Publications

Brief of the Office of the Commissioner of Official Languages on the draft regulations for Part VII of the *Official Languages Act*

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Summary

Decades of investigations by the Office of the Commissioner of Official Languages (the Office of the Commissioner) have shown that violations of Part VII of the *Official Languages Act* (the Act) are rarely deliberate and generally result from a misunderstanding of Part VII obligations by federal institutions. Following the modernization of the Act and the substantial amendments made to Part VII, federal institutions are more than ever in need of clear guidance on how to meet their obligations and on the scope of those obligations.

The Office of the Commissioner strongly encourages the government to take this opportunity to accomplish two important and urgent objectives: (i) to clarify how federal institutions should comply with Part VII of the Act and (ii) to ensure that the regulations are consistent with a broad interpretation of the Act.

More specifically, the Office of the Commissioner's analysis established that the draft regulations should be amended so that impact analyses apply to any decision that could affect the government's commitments set out in subsections 41(1) to (3) of Part VII of the Act. This amendment would avoid any discrepancy between the Part VII regulations and Part VII of the Act itself, as interpreted in light of the Federal Court of Appeal's decision in *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)*. In this regard, **the term "initiative" could therefore be defined more clearly for federal institutions. Additionally, a revised definition of this term could reflect the obligation of institutions to analyze the impact of any decision that may affect the commitments made by the government in Part VII of the Act.**

Because federal institutions must take into account the ongoing nature of the obligation to take positive measures, the draft regulations should not prevent impact analyses from being conducted throughout the full cycle of an institution's activities, including during planning, development, implementation, evaluation and reporting. **It is therefore important to review section 3 of the draft regulations so as not to limit the circumstances in which an impact analysis must be conducted, especially with regard to negative impacts.**

Whether evaluating positive measures, considering ways to mitigate or avoid negative impacts, or negotiating certain federal-provincial/territorial agreements, institutions must take into account the priorities of minorities and stakeholders. However, the draft regulations could be more specific about when and how the priorities of minorities and stakeholders are taken into account. To better equip federal institutions and to ensure that stakeholders' views truly influence institutions' decisions, **it is important that the draft regulations further specify *when* and *how* federal institutions must take into account the priorities of minorities and stakeholders.**

Regarding evaluation and monitoring mechanisms related to positive measures, measures taken by a federal institution to avoid or mitigate negative impacts, and federal-provincial/territorial agreements, **the draft regulations must ensure that the results of evaluation and monitoring exercises lead to concrete action.** Otherwise, these mechanisms will not achieve their ultimate goal, which is to lead institutions to course correct where they have missed the mark.

Although it is positive that the draft regulations specify certain circumstances that would require federal institutions to consult with minorities and stakeholders, this should not be done in a way that constrains institutions' obligation to consult. **A broad interpretation of the obligation to consult, consistent with the phrase "to the extent possible" in the Act, is needed.**

This will, for example, prevent minorities and stakeholders from being consulted only after an institution has determined that a structural decision is likely to have a direct negative impact on commitments. Consultations must instead take place prior to such decisions.

The draft regulations do not clearly specify what is expected of institutions when it comes to taking the "necessary measures" to include language clauses in federal-provincial/territorial agreements. On another note, **the content of the provisions that must be included in the agreements could be clarified. In addition, the regulations could include in what way and how often institutions must evaluate and monitor the language provisions of an agreement. The regulations could also require institutions to include clauses specifying the actions to take when the provisions set out in the agreement are not complied with.**

It is also important to note that the draft regulations do not include a governance framework that can be applied to federal institutions. **The Office of the Commissioner encourages the Treasury Board of Canada Secretariat to ensure the development of a robust governance framework that clearly specifies the responsibilities of departments.**

1. Introduction

On December 9, 2025, the Honourable Shafqat Ali, President of the Treasury Board of Canada, tabled in the House of Commons the draft regulations on official languages (advancement of equality of status and use of English and French).

