The Need to Amend Part VII of the *Official Languages Act* of Canada

Brief to the Standing Senate Committee on Official Languages in the Context of its Study of the Perspective of Canadians on Modernizing the *Official Languages Act*

November 23, 2018
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INTRODUCTION

The International Observatory on Language Rights of the Faculty of Law at the Université de Moncton wishes to present this brief as part of the consultation process undertaken by the Standing Senate Committee on Official Languages on the modernization of the federal *Official Languages Act* (OLA). We address therein the need to reform Part VII and present a proposed amendment to Part VII that seeks to illustrate the type of amendment we believe is necessary.

1. **The Observatory at a glance**

The International Observatory on Language Rights is a research centre of the Faculty of Law at the Université de Moncton. With a network of more than 80 researchers across all continents, a scientific journal (the *Revue de droit linguistique*), the publication of many significant major works (including the third edition of *Les droits linguistiques au Canada*, an essential point of reference in its field), the creation of several research tools, as well as an active contribution to current political and legal debates, the Observatory ensures the pan-Canadian and international influence of language rights as well as that of the Faculty of Law at the Université de Moncton, itself the outcome of a long and fierce struggle for the respect of the rights of New Brunswick’s Acadians and francophones.

Established in 2010, the Observatory has been led since 2017 by Érik Labelle Eastaugh, Assistant Professor at the Faculty of Law.1

2. **The need for Part VII reform**

A number of witnesses who appeared before this committee during this study have already pointed out that Part VII, in its current form, does not produce the results expected when it was adopted in 1988 or when it was reformed in 2005. The committee report prepared in 2014 under the chairmanship of Senator Maria Chaput echoes this sentiment.2 We therefore hope that one of the objectives of a project to modernize the OLA will be to improve Part VII in order to make it more effective. The question that arises is, how do we change Part VII so that it will have the desired impact?

2.1 **The purpose of Part VII and its role in the overall structure of the OLA**

If the current wording of section 41 is the direct or immediate cause of the problem, the ultimate cause is the complexity of the legislator’s objective in adopting Part VII. Thus, before directly addressing the flaws in the wording of section 41, it is necessary first to briefly clarify the purpose

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of Part VII and its role in the structure of the OLA.

2.1.1 The main objectives of the OLA

Overall, the *Official Languages Act* seeks to establish the conditions required for the federal government to respect the principle of equality of official languages set out in section 16 of the *Canadian Charter of Rights and Freedoms*. In this regard, the Act has two main objectives: (1) ensure that the equality of the official languages is respected in the operation of federal institutions, both internally and in their relationship with society; and (2) support the development of francophone and anglophone minorities and ensure that the federal government contributes to the advancement of the equality of both official languages in Canadian society.3

The OLA contains a very large number of provisions that seek to implement these objectives in relation to specific issues, including by creating specific language rights in the areas of services (Part IV), language of work (Part V), court decisions (Part III), and so on. However, there is an additional dimension to the problem of linguistic equality, a dimension that could be called “sociological,” which is cross-cutting to the Act as a whole. In our view, Part VII is called upon to set standards to govern this dimension of the problem.

2.1.2 The “sociological” dimension of the desired objectives

The “sociological” dimension stems, first of all, from the principle of equality itself. In order to achieve the objective of respecting the equality of the official languages in the operation of federal institutions, the *OLA* requires that a range of activities and services be undertaken or available in both official languages. So there has to be equality of language in each area of activity. However, as the Supreme Court of Canada has repeatedly pointed out, the equality of official languages must be understood as a so-called “real” equality, not as a so-called “formal” equality. “Real” equality is defined by taking into account the particular circumstances of the individuals or groups involved; therefore, it can require different treatment in order to achieve the same results. Therefore, for a service to be truly of equal quality in both official languages, it must be designed and delivered in such a way that it takes into account the socio-cultural differences between the two linguistic communities.4

The second objective, which is to support the development of francophone and anglophone minorities and to contribute to the advancement of the equality of both official languages in Canadian society, is also based on sociological considerations. This objective can be traced, among other things, to the work of the Royal Commission on Bilingualism and Biculturalism, which revealed (or rather confirmed) the many important differences between the sociological situation of English and French in Canada. In 1967, French was proportionally less valued, less used and less prestigious than English. The result was a very high assimilation rate for francophone minority communities. Even in Quebec, the future of French was not guaranteed. Furthermore, the Commission found that federal institutions, for their part, accentuated the weakness of French by offering very few services in that language outside Quebec, by being a unilingual anglophone workplace and by offering services that were based on the needs of the majority. Consequently, the Commission recommended, and the legislator (and subsequently the framers) accepted, that the federal government should instead use its considerable influence on

