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CIRLM
Canadian Institute
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on Linguistic
Minorities

Required changes to the Canadian census,
as of 2021, so that it will allow

- (1) the full implementation of the minority language education guaranteed by section 23 of the *Canadian Charter of Rights and Freedoms*, and
- (2) the full implementation of sections 16, 16.1, 19 and 20 of the *Charter* and parts III, IV and VII of the *Official Languages Act*

Report

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Official Languages Act

Rapport

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L'**Institut canadien de recherche sur les minorités linguistiques** est un organisme de recherche indépendant et sans but lucratif, créé grâce à un financement de Patrimoine canadien. Il exerce un rôle de leader, de rassembleur et de partenaire auprès des chercheurs, des organismes communautaires et des instances gouvernementales, afin de promouvoir une plus grande connaissance de la situation des minorités de langue officielle du Canada et une meilleure compréhension des enjeux prioritaires qui les concernent.

L'Institut canadien de recherche sur les minorités linguistiques reconnaît l'appui du gouvernement du Canada.

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Required changes to the Canadian census, as of 2021, so that it will allow

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1. INTRODUCTION

1.1. THE ROLE THAT PLAYS THE CANADIAN CENSUS IN THE IMPLEMENTATION OF SECTION 23 OF THE CHARTER

Section 23 of the *Canadian Charter of Rights and Freedoms*¹ (the “*Charter*”) guarantees certain categories of Canadian citizens the right to an education in the language of the minority:

23. (1) Les citoyens canadiens :

a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l’un ou l’autre cas, le droit d’y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

(3) Le droit reconnu aux citoyens canadiens

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, constituting Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

- a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité ;
- b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Subsection 23(3) of the *Charter* specifies that the rights to instruction in the language of the minority guaranteed by section 23 of the *Charter* are subject to the criterion of "where the number warrant."

In its seminal ruling in *Mahé v. Alberta*, the Supreme Court of Canada, under the pen of Chief Justice Dickson, set out the criterion to be applied to determine the number that would warrant the provision of a minority language education and minority schools:

À mon sens, le chiffre pertinent aux fins de l'art. 23 est le nombre de personnes qui se prévaudront en définitive du programme ou de l'établissement envisagés. Il sera normalement impossible de connaître le chiffre exact, mais on peut en avoir une idée approximative en considérant les paramètres dans lesquels il doit s'inscrire – la demande connue relative au service et le nombre total de personnes qui pourraient éventuellement se prévaloir du service.

In my view, the relevant figure for s. 23 purposes is the number of persons who will eventually take advantage of the contemplated programme or facility. It will normally be impossible to know this figure exactly, yet it can be roughly estimated by considering the parameters within which it must fall – the known demand for the service and the total number of persons who potentially could take advantage of the service.²

[Emphasis added]

This is the criterion the courts have been using since 1990 to determine what "the number ... warrants" in the meaning of section 23 of the *Charter*. Consequently, this is also the criterion that must be used by minority language school boards and provincial and territorial governments to determine what the number warrants within the school boards' territories, and at regional and local levels.

² *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 384.

The relevant number of children with rights under section 23 of the *Charter* in a given area, for the purposes of assessing what the number warrants (and indeed what the number requires), is therefore the number that represents the realistic potential population of a minority language school. As the Supreme Court indicated in *Mahé*, this number is between two numbers that can be calculated: the known demand – i.e. the current enrolment, in the case of an area in which minority language education is already offered – and the total potential demand, i.e. the total number of children eligible to attend a minority language school.

With regard to the provinces and territories other than Québec, census data play a crucial role in the calculation required by section 23 of the *Charter*, as they are the only source of data regarding the total number of children with parents who are entitled, under section 23, to enroll their children in a French-language school outside Québec. There is no other source of data that identifies, for any given area, the number of children with at least one parent whose first official mother tongue is French.

The use of census data by the Canadian courts in cases relating to section 23 of the *Charter* outside Québec shows the extent to which these data are necessary and constitute the only data available to estimate the potential total demand for a particular minority French-language school, as required by the Supreme Court's analysis in *Mahé*. To consider only the most recent cases, courts in British Columbia³ and the Northwest Territories⁴ have relied on census data as a key piece of evidence for numbers in their assessment of what the number warrants with regard to school capital projects.

Francophone school boards and provincial and territorial governments can obtain these data by submitting an order to Statistics Canada for data on the number of children of certain ages with at least one parent having French as their mother tongue, living in a specific geographic area, corresponding to the catchment area of an existing or proposed school.

In Québec, data collected by the current census are irrelevant to the analysis of the “number warrants” criterion required by section 23 of the *Charter*, since although the census identifies the number of children with at least one parent having English or French as their first official mother tongue, it does not collect any data regarding the language of instruction of either the parent or the parent's children. As section 23 of the *Charter* applies exceptionally in Québec, where having English as the first official mother tongue does not confer upon parents the right to have their children educated in English,⁵ the current census does not collect any data at all on parents entitled to enroll their children in a minority language school in Québec under section 23 of the *Charter*.

In sum, the census does not offer any relevant data on the number of children of rights holders eligible to attend a minority language school in Québec, and for Francophones outside Québec, the data are incomplete as they cover only one of the three criteria set out in section 23 of the *Charter*. Moreover, as is shown below, the census greatly underestimates the number of children of rights holders under section 23 outside Québec with regard to this first criterion, i.e. having a parent

³ *Association des parents de l'école Rose-des-vents et Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, [2015] 2 SCR 139 at paras. 52 and 53; see also the motion judge's ruling, 2012 BCSC 1614 at paras. 123 to 127; *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764 at chapter VII.

⁴ *Northwest Territories (AG) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 at paras. 67, 103, and the trial judge's ruling, 2012 NWTSC 43; see also *Northwest Territories (AG) v. Commission scolaire francophone, Territoires du Nord-Ouest*, 2015 NWTCA 1 and the trial judge's ruling, 2012 NWTSC 44.

⁵ Under section 59 of the *Constitution Act, 1982*.

with French as their mother tongue. These major gap prevent the census from fully playing its crucial role in the implementation of section 23 of the *Charter*, both outside Québec and in Québec.

The provincial and territorial governments rightly require enrolment projections from the school boards to support their applications for capital project funding. For example, the Alberta Ministry of Education's *School Capital Manual* states that "Enrolment Projections" are among the criteria evaluated by the Ministry in order to prioritize every funding application submitted by a school board for a capital project.⁶ In the case of minority language school boards,⁷ for the reasons outlined below, this requires complete, reliable data regarding the total potential number of students who could attend the minority language school in question. The census is the best tool for collecting these data.

It is therefore necessary to determine how the census questionnaire⁸ could be modified to address its current shortcomings and ensure that it provides complete, reliable data on the total number of children whose parents are entitled to enroll them in a minority language school, both outside Québec and in Québec. The provincial and territorial governments and the minority language school boards need these complete, reliable data in order to properly assess the needs in minority language education. As explained below, the constitutional and quasi-constitutional obligations of the federal government require it to address these shortcomings in the census to allow section 23 of the *Charter* to be fully implemented outside Québec and in Québec.

1.2. THE ROLE THAT PLAYS THE CANADIAN CENSUS IN THE IMPLEMENTATION OF SECTIONS 16 TO 20 OF THE *CHARTER*, AND PARTS III, IV AND VII OF THE *OLA*

The Canadian census also plays a crucial role in the implementation of sections 16 to 20 of the *Charter*.⁹ Sections 16 to 20 of the *Charter* enshrine the equal status of French and English as official languages of Canada and New Brunswick. In particular, subsection 20(1) of the *Charter* provides that the public has the right to use French or English to communicate with the head or central office of the institutions of the Parliament or government of Canada. Paragraph 20(1)a) of the *Charter* provides that the public also has this right with regard to any office of those institutions if there is a "significant demand" for the use of French or English or if it is justified by the nature of the office. The purpose of Part IV of the *Official Languages Act*¹⁰ ("*OLA*") is to implement the federal government's obligations under subsection 20(1) of the *Charter*, while the purpose of Part VII of the *OLA* is to implement the federal government's obligations under section 16 of the *Charter*, and to impose on the government further obligations of a quasi-constitutional nature.

The census also provides the federal government and the government of New Brunswick with data that are useful for the implementation of the right of litigants to communicate with the courts in the official language of their choice, a right guaranteed by section 19 of the *Charter* and Part III of the *OLA*. Moreover, the census gives the government and the New Brunswick legislature data

⁶ Alberta Education, *School Capital Manual*, March 2015 at p. 19, online: <<https://education.alberta.ca/media/1477148/school-capital-manual-march-2015.pdf>>.

⁷ The term "minority language school board" as used in this report refers to French-language school boards outside Québec and English-language school commissions in Québec.

⁸ Note that references in this report to the "census questionnaire" that do not specify whether it is the short-form or long-form questionnaire refer to both questionnaires considered together. As explained in detail below, the questions that provide the number of rights holders under section 23 of the *Charter* and their children should all figure in the short-form census questionnaire, the full content of which also figures in the long-form census questionnaire. For that reason, the questions in the short-form questionnaire are asked of 100% of the population.

⁹ Unless otherwise indicated by the context, references to "sections 16 to 20 of the *Charter*" in this report refer to the entirety of sections 16 to 20 of the *Charter*, in their application to the federal and New Brunswick governments.

¹⁰ *Official Languages Act*, RSC 1985, c. 31 (4th Supp.).

allowing them to implement subsection 16(2) of the *Charter* and to target the measures it takes to comply with the spirit and letter of section 16.1 of the *Charter*, which enshrines the equality of the province's French and English language communities.

The census provides the data that form the basis of the federal government's decisions regarding where it will offer many services in the minority language under paragraph 20(1)a) of the *Charter*, and the federal government's decisions regarding the interventions required to promote the development and vitality of official language minority communities and the equality of status of Canada's official languages. In both cases, it is the census that provides the demographic and linguistic picture of the official language minority communities that guides the decisions and interventions of the federal government. The census thus plays a crucial role in the implementation of sections 16 to 20 of the *Charter*, as well as Parts III, IV and VII of the *OLA*.

Census data are also used by the provincial and territorial governments to determine whether and where services will be offered in the minority language.

It is therefore crucial that the picture of official language minority communities provided by the census be as accurate and detailed as possible. Unfortunately, as things stand, because of the major gaps in the census questionnaire, the picture it paints is incomplete and does not allow the federal government or the provincial and territorial governments to fully appreciate their obligations toward those communities. As a result, the federal, provincial and territorial governments are ill-equipped to counter the linguistic and cultural assimilation of those communities, and to assess what must be done to ensure their survival and growth. Nor has the census provided the communities and their representatives with the data required to plan their interventions effectively. These shortcomings in the census thus prevent it from fully playing its crucial role in the implementation of sections 16 to 20 of the *Charter*, Parts III, IV and VII of the *OLA*, and the other language rights provided for in the provinces and territories, and as a result, they have a negative impact on the vitality of official language minority communities.

The same improvements to the data collected by the census that are required to allow the full implementation of section 23 of the *Charter* are highly relevant to the question of where there is a significant demand for minority language services, and what government interventions are possible or in fact required in order to promote the vitality and development of official language minority communities.

1.3. THE NEED FOR THE SHORTCOMINGS IN THE CENSUS IDENTIFIED IN THIS REPORT TO BE CORRECTED IN THE CENSUS QUESTIONNAIRE BEGINNING IN 2021

The questions that will be added to the census questionnaire as of 2021, or that will appear in a modified version beginning in 2021, will be the subject of tests conducted by Statistics Canada beginning in 2018.¹¹ The 2021 census questionnaire could therefore be improved in order to collect complete and reliable data regarding the number of children of rights holders under section 23 of the *Charter*, both in Québec and elsewhere, if the federal government acts promptly. Below, this report analyzes how the census questionnaire could be modified and suggests modifications that could contribute to the work of Statistics Canada, the federal institution responsible for the census, and be the subject of tests conducted by it.

¹¹ See the testimony of Jean-Pierre Corbeil, Assistant Director of the Social and Aboriginal Statistics Division of Statistics Canada, on December 5, 2016, before the Standing Senate Committee on Official Languages, online: <<https://sencanada.ca/en/Content/Sen/committee/421/ollo/52973-e>>.

In brief, in order to do this, the census must count all the persons who have the minority official language as their mother tongue, regardless of whether they have more than one mother tongue. It must also count the persons who have had a significant portion of their schooling at a minority language school. Below, this report analyzes how these questions relating to section 23 of the *Charter* could be asked in such a way as to also collect all the data that would allow sections 16 to 20 of the *Charter*, parts III, IV and VII of the *OLA*, and applicable provincial and territorial laws to be fully implemented.

As explained below, in order to properly understand the composition and needs of official language minority communities, the census would count not only the persons who have French or English as their mother tongue where that language is a minority language and those who have had at least part of their schooling at a minority language school, but also those who have attended a French immersion school. An analysis of the proposed questions on the language of education that were tested by Statistics Canada in 1993 and 1998 points to the conclusion that in a question on the language of education, it is in fact necessary to address the concept of French immersion and clearly distinguish it from education in a French-language school (a majority school in Québec and a minority school outside Québec).

This report therefore offers concrete suggestions below regarding possible formulations for a modified question on mother tongue, and an added question regarding the language of education. These questions could be tested by Statistics Canada in 2018 in order to determine which formulations should figure in the census beginning in 2021. If for any reason Statistics Canada does not find these suggestions satisfactory, that agency must nonetheless find a solution in order to address the shortcomings in the census identified in this report, beginning in 2021.

2. A CONSTITUTIONAL IMPERATIVE: CONSTITUTIONAL OBLIGATIONS THAT REQUIRE RELIABLE DATA WITH RESPECT TO THE NEEDS IN THE AREA OF MINORITY LANGUAGE EDUCATION

The federal government has constitutional and quasi-constitutional obligations that require it, when considering how to modify the census, to take into account the needs of official language minority communities and their capacity to fully implement section 23 of the *Charter*.

To begin, it should be remembered that the federal government has exclusive constitutional jurisdiction to conduct the census under subsection 91(6) of the *Constitution Act, 1867*.

With regard to the federal government's constitutional obligations to collect data making it possible to assess the needs in the area of minority language education, they are grounded in section 23 of the *Charter* itself, and the fundamental constitutional principle of respect for minorities.

2.1. SECTION 23 OF THE CHARTER

The Canadian courts have never considered in a published judgment whether section 23 of the *Charter* directly imposes obligations on the federal government. This is unsurprising, since section 93 of the *Constitution Act, 1867* gives the provinces, and not the federal government, legislative jurisdiction over education, and litigation regarding section 23 of the *Charter* has primarily focused on the adequacy of the funding granted by a province or territory for minority language education, either in general or with regard to the number of minority school buildings funded by the provincial or territorial government, or the quality of the school buildings. However, there is a partial exception: in the early 1990s, a parent living on a military base in Alberta brought an action against the Minister of National Defence and the Commander of the Armed Forces Base before the Federal

Court in order to have her children educated in a French-language school;¹² this case did not result in a written judgment.

The fundamental guarantee contained in subsections 23(1) and 23(2) of the *Charter* simply states that Canadian citizens with certain characteristics are entitled to have their children educated, at the elementary and secondary levels, in the language of the minority. A liberal and purposive interpretation of section 23 of the *Charter* (as in the case of all the rights guaranteed by the *Charter*), in the context of the census, leads to the conclusion that section 23 of the *Charter* imposes obligations on the federal government in this area.

First, consider the primary objective of section 23 of the *Charter*. According to the Supreme Court of Canada in *Mahé*:

L'objet général de l'art. 23 est clair : il vise à maintenir les deux langues officielles du Canada ainsi que les cultures qu'elles représentent et à favoriser l'épanouissement de chacune de ces langues, dans la mesure du possible, dans les provinces où elle n'est pas parlée par la majorité. L'article cherche à atteindre ce but en accordant aux parents appartenant à la minorité linguistique des droits à un enseignement dispensé dans leur langue partout au Canada.

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.¹³

In *Solski v. Québec*, the Supreme Court of Canada said the following with regard to the purpose of section 23 of the *Charter*, emphasizing its remedial purpose, the individual and collective aspects of the rights guaranteed by section 23, and the fact that section 23 allows rights holders to move anywhere in Canada without giving up their right to have their children educated in French or English, as the case may be:

... Il ressort de cet objet que l'art. 23 garantit à la fois un droit social et collectif et un droit civil et individuel. En fait, il faut souligner là encore que, pour être admissibles sous le régime de l'art. 23, les enfants n'ont pas à posséder une connaissance pratique de la langue de la minorité ni à appartenir à un groupe culturel identifié à cette langue. Cet article est une disposition réparatrice. Dans des arrêts antérieurs, notre Cour a tenu à préciser que l'art. 23 doit être interprété de manière à faciliter la réintégration, dans la communauté culturelle que l'école de la minorité est censée protéger et contribuer à

... This purpose indicates that s. 23 is both a social and collective right, and an individual and civil right. It must indeed be noted here again that children qualified under s. 23 are not required to have a working knowledge of the minority language, or to be members of a cultural group that identifies with the minority language. The section is remedial. In previous cases, this Court has insisted that s. 23 must be interpreted so as to facilitate the reintegration of children who have been isolated from the cultural community the minority school is designed to protect and develop. Section 23(2) in particular

¹² *Brisson-Foster v. Minister of National Defence* (August 6, 1991), Edmonton T-1870-91 (F.C.T.D.); see Mark Power, "Les droits linguistiques en matière d'éducation" ["Language rights in the area of education"] in Michel Bastarache et al., *Les droits linguistiques au Canada* [*Language Rights in Canada*], 3rd ed., Yvon-Blais, Cowansville, QC, 2014, 657 at p. 685.

¹³ *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 362.

épanouir, des enfants qui ont été isolés de cette communauté. Le paragraphe 23(2), en particulier, favorise la liberté de circulation et d'établissement ainsi que la continuité de l'instruction dans la langue de la minorité, même si le changement de lieu de résidence n'est pas une condition d'exercice du droit garanti. Comme nous l'avons vu, l'art. 23 est également censé s'appliquer à des membres de communautés culturelles qui ne sont ni francophones ni anglophones.

facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right. As noted, s. 23 is also meant to apply to some members of cultural communities that are neither French nor English.¹⁴

More recently, in *Association des parents de l'école Rose-des-vents and Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, the Supreme Court of Canada said the following with regard to the purpose of section 23 of the *Charter*:

L'article 23 avait pour objet de remédier à l'érosion de groupes minoritaires de langue officielle ou d'empêcher cette érosion de manière à faire des deux groupes linguistiques officiels du Canada des partenaires égaux dans le domaine de l'éducation. L'éducation dans la langue de la minorité est primordiale pour assurer le maintien de ce partenariat...En effet, dans les communautés linguistiques minoritaires, les écoles sont un instrument primaire de transmission de la langue et, donc, de la culture. ...

Section 23 was designed to correct and prevent the erosion of official language minority groups so as to give effect to the equal partnership of Canada's two official language groups in the context of education. Minority language education is crucial to the maintenance of that partnership...Indeed, in minority language communities, schools are a primary instrument of linguistic, and thus cultural, transmission. ...¹⁵

[References omitted]

It is also important to remember that the liberal and purposive interpretation of section 23 of the *Charter* by the courts led to the recognition of such fundamental aspects of the rights guaranteed by section 23 as the right of the minority to manage and control minority language education. This right is implicit in the text of section 23 of the *Charter*, and not explicitly granted by the text of that section. The Supreme Court of Canada recognized the existence of that right in its ruling in *Mahé*, after the lower courts in that case and lower courts in other cases had already reached the same conclusion.¹⁶

Considering this, and the fact that (1) the federal government has the exclusive constitutional jurisdiction to conduct the census under subsection 91(6) of the *Constitution Act, 1867*; (2) the census already plays a crucial role in the evaluation of the constitutional obligations of the provinces and territories, and of French-language school boards outside Québec; (3) there is no other source of data that would provide an estimate of the total number of children of rights holders under section 23 of the *Charter* outside Québec; (4) this data would also be extremely useful

¹⁴ *Solski (Tutor of) v. Québec (Attorney General)*, [2005] 1 SCR 201 at para. 33.

