Review of Bill S-3

Testimony

prepared by

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Mr. Chair and dear members of Parliament, thank you for asking me to share my thoughts on Bill S-3. I am particularly delighted since the issues raised by the draft legislation are critical to the future of francophone communities.

I would like to give you my analysis of Bill S-3. Unlike my colleagues who are scholars in the field of law, and who have been speaking to you since the start of your hearings, I would like to set Bill S-3 in a different context.

My point is that Part VII was prepared with a view to national reconciliation but has failed in this regard.

Moreover, I would argue that rendering Part VII operative would be but a partial answer to the difficulties related to its application. I would also argue that the government must show more commitment to the official language issue.

In presenting my point, I am basing myself on the results of research into the many testimonies submitted to the Legislative Committee on Bill C-72 and those to the Standing Joint Committee on Official Languages at the time that the Bill was under review in 1987, and on data drawn from the major studies into Part VII¹. I will start by outlining the political environment in which Part VII was adopted. I will then show that there were good reasons for developing Bill S-3. Finally, I will address the need for a political and administrative approach to the growth and development of official language minorities.

Environment

I would like to remind you that on June 25, 1987, Minister of Justice Ray Hnatyshyn tabled Bill C-72 on official languages, which contained Part VII. The Minister believed that the Bill reflected the government’s commitment to linguistic duality, which he presented as a unique and vital feature of the Canadian identity. He also indicated that the Bill had been developed in a spirit of national unity and reconciliation to round out the mutual commitment of the different levels of government under the Meech Lake Accord to official language communities. At the time, the ministers responsible for official languages, David Crombie and Robert de Cotret, were working in a true climate of national reconciliation, and they even wanted to set up a Canadian council on official languages.

In a letter to his Cabinet colleagues, the country’s Prime Minister, Brian Mulroney, wrote that “the government is committed to fostering and supporting the growth and development of Canada’s English- and French-speaking minorities. It is therefore essential that all federal departments and agencies contribute to strengthening these communities and bear them in mind when developing policies and implementing programs².”

¹ Part of the research was done by Martin Normand, whom I thank.
² Statement quoted in the study by the Office of the Commissioner of Official Languages, A Blueprint for Action: Implementing Part VII of the Official Languages Act, 1988, Ottawa, Minister of Supply and Services Canada, February 1996, p. 91. The quote refers to a letter from the Prime Minister to his Cabinet colleagues in July 1987, the day following the tabling of Bill C-72.
It should be noted that, at the time, the Prime Minister was referring to all federal departments and agencies, whereas a few years later, 26 departments and agencies were identified as being required to comply with Part VII. Of course, it should be remembered that a wind of good intentions was blowing over Canada, and there was an unmistakable spirit of reconciliation and openness, particularly towards francophone and anglophone minorities.

The Legislative Committee on Bill C-72 was set up and met for the first time on Thursday, March 17, 1988, nine months after the Bill was tabled in the House of Commons. It met 27 times between March 17 and June 22, 1988, but the discussions centred mainly around parts III on the administration of justice, IV on communications with and services to the public and V on language of work.

The Committee also pointed out the connection between the Meech Lake Accord and the Bill, particularly since, at the time, the Accord was deemed inadequate by the official language minorities. Nonetheless, Minister Hnatyshyn reminded members of the Legislative Committee that Part VII “[Translation] rounded out the commitment found in the Meech Lake constitutional accord on Canada’s linguistic duality.”

The media also reported different views. In April 1988, at the international congress of the International Association of Comparative Language Rights, in Montreal, Pierre Martel, then Chair of the Conseil de la langue française, indicated that the very objective of Bill C-72 imperils the provisions of Bill 101 on French. He explained that the government could intervene, pursuant to its spending authorities, in Quebec companies to protect individuals wishing to speak English.

Thus, very soon, the Government of Quebec started looking into the impact of Part VII. According to Mr. Martel, the Bill overlooked a fundamental fact: “[translation] in Canada, French is the minority language and, therefore, the one that requires protection in this country.”

