Office of the Commissioner of Official Languages
Commissariat aux langues officielles

Making Progress Toward Substantive Equality

PRINCIPLES TO GUIDE THE DEVELOPMENT OF REGULATIONS FOR THE IMPLEMENTATION OF PART VII OF THE *OFFICIAL LANGUAGES ACT*

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Principes visant à guider l'élaboration d'un règlement pour la mise en œuvre de la partie VII de la Loi sur les langues officielles

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1. HISTORICAL OVERVIEW OF PART VII OF THE *OFFICIAL LANGUAGES ACT*

The coming into force of the *Canadian Charter of Rights and Freedoms* (the Charter) in 1982 was a catalyst for the revision of the *Official Languages Act* (the Act) several years later. The Charter enshrined a number of language rights for the public and official language minority communities (OLMCs) into the Canadian Constitution—otherwise known as the supreme law of Canada. Nearly 20 years after the Act received Royal Assent in 1969, this quasi-constitutional law underwent significant review in the process leading to its update in 1988.

Part VII was added to the Act during its update in 1988. It outlined the Government of Canada's commitment to enhancing the vitality of OLMCs and to promoting the full recognition and use of both of Canada's official languages. It was widely seen by OLMCs as one of the major improvements to the Act. Indeed, Part VII is a concrete example of measures taken by the Government of Canada to implement subsection 16(3) of the Charter, which concerns the advancement of status and use of Canada's official languages. Part VII is also inspired by the unwritten constitutional principle of the protection of minorities. As then Minister of Justice Ramon Hnatyshyn explained:

> This part of the bill builds on the principle of advancement of progress in the equality of status and use of the two languages, a principle recognized by Section 16 of the Charter and by the Supreme Court of Canada in a number of important decisions. As the court has pointed out, legislative initiatives [are] "particularly suited to advance the principle" of equality.[1]

It is interesting to note that in a letter to his Cabinet colleagues in July 1987, shortly after Bill C-72 to amend the Act was tabled in Parliament, Prime Minister Brian Mulroney stated:

> I would like to note in particular that the Government is committed to fostering and supporting the growth and development of Canada's English- and French-speaking minorities. It is therefore essential that all federal departments and agencies contribute to strengthening these communities and bear them in mind when developing policies and implementing programs.[2]

According to the courts, however, section 41 of the Act and its two-pronged commitment—which relates to enhancing the vitality of OLMCs and supporting and assisting their development, as well as fostering the full recognition and use of Canada's official languages—was largely seen as "declaratory."[3] In fact, the Federal Court of Appeal found that the government's commitment to OLMCs and official languages (section 41) used terms "that did

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[1] House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72*, 33rd Parl., No. 1 (March 22, 1988) at p 18.

[2] This excerpt was published in the Commissioner of Official Languages' *Annual Report 1988*, at p 18, and quoted in our study, *A Blueprint for Action: Implementing Part VII of the Official Languages Act, 1988* - February 1996.

[3] *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)*, 2004 FCA 263 [*Forum des maires*] at para 46.

not evoke the notion of a legal obligation."[4] Though the Court agreed that the protection of language rights constituted a fundamental constitutional objective, it was necessary that "these be rights to protect and not policies to define."[5] Any obligations under Part VII were the responsibility of the Secretary of State at the time, which would eventually become the Department of Canadian Heritage. When subsection 43(1) was added to the Act, the Department of Canadian Heritage had already been taking measures listed in this subsection of the Act for some time already (e.g., programs to support OLMCs in education).

In response to numerous criticisms regarding the inaction of the federal government, which considered these provisions to be non-binding, multiple private Member's bills seeking to strengthen the obligations of Part VII were introduced between 2001 and 2005 by Senator Jean-Robert Gauthier.[6] The last iteration of these bills, Bill S-3, received Royal Assent in 2005.[7]

The Act was thus amended yet again in 2005, albeit to a much lesser extent than in 1988. In an effort to add "teeth" to Part VII and make it enforceable*,* Part VII was added to the list of sections of the Act that can benefit from a legal remedy before the Federal Court under section 77. Contrary to what previous court decisions held, Part VII was henceforth justiciable. In other words, the courts could rule on Part VII violations and grant complainants a legal remedy.