¹⁵ *Association des parents de l'école Rose-des-vents and Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, [2015] 2 SCR 139 at para. 27.

¹⁶ *Mahé v. Alberta*, [1990] 1 SCR 342 at pp. 368 to 380.

in Québec; and (5) the Supreme Court of Canada has recognized that section 23 of the *Charter* imposes positive obligations on governments,¹⁷ it appears that section 23 of the *Charter* imposes obligations on the federal government in the very specific context of the census. In short, the census can generate data that would provide an accurate understanding of the potential of minority language schools, and consequently, would allow section 23 of the *Charter* to be fully implemented, or it can hinder the full implementation of section 23 by underestimating the potential of French-language schools outside Québec and by playing no role in its implementation in Québec. In view of the purpose of section 23 of the *Charter*, as explained by the Supreme Court of Canada, it is logical to conclude that section 23 requires the census to promote, and not hinder, the full implementation of the rights guaranteed by that section.

2.2. THE CONSTITUTIONAL PRINCIPLE OF RESPECT FOR MINORITIES

The fundamental constitutional principle of respect for minorities “is itself an independent principle underlying our constitutional order”¹⁸ and “was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation.”¹⁹ *Lalonde v. Ontario (Commission de restructuration des services de santé)*²⁰ (“*Lalonde*”) remains the case in which a Canadian court took most seriously, and most directly applied, the fact that “[f]undamental constitutional values have normative legal force.”²¹

The context of the census is one in which the fundamental constitutional principle of respect for minorities is at issue, as was the case in *Lalonde*. *Lalonde* dealt with a situation “with profound implications for Ontario’s minority francophone community that engages the constitutional principle of respect for and protection of minorities;”²² similarly, federal decisions regarding the census have profound implications for official language minority communities. It is most often census data that justify, or otherwise, a funding application for the acquisition or construction of a school building, or for its renovation or expansion. Consequently, the federal government’s decisions with regard to the census, to the extent that they lead to an underestimation of the number of children of rights holders under section 23 of the *Charter*, prevent minority language school boards, and provinces and territories, from achieving the remedial purpose of section 23 of the *Charter*. To the extent that the census underestimates the number of such children, it has a direct, harmful effect on the vitality of official language minority communities. Indeed, where the census underestimates the number of children of rights holders under section 23 of the *Charter*, the census may actually lead to violations of the rights guaranteed by section 23.

Clearly, it must be concluded that the fundamental constitutional principle of the respect for minorities prevents the federal government from making decisions regarding the census that (1) undermine the rights to minority language education guaranteed by section 23 of the *Charter*, and (2) have the concrete effect of making official language minority communities less likely to survive and diminishing their vitality.

¹⁷ *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 389; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para. 28.

¹⁸ *Reference re Secession of Québec*, [1998] 2 SRC 217 at para. 80.

¹⁹ *Reference re Secession of Québec*, [1998] 2 SRC 217 at para. 81.

²⁰ *Lalonde v. Ontario (Commission de restructuration des services de santé de l’Ontario)* (2001), 56 OR (3d) 577 (CA).

²¹ *Lalonde v. Ontario (Commission de restructuration des services de santé de l’Ontario)* (2001), 56 OR (3d) 577 (CA) at para. 174.

²² *Lalonde v. Ontario (Commission de restructuration des services de santé de l’Ontario)* (2001), 56 OR (3d) 577 (CA) at para. 173.

3. SECTIONS 16 TO 20 OF THE CHARTER REQUIRE COMPLETE, RELIABLE DATA ON OFFICIAL LANGUAGE MINORITY COMMUNITIES

3.1. PARAGRAPH 20(1)A) OF THE CHARTER

The only data used by the federal government to determine whether there is a “significant demand” from the “offices” of federal institutions for services in the minority language come from the census.

Paragraph 20(1)a) of the *Charter* provides that the public is entitled to use French or English to communicate and receive government services in any office of an institution of the Parliament or government of Canada where there is a “significant demand” for these services:

20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services ; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante ;

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;

[Emphasis added]

Part IV of the *OLA* attempts to implement this paragraph by empowering the Governor in Council to determine through regulations the circumstances in which the demand is significant.²³ The method currently used by the federal government to determine where there is “significant demand” is set out in the *Official Languages (Communications with and Services to the Public) Regulations*,²⁴ made under the *OLA*. These Regulations adopt “Method I”²⁵ proposed by Statistics Canada as a method to estimate the minority language population in a given geographical area. Sections 3 and 4 of the Regulations specify that the data used for this estimate come from the census.

This “first official language spoken” (“FOLS”) method used by Statistics Canada has the effect of assigning all Canadians to four official language categories: English, French, English and French, and neither English nor French. Since the first criterion used by the method is the knowledge of either official language (or both), this has the effect of assigning to the English official language population any persons who have French as their mother tongue (first language learned at home and still understood) who are no longer capable of carrying on a conversation in that language (the

²³ *Official Language Act*, RSC (1985), c. 31 (4th suppl.), s. 20, 22, 32.

²⁴ *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48.

²⁵ *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, s. 2:

Method I means the method of estimating first official language spoken that is described as Method I in *Population Estimates by First Official Language Spoken*, published by Statistics Canada in September 1989, which method gives consideration, firstly, to knowledge of the official languages, secondly, to mother tongue, and thirdly, to language spoken in the home, with any cases in which the available information is not sufficient for Statistics Canada to decide between English and French as the first official language spoken being distributed equally between English and French; (*méthode I*)

basis for Statistics Canada's definition of the knowledge of a language).²⁶ In order for this method to be to the advantage of minority Francophone communities in the enumeration of their members, the number of "Allophones" with French as FOLS must be higher than the number of "Francophones" who can no longer carry on a conversation in French. Only Francophone regions with a relatively high level of Allophone immigrants with French as FOLS benefit in their enumeration. The very strong preference for English among Allophones outside Québec²⁷ gives that language the upper hand in this respect. According to the 2011 census, if the multiple responses that include French are assigned to the "Francophone" population, the FOLS method yields a count of 1,066,580 "Francophones" outside Québec using the mother tongue criterion, but 1,007,580 persons whose FOLS is French.²⁸ This clearly shows that the arrival of new immigrants whose FOLS is French is not compensating for the strong assimilation of Francophones outside Québec. Hence the importance of an accurate knowledge of the potential clientele for French-language schools outside Québec, which are the key factor that can contribute to the vitality of minority Francophone communities.

Like section 23 of the *Charter*, paragraph 20(1)a) of the *Charter* confers a right that is conditional on a variable criterion – in the case of paragraph 20(1)a), that of "significant demand." The determination of significant demand is not an exercise that should be entirely quantitative. As for all constitutional rights, it is important to implement section 20 in a flexible way so as to achieve its objective. As the Supreme Court of Canada stated in *Beaulac* with regard to the determination of the "language of the accused" for the purposes of the *Criminal Code*, a simple method "does not provide a solution for many situations encountered in a multicultural society and does not respond to the fact that language is not a static characteristic."²⁹

An analogy can be drawn between the determination of the significance of demand for the purposes of paragraph 20(1)a) of the *Charter* and the interpretation by the Supreme Court of Canada of the criterion of the "major part" imposed by the *Charter of the French language*,³⁰ in order to determine when a child's education at an English-language school will make their parents rights holders in Québec under subsection 23(2) of the *Charter*. In *Solski*, the Supreme Court of Canada once again rejected a strict, quantitative interpretation. In order for Québec law to be compatible with subsection 23(2) of the *Charter*, the Court rejected the idea that the "major part" should be measured on a purely quantitative basis:

La question pertinente consiste donc à se demander si le critère de « majeure partie » est compatible avec l'objet du par. 23(3) et s'il peut garantir que les enfants qu'il est censé protéger seront admis dans des écoles de la minorité linguistique. À notre avis, [la mesure quantitative] a une portée trop limitée [...] Par conséquent, le critère de la « majeure partie » ne peut être

The pertinent question, then, is whether the "major part" requirement is consistent with the purpose of s. 23(2) and capable of ensuring that the children meant to be protected will actually be admitted to minority language schools. In our view, [the quantitative requirement] is underinclusive [...] Thus, the "major part" requirement cannot be saved unless it is interpreted

²⁶ Réjean Lachapelle and Jean-François Lepage, *Languages in Canada. 2006 Census*, Ottawa, Canadian Heritage and Statistics Canada, 2010 at pp. 149-151.

²⁷ Réjean Lachapelle and Jean-François Lepage, *Languages in Canada. 2006 Census*, Ottawa, Canadian Heritage and Statistics Canada, 2010 at p. 160.

²⁸ Statistics Canada, *French and the francophonie in Canada*, Ottawa, Statistics Canada, No. 98-314-X2011003 (2012).

²⁹ *R. v. Beaulac*, [1999] 1 SCR 768 at paras. 32-33.

³⁰ *Charter of the French Language*, RSQ c. C-11.

sauvegardé que si on donne à l'adjectif « majeure » un sens qualificatif plutôt que quantitatif.

such that the word “major” is given a qualitative rather than a quantitative meaning.³¹

In order to implement paragraph 20(1)a) in a flexible, context-sensitive way so as to achieve its purpose, it is vital to have access to rich quantitative and qualitative data that allow governments to target their efforts to adequately respond to the demand. Quantitatively, this means obtaining detailed data on the relationship individuals have with the French language, in order to identify the populations to whom French-language services must be actively offered. The census can and must collect these data. Qualitatively, this means taking into account, through sources other than the census, including consultations, the vitality of official language minority communities at the institutional level (the existence of minority schools, community centres, etc.).

3.2. SECTION 16 OF THE CHARTER

Section 16 of the *Charter* stipulates that “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.” Although there is very little jurisprudence interpreting this provision, its very broad wording, read in light of the principles applicable to the interpretation of language rights, leaves open the possibility of drawing legal obligations from the text.

According to Justice Wilson in *Société des Acadiens v. Association of parents*, “the opening statement ‘English and French are the official languages of Canada’ [is] declaratory and the balance of the section [identifies] the main consequence in the federal context of the official status which has been declared, namely that the two languages have equality of status and have the same rights and privileges as to their use in all institutions of the Parliament and government of Canada.”³² In her view, subsection 16(1) of the *Charter* enshrines the fundamental importance given to language rights in Canada’s constitutional structure.³³ It is therefore essential that the obligations created by these provisions evolve over the years in order to achieve this evolution: “Accordingly the question, in my view, will always be – where are we currently on the road to bilingualism and is the impugned conduct in keeping with that stage of development?”³⁴ The approach adopted by Justice Wilson seems to be in line with earlier decisions regarding other linguistic guarantees provided in the Constitution, including section 133 of the *Constitution Act, 1867*, according to which these guarantees should be applied in light of their contemporary meaning.³⁵

With regard to the part of Justice Wilson’s reasons dealing with language rights, it should be noted that she was not expressing the views of the majority of the Supreme Court of Canada. However, jurisprudence subsequent to *Société des Acadiens* set aside the doctrine of restrictive interpretation of language rights adopted by the majority in that case and is now generally in line with Justice Wilson’s reasons.³⁶

What function does the census serve in achieving the purpose of section 16? In order to be in a position to guarantee substantive equality of status and use of English and French in Canada, the federal government must have access to data allowing it to determine the measures that must be

³¹ *Solski (Tutor of) v. Québec (AG)*, 2005 SCC 14 at para. 35.

³² *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 549 at para. 140.

³³ *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 549 aux paras. 140 and 178.

³⁴ *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 549 at para. 140.

³⁵ See *Québec (AG) v. Blaikie et al.*, [1979] 2 SCR 1016; *Québec (AG) v. Blaikie et al.*, [1981] 1 SCR 312.

³⁶ See for example *Ford v. Québec (AG)*, [1988] 2 SCR 712 at pp. 748 and 749; *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 365; *R. v. Beaulac*, [1999] 1 SCR 768 at paras. 16-25.

taken to reach that objective. Indeed, if, as Justice Wilson states, the normative content of section 16 can be expected to evolve along the “road to bilingualism” in Canada, then we must be able to quantify how far along that road we have come. In that context, the census plays a crucial role, and the shortcomings identified in this report undermine the federal government’s capacity to fully understand the scope of its constitutional obligations.

Moreover, needless to say, addressing the shortcomings in the census would be a measure that would promote progress toward equality of status and use of English and French within federal, provincial and territorial institutions, by making it possible to more effectively target positive measures aimed at reaching that objective. In this way, the government would promote the achievement of the purpose of subsection 16(3) of the *Charter*.

3.3. SECTIONS 16.1 AND 19 OF THE CHARTER

Section 16.1 of the *Charter* enshrines the equality of the two official language communities in the province of New Brunswick and confirms the role of the legislature and government of New Brunswick in protecting and promoting the status, rights and privileges of the two communities:

Communautés linguistiques française et anglaise du Nouveau-Brunswick

16.1 (1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d’enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

Rôle de la législature et du gouvernement du Nouveau-Brunswick

(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Section 16.1 is a source of concrete legal obligations which, like those arising from section 16 (including subsection 16(2), which proclaims the equality of English and French in New Brunswick), are dynamic.³⁷ The census data allow the government and legislature of New Brunswick to take the measures required in order to achieve the purpose of that provision. In particular, they make it possible to determine the potential demand for the educational and cultural institutions of the two linguistic communities in the province, and to determine the location and funding needed by those institutions.

³⁷ *Moncton (City) v. Charlebois*, 2001 NBCA 117 at para. 80; see also *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, RSNB 2011, c.198; Michel Bastarache, “Le principe d’égalité des langues officielles” [“The principle of equality of the official languages”] in Michel Bastarache et al., *Les droits linguistiques au Canada* [Language rights in Canada], 3rd ed., Yvon-Blais, Cowansville, QC, 2014, 89 at pp. 131-133.

As for subsection 19(1) of the *Charter*, it provides that litigants are entitled to use English or French in all cases before courts established by Parliament, and in any pleading in or process issuing from them. Part III of the *OLA* is aimed at implementing this right. Once again, reliable data on the location of persons likely to exercise this right are necessary to allow the government of Canada to manage its human and financial resources so as to ensure that it fulfils its constitutional obligations with respect to the Federal Court, the Federal Court of Appeal, and the many federal administrative tribunals. The same reasoning applies to subsection 19(2) of the *Charter*, which guarantees the right of litigants to use either official language before the courts of New Brunswick.

3.4. FRENCH-LANGUAGE SERVICES AND THE ADMINISTRATION OF JUSTICE IN THE PROVINCES AND TERRITORIES

The federal government is not the only government that uses census data to target positive measures aimed at promoting official language minority communities. Certainly all the provinces and all the territories use those data to assess the potential number of rights holders under section 23 of the *Charter*. But in addition, most of those jurisdictions also offer government services in French. Census data are therefore essential in order for them to know where to offer those services and what level of human and financial resources is required for them. The data are also necessary for the effective implementation of measures aimed at promoting access to justice in the official language minority.

A prime example of this is the designation of regions for the purposes of Ontario's *French Language Services Act*.³⁸ The act imposes the obligation to offer services in French in any "designated area" and provides for the authority to designate areas through regulations. Although the criteria for designation are not set out in any act or regulations, one of the criteria used by the government of Ontario is quantitative: the area in question must be 10% "Francophone" and have no fewer than 5,000 Francophones in its urban centres.³⁹ Logically, the best tool currently available to determine whether this criterion is satisfied is the federal census. Consequently, the quality and diversity of the data in the census are liable to have a significant impact on the decisions of the Ontario government.

Thus, a complete, reliable picture of official language minority communities is essential for all jurisdictions in Canada to ensure that services and access to justice are provided in both official languages.

4. THE FEDERAL GOVERNMENT'S QUASI-CONSTITUTIONAL OBLIGATIONS

The *OLA* also imposes quasi-constitutional obligations on the federal government with respect to its decisions concerning the census. Under Part VII of the *OLA*, the federal government is required to take positive measures to enhance the vitality of Canada's official language minorities and support their development:

41 (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et

41 (1) The Government of Canada is committed to

(a) enhancing the vitality of the English and French linguistic minority

³⁸ *French Language Services Act*, RSO 1990, c. F.32.

³⁹ Office of the French Language Services Commissioner, "Process of Designating an Area" (18 October 2013), online: <<http://csfontario.ca/en/articles/4619>>.

l'usage du français et de l'anglais dans la société canadienne.

(2) Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour mettre en oeuvre cet engagement. Il demeure entendu que cette mise en oeuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces.

As the Commissioner of Official Languages of Canada, Graham Fraser, put it in his 2010-2011 annual report: “[a positive measure] essentially means a measure that has a real and constructive impact on the vitality of official language [minority] communities and on the advancement towards the equality of English and French in Canadian society.”⁴⁰ Decisions aimed at addressing the shortcomings of the census identified in this report would clearly constitute such positive measures in the sense of Part VII of the *OLA*.

Moreover, the Minister of Canadian Heritage has additional obligations under Part VII of the *OLA*, requiring her to “encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41.”⁴¹ The Minister has specific obligations requiring her to take the measures indicated to encourage the learning of French and English, and promote and support the offer of minority language education:

43. (1) Le ministre du Patrimoine canadien prend les mesures qu'il estime indiquées pour favoriser la progression vers l'égalité de statut et d'usage du français et de l'anglais dans la société canadienne et, notamment, toute mesure :

a) de nature à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement;

b) pour encourager et appuyer l'apprentissage du français et de l'anglais;

c) pour encourager le public à mieux accepter et apprécier le français et l'anglais;

communities in Canada and supporting and assisting their development; and

(b) fostering the full recognition and use of both English and French in Canadian society.

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.

43. (1) The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to advance the equality of status and use of English and French in Canadian society and, without restricting the generality of the foregoing, may take measures to

(a) enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development;

(b) encourage and support the learning of English and French in Canada;

(c) foster an acceptance and appreciation of both English and French by members of the public;

⁴⁰ Office of the Commissioner of Official Languages, *Annual Report 2010-2011* at p. 1, online: <http://www.officiallanguages.gc.ca/en/publications/annual_reports/2010-2011>.

⁴¹ *Official Languages Act*, RSC 1985, c. 31 (4th suppl.), s. 42.

d) pour encourager et aider les gouvernements provinciaux à favoriser le développement des minorités francophones et anglophones, et notamment à leur offrir des services provinciaux et municipaux en français et en anglais et à leur permettre de recevoir leur instruction dans leur propre langue;

e) pour encourager et aider ces gouvernements à donner à tous la possibilité d'apprendre le français et l'anglais;

f) pour encourager les entreprises, les organisations patronales et syndicales, les organismes bénévoles et autres à fournir leurs services en français et en anglais et à favoriser la reconnaissance et l'usage de ces deux langues, et pour collaborer avec eux à ces fins;

g) pour encourager et aider les organisations, associations ou autres organismes à refléter et promouvoir, au Canada et à l'étranger, le caractère bilingue du Canada;

h) sous réserve de l'aval du gouverneur en conseil, pour conclure avec des gouvernements étrangers des accords ou arrangements reconnaissant et renforçant l'identité bilingue du Canada.

