THE FUTURE OF OFFICIAL LANGUAGE MINORITY GROUPS AND THE COMMITMENT BY FEDERAL INSTITUTIONS:

Part VII of the *Official Languages Act* as a Tool for Achieving Substantive Equality

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A. EXECUTIVE SUMMARY

A.1. The contribution of this report to achieving the mandate of the Senate Standing Committee on Official Languages

[1] On April 27, 2006, the Senate instructed the Senate Standing Committee on Official Languages (the Committee) to study the implementation of Part VII of the *Official Languages Act* (the OLA).[1] The Committee was assigned this task in response to the amendment of the OLA in 2005.[2] The Committee's terms of reference instruct it to report on initiatives by federal institutions and identify the improvements needed for the development of the linguistic minority communities in Canada (LMCC).[3] The Committee assesses the effectiveness of coordination among federal institutions in implementing Part VII. The Committee also has the mandate of measuring the impact of Part VII on LMCCs.

[2] The expression "LMCC" to describe official language minority groups in Canada is the terminology chosen by Parliament in Part VII of the OLA. That expression refers to French-speaking persons living both in Quebec and elsewhere in Canada. Because Part VII applies to French-speaking persons throughout Canada, it would have been too narrow to use the expression "OLMC", "official language minority communities", an expression that ordinarily excludes Francophones in Quebec.

[3] The objective of this report is to propose ideas to the Senate Standing Committee on Official Languages to assist it in achieving its mandate. More specifically, this report:

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[1] R.S.C. 1985 (4th Supp.), c. 31 [OLA].

[2] Bill S-3, *An Act to amend the Official Languages Act (promotion of English and French)*, 1st Sess., 38th Parl., 2004 (passed by the Senate on October 26, 2004, received Royal Assent on November 25, 2005) [Bill S-3].

[3] The expression "linguistic minority communities in Canada" (LMCC) is used by Parliament in subs. 41(1) of the OLA. [subs. 41(1) in English: "English and French linguistic minority communities in Canada"; in French: "minorités francophones et anglophones du Canada" – Tr.]

(1) identifies persons who are entitled to benefit under Part VII;

(2) measures the impact of the new Part VII on LMCCs by proposing a new reading of the OLA that is more consistent with its purposes;

(3) defines the concept of "positive measures" which is used in subsection 41(2) of the OLA;[4]

(4) proposes a method by which Part VII can be applied to concrete situations, in order to

(a) determine negative measures; and

(b) determine when it would be possible to require that a positive measure be taken; and

(5) suggest a new direction for the commitment by federal institutions by encouraging greater emphasis on the community aspect.

A.2. History of the *Official Languages Act*

[4] The first version of the OLA was enacted in 1969 in response to the recommendations in the reports by the Royal Commission on Bilingualism and Biculturalism.[5] The 1969 Act recognized the equality of English and French, made them the official languages, and assigned them equal status in all federal institutions in Canada.

[5] A second OLA came into force in 1988, replacing the 1969 Act. The 1988 OLA represented significant progress from the 1969 Act. One of the objectives of the 1988 Act was to align the OLA with the *Canadian Charter of Rights and Freedoms*[6] (the Charter). Part VII is one of the major innovations in the 1988 OLA.

[4] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 41(2).

[5] *Report of the Royal Commission on Bilingualism and Biculturalism*, vol. 1, Ottawa, Queen's Printer, 1967, General Introduction, The Official Languages, p. 145.

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

A.3. Part VII of the OLA is binding today

[6] Subsection 41(1) of Part VII provides:

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.	**41.(1)** Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne. [7]

[7] In 2004, the Federal Court of Appeal held that Part VII is declaratory and not binding.[8]

[8] In 2005, Senator Jean-Robert Gauthier, seconded by the Hon. Don Boudria, succeeded in persuading parliamentarians to amend Part VII. Subsection 41(2) of Bill S-3 provides that federal institutions must now take "positive measures" to support the development of LMCCs and foster the full recognition and use of both English and French in Canadian society:

41.(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.	**41.(2)** Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour mettre en œuvre cet engagement. Il demeure entendu que cette mise en œuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces. [9]

[9] This important amendment makes Part VII enforceable in the courts. The OLA provides that in the case of a violation of Part VII, a complaint may be

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[7] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 41(1).