A month later, on May 29, 1988, Lucien Bouchard told the media that the government intended to “[Translation] officially address the issue of minority rights at a constitutional conference” once the Meech Lake Accord was adopted. He indicated that “[Translation] the rights of francophones will only be properly addressed once Quebec buys into the Constitution.”

In July, Gil Rémillard and Jacques Parizeau expressed their concern that Bill C-72 would open the door to federal intrusion in the area of language skills in Quebec. At this point, Mr. Bouchard responded that there was no question of allowing the Bill to be unevenly applied.

The legislation was enacted on September 15. On September 28, 1988, Mr. Bouchard explained to the Standing Joint Committee on Official Languages that the new act was a key tool,

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3 Legislative Committee on Bill C-72, Proceedings, Issue no. 1, 1988, p. 18.
7 Ibid.
but not the only one, in the government’s efforts in favour of official languages. He explained that the need for such an instrument was in part due to the Meech Lake Accord, where federal and provincial first ministers acknowledged the dual nature of Canadian society. He pointed out that negotiations were under way with other levels of government in order to ensure compliance with the commitments stipulated in Part VII.

Clearly, Part VII and the Meech Lake Accord were designed to work together. Neither one stands well on its own. However, the Meech Lake Accord was not adopted, and we are still waiting for Quebec and the rest of Canada to begin real reconciliation.

In 2003, the publication of the *Action Plan for Official Languages* revealed the government’s desire to set the official languages issue at the heart of the Canadian national project. However, ever since the failure of the Meech Lake Accord, we have been out of kilter when it comes to official languages. The Supreme Court has acknowledged that Quebec has a special role to play in promoting French. However, without a specific commitment from the nation’s Prime Minister to restore official languages at the heart of a true effort at national reconciliation, Part VII will never be endorsed across the board or even properly serve the minorities it addresses. In the absence of such a step, can the adoption of Bill S-3 help fill the gap?

*From Part VII to Bill S-3*

It might surprise some to learn that no questions were raised about Part VII during the different committee meetings that were supposed to during its adoption. Clearly, barring a few exceptions, Part VII sparked very little interest in the committees.

At the time of the clause-by-clause review of Bill C-72, Jean-Robert Gauthier was one of the few to challenge Minister Hnatyshyn about the non-enforceable nature of Part VII. According to Mr. Gauthier, it did not give Canadians any legal recourse against mishandling, oversight or any act by (the government). Yet, as the Minister explained, it “{Translation} is important to understand that the language referred to in Part VII is that of encouragement. It is not the language of force.” The Commissioner of Official Languages at the time, D’Iberville Fortier, also commented on Part VII but none of the committee members asked him to elaborate on his comments.

Yvon Fontaine, President of the Fédération des francophones hors Québec (FFHQ) at the time, found that Part VII contained “{Translation} innovative language, that went well beyond anything used before then.” He pointed to the weaknesses of Part VII which, according to him, lay in the “{Translation} mechanisms provided to implement the federal government’s commitment to protecting and developing language minorities.” He indicated that “{Translation} these mechanisms are inadequate, in particular because the affirmation of the duty of every department to engage in this effort was not explicit,” adding that “{Translation} there must be

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8 Comité mixte permanent des langues officielles, testimony, issue no. 30, 1988, p. 15.
9 Legislative Committee on Bill C-72, testimony, issue no. 3, 1988, p. 11.
10 Legislative Committee on Bill C-72, testimony, issue no. 7, 1988, p. 11.
more involvement by the departments. In brief, official language minority representatives were enthusiastic, but pointed out the need for a clear commitment on the government’s part to the development of official language minorities.

It was only when the Legislative Committee was wrapping up that the members finally realized that they had run out of time to discuss Part VII and that they did not have all the information they needed to adopt the sections in this Part with certainty. Some members even admitted that they were not aware that Part VII was an addition to the Act, and some began to express doubts that this Part could be applied as intended at the outset. Thus, members adopted the 5 sections in Part VII without having discussed them in detail. The sections contained in the final version of the Act are thus identical to the ones that were in the original version of Bill C-72.