(d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally and, in particular, to offer provincial and municipal services in both English and French and to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;

(e) encourage and assist provincial governments to provide opportunities for everyone in Canada to learn both English and French;

(f) encourage and cooperate with the business community, labour organizations, voluntary organizations and other organizations or institutions to provide services in both English and French and to foster the recognition and use of those languages;

(g) encourage and assist organizations and institutions to project the bilingual character of Canada in their activities in Canada or elsewhere; and

(h) with the approval of the Governor in Council, enter into agreements or arrangements that recognize and advance the bilingual character of Canada with the governments of foreign states.⁴²

[Emphasis added]

Modifications to the census that would allow it to provide complete, reliable data on the total number of children whose parents are entitled under section 23 of the *Charter* to enrol them in a minority language school would clearly encourage the learning of English and French, and would foster and support the offer of minority language education throughout Canada. They would also put the federal government in a better position to fulfil its constitutional obligations with regard to communications and services, as well as its quasi-constitutional obligations under Part VII of the *OLA* and its obligations with regard to access to justice under part III of the *OLA*.⁴³

⁴² *Official Languages Act*, RSC 1985, c. 31 (4th suppl), s. 43.

⁴³ In particular, modifications to the census would allow the Department of Canadian Heritage, provincial and territorial governments, and Francophone and Acadian communities to identify realistic targets for the federal funding granted through the *Protocol for Agreements for Minority-Language Education and Second-Language Instruction* and to determine the actual impact of the federal funds invested to promote the participation and retention of students in French-language schools.

5. THE CENSUS AS THE BEST SOURCE OF DATA FOR THE FULL IMPLEMENTATION OF CONSTITUTIONAL AND QUASI CONSTITUTIONAL LANGUAGE RIGHTS AND FOR THE FULL IMPLEMENTATION OF PROVINCIAL AND TERRITORIAL REGIMES, AND THE NEED FOR THOSE DATA TO BE COLLECTED FROM 100% OF THE POPULATION

As explained in detail above, census data on official language communities are essential to allow the federal government to fulfil its constitutional obligations – as set out in section 23 and 16 to 20 of the *Charter* – and its quasi-constitutional obligations – in particular those set out in Parts III, IV and VII of the *OLA*. These data also allow provincial and territorial governments to fulfil their obligations and fully implement their policies and directives. This section shows that the mandatory census is the best possible source for such data, and that the questions on official languages should figure in the short-form census questionnaire, the results of which are available for 100% of the population, since those questions are also included in the long-form questionnaire.

The mandatory census – i.e. the short-form and long-form census questionnaires – is the best source of data on official language minority communities. All the questions in the short-form questionnaire also figure in the long-form census questionnaire, and as a result, those questions are asked of 100% of the Canadian population. The census questions on the knowledge of official languages, languages spoken most often at home and spoken regularly at home, and mother tongue (census questions 7 to 9) appear in the short-form census questionnaire (and therefore also in the long-form census questionnaire). The questions added regarding language of education should be added to the same section of the census, in the short-form questionnaire (and therefore also in the long-form questionnaire).

It is important to collect data on linguistic minorities from 100% of the population, since what is required is an actual enumeration of the members of those communities so that it can be determined which categories those persons belong to (for example, with regard to mother tongue and language of education). If the questions on language of education were asked of only 25% of the population, in the long-form census questionnaire, it would be necessary to extrapolate from the data on this 25% sample of the population to 100% of the population. In other words, it would be necessary to extrapolate the total numbers of members of those communities from that sample. Since the goal is to establish the number of members in those communities in order to determine the content of the government's constitutional and quasi-constitutional obligations, and since, in order to do this, it makes a difference where those individuals are located, it is important to actually count those persons, and not to attempt somehow to infer their numbers based on a smaller sample. Moreover, past experience⁴⁴ shows that estimates relating to language based on the long-form questionnaire for small areas such as those covered by a school or school board are not very reliable.

It is important that the questions collecting data on official language minority communities be asked in the census and not in another survey, since the response rate associated with the census,

⁴⁴ This was the case, for example, in the preparation of numerous descriptive tables of children of rights holders under section 23 of the *Charter* for census sub-divisions in analyses of the 2001 and 2006 censuses in the provinces and territories. Those analyses were necessarily limited to the single category of children of rights holders for which the census collects data, i.e. children of parents outside Québec who have French as their mother tongue. Rodrigue Landry, *Libérer le potentiel caché de l'exogamie : Profil démologique des enfants des ayants droit francophones selon la structure familiale (Là où le nombre le justifie...IV)* [Unlocking the hidden potential of exogamy: A demological profile of the children of Francophone rights holders by family structure (Where numbers warrant...IV)], Moncton: Canadian Institute for Research on Linguistic Minorities, 2003 online: <www.icrml.ca> (in French only). Rodrigue Landry, *Petite enfance et autonomie culturelle, Là où le nombre le justifie... V* [Early childhood and cultural autonomy, Where numbers warrant...V], Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca> (in French only).

which is mandatory, is much higher than the response rate for other surveys, and the quality of the data collected is much better. That is why the replacement of the long-form census questionnaire by the National Household Survey, which was a voluntary survey, was so strongly criticized and even led to the resignation of Statistics Canada's chief statistician. It is also why the long-form questionnaire was reinstated for the 2016 census. However, the questions relating to section 23 of the *Charter* should be asked in the short-form census questionnaire, in view of the fact that these same questions are also asked in the long-form questionnaire and therefore represent an actual census of the entire population of Canada. This would yield much more reliable results than just the long-form questionnaire on members of official language minorities, whose numbers are small.

If the federal government were to conduct a survey of official language minority communities, like the 2006 post-censal survey on official language minority communities, this would be positive, but for the reasons outlined above, such a survey would need to be undertaken along with the addition of language of education questions to the census. In other words, such a survey would need to enrich the data collected through the census with further details and not replace the census as a method for collecting the fundamental data on those communities.

Indeed, it is important to note that the respondents targeted by the 2006 post-censal survey were chosen from among the members of official language minority communities who could be identified based on the census data provided by respondents to the long-form questionnaire (i.e. only 20% of the population). For that reason, persons with English and French as their mother tongues, but who, according to the census data only have English as their mother tongue, and persons outside Québec whose mother tongue is English but who did their schooling in French, or whose children are doing or did their schooling all or partly in French, and persons in Québec whose mother tongue is French, but who did their schooling in English, or whose children are doing or did their schooling all or partly in English, would not have been included on the list of possible respondents to the 2006 post-censal survey. For that reason, the 2006 post-censal survey could not identify all the rights holders under section 23 of the *Charter*, since the sample was limited to a subset of the persons with French as their mother tongue, according to the census, and to Allophones for whom French was the first official language spoken. "Anglophones" and "Allophones" who do not have French as their first official language spoken who would be rights holders under paragraph 23(1)b) or subsection 23(2) of the *Charter* would not be included in the survey. It should be noted that the term "Anglophone" as used in the previous sentence refers to a person who, according to the census, has English as his or her mother tongue and does not have French as his or her mother tongue. That category therefore includes persons who learned French at the same time as English, but who did not indicate on the census questionnaire – or for whom another person, often a spouse, did not indicate on the census questionnaire – that French is one of their mother tongues. That category also includes persons who do not have French as a mother tongue, but have at least one parent whose mother tongue was French, and whose children attend a French-language school thanks to a remedial "grandparent clause" aimed at reversing the loss of the French language and Francophone culture.

Indeed, a post-censal survey could not replace the census for the collection of the demolinguistic data required to properly enumerate rights holders under section 23 of the *Charter* and their children, and the populations to whom services in French must be actively offered. As indicated above, unlike the census, a post-censal survey would not provide the numbers of rights holders and their children in small areas such as the territory of a school board or the catchment area of a school. The 2006 post-censal survey on the vitality of official language minority communities included an adult sample (N = 30,794) and a sample of children under the age of 18 (N = 22,362).

The respondents were selected from among respondents to the 2006 census long-form questionnaire, administered to 20% of households. The response rate was 70.5% for the adult sample and 76.1% for the child sample. The database for the children is 15,550 children, and the database for the adults is 20,067. The respondents for the child sample were generally a parent of the child belonging to the official language minority, either based on their mother tongue or their first official language spoken (excluding “Anglophones” outside Québec and “Francophones” in Québec).

It was this sample that was used for the analysis of the data relating to section 23 of the *Charter* and the other questions about children in the 2006 post-censal survey on the vitality of official language minorities by Statistics Canada. The sample was too small to allow the results to be reliably extrapolated for regions within provinces (or territories) with the exception of Ontario, Québec and New Brunswick, and in those cases, this was only possible for relatively large regions (Ontario was divided into 6 regions, Québec into 6 regions, and New Brunswick into 3 regions). For all the other provinces and all the territories, the results were reliable only for the entire province or territory. In the case of the territories, the data were combined, and did not allow analyses for each individual territory, but only for the three Canadian territories as a whole.⁴⁵

A survey like the 2006 post-censal survey can provide estimates of the number of persons with certain characteristics, but it clearly cannot enumerate the number of rights holders and their children in sufficiently precise, targeted geographic areas.

6. THE SIGNIFICANT SHORTCOMINGS OF THE CENSUS AND THEIR HARMFUL EFFECT ON THE VITALITY OF OFFICIAL LANGUAGE MINORITY COMMUNITIES

The census suffers from significant shortcomings, leading it to significantly underestimate the number of children of rights holders under section 23 of the *Charter* outside Québec, and it does not count the children of rights holders in Québec at all. As indicated above, these shortcomings have a harmful effect on official language minority communities since they prevent the provinces and territories, and minority language school boards, from accurately assessing the scope of needs in minority language education and fully meeting those needs, as section 23 of the *Charter* requires. These shortcomings make it more difficult for minority language school boards to carry out their planning, including capital planning. Moreover, they make it more difficult – and in some cases impossible – to present the provincial or territorial Ministry of Education and ultimately the province or territory’s Treasury Board with concrete evidence to justify funding applications for the acquisition, construction or renovation of school buildings. In some cases, these shortcomings prevent an official language minority community from having a school; in other cases, these shortcomings prevent such a community from having its school renovated or extended, even though it needs to do so.

Planning by minority language school boards also includes raising awareness among rights holder parents and recruiting their target school population. According to the only data available, only around 50% of the children of rights holders outside Québec attend a French-language school⁴⁶ and around 41% of rights holder parents whose child attends an English-language school outside Québec would have preferred for their child to attend a minority school, although that percentage

⁴⁵ Jean-Pierre Corbeil, Claude Grenier and Sylvie Lafrenière, “Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities,” Ottawa, Statistics Canada, 2007, number 91-548-X at p. 71.

⁴⁶ Jean-Pierre Corbeil, Claude Grenier and Sylvie Lafrenière, “Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities,” Ottawa, Statistics Canada, 2007, number 91-548-X at p. 50.

may vary depending on the province or territory.⁴⁷ In reality, the percentage of children of rights holders outside Québec whose children attend the French-language school must be less than 50% since as indicated above, the 2006 post-censal survey did not include in its sample either “Anglophones” or “Allophones” who may be entitled to have their children educated in French under sections 23(1)*b*) and 23(2) of the *Charter*.⁴⁸ Moreover, the 2006 post-censal survey on the vitality of official languages conducted by Statistics Canada showed that around 15% of children eligible to attend a French-language school outside Québec were attending a French immersion program at an English-language school.⁴⁹ Studies have shown that many parents mistakenly believe a school program referred to as “bilingual” (e.g. 50% of classes in French and 50% of classes in English, a formula similar to the one used in the immersion program) is more effective in making their child bilingual than a French-language school.⁵⁰ However, both for the children of rights holders in exogamous⁵¹ relationships and for those in endogamous⁵² relationships, Francophones in a minority setting, it is the French-language school that produces the highest level of bilingualism in both official languages.⁵³ The results of the census would be used to organize campaigns aimed at raising awareness among rights holders outside Québec of the effects of the

⁴⁷ Rodrigue Landry, “De la garderie aux études postsecondaires: l’éducation des enfants des communautés de langue officielle en situation minoritaire (CLOSM) dans les établissements d’enseignement de la minorité” (“From daycare to post-secondary studies: the education of children from official language minority communities (OLMCs) in minority schools,” in Rodrigue Landry (ed.), *La vie dans une langue officielle minoritaire au Canada (Life in an official language minority in Canada)*, Quebec City, Presses de l’Université Laval, 2014 at pp. 95-145 (in French only).

⁴⁸ Once again, these “Anglophones” would include persons with French as one of their mother tongues but who, according to the census, have only English as their mother tongue, as well as all parents whose children attend a French-language school thanks to a “grandparent clause.”

⁴⁹ Jean-Pierre Corbeil, Claude Grenier and Sylvie Lafrenière, “Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities,” Ottawa, Statistics Canada, 2007, number 91-548-X at p. 50; Rodrigue Landry, “De la garderie aux études postsecondaires: l’éducation des enfants des communautés de langue officielle en situation minoritaire (CLOSM) dans les établissements d’enseignement de la minorité”, in Rodrigue Landry (ed.), *La vie dans une langue officielle minoritaire au Canada*, Quebec City, Presses de l’Université Laval, 2014 at pp. 95-145.

⁵⁰ Kenneth Deveau, Paul Clarke, and Rodrigue Landry, “Écoles secondaires de langue française en Nouvelle-Écosse: des opinions divergentes” (“French-language secondary schools in Nova Scotia: divergent opinions”), *Francophonies d’Amérique*, 2004, 18 at pp. 93-105 (in French only); Kenneth Deveau, Rodrigue Landry, and Réal Allard, “Facteurs reliés au positionnement envers la langue de scolarisation en milieu minoritaire francophone: le cas des ayants droit de la Nouvelle-Écosse (Canada)” (“Factors relating to the position on the language of schooling in a minority Francophone setting: the case of rights holders in Nova Scotia (Canada),” *Revue des sciences de l’éducation*, volume XXXII, n° 2, 2006 at pp. 417-437 (in French only).

⁵¹ In the context of official language minorities in Canada, an exogamous couple is made up of two individuals whose mother tongues are different (e.g. a Francophone whose spouse is Anglophone or whose mother tongue is a non-official language). These couples are sometimes referred to as “interlinguistic couples.”

⁵² In the context of official language minorities in Canada, an endogamous couple is made up of two individuals belonging to the same linguistic group.

⁵³ Rodrigue Landry and Réal Allard, “L’exogamie et le maintien de deux langues et de deux cultures: le rôle de la francité familialo-scolaire” (“Exogamy and the maintenance of two languages and two cultures: the role of family and school Frenchness”), *Revue des sciences de l’éducation*, 23, 1997 at pp. 561-592 (in French only); Rodrigue Landry and Réal Allard, “Can schools promote additive bilingualism in minority group children?” in Liliam Malave and Georges Duquette (ed.), *Language, culture and cognition: A collection of studies in first and second language acquisition*, Clevedon, England, Multilingual Matters Ltd., 1991 at pp. 198-229; Rodrigue Landry and Réal Allard, “Ethnolinguistic vitality and the bilingual development of minority and majority group students,” in Willem Fase, Koen Jaspaert and Sjaak Kroon (ed.), *Maintenance and Loss of Minority Languages*, Amsterdam, Benjamins, 1992 at pp. 223-251; Rodrigue Landry and Réal Allard, “Langue de la scolarisation et développement bilingue: le cas des acadiens de la Nouvelle-Écosse” (“Language of schooling and bilingual development: the case of Acadians in Nova Scotia”), Canada, *DiversCité Langues*, 2000, vol. V, online: <<http://www.telug.quebec.ca/diverscite/entree.htm>> (in French only).

different education programs on their children's bilingual development.⁵⁴ Recently, in a report on early childhood, the Commissioner of Official Languages for Canada recommended such campaigns to raise awareness among rights holders under section 23 of the *Charter*, recognizing early childhood as crucial for the vitality of Francophone communities.⁵⁵ Moreover, the first *Action Plan for Official Languages* prepared by the federal government in 2003 placed special emphasis on early childhood and set an objective of 80% for the enrolment of the children of rights holders under section 23 of the *Charter* in French-language schools.⁵⁶

Therefore, because of the shortcomings in the census, the number of children with at least one parent who is a rights holder under the *Charter* outside Québec, identifiable as such in the census data, does not come close to representing the upper limit of potential enrolment in French-language schools. In other words, the census is the only tool at the disposal of school boards and provincial and territorial governments to try to estimate, for a given school, the total potential of children with at least one rights holder parent for a given school. However, the number provided by the census is clearly not the total potential described by the Supreme Court of Canada in *Mahé*; it is necessarily lower than that number – a number which is nonetheless needed in order to determine what “the number ... warrants.” With regard to Québec, as explained below, English-language school boards have no access to census data to assist them with their planning or support their funding applications, on the children of rights holders under section 23 of the *Charter*.

⁵⁴ Rodrigue Landry, *Petite enfance et autonomie culturelle, Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca> at pp. 60-61 (in French only).

⁵⁵ Office of the Commissioner of Official Languages for Canada (2016), *Early Childhood: Fostering the Vitality of Francophone Minority Communities*. Ottawa, Office of the Commissioner of Official Languages for Canada at pp. 9-10 and recommendation 3.

⁵⁶ Government of Canada, *The Next Act: New Momentum for Canada's Linguistic Duality: the Action Plan for Official Languages*. Ottawa, Government of Canada, 2003 at p. 26.

6.1. THE THREE CATEGORIES OF RIGHTS HOLDER PARENTS UNDER SECTION 23 OF THE CHARTER OUTSIDE QUÉBEC

Before looking at each category, it is important to remember that the *Charter* gives the following three categories of parents the right to enrol their children in a French-language school outside Québec:

- 1 parents whose first official mother tongue is French (paragraph 23(1)a) of the *Charter*);
- 2 parents who had a significant portion of their elementary-level schooling at a French-language school in Canada (paragraph 23(1)b) of the *Charter*); and
- 3 parents with a child who attends or attended a French-language school in Canada (subsection 23(2) of the *Charter*).

6.2. THE TWO CATEGORIES OF RIGHTS HOLDER PARENTS UNDER SECTION 23 OF THE CHARTER IN QUÉBEC

The *Charter* grants the equivalent of the last two categories⁵⁷ – with the difference that the schooling in question must have been done in English, not in French – the right to enrol their children in an English-language school in Québec:

- 3 parents who had a significant portion of their elementary-level schooling at an English-language school in Canada (paragraph 23(1)b) of the *Charter*); and
- 3 parents with a child who attends or attended an English-language school in Canada (subsection 23(2) of the *Charter*).

6.3. THE FIRST CATEGORY OF RIGHTS HOLDERS UNDER SECTION 23 OF THE CHARTER (WHICH APPLIES ONLY OUTSIDE QUÉBEC)

As indicated above, only the first category of rights holders under section 23 of the *Charter* – those with French as their first official mother tongue (paragraph 23(1)a) of the *Charter*) – is counted by the census. The census significantly underestimates the number of parents living outside Québec who have French as one of their mother tongues, since the census question on mother tongue suggests that only one language should be identified in response to this question (even though the questionnaire does accept multiple responses). Moreover, the instructions associated with that question⁵⁸ directly tell respondents that if they learned more than one language at the same time during their childhood, and they did not speak both languages with the same frequency before they started school, they should indicate only the language most often spoken at home before they attended school. These instructions are very constraining for people learning French at the same time as English in an exogamous household. The majority language has a strong tendency to be used more often at home than the minority language in these families, but this does not prevent French from being learned at the same time and being a second mother tongue. Instructions of this kind are invalid from a sociolinguistic perspective. They ask a growing proportion⁵⁹ of the official language minority population to give a false response to the census question on mother tongue.

⁵⁷ As indicated above, under section 59 of the *Constitution Act, 1982*, paragraph 23(1)a) of the *Charter* does not apply in Québec.

