

## EXECUTIVE SUMMARY

***“Until the Queen otherwise directs...”*: The Government of Canada’s positive obligation to foster and promote the equality of both official languages in the City of Ottawa**

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## I. INTRODUCTION

Our study addresses the federal government’s hypothetical obligation to promote the equality of both official languages in the City of Ottawa. It is part of a now ongoing and broader public debate launched by citizens groups advocating for the recognition of French and English as the official languages of the City of Ottawa on the occasion of Canada’s sesquicentenary in 2017.<sup>1</sup> Given that the municipalities come under provincial jurisdiction, discussions about the official recognition of French and English in Ottawa predictably revolve around the role that the Province of Ontario and the City of Ottawa are expected to play in this regard.<sup>2</sup> This study examines whether the constitutional designation of Ottawa as the national capital under section 16 of the *Constitution Act, 1867* has legal consequences for the federal government in respect of language issues. This question first leads to the examination of the federal government’s positive obligations pursuant to section 16 of the *Constitution Act, 1982*,<sup>3</sup> Part VII of the *Official Languages Act (OLA)*,<sup>4</sup> and the constitutional principles governing the protection of minorities and cooperative federalism. In light of this legal framework, this study concludes that the federal government’s silence or neutrality on this issue is in all probability inadmissible.

## II. CONSTITUTION ACT, 1867: Section 16

Section 16 of the *Constitution Act, 1867*<sup>5</sup> is the starting point of our study.

16. Until the Queen otherwise directs, the Seat of Government of Canada shall still be Ottawa.

16. Jusqu’à ce qu’il plaise à la Reine d’en ordonner autrement, Ottawa sera le siège du gouvernement du Canada.

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<sup>1</sup>“Les aînés francophones veulent une capitale bilingue,” *Le Droit* (26 August 2015); Marie Danielle Smith, “Movement Pushes for Official Bilingualism Policy in Ottawa,” *The Ottawa Citizen* (13 August 2014); John Trent “Eight Reasons Ottawa Should Be Bilingual,” *The Ottawa Citizen* (5 August 2014); Yolande Grisé “C’est élémentaire, mon cher Watson,” *Le Droit* (28 August 2014); “FCFA en faveur de la désignation bilingue pour Ottawa,” *La Presse* (19 August 2014).

<sup>2</sup>Royal Commission on Bilingualism and Biculturalism report, *Book V: The Federal Capital*, Ottawa, Queen’s Printer, 1970, §236 (Recommendation 8) [Bi and Bi Commission Report]. “Capitale bilingue : les différents ordres de gouvernement se renvoient la balle,” ICI Radio-Canada, (11 August 2014).

<sup>3</sup>*Canada Act (UK) 1982*, c 11 [*Constitution Act*].

<sup>4</sup>*Official Languages Act*, RSC 1985, c 31 (4th supp.) [OLA]

<sup>5</sup>*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 16, reproduced in RSC 1985, App. II, No. 5 [*Constitution Act, 1867*].

At first glance, section 16 appears to reserve the authority to choose Ottawa as the seat of the federal government to the Queen. However, the provisions of the *Constitution Act, 1867* have often been found to reveal unsuspected depths<sup>6</sup> and the actual scope of this section remains to be determined. In addition to Her Majesty's prerogative to designate the location of the national capital, section 16 could also possibly contain the seeds for broader federal jurisdiction to regulate its nature and character.

Although section 16 has not been analyzed in detail from a legal perspective, the Supreme Court of Canada has nonetheless noted the following:

The authority reserved by this section to the Queen to change the location of the Seat of Government of Canada would now be exercisable by Her Majesty in the right of Canada and, while the section contemplates executive action, the change could, doubtless, be made by Act of Parliament in which Her Majesty acts with the advice and consent of the Senate and House of Commons of Canada.<sup>7</sup>

Thus, according to the Supreme Court, the first clause of section 16 (*Until the Queen otherwise directs... / Jusqu'à ce qu'il plaise à la Reine d'en ordonner autrement...*) reserves the authority to the executive – Her Majesty in the right of Canada – to change the location of the national capital. Whereas section 16 comes under Part III of the *Constitution Act, 1867*, which deals with executive power, the Court argues that Parliament very likely has the same prerogative. Furthermore, in *Munro v National Capital Commission*, the Court concluded that the federal imperative to develop the National Capital Region derives from the residual power of Parliament to legislate for the peace, order and good government of Canada. In the words of Justice Cartwright:

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<sup>6</sup>For example, over the years, the Canadian courts have discovered hidden meanings in the words “person,” “Indians,” “marriage” and “superior courts,” respectively, in sections 24, 91(24), 91(26) and 96 of the *Constitution Act, 1867*. See, respectively: *Edwards v Canada (AG)*, [1930] AC 124, 1929 UKPC 86; *Canada (Indian Affairs) v Daniels*, 2014 FCA 101, 371 DLR (4th) 725, (judgment reserved, SCC); *Reference re same-sex marriage*, 2004 SCC 79, [2004] 3 SCR 698; and *Crevier v Quebec (AB)*, [1981] 2 SCR 220, 127 DLR (3d) 1.

