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50 ans de législation en matière de langues officielles au Canada : bilan et perspectives 50 Years of Legislation Concerning Official Languages in Canada: Review and Prospects

Éric Forgues, Patrick Donovan, Érik Labelle Eastaugh et Lorraine O'Donnell

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Introduction

50 Years of Legislation Concerning Official Languages in Canada: Review and Prospects

Éric Forgues

Canadian Institute for Research
on Linguistic Minorities (CIRLM)

Patrick Donovan

Quebec English-Speaking Communities
Research Network, Concordia University

Érik Labelle Eastaugh

Observatoire international des droits linguistiques
Faculté de droit, Université de Moncton

Lorraine O'Donnell

Quebec English-Speaking Communities
Research Network, Concordia University

The articles presented in this issue stem from the symposium entitled “50 Years of Implementing the *Official Languages Act*: Review and Prospects”, which took place during the 87th congress of the Association francophone pour le savoir (Acfas) in 2019. This symposium was an occasion to take stock of the evolution of the official languages question within its Canadian political context. To follow the evolution of the Act and its implementation is to follow the evolution of the various discourses, debates, dialogues and reflections surrounding this issue in Canada.

The stakeholders at the heart of these discussions of over fifty years have changed, with new ones appearing since the 1960s. We need only think of the many organizations of the Canadian Francophonie or of Quebec’s English-speaking communities which, with the Fédération des communautés francophones et acadienne (FCFA) and the Quebec Community Groups Network (QCGN) at the forefront, are now closely involved in discussions surrounding the Canadian government’s expressed desire to modernize the *Official Languages Act*.¹

It is important to remember that it was in the wake of the work carried out by the Royal Commission on Bilingualism and Biculturalism, which began in 1963, that the Canadian government adopted the *Official Languages Act* (OLA)² in 1969. Adopting the

1. RSC 1985, c. 31 (4th Supp.).

2. RSC 1970, c. 0-2.

OLA stemmed from the federal government's political concern to maintain national unity in the face of rising Quebec nationalism. In her book, *Panser le Canada : Une histoire intellectuelle de la commission Laurendeau-Dunton*, Lapointe-Gagnon (2018) uses a medical analogy to describe how the Canadian government and several stakeholders wanted to resolve the national crisis. The Royal Commission brought together experts for a public consultation to develop and suggest solutions to the Canadian "malaise". The OLA was adopted in 1969 as one of these solutions, followed by the Canadian Multiculturalism Policy in 1971.

The vision of Pierre Elliott Trudeau, elected Prime Minister in 1968, influenced the design of the OLA by moving it away from a national duality approach and instead favouring an individualistic conception of language rights, thus removing language from the realm of territory and culture (Dorais, Bock, & Meunier, 2018; Cardinal & Denault, 2008). Marking the 40th anniversary of the establishment of the Royal Commission on Bilingualism and Biculturalism, Official Languages Commissioner Graham Fraser summarized Trudeau's vision as follows:

En septembre [1967], Pierre Trudeau – alors ministre de la Justice – classe les droits linguistiques en deux catégories : le droit d'apprendre une langue et le droit d'utiliser cette langue. Notre conception des droits linguistiques qui s'est bâtie au fil des 40 dernières années repose sur ces deux piliers (Fraser, 2008, p. 21).

It was therefore in a political context where the country's national unity was at stake that the official language minority populations obtained recognition of their language rights in the OLA adopted in 1969.

While the OLA recognized the language rights of individuals, the fact remains that, following its adoption, the Canadian government, through the Secretary of State, increasingly funded official language minority community (OLMC) organizations (Martel, 1997, p. 163-164).

This type of support from the Canadian government came at a time when Francophones and Anglophones were redefining their respective identity affiliations. For Francophones, the Estates General of French Canada called into question the ties of solidarity between Quebec and Francophone communities outside Quebec, as they were then known (Laniel & Thériault, 2016; Martel, 1997). Moreover, the declining role of the Catholic Church in structuring French Canadian civil society (Warren, 2007) fostered the reshaping of Francophone civil society around lay Francophone organizations at the provincial and territorial levels, as well as at the national level with federal government financial support. For English-speaking Quebecers, greater awareness as a linguistic minority came about as a result of the growth of a Francophone interventionist state during the Quiet Revolution of the 1960s and the restrictions imposed by Quebec's language laws of the 1970s, particularly the *Charter of the French Language*³ (Jedwab & Maynard, 2012, p. 307-309).