⁵⁸ These instructions are reproduced and analyzed below.

⁵⁹ Because of the increase in exogamy, more and more Canadians who learn French as their mother tongue outside Québec will learn it at the same time as English.

These two factors discourage multiple responses from persons who learned French and English simultaneously as first languages. Parents with French and English as mother tongues often live in a context in which English is the dominant language (in their community, at work and in the home) and will therefore often tend to indicate that English is their mother tongue if they feel they have to choose between English and French. Similarly, when the Anglophone (or Allophone) spouses of such parents respond to the census for the household, they may tend to indicate only the dominant language of the home (English) as the mother tongue of their bilingual spouse or their children.⁶⁰ Since a very large proportion of those bilingual parents grew up in an environment in which French was the minority language, and with only one Francophone parent, in very many cases, they will have spoken English more often than French before they started school.⁶¹

The evidence in the recent case on French-language education in British Columbia included evidence from a number of parents with rights under paragraph 23(1)a) of the *Charter*, who have children in schools of the Conseil scolaire francophone de la Colombie-Britannique [British Columbia' Francophone school board], but had not been identified as rights holders under section 23 of the *Charter* by the census. Among those witnesses were parents with French and English as their mother tongues who indicated only English as their mother tongue on the census because they thought they had to choose. The Court accepted this evidence, but treated it as essentially anecdotal and concluded that it was impossible to infer how many such children of rights holders are not counted by the census:

In my view, there is some evidence to suggest that the census data compiled by Dr. Landry underreports the total universe of s. 23(1)(a) rightsholders' children. Given the high rate of Exogamy in British Columbia, the dominance of English and the wording used in the Mother Tongue question on the census, some Mother-Tongue rightsholders likely report English as their sole mother tongue. It is impossible to quantify the extent of this underreporting.⁶²

According to Statistics Canada, the wording of the mother tongue question remained the same in 2001, 2006 and 2011.⁶³ However, the percentage of multiple responses to the census question on mother tongue varied among the different censuses depending on the context of the question. When the mother tongue question was asked in the context of other language questions, i.e. preceded by the questions on (1) knowledge of official languages (and knowledge of other languages in the long-form questionnaire) and (2) languages spoken at home (in the long-form questionnaire for the 2001 and 2006 censuses, and the questionnaire for the 2011 census⁶⁴) the percentage of multiple responses was relatively low nationally: 1.3% (2001), 1.3 % (2006) and 1.9 % (2011).⁶⁵ The 2011 census questionnaire is comparable to the 2001 and 2006 long-form questionnaires in that it contains more than one language question – three, in fact – compared to

⁶⁰ Without presenting any figures to this effect, two researchers at Statistics Canada state that depending on the language of the respondent, responses to the census questionnaire may vary (page 406). Mireille Vézina and René Houle, “La transmission de la langue française au sein des familles exogames et endogames francophones au Canada” (“The transmission of the French language in exogamous and endogamous Francophone families in Canada”), *Cahiers québécois de démographie*, vol. 43, n° 2, 2014 at pp. 399-438 (in French only).

⁶¹ Mireille Vézina et René Houle, “La transmission de la langue française au sein des familles exogames et endogames francophones au Canada,” *Cahiers québécois de démographie*, vol. 43, n° 2, 2014 at pp. 399-438.

⁶² *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764 at paras. 517. See also paras. 510-512, 518.

⁶³ Statistics Canada, *Methodological Document on the 2011 Census Language Data*, Ottawa, Statistics Canada, 2013, number 98-314-XWF2011051 at p. 6.

⁶⁴ There was only one questionnaire for the 2011 census, equivalent to the 2016 short-form questionnaire.

⁶⁵ Statistics Canada, *Methodological Document on the 2011 Census Language Data*, Ottawa, Statistics Canada, 2013, number 98-314-XWF2011051 at p. 11.

four in the 2001 and 2006 long-form questionnaires (not counting the two-part question on language of work). Moreover, apart from the absence of a question about the knowledge of non-official languages in 2011, the order of the language questions is the same in the 2011 census as in the 2001 and 2006 long-form questionnaires. These results are very different from those of respondents to the 2001 and 2006 short-form questionnaires, for which the respective percentages of multiple responses to the mother tongue question are up to three times higher (4.9% in 2001 and 3.6% in 2006). It seems, therefore, that the questions preceding the mother tongue question affect the percentage of multiple responses. It should be noted that when the mother tongue question, for which the response options are in the singular, appears by itself (in the 2001 and 2006 short-form questionnaires), it yields more multiple responses than when it is preceded by other language questions (knowledge of languages and use of languages at home), which openly invite multiple responses. This openness to the knowledge or use of more than one language in the 2011 census and the 2001 and 2006 long-form questionnaires contrasts with the insistence on a single response (only the singular is used) in the question on the first language learned at home and still understood, asked immediately after those two questions.

These figures from Statistics Canada on multiple responses in Canada as a whole do not reflect the specific reality of Francophones. This is clear if we calculate the multiple responses among Francophones (i.e. those who indicated that they had French as the first language learned and still understood) for the 2011 census from the data tables provided by Statistics Canada on its website.⁶⁶ This calculation supports the hypothesis that there is a direct link between the percentage of multiple responses, the concentration of the Francophone population, and exogamy. Indeed, the lower the concentration of Francophones, the higher the level of exogamy (mixed marriages between Francophones and Anglophones or Allophones) and the higher the rate of multiple responses.⁶⁷ We would therefore expect the lowest percentages of multiple responses to be in Québec and New Brunswick and the highest levels to be in provinces where there are few regions with a high concentration of Francophones and there is a high rate of exogamy (Newfoundland and Labrador, Saskatchewan, Alberta and British Columbia). The results for provinces where there are a few regions with strong concentrations of Francophones and other regions with low or very low concentrations would be in the middle (Ontario, Prince Edward Island, Nova Scotia, Manitoba). The results for the three territories would also be in the middle, despite the low concentration of Francophones, due to Francophones' shorter duration of residence and to the impact of Francophone newcomers, given the small populations of Francophone residents.⁶⁸

The results are in line with this hypothesis. The lowest percentages of multiple responses are in Québec (2.1%) and New Brunswick (2.8%) and the highest are in the four provinces with the lowest concentrations of "Francophones:" Newfoundland and Labrador (17.7%), Saskatchewan (14%), Alberta (15.4%), and British Columbia (19%). The results in the other provinces and territories are in the middle: Ontario (12%), Prince Edward Island (8.5%), Nova Scotia (9.7%), Manitoba (11.6%),

⁶⁶ Topic-based tabulation # 98-314-XCB2011027 Mother tongue (8), age group (25) and sex (3) for the population of Canada, provinces, territories and federal electoral districts (2003 Representation Order), 2011 Census.

⁶⁷ Mireille Vézina and René Houle, "La transmission de la langue française au sein des familles exogames et endogames francophones au Canada," *Cahiers québécois de démographie*, vol. 43, n° 2, 2014 at pp. 399-438.

⁶⁸ Anne Robineau, Christophe Traisnel, Éric Forgues, Josée Guignard Noël, Rodrigue Landry, *La vitalité des communautés francophones dans les territoires (Northern Francophone Communities: Vitality of Francophone Communities in the Territories)*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010 (summary available in English: <<http://www.icrml.ca/en/research-and-publications/cirlm-publications/item/8674-la-francophonie-boreale-la-vitalite-des-communautes-francophones-dans-les-territoires>>).

Northwest Territories (8.4 %), Yukon (10.7 %) and Nunavut (3.3 %).⁶⁹ In Toronto, where the number of Francophones (i.e. those who indicated that they had French as the first language learned and still understood) is very high (87,085, if single and multiple responses are included), but where their territorial concentration is very low, the level of multiple responses was 27 %.⁷⁰ The average percentage of multiple responses to the mother tongue question for Francophones outside Québec is 10.6 %. This figure is more than 5 times higher than that of the Canadian population as a whole (1.9%). It is reasonable to assume that the official language status of French, the right to receive instruction at a French-language school, and the bilingualism of some of the “Anglophone” spouses as a result of French immersion programs lead many Francophone families to use both official languages at home and pass the minority language on to their children.⁷¹ It is also reasonable to assume that that percentage would be even higher if the mother tongue question were more consistent with that sociolinguistic reality. In fact, that percentage of multiple responses is obtained despite the context of the question, which strongly encourages respondents to indicate a single mother tongue (see sections 0 and **Erreur ! Source du renvoi introuvable.**).

It is important to note that the variation due to this factor would be expected to be more limited since 2011, since in the form for the 2011 census (which used only one questionnaire – the short form), the mother tongue question was preceded by questions about the knowledge of official languages and languages spoken at home, and that structure was maintained in the 2016 census form (both short and long). Since 2011, all respondents have responded to the mother tongue question (which suggests that just one language should be identified) in light of the questions about the knowledge of official languages and languages spoken at home (which clearly allow multiple responses).

6.3.1. The formulation of the census question on mother tongue, response options for that question, and the context created by the questions preceding it, discourage multiple responses

The census question on mother tongue was formulated as follows in the 2016 census:

9. Quelle est la langue que cette personne a apprise en premier lieu à la maison dans son enfance et qu'elle comprend encore ?

[Si cette personne ne comprend plus la première langue apprise, indiquez la seconde langue qu'elle a apprise.]

1 : Français

2 : Anglais

3 : Autre langue – précisez

Cette question s'adresse à toutes les personnes inscrites sur le questionnaire. Si

9. What is the language that this person first learned at home in childhood and still understands?

[If this person no longer understands the first language learned, indicate the second language learned.]

1: English

2: French

3: Other language – specify

This question is for all persons listed on the questionnaire. If you are answering on

⁶⁹ Topic-based tabulation # 98-314-XCB2011027 Mother tongue (8), age group (25) and sex (3) for the population of Canada, provinces, territories and federal electoral districts (2003 Representation Order), 2011 Census.

⁷⁰ Census Profile, Toronto (Census Metropolitan Area), Language, 2011 Census.

⁷¹ See note 87 below.

vous répondez pour d'autres personnes, veuillez consulter chaque personne⁷².

behalf of other people, please consult each person.⁷³

It is worth comparing this question with the one on the ability to speak English and French:

7. Cette personne connaît-elle assez bien le français ou l'anglais pour soutenir une conversation ? [Cochez un seul cercle]⁷⁴

7. Can this person speak English or French well enough to carry on a conversation? [Mark one circle only.]⁷⁵

The question above, just two questions before the mother tongue question and therefore still visible when the respondent answers the mother tongue question, provides the following response options:

1 : Français seulement
2 : Anglais seulement
3 : Français et anglais
4 : Ni français ni anglais⁷⁶

1: English only
2: French only
3: Both English and French
4: Neither English nor French⁷⁷

It is striking that question 7, on the ability to speak the official languages, clearly suggests that a double response is among the desired responses: "Français et anglais" and "Both English and French" (depending on the language in which the questionnaire is completed). On the other hand, two questions below, in question 9, on mother tongue, the response options suggest that the census is looking for a single response:

⁷² Statistics Canada, Questions du Recensement de la population de 2016, questionnaire abrégé, online: <<http://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-fra.cfm>>.

This reference is to the short form questionnaire, made up of five "steps," from "A" to "E." At step "A," the respondent gives their contact information; at step "B," they give the number of persons who usually reside at the address; at step "C," they identify any persons excluded due to uncertainty, providing the person's name, their relationship with the household, and the reason they were excluded; step "D" asks two questions aimed at identifying farmers and, as a subset of those persons, farmers who make the day-to-day management decisions related to the farm; step "E" contains the 10 questions in the short-form questionnaire about each person living in the household on May 10, 2016, including questions 7 to 9, which relate to language (question 7 – knowledge of official languages; question 8 – languages spoken most often and on a regular basis at home; question 9 – mother tongue).

Steps "A" to "E" as they appear on the short-form questionnaire appear in the same way on the long-form questionnaire (<http://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-eng.cfm>) and are numbered in exactly the same way as on the short-form questionnaire. In the long-form questionnaire, step "E" simply continues after the 10 questions contained in the short-form questionnaire. The version of step "E" in the long-form questionnaire contains 49 questions. The long-form questionnaire also contains a step "F" and a step "G."

The footnote references corresponding to questions 7 to 9 of the census are references to the short-form questionnaire of the 2016 census, but, as explained, exactly the same questions were asked of respondents who received the long-form questionnaire. The only footnotes that reference the long-form questionnaire, below, correspond to questions only asked on the long-form questionnaire.

⁷³ Statistics Canada, 2016 Census of Population questions, short form, online: <<http://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-eng.cfm>>.

⁷⁴ Statistics Canada, Questions du Recensement de la population de 2016, questionnaire abrégé, online: <<http://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-fra.cfm>>.

⁷⁵ Statistics Canada, 2016 Census of Population questions, short form, version anglaise, online: <<http://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-eng.cfm>>.

⁷⁶ Statistics Canada, Questions du Recensement de la population de 2016, questionnaire abrégé, online: <<https://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-fra.cfm>>.

⁷⁷ Statistics Canada, 2016 Census of Population questions, short form, online: <<https://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-eng.cfm>>.

- 1 : Français
- 2 : Anglais
- 3 : Autre langue – précisez

- 1: English
- 2: French
- 3: Other language – specify

Moreover, the formulation of question 9 on mother tongue suggests that it is asking the respondent to identify a single language in response to the question. It asks:

Quelle est la langue que cette personne a apprise en premier lieu à la maison dans son enfance et qu'elle comprend encore ?

What is the language [singular] that this person first learned at home in childhood and still understands?

[Emphasis added]

Question 8 on the language most often spoken at home and the other languages spoken at home on a regular basis (if applicable), through its formulation, communicates that it is asking the respondent to identify a single language in response to the first part of the question, but that the respondent may identify a single language or give a multiple response to the second part:

8. a) Quelle langue cette personne parle-t-elle le plus souvent à la maison?

- 1 : Français
- 2 : Anglais
- 3 : Autre langue – précisez

b) Cette personne parle-t-elle régulièrement d'autres langues à la maison?

- 1 : Non
- 2 : Oui, français
- 3 : Oui, anglais
- 4 : Oui, autre langue – précisez⁷⁸

8. a) What language does this person speak most often at home?

- 1: English
- 2: French
- 3: Other language – specify

b) Does this person speak any other languages on a regular basis at home?

- 1: No
- 2: Yes, English
- 3: Yes, French
- 4: Yes, Other language – specify⁷⁹

[Emphasis added]

Thus, the context created by questions 7 and 8, which precede the mother tongue question, indicates that the census questionnaire clearly communicates when a double or multiple response is expected. On the short-form questionnaire, questions 7, 8 and 9 make up the entire language section of the questionnaire. The short-form questionnaire was sent to 75% of the population during the 2016 census.⁸⁰ The other 25 % of the population received the long-form questionnaire, which includes the same questions in the same order, followed by the same question 10 that is on the short-form questionnaire. The mother tongue question is therefore presented in the same context in both questionnaires.

⁷⁸ Statistics Canada, Questions du Recensement de la population de 2016, questionnaire abrégé, online: <<https://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-fra.cfm>>.

⁷⁹ Statistics Canada, 2016 Census of Population questions, short form, online: <<https://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-eng.cfm>>.

⁸⁰ Statistics Canada, "Census of Population," online: <<http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3901>> :

Statistics Canada reinstated the mandatory long-form questionnaire in time for the 2016 Census. Thus, a 25% sample of Canadian households will receive a long-form questionnaire. All other households will receive a short-form questionnaire.

The other language questions in the long-form questionnaire, presented further down in the questionnaire, at questions 16 (other language(s) spoken) and 45 (language of work), also suggest that the census is looking for a single response to question 9 on mother tongue. Indeed, question 16 strongly suggests to the respondent that the census questionnaire clearly communicates when a multiple response is expected:

16. Quelle(s) langue(s), autre(s) que le français ou l'anglais, cette personne connaît-elle assez bien pour soutenir une conversation?

1 : Aucune; OU

2 : Autre(s) langue(s) – précisez⁸¹

16. What language(s), other than English or French, can this person speak well enough to conduct a conversation?

1: None; OR

2: Other language(s) – specify⁸²

[Emphasis added]

As for question 45 on language of work, it is structured in the same way as question 8 on language spoken at home, first asking for the language used most often at work (“In this job”), and then asking about other languages spoken at work on a regular basis:

a) Dans cet emploi, quelle langue cette personne utilisait-elle le plus souvent?

1 : Français

2 : Anglais

3 : Autre langue – précisez

a) In this job, what language did this person use most often?

1: English

2: French

3: Other language – specify

b) Cette personne utilisait-elle régulièrement d'autres langues dans cet emploi?

1 : Non

2 : Oui, français

3 : Oui, anglais

4 : Oui, autre langue – précisez⁸³

b) Did this person use any other languages on a regular basis in this job?

1: No

2: Yes, English

3: Yes, French

4: Yes, other language – specify⁸⁴

[Emphasis added]

Thus, regardless of whether the respondent completes the short-form or the long-form questionnaire, the conclusion is the same: the formulation of question 9 on mother tongue, the response options for that question, and the context created by the other language questions all communicate to the respondent that the census is expecting the respondent to identify a single language in response to the mother tongue question.

⁸¹ Statistics Canada, Questions du Recensement de la population de 2016, questionnaire détaillé, online: <<https://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-fra.cfm>>.

⁸² Statistics Canada, 2016 Census of Population questions, long form, online: <<http://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-eng.cfm>>.

⁸³ Statistics Canada, Questions du Recensement de la population de 2016, questionnaire détaillé, online: <<https://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-fra.cfm>>.

⁸⁴ Statistics Canada, 2016 Census of Population questions, long form, online: <<http://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-eng.cfm>>.

6.3.2. The census instructions for question 9 on mother tongue explicitly discourage multiple responses

The instructions associated with question 9 of the census on mother tongue explicitly discourage multiple responses to the question:

Si une personne a appris deux langues ou plus en même temps dans sa petite enfance, indiquez la langue qu'elle parlait le plus souvent à la maison avant d'aller à l'école. Indiquez deux langues ou plus si la personne les utilisait aussi souvent les unes que les autres et si elle les comprend encore.

Dans le cas d'un enfant n'ayant pas encore appris à parler, indiquez la langue utilisée le plus souvent à la maison pour communiquer avec l'enfant⁸⁵.

...

For a person who learned two or more languages at the same time in early childhood, report the language this person spoke most often at home before starting school. Report two or more languages only if those languages were used equally often and are still understood by this person.

For a child who has not yet learned to speak, report the language spoken most often to this child at home.⁸⁶

...

These instructions are published by Statistics Canada in the guide to the census questionnaire, and appear in the online version of the census questionnaire if the viewer clicks on the "help" button associated with question 9 on mother tongue.

Two conclusions can be drawn from these instructions: (1) the census explicitly asks rights holders under paragraph 23(1)a) of the *Charter* outside Québec who have both English and French as their mother tongues (a constantly growing category due to the increase in exogamy and improvements in the transmission of the minority language among exogamous couples⁸⁷) to declare just one of those languages as their mother tongue, and (2) in practice, the census asks a very high proportion of those rights holders to declare that they do not have French as their mother tongue, since when a person has English and French as their mother tongues, there is a strong likelihood that their parents form an exogamous couple, and that French is a minority language in the community – in both cases, factors that result in English being spoken more often and French less often.⁸⁸

⁸⁵ Statistics Canada, "Guide du questionnaire détaillé du Recensement de la population de 2016" at p.12, online: <http://www23.statcan.gc.ca/imdb-bmdi/document/3901_D18_T1_V1-fra.pdf>.