<sup>7</sup>*Munro v National Capital Commission*, [1966] SCR 663, pp 669-670, 57 DLR (2d) 753 [*Munro*]

I find it difficult to suggest a subject matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.<sup>8</sup>

Accordingly, if the *Constitution Act, 1867* enables Parliament to determine the fundamental character of the national capital, including its location (section 16), and to ensure a nature and character of the seat of the Government of Canada in accordance with its national significance,<sup>9</sup> through the exercise of its power to make laws for the peace, order and good government of Canada (section 91), could it not also regulate the status of the use of the official languages in the national capital? Would not such a hypothetical measure derive from the “federal legislative authority to add to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal legislative control”?<sup>10</sup>

It is true that since the capital of Canada is also a city in Ontario, the imposition of a federal linguistic framework on the City of Ottawa could possibly be seen as an encroachment, *ultra vires*, on provincial jurisdiction respecting “municipal institutions.”<sup>11</sup> However, it could be argued that the status of official languages could at the very least be considered a matter of shared jurisdiction,<sup>12</sup> that imposing official bilingualism on the City of Ottawa would at most have an incidental effect on the interests of the province,<sup>13</sup> and that ultimately, such a measure would in no way be incompatible with Ontario’s current bilingualism policy respecting its municipalities.<sup>14</sup> These questions will be further addressed in Part V of this study.

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<sup>8</sup>*Munro, ibid*, 671 (our emphasis).

<sup>9</sup>*National Capital Act*, RSC 1985, c N-4, s 10(1) [NCA].

<sup>10</sup>*Jones v New Brunswick (AG)*, [1975] 2 SCR 182, p. 195, 7 NBR (2d) 526 [Jones]. The principle that elected governments can enhance language rights has been constitutionalized in paragraph 16(3) of the *Constitution Act, 1982*, *supra* note 3

<sup>11</sup>*Constitution Act, 1867*, *supra* note 5 art 92(8).

<sup>12</sup>*Jones, supra* note 10.

<sup>13</sup>*Munro, supra* note 7, p 671.

<sup>14</sup>*French Language Services Act*, RSO 1990, c F-32, s 14(1) [FLSA] ; *City of Ottawa Act, 1999*, SO 1999, c 14, sec 11.1.

### III. OTTAWA: BILINGUAL CAPITAL AND MUNICIPALITY

Prior to 1867, Canada had several different capitals, including Kingston, which was briefly the capital from 1841 to 1843. Situated between Toronto, Montreal and Quebec City,<sup>15</sup> Kingston satisfied English-Canadians eager to see the capital located in Upper Canada.<sup>16</sup> However, it was vulnerable because of its proximity to the United States border. Montreal, which was the second capital from 1843 to 1849, was not a unanimous choice and discontent over royal assent to the controversial law drove English-Canadian rioters to set fire to the parliament building and attack the Governor General.<sup>17</sup> After this incident, it was decided to alternate the seat of government between Toronto and Quebec City (1849-1857), but this arrangement eventually proved expensive<sup>18</sup> and unpopular.<sup>19</sup> Finally, the Queen was asked to resolve the issue of where to locate the national capital, which she did in 1857, 10 years after Confederation.

Although the explicit reasons for the Queen's choice remain unknown, she could not have been unaware that it could affect the viability of the Union of the two Provinces of Canada, given the instability that had reigned in earlier years.<sup>20</sup> In its 1857 memorial to the Queen, the City of Ottawa emphasized its qualities as a central city with a bilingual and loyal population: "which lies in the heart of Canada, far removed from the American frontier, surrounded by a loyal population, composed equally of French and British origin, who have ever remained free from the stain of disaffection to the Crown of England."<sup>21</sup> Since the designation of the capital had been the subject of heated political debate in prior years, Ottawa was no doubt a good compromise. Even though little information is available on the constitutional discussions preceding the adoption of

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<sup>15</sup>Wilfrid Eggleston, *The Queen's Choice: A Story of Canada's Capital*, Ottawa, Queen's Printer, 1961, p 107 [*Queen's Choice*].