3. *Charter of the French Language*, CQLR 1979, c C-11.

The adoption of the OLA did not prevent a referendum from being held on Quebec's sovereignty project in 1980. The failure of the 1980 referendum revived the project to revise the Canadian Constitution that had been discussed at the constitutional conferences of 1968 to 1971 (Canadian Intergovernmental Conference Secretariat, n.d.). Adopted in 1988, the revised OLA took into account the changes brought about by the new *Constitution Act, 1982*⁴, which included the *Charter of Rights and Freedoms*. The revised OLA therefore now has quasi-constitutional status (Doucet, 2007; Office of the Commissioner of Official Languages, 2009). This revision was presented as a complement to the 1987 Constitutional Accord, commonly referred to as the Meech Lake Accord.⁵

The 1988 revision of the OLA, particularly Part VII, in which the Government of Canada commits to “enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development”, reflects a collective approach to language rights. With the new OLA, another pillar is added to the two pillars mentioned by Fraser. This third pillar focuses on communities.⁶ Part VII formalizes the federal government's commitment to civil society and communities that it made in the Act of 1969 by making it a formal obligation. Legal experts see this as an explicit recognition of collective rights with respect to official languages (Doucet, 2007; Foucher, 2008). According to some observers, the addition of Part VII gives effect to subsection 16(3) of the *Canadian Charter of Rights and Freedoms*, which refers to “the authority of Parliament or a legislature to advance the equality of status or use of English and French” (Simard, 1999; Office of the Commissioner of Official Languages, 1996). However, Labelle Eastaugh, in his article in this issue, points out that Part VII is also based on subsection 16(1) of the Charter, at least since the 2005 amendments to the OLA.⁷

The 50th anniversary of the OLA came at a time when a collective reflection on the Act's modernization was also taking place. Since its inception, the Office of the Commissioner of Official Languages has highlighted the government's shortcomings with respect to the OLA yearly, and several stakeholders have pointed out difficulties in the implementation of and compliance with the OLA, and would like to see the new Act strengthened in this regard (see the papers by Bastarache, the FCFA and Forgues in this issue). Four consultations were conducted to reflect on the modernization of the OLA: by the Senate Standing Committee on Official Languages (started in 2017), the Office of the Commissioner of Official Languages of Canada (in 2018), the House of Commons Standing Committee on

4. *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

5. See the statements of the Minister of Justice who introduced the bill in the House of Commons, Hnatyshyn (1988).

6. In the English version of the OLA, the idea of community emerges explicitly with the use of the term *communities*.

7. According to Labelle Eastaugh, this distinction may be important. Any statutory provision must be interpreted in light of its intent, and thus the scope of Part VII could vary depending on whether it is assumed to be used to implement section 16(1) or 16(3) of the Charter.

Official Languages (in 2018), and Canadian Heritage and the Minister of Tourism, Official Languages and La Francophonie (in 2019). Community stakeholders, experts and citizens were invited to express their expectations for a new OLA. Today, what are the hopes, visions and aspirations of OLMC representatives and citizens regarding the OLA and its implementation?

In the wake of these efforts, the Canadian government committed to modernizing the OLA in 2018 and again in 2019 after its re-election (Vachet, 2018 & 2020). It should be noted that the political context in which the consultations and collective reflections towards modernizing the OLA are taking place is very different from that of the 1960s. There seems to be little threat to national unity on the language front. Sustained intervention by the Canadian government has led to an increase in the number of minority-language organizations (Allain, 2004; McRoberts, 1999, p. 137). Civil society representing OLMC interests is now composed of several hundred organizations that are largely funded by the Canadian government. Today, these organizations are the federal government's primary interlocutors in official language matters. It is the representatives of these organizations who have largely taken part in these consultations and collective discussions. During a consultation organized by Minister Mélanie Joly in Moncton on March 12, 2019, Me Michel Bastarache said that he had the impression that “de plus en plus, la question des langues au Canada en est une qui intéresse presque exclusivement les francophones hors Québec.” It should be noted, however, that Quebec's English speakers were also actively involved in consultations surrounding OLA modernization.