Regulations under Part VII are a very important milestone in the full implementation of the *Official Languages Act* (the Act). Such regulations have been awaited since legislative amendments were made to the Act in 2005, and the need for these regulations has become even greater following the modernization of Part VII and of the Act in 2023. More than ever, federal institutions need clear instructions on how to meet their obligations and on the scope of those obligations. With this in mind, Commissioner of Official Languages (Commissioner) Raymond Théberge published his *Roadmap for federal institutions' obligations under Part VII of the* Official Languages Act (the Roadmap), which serves as a guide to help federal institutions and members of the public better understand Part VII of the Act.

Given the critical importance of obtaining regulations under Part VII of the Act, Commissioner Raymond Théberge also published a document titled *Making Progress Toward Substantive Equality: Principles to Guide the Development of Regulations for the Implementation of Part VII of the* Official Languages Act, in which he identifies the following five guiding principles for the rigorous regulation of Part VII:

- Preserve the principles established in the Federal Court of Appeal decision in *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development).*
- Provide clear instructions to all federal institutions so they take concrete actions.
- Establish guidelines applicable to all programs, policies, initiatives and decisions of federal institutions.
- Ensure that a framework that clearly establishes responsibilities is implemented in each federal institution.
- Enable greater transparency and accountability with regard to measures taken.

Following a thorough analysis of the draft regulations, the Office of the Commissioner of Official Languages (the Office of the Commissioner) concluded that these five principles could be better reflected in the draft regulations. The Office of the Commissioner strongly encourages the government to take this opportunity to achieve two important and urgent objectives: (i) to clarify how federal institutions should comply with Part VII of the Act and (ii) to ensure that the regulations are consistent with a broad interpretation of the Act.

These two objectives will form the two pillars of the recommendations made by the Office of the Commissioner in this brief, which aims to ensure that the regulations tangibly and effectively promote the advancement of equality of status and use of English and French in Canadian society.

These objectives reflect the guiding principles put forward by Commissioner Raymond Théberge to steer the development of the Part VII regulations. The Office of the Commissioner recognizes the critical importance of clear and precise regulations, without which federal institutions may fail to meet their obligations for the implementation of this part of the Act because of a lack of guidance. In addition to this crucial need for greater clarity, the draft regulations must also preserve the historic gains seen by minorities in the Federal Court of Appeal's decision in *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)* and must give full effect to Part VII of the Act.

2. The circumstances in which an impact analysis is required are insufficient

Section 3 of the draft regulations specifies that an impact analysis must only be conducted in the case of a *program*, *policy* or *initiative*. The analysis conducted by the Office of the Commissioner established that this approach is insufficient. As stated below, an impact analysis is required for any decision that may have an impact on the government's commitments under Part VII of the Act with regard to enhancing the vitality of minorities, the promotion of official languages, the protection of French, and minority language education.

However, the proposed definition of the term "initiative" in section 1 of the draft regulations refers to a "significant action," which is problematic for two reasons. First, a definition that does not provide enough clarity to federal institutions hinders the full realization of the purpose of Part VII of the Act, which is to advance the substantive equality of minorities and official languages in Canada. Second, the reference to a "significant action" could limit the obligation of federal institutions to analyze the impact of any decision that may affect the government's commitments under Part VII of the Act.

The term "initiative" could therefore be defined more clearly for federal institutions. Additionally, a revised definition of this term could reflect the obligation of institutions to analyze the impact of any decision that may affect the commitments made by the government in Part VII of the Act.

The draft regulations also stipulate that in addition to being linked to a *policy*, *program* or *initiative*, impact analyses must only be conducted at specific stages, such as during the development, amendment, renewal or abolition of a program, policy or initiative. This means that the draft regulations exclude the ongoing implementation of a program, policy or initiative (or of any other decision). It also means that the ongoing nature of the obligation to take positive measures would not be respected when a program, policy or initiative is *in progress* and at the stage of its operational implementation (with no amendment or renewal).