Furthermore, and of significant importance, the 2005 amendments added subsection 41(2) to the Act*.* Subsection 41(2) created an obligation for all federal institutions to take "positive measures" in order to implement the government's commitments to enhancing the vitality of OLMCs and fostering Canada's official languages. The 2005 amendments addressed the shortcoming identified in the *Forum des maires*[8] decision. It made Part VII justiciable and transformed "policies to define" into "rights to protect."[9]

The 2005 amendments also provided for the adoption of eventual regulations to elaborate on what was included in the taking of "positive measures" in more concrete terms. For instance, Senator Jean-Robert Gauthier stated:

> . . . as an example, such regulations could impose a duty on institutions: first, to determine whether their policies and programs have impacts on the promotion of linguistic duality and the development of minority communities, from the initial elaboration of policies through to their implementation; second, institutions would have to consult affected publics as required, especially representatives of official language minority communities, in connection with the development or implementation of

[4] *Forum des maires,* at para 36.
[5] *Forum des maires*, at para 39.
[6] Bill S-32, introduced on September 19, 2001, died on the Order Paper; Bill S-11, introduced on December 10, 2002, died on the Order Paper; Bill S-4, introduced on February 3, 2004, died on the Order Paper.
[7] Bill S-3, introduced on October 6, 2004, received Royal Assent on November 25, 2005.
[8] *Forum des* maires, at para 39.
[9] *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, 2022 FCA 14 [*FFCB, FCA*] at para 129.

> policies or programs; and three, they should be able to describe their actions and demonstrate that they have considered the needs of minority communities.[10]

Unfortunately, these regulations were never adopted. As a result, the meaning of the term "positive measures" remained ambiguous, providing federal institutions little guidance on how to implement such measures and leaving federal institutions significant latitude in interpreting their obligations.

The Federal Court's 2018 decision in *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*[11] urged the government to finally develop regulations to give effect to Part VII, because without them, according to the first instance decision, "the exact nature of the duty in subsection 41(2) [to take positive measures] remains general and indeterminate to this day, and the duty does not have the specificity that regulations were expected to provide."[12] The Federal Court found that without regulations to specify its scope or scale, the obligation to take positive measures [subsection 41(2)] could not include the requirement of increased specificity or connection with particular programs or situations of federal institutions. As a result of the Federal Court's decision, and until the decision on appeal, Part VII could not be interpreted to include a duty to take specific positive measures or measures that related to a particular Part VII complaint. In other words, according to the Federal Court, there was nothing to suggest that "the positive measures prescribed by Part VII must be targeted for a program, decision-making process, factual situation or specific initiative of a federal institution that may have been the subject of a complaint to the Commissioner."[13] Thus, the duty to take positive measures was considered nothing more than a general obligation to act.

This first instance decision made it incredibly difficult for the Commissioner to investigate Part VII complaints and, unfortunately, OLMCs suffered as a result. As the decision itself recognized, without regulations to clarify the scope, extent and intent of Part VII, OLMCs would end up paying the price:

> It is undeniable, in my opinion, that the scope of the duty contained in section 41 is hamstrung by the absence of regulations. And, it must be said, this regulatory silence and the resulting vagueness are probably detrimental to the linguistic minorities in Canada, who may be losing a potential benefit under Part VII. As I recall, Senator Gauthier's expectation during the 2005 amendments was to have the regulations clarify the scope of the general duty to act created by the new subsection 41(2), which he sponsored.[14]

It was not until 2022 that the Federal Court of Appeal issued its decision in this case, overturning the Federal Court's decision by interpreting the obligation to take positive measures in a manner consistent with the intention of Parliament, the objectives of the Act and the arguments of the

[10] Senator Gauthier (October 18, 2004), before the Standing Senate Committee on Official Languages.
[11] 2018 FC 530 [*FFCB*, *FC*].
[12] *FFCB, FC*, at para 221.
[13] *FFCB, FC*, at para 248.
[14] *FFCB, FC*, at para 293.

Commissioner of Official Languages. The Federal Court of Appeal agreed that the Federal Court's interpretation of the obligation to take positive measures was so restrictive that the federal government's commitment could not be given effect, finding that "the trial judge's interpretation of Part VII essentially renders it meaningless."[15] The Federal Court of Appeal clarified that the duty to take positive measures "requires federal institutions to act in order to achieve the purpose set out in paragraph 2(b) [of the Act] and reiterated in subsection 41(1)."[16] Though federal institutions have discretion in the measures they take, the obligation is not diminished. In short, the Federal Court of Appeal agreed with the Commissioner's position:

> Federal institutions must first be sensitive to the particular circumstances of the country's various official language minority communities and determine the impact that the decisions and initiatives that they are called upon to take may have on those communities. Second, federal institutions must, when implementing their decisions and initiatives, act, to the extent possible, to enhance the vitality of these communities; or where these decisions and initiatives are susceptible of having a negative impact, act, to the extent possible, to counter or mitigate these negative repercussions.[17]

On the issue of Part VII regulations, the Federal Court of Appeal clarified that the obligation to take positive measures arises under subsection 41(2) and exists independently of the adoption of regulations.