However, since Me Bastarache's observation, the debate has shifted to Quebec, where, taking advantage of the fall 2019 federal elections, the Government of Quebec asked federal party leaders to make businesses under federal jurisdiction subject to the *Charter of the French Language*. This intervention prolonged the collective reflection underway, which did not fail to arouse some impatience on the part of OLMC stakeholders (Deschênes-Thériault, 2021). Prime Minister Justin Trudeau's government won re-election in the September 2019 election, and, though falling short of a majority, its 2020 Speech from the Throne announced that it “had the responsibility to protect and promote French not only outside of Quebec, but also within Quebec” (Governor General, 2020). This position seems to indicate a new approach to official languages. The Prime Minister also clarified his position on a request by the Quebec premier, stating that rather than subjecting federal businesses to the *Charter of the French Language*, the Canadian government wanted to amend the OLA to provide for specific language requirements for federal businesses in Quebec (Leblanc, 2020), as well as in certain regions with a “strong Francophone presence” elsewhere in the country, which would introduce a territorial dimension to the OLA. This terminology suggests that the government intends to move away from the framework of “significant demand” regions under subsection 20(1) of the Charter and Part IV of the OLA. In the fall of 2020,

Minister Mélanie Joly announced that she would release a white paper on official languages in early 2021 (Bellavance, 2020). Prior to its release, the Government of Quebec clarified its position on the modernization of the OLA (Government of Quebec, 2021). This position converges, on certain points, with that of the Canadian government (Leblanc & Martin, 2021), notably on the need to adopt a differentiated approach with respect to Quebec and on the desire to protect French in Quebec. However, the organization that represents the province's English speakers, the Quebec Community Groups Network (QCGN), stated in a press release that it did not share the Quebec government's vision (QCGN, 2021a).

On February 19, 2021, Minister Mélanie Joly published her white paper on modernizing the OLA, which confirms her intention to adopt an approach that takes into account the language regimes of the provinces, while reaffirming that the government is committed to “protecting French outside Quebec, but also in Quebec, in full respect of the rights of its English-speaking minority” (Government of Canada, 2021). Thus, we can read that the Canadian government recognizes “the right to be served and to work in French in businesses under federal jurisdiction in Quebec and in regions with a strong Francophone presence in the country.” The QCGN (2021b) is concerned about the impact of this approach on English-speaking Quebecers.

Because of this reflection on the modernization of the OLA and its 50th anniversary, we felt it was an opportune time to take stock of the legislation in terms of its objectives, implementation and compliance, but also in light of the aspirations of OLMCs. The contributions to this issue are intended to further the reflection of researchers and stakeholders in the field of official languages.

The issue features articles by key stakeholders on the official languages scene, such as the Commissioner of Official Languages, Raymond Théberge; former Supreme Court of Canada Justice, Michel Bastarache; lawyer Marion Sandilands; and the organizations that speak for OLMCs, namely the Fédération des communautés francophones et acadiennes du Canada and the Quebec Community Groups Network.

The paper by the Commissioner of Official Languages, Raymond Théberge, takes stock of the OLA by situating its adoption in a context of national unity crisis, but also in a context where significant progress was being made in the recognition of rights. He highlights the Act's successes, such as linguistic duality, and its impact on the language of work and public services. He acknowledges certain advances in language rights, but also some setbacks. To meet the challenges that remain in terms of implementing and enforcing the OLA, he calls for its modernization to make it more dynamic and robust.

In his paper, the Honourable Michel Bastarache makes several arguments in support of the position that the OLA must be better implemented. As such, he makes no request for new rights in a new OLA, but rather for more measures to strengthen compliance.

The FCFA paper presents the memoir they prepared for a new *Official Languages Act*. The proposals in the memorandum are aimed at promoting better implementation of and compliance with the new OLA. This organization is also proposing a new obligation, that of consulting communities, as well as formalizing and making mandatory certain practices and including new obligations.

As for the QCGN, director Sylvia Martin-Laforge points to unequal treatment of Anglophone and Francophone minorities when it comes to official languages. According to her, English speakers are in some respects less well represented in several public bodies and benefit less than Francophones from investments in official languages. She believes that equality between the two language groups must be better respected in a new OLA.

