under a lesser obligation; it may well be that the territories are subject to constitutional obligations similar to New Brunswick's. This should be carefully considered by Francophone communities outside of Quebec.

The OLA

The *OLA* is a quasi-constitutional statute that implements federal constitutional official language obligations under sections 16, 17, 18, 19 and 20 of the *Charter of Rights and Freedoms* (the “*Charter*”), and s. 133 of the *Constitution Act, 1867*. The *OLA* has three purposes:

- a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;
- b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and
- c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

The *OLA* is not passive and defensive in nature. It imposes positive obligations on federal institutions to achieve its purposes.

The *OLA* was the Government of Canada’s legislative response to the recommendations of the Royal Commission on Bilingualism and Biculturalism (1963-69). The Commission was established to respond to Quebec’s justified concerns over the absence of French in the Government of Canada. Both the first (1969) and second (1988) *OLAs* were adopted with these concerns front and centre. The central purpose of the initial *OLA*, which is carried forward to its current iteration, is to ensure the equality of French in the workings of the Canadian state. Linguistic duality was a policy objective that supported this overarching aim, which is why Canada’s support to English and French linguistic minority communities was included in the Act.¹

Canada being a federal state, the minority status of official language communities is defined by language spoken by the majority in each province and territory. The Royal Commission on Bilingualism and Biculturalism, the *OLA*, and other federal legislation reflects this architecture. Quebec’s position that French be the only minority language recognized in federal legislation ignores Canada’s federal structure and is unsustainable.

The Application of the OLA

The *OLA* is implemented in a way that respects French in Quebec. For example, signage for federal installations (i.e. Parks Canada) on provincial roads is in French only, and federal signage in Quebec must be in French before in English. All federal points of service in Quebec – without exception – must offer services in French. Where numbers warrant, these services are also offered in English. Whereas the right

¹ See for instance *Official Languages Act*, RSC 1985, c 31 (4th Supp), preamble, s. 2(b), s. 41, 43, 84. The Commissioner of Official Languages defines linguistic duality as the coexistence of two majority language groups.

to work in French in federal institutions located in Quebec is universal, the right to work in English in these institutions is very limited, and dependent on the nature and location of the institution. The language of work at the Canadian Space Agency for example is French, because it is located in Longueuil. Workers at this agency have no right to work in English.

There is no social science or empirical evidence to suggest that in the limited circumstances imposed by law and regulation, the provision of services in English in Quebec, or the rights of federal employees to work in English threatens French in Quebec.

The *OLA* is implemented in a way that respects provincial jurisdiction. For example, under Part VII of the Act, the Government of Canada is committed to enhancing the vitality of Canada's English and French linguistic minority communities and imposes a duty on federal institutions to take positive measures to implement this commitment, "while respecting the jurisdiction and powers of the provinces." The Government of Quebec has brought forth no evidence that this statutory requirement has been breached and has never challenged the application of the *OLA* in court.

Asymmetry

The Government of Quebec is proposing that an asymmetric approach towards Canada's official languages be baked into the *OLA*. This is constitutionally problematic. Pursuant to section 16(3) of the *Charter*, "Nothing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French." Read in conjunction with other official languages constitutional obligations, Parliament cannot undermine the equality of status and use of English in Quebec within areas of federal jurisdiction.

Substantive equality in relation to the *OLA* requires that the law be implemented in a way that takes into account the actual circumstances of individual official language minority communities. Indeed, Canada's official languages strategies have, and continue to distribute resources based on this principle, and the QCGN supports this approach.

For example, the Department of Canadian Heritage median per capita investment in Minority Language Education – the amount of money Ottawa gives the provinces to support English and French minority school systems – was \$190 per official language community member in 2018/19. The amount transferred to Quebec to support the English system was \$44 per English-speaking Quebecer. The QCGN would welcome an audit of all Canada's official languages strategies, including the current *Action Plan for Official Languages*, to demonstrate that the *OLA* is not implemented in a way evenly distributes resources across official language minority communities.

The challenges of Canada's English and French linguistic minority communities are fundamentally different, and these differences are highlighted in the application of the *OLA*. Outside of Quebec, the use of French is declining, as is the demographic weight of these communities. The principal concern is the preservation of the French language, and the continued viability of the Francophone minority.

The English-speaking minority in Quebec struggles with socio-economic integration in a society that defines itself by the use of the French language. It is a linguistic minority living in a jurisdiction where the use of languages other than French are restricted by statute. Francophones outside of Quebec will

remember similar provincial measures, like *Regulation 17* that effectively banned public French-Language education for a generation.

Canada's demographic make-up is changing, as is the historic view of Canada and two founding peoples. Other provinces are watching how the governments of Canada and Quebec navigate the modernization of the *OLA*. It is noted that only one province – New Brunswick – has constitutional obligations analogous to the federal government's in relation to English and French. If space is carved out for the *OLA* to be asymmetrically applied in Quebec, nothing prevents other provinces and territories from demanding similar accommodations.²

There is no evidence that the federal government offering services in English in Quebec where numbers warrant, or on the basis of the service provided, undermines French. Indeed, investments made by Canadian Heritage in English-speaking artists in Quebec – Arcade Fire for example – benefits Quebec.

Proposing Supremacy of the Charter of the French Language

The Government of Quebec is seeking supremacy of the *Charter of the French Language* in cases where it conflicts with the *OLA*. Legislative conflicts are a matter for the courts. However, it is noted that Quebec's only constitutional obligations towards its English minority are contained in s. 133 of the *Constitution Act, 1867*, and s. 23 of the *Charter*. The *OLA* animates a much broader range of rights. Questions of jurisdiction aside, it is constitutionally unsound to believe that less-generous provincial legislation would trump rights contained in the *OLA*.