To be clear, while regulations are not necessary to give effect to the Part VII obligations, they have been expected since the 2005 amendments and would provide much-needed clarity for federal institutions and the public alike.

Now, more than ever, there is a need for clarity with respect to Part VII of the Act. The most recent modernization of the Act, completed in June 2023, significantly expanded on the provisions included in Part VII. Federal institutions need clear guidance on how to navigate their new obligations. The Part VII regulations are critical to preserving the gains that were made in the Federal Court of Appeal's decision; the government must seize this opportunity to clarify once and for all the breadth of the rights guaranteed in Part VII of the Act.

2. THE IMPORTANCE OF PART VII

Part VII states the federal government's commitment to enhancing the vitality of the English and French linguistic minority communities in Canada and to supporting and assisting their development, as well as to fostering the full recognition and use of English and French in Canadian society. Indeed, Part VII of the Act gives effect to subsection 16(3) of the Charter and

[15] *FFCB, FCA*, at para 145.
[16] *FFCB, FCA*, at para 140.
[17] *FFCB, FCA*, at para 163.

also provides for the implementation of the preamble and purpose section of the Act itself, as set out in section 2.

In addition to this long-standing commitment, new commitments were added following the modernization of the Act. The Government of Canada has committed to protecting and promoting the French language and to advancing formal, non-formal and informal opportunities for members of English and French linguistic minority communities to pursue quality learning in their own language throughout their lives, including from early childhood to post-secondary education.

The modernized Act also prescribes a more detailed process to be followed by all federal institutions before and after taking positive measures. The first step for federal institutions is to conduct a preliminary analysis to understand the needs of OLMCs and the impact of the institution's decisions on the government's commitments. Following this analysis, federal institutions must take concrete positive measures to implement the government's commitments set out in Part VII. Finally, once positive measures have been taken, federal institutions must evaluate and monitor them over time.

In addition, Part VII of the modernized Act introduces changes to the obligation not to hinder or harm the government's commitments, including the development of OLMCs. If federal institutions make decisions that could have a negative impact on the government's commitments, they must avoid or at the very least mitigate these impacts.

The modernization of the Act, and of Part VII in particular, is a step toward advancing the substantive equality of both official languages, which remains the ultimate objective of Part VII of the Act. The emphasis is deliberately placed on the aspect of progress because that is precisely the aim of Part VII: continuous, sustained advancement of OLMCs in relation to the majority official language population and of both official languages. Simply put, Part VII of the Act exists to offset the pressure placed on members of OLMCs to assimilate, and the concept of "progression" or "advancement" toward substantive equality is incompatible with the notion of *status quo*. Positive action toward the objective of Part VII is therefore required by federal institutions.

Many other new provisions have been added to Part VII, including—but certainly not limited to—provisions dealing explicitly with language clauses in federal–provincial/territorial agreements, and obligations for institutions to establish evaluation and monitoring mechanisms in relation to positive measures and federal–provincial/territorial agreements.

3. MY POSITION AND THAT OF MY PREDECESSOR ON PART VII

Following the adoption of the legislative amendments to the Act in 2005, one of my predecessors, Graham Fraser, proposed three guiding principles for federal institutions seeking

to meet their obligations under Part VII of the Act: (1) the need for every institution to develop a Part VII "reflex"; (2) the importance of engaging citizens and communities; and (3) the requirement of a continuing process for improving programs and policies. Commissioner Fraser had hoped at the time to avoid overly specific definitions or enumerations of "positive measures" so as not to limit innovation or creativity or place too many restrictions on federal institutions' decision-making process.

Five years later, Commissioner Fraser identified serious problems with federal institutions' implementation of Part VII and described the approach to implementation as fragmented. In particular, he noted significant gaps, such as the absence in Part VIII of the Act of an oversight role for the Treasury Board of Canada Secretariat (TBS) in relation to the implementation of Part VII. Although subsection 41(3) of the Act enabled the Governor in Council to make regulations prescribing the manner in which the duties under Part VII are to be carried out, Commissioner Fraser recommended that specific provisions be added to the Act requiring the Treasury Board to recommend regulatory measures to ensure that such initiatives were taken.