However, many of the Office of the Commissioner's investigations under Part VII concern decisions that may affect English and French linguistic minority communities and the government's commitments, even though the policy, program or initiative is not in the stages targeted by the draft regulations. Funding agreements with third parties, events of national significance and federal office closures are just a few examples of factual situations that are not necessarily covered by the draft regulations.

The impact analysis is a crucial stepping stone to the full implementation of the government's commitments. The premise is simple: without adequate and ongoing impact analyses, an institution cannot fully grasp the real effects of its decisions on minorities, nor can it take informed positive measures to implement the government's commitments. Worse still, an institution that fails to meet its obligations to conduct an impact analysis may—even unintentionally—undermine the government's commitments set out in Part VII. As demonstrated in *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development),* the obligation to take positive measures is ongoing and applies "so long as a federal institution can act towards achieving the intended purpose [1]." The ongoing nature of the obligation to take positive measures therefore requires that the draft regulations not prevent impact analyses from being conducted throughout the full cycle of an institution's activities, including during strategic planning, development, implementation, evaluation and reporting.

Furthermore, the case of *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)* requires that an impact analysis be conducted for "decisions and initiatives" that federal institutions are called upon to take regarding minorities [2]. In response to this decision, Commissioner Raymond Théberge's Roadmap specified that impact analyses "... **must precede each decision that could affect the commitments under subsections 41(1), (2) and (3)** of the Act, given that it is almost impossible to know in advance whether a decision may have an impact on the commitments" without first conducting an analysis [3]. It is important to note that the outcome of the *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)* case would have been very different if the draft regulations had been in force at the time of the violation of Part VII recognized in the Court of Appeal's decision.

In short, although it is beneficial to clarify when an impact analysis must be conducted, such a clarification must not be at the expense of the objectives of Part VII, which are to promote progress toward equality of status and use of English and French, as well as equality between Canada's two official language communities. The approach taken in the draft regulations is clearly inadequate when it comes to accounting for all decisions that may have an impact on the government's commitments. **It is therefore important to review section 3 of the draft regulations so as not to limit the circumstances in which an impact analysis must be conducted, especially with regard to negative impacts**. This means that the draft regulations must better reflect the ongoing nature of the obligations set out in Part VII of the Act to further promote the full implementation of the purpose of that part of the Act.

3. The regulations must better equip federal institutions to take into account the priorities of minorities

It is unclear in the draft regulations *when* and *how* minority priorities are considered, be it for positive measures, for measures taken to avoid or mitigate negative impacts or for federal-provincial/territorial agreements. These elements would benefit from clarification, otherwise consultations and impact analyses may not achieve the desired results.

For example, with regard to positive measures, paragraph 4(1)(c) of the draft regulations leaves some uncertainty as to how federal institutions must meet their obligation to take into account the priorities of minorities in their analyses [4]. More specifically, this paragraph states that analyses of positive measures must be conducted in such a way as to identify potential positive measures. These *could* include measures that address the priorities of the English or French linguistic minority communities or other stakeholders.

Even though potential positive measures "must" not always include measures designed to address minority priorities, it is still important to equip federal institutions with the tools they need to better understand how to take minority priorities into account, how institutions can "openly and meaningfully consider their opinions" [5] and how institutions can meet their obligation to "be prepared to alter those positive measures" [6] as required by the Act.

The same applies to measures to avoid or mitigate direct negative impacts [7]. As with positive measures, it is important to specify how minority priorities will be considered at this stage, in addition to further clarifying how institutions should go about avoiding or mitigating negative impacts.

It is also essential to better outline the consideration of minority priorities in analyses relating to the federal-provincial/territorial agreements listed in subsection 4(2) of the draft regulations. Because the language clauses analyzed for inclusion in federal-provincial/territorial agreements to contribute to the implementation of commitments "could" include provisions that address minority priorities, further clarification is required to ensure that minority priorities are taken seriously.