After it was adopted, and it had been brought to Mr. Bouchard’s attention that Part VII was more declaratory than enforceable, he explained that regulations were not necessary for it to be applied. He indicated that he could count on the Committee to ensure compliance with Part VII of the Act. In a sense, he was delegating some of his responsibilities to it. Instead of having to manage an enforceable provision, all he had to do was wait for the reports and attend to them.

Three years later, in 1991, in a study by Michel Bastarache and Andréa Ouellet on the legal value of Part VII, the authors attempted to clarify whether it would be creating new rights. According to them, Part VII would create the biggest problems in terms of defining new rights and related obligations. They saw a problem in the overlapping responsibilities between the different levels of government.

Another problem lay in the very wording of Section 41. According to the authors, the English version of Section 41 used the expression “is committed to” whereas the French version used the expression “engagement”. According to them, the French term implied enforceability, regardless of the measure it supported. Thus, one could not conclude that a commitment had no legal value.

The authors acknowledged that while it was true that no specific sanctions had been included for a breach of section 41, the following sections nonetheless contained duties related to the need to coordinate and implement the Act, which lent support to the obligation to act. Thus, they believed that the federal government had instilled an obligation for the government to pursue the effort to promote in good faith. At the time, they felt that the Secretary of State had a legal obligation to act, in a discretionary manner, in support of the obligation to coordinate and promote Part VII of the Act.

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11 Ibid., p. 6.
12 Ibid., issue no. 21, p. 36.
13 Ibid., issue no. 30, p. 46.
15 Ibid., p. 21.
16 Ibid., p. 24.
17 Ibid., p. 25.
They also deemed that the Commissioner of Official Languages had to ensure compliance with the requirements resulting from Part VII. They identified a weakness in the act in this regard. According to them, although the judicial recourse contained in subsection 77(1) excluded Part VII of the Act, there was not doubt that subsection 77(5) upheld all other right to act, and that subsection 78(3) upheld the authority of the Commissioner to intervene in a legal matter other than one covered under subsection 77(1). Thus, they argued, the recourse provided under Part X of the Act is neither exclusive nor limiting. In essence, for Bastarache and Ouellet, Part VII appeared to create enforceable rights and obligations.

However, according to a 2001 Library of Parliament study, “it is hard to say with any certainty whether the federal government has done justice to the intentions Parliament expressed in 1988.” The government has a positive obligation to act in support of linguistic rights and official language minority communities. This same study states that “Parliament was not limiting itself to a statement of intentions, but creating a positive obligation for the federal government to act (…).” As well, “the Supreme Court judgments (…) tend to show that there is a positive obligation for the Canadian government to act on the objectives (…) implemented under section 41 of the OLA.”

That same year, on September 19, 2001 specifically, Bill S-32 was tabled before the Senate during the 1st session of the 37th legislature. And thus began the real debate, 13 years after the adoption of the Act, but to no end. A new bill, Bill S-11 was tabled on December 10, 2002. This was followed by Bill S-4 on February 3, 2004. Finally, Bill S-3, which is before us now, was introduced in the Senate on October 6, 2004.

Senator Gauthier wants section 41 to be enforceable in order to avoid any ambiguity. He believes that this was the legislator’s intention. Yet, in Canada (Commissioner of Official Languages) v. Canada (Department of Justice), the Solicitor General of Canada maintained that “nowhere in Part VII of the OLA is there any duty imposed on the federal government to always take those measures that most enhance the vitality and support the development of minority communities or best advance both official languages, or any duty to systematically hold public consultations. That commitment is essentially political in nature.”

A political and administrative approach: the role of the Prime Minister and the Privy Council

In 1996, the Commissioner of Official Languages, in a study on the measures used by the federal government to implement Part VII, concluded that the objectives set by the legislator in section 41 had not been achieved. “The lack of impact (was) traceable to a failure to set clear priorities, objectives and guidelines.”