3 See in particular section 2 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [OLA].
Canadian society to reinforce the French fact.5

2.1.3 The role of Part VII in achieving the objectives of the OLA

In order to achieve the dual objective that Canada has set for itself with respect to the equality of official languages, it is not enough to set out specific standards applicable to a given issue, such as the one found in section 22 of the OLA (right to services and communications). There is also a need for standards that guide the decision-making process of federal institutions to ensure that the “sociological” dimension of linguistic equality is taken into account at the outset of any decision that may have an impact on issues related to linguistic equality. While the roles assigned to the Commissioner of Official Languages and the courts are essential, they can only react after the fact and in a limited way, and therefore cannot be relied upon to ensure full implementation of the Act. There must also be a system that ensures that relevant issues are identified before problems arise.

This, in our view, is the primary function that Part VII occupies (or should occupy) in the overall structure of the OLA. Its role is to set out the standards that must guide the decision-making process of any federal institution in order to ensure full respect for the principle of equality of official languages within its mandate.

2.2 The main flaw of Part VII in its current form

The problems associated with the implementation of Part VII, whether by federal institutions or by the courts, stem mainly from the wording of section 41. This provision is worded in terms that are too broad to achieve the desired objective. This has two main consequences. On the one hand, federal institutions are struggling to understand their duties under this part of the Act and, on the other hand, the courts have been very reluctant to find breaches of Part VII and to issue orders based on it.

These problems are not new. These are the same difficulties that motivated the late Senator Jean-Robert Gauthier to propose amendments to Part VII as early as 2001, the result of which was the adoption in 2005 of a new version of Part VII. Despite these changes, Part VII remains the poor relation of the OLA. In fact, the interpretation given to it by Department of Justice lawyers has remained virtually unchanged since 1988, despite the 2005 amendment. Before the Federal Court, they still claim that the implementation of section 41 is entirely at the discretion of federal institutions and that no specific measures can be taken as a result.6 The court has sometimes rejected this reading of Part VII, as in Picard,7 but some judges have been inclined to accept it, as in FCFA.8

Just recently, in the case of the Fédération des francophones de la Colombie-Britannique, the Federal Court made certain comments about Part VII, which clearly show the nature of the problem. Therefore, these are worth quoting in detail:

5 See generally the Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages, Ottawa: Queen’s Printer, 1967, and in particular the “Blue Pages”.
6 See, for example, Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development), 2018 FC 530 at para 199.
7 Picard v Canada (Intellectual Property Office), 2010 FC 86.
8 Fédération des communautés francophones et acadienne du Canada v Canada (Attorney General), 2010 FC 999.
In the absence of regulations that could limit its scope, the discretion left to federal institutions remains intact. This is easy to explain. Federal institutions are in the best position to determine, within their institutional mandate, what specific positive measures are most reasonable and appropriate to fulfill the commitment to enhance the vitality of linguistic minorities and foster the full recognition and use of English and French in Canadian society.

... 

Unlike Parts I to V of the OLA, Part VII is not intended to protect or establish specific language rights.

... 

In short, section 41 does not impose specific and particular duties on federal institutions. Nothing in the language used in subsection 41(2) evokes any specificity.9

For reasons that we have detailed elsewhere,10 we believe that the Federal Court erred in its interpretation of section 41, and we would hope that the Federal Court of Appeal will allow the appeal currently before it in this case. Nevertheless, it must be recognized that such a result is not surprising, even though it is still disappointing. Part VII does not spell out with sufficient clarity the legal norms that are essential to its implementation, whether by federal institutions or by the courts called upon to evaluate their conduct in retrospect. While one can infer the required norms from the existing provisions, as many jurists and lawyers have attempted to do,11 their wording contains a level of ambiguity that allows the government to interpret them minimalistically and discourages the courts from making overly assertive judgments against it.

2.3 The nature of the challenge

To correct this problem and to prevent Part VII from being rendered meaningless, we must adopt a different strategy.