⁸⁶ Statistics Canada, "2016 Census of Population Long-form Guide" at p.12, online: <http://www23.statcan.gc.ca/imdb-bmdi/document/3901_D18_T1_V1-eng.pdf>.

⁸⁷ Outside Québec, the rate of transmission of French as a mother tongue among exogamous couples rose from 23% in 1991 to 39% in 2011 where the mother was the "Francophone" spouse, and from 10% to 19% where the "Francophone" parent was the father (a total of 29% in 2011 for exogamous couples). Among endogamous "Francophone" couples, the rate remained relatively stable at around 91%. For both types of couples combined, the rate of transmission of French as a mother tongue varied from 48% to 50%. In fact, the improved transmission of French as a mother tongue among exogamous couples is counterbalanced by an increase in the percentage of children whose parents form an exogamous couple: that figure rose from 56.5% in 1991 to 67% in 2011. Mireille Vézina and René Houle, "La transmission de la langue française au sein des familles exogames et endogames francophones au Canada," *Cahiers québécois de démographie*, vol. 43, n° 2, 2014 at pp. 399-438, 415.

⁸⁸ Rodrigue Landry, *Libérer le potentiel caché de l'exogamie: Profil démolinguistique des enfants des ayants droit francophones selon la structure familiale (Là où le nombre le justifie...IV)*, Moncton: Canadian Institute for Research on Linguistic Minorities, 2003 online: <www.icrml.ca> at pp. 13-14; Rodrigue Landry, *Petite enfance et autonomie culturelle. Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca> at p. 32; Mireille Vézina and René Houle, "La transmission de la langue française au sein des familles

Thus, the effect of this instruction is that Statistics Canada is effectively telling numerous rights holders under paragraph 23(1)a) of the Charter outside Québec that they should not give the true response to the question – English and French – but should rather answer by identifying just one language, instead of giving the true twofold response. Because of the context of exogamy and the minority status of French in the vast majority of communities outside Québec, the effect of this instruction is therefore also that in practice, Statistics Canada is asking rights holders under paragraph 23(1)a) of the *Charter* outside Québec who have English and French as their mother tongues to indicate that they have only English as their mother tongue, with the result that their children will be excluded from the number of children of rights holders under the *Charter* that can be identified through the census.

The 2006 census results⁸⁹ contain indications that children with at least one Francophone parent (i.e. one who indicated that they had French as their first language learned and still understood), and whose parents form an exogamous couple outside Québec, are learning French at the same time as English even where English is the language most often spoken in the home, and even where the parents did not indicate in the census that the child had French as a mother tongue. Among children aged 4 and younger, the percentage of children using French at least on a regular basis at home and the number of children able to conduct a conversation in French is higher than the number of children who have French as a mother tongue, which shows that some children whose parents did not indicate in the census that their child had French as a mother tongue are learning that language very early in life. When the mother is the “Francophone” parent of these children aged 4 and younger, 47% speak French at home on a regular basis and 49% know French (are able to conduct a conversation) whereas 39% have French as a mother tongue. When the “Francophone” parent is the father, the figures are 28%, 29%, and 18% respectively.⁹⁰ These figures do not include parents who have French as one of their mother tongues but did not indicate it in the census as a result of the context of the question.

6.3.3. The census encourages respondents to identify a single mother tongue in response to question 9 of the census

It is important to note that paragraph 23(1)a) of the *Charter* grants parents with French as their first official mother tongue the right to have their children educated at a French-language school outside Québec, regardless of whether they have a second or even third mother tongue. Paragraph 23(1)a) of the *Charter* guarantees that right to every citizen “whose first language learned and still understood is that of the ... French linguistic minority population of the province in which they reside / dont la première langue apprise et encore comprise est celle de la minorité francophone... de la province où ils résident.” Nothing in the text of the *Charter* limits this right to parents with only French as their first language learned and still understood (all that is required is that French be the first official language learned).

Indeed, in view of the remedial purpose of section 23 of the *Charter* and the broad, purposive interpretation that must be given to section 23, all persons with French as their first official mother tongue must be counted in order to calculate the total potential population of French-language

exogames et endogames francophones au Canada,” *Cahiers québécois de démographie*, vol. 43, n° 2, 2014 at pp. 399-438, 412.

⁸⁹ Rodrigue Landry, *Petite enfance et autonomie culturelle, Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca>, Table 7 at p. 33. To Professor Landry’s knowledge, no one has done analyses of this kind using the data from the 2011 census.

⁹⁰ Rodrigue Landry, *Petite enfance et autonomie culturelle, Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca>, Table 7 at p. 33.

schools outside Québec. The Supreme Court of British Columbia had to rule on this very issue in *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, and it concluded that all rights holders under paragraph 23(1)a) of the *Charter* (and their children) must be counted, regardless of whether they have more than one mother tongue:

...it seems wholly appropriate to include persons with a double mother tongue in the universe of British Columbia's s. 23(1)(a) rights holders. Persons with French as one of their mother tongues are s. 23 rights holders.⁹¹

It is therefore inappropriate for the census to discourage multiple responses to question 9 on mother tongue on the part of persons with English and French as their first official mother tongue.

6.3.4. Census question 9 on mother tongue and the instructions associated with it must be modified

Census question 9 on mother tongue, and the instructions on that question, must therefore be modified in the census beginning in 2021, so as not to discourage double (or multiple) responses on the part of such rights holders under paragraph 23(1)a) of the *Charter*. These modifications would make the census data on the number of children of rights holders under paragraph 23(1)a) of the *Charter* complete and reliable, instead of significantly underestimating those numbers as the current census does. These modifications, which are necessary in order to allow section 23 of the *Charter* to be fully implemented outside Québec and promote the vitality and development of French-language communities outside Québec, would allow the federal government to fulfil its obligations toward those communities under the *Charter*, according to the fundamental constitutional principle of respect for minorities, and under Part VII of the *OLA*.

6.4. CATEGORIES 2 AND 3 OF RIGHTS HOLDERS UNDER SECTION 23 OF THE CHARTER (WHICH APPLY BOTH OUTSIDE AND WITHIN QUÉBEC)

With regard to the second and third categories identified above, those of the parent's language of education at the elementary level (paragraph 23(1)b) of the *Charter*) and the language of education of one of the parent's children, at either the elementary or secondary level (subsection 23(2) of the *Charter*), the census collects no data at all. The short-form questionnaire of the census simply does not ask any questions about the schooling of parents or their children, and the long-form questionnaire only asks whether the person has obtained a high school diploma or equivalent. The census data therefore do not make it possible to estimate the number of children whose parents are entitled to enroll them in a minority language school as a result of their own schooling or the schooling of one of their children. Although in the past the vast majority of rights holders held their rights as a result of their first language learned and still understood (paragraph 23(1)a) of the *Charter*), this can no longer be assumed today. As explained in the following pages, the sociolinguistic context of official language minority populations has changed dramatically and the importance of the second and third categories of rights holder parents is more evident now. There is every indication that this trend will increase in the future. The census must now take that reality into account.

⁹¹ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764 at para. 507.

6.4.1. Children of rights holders under paragraph 23(1)b) and subsection 23(2) of the Charter outside Québec are sizable, constantly-growing categories

The fact that the census asks no questions about language of instruction ignores the fact that a very large number of children eligible to attend a French-language school outside Québec are the children of exogamous couples in which only one of the parents is Francophone. Indeed, in many communities, such children represent the vast majority of children eligible to attend the French-language school.⁹² A very significant number of those children learn French at school rather than at home.⁹³ If they have had a significant portion of their schooling at a French-language school, such students, when they become adults, are entitled to enroll their children in a French-language school. However, the census does not make it possible to count them, because they do not have French as their first official mother tongue.

The fact that the census does not ask any questions about language of instruction also ignores the fact that French-language schools in most provinces and territories can accept students whose parents are not rights holders under section 23 of the *Charter*.⁹⁴ All provinces and all territories, with the exception of British Columbia, regularly allow the admission of children with a Francophone grandparent, even if neither parent has French as their first official mother tongue, because of the remedial nature of section 23.⁹⁵ This category is particularly large in places where the Francophone

⁹² Rodrigue Landry, *Libérer le potentiel caché de l'exogamie: Profil démolinguistique des enfants des ayants droit francophones selon la structure familiale (Là où le nombre le justifie...IV)*, Moncton: Canadian Institute for Research on Linguistic Minorities, 2003 online: <www.icrml.ca>, Table 1 at p. 11; Rodrigue Landry, *Petite enfance et autonomie culturelle, Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca>, Table 6 at p. 32; Mireille Vézina and René Houle, "La transmission de la langue française au sein des familles exogames et endogames francophones au Canada," *Cahiers québécois de démographie*, vol. 43, n° 2, 2014 at pp. 399-438, 412.

⁹³ For example, in *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, the evidence demonstrated, and the Court concluded, that the vast majority of students in the Conseil scolaire francophone de la Colombie-Britannique come from exogamous households and need Francisation services when they start school: 2016 BCSC 1764 at para. 1807.

According to the 2006 census, among children aged 17 or younger of exogamous couples in which at least one of the parents was "Francophone," 34% of children had French as a mother tongue and 56% knew French if the "Francophone" parent was the mother. When the "Francophone" parent was the father, the figures were 15% and 41% respectively. This shows that many more children know French than the mother tongue percentages indicate, and this presupposes that the school is playing a role. Rodrigue Landry, *Petite enfance et autonomie culturelle, Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca>, Table 7 at p. 33. The current census does not make it possible to determine how many of these children have attended a French-language school.

⁹⁴ See, for example, *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 SCR 282 at paras. 71 to 73.

⁹⁵ Northwest Territories: Ministerial Directive: Enrolment of Students in French First Language Education Programs, August 11, 2016, <<https://www.ece.gov.nt.ca/en/content/ministerial-directive-french-first-language-education-programs-2016>>; Yukon: Admission to French First Language Schools Policy, August 18, 2016, <www.education.gov.yk.ca/pdf/policies/Admission_to_French_First_Language_Schools_Policy.pdf>; Nunavut: Politique d'admission des élèves à l'éducation en français au Nunavut [Policy on the admission of students to French-language education in Nunavut], April 18, 2012, <<https://trois-soleils.ca/troissol/wp-content/uploads/2015/04/CSFN-politique-admission.pdf>> (in French only); Alberta: The Francophone school boards have an admission policy allowing students who are not admissible under section 23 of the *Charter* to be admitted on a case-by-case basis; Saskatchewan: Politique de gouvernance du CSF 1.1.3 sur le droit d'admission [Governance Policy on the right to be allowed admission], May 3, 2011, <http://ecolefrancophone.com/images/client/pdf/Politiques_procedures/S4-Droit_permission_admission111026.pdf> (in French only); Manitoba: Admission des enfants dont les parents sont non ayant droit [Admission of children whose parents are not rights holders], October 26, 2011, <<https://www.dsrm.mb.ca/ScriptorBD/documents/874953/Dir%20adm/ADM%2003%20Admission%20des%20enfants%20dont%20les%20parents%20sont%20non%20ayants%20droit.pdf>> (in French only); Ontario: The *Education Act* allows

community has experienced a high rate of assimilation.⁹⁶ Although the details of admission rules vary from jurisdiction to jurisdiction, most provinces and territories also allow the admission of other categories of students without a rights holder parent, including the children of Francophiles (these parents are often graduates of French immersion programs), and immigrants who did their schooling in French, or with a child who did his or her schooling in French. Once their children have attended a French-language school, these parents obtain the right under section 23 to have their other children attend a French-language school (subsection 23(2)), assuming they already have (as is the case for the majority of the “Francophile” category and part of the “immigrant” category) or obtain (the other part of the “immigrant” category) Canadian citizenship.⁹⁷ Moreover, the child obtains the right to have his or her own children educated in French (paragraph 23(1)b)).

Finally, the fact that the census does not ask any questions about language of education ignores the fact that there is a large number of persons who do not have French as their first official mother tongue, who are educated in French in Québec (where it is difficult to gain access to an English-language school), who then move to another part of Canada, where they are entitled to enroll their children in a French-language school.⁹⁸ One of the objectives of section 23 of the *Charter* is precisely

French-language school boards to admit students without a rights holder parent under section 23 of the *Charter* (*Education Act*, RSO 1990, c. E.2, s. 293); New Brunswick: The admission criteria set out in New Brunswick’s *Education Act* (c. E-1.12, s. 5(1)) go far beyond those provided in section 23 of the *Charte*; Nova Scotia: Critère d’admission – maternelle à 12 [Admission criteria – kindergarten through 12], November 2, 2013, <<http://vieux.csap.ca/225%2024juillet2014.pdf>> (in French only); Prince Edward Island: Admission des élèves [Admission of students], June 16, 2009, <<https://csfipe.files.wordpress.com/2014/03/gc3a9n-3032.pdf>> (in French only); Newfoundland and Labrador: Admission des élèves [Admission of students], March 18, 2013, <<http://www.csfp.nl.ca/csfp/wp-content/uploads/2013/06/Admission.pdf>> (in French only).

⁹⁶ For example, in a survey of rights holders in an Acadian region of Prince Edward Island where the rate of assimilation was high due to the historical absence of a French-language school, 66% of children eligible to attend a new French-language school were from the “at least one Francophone grandparent” category. Rodrigue Landry, *Enfants d’ayants droit dans la région de Rustico* [*Children of rights holders in the Rustico region*], Moncton, Canadian Institute for Research on Linguistic Minorities, 2009 (in French only).

⁹⁷ It should be noted that the question on citizenship is asked on the long-form census questionnaire only (question 13). Thus, currently, in order to find out, for example, how many persons outside Québec have “French as a mother tongue” and are Canadian citizens, we must determine based on the 25% sample of the population who responded to the long-form questionnaire in the 2016 census what percentage of the population with French as a mother tongue outside Québec were Canadian citizens and apply that rate to the total number of persons with French as a mother tongue outside Québec (enumerated by the short-form questionnaire and the long-form questionnaire). The citizenship question could be moved to the short-form questionnaire, but this change would be less important than the other modifications proposed in this report. The fact is that it is important for the children of persons whose first official mother tongue is French or did their schooling in French be admitted to French-language schools outside Québec, regardless of their citizenship.

⁹⁸ A significant number of Anglophones or their children have attended French-language schools in Québec and would be rights holders if they moved to another part of Canada. According to Statistics Canada’s 2007 postcensal survey, 48% of children (around 86,000) with at least one “English-speaking” parent were enrolled in a French-language school in Québec in 2006. Jean-Pierre Corbeil, Claude Grenier and Sylvie Lafrenière, “Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities,” Ottawa, Statistics Canada, 2007, number 91-548-X at p. 74 to p. 62. According to data published by the government of Québec, in 2012-2013, 97.4% of “Francophone” students throughout Québec were receiving their education in French compared to 26.4% of “Anglophone” students and 87.5% of “Allophone” students. Government of Québec, *Indicateurs linguistiques. Secteur de l’Éducation Édition 2013* [*Linguistic indicators. Educational sector, 2013 edition*], Québec, Ministry of Education, Recreation and Sports, 2014. Between 2001 and 2006, 33,900 “Anglophones” from Québec, including 8,495 aged 20 to 29 years, migrated to other provinces and territories: 62.3% to Ontario, 12.8% to British Columbia and 10.2% to Alberta. 20,740 Québec “Allophones” did the same, including 3,265 aged 20 to 29 years, and 30,580 “Francophones” (8,460 from 20 to 29 years of age). The category of 20 to 29-year-olds is the only one given with the total number of respondents in this report: Éric Forgues, Maurice Beaudin, Josée Guignard Noël

to promote the mobility of Canadians and allow children to continue their schooling in other parts of Canada in the language in which they started it, or to receive their education in the same language as at least one of their parents, despite the fact that they do not live in the province or territory where that parent received their schooling.

These shortcomings in the census have a direct harmful effect on the vitality of French-language communities outside Québec, and they will become increasingly crucial with each census due to the increase in the number of exogamous couples. The children of those couples will most often have either English and French as first official mother tongues, or just English (the French-language school plays a very important role in the transmission of the French language and Francophone culture to such children). A constantly-growing number of rights holders under section 23 of the *Charter* will therefore not be identifiable by the census, either because they have English and French as first official mother tongues and grew up in a majority English environment (and English is the only mother tongue indicated on the census), or because they do not have French as their first official mother tongue, despite the fact that they or one of their children attended a French-language school.

Indeed, in its judgment in *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, Justice Russell of the Supreme Court of British Columbia emphasized the importance of data on the children of rights holders under paragraph 23(1)b) and subsection 23(2) of the *Charter*, for the Francophone school board and the province, concluding that the province must collect data on the number of children who could be enrolled in that school board's schools, and their geographical distribution.⁹⁹ It remains clear, however, that the simplest, most effective and reliable way to have access to such data is through the census. Moreover, such data should be collected for the entire country, making it possible to enumerate rights holders and their children in very specific areas such as the catchment area of a school, which only the census can do. As indicated above, a survey, even if it is conducted as part of a postcensal study like the one conducted by Statistics Canada in 2006, would not make it possible to enumerate rights holders and their children, and would not make it possible to reliably infer their numbers in small areas such as the territory of a school board or the catchment area of a school.

It should be noted that in Alberta, school boards – including English-language school boards – are required to collect limited data on their students who are rights holders under section 23 of the *Charter* and on their parents, under paragraph 2(1)s) of the *Student Record Regulation*.¹⁰⁰ However, that regulation generates very incomplete results in limited detail. An examination of paragraph 2(1)s) of the regulation shows why the census, even with its shortcomings, remains the only real source of data on the number of children of rights holders under section 23 of the *Charter* in Alberta. Paragraph 2(1)s) of the regulation provides that:

2(1) The student record of a student must contain all information affecting the decisions made about the education of the student that is collected or maintained by a board, regardless of the manner in which it is maintained or stored, including

...

and Jonathan Boudreau, *Analyse des tendances migratoires au Québec entre 2001 et 2006* [Analysis of migration trends in Québec between 2001 and 2006], Moncton, Canadian Institute for Research on Linguistic Minorities, 2010 at pp. 19-23.

⁹⁹ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al c Colombie-Britannique (Éducation)*, 2016 BCSC 1764 aux paras 6656 à 6659.

¹⁰⁰ *Student Record Regulation*, Alta Reg 225/2006.

(s) if the parent of the student is eligible to have the student taught in the French language pursuant to section 23 of the *Canadian Charter of Rights and Freedoms*, a notation to indicate that and a notation to indicate whether the parent wishes to exercise that right

The regulation does not stipulate what questions must be asked of the parents, or how they should be asked. The questionnaire used by an English-language school board might even ask simply whether the parent “is eligible to have the student taught in the French language pursuant to section 23 of the *Canadian Charter of Rights and Freedoms*” without explaining what categories of parents have those rights. Indeed, the regulation asks for a legal conclusion (“eligible to have the student taught in the French language”) and does not require the school boards to collect data on the parents’ mother tongue, their schooling, or their children’s schooling.

6.4.2. Children of rights holders under paragraph 23(1)b) and subsection 23(2) of the Charter in Québec are the only categories of children in Québec who are eligible to be educated in the language of the minority under section 23 of the Charter

With regard to Québec, the census collects no data allowing the English-language school boards to assess the potential demand for minority language education, carry out their planning, including capital planning, or justify their capital funding applications. It is true that the Ministry of Education and Higher Learning (*ministère de l'Éducation et de l'Enseignement supérieur*, “MÉES”) (formerly the Ministry of Education, Recreation and Sports of Québec), through the school commissions and private schools, collects certain data on children with at least one parent entitled to enroll them in a minority language school,¹⁰¹ but the usefulness of those data for English-language school commissions has significant limitations. In particular, the data published by the MÉES (1) include only children with a parent who has requested from the school a certificate of admissibility allowing them to attend the English-language school;¹⁰² (2) do not include any data on children between the ages of 0 and 4 years;¹⁰³ (3) presents the number of school-aged children from kindergarten through grade 11 as a single number, without dividing them into categories by age or

¹⁰¹ See the report “Indicateurs linguistiques dans le secteur de l'éducation” (“Linguistic indicators in the education sector”) published by the MÉES. Online: <http://www.education.gouv.qc.ca/references/publications/resultats-de-la-recherche/detail/article/indicateurs-linguistiques-dans-le-secteur-de-leducation/> (report published on August 25, 2014).