<sup>16</sup> Joseph Royal, *Histoire du Canada: 1841-1867*, Montréal, Beauchemin, 1909, p 100 [*Histoire du Canada*].

<sup>17</sup>*Queen's Choice*, *supra* note 15, p 107.

<sup>18</sup>*Histoire du Canada*, *supra* note 16, p 339.

<sup>19</sup>*Queen's Choice*, *supra* note 15, p 108

<sup>20</sup>*Ibid*, p 105.

<sup>21</sup>*Memorial of the City of Ottawa to the Queen's Excellent Majesty* by Richard Scott (1857). Online: <http://ottawa.ca/en/residents/arts-culture-and-community/museums-and-heritage/virtual-exhibit-ottawa-becomes-capital--17>.

section 16 of the *Constitution Act, 1867*,<sup>22</sup> there is no reason to believe that questions were raised about the Queen's choice.

However, during the parliamentary debates on Confederation, the Honourable Christopher Dunkin, MP for Brome, voiced his concerns about the exclusion from the constitutional document of any mention of the federal government's powers in the administration of its capital. He would like to have seen the establishment of a federal district similar to Washington D.C., which would have protected the national capital from the whims of Ontario and prevented inevitably turbulent relations among the different levels of government.<sup>23</sup> Although Dunkin's concerns were not unfounded, the federal government's lack of any explicit authority over the administration of the city seems to have forced it to maintain cordial relations to ensure the city's smooth operation, especially since Ottawa had to provide a range of services to federal institutions without being able to collect taxes on federal buildings.<sup>24</sup> The two levels of government have always had to deal with the duality of the city's municipal and federal nature.<sup>25</sup>

Since the capital was established, the Government of Canada has made every effort to reflect its national importance and dignity. To this end, Parliament set up a number of federal institutions, including the current National Capital Commission (NCC) which was mandated to ensure "that the nature and character of the seat of the Government of Canada may be in accordance with its national significance"<sup>26</sup> and to act as a focal point for liaison with the City of Ottawa and the other municipalities in the National Capital Region. In 1969, following the introduction of the first *Official Languages Act*, the NCC and all federal offices in the National Capital Region began to offer services in both

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<sup>22</sup>Peter W. Hogg, *Constitutional Law of Canada*, Loose-leaf edition (consulted 15 October 2015), Carswell, 2007, ch 1, p 4 [Hogg].

<sup>23</sup>Parliamentary Debates, 3rd Parliament, 8th Session, Speech delivered in the Legislative Assembly by Christopher Dunkin, Esq., member for Brome, during the debate on the subject of the confederation of the British North American provinces, Quebec, Hunter Rose, 1865, pp 28-29

<sup>24</sup>*Constitution Act, 1967*, *supra* note 5, s 125.

<sup>25</sup>See *Queen's Choice*, *supra* note 15, p 107 and Bernard Sabourin; *A Case Study in Municipal Finance: The Corporation of the City of Ottawa (1939-1954)* (Master's of Art in Economics, University of Ottawa), April 1957 (Bernard Sabourin).

<sup>26</sup>*NCA*, *supra* note 9, s 10(1).

official languages.<sup>27</sup> Furthermore, until quite recently, the NCC had been legally mandated to “organize, sponsor and promote public activities and events in the National Capital Region that will enrich the cultural and social fabric of Canada taking into account the federal character of Canada, the equality and status of the official languages of Canada and the heritage of the people of Canada”<sup>28</sup> (our emphasis). The Department of Canadian Heritage is now directly responsible for oversight of the promotion of the official languages in the National Capital Region – and thus also in the City of Ottawa.<sup>29</sup> Transferring the responsibility for the status of the official languages in the capital to the Department of Canadian Heritage is consistent with the government’s commitment in 1988, at the time of the adoption of the new *Official Languages Act*, “to enhancing the bilingual character of the National Capital Region.”<sup>30</sup>

Historically, the commitment to bilingualism in the City of Ottawa has been half-hearted.<sup>31</sup> According to Andrew and Chiasson, Ottawa has trouble seeing and presenting itself as the capital of a country. It has increasingly cultivated its image of being at the service of its residents and feels no responsibility to represent all Canadians.<sup>32</sup> Despite its identity problems, the City of Ottawa adopted its first policy on bilingualism in 1970 on the heels of the Royal Commission on Bilingualism and Biculturalism (Bi and Bi Commission). This policy was revised on several occasions over the next decades, but since its application has been left up to municipal managers, the bilingualism regime has remained largely symbolic.<sup>33</sup> In 1986, the *French Language Services Act* introduced a