Because of its cross-cutting function, as described in section 3.1 of this brief, Part VII must set out legal norms that apply to all federal institutions, whose missions and activities are quite varied. Moreover, they must be formulated in the context of the fact that it is impossible to predict in advance all situations in which respect for substantive equality might require a different approach to the two linguistic communities or in which a federal institution could advance the sociological equality of the official languages.

The solution first adopted by the legislator in 1988, when Part VII was first drafted, was to set out a general commitment that federal institutions would have to specify in the execution of their mandates.12 This approach has failed in judicial interpretation. The idea of stating a general

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9 Ibid at para 208, 214 and 216.
12 At the time, section 41 read as follows: “The Government of Canada is committed to (a) enhancing the vitality of the English and French linguistic minority 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.” There was no
principle is not a problem in itself. The provisions of the *Canadian Charter of Rights and Freedoms*, for example, as do most constitutional provisions, set out general norms that the courts subsequently had to specify on a case-by-case basis.\(^\text{13}\) However, the nature of the principles that the original version of section 41 sought to enshrine, combined with the breadth and complexity of the activities that were sought to be regulated through this single norm, resulted in the provision being interpreted as non-justiciable.\(^\text{14}\)

In 2005, the legislator attempted a new approach. In addition to specifying that section 41 imposes a “duty” on federal institutions, legal remedies based on Part VII were explicitly authorized,\(^\text{15}\) which allowed the courts to get involved in the definition of basic duties, and the right to adopt regulations governing the implementation of Part VII was granted,\(^\text{16}\) which was intended to lead to the adoption of more precise measures. However, as we can see, this approach has not produced the desired results. The courts have continued to interpret section 41 in a restrictive manner, and no regulations have been made since subsection 41(3) came into force.

2.4 The solution: specific standards stemming from a consultation process

In order to ensure that the norms set out in Part VII are actually implemented, they must be accompanied by a mandatory process leading to the adoption of specific standards tailored to the particular contexts in which the various federal institutions operate. In addition, the development of more specific norms must be based on a consultation process with OLMCs themselves.

The need for a consultation process is easily explained, having already been recognized by the Supreme Court of Canada, particularly in the area of education within the context of section 23 of the *Charter*. In *Mahe v. Alberta*,\(^\text{17}\) the Supreme Court of Canada considered whether section 23 confers a right of “management and control” over minority schools on rights holders. As we know, the court did recognize the existence of such a right. Its conclusion in this regard was largely based on the fact that a majority-dominated institution will have difficulty identifying and understanding the linguistic and cultural issues of a particular decision. As former Chief Justice Dickson stated,

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\text{[M]inority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.}\(^\text{18}\)
\]

While this is a slightly different context, this observation also applies to the issues raised by Part VII. While services provided by the federal government may be less critical to the survival of OLMCs than education, they are nevertheless an important support for their vitality. Furthermore, as the Supreme Court recognized in *DesRochers*, the provision of service of equal

\(^{13}\) See, for example, Érik Labelle Eastaugh, “Jurilinguistique et égalité : les droits linguistiques en tant qu’accords incomplètement théorisés” (2017) 47 RDUS 1 at pp. 8-14.

\(^{14}\) *Forum des maires de la Péninsule acadienne v Canada (Agence d’inspection des aliments)*, 2004 FCA 263.

\(^{15}\) OLA, supra note 3, s 77(1).

\(^{16}\) *Ibid*, art 41(3).

\(^{17}\) *Mahe v Alberta*, [1990] 1 SCR 342.

\(^{18}\) *Ibid*, at page 372.
quality may require that it be provided on the basis of a different model that takes into account the differences between linguistic communities. In order for the linguistic and cultural interests of OLMCs to be taken into account, they must be involved in the decision-making process.

Under section 23, the solution to this problem was the recognition of a collective right of management and control, which generally resulted in the establishment of independent school boards for minority schools. Without seeking to fully replicate such a model within the federal public service, it can be used to shape a regime that ensures that the perspective and interests of OLMCs are taken into account.