¹⁰² See the report “Indicateurs linguistiques dans le secteur de l'éducation” at p. 2, in which Table 10, showing data on students eligible to receive English-language instruction, is explained. The report indicates that the students in question are students holding a certificate of eligibility to receive instruction in English. Applications for certificates of eligibility to receive instruction in English from a school are governed by the *Regulation respecting requests to receive instruction in English*, RRQ c. C-11, r 5, section 1 of which provides that:

1. Any person wishing to invoke any of the provisions of section 73 or 86.1 of the Charter of the French language (chapter C-11) in order that his child may be declared eligible to receive instruction in English shall address such request in writing to a school body.

For the purposes of this Regulation, the school bodies include, in addition to those mentioned in the Schedule to the *Charter*, private educational institutions governed by the Act respecting private education (chapter E-9.1).

¹⁰³ The report “Indicateurs linguistiques dans le secteur de l'éducation” presents data on “the school population in preschool, elementary and secondary education.” The report does not define “preschool education” and does not indicate the precise ages included in the data presented. However, chapter 4, “Éducation préscolaire” (“Preschool education” at p. 52 (online:

<[http://www1.education.gouv.qc.ca/sections/programmeFormation/primaire/pdf/prform2001nb-prform2001nb-040.pdf](http://www1.education.gouv.qc.ca/sections/programmeFormation/primaire/pdf/prform2001nb/prform2001nb-040.pdf)>), of the ministerial document “Programme de formation de l'école québécoise: Éducation préscolaire, Enseignement primaire” (“Quebec school education program: Preschool education, Elementary education”) (online: <<http://www1.education.gouv.qc.ca/sections/programmeFormation/primaire/index.asp?page=prform2001h>>) states that “preschool education” is kindergarten.

grade; and (4) do not allow school commissions to do research to assess demand in a specific geographical area (the data are published for the Island of Montréal and for all of Québec).¹⁰⁴

English-language school commissions in Québec would benefit in the same way as French-language school boards outside Québec from modifications to the census that would allow them to assess their total potential school populations and the potential for very specific geographic areas. It is just as important for Québec's English-language school commissions as it is for Francophone school boards outside Québec to be able to assess their total potential school populations and to base their planning and funding applications on complete, reliable data.

6.4.3. Questions must be added to the census beginning in 2021 that would make it possible to enumerate the children of rights holders under paragraph 23(1)b) and subsection 23(2) of the Charter

Therefore, questions on the language of education of parents and their children must be added to the census beginning in 2021, making it possible to enumerate the children of rights holders under paragraph 23(1)b) and subsection 23(2) of the *Charter*. These modifications would mean that the census would collect complete, reliable data on both categories of rights holders under section 23 of the *Charter* on whom it currently collects no data, and also on the children of such parents. These modifications, which are necessary in order to allow section 23 of the *Charter* to be fully implemented outside Québec and in Québec, and to promote the vitality and development of minority language communities outside Québec and in Québec, would allow the federal government to fulfil its obligations toward those communities under the *Charter*, according to the fundamental constitutional principle of respect for minorities, and under Part VII of the *OLA*.

6.5. A NUMBER OF THESE SHORTCOMINGS IN THE CENSUS WERE RECOGNIZED BY THE ASSISTANT DIRECTOR OF THE SOCIAL AND ABORIGINAL STATISTICS DIVISION OF STATISTICS CANADA

On December 5, 2016, Jean-Pierre Corbeil, Assistant Director of the Social and Aboriginal Statistics Division of Statistics Canada, was invited to appear before the Standing Senate Committee on Official Languages as part of the Committee's study on the challenges relating to access to French-language schools and French immersion programs in British Columbia. The purpose of the testimony was "to discuss statistics on the francophonie in British Columbia and to comment on suggestions made by some witnesses on reviewing language questions asked during the census and to hold a new post-census survey on the vitality of official language minority communities."¹⁰⁵

From the outset, Mr. Corbeil recognized that "[p]rovincial and territorial statistics on school enrolment collected by Statistics Canada do not contain any information on the mother tongue of children or their parents, nor on the language of instruction of the parents or brothers and sisters of the enrolled students. As a result, the children of rights holders cannot be identified."¹⁰⁶

In response to a question on the possibility of giving a multiple response to the census question on mother tongue, Mr. Corbeil answered that Statistics Canada does not prevent people from giving that kind of response, but that "multiple responses are extremely unstable from one census to

¹⁰⁴ See the report "Indicateurs linguistiques dans le secteur de l'éducation."

¹⁰⁵ Senate of Canada, The Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<http://www.parl.gc.ca/content/sen/committee/421/OLLO/52973-E.HTM>>.

¹⁰⁶ Senate of Canada, The Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<http://www.parl.gc.ca/content/sen/committee/421/OLLO/52973-E.HTM>>.

another.”¹⁰⁷ This aspect of Mr. Corbeil’s testimony is addressed below in part O of this report, which discusses many reasons why such responses from the same individual may vary over the years.

In response to a question asked by a senator about linguistic assimilation, Mr. Corbeil noted that the transmission of French to children from exogamous families has increased over time¹⁰⁸ and that many of those children attend French-language schools:

[...] despite the fact that the majority of parents in exogamous couples predominantly pass on English to their children, the transmission of French has increased over time. This is partly – I’m not saying exclusively – because English-speaking spouses attended immersion schools and have a knowledge of French. Those parents, when they are of an age to have children, often choose to enrol their children in minority schools or immersion programs, even if the first language learned is English.¹⁰⁹

During his appearance before the Standing Senate Committee on Official Languages, Mr. Corbeil provided some clarifications on the timeline for the development of new questions and modified questions for the 2021 census. Mr. Corbeil indicated that testing for the 2021 national census will be conducted during the year 2018.¹¹⁰ Thus, in order to appear in the 2021 census questionnaire, it seems that all questions must be developed during the year 2017 in order to be included in the tests that will be carried out in 2018 and 2019. There is still ample time for Statistics Canada to include new questions on official languages.

During his testimony, Mr. Corbeil also addressed two questions on “language of education” that were tested by Statistics Canada in 1993 and 1998. These are analyzed below.

7. THE ATTENTION GIVEN TO THE SHORTCOMINGS IN THE CENSUS BY RECENT JUDGMENTS CONCERNING MINORITY FRENCH-LANGUAGE EDUCATION

A few recent judgments from Canadian courts have dealt with issues relating to census data on official languages. These judgments shed light on the absence of reliable data making it possible to identify all rights holders under section 23 of the *Charter*. They also demonstrate the difficulties created by the absence of complete data when a party to litigation tries to present reliable evidence to demonstrate whether the number warrants an education in the language of the minority.

7.1. THE DECISION IN *CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE, FÉDÉRATION DES PARENTS FRANCOPHONES DE COLOMBIE-BRITANNIQUE ET AL. V. BRITISH COLUMBIA (EDUCATION)*

Among other things, *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*¹¹¹ addressed

¹⁰⁷ Senate of Canada, The Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<http://www.parl.gc.ca/content/sen/committee/421/OLLO/52973-E.HTM>>.

¹⁰⁸ As mentioned above, outside Québec, the rate of transmission of French as a mother tongue among exogamous couples rose from 23% in 1991 to 39% in 2011 when the mother was the “Francophone” spouse and from 10% to 19% when the “Francophone” parent was the father (a total of 29% in 2011 for exogamous couples).

¹⁰⁹ Senate of Canada, The Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<http://www.parl.gc.ca/content/sen/committee/421/OLLO/52973-E.HTM>>.

¹¹⁰ Senate of Canada, The Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<http://www.parl.gc.ca/content/sen/committee/421/OLLO/52973-E.HTM>>.

¹¹¹ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764.

the issue of what the number warranted, in the meaning of section 23 of the *Charter*, with regard to school infrastructure in a number of communities in British Columbia. The applicants therefore presented a large amount of evidence on the number of students who could attend the schools of the Conseil scolaire francophone (the Francophone school board), and evidence was presented by expert witnesses on behalf of the applicants and the defendants on the census data and the inferences that could or could not be drawn from the census data. The chapter “VII. The Number of Children” of the judgment addresses these issues.

In that case, the Court agreed that the census underestimates the total number of children of persons having French as a mother tongue, but said it was impossible to quantify the degree to which it is underestimated.¹¹² Moreover, the Court agreed that the number of children with just one parent having French as a mother tongue, but who were living with the other parent during the census (and therefore not counted by the census as children with a parent who has French as a first official mother tongue), inferred by Professor Rodrigue Landry in his expert report, based on the percentage of exogamous households and the percentage of households in which the children do not live with both parents,¹¹³ is reasonable.

In the second line of his Catchment Area Tables, Dr. Landry estimated the number of children of Francophones whose parents are separated, and who do not live with their Francophone parent. Dr. Landry extrapolated the number of such children by making two assumptions: First, he assumed that the rate of divorce of Exogamous and Endogamous couples is the same. Second, he assumed that custody rates are not related to language, so the rate of custody between Francophone and non-Francophone parents would be 50%. On cross-examination, he maintained that his assumptions were reasonable and standard practice, and I accept that is the case.¹¹⁴

However, the Court concluded that it was impossible to know how many children there are with at least one parent who has rights under paragraph 23(1)b) or subsection 23(2) of the *Charter*. The census data indicated that there was a significant number of children who spoke French regularly at home, but who, according to the census, did not have a parent with French as a mother tongue. The applicants had presented evidence of individuals whose children fell into that category (and even of parents whose children did not fall into that category either), who are rights holders under section 23 of the *Charter*. However, the Court concluded that this did not make it possible to determine what proportion of such children have a parent with rights under section 23 of the *Charter*.

In this case, the Court emphasized how important it would be, for the Conseil scolaire francophone and the province, for such data to be available, concluding that the province must collect data concerning the number of children who can be enrolled in the schools of the Conseil scolaire francophone, and their geographical distribution.¹¹⁵ It remains clear, however, that the only effective

¹¹² *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764 at para. 517.

¹¹³ Using a method suggested by the demographer Michel Paillé: Michel Paillé, “Portrait des minorités francophones et acadiennes au Canada: bilan démographique [A portrait of Francophone and Acadian minorities in Canada: a demographic assessment]” in Réal Allard (ed.), *Actes du colloque pancanadien sur la recherche en éducation en milieu francophone minoritaire: Bilan et perspectives* at pp. 21-29, 2003, Moncton, Centre de recherche et développement en éducation, Québec, Association canadienne d’éducation de langue française.

¹¹⁴ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764 at para. 508.

¹¹⁵ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764 at paras. 6656 to 6659.

way to collect such data is through the census, and that is also the simplest and most efficient way to proceed.

7.2. THE DIFFERENT TREATMENT OF THE CENSUS DATA BY COURTS IN BRITISH COLUMBIA AND THE NORTHWEST TERRITORIES

It is particularly important that the census be modified to provide a complete picture of the children of rights holders under section 23 of the *Charter* (and of official language minority communities in general) since the incomplete data currently collected are treated differently by different courts. In particular, contrary to the conclusion drawn by the Supreme Court of British Columbia in *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, the Supreme Court of the Northwest Territories, in a case decided in 2012, concluded that the census data on children who, according to the census, had at least one parent whose mother tongue is French should be increased by 20% to take into account the categories that were not captured by the census; this conclusion was upheld on appeal.¹¹⁶

The different treatment of the incomplete census data by the courts in British Columbia and the Northwest Territories is a clear sign that the data in question need to be improved.

It is important to note that the conflict is not one concerning a question of law that will be settled by the Supreme Court of Canada. What is at issue is rather findings of fact, based on evidence, including expert evidence. The appeal courts, including the Supreme Court of Canada, must defer to such findings of fact. The problem is one of the completeness and reliability of the data collected by the census. The completeness and reliability of these data cannot be improved by a decision of the Supreme Court of Canada; the only solution to the problem is to collect complete, reliable data in the census.

7.3. THE SHORTCOMINGS BROUGHT OUT BY RECENT JUDICIAL ATTENTION TO THE CENSUS ARE JUST AS RELEVANT TO THE QUESTIONS REGARDING THE OTHER CONSTITUTIONAL AND QUASI CONSTITUTIONAL LANGUAGE RIGHTS AND THE PROVINCIAL AND TERRITORIAL REGIMES

Commentary in case law on the shortcomings of the census have primarily focused on its failure to correctly identify all rights holders under section 23 of the *Charter*. It can be seen from the foregoing that the census includes only one question that identifies individuals belonging to a single category of rights holders, i.e. parents whose first language learned and still understood is the language of the official language minority.¹¹⁷ Moreover, that question discourages multiple responses and

¹¹⁶ *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 at para. 103:

The trial judge calculated the potential minority language school population by starting with the 2006 Census number, which identified 245 school-age children with at least one rights-holder parent. She then accepted Dr. Landry's opinion that the census numbers had to be increased by 20% because the Census did not include three categories: a) single parent families when the custodial parent is an Anglophone, and the other parent has s. 23 rights, b) those covered under s. 23(1)(b) because they received their primary education in French, and c) those covered under s. 23(2) because a sibling is being educated in French (reasons, paras. 273, 672). Adding 20% set the number of school-age children at 294. While depending largely on Dr. Landry's estimate, those conclusions are supported by the record, and disclose no reviewable error.

The judgment of the Supreme Court of the Territories in this case is judgment 2012 NWTSC 43 / 2012 CSTN-O 43. *Commission scolaire francophone, Territoires du Nord-Ouest v. Attorney General of the Northwest Territories*, 2012 NWTSC 44 / 2012 CSTN-O 44, which also dealt with the issue of the completeness and reliability of the data, was decided at the same time.

¹¹⁷ It should be remembered that this category of rights holders does not provide any indication of the number of rights holders under section 23 of the *Charter* in Québec.

therefore underestimates the actual number of rights holders under paragraph 23(1)a) of the *Charter*. In addition, the omission of questions on the two other categories of rights holders – i.e. parents who received their elementary education in the minority official language (paragraph 23(1)b)) and parents with at least one child who is or was enrolled in a minority school (subsection 23(2)) – prevents official language minority communities from correctly assessing the demand for an education in their language.

These shortcomings are particularly grave since the categories of rights holders that are not covered by questions in the census are currently growing. For example, as mentioned above, more and more children of exogamous couples are attending or have attended minority language schools although the minority language is not their first language learned. The growing number of “Allophones” likely to enroll their children in these schools and the increasing number of students in French immersion programs are having the effect of considerably increasing the demand for minority language education.

Although the addition of questions to the census is a crucial issue for minority language education, it is also a crucial issue for ensuring that governments are able to respond to the demand for government services in the minority language. More specifically, in order for the federal government to fulfil its obligations under subsection 20(1) of the *Charter* to provide services in the minority official language in all offices located in regions where there is “significant demand,” it must be able to identify all the potential clients who might request such services. It is therefore essential for the government to collect data that is as rich as possible on the knowledge of the minority official language, and on persons with a concrete link with official language communities (as a result of their own schooling or that of their children). These data are also essential for the implementation of Parts III, IV, and VII of the *OLA* and the language rights that apply in New Brunswick, and the implementation of other programs offering services in the minority official language in the other provinces and territories.

The Commissioner of Official Languages for Canada, Graham Fraser, identifies three groups of persons who should be considered as potential clients requesting services in the minority language: (a) persons whose first official language spoken is not that of the minority, but who speak the language of the minority regularly at home (such as exogamous couples, newcomers and Francophiles); (b) those who speak the language of the minority in their workplace; and (c) those who are receiving their education in the language of the minority.¹¹⁸ In Canada outside Québec, a growing number of members of communities do not have French as their mother tongue, but have a better knowledge of French than of English. Others are Anglophones in relationships with Francophones in households where French is the language spoken most frequently. These individuals are essential in maintaining the vitality of the linguistic communities, but they are not all taken into account when an assessment is made of whether the demand is “significant,” given the fact that the shortcomings of the census do not allow them all to be identified correctly.

Clearly, it is not only the offer and delivery of government services by the federal government that is affected by this issue. It is in the interest of all jurisdictions that offer services in the language of the minority, and which use data from the census to that end, to obtain complete data.

¹¹⁸ Senate, Standing Senate Committee on Official Languages, *Evidence*, 2nd sess., 41st leg. (May 11, 2015).

8. ANALYSIS OF THE SHORTCOMINGS IN THE CENSUS AND THE MODIFICATIONS AND ADDITIONS TO THE CENSUS QUESTIONNAIRE THAT ARE REQUIRED

8.1. MOTHER TONGUE

8.1.1. Suggested modifications to question 9 of the census on mother tongue, to address the current shortcomings in the census

The current formulation of question 9 of the census, on mother tongue, communicates to respondents that the census is looking for a single response to the question. Question 9 asks what is the “language... first learned,” in the singular. The question in no way suggests that a twofold response will be accepted (although the questionnaire allows double or even multiple responses). Similarly, the three response options suggest that only one response will be accepted: “English,” “French,” or “Other language” (singular), in the English version of the question. The suggestion is the same in the French version of question 9:

Current version of question 9 of the census, on mother tongue, as it was included in the short-form and long-form questionnaires of the 2016 census

9. Quelle est la langue que cette personne a apprise en premier lieu à la maison dans son enfance et qu'elle comprend encore ?

[Si cette personne ne comprend plus la première langue apprise, indiquez la seconde langue qu'elle a apprise.]

- 1 : Français
- 2 : Anglais
- 3 : Autre langue – précisez

Cette question s'adresse à toutes les personnes inscrites sur le questionnaire. Si vous répondez pour d'autres personnes, veuillez consulter chaque personne¹¹⁹.

9. What is the language that this person first learned at home in childhood and still understands?

[If this person no longer understands the first language learned, indicate the second language learned.]

- 1: English
- 2: French
- 3: Other language – specify

This question is for all persons listed on the questionnaire. If you are answering on behalf of other people, please consult each person.¹²⁰

It is therefore important to modify question 9 on mother tongue, so as not to give respondents the false impression that they must only give one response to the question, or suggest that if a person learned more than one language at the same time in early childhood, they must choose their dominant language among those languages. Question 9 must adequately identify the mother tongue or mother tongues of every person, as well as their first official language learned and still understood.

8.1.1.1. Suggested modification to census question 9 on mother tongue – suggestion 1a

The following suggested modification communicates to the respondent, in the formulation of the question, that a person may, for the purposes of the census, have more than one mother tongue. In other words, this formulation clarifies that the census recognizes the reality of double (and

¹¹⁹ Statistics Canada, “Questions du Recensement de la population de 2016, questionnaire abrégé,” online: <<https://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-fra.cfm>>.

¹²⁰ Statistics Canada, “2016 Census of Population questions, short form,” online: <<https://www12.statcan.gc.ca/census-recensement/2016/ref/questionnaires/questions-eng.cfm>>.

multiple) mother tongues, and that respondents are not required to respond by identifying only one language, if the true response is that they have two (or in some cases three).

In order to do this, a plural option is therefore added to the question “[w]hat is the language,” in the singular, “that this person... learned.” Moreover, the mention of an “[o]ther language” apart from French or English is modified to indicate that it may be one “other language,” or more than one.