As mentioned, the Government of Canada's approach to official languages already takes into account the linguistic objectives of Quebec. There is no evidence that the federal approach infringes on Quebec's constitutional legislative jurisdiction. There is no statistical evidence that French is not the dominant language in Quebec, just an assumption that French is threatened. A recent study from the *Office québécois de la langue française* clearly demonstrates the dominance of French in Quebec, and its use in the public square.

Quebec and the Canadian Francophonie

It is up to Francophone minority communities to judge Quebec's commitment to their vitality. Quebec's statutory obligation is to protect its own interests and its constitutional jurisdiction. This is not always consistent with supporting Francophone rights outside of Quebec. Quebec has frequently intervened against Francophone minorities fighting for s. 23 minority language education rights, for example. It is the Government of Canada's responsibility to protect its jurisdiction in matters assigned to the federal partner in the Constitution. There are dire implications of ceding federal responsibility to a province on questions related to Canada's official languages. If one province is allowed to impose its language laws on entities operating within federal jurisdiction, the door is thrown open for a patchwork of provincial and territorial language regimes.

² This will likely wind up being litigated in the courts. Manitoba is under a lesser obligations; it may well be that the territories are subject to constitutional obligations similar to New Brunswick's.

Quebec assumes a responsibility towards protecting French within Canada through support of the Francophonie. However, the level of support Quebec can provide pales beside the resources provided by the Government of Canada through the federal constitutional spending power.

It is important to note that Quebec's positions on modernizing the *OLA* seek exclusivity on questions of language within its territory. Quebec's position should be understood as an opportunity to extend the reach of its legislature. Its stance on modernizing the *OLA* is a vehicle to achieve this strategic goal.

Language of Work

We have touched on Quebec's position regarding language of work in Quebec. The *OLA* does not interfere with the rights of individuals to work in French in Quebec. The extension of these rights in federal institutions to English-speakers in Quebec is already limited by the nature and location of the institutions, and in no way threatens the use of French in the workplace within these institutions.

The question of language of work in federally regulated enterprises in Quebec has been studied. Industry Canada's (as it was then) 2013 report, *Language of Work in Federally Regulated Private Businesses in Quebec not subject to the Official Languages Act* was an exhaustive piece of research that concluded "that employees of federally regulated private-sector businesses in Quebec (not subject to the *OLA*) seem generally able to work in French in their workplaces." Calls to subject these businesses to the *Charter of the French Language* are political and are not evidenced based. There is a mischief in the law, insofar as workers in these businesses operated without language rights, which is why both the QCGN and the FCFA have recently and publicly called for the *OLA* to be applied to these enterprises. This is a national solution that would extend new language rights to English and French workers across Canada.

Accepting that these enterprises would be subject to the *Charter of the French Language* is another example of precedent that will be used by other provinces and territories against their official language communities.

Accountability

Linguistic clauses are becoming standard within intergovernmental agreements. In relation to Quebec, these clauses would become non-binding, an option left open for other provinces and territories to emulate.

When federal resources are used to support Canada's official languages, there must be full transparency by the provinces and territories regarding the use of these funds. It is impossible to see how legislative accountability over the expenditure of public funds can be undertaken without this transparency. Taxpayers do not write governments blank cheques.

Quebec's Relationship with the Government of Canada and the Promotion of French

Quebec insists that the Government of Canada obtains its permission before promoting French on the province's territory. The Government of Canada does not unilaterally intervene to promote French in Quebec in areas of provincial jurisdiction. *M-30 - Act respecting the Ministère du Conseil exécutif*

prevents provincial bodies from entering into agreements with the Government of Canada without the permission of Quebec's Minister of Intergovernmental Relations.

This demand, however, extends beyond areas of Quebec's jurisdiction, applying to federal funds expended within the territory of Quebec to promote French. Radio Canada is headquartered in Montreal. Does Quebec seek the right to approve federal support to the network and its promotion of French in Canada?

Quebec and the English-speaking Community of Quebec

Quebec is claiming jurisdiction to determine extra-constitutional language rights. This is difficult to decipher. The only constitutional language guarantees English-speaking Quebec enjoys with Quebec are s. 23 minority language education rights, and s. 133 rights under the *Constitution Act, 1867*. If what Quebec is claiming is legislative supremacy over the extension of language rights read in by the courts, or additional rights granted by virtue of federal legislation, this demand is constitutionally problematic.

The Government of Quebec is seeking to interfere in the relationship English-speaking Quebec has with federal institutions. It seeks obligatory collaboration between Canada and Quebec, and Quebec's permission to undertake positive measures to enhance community vitality. Moreover, Quebec seeks to ensure that these measures comply with Quebec's language policies. Finally, Quebec wants federal transfers made to it by the federal partner to support English-speaking Quebec to be made without condition (see comments on accountability above).

The effects on the English-speaking community of Quebec would be catastrophic. The threat to Francophone minorities elsewhere in Canada if Quebec is accommodated on this point are obvious. *Par et pour* would be replaced by a system characterized by intergovernmental negotiations, with no provincial or territorial accountability on the use of directed federal resources. And although Quebec's position targets the *OLA*, the principles put forth could be extended to other pieces of federal legislation like the *Canada Health Act*, or the *Immigration and Refugee Protection Act*.

Quebec's Responsibility to Francophones Outside of Quebec

Quebec has a leadership role in the Canadian Francophonie. What it seeks in a modernized *OLA* however is an autonomous leadership role. How the Government of Quebec hopes to intervene in the affairs of other provinces and territories in support of Francophone minorities is not clear. The Government of Canada is the only level of government able to maneuver at this level, aided by the federal constitutional spending power, and a national vision of official languages.