Recognizing that there had been little improvement in the situation, Commissioner Fraser, speaking at the 2015 annual meeting of the Language Rights Support Program, proposed that the time had come to reflect "on the opportunity to develop a regulatory framework that could, for example, clarify the decision-making processes institutions must follow in discharging their obligation to be proactive and not to hinder the development and vitality of official language communities."[18]

I echoed Commissioner Fraser's statements in my 2019 position paper on the modernization of the Act, in which I highlighted the need for Part VII to be accompanied by regulations. In order to set clearer parameters for federal institutions to meet their Part VII obligations effectively and fully, I recommended that the Governor in Council, in consultation with OLMCs across Canada and with other interested groups, make regulations prescribing the manner in which federal institutions are to carry out their duties under Part VII of the Act. As time has shown, the absence of such regulations has left far too much latitude in the interpretation and execution of federal institutions' duties under Part VII.

Once again, in 2022, in my brief to Parliament on the modernization of the Act, I noted that the provisions of the Act relating to the advancement of English and French and support for the development and vitality of communities (the Part VII provisions) had led to substantial misunderstanding and inaction by federal institutions over the years. My brief to the Parliamentary committees examining Bill C-13, which modernized the Act, reiterated the need for clarity through strong Part VII regulations.

[18] Commissioner of Official Languages, *Notes for an address at the annual meeting of the Language Rights Support Program at the University of Ottawa*, November 23, 2015.

4. PROBLEMS WITH THE IMPLEMENTATION OF PART VII THROUGHOUT THE YEARS

As an ombudsman for official languages, I investigate complaints in relation to violations of the Act. Federal institutions' non-compliance with Part VII of the Act has resulted in a host of complaints being filed with my office over the years. Over the course of the 2022–2023 fiscal year, I received 44 admissible complaints related to Part VII. This number had reached a staggering 1,546 during the 2021–2022 fiscal year, which was primarily attributable to the appointment of a Governor General who was not fluent in French.

In response to my office's investigations concluding that certain complaints were founded under Part VII, we received responses from federal institutions raising the issue of there not being regulations made pursuant to Part VII of the Act. These institutions argued that because there is no regulatory "methodology" for taking positive measures, they have considerable discretion with respect to the choice of measures they take to implement Part VII. Although federal institutions do have latitude in the choice of measures they take to implement their Part VII obligations, their obligation to take concrete measures is not thereby diminished, and they must comply with the methodology established in the Federal Court of Appeal's decision in *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development Canada)*. Nevertheless, the idea that a regulatory framework would help federal institutions to know when and how to act on Part VII has merit.

In my experience, violations of Part VII are rarely deliberate and are usually the result of more systemic issues such as:

- a lack of understanding of Part VII obligations by federal institutions;
- in some cases, a lack of understanding as to how Part VII applies to the federal institution's mandate;
- an inconsistent application of Part VII across federal institutions;
- decisions made without proper consideration of OLMCs' needs and interests; or
- decisions that have an unintentional negative impact on OLMCs.

An example of an investigation that illustrates the importance of getting Part VII right is the case of substantial budget cuts and decisions made at CBC/Radio-Canada in 2009. CBC/Radio-Canada's decisions regarding CBEF Windsor, the only French-language radio station in southwestern Ontario, were vigorously denounced by the region's Francophone community, which maintained that the radio station and the services it provided were vital to its development and vitality. The investigation conducted by my office into this matter found that CBC/Radio-Canada made these decisions without regard for the larger community served by the station. I concluded that CBC/Radio-Canada had failed to meet its obligations under Part VII of the Act to consult with the OLMC in southwestern Ontario prior to the budget cuts, and that it had not conducted an impact analysis of the decision.

In my view, this case clearly illustrates the need for regulations to implement Part VII. The existence of regulations to implement Part VII could have facilitated discussions between the

OLMC and the federal institution and ensured that members of that community remained well informed and frequently consulted. The purpose of Part VII is to support the development of English-and French linguistic minority communities and to encourage progress toward substantive equality of the two official languages. Countering the erosion experienced by OLMCs is therefore one of the objectives that must guide federal institutions in their decision making. Therefore, federal institutions must listen and remain attentive to the needs of OLMCs across the country and must always consider the impact of their decisions on them.

5. GUIDING PRINCIPLES FOR ROBUST PART VII REGULATIONS

As I've stated with respect to the regulations for Part IV of the Act, one consequence of the Act's being quasi-constitutional is that its regulations are quasi-legislative. Just as the Act is an instrument that reflects certain principles of Canada's Constitution and the Charter, the regulations are an instrument that reflects the principles contained in the Act. Therefore, the regulations that are eventually adopted to implement Part VII of the Act will invariably be recognized as a key instrument in applying the fundamental values set out in both the Act and the Charter. The Federal Court recently confirmed this in *Thibodeau v Greater Toronto Airports Authority*[19] by being explicit on this matter and declaring that "certain regulations, such as the ones at issue here [the Part IV Regulations], give a concrete scope to rights and guarantees that have their source in the Charter; it would therefore be logical for the interpretation of the Regulations to be guided by the same principles applicable to so-called quasi-constitutional statutes, which the Regulations are intended to implement".[20] Put simply, "the principles of interpretation applicable to the [Act] also apply to its Regulations", which means that the regulations "must be interpreted using a purposive approach including the same broad and liberal interpretation applicable to language rights".[21]

In light of my office's many years of experience in investigating Part VII complaints, and following a thorough analysis of the recently modernized Act, I submit that the following five principles must guide the drafting of Part VII regulations.

