Guide to Sections 41 and 41.1 of the *Official Languages Act*: Advancement toward Equality of Status and Use of English and French

Notice to readers

This document[1] does not constitute legal advice. To receive such advice, please consult the legal services of your federal institution.

Background

This guide provides an overview of Sections 41 and 41.1 of Part VII of the *Official Languages Act*, (OLA) and explains the obligations and role of federal institutions in meeting the federal government's commitments to advance the equality of status and use of English and French.

Part VII of the OLA

Part VII of the OLA deals with advancing the equality of status and use of English and French in Canadian society.

Section 41 opens Part VII by setting out a series of commitments by the Government of Canada to advance the equality of status and use of English and

[1] This document may be subject to change once the regulations on Part VII of the *Official Languages Act* come into force.

French in Canadian society. These commitments must be reflected in positive measures taken by federal institutions.

Commitments set out in Section 41 of the OLA

Under Section 41 of the OLA the Government of Canada commits, among other things, to:

> enhancing the vitality of the English and French linguistic minority communities in Canada and support and assist their development, taking into account their unique and diverse character, and their cultural and historical contributions to Canadian society; and foster the full recognition and use of both English and French in Canadian society (41(1));
>
> protecting and promoting the French language by recognizing and accommodating the fact that French is in a minority situation in Canada and North America due to the predominant use of English (41(2));
>
> strengthen opportunities for English- and French-speaking minorities to acquire quality formal, non-formal and informal learning opportunities in their own language throughout their lives, from early childhood through to post-secondary education (41(3)).

The commitments set out in subsections 41(1) to (3) apply to all federal institutions[2] as defined in subsection 3(1) of the OLA to which Part VII is applicable. Each of these federal institutions has the obligation to ensure the implementation of these commitments by taking positive measures.

Duty of Federal Institutions – Positive measures

In carrying out its mandate, and pursuant to subsection 41(5) each federal institution must ensure that it takes positive measures to implement the commitments set out in subsections 41(1) to (3) of the OLA.

The OLA does not define what a positive measure is. Given the unique mandate of each federal institution and the fact that the realities and needs of linguistic communities are different across the country, institutions have some flexibility to determine the positive measures to be taken following a process of analysis.

[2] Designated airport authorities, as defined in the *Airport Transfer Act*, are not required to apply Part VII of the *Official Languages Act*.

Nevertheless, the OLA lists certain characteristics of positive measures in subsection 41(6) in order to guide federal institutions in their analysis.

Positive measures must :

- be concrete;
- be taken with the intention of having a favorable effect on the implementation of the undertakings set out in subsections 41(1) to 41(3);
- respect the need to protect and promote French in each province and territory;
- respect the need to take into account the specific needs of each official language community.

In addition, paragraph 41(6)(c) of the OLA provides a non-exhaustive list of fields of action in which positive measures may be taken:

- promoting and supporting the learning of English and French in Canada;
- fostering public acceptance and appreciation of English and French;
- encouraging and assisting organizations, associations and other bodies to reflect and promote, in Canada and abroad, the bilingual character of Canada and providing them with the assistance they need to do so;
- ensuring that the demographic weight of French-speaking minorities is restored and increased;
- supporting the creation and dissemination of information in French that contributes to the advancement of scientific knowledge in all disciplines;
- supporting sectors essential to the vitality of English- and French-speaking minorities, including culture, education - from early childhood to post-secondary studies - health, justice, employment and immigration, and protect and promote the presence of strong institutions serving these communities.

This list is indicative, meaning that a federal institution may choose to take positive action in one or more of these areas, or take action in other areas.

When to consider positive measures

The commitments set out in Section 41 of the OLA and the obligations arising from them must be taken into account throughout the life cycle of a policy or program. Whether during the strategic planning, development, implementation, evaluation and monitoring of policies and programs, or accountability, the federal institution should consider the potential for taking positive measures at all these stages.