This suggested version offers three response options, like the current census, with the difference that it tells the respondent to check all the responses that apply. The formulation used to do this is one that is already used elsewhere in the census.¹²¹ The instructions that go with the current question 9 (reproduced in full above), before and after the response options, are not included in the suggested versions below. All suggested additions to the text of question 9 are underlined.

Suggested modification to census question 9 on mother tongue – suggestion 1a

9. Quelle est la langue, ou quelles sont les langues, que cette personne a apprise(s) en premier lieu à la maison dans son enfance et qu'elle comprend encore ?

[Cochez plus d'un cercle, s'il y a lieu.]

1 : Français

2 : Anglais

3 : Autre(s) langue(s) – précisez

9. What is the language, or what are the languages, that this person first learned at home in childhood and still understands?

[Mark as many circles as applicable.]

1: English

2: French

3: Other language(s) – specify

It would also be possible to give respondents an exhaustive list of response options for question 9, including “English and French” / “Français et anglais,” and to ask respondents to mark one circle. Such variants could be tested.

8.1.1.2. Suggested modification to census question 9 on mother tongue – suggestion 1b

Another possibility would be to ask the mother tongue question in two parts, like the current question 8 of the census which asks firstly, “What language does this person speak most often at home?” and then, “Does this person speak any other languages on a regular basis at home?”¹²² The second part of this question was added in 2001. The main question, on the language most often spoken at home, had been asked since 1971. This addition did not pose any major problems. Statistics Canada may prefer to modify the question in the following way in order to maximize the comparability of the 2021 census with earlier censuses, keeping the first part of the question unchanged and adding a second part to the question.

However, it should be noted that this case is different from that of the language most often spoken at home and the other languages spoken regularly at home. The latter are actually distinct questions, whereas in the case of the question suggested below, the second part of the question is

¹²¹ See for example question 26 of the long-form census questionnaire: Statistics Canada, “Questions du Recensement de la population de 2016, questionnaire détaillé (Enquête nationale auprès des ménages),” online: <<https://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-fra.cfm>>; Statistics Canada, “2016 Census of Population questions, long form (National Household Survey),” online: <<http://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-eng.cfm>>.

¹²² Statistics Canada, “Questions du Recensement de la population de 2016, questionnaire détaillé (Enquête nationale auprès des ménages),” online: <<https://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-fra.cfm>>; Statistics Canada, “2016 Census of Population questions, long form (National Household Survey),” online: <<http://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-eng.cfm>>.

used to collect any multiple responses that may not have been provided in the first part. It should also be noted that in the case of the question on mother tongue, adding a second part as suggested below would doubtless have an impact on the way some respondents would respond to the first question, since those who have given a multiple response to the current mother tongue question in spite of its discouraging effect, would normally change that behaviour, and indicate one of the two languages in the second part of the question. Moreover, it seems that the addition of a second part, while maintaining the current question 9 as the first part, could pose a problem for those who actually learned more than one language (e.g. French and English) at the same time and spoke both languages more or less equally often. For those persons, at least some of whom already respond that they have more than one mother tongue, despite the formulation of the current question 9, it would likely be difficult to indicate that one of their mother tongues is subordinate to the other, by indicating that it is the “other language” learned at the same time, in part (b) of the question. It therefore seems that suggestion 1a above is the preferable option. However, it may be useful for Statistics Canada to conduct tests on both options (1a and 1b) (in addition to any other option or variant Statistics Canada may consider useful to test).

Applying this structure to the mother tongue question, we might arrive at a formulation such as the following:

Suggested modification to question 9 of the census on mother tongue – suggestion 1b

9. a) Quelle est la langue que cette personne a apprise en premier lieu à la maison dans son enfance et qu'elle comprend encore ?

- 1 : Français
- 2 : Anglais
- 3 : Autre langue – précisez

b) Cette personne a-t-elle appris une autre langue ou d'autres langues en même temps à la maison dans son enfance qu'elle comprend encore ?

- 1 : Non
- 2 : Oui, français
- 3 : Oui, anglais
- 4 : Oui, français et autre(s) langue(s) – précisez
- 5 : Oui, anglais et autre(s) langue(s) – précisez
- 6 : Oui, autre(s) langue(s) – précisez

9. a) What is the language that this person first learned at home in childhood and still understands?

- 1: English
- 2: French
- 3: Other language – specify

b) Is there another language or languages that this person learned at the same time at home in childhood and still understands?

- 1: No
- 2: Yes, English
- 3: Yes, French
- 4: Yes, English and Other language(s) – specify
- 5: Yes, French and Other language(s) – specify
- 6: Yes, Other language(s) – specify

8.1.1.3. Suggested modification to census question 9 on mother tongue, to obtain an accurate count of persons with French as their first official language spoken

As indicated above, it is also important for the census to accurately determine the first official language learned and still understood. This is the case because it is important to count all persons outside Québec who have neither English nor French as their mother tongue, but who have a strong connection with the French language. A significant portion of these persons will be counted through the question or questions on language of education, but certainly not all. However, an increasing number of persons from Africa, Europe and elsewhere in the world receive their schooling in a language other than French, but have French as their second language spoken (and

therefore their first “official” language in Canada), and as a result have a strong connection with French. Many of these persons enroll their children in a French-language school when they move to Canada. Some of these persons are not counted by the derivation method for the first official language spoken (widely known as the “FOLS”), which takes into account firstly knowledge of both official languages, secondly, mother tongue, and thirdly, language spoken at home.¹²³ These people must be counted, even if they speak English at home, e.g. because they live in Calgary and speak English at home in an effort to master the language required for the majority of jobs in their new city. As mentioned, many persons who fall into this category enroll their children in French-language schools outside Québec. It is therefore crucial that they be identified in the census, which is not currently the case. In order to address this problem, the census form could, when a person responds that neither French nor English is their mother tongue, ask what is the next language they learned, if any. The form could ask this question until an official language of Canada is identified, or no more languages are given (e.g., 1. Arabic, 2. French, or 1. Portuguese, 2. Spanish, 3. French). This suggestion applies to suggestions 1a and 1b above.

8.1.2. Suggested modifications to the instructions for the mother tongue question provided in the census guide – suggestion 2

The current formulation of the instructions for question 9 on mother tongue contributes to the impression given to respondents that the census is looking for a single response to this question. It is important to modify the wording of question 9 and/or add a new question to correctly identify the mother tongue or mother tongues of each respondent. Clarifications in the instructions are not sufficient, as there is every indication that the majority of respondents do not consult the instructions. That being said, the instructions are still important and must therefore be clarified.

The following formulation of the instructions regarding question 9 would inform the respondent, in the applicable situations, that multiple responses are accepted (suggested additions are underlined and suggested deletions are struck out):

Suggested modification to the instructions for question 9 on mother tongue – suggestion 2

Si une personne a appris deux langues ou plus à la maison en même temps dans sa petite enfance, indiquez ~~les~~ langues qu'elle parlait ~~le plus souvent~~ à la maison avant d'aller à l'école et qu'elle comprend encore. ~~Indiquez deux langues ou plus si la personne les utilisait aussi souvent les unes que les autres et si elle les comprend encore.~~

Dans le cas d'un enfant n'ayant pas encore appris à parler, indiquez la langue utilisée ou les langues utilisées le plus souvent à la maison pour communiquer avec l'enfant.

Les personnes sourdes ou les personnes ayant des troubles de la parole doivent indiquer leur

For a person who learned two or more languages at home at the same time in early childhood, report the languages ~~this person spoke most often~~ at home before starting school and that are still understood by this person. ~~Report two or more languages only if those languages were used equally often and are still understood by this person.~~

For a child who has not yet learned to speak, report the language or the languages spoken most often to this child at home.

For people who are deaf or for people who have a speech disability, report knowledge of

¹²³ Census Dictionary, “First official language spoken,” online: <http://www12.statcan.gc.ca/census-recensement/2011/ref/dict/pop034-eng.cfm>.

connaissance du français ou de l'anglais s'il y a lieu, en cochant l'option appropriée. Pour d'autres langues, incluant la langue des signes, il faut les inscrire dans la case « Autre langue – précisez ».

Soyez précis lorsque vous inscrivez d'autres langues. Par exemple, les personnes qui déclarent le chinois devraient plutôt mentionner la langue chinoise précise, soit le cantonais, le mandarin, le chaochow, le foukien, le hakka, le shanghaien, le taïwanais, etc.

English or French as applicable, by marking the appropriate option. Other languages, including sign language, should be entered in the box labeled "Other language - specify".

When reporting other languages, be specific. For example, people who report Chinese should instead report the specific Chinese language: Cantonese, Mandarin, Cheocho, Fukien, Hakka, Shanghainese, Taiwanese, etc.

It goes without saying that like the possible changes to the questions, the instructions could also be tested by Statistics Canada.

8.1.3. Response to concerns on the part of Statistics Canada regarding the variability of twofold responses to the census questionnaire on mother tongue

During his testimony before the Standing Senate Committee on Official Languages on December 5, 2016, in response to a question from Senator Raymonde Gagné (independent) on multiple mother tongues, Jean-Pierre Corbeil indicated that Statistics Canada considers multiple responses to be "extremely unstable" from one census to another:

What you need to know is that multiple responses are extremely unstable from one census to another. In recent years, we have paired files to examine the extent to which people who provided multiple responses in one census provided exactly the same type of response in the next census.

We have concluded that the information over the past 25 or 30 years has been very consistent, as almost 80 p. 100 of respondents who provide multiple responses in one census do not provide the same responses in the next census. This does not mean that those answers are not valid, but Statistics Canada tries to ensure that those who give more than one response have actually learned both languages first; people tend to report more languages than the first language learned, even the languages they use outside the home.

Our goal is to get the best quality possible. However, in all census data, 1.5 to 2.5 per cent of Canadians still provide multiple responses to the mother tongue question.¹²⁴

It would appear, however, that there are a great many reasons why responses regarding the mother tongue could vary over the years, that would not suggest that the multiple responses given at one of the times in question are false.

First, the same person does not always respond to the census for a given individual. One questionnaire – electronic or written – is completed per household. Often one person completes the questionnaire for the household without discussing the responses given with the other

¹²⁴ Senate of Canada, Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<https://sencanada.ca/en/Content/Sen/committee/421/ollo/52973-e>>.

members of the household.¹²⁵ If a person with two mother tongues is in a relationship with an Anglophone partner, and they only use English when speaking to each other, the Anglophone partner is very likely to respond for herself and her partner that English is their mother tongue. If that person with two mother tongues completes the census questionnaire himself during a subsequent census (regardless of whether he is still in a relationship with the same partner, single, or in a relationship with a new partner – Anglophone, Francophone or Allophone), he is liable not to give the same response.

Second, the instructions associated with question 9 on the mother tongue, according to which a respondent should only indicate more than one mother tongue if they spoke both languages equally often before starting school,¹²⁶ is itself liable to cause variations in the responses given. Quite simply, many persons with English and French as the mother tongue would not give the same response to the question depending on whether they consulted the instructions associated with the question.

Third, as pointed out above, different responses were given to the mother tongue question when the respondent completed the short-form questionnaire for one census and the long-form questionnaire for the other, or vice versa. When the mother tongue question was asked in the context of other language questions, i.e. preceded by questions on knowledge of official languages (and knowledge of other languages in the long-form questionnaire) and languages spoken at home (long-form questionnaire for the 2001 and 2006 censuses and short-form questionnaire for the 2011 census), questions that clearly allow multiple responses, the percentage of multiple responses was relatively low for the country as a whole: 1.3% (2001), 1.3% (2006) and 1.9 % (2011). These results are very different from those of respondents to the 2001 and 2006 short-form questionnaires, for which the respective percentages of multiple responses to the mother tongue question were 4.9% and 3.6%.¹²⁷ It would seem therefore that the questions preceding the mother tongue question (questions that clearly invite multiple responses, whereas the mother tongue question suggests that only one language should be identified) have an effect on the percentage of multiple responses. We have also already pointed out that the rates of multiple responses are much higher among “Francophones” outside Québec (10.6% on average in 2011) than in the Canadian population as a whole.

Fourth, the respondent or respondents (who, as pointed out above, are not necessarily the same person for different censuses, in relation to a particular individual) may interpret the question differently during different censuses. In other words, the respondent (whether or not it is the same person) may draw different conclusions during different censuses as to whether multiple responses are allowed.

¹²⁵ In *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al. v. British Columbia (Education)*, 2016 BCSC 1764, there was very detailed evidence on this question from one couple in particular. The Anglophone spouse had always completed the census questionnaire for the household and had never discussed the responses given to the language questions for all the members of the household with his partner. The Court accepted this evidence (see para. 511). However, as explained above, the Court concluded that it was impossible to quantify, based on the evidence, the extent to which the census underestimates the number of children of rights holders under section 23 of the *Charter* in a given geographical area (see paras. 517 and 518).

¹²⁶ Statistics Canada, “Guide du questionnaire détaillé du Recensement de la population de 2016” at p.12, online: <http://www23.statcan.gc.ca/imdb-bmdi/document/3901_D18_T1_V1-fra.pdf>/ Statistics Canada, “2016 Census of Population Long-form Guide” at p.12, online: <http://www23.statcan.gc.ca/imdb-bmdi/document/3901_D18_T1_V1-eng.pdf>.

¹²⁷ Statistics Canada, *Methodological Document on the 2011 Census – Language Data*, Ottawa, Statistics Canada, 2013, number 98-314-XWF2011051 at p. 10.

Fifth, a person's level of awareness regarding the minority language may change considerably over the years as a result of changes in their personal circumstances. For example, a person with English and French as mother tongues living with an Anglophone spouse in a region with a large Anglophone majority, not living near their family and with no children, would be less likely to think about their French mother tongue as the same person if they have children, particularly if they have enrolled them (or are considering enrolling them) in a French-language school.

Sixth, a person's language skills may change over the years. First, a person who has two mother tongues may, later in their life, no longer understand one of those languages, in which case that language is no longer considered to be one of their mother tongues by the census. However, even a much less extreme decline in their skills may cause a person to change their response (or the response of someone else on that person's behalf) regarding their minority mother tongue. Such a person may, particularly if they do not use their minority mother tongue often, decide at some point that they no longer speak it "well enough" to say it is their mother tongue. That same person may, later in their life, particularly if their children attend a minority language school, regain a closer connection with that language and improve their skills in that language, with the result that the person once again considers the minority language to be a true mother tongue for them. Indeed, a parent who has received two mother tongues from exogamous parents may have indicated only English as their mother tongue on one census, because that was the language they spoke most often, but indicate two mother tongues (English and French) on the next census, once they have become aware of their status as a rights holder under section 23 of the *Charter*, for example, because they enrolled their child in a French-language school outside Québec, or plan to do so when the child reaches school age.

8.2. LANGUAGE OF EDUCATION – OF PARENTS AND CHILDREN

8.2.1. Analysis of the "language of education" questions suggested by Statistics Canada that were tested in 1993 and 1998

During his testimony before the Standing Senate Committee on Official Languages on December 5, 2016, in response to questions posed by members of the committee, Mr. Corbeil mentioned two tests conducted by Statistics Canada in the past, in which a question on "language of education" was added. These tests were carried out in 1993 and 1998. In 1993, the question tested was "Since September 1993, in which language was this person taught most of the courses taken at school, college or university?" The results of the tests showed that this question did not provide the desired information, since the ideas of immersion and second language instruction programs created confusion among respondents.¹²⁸ Indeed, this question clearly does not even suggest to the respondent that there are Francophone programs and French immersion programs, and that the differences between these programs is important. Moreover, the question combines all levels of education, which causes problems in terms of the usefulness of responses for enumerating rights holders under section 23 of the *Charter* and their children. Finally, the suggested question attempted to collect data only on elementary, secondary, college and university education that was ongoing at the time when the question was asked. The question would therefore necessarily have failed to identify rights holders under paragraph 23(1)b) of the *Charter* (due to the parent's elementary-level education), since all the data collected regarding elementary-level education in French would have concerned the schooling of children who were attending elementary school at the time when the question was asked; the question did not attempt to collect data on the

¹²⁸ Senate of Canada, Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<https://sencanada.ca/en/Content/Sen/committee/421/ollo/52973-e>>.

schooling of parents who had received their elementary-level education many years before the time specified in the suggested question (“[s]ince September 1993,” i.e. the current year when the question was tested).

Mr. Corbeil did not cite the text of the suggested questions on “language of education” that were tested in 1998, but he did indicate that it was a two-part question, to attempt to distinguish French immersion programs from minority French-language programs. He said the results were overall much better than those of 1993, and that following the qualitative tests conducted by Statistics Canada, the recommendations received were of interest. Mr. Corbeil indicated that a quantitative survey should have been carried out later with a large sample of 75,000, in order to proceed with the addition of the questions. At that time, it was too late to conduct that type of survey.¹²⁹

The text of the two variants of these questions that were tested in 1998, Statistics Canada’s analysis of those questions and the results they yielded, and the text of the modifications suggested by Statistics Canada following that analysis, are contained in an internal Statistics Canada report (prepared in French only), *Test du recensement national de 1998: analyse des variables linguistiques (1998 national census report: analysis of linguistic variables)*.¹³⁰ The text of the questions tested, along with the text of the variants suggested in the report *Test du recensement national de 1998* is reproduced and analyzed below. It should be noted from the outset that the questions tested in 1998, like the one tested in 1993, were aimed at collecting data on education being received at the time when the questions were asked (here, “[s]ince September 1997”). However, although the purpose of these suggested questions was therefore different from that of a question on language of education in the 2021 census, should such a question be added, the progress made by Statistics Canada in 1998 and 1999 on the issue of clearly identifying the difference between a French-language school and a French immersion school is relevant to the formulation of a question or questions on language of education for inclusion in the census questionnaire beginning in 2021. It should also be noted that the context of minority language schooling has changed considerably since the 1990s, and that Canadians’ knowledge about the existence of, and differences between, French immersion programs offered by Anglophone school boards, on the one hand, and French-language schools outside Québec, on the other, has improved significantly since that time.

The following two variants of the language of education question were tested in 1998 (the bold type is in the original version):

Version 1: Since **September 1997**, what was the language used in the majority of subjects taught to this person at school, college or university?

You should mark “French – Immersion in an English school” in the case of students who attend an English school in which a number of subjects are taught to them in French.

Mark one circle only.

French – French school, college or university
 French – Immersion in an English school

¹²⁹ Senate of Canada, Standing Senate Committee on Official Languages, *Evidence*, 1st sess., 42nd leg. (December 5, 2016), online: <<https://sencanada.ca/en/Content/Sen/committee/421/ollo/52973-e>>.

¹³⁰ Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998: analyse des variables linguistiques*. Statistics Canada, August 1999 (only the French version was available; text cited from the report in this report has been translated from that version).

English – English school, college or university
Other – *Specify*

Version 2: a) Since **September 1997**, what was the language used in the majority of subjects taught to this person at school, college or university?

French
English
Other – *Specify*

b) Was this person enrolled in an immersion program in an English school in which they are taught a number of subjects in French?