2.5 Proposed amendment

As an illustration, we have drafted a proposal to amend Part VII to achieve the desired goal. For convenience, the proposal is presented twice. The first table compares the proposal to the current version of the provisions in question to make it easier to identify the amendments. The second table contains only the proposed amendment, but also includes explanatory notes that provide a better understanding of the nature and reason for the proposed amendment.
## Proposed Part VII Amendment and Current Wording

<table>
<thead>
<tr>
<th>Proposed Amendments</th>
<th>Current law</th>
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<tbody>
<tr>
<td><strong>PART VII</strong></td>
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<tr>
<td>Rights of Official Language Minority Communities and Advancement of English and French</td>
<td>Advancement of English and French</td>
</tr>
<tr>
<td><strong>General Duty</strong></td>
<td><strong>Commitment</strong></td>
</tr>
<tr>
<td>41 The Government of Canada has a duty to enhance the sociolinguistic vitality of the official language minority communities in Canada (OLMCs) and to support and assist their development; as well as to foster the full recognition and use of both English and French in Canadian society.</td>
<td>41(1) The Government of Canada is committed to (a) enhancing the vitality of the English and French linguistic minority 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.</td>
</tr>
<tr>
<td><strong>Duties of federal institutions</strong></td>
<td><strong>Regulations</strong></td>
</tr>
<tr>
<td>(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.</td>
<td>(3) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer, prescribing the manner in which any duties of those institutions under this Part are to be carried out.</td>
</tr>
<tr>
<td><strong>Duties of federal institutions to OLMCs</strong></td>
<td></td>
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<tr>
<td>41.1 (1) Federal institutions shall identify any decision, policy, program or other activity undertaken by them in the course of their mandate that may affect the sociolinguistic vitality or development of OLMCs, including any measure adopted under Parts I to V of this Act (“the activities to be</td>
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*(See section 41.3 below)*
Federal institutions establish a three-year process for implementing subsection (1).

The process referred to in subsection (2) includes consultation with each of the representative entities identified in section 41.2 of this Act.

The process referred to in subsection (2) concludes with an agreement with each representative entity. The agreements establish a list of the activities to be carried out for the region concerned, and identify measures that can be taken within the framework of those activities to promote the sociolinguistic vitality and development of OLMCs.

It is the responsibility of federal institutions to ensure that the activities set out in the agreements, as well as any other activity that meets the criterion of subsection (1), are undertaken in such a way as not to impede the sociolinguistic vitality and the development of OLMCs.

Federal institutions adopt the measures to promote the sociolinguistic vitality and development of OLMCs set out in the agreements.

If all reasonable measures have been taken and all reasonable projects have been developed to ensure compliance with subsections (5) and (6), the duties they impose are subject to the reasonable and necessary limitations required by the circumstances.

Federal institutions adopt any other measure to promote the sociolinguistic vitality and/or the development of OLMCs that is reasonable in the circumstances.

Federal institutions may receive a request from any member of the public to adopt a measure referred to in subsection (8).

Requests referred to in subsection (9) shall be accepted or refused in accordance with the principles of this Act. If refused, the refusal is communicated.
to the applicant in writing with reasons.

### Representative entities

41.2 (1) The Governor in Council shall, by regulation, designate at least one representative entity for the OLMC of each province.

(2) The Governor in Council shall consult the OLMCs before adopting the regulations referred to in subsection (1).

(3) Any subsequent change to the list of designated entities requires, in advance, support from two thirds of the entities currently designated.

(4) Notwithstanding any other source of funding they may have, representative entities shall be paid an amount equivalent to the salary of a Federal Court judge other than the Chief Justice for the performance of their duties under this Part. Their representatives are entitled to travel and living expenses incurred while performing their duties outside their ordinary residence.

(5) A representative entity may delegate its rights and functions under this Act to another representative entity.

### Regulations

41.3 The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer, prescribing the manner in which any duties of those institutions under this Part are to be carried out.
## Proposal to Amend Part VII with Explanatory Notes