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<sup>27</sup>OLA, *supra* note 4, s 7, 9 and 11

<sup>28</sup>NCA, *supra* note 9, s 10(1)b) (this provision was repealed in 2013)

<sup>29</sup> *Department of Canadian Heritage Act*, SC 1995, c 11, s 4(1) “ The powers, duties and functions of the Minister extend to and include...(2)k.1) the organization, sponsorship and promotion of public activities and events in the National Capital Region, as defined in section two of the *National Capital Act*, that will enrich the cultural and social fabric of Canada taking into account the federal character of Canada, the equality and status of the official languages of Canada and the heritage of the people of Canada.”

<sup>30</sup>OLA, *supra* note 4, Preamble.

<sup>31</sup>See *Bi and Bi Commission Report*, p 5, 24. At the time the report was written services in French were virtually non-existent. The city council even refused to install bilingual traffic signs.

<sup>32</sup>Caroline Andrew and Guy Chiasson, *The City of Ottawa: Symbolic Representation and Public Image* in Richard Clément and Caroline Andrew (dir), *Cities and Languages: Governance and Policies An International Symposium*, Ottawa, Invenire, 2012, pp 43-44.

<sup>33</sup> François Charbonneau and Samuel Coeytaux, *L'affaire Lepage et le caractère symbolique de la politique de bilinguisme de la City of Ottawa (1970-2001)* (2013) 47:2 *Revue d'études canadiennes* (Journal of Canadian Studies) 119-149.

new more restrictive bilingualism regime for the Ontario municipalities that voluntarily comply with these legal obligations by adopting a regulation to this effect.<sup>34</sup> In 2001, the City of Ottawa adopted a regulation<sup>35</sup> and a policy<sup>36</sup> on bilingualism that explicitly refer to the *French Language Services Act*. A few years later, in 2005, an amendment to the *City of Ottawa Act*,<sup>37</sup> 1999 required the city to adopt a policy on bilingualism. While there is no doubt that this legal framework is more favourable to bilingualism in the national capital than that in place at the time of the Bi and Bi Commission, it has not necessarily made the City of Ottawa an officially bilingual capital.

#### IV. COOPERATIVE FEDERALISM AND THE OFFICIAL LANGUAGES

The Fathers of Confederation endowed Canada with a federal structure to create “a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.”<sup>38</sup> Sections 91 and 92 of the *Constitution Act, 1867* constitute the “primary textual expression of the principle of federalism in our Constitution.....”<sup>39</sup> In practice, even though each level of government has considerable autonomy within its exclusive fields of jurisdiction, achieving common objectives of national importance has long required intergovernmental collaboration, which gradually led to the principle of cooperative federalism. As the Supreme Court has pointed out, cooperative federalism is a “legal principle that has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity. It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action.”<sup>40</sup>

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<sup>34</sup> *FLSA*, *supra* note 14 s 14.

<sup>35</sup> City of Ottawa, By-law, N° 2001-170, *Bilingualism*, 9 May 2001.

<sup>36</sup> City of Ottawa, *Bilingualism Policy*, 9 May 2001.

<sup>37</sup> *City of Ottawa Act, 1999*, *supra* note 14 s 11.1.

<sup>38</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, par 43, 161 DLR (4th) 385. See also par 43-47 and par 55-60.

<sup>39</sup> *Ibid*, par 47

<sup>40</sup> *Quebec (AG) v Canada (AG)*, 2015 SCC 14, par 17, [2015] 1 SCR 693.

The promotion of the official languages is fertile ground for intergovernmental cooperation since language is not an independent matter of legislation but is rather “ancillary” to the exercise of exclusive federal and provincial jurisdictions.<sup>41</sup> Each level of government must thus regulate the linguistic aspects of matters that lie within its exclusive jurisdiction. In general, this enables collaboration between the federal government, which is committed to promoting bilingualism across the country,<sup>42</sup> and provincial governments, which wish to better serve their linguistic minority communities (OLMC).<sup>43</sup> The adoption of the *Constitution Act, 1982* launched a new era of intergovernmental collaboration on official languages, particularly with respect to education in the linguistic minority communities.<sup>44</sup> The provinces and the federal government also reached bilateral agreements for the delivery of services in French.<sup>45</sup> Because of its unique status as the national capital, the City of Ottawa also receives federal funding – in addition to that provided under the agreements between the federal government and Ontario – to help it deliver services in French.<sup>46</sup>