Considering the possibilities for intervention

Subsection 41(7) of the OLA states that in carrying out their mandate, federal institutions shall, on the basis of analyses:

- consider the potential for taking positive measures to promote the implementation of their commitments set out in subsections 41(1) to (3);
- take the necessary measures to promote the inclusion of provisions establishing the obligations of the parties with respect to official languages (e.g. language clauses) in funding or other agreements they negotiate with the provinces and territories;
- consider the possibilities for avoiding or, at the very least, mitigating the direct negative impacts that their structuring decisions have or could have on the government's commitments under subsections 41(1) to (3) of the OLA.

In this context, structuring decisions are those that have broad, complex, or multiple effects on the programs, policies, or initiatives of a federal institution. They differ from routine or operational decisions, which are part of day-to-day management. Depending on the circumstances, structuring decisions affecting a program, policy, or initiative may include:

- design and development;
- substantial modification or restructuring;
- substantial updating or renewal;
- abolition or termination;
- transfer of responsibilities, even in part.

Analyses to inform the choice of positive measures

An analysis allows federal institutions to gather and interpret data, identify trends and assess risks, among other things. An analysis is essential to identify the positive or negative effects that an action could have on the commitments described in subsection 41(1) to (3) and in identifying and ultimately selecting the positive measures to be taken by federal institutions.

To do this, federal institutions must:

- take into account considerations relating to Section 41 from the outset of the decision-making process;

- consider possible interventions to avoid or, at the very least mitigate the direct negative impacts that its structuring decisions could have on the commitments described in paragraphs 41 (1) to (3);
- be able to demonstrate, if a structuring decision has direct negative effects, how they intend to avoid these effects or, at the very least, mitigate them.

Key questions to guide analyses

Here are some examples of key questions that could guide federal institutions in their analysis with a view to making an informed decision:

- Could the decision to be made have an impact on one or more of the commitments listed in subsections 41(1) to (3) of the OLA?
- What is the potential for facilitating the implementation of the commitments set out in subsections 41(1) to (3) by taking a positive measure?
- What concrete measures could be taken?
- How do we take into account the priorities of the Official Language Minority Communities (OLMCs) and other stakeholders?
- How do we take into account the need to protect and promote French?
- How do we take into account the specific needs of each of the two official language communities?
- What are or could be the direct negative impacts of the structuring decision to be taken on the commitments set out in subsections 41(1) to (3)? How can the direct negative impacts be avoided or at least mitigated?
- When the federal institution plans to negotiate or renew an agreement with a province or territory, does it plan to act in an area that can contribute to the implementation of the commitments set out in subsections 41(1) to (3)? If so, how can the federal institution encourage the inclusion of language clauses in the negotiations?

Dialogue and consultation activities, research and evidence-based findings

Section 41(8) of the OLA states that analyses must be based as far as possible on the results of dialogue and consultation activities, research and evidence. By understanding the environment in which federal institutions operate and by taking into account the priorities of the English and French linguistic minority communities and other stakeholders, it is possible to contribute to progress towards equality of status and use of English and French in Canadian society.

The OLA sets out expectations for dialogue and consultation activities. Federal institutions must :

- gather relevant information;
- obtain the views of the English and French linguistic minorities and other stakeholders on the positive which are the subject of the consultations;
- provide participants with the relevant information on which these positive measures are based;
- consider their opinions openly and seriously;
- be willing to modify these positive measures.

Evaluation and monitoring mechanisms

Finally, federal institutions must establish evaluation and monitoring mechanisms relating to the positive measures taken and the obligation to promote the inclusion of official language provisions in relevant federal-provincial/territorial (FPT) agreements, as set out in subsection 41(10) of the OLA.

Implementing these mechanisms can, among other things, help federal institutions improve their decision-making, manage risks, ensure transparency, and measure their performance.

Disposal strategy - considerations under Section 41.1 of the OLA

Section 41.1 of the OLA establishes an obligation for departments and federal institutions that support them to take the needs and priorities of OLMCs into account when developing a disposal strategy for federal real property or immovables. In considering these needs and priorities, departments are required to consult with OLMCs and other stakeholders, including school boards or commissions.

Please refer to the Treasury Board's Directive on the Management of Real Property- Canada.ca for more information.

Information

For any questions or information requests, federal institutions are invited to contact Official Languages Centre of Excellence at the following address OLCEInformationCELO@tbs-sct.gc.ca