<table>
<thead>
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<th>Proposed Amendments</th>
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<tr>
<td><strong>PART VII</strong></td>
<td>We are proposing to amend the title of Part VII. It should be explicitly stated that Part VII creates rights for OLMCs. In its recent judgment, the Federal Court incorrectly argued that Part VII is distinct from other parts of the OLA in that it does not create “rights” but only duties.(^{19})</td>
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<td>Rights of Official Language Minority Communities and Advancement of English and French</td>
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<tr>
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<td>The term “committed” should be replaced by “duty” to further clarify that section 41 is intended to limit the discretion of federal institutions.</td>
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<td>41. The Government of Canada has a duty to enhance the sociolinguistic vitality of the official language minority communities in Canada (OLMCs) and to support and assist their development; as well as to foster the full recognition and use of both English and French in Canadian society.</td>
<td>The term “English and French linguistic minority” should be replaced by “official language minority community”. This is more in keeping with the collective aspects of the interests that Part VII seeks to protect, and is more in line with the current English version, which already uses this vocabulary.</td>
</tr>
<tr>
<td>Duties of federal institutions to OLMCs</td>
<td>The term “vitality” should be replaced by “sociolinguistic vitality”. The latter term more accurately describes the interest and is more in line with the current English version, which refers to “vitality”.</td>
</tr>
<tr>
<td>41.1 (1) Federal institutions shall identify any decision, policy, program or other activity undertaken by them in the course of their mandate that may affect the sociolinguistic vitality or development of OLMCs, including any measure adopted under Parts I to V of this Act (“the activities to be covered”).</td>
<td>Subsection 41.1(1) sets out the basic duty to identify activities, decisions, etc. that is likely to influence the protected interests of OLMCs. The process to be followed in this regard is set out in the following paragraphs, as are the subsequent obligations.</td>
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\(^{19}\) See *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, 2018 FC 530 at para. 204. For a detailed analysis of this issue, see Labelle Eastaugh, *supra* note 10.
(2) Federal institutions establish a three-year process for implementing subsection (1).  
We propose a review every three years for two reasons: (1) to provide sufficient time for institutions to perform the required work; (2) to ensure that the list generated is updated in a timely manner.

(3) The process referred to in subsection (2) includes consultation with each of the representative entities identified in section 41.2 of this Act.  
Basic duty to consult OLMCs.

(4) The process referred to in subsection (2) concludes with an agreement with each representative entity. The agreements establish a list of the activities to be carried out for the region concerned, and identify measures that can be taken within the framework of those activities to promote the sociolinguistic vitality and development of OLMCs.  
This provision distinguishes between two concepts: “activity to be carried out” and “measure”. The activities to be carried out are spheres of activity, types of decisions, programs, etc. that involve the interests of OLMCs. Their impact can be positive, negative or other on OLMCs. It is important to ensure that federal institutions are aware of this dimension when they act in such a sphere. The measures are the specific measures that federal institutions could take with the express purpose of promoting the sociolinguistic vitality or the development of an OLMC.

(5) It is the responsibility of federal institutions to ensure that the activities set out in the agreements, as well as any other activity that meets the criterion of subsection (1), are undertaken in such a way as not to impede the sociolinguistic vitality and the development of OLMCs.  
This provision creates an enforceable duty that can be the subject of a complaint to the COL and an application to the Federal Court.  
It also creates a residual category of activity, in the event that a relevant activity was not included in an agreement, but that its relevance can be demonstrated afterwards.

(6) Federal institutions adopt the measures to promote the sociolinguistic vitality and development of OLMCs set out in the agreements.  
This provision creates an enforceable duty that can be the subject of a complaint to the COL and a recourse to the Federal Court.

(7) If all reasonable measures have been taken and all reasonable projects have been developed to ensure compliance with subsections (5) and (6), the duties they impose are subject to the reasonable and necessary limitations required by the circumstances.
(8) Federal institutions adopt any other measure to promote the sociolinguistic vitality and/or the development of OLMCs that is reasonable in the circumstances. This provision provides that the duties of federal institutions are not exhausted by the agreements and that any other relevant and reasonable measures must be taken.

(9) Federal institutions may receive a request from any member of the public to adopt a measure referred to in subsection (8). The purpose of this provision is to allow members of the public, other than representative entities, to enrich the discussion on the implementation of section 41.

(10) Requests referred to in subsection (9) shall be accepted or refused in accordance with the principles of this Act. If refused, the refusal is communicated to the applicant in writing with reasons.

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<td>(3) Any subsequent change to the list of designated entities requires, in advance, support from two thirds of the entities currently designated.</td>
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<td>(4) Notwithstanding any other source of funding they may have, representative entities shall be paid an amount equivalent to the salary of a Federal Court judge other than the Chief Justice for the performance of their duties under this Part. Their representatives are entitled to travel and living expenses incurred while performing their duties outside their ordinary residence. This provision, modelled on the salary provision of the Commissioner of Official Languages, seeks to illustrate how representative entities could be guaranteed the resources required to ensure their independence from the federal government and to enable them to carry out their duties under the law. Further study is required to determine the level of resources required.</td>
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(5) A representative entity may delegate its rights and functions under this Act to another representative entity.

**Regulations**

41.3 The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

This provision seeks to preserve the regulatory power created in 2005, which could be a powerful tool if used.