Bill S-205 : Brief submitted to the Standing Senate Committee on Official Languages

Bill S-205: *An Act to Amend the Official Languages Act (Communications with and Services to the Public)*

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Introduction

This brief sets out the Commissioner of Official Languages' position on Bill S-205, which seeks to update Part IV of the *Official Languages Act* (the Act).

The Commissioner recognizes the need for the bill tabled by Senator Chaput, as well as its importance, because it will help fulfill the purpose of Part IV and enable official language minority communities to develop, thrive and strengthen their identity.

This brief will address the following two questions:

> Why is it necessary to update Part IV of the Act?
>
> What other criteria regarding significant demand could help achieve the objectives of Part IV of the Act?

To answer these questions, it is necessary to recall the purpose and scope of the rights that are recognized in Part IV, as well as their impact on achieving the objectives of the Act.

(1) Purpose and scope of Part IV of the Act

The public's fundamental right to communicate with and to receive services from federal institutions in either official language is established in section 20 of the *Canadian Charter of Rights and Freedoms*. [1] Although section 20 of the Charter acknowledges that this right can be exercised by the public, its purpose is mainly remedial, since its primary goal is to enable official language minorities to develop, thrive, strengthen their identity and promote their vitality. For example, among those judgments [2] dealing with the remedial purpose of language rights, the decision rendered by Justice Moreau in *Fédération Franco-Ténoise* v (versus) *Canada* (*Attorney General)* [3] eloquently explains the effects of exercising the right guaranteed by section 20 of the Charter on community vitality:

> The more that government action makes a language visible and vital, the greater the recognition of the legitimacy of the language, and the more the members of the language group perceive their group as having a strong vitality. But Mr. (Mister) [Rodrigue] Landry noted:
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> > … A language that is not used in the public domain of society is perceived as being illegitimate, that is, as having no recognition within the society. This situation leads to members of the group gradually abandoning their language and seeking to integrate into the dominant language group.
> >
> > **[translation]**

It is true that, for various reasons over the past decade, federal institutions have had to review how they deliver services, which has sometimes resulted in their reducing the number of regional offices providing service in person. However, the fact remains that federal offices that still provide services to the public have a substantive and significant impact on the identity and vitality of English and French linguistic minority communities.

(2) Why is it necessary to update Part IV of the Act?

There are at least three reasons why Part IV needs to be updated.

First, the regulations related to Part IV of the Act (adopted in 1991) do not take into account the criterion of the particular characteristics of Canada's English and French linguistic minorities, or the impact of public

services provided in both official languages on the status and legitimacy of the minority language.

Second, the numerical criteria that are set out in subsection 32(2) of the Act and used in the 1991 Regulations to define significant demand do not take into account all of the people likely to choose to be served in the minority language.

Third, Part IV of the Act does not explicitly recognize the principle of substantive equality or the duty to consult the English and French linguistic minority population.

(2.1) Importance of the criterion of the particular characteristics and vitality of the English and French linguistic minority population

It is worth pointing out that Part IV of the Act states that the public's right to receive services from federal institutions in either official language can be exercised with respect to federal offices located in areas where there is significant demand for communications with and services from those offices in English or French. In addition, Part IV of the Act gives the government the regulatory authority to determine the circumstances in which significant demand applies. To guide the government in exercising that authority, Parliament established, through subsection 32(2) of the Act, a number of criteria, including the **number of persons composing the English or French linguistic minority population** of the area served by an office or facility, **the particular characteristics of that population** and the proportion of that population to the total population of that area.

In the Regulations that were adopted in 1991, the government did, in fact, define "linguistic minority population" using the "first official language spoken" (FOLS) concept. The government also adopted

various numerical thresholds and percentages that determine whether federal offices are required to provide all services or only certain key services [4] in both official languages. However, the Regulations do not explicitly mention the particular characteristics of the linguistic minority population, even though many parties insisted, during consultations prior to the adoption of the Act in 1988, that the Act and its regulations should not rely strictly on numerical criteria in defining "significant demand." This was a key issue for the leading official language minority community associations, who were pleased with the remarks made at the time by the then Minister of Justice, the Right Honourable Ramon Hnatyshyn, when he appeared before the legislative committee on March 22, 1988:

> [The] particular characteristics of that [official-language] minority population … such as the existence of educational, religious, social or cultural institutions … may attest, perhaps better than numbers alone, to that population's vitality and potential as a community. [5]

By clearly stating that the government "shall have regard to" the particular characteristics of the English or French linguistic minority population, Bill S-205 seeks to effectuate legislative intent as expressed by the former minister of Justice. The bill therefore promotes the consistent application of all of the parts of the Act. Without that criterion, a small official language minority community that might receive funding from Canadian Heritage to create or preserve a school could find itself in a situation where it now falls below the numerical threshold established in the Regulations or no longer represents 5% of the total population of the area served. As a result, despite the vitality it would be able to show by having a school, the community could lose

access to federal services in its language—services that would help strengthen its identity and vitality. It is this kind of inconsistent result of the application of the Act that Bill S-205 seeks to remedy.