Statistics Canada concluded that the second version was preferable, since respondents found it easier to understand, whereas the first version contained too much information in a single question.¹³¹ Statistics Canada summed up the weaknesses in the question, based on its analysis of the test results, including telephone follow-up, as follows:

The problems with the understanding of the concept of French immersion observed during the telephone follow-up seem to indicate that there is some risk of obtaining biased results with regard to the distribution of students in the French and English school systems, and that this bias would favour the English system.¹³²

Statistics Canada had indeed concluded that there was some confusion around the concept of French immersion, but mainly in Québec. After applying partial corrections in this regard, the results outside Québec were essentially unchanged:

As expected, the bias is in favour of the English school system, and it is greater in all sites in Québec than in those outside Québec as the understanding of the concept of immersion is more problematic there. Thus, following the partial correction made, the proportion of young people attending [schools in] the English system in all sites in Québec fell from 14.9% to 10.8%, while in all sites outside Québec it only fell slightly, from 87.9% to 87.6%.¹³³

Statistics Canada formulated two modified versions of part (b) of the question on language of education, in light of the preliminary analysis of the results of the national test conducted in October 1998. Qualitative tests were carried out on these two questions, but no quantitative tests were done. In this modified version of part (b), Statistics Canada tried to “reduce certain difficulties noted in the analysis of the results and during the telephone follow-up, such as:”

- respondents had not realized that it was a **French** immersion program;
- it did not seem clear that it was a program offered in an English school system;

¹³¹ Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998: analyse des variables linguistiques*. Statistics Canada, August 1999 at p. 2 (note that the pages in the report are not numbered; the page following the title page is subtitled “2. Analyse des résultats du test,” immediately followed by the subtitle “Langue d’enseignement” – that page is considered to be p. 1 for the page references in the present report).

¹³² Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998: analyse des variables linguistiques*. Statistics Canada, August 1999 at p. 20.

¹³³ Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998: analyse des variables linguistiques*. Statistics Canada, August 1999 at p. 15.

- respondents believed they could indicate their situation in the past, if they had been enrolled in an immersion program.¹³⁴

[Bold type in the original version]

The variants on part (b) of the question on language of education were formulated as follows:

Version 1: b) Is this person **currently** enrolled in an **immersion program** at an **English school** in which several subjects are taught in French?

No
Yes

Version 2: b) Is this person **currently** enrolled in an **immersion program** in French at an **English school**?

No
Yes¹³⁵

Statistics Canada concluded that version 2 was preferable as it was clearer, but that a quantitative test would be required to confirm that it would yield reliable results throughout the country:

Based on the comments gathered during the interviews, version 2 seems clearer and easier to understand. It is clear that we are referring to French immersion, whereas in version 1 it is referred to in a less direct way. Furthermore, the bold type seems to help emphasize what we are seeking to determine. Thus in Québec, where the understanding of the concept of immersion was most problematic, a number of people noticed that it was a program offered in the English school system. However, although this version seems promising, only a quantitative test would allow us to state with certainty that this wording would yield plausible results both in Québec and outside Québec. The results obtained should be similar to the data suggested by administrative records.¹³⁶

It seems that version 2 of part (b) reworked by Statistics Canada clearly identified what is meant by a French immersion program. However, three comments are called for with regard to the questions suggested by Statistics Canada, from the perspective of collecting the data required for the full implementation of section 23 of the *Charter*, and the full implementation of sections 16, 16.1, 19 and 20 of the *Charter* and Parts III, IV and VII of the *OLA*.

First, both parts of the question focus on education that is ongoing at the time of the census. The question should enumerate the persons who received instruction in French regardless of when they received that instruction.

Second, the first part of the question indicates that the question is about instruction received “at school, college or university.” The question thus combines too many categories, which need to be distinguished in order to provide data that is truly useful. Data on schooling cannot be combined with data on post-secondary education. Given that the suggested question was about education

¹³⁴ Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998 analyse des variables linguistiques*. Statistics Canada, August 1999 at p. 20.

¹³⁵ Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998: analyse des variables linguistiques*. Statistics Canada, August 1999 at p. 20.

¹³⁶ Louise Marmen, J.-P. Séguin, C. Jaworski, *Test du recensement national de 1998: analyse des variables linguistiques*. Statistics Canada, August 1999 at p. 21.

being received at a specific time, it may be that Statistics Canada planned to be able to separate the data by age, which would allow it to be divided, with an acceptable degree of precision, between responses regarding persons at school and those at college or university.

However, given that data must be collected on education regardless of when it was received, as indicated, it will be impossible to ask a question about multiple levels of schooling and education in this way. First, data on elementary education must remain separate from all other data, since the right guaranteed in paragraph 23(1)b) of the *Charter* specifically depends on the parent's elementary-level education. Second, data on secondary-level education must remain separate from data on college or university, since the right conferred by subsection 23(2) of the *Charter* depends on the schooling – at the elementary or secondary level – of a parent's child, and not on their post-secondary education. If it is possible to ask a question about the language of post-secondary education, that would certainly be desirable. However, if it is not possible to ask three questions, or three parts of questions, about elementary, secondary and post-secondary education respectively, post-secondary education is the category that must be eliminated, so that at least the data required for assessing the universe of rights holders under section 23 of the *Charter* and their children can be collected.

8.2.2. It will be very important to deal with French immersion in the question on language of education, both to ensure the quality of the data on language of education and because of the importance of French immersion for Canadian bilingualism and the composition of French-language communities, including exogamous couples

It will be very important to deal with French immersion in the question on language of education. First, it is important that the data clearly distinguish between education received in French-language schools and that received in immersion programs offered by English-language school boards, since only the first of these gives parents rights under paragraph 23(1)b) of the *Charter* (with regard to their own education), or subsection 23(2) (with regard to the education of one of their children).¹³⁷ Second, it is important to know the distribution of those who have attended immersion programs, since they represent a significant proportion of bilingual Canadians, including Francophiles who are an integral part of French-language communities, and parents whose children attend French-language schools – either because the other parent is a rights holder under section 23 of the *Charter*, or because the child was admitted to a French-language school outside Québec, or because the child attends a French-language school in Québec (where all children are eligible to attend a French-language school). It is also important to collect data on persons who received their education in French immersion programs, because this would provide a better understanding of the composition of the growing category of exogamous couples, in which the rate of transmission of French as a mother tongue has improved in recent decades. It should be noted that the number of students in French immersion is very high and growing:

Enrolments in French immersion programs totalled 409,893 in 2014/2015, up 4.5% compared with 2013/2014 when 392,430 students were enrolled. Increases in these program enrolments were seen in virtually every province and territory.¹³⁸

The distinction between French-language schools and immersion programs is important for another reason. It would provide the number of children with at least one parent who is a rights

¹³⁷ In *Solski (Tutor of) v. Québec (AG)*, [2005] 1 SCR 201 at paras. 50 and 60, the Supreme Court of Canada confirmed that a school that offers a French immersion program is an English-language school.

¹³⁸ Statistics Canada, "Elementary-Secondary Education Survey for Canada, the provinces and territories, 2014/2015," online: <<http://www.statcan.gc.ca/daily-quotidien/161118/dq161118d-eng.htm>>.

holder under section 23 of the *Charter* outside Québec who are enrolled in an immersion program rather than the French-language school. The Survey on the Vitality of Official Languages conducted by Statistics Canada following the 2006 census showed that around 15% of children eligible to attend a French-language school were attending an immersion program at an English-language school.¹³⁹ The importance of this number is underlined by the fact that only around 50% of children with at least one rights holder parent outside Québec attend a French-language school¹⁴⁰ and around 41% of parents whose child attends the English-language school would have preferred for their child to attend a minority school.¹⁴¹ These results would be used to organize campaigns to raise awareness among rights holders outside Québec of the effects of the various education programs on their children's bilingual development.¹⁴² Many parents are under the mistaken impression that a bilingual school program (e.g. 50% of classes in French and 50% of classes in English, a formula similar to the one used in immersion programs) will provide their child with stronger bilingual language skills than the French-language school.¹⁴³ Both for the children of rights holders in exogamous relationships and for those of endogamous Francophone couples in a minority setting, the French-language school provides stronger bilingual language skills.¹⁴⁴ Recently, the Commissioner of Official Languages for Canada, in a report on early childhood, recommended that campaigns of this kind be organized to raise awareness among rights holders outside Québec, recognizing the period of early childhood as crucial for the vitality of Francophone communities.¹⁴⁵

8.2.3. Suggested additions with regard to language of education, to address the current shortcomings in the census

The following suggested question on language of education would be a new question 10 on the census, following the mother tongue question. It would be included in the short-form

¹³⁹ Jean-Pierre Corbeil, Claude Grenier and Sylvie Lafrenière, "Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities," Ottawa, Statistics Canada, 2007, number 91-548-X at p. 50. Rodrigue Landry, "De la garderie aux études postsecondaires: l'éducation des enfants des communautés de langue officielle en situation minoritaire (CLOSM) dans les établissements d'enseignement de la minorité," in Rodrigue Landry (ed.), *La vie dans une langue officielle minoritaire au Canada*, Québec, Presses de l'Université Laval, 2014 at pp. 95-145 (in French only).

¹⁴⁰ Jean-Pierre Corbeil, Claude Grenier and Sylvie Lafrenière, "Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities," Ottawa, Statistics Canada, 2007, number 91-548-X at p. 50.

¹⁴¹ Rodrigue Landry, "De la garderie aux études postsecondaires: l'éducation des enfants des communautés de langue officielle en situation minoritaire (CLOSM) dans les établissements d'enseignement de la minorité," in Rodrigue Landry (ed.), *La vie dans une langue officielle minoritaire au Canada*, Québec, Presses de l'Université Laval, 2014 at pp. 95-145, 134.

¹⁴² Rodrigue Landry, *Petite enfance et autonomie culturelle. Là où le nombre le justifie... V*, Moncton, Canadian Institute for Research on Linguistic Minorities, 2010, online: <www.icrml.ca>.

¹⁴³ Kenneth Deveau Paul Clarke, and Rodrigue Landry, "Écoles secondaires de langue française en Nouvelle-Écosse: des opinions divergentes," *Francophonies d'Amérique*, 2004, 18 at pp. 93-105; Deveau, Kenneth, Rodrigue Landry, and Réal Allard, "Facteurs reliés au positionnement envers la langue de scolarisation en milieu minoritaire francophone: le cas des ayants droit de la Nouvelle-Écosse (Canada)," *Revue des sciences de l'éducation*, volume XXXII, n° 2, 2006 at pp. 417-437.

¹⁴⁴ Rodrigue Landry and Réal Allard, "L'exogamie et le maintien de deux langues et de deux cultures: le rôle de la francité familio-scolaire," *Revue des sciences de l'éducation*, 23, 1997 at pp. 561-592; Rodrigue Landry and Réal Allard, "Can schools promote additive bilingualism in minority group children?" in Liliam Malave and Georges Duquette (ed.), *Language, culture and cognition: A collection of studies in first and second language acquisition*, Clevedon, England, Multilingual Matters Ltd, 1991 at pp. 198-229; Rodrigue Landry and Réal Allard, "Ethnolinguistic vitality and the bilingual development of minority and majority group students," in Willem Fase, Koen Jaspaert and Sjaak Kroon (ed.), *Maintenance and Loss of Minority Languages*, Amsterdam, Benjamins, 1992 at pp. 223-251.

¹⁴⁵ Office of the Commissioner of Official Languages for Canada, *Early Childhood: Fostering the Vitality of Francophone Minority Communities*. Ottawa, Office of the Commissioner of Official Languages for Canada, 2016.

questionnaire, and would thus be asked of 100% of the population, since as indicated above, questions that figure in the short-form census are also included in the long-form census.

Two formulations for a new question 10 are suggested below. No words are in bold print in the suggested questions below. Statistics Canada may wish to emphasize certain words, or test different variants, with certain words emphasized using bold print in some of them. Although this is a suggested addition, since the entire question is an addition, in the interest of legibility, the text is not underlined.

8.2.3.1. Addition of a new census question 10 on language of education – suggestion 3a

The suggested question recognizes that, as the Supreme Court of Canada confirmed in *Solski*¹⁴⁶ and *Nguyen*,¹⁴⁷ a person is not required to have had all their schooling in the language of the minority in order for section 23 of the *Charter* to give them rights under paragraph 23(1)b) or subsection 23(2), and section 23 does not “require that the time spent in the minority language education program be greater than the time spent in the majority language program.”¹⁴⁸ The suggested question therefore asks about “a substantial part” of the person’s education, at the primary level in part (a) of the question, and at the secondary level in part (b) of the question. The suggested instructions between the question and the response options (for both part (a) and part (b)) tell the respondent that they may mark more than one circle, if applicable. This instruction communicates to the respondent that there may be more than one substantial part of a person’s primary or secondary education. This instruction therefore communicates that it is not necessary to give just the response that corresponds to the largest number of years of education. Moreover, multiple responses will be useful since they will make it possible to identify and quantify school careers that involve a combination of programs – e.g., the French-language school and French immersion, or French immersion and the regular Anglophone program in an English-language school.

It would also be possible to ask a similar question about post-secondary education, either as an added part (c) of the question proposed below, or as a separate question. It seems that it would be preferable to ask such a question separately, as there are significant differences between primary and secondary education on the one hand and post-secondary education on the other, including the fact that minority language programs in the meaning of section 23 of the *Charter* do not exist beyond the secondary level.

¹⁴⁶ *Solski (Tutor of) v. Québec (AG)*, [2005] 1 SCR 201.

¹⁴⁷ *Nguyen v. Québec (Education, Recreation and Sports)*, [2009] 3 SCR 208.

¹⁴⁸ *Solski (Tutor of) v. Québec (AG)*, [2005] 1 SCR 201 at para. 41 (see also paras. 32 to 48).

Addition of a new census question 10 on language of education – suggestion 3a

10. a) Dans quelle sorte de programme éducatif cette personne a-t-elle fait une partie substantielle de sa scolarité au niveau primaire?

[Cochez plus d'un cercle, s'il y a lieu.]

[Si la personne est toujours inscrite à l'école primaire, répondez par rapport à la partie des études primaires faite jusqu'à ce jour.]

- 1: Programme francophone, dans une école de langue française
- 2: Programme d'immersion en français, dans une école de langue anglaise
- 3: Programme anglophone, dans une école de langue anglaise
- 4: Autre – précisez
- 5: Cette personne n'a pas fait des études au niveau primaire

10. b) Dans quelle sorte de programme éducatif cette personne a-t-elle fait une partie substantielle de sa scolarité au niveau secondaire ?

[Cochez plus d'un cercle, s'il y a lieu.]

[Si la personne est toujours inscrite à l'école secondaire, répondez par rapport à la partie des études secondaires faite jusqu'à ce jour.]

- 1 : Programme francophone, dans une école de langue française
- 2 : Programme d'immersion en français, dans une école de langue anglaise
- 3 : Programme anglophone, dans une école de langue anglaise
- 4 : Autre – précisez
- 5 : Cette personne n'a pas fait des études au niveau secondaire

10. a) In what type of educational program did this person receive a substantial part of his or her primary school education?

[Mark as many circles as applicable.]

[If the person is still enrolled in primary school, answer regarding the portion of primary school instruction completed to date.]

- 1: English program in an English-language school
- 2: French immersion program in an English-language school
- 3: Francophone program in a French-language school
- 4: Other – specify
- 5: This person has not received instruction at the primary school level

10. b) In what type of educational program did this person receive a substantial part of his or her secondary education?

[Mark as many circles as applicable.]

[If the person is still enrolled in secondary school, answer regarding the portion of secondary-level studies completed to date.]

- 1: English program in an English-language school
- 2: French immersion program in an English-language school
- 3: Francophone program in a French-language school
- 4: Other – specify
- 5: This person has not received instruction at the secondary school level

8.2.3.2. Addition of a new census question 10 on language of education – suggestion 3b

The following is an alternative formulation for a new census question 10 on language of education, taking into account the location where the person received their schooling (in Canada or outside Canada):

Addition of a new census question 10 on language of education – suggestion 3b

10. Dans quelle sorte de programme éducatif cette personne a-t-elle fait une partie substantielle de sa scolarité au niveau primaire au Canada ?

[Si la personne est toujours inscrite à l'école primaire, répondez par rapport à la partie des études primaires faite jusqu'à ce jour.]

- 1: Programme francophone, dans une école de langue française
- 2: Programme d'immersion en français, dans une école de langue anglaise
- 3: Programme anglophone, dans une école de langue anglaise
4. Combinaison de 1 et 2
5. Combinaison de 2 et 3
6. Combinaison de 1 et 3
- 7: Cette personne n'a pas fait des études au niveau primaire au Canada: Spécifiez la langue principale de la scolarisation: _____
8. Cette personne est trop jeune et n'a pas fait des études au niveau primaire
9. Cette personne n'a pas fait des études au niveau primaire

10. In what type of educational program did this person receive a substantial part of his or her primary education in Canada?

[If the person is still enrolled in primary school, answer regarding the portion of primary school instruction completed to date.]

- 1: English program in an English-language school
- 2: French immersion program in an English-language school
- 3: Francophone program in a French-language school
- 4: Combination of 1 and 2
- 5: Combination of 2 and 3
- 6: Combination of 1 and 3
- 7: That person has not received instruction at the primary school level in Canada: Specify the primary language of schooling: _____
- 8: This person is too young and has not received primary school level instruction
- 9: This person has not received instruction at the primary school level

If this option (suggestion 3b) is tested by Statistics Canada, a second question, or a second part of the question, would also need to be added, asking about the educational program in which the person received their secondary-level schooling.

It should be noted that the suggested question 3a does not ask where the instruction in question was received. The question could ask for this additional information, as is the case in suggested question 3b. In addition, the question could ask respondents to specify where the instruction was received, in the case of instruction received outside Canada, which is not done by suggestion 3b (if, for example, it is considered to be useful to determine whether instruction in French outside Canada was received in the Democratic Republic of the Congo, Haiti, Belgium, etc.). Even without asking where the instruction was received, it can be expected that responses identifying French immersion would refer to instruction received in Canada. Similarly, it would be possible to conclude that most responses regarding instruction received in a language other than French or English, identified under category 4, "Other," of suggestion 3a refer to instruction received outside Canada.

9. CONCLUSION

The census questionnaire can and must be modified beginning in 2021, so that it collects complete, reliable data on the number of children of rights holders under section 23 of the *Charter*, both in Québec and outside Québec. These modifications would address the current shortcomings in the census with regard to children of rights holder parents under section 23 of the *Charter*, by not discouraging twofold (or multiple) responses to the mother tongue question, and by collecting data on the language of instruction of parents and their children. In this way, the census would provide data corresponding to the total potential demand for minority language schools – a number that must be taken into account when determining what the number warrants, as explained by the Supreme Court of Canada in *Mahé*. By introducing these modifications, the federal government would fulfil its obligations under the *Charter*, according to the fundamental constitutional principle of respect for minorities, and under Part VII of the *OLA*. The federal government would thus allow the census to fully play its crucial role in the implementation of section 23 of the *Charter* throughout Canada.

The Canadian census also plays a crucial role in the implementation of sections 16 to 20 of the *Charter*, Parts III, IV and VII of the *OLA*, and provincial and territorial programs. However, the current census provides only incomplete data on official language minority communities. It therefore does not allow these sections of the *Charter* and these parts of the *OLA* to be fully implemented. Consequently, the federal government is not equipped to intervene where required in order to promote the development and vitality of official language minority communities and the equality of status of the official languages, and to counter linguistic and cultural assimilation. Moreover, New Brunswick does not have all the data needed so that it can meet its own constitutional requirements, including subsections 16(2) and 19(2) and section 16.1 of the *Charter*, which enshrines the equality of the province's English and French linguistic communities. These shortcomings must be addressed in the census beginning in 2021.

The concrete suggestions presented in this report for possible formulations of a modified census question on mother tongue, instructions associated with that question, and one or more added questions on language of education, should be tested by Statistics Canada in 2018, in order to address these shortcomings in the census beginning in 2021. It is crucial that the 2021 census and subsequent censuses allow the government of Canada and provincial and territorial governments to fulfil their constitutional and quasi-constitutional obligations toward official language minority communities. It is therefore also crucial that Statistics Canada take the necessary actions to ensure that the required questions are formulated, tested and recommended in time so that the 2021 census questionnaire will fulfil these obligations.