[8] *Forum des maires de la Péninsule acadienne v. Canada Food Inspection Agency*, 2004 FCA 263 at para. 46; *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, [2005] 3 S.C.R. 906, leave to appeal to the S.C.C. withdrawn. Note that Bill S-3 was enacted by Parliament a few days before the Supreme Court of Canada could hear the appeal from this judgment. The Supreme Court of Canada stated the following reasons:

> In view of the enactment and coming into force on November 25, 2005, after leave to appeal had been granted, of Bill S-3, *An Act to amend the Official Languages Act (promotion of English and French)*, S.C. 2005, c. 41, the questions of law for which leave was granted are no longer of public importance and do not justify maintaining that leave.

[9] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 41(2).

made to the Commissioner of Official Languages of Canada and may then be taken before the Federal Court. Ultimately, if the Court concludes that a federal institution has failed to comply with Part VII, it may "grant such remedy as it considers appropriate and just in the circumstances".[10]

A.4. Content of this report

[10] This report interprets and applies subsections 41(1) and 41(2) of Part VII in light of recent developments in relation to language rights. It analyzes the binding effect of Part VII in relation to the following themes:

(1) Who is entitled to benefit under Part VII of the OLA?

(2) How could Part VII of the OLA be applied by federal institutions and the courts?

(3) Should the commitment by federal institutions put greater emphasis on the community aspect?

A.4.1. Who is entitled to benefit under Part VII of the OLA?

[11] A clearer definition of who is entitled to benefit under Part VII will assist in identifying situations in which a federal institution is required to take positive measures. A narrow formula for identifying these persons disregards exogamous households, among other things.

[12] When a federal institution identifies the holders of language rights too narrowly, as is the case in respect of communications and services provided for in Part IV of the OLA, it undermines the commitment by failing to enhance the vitality of LMCCs.

[10] OLA, R.S.C. 1985 (4th Supp.), c. 31, art. 77.

[13] Similarly, a federal institution can be in breach of its obligation to take positive measures if it fails to perform its role of providing institutional support for LMCCs.

[14] The methods adopted by some federal institutions for identifying rights holders do not allow for all members of LMCCs to be counted accurately.

A.4.2. A new model for the application of Part VII of the OLA by federal institutions and the courts

A.4.2.1. What is a "positive measure" within the meaning of Part VII of the OLA?

[15] A positive measure within the meaning of Part VII is a measure taken by a federal institution and applied by that institution, the effects of which are beneficial, lasting and tangible for LMCCs. The role of Part VII is to ensure that in all of their activities, federal institutions have regard to both of the linguistic communities they are required to serve.

A.4.2.2. Federal institutions should justify all negative measures

[16] This report proposes that federal institutions be required to justify all negative measures.

[17] To comply with their commitment, as codified in Part VII, federal institutions should justify any measures that are harmful to the vitality of LMCCs. To justify a negative measure, federal institutions would have to show:

(1) that its objectives are sufficiently important to justify a negative measure;[11]

[11] *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 54, 55 and 69. An analysis of the proportionality between the objective of a negative measure and the effects of the negative measure has been applied by the Canadian courts since 1986. That decision recognized that a number of other democratic judicial systems, including the European Court of Human Rights, apply a similar method

(2) that there is a rational connection between the negative measure taken by the federal institution and the sufficiently important objective of the negative measure;[12] and

(3) that the negative measure impairs the vitality of LMCCs as little as possible.[13]

A.4.2.3. Can federal institutions be required to take positive measures?

[18] Federal institutions sometimes fail to take positive measures or they take inadequate action. These failures to act and inadequate actions occur for various reasons; some are justified and others are not.

[19] When a federal institution fails to take a positive measure, or takes inadequate action, two questions should be asked:

(1) Has the federal institution taken action in the area in question in the past?

(2) Does the failure to act or inadequate action on the part of the federal institution impair the vitality of LMCCs to such an extent that subsection 41(2) of Part VII requires that a positive measure be taken?

of analysis to determine the validity of government decisions that infringe fundamental rights or the rights of minority groups.

[12] *Ibid.*, at para. 70.

[13] *Ibid.*

A.4.3. A new direction for the commitment by federal institutions: greater emphasis on the community aspect

[20] The OLA does not give full effect to its objectives if Part VII is interpreted in a vacuum. The OLA must be interpreted holistically. Applying that concept, Part VII must be analyzed in relation to the other parts of the OLA. The Federal Court of Canada recently held[14] that Part VII will sometimes require that a federal institution take a positive measure.[15] It is essential that the scope of the obligation imposed on federal institutions by Part VII be defined.