In light of the above, **it is important that the regulations further specify *when* and *how* federal institutions must take into account the priorities of minorities and stakeholders.**

4. The draft regulations must ensure that the results of evaluation and monitoring exercises lead to concrete action

It is encouraging to note that the obligation to take evaluation and monitoring mechanisms into consideration is included as early as the impact analysis stage. However, overall, section 8 of the draft regulations, which pertains to evaluation and monitoring mechanisms, does not appear to be sufficiently robust or detailed to support federal institutions and minorities.

The regulations must clearly specify what institutions should do with the results of these evaluations. For example, the regulations could require that mechanisms provide a course of action in the event of a negative impact being identified. It is essential to ensure that mechanisms reflect the ongoing nature of the obligation to take positive measures.

This shortcoming in section 8 of the draft regulations is particularly problematic given that the cycle of the obligation to take positive measures based on impact analyses is limited to policies, programs and initiatives at specific stages. The ongoing implementation of a program, a policy, an initiative or any other decision that creates a negative impact—identified though evaluation and monitoring mechanisms—does not necessarily require mitigation measures to limit harm or negative effects on minorities. The government should correct this shortcoming, which undermines the ultimate goal of evaluation and monitoring mechanisms, which is to lead institutions to course correct when they have missed the mark.

The draft regulations must therefore ensure that the results of evaluation and monitoring exercises lead to concrete action.

5. The draft regulations limit the circumstances required by the Act for conducting consultations

Under subsection 41(8) of the Act, impact analyses relating to positive measures, federal-provincial/territorial agreements and negative impacts "shall be founded, to the extent possible, on the results of dialogue and consultation activities, on research and on evidence-based findings." The purpose of dialogue and consultation activities is to ensure that the priorities of English and French minority communities and other stakeholders are taken into account [9].

Section 6(1) of the draft regulations clarifies precisely the circumstances in which federal institutions must conduct consultation activities as part of their impact analyses. However, contrary to the Act, the draft regulations limit the specific circumstances that would require federal institutions to consult with minorities and stakeholders.

Although it may be useful for federal institutions to have clarification regarding the circumstances in which they must consult, such clarification must not be inconsistent with the requirements of the Act. The phrase "to the extent possible" in the Act means that conducting consultations is required unless it is *impossible* to do so.

The limitations of section 6 of the draft regulations are even more evident when it comes to negative impacts. Paragraph 6(1)(c) of the draft regulations specifies that consultation should take place when federal institutions "identify that a structuring decision may have direct negative impacts on the commitments." The question that arises, however, is whether institutions will be able to determine that a policy, program, or initiative may have a negative impact on commitments without or before consulting minorities.

The approach selected for conducting consultations on the negative impacts of institutions' decisions appears to be backward, meaning that consultations will only be conducted once an institution has already "identified" that a negative impact will occur. This may lead to institutions misinterpreting negative impacts without having validated their analysis and conclusions with minorities. Worse, they may mistakenly assume that there are no negative impacts, relieving them of their obligation to conduct consultations.

This approach risks making the obligation to avoid or to mitigate negative impacts optional for federal institutions. Once an institution determines that no negative impacts have been identified, it will not be required to consult with minorities and stakeholders. This poses the risk of implementing a decision that could harm minorities and undermine the commitments set out in Part VII.

The example about negative impacts shows that the draft regulations limit the circumstances in which institutions are required by the Act to consult minorities. Therefore, although it is positive that the draft regulations set out specific circumstances that would require federal institutions to consult minorities and stakeholders, this should not be done in a way that constrains institutions' obligations to consult. **A broad interpretation of the obligation to consult, consistent with the phrase "to the extent possible" in the Act, is needed.**

On a different note, dialogue activities would also benefit from being further clarified in the draft regulations, particularly by specifying the circumstances that would favour one type of dialogue activity over another.

6. The provisions relating to federal-provincial/territorial agreements should be strengthened

Under paragraph 41(7)(a.1) of the Act, federal institutions are required to "take the necessary measures" to promote the inclusion of language clauses in their negotiations of federal-provincial/territorial agreements. Section 7 of the draft regulations describes what is expected of institutions with respect to these "necessary measures." More specifically, this section stipulates that institutions must (i) inform the parties of the expectations and objectives relevant to official languages and (ii) propose provisions for inclusion in the agreement to the parties.