I. Preserve the principles established in the Federal Court of Appeal's decision in *Canada (Commissioner of Official Languages) v. Canada (Employment and Social Development Canada)*, including the following:

a. **Supporting the development of official language minority communities**
The objective of Part VII is the support of both English and French linguistic minority communities as well as the advancement toward substantive equality of both official languages. Halting the erosion of official language minority communities is part of the objectives that must guide positive measures.

[19] 2024 FC 274 [*GTAA*].
[20] *GTAA*, at para 37.
[21] *GTAA*, at para 38.

b. **Implementing the substantive equality norm**
Positive measures must be guided by the standard of substantive equality, which sometimes requires that the services received by official language minority communities be different from those received by the majority. This distinction is based on the idea that it is necessary to take official language minority communities' particular situation and needs into account.

c. **Understanding the continuous nature of the obligation**
The obligation to take positive measures is an ongoing obligation: it applies as long as a federal institution can act to achieve the intended purpose.

d. **Understanding the needs of official language minority communities**
Federal institutions must be attentive to the needs of official language minority communities across the country and consider the impact that the decisions they are called upon to make may have on those communities.

e. **The duty to enhance and the duty not to harm**
The duty to enhance necessarily entails the duty not to harm. This implies proactive measures on the part of federal institutions.

f. **Applying Part VII to an unlimited variety of situations**
Part VII can be applied to an unlimited variety of situations, regardless of the region, official language minority community, institution involved, issue at hand, etc. The obligation can, for example, target a policy, program, decision-making process or any other specific initiative of a federal institution.

II. Provide clear instructions to all federal institutions to take concrete action

It is difficult for federal institutions to implement—let alone meet—obligations that they do not clearly understand. The regulations should enable federal institutions to understand their obligations by detailing them clearly and precisely. The implementation of Part VII obligations depends on a precise approach that details the entirety of each federal institution's responsibilities under Part VII.

III. Establish guidelines applicable to all programs, policies, initiatives and decisions of federal institutions

Because Part VII can be applied in an unlimited number of situations and because all federal institutions are subject to Part VII of the Act, each federal institution must be able to see its mandate reflected in the regulations made under Part VII. This will enable all federal institutions, despite the diversity of their mandates and their programs, to obtain clear instructions that can be applied to their activities.

Furthermore, due to the ongoing nature of the obligation to take positive measures, the regulations should emphasize the need for institutions to continually adjust when their measures do not have a tangible positive impact on the federal government's Part VII commitments.

IV. Ensure that a framework providing clear responsibilities is in place within each federal institution

The implementation of Part VII of the Act requires effective governance at the federal level and within each institution. The necessary infrastructure must be put in place to enable the full realization of the objectives of Part VII. Without established processes

that include dedicated personnel with the necessary training and expertise, the implementation of Part VII will remain muddled and disorganized.

V. **Enable greater transparency and accountability with respect to measures taken**
It is essential that Part VII of the Act be given the utmost transparency and that it promote greater accountability. The regulations should facilitate exchanges between official language minority communities and federal institutions to ensure that these communities continue to be well-informed and frequently consulted.

6. CONCLUSION

My office shared these principles with TBS in late 2023, and they have served as the foundation for our discussions during the "pre-consultation" phase of the regulatory process. These principles have also been shared with key stakeholders—the Fédération des communautés francophones et acadienne du Canada and the Quebec Community Groups Network—both of which have expressed their support for these principles and their desire to see them guide the drafting of Part VII regulations. My office has also provided the TBS with more detailed proposals for the Part VII regulations that I would like to see integrated into the eventual regulations.

As is outlined in the Act, TBS will consult on its draft regulations and table them in Parliament before they come into force. I will be following this very closely and will analyze the draft regulations when they are made public.

Finally, I cannot overstate the importance of integrating the five principles I have outlined into Part VII regulations, as they will undoubtedly give strength and meaning to the modernized Part VII and contribute to the advancement of the substantive equality of both OLMCs and official languages. We have been patiently waiting for these regulations since 2005, and the time is long overdue for comprehensive and purposive Part VII regulations.