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18 Ibid., p. 33-34.
19 Ibid., p. 35.
21 Ibid.
22 Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001, 55.
23 Office of the Commissioner of Official Languages, A Blueprint for Action, op. cit, p. 11.
It is important to also recognize that these were the days of post-Meech Lake, the Charlottetown letdown and the aftermath of the 1995 referendum. Relations between Quebec and the rest of Canada were tense, and official language minorities were essentially on the government’s radar only to intercept the aspirations of Quebec separatists. The Commissioner pointed out that other than those of Canadian Heritage, none of the official documents published by federal institutions referred to Part VII.

The Commissioner referred to the role of the Privy Council Office, which can make departments aware of the needs of official language minority communities and take their development into consideration when making recommendations to Cabinet. By 1996, it had been noted that the Privy Council Office had to play a key role in regard to Part VII.

At the same time, in 1996, the Standing Joint Committee on Official Languages published a study on the implementation of Part VII, in which it pointed out that the Commissioner was dismayed at the “meagreness of the efforts being made to follow up on Parliament’s intentions as expressed in this Part of the Act” since 1989. The Committee also believed that the Privy Council Office should “ensure the leadership, coordination and accountability of departments and government agencies with respect to the implementation of Part VII.”

In 1998, in a study on Part VII, Donald Savoie expressed the view that federal government executives did not understand it. He insisted on the role of the Privy Council Office, whose mandate was to advise the Prime Minister and the government on the application of section 41. In 1999, Senator Jean-Maurice Simard strongly expressed similar views.

In 2001, the Prime Minister gave the President of the Privy Council Office the job of developing a coordinated approach to official languages in regard to the application of Part VII. This led to the Action Plan on Official Languages.

In essence, we can see two possible routes for the implementation of Part VII: the political-administrative route, which was reinforced by the new responsibilities issued to the Privy Council Office for coordinating official languages, and the legal route, which is that of Senator Gauthier. We opt for the first rather than the second.

Official languages must be guided from the highest levels inasmuch as the growth and development of official language minorities is an essential condition for any approach to national reconciliation. In view of the importance of the issues, the Prime Minister must show sustained leadership in this area. Among other things, he must ensure that those who are responsible for the implementation of Part VII receive adequate resources with which to do their work, and that the

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25 Ibid., p. 4.
26 Donald J. Savoie, Official Language Minority Communities: promoting a government objective, November 1988, p. 45.
committees that are set up have the necessary authority to play a significant part in improving the situation.

At this point, there are some forty committees and consultative entities monitoring the opinions of official language minorities and trying to integrate them into the process of administering official languages. There is also a growing movement in the area of federal-provincial relations working on the spirit of Part VII.

So the government is starting to take steps to ensure the growth and development of official language minorities. However, it must arm itself with more effective language planning mechanisms. It must assess more systematically the effectiveness of its interventions in regard to community development. And inasmuch as French is the minority language in Canada, it must also promote closer links between francophone minorities and Quebec, and give the latter a larger role in developing strategies that are conducive to the formers’ growth.

Conclusion

This is the first time in 17 years that we get to see a serious discussion on Part VII. It is thanks to Bill S-3 that this debate is finally taking place. However, it is unfortunately happening at a time when the key ingredient needed to really implement Part VII is still missing. The Meech Lake Accord has not been ratified, and we are still awaiting a real reconciliation between Quebec and the rest of Canada. Partly for this reason, the Prime Minister has a special responsibility in regard to official languages, and in particular in regard to the growth and development of official language minorities.

Moreover, the benefit of a sustained approach backed by the Prime Minister is that it forces everyone to become accountable in order to determine how each of us can contribute to the growth and development of official language minorities. We think that the point is to strengthen such an approach on the policy and administrative level by insisting that the Prime Minister and the Privy Council Office be more committed to Part VII rather than making it justiciable.

Bill S-3 represents the culmination of extensive efforts by Senator Gauthier, for whom I have the highest regard. Of course, I believe that it would be more useful for the government to ensure ever more effective coordination of Part VII in the pursuit of federalism, and in a real spirit of national reconciliation, including reconciliation with Quebec. This type of commitment is political. No tribunal could substituted for the government’s role in the field of official languages.

Thank you for your attention.