However, these two "necessary measures" seem to be incomplete. The draft regulations do not truly specify what is expected of institutions with regard to the "necessary measures" for including such language clauses. It is important to note that the draft regulations do not address the course of action to be taken when a federal institution fails in its negotiations with the provinces and territories to include language provisions and evaluation and monitoring mechanisms in an agreement. The draft regulations could clarify to institutions that they are not relieved of their obligations to take positive measures when they are unable to include a language clause in an agreement.

On another note, **the content of the provisions that must be included in agreements [10] could be clarified** to provide better guidance to federal institutions. **The regulations could also include in what way and how often institutions must evaluate and monitor the language provisions of an agreement. In addition, the regulations could require institutions to include clauses specifying the actions to take when the provisions set out in the agreement are not complied with.**

Furthermore, as noted above, it is unclear when and how institutions should take into account the views of minorities and stakeholders in their negotiations with provinces and territories. It should be noted here that in order for institutions to consider the opinions of minorities and stakeholders openly and seriously, they must hold consultations early and throughout negotiations with provinces and territories rather than reactively.

7. The draft regulations do not include a governance framework applicable to federal institutions

The draft regulations do not include a governance framework applicable to federal institutions, despite the importance of implementing effective governance within each federal institution so that they have the infrastructure required to meet their obligations.

Such a governance framework could clarify what is expected of senior leaders in institutions.

It would also be important to clarify the respective roles of the Treasury Board of Canada and of the Minister of Canadian Heritage with respect to Part VII. A governance framework could establish their role in providing guidance to federal institutions and in ensuring compliance with Part VII.

Although the draft regulations do not include a governance framework, one could be developed through subsequent policy instruments. However, it is essential that an effective framework be sufficiently robust, that it clearly specify the responsibilities assigned to each party and that it be developed quickly when the regulations are adopted.

In light of this, **the Office of the Commissioner encourages the Treasury Board of Canada Secretariat to ensure the development of a robust governance framework that clearly specifies the responsibilities of departments.**

8. Conclusion

In closing, the draft regulations must clearly set out how all federal institutions are to comply with their obligations under Part VII of the Act. It is imperative that this clarification preserve the gains seen in Canada's language policy in recent years, including by reflecting the decision of the Federal Court of Appeal in *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)*. The draft regulations must also provide federal institutions with greater clarity and guidance on how to implement Part VII of the Act. The Office of the Commissioner firmly believes that these clarifications can be made while preserving a broad interpretation of Part VII by federal institutions.

With this in mind, the Office of the Commissioner strongly encourages the Treasury Board of Canada Secretariat to take note of the recommendations presented in this brief aimed at strengthening the draft regulations on official languages (advancement of equality of status and use of English and French).

Footnotes

1. *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)*, 2022, Federal Court of Appeal 14, at paragraph 141.
2. *Canada (Commissioner of Official Languages) versus Canada (Employment and Social Development)*, 2022, Federal Court of Appeal 14, at paragraphs 142 and 163.
3. Office of the Commissioner of Official Languages *Roadmap for federal institutions' obligations under Part VII of the* Official Languages Act, page 9.
4. Refer to subsections 41(9) and 41(9.1) of the *Official Languages Act*, Revised Statutes of Canada 1985, Chapter 31 (4th Supplement).
5. *Official Languages Act*, Revised Statutes of Canada 1985, Chapter 31 (4th Supplement), section 41(9).
6. *Official Languages Act*, Revised Statutes of Canada 1985, Chapter 31 (4th Supplement), section 41(9.1)(d).
7. *Official Languages Act*, Revised Statutes of Canada 1985, Chapter 31 (4th Supplement), section 41(9.1)(e).
8. Refer to subsection 4(3) of the draft regulations.
9. *Official Languages Act*, Revised Statutes of Canada 1985, Chapter 31 (4th Supplement), section 41(9).
10. Refer to subsection 7(2) of the draft regulations.

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