[21] The analysis required by Part VII has to redirect the commitment of federal institutions, to give priority to community considerations in relation to the promotion of the official languages and the vitality of LMCCs. This is consistent with the concept of substantive equality, as recognized by the courts.[16] LMCCs live with the challenges of linguistic assimilation on a daily basis. They are thus in the best position to identify the mechanisms most likely to counter assimilation. Collaboration with LMCCs is a prerequisite for achieving substantive equality.

[14] *Picard v. Canada (Office de la propriété intellectuelle)*, 2010 FC 86 [not yet translated – TR.]

[15] *Ibid*. The Federal Court ordered the Patent Office to offer service in the other official language even though this is not required by Part IV, which deals specifically with services and communications.

[16] *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 25.

B. INTRODUCTION

[22] The amendment to Part VII in 2005[17] is a major improvement to federal language rights. The late Sen. Jean-Robert Gauthier was able to persuade parliamentarians to amend the OLA to transform Part VII so that it is now binding[18] and not declaratory.[19] In other words, since 2005, the OLA has allowed for court proceedings to be brought against a federal institution that violates the obligations set out in Part VII.

[23] That major amendment to Part VII is part of a major shift in language rights that occurred in the last 20 years. Canadian courts now recognize that "[l]anguage rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided" and that "the freedom to choose is meaningless in the absence of a duty of the State to take **positive steps** to implement language guarantees".[20] In other words, federal institutions have binding obligations to the holders of language rights. The Supreme Court of Canada now states that the principle of substantive equality requires that federal institutions ensure that language rights are implemented.[21]

[17] Bill S-3, 1st Sess., 38th Parl., 2004 (passed by the Senate on October 26, 2004, received Royal Assent on November 25, 2005).

[18] *Ibid*., at para. 77(1).

[19] *Forum des maires de la Péninsule acadienne v. Canada (Agence canadienne d'inspection des aliments)*, 2004 FCA 263.

[20] *R v. Beaulac*, [1999] 1 S.C.R. 768 at para. 20. See, *inter alia*, *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 79-82; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] 1 S.C.R. 383; *DesRochers v. Canada (Industry)*, [2009] 1 S.C.R. 194.

[21] *R v. Beaulac*, [1999] 1 S.C.R. 768 at para. 24 [? – Tr.]: the principle of substantive equality is different from formal equality in language law; *DesRochers v. Canada (Industry)*, [2009] 1 S.C.R. 194 at para. 31: "Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation."

[24] This report considers the most recent legal trends in the area of language law, and explores different ways of interpreting and envisioning the OLA and Part VII of that Act. This paper therefore presents an analysis of the binding effect of Part VII having regard to the following themes:

(1) Who are the beneficiaries under Part VII of the OLA?

(2) How could Part VII of the OLA be applied by federal institutions and the courts?

(3) Can the commitment by federal institutions be redirected so as to place greater emphasis on the community aspect?

[25] First, this report cautions against a narrow definitions of beneficiaries under Part VII. A more inclusive definition helps to determine the situations in which a federal institution must take positive measures. When a federal institution identifies beneficiaries under Part VII too narrowly, it is going counter to that commitment and undermining the interests of LMCCs. For example, a narrow method of identifying beneficiaries under Part VII is one that fails to take exogamous homes into account.

[26] Second, this report develops a method of analysis for use by public servants and judges responsible for applying Part VII.[22] This section analyzes a federal institution's failure to comply with its commitment under Part VII. That failure can take the form of a failure to act, inadequate action or a negative measure that detracts from the vitality of LMCCs.

[27] Third, the OLA cannot achieve its objectives if Part VII of the Act is interpreted in a vacuum. It is therefore essential to define the scope of the obligation imposed on federal institutions by Part VII. In fact, the analysis required by Part VII must redirect the commitment by federal institutions in order to prioritize the community aspect in relation to promotion of the official

[22] OLA, R.S.C. 1985 (4th Supp.), c. 31, ss. 41, 77.

languages and enhancing the vitality of LMCCs. Collaboration with LMCCs is a prerequisite for achieving substantive equality.

C. WHO ARE THE BENEFICIARIES UNDER PART VII OF THE OLA?

C.1. Contextual identification of beneficiaries under Part VII of the OLA

[28] A federal institution violates its obligation to take positive measures to enhance the vitality of LMCCs when beneficiaries under Part VII are defined too narrowly. A federal institution must develop its policies taking LMCCs and their needs into account. When a federal institution fails to take into account all possible beneficiaries under Part VII, it violates its commitment to enhance the vitality of LMCCs.