## V. LEGAL AND MORAL OBLIGATION OF THE FEDERAL GOVERNMENT TO PROMOTE THE OFFICIAL LANGUAGES IN THE CITY OF OTTAWA

The previous sections outline the historical and legal foundations underlying the premises of our theory. Section 16 and the operational clause of section 91 of the *Constitution Act, 1867* grant the federal government the power to determine the characteristics and image of the capital of Canada, including the power to regulate its linguistic nature. With the adoption of paragraphs 16(1) and (3) of the *Constitution Act, 1982*, this power became a

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<sup>41</sup>*Devine v Québec (AG)*, [1988] 2 SCR 790, par 18, 55 DLR (4th) 641.

<sup>42</sup>*OLA*, supra note 4, Part VII.

<sup>43</sup>Daniel Bourgeois, Wilfrid Denis, Donald Dennie and Marc L. Johnson, *Provincial and Territorial Government Contributions to the Development of Francophone Minority Communities: Assessment and Projections*, Moncton, CIRLM, 2007.

<sup>44</sup>Protocol for Agreements for Minority-Language Education and Second-Language Instruction, 2013-2014 to 2017-2018 reached between the Government of Canada and the Council of Ministers of Education, Canada. Online: [http://www.cmec.ca/docs/programsInitiatives/olp/protocol/Protocol\\_2013-2018\\_EN.pdf](http://www.cmec.ca/docs/programsInitiatives/olp/protocol/Protocol_2013-2018_EN.pdf)

<sup>45</sup>See for example the Canada-Ontario Agreement on French Language Services, Ontario Office of Francophone Affairs, *Estimates Briefing Book 2015-2016*, online: <http://www.ofa.gov.on.ca/en/oaf-plans-estimates1516.html>.

<sup>46</sup>See for example the City of Ottawa, Contribution Agreement: Delivery of French Services by the City of Ottawa - 2006-2007. Online: <http://ottawa.ca/calendar/ottawa/citycouncil/csdc/2007/09-04/Doc-3-E.htm>.

duty, and finally, with the introduction of the second *Official languages Act*<sup>47</sup> and the recent amendments to the *Department of Canadian Heritage Act*, an obligation. Section 16 of the Constitution Act, 1982 provides:

<p>Langues officielles du Canada 16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.</p> <p>Langues officielles du Nouveau-Brunswick (2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.</p> <p>Progression vers l'égalité (3) La présente Charter ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.</p>	<p>Official languages of Canada 16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.</p> <p>Official languages of New Brunswick (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.</p> <p>Advancement of status and use (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.</p>
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Hogg has been observed that, while section 16 makes English and French the “official languages” of Canada and New Brunswick, “[i]t is not clear what, if any, practical consequences flow from official status.”<sup>48</sup> However this may be, and whatever the full scope of section 16, it is our submission that the nation’s capital – the seat of Government of Canada – clearly falls within the meaning of the words “all institutions of the Parliament and government of Canada”. It follows, in our view, that section 16 creates legal obligations for the government of Canada with respect to the City of Ottawa. Explicitly charged with “fostering the full recognition of both English and French in Canadian society”<sup>49</sup> and, *a fortiori*, in the national capital,<sup>50</sup> the federal government cannot remain silent in the face of pressure from popular movements demanding the City of Ottawa be officially bilingual.

<sup>47</sup>OLA, *supra* note 4, Preamble and Part VII.

<sup>48</sup>Peter Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed, vol 2, Toronto, Carswell, 2011 at p. 56-22.

<sup>49</sup>OLA, *supra* note 4, s 41(1).

<sup>50</sup>*Department of Canadian Heritage Act*, *supra* note 30

It is evidently unlikely that the federal government would unilaterally manage language issues for the national capital as discussed in Part II of this study. The increasing influence of cities in Canadian society and the growing importance of their role in building community identity suggest that the federal government would be unable to impose official bilingualism on the City of Ottawa without the cooperation of the municipal authorities. This said, in our view, it is in the interest of the federal government to ensure that the equality of both official languages is reflected in all aspects of public administration in Canada's capital, and it has the power to do so. It therefore has an obligation to demonstrate moral, legal and economic leadership, to collaborate with the Province of Ontario and the City of Ottawa in a spirit of cooperative federalism, and to make the City of Ottawa an officially bilingual public space.