(2.2) The criteria for defining significant demand must take into account all of the people likely to choose to be served in the minority language

Currently, the assessment of significant demand relies largely on the number of people in the linguistic minority population, which is established based on the number of people whose FOLS (first official language spoken) is the minority language. By way of background, FOLS (first official language spoken) was adopted in the wake of a sizeable growth in international immigration beginning in the mid-1980s. It was created to take into account that proportion of the population whose mother tongue is neither English nor French. It is derived using a method that successively takes into consideration responses to three census questions: knowledge of the official languages, mother tongue, and language spoken **most often** at home.

Application of the existing criteria set out in subsection 32(2) of the Act and further clarified in the 1991 Regulations does not take into account people whose FOLS (first official language spoken) is not the minority language, but who use it in the public or private domain. These could, for example, be people who

- speak the minority language at home (as can be the case for a certain number of exogamous couples, newcomers and anglophiles or francophiles);or
- speak the minority language in the workplace (for example, in certain sectors in particular, such as teaching, health and social services, and provincial or municipal government services);or
- receive their education in the minority language.

All of these people and those who use the minority language in the public or private sphere are likely to elect to receive their services from federal offices in the minority language. Consequently, they should be considered in the criteria and methodology used to assess significant demand, in the same way as people whose FOLS (first official language spoken) is the minority language.

(2.3) The principle of substantive equality and the importance of consulting the English and French linguistic minority population

Bill S-205 is important because it codifies the principle of substantive equality by explicitly imposing on federal institutions the duty to provide service of equal quality in both official languages and to consult with the English and French linguistic minority population regarding the quality of their communications and services. That principle, set out in clause 3 of the bill, codifies the teachings of the Supreme Court of Canada, which justly stated in *DesRochers* that:

> Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question. [6]

(3) What other criteria regarding significant demand could help achieve the objectives of Part IV of the Act?

The debate surrounding Bill S-205 has been mainly about clause 5, which seeks to amend the criteria for assessing significant demand, as set out in subsection 32(2) of the Act. For example, the criterion of the "number of people who can communicate in the language of the English or French linguistic minority population" raised a number of questions and concerns among witnesses and among members of the Standing Senate Committee on Official Languages.

To be clear, the purpose of subsection 32(2) is not to define who is a Francophone or to determine who should be included in the francophone minority communities; neither is its purpose to determine who is an Anglophone in Quebec, nor to determine the size of Quebec's English-speaking communities.

However, the numerical criteria in subsection 32(2) for assessing potential demand for services in the minority language should be inclusive and relevant, taking into account the purpose of Part IV of the Act.

For example, not everyone who **can** communicate in the language of the English or French linguistic minority population is likely to elect to receive public services in the minority language. However, people who **use** the minority language in the public or private sphere could make that choice. That would clearly be the case for the three aforementioned groups of people.

In conclusion, Bill S-205 tabled by Senator Chaput is just as important and necessary as Bill S-3, which was tabled by Senator Gauthier to amend Part VII of the Act. As Senator Chaput said, "The basic purpose of

updating Part IV of the *Official Languages Act* is to better serve our two official language communities."

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1 20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

2 *Reference re Public Schools Act (Man.)*, [1993] 1 S.C.R. (Supreme court reports) 839 at pp (pages) 850-851; *Doucet-Boudreau v (versus) Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. (Supreme court reports) 3 at para (paragraph) 27; *Arsenault-Cameron v Prince Edward Island*, [2000] 1 S.C.R. (Supreme court reports) 3, at para (paragraph) 27; *Mahe v (versus) Alberta*, [1990] 1 S.C.R. (Supreme court reports) 342 at p (page) 363.

3 *Fédération Franco-Ténoise* v (versus) *Canada (Attorney General)*, 2006, NWTSC (Northwest Territories Supreme Court) 20 at para (paragraph) 600.

4 Key services include those related to federal income security programs, post office services, services of a federal government employment centre, services of a federal government tax office, Canadian Heritage services, Royal Canadian Mounted Police services and services from the Public Service Commission.

5 *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72, An Act respecting the status and use of the official languages of Canada*, Issue No.1 (March 22, 1988) at p (page) 37.

6 *DesRochers v (versus) Canada (Industry)*, [2009] 1 S.C.R. (Supreme court reports) 194, 2009 S.C.C. (Supreme Court of Canada) 8 at para. (paragraph) 51.

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