The paper by Marion Sandilands is in the same vein. In Quebec, the discussion of language is framed in the context of Quebec and the *Charter of the French Language* (commonly known as Bill 101), rather than in the context of the *Official Languages Act*. However, the author shows that Quebec's English-speaking community has played a role in the recognition of language rights in the country. She provides an overview of legislative changes regarding language from Quebec's Anglophone perspective, by highlighting the limitations of the OLA and considering its modernization, while noting, as Michel Bastarache does, that collective discussion on the subject has not been national in scope. For the new OLA to play a more active nation-building role, it must be based on a broader national discussion, which may be difficult, but which could lead to a substantial modernization of the OLA.

This issue also presents several articles produced by researchers in the field of official languages.

Martin Cyr Hicks examines the national imaginaries of Canada's Anglophone and Francophone communities. While two national imaginaries can be clearly distinguished until the 1960s, the Estates General of French Canada and the adoption of the 1969 OLA, which rejected the concept of biculturalism, led to a reconfiguration of these imaginaries. The concept of biculturalism was not retained in the OLA, 1969; however, the author states that with the adoption of a new OLA in 1988, the notion of linguistic duality emerges, but he wonders if this is enough to revive a pan-Canadian Francophone identity.

Robert J. Talbot's article examines debates surrounding linguistic duality in Canada by showing that the arguments used in favour or against linguistic duality are similar in 2019 to those used in 1969, when the OLA was adopted, and in 1929, when the Canadian government introduced measures to bilingualize post offices. In referencing past debates, the author expresses confidence in views that recognize the importance of linguistic duality in ensuring national unity. However, the author mentions the emergence of social media, which provides a platform for individuals with extremist views.

The article by Rodrigue Landry offers an analysis of the effects of the OLA on OLMC vitality. Drawing in particular from his own work, the author concludes that, except for Part VII—which has a potential that has not yet been fully realized in this sense—the OLA has little effect on the vitality of OLMCs. In keeping with Part VII of the OLA, the author invites the government and stakeholders to define and implement a true language management plan that fully engages individuals and families in order to have a tangible effect on OLMC vitality.

Érik Labelle Eastaugh's article focuses on Part VII of the *Official Languages Act*, and more specifically on section 41, which states that the Government of Canada is committed to the development of OLMCs and to enhancing their vitality. He analyzes the various interpretations of this section and systematically criticizes the one adopted by the Federal Court in *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*,⁸ which empties section 41 of its substance. In so doing, Labelle Eastaugh points out the disadvantages of the approach taken in the drafting of section 41, whose wording is open to restrictive interpretations like that of the Federal Court, and he suggests ways of clarifying this part of the OLA in the context of its planned modernization.

The clarity of the OLA is a variable that can have an impact on its implementation and compliance to it, which appears, as we mentioned above, to be a persistent problem with the OLA. Éric Forgues' text aims to provide an analysis grid that makes it possible to understand the factors that determine the effectiveness of a linguistic law. This grid can be used by researchers, but also by actors who must implement measures to ensure compliance with the OLA.

Lastly, the article by Bengt-Arne Wickström adopts an economic approach to analyze language policies and their effects on vitality based on their costs, by distinguishing between a cost-benefit analysis and a cost-efficiency analysis. If more than one language policy can produce positive effects on the vitality of a minority language, it seems relevant to him to apply an analysis of its costs based on its results. The characteristics of the minority, particularly its size and concentration within the territory, can have an effect on the costs, effectiveness, and benefits of a policy.

In 2021, languages remain more than ever at the heart of the Canadian political landscape. Discussions about the nature and scope of the yet-to-be-revised OLA continue to engage government and media. The *Indigenous Languages Act*,⁹ passed in 2019, has brought to the forefront the practices and preservation of Canada's First Nations, Métis and Inuit communities. At the time of writing, the current Quebec government announced that it

8. 2018 FC 530.

9. *Indigenous Languages Act*, SC 2019, c 23.

will revise the *Charter of the French Language*. The reflection surrounding the revision of the OLA is therefore taking place in the context of a broader reflection in Canada on the status of languages and the recognition of minority communities.

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Correspondance

eric.forgues@umoncton.ca

patrick.donovan1@concordia.ca

erik.labelle.eastaugh@umoncton.ca

lorraine.odonnell@concordia.ca