[29] Given the diversity and dynamism of LMCCs, it is difficult and rare for a static mathematical identification to find all beneficiaries under Part VII. The Supreme Court of Canada has held that beneficiaries of language rights must be identified using qualitative rather than quantitative criteria.[23]

[30] It is obvious today that the *Official Languages (Communications with and Services to the Public) Regulations* (the Regulations)[24] made under Part IV have been vitiated. Those Regulations are not sufficiently flexible to correctly identify the members of the public who would like to receive services in either official language. For example, the Federal Court has held part of the Regulations to be unconstitutional.[25] The Regulations had wrongly ignored 800,000 members of

[23] *Solski (Tutor of) v. Quebec (Attorney General),* [2005] 1 S.C.R. 201 at paras. 28, 35; *R v. Beaulac,* [1999] 1 S.C.R. 768 at para. 33.

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

[25] *Doucet v. Canada*, [2005] 1 F.C.R. 671.

the LMCC on a busy section of the Trans-Canada Highway connecting southern New Brunswick with Nova Scotia.[26]

[31] Federal institutions cannot rely on the gross errors codified in the Regulations made under Part IV to implement Part VII. Those regulations mainly use rigid calculation methods for identifying beneficiaries, such as language first spoken at home. That narrow method of identifying beneficiaries under Part IV disregards, or marginalizes, certain very relevant factors, in particular exogamous marriages.

[32] The criteria for identifying beneficiaries that applies in language law is the ability to speak or use the language, even at a rudimentary level.[27] Language rights have a remedial purpose. Some member of the public spoke the language of the minority but no longer speak it. Others are losing their language. Some no longer speak the language but still consider themselves to be members of LMCCs. Identifying the members of LMCCs is therefore a subtle, subjective exercise.

[33] To identify what community[28] is affected by a federal institution's decision, the linguistic majority and minority must be considered to be two substantively equal communities and they must be served based on their respective needs.[29] *A priori*, all members of the public who use the minority official language[30] could be beneficiaries under Part VII, whether, for instance, the members of the public have in common residence in a province or territory, membership in an

[26] *Ibid.,* at para. 31.

[27] *R v. Beaulac*, [1999] 1 S.C.R. 768 at para. 33.

[28] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 41(1). The English version uses the expression "English and French linguistic minority **communities** in Canada".

[29] *R v. Beaulac*, [1999] 1 S.C.R. 768 at para. 25; *DesRochers v. Canada (Industry)*, [2009] 1 S.C.R. 194.

[30] *Ibid*., at para. 34.

institution, registration in a postsecondary institution of the LMCC, or any other connection.

C.2. Institutional role of supporting the development of the LMCCs

[34] Federal institutions must develop ways of taking the substantive needs of the two LMCCs into account that will produce results. This will allow for concrete implementation of the commitment codified in Part VII.

[35] Federal institutions enable LMCCs to affirm their existence, to come together and to have the impression they control their destiny.[31] Part VII must achieve that, together with Part IV relating to communications and services.

[36] A contextual reading of Part IV leads to the conclusion that federal institutions contribute to the vitality of LMCCs when they offer services and communications in the minority language and thus play a broader institutional role.[32] Part IV can guarantee LMCCs services in their language, to contribute to the vitality of LMCCs by recognizing that federal institutions belong to LMCCs as much as to the majority.

[37] Some federal institutions play a broader supportive institutional role by concretely promoting the official languages of Canada. For example, that broader institutional support is seen when a federal institution has an image, function or status that is closely connected with the federal government, such as the Royal Canadian Mounted Police, or tax collection services. Similar considerations arise when a federal institution is dealing with a postsecondary institution that is important to LMCCs.[33]

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[31] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] 56 O.R. (3d) 577, at paras. 69-71 (C.A.).

[32] Elmer A. Driedger, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983 at p. 87.

[33] Canadian Heritage, "Canada-Albert Agreement on Provincial, National and Interprovincial / Territorial Complementary Projects Related to Official Languages in Education 2008-09" (winter

[38] The Charter also requires that services from federal institutions be provided in English and French were the "nature of the office""[34] warrants it. Under Part IV, a member of the public is not entitled to have federal institutions' offices communicate in their preferred official language[35] where they live in a small LMCC community that does not rise to the mathematical threshold in the Regulations made under Part IV. A federal institution whose nature it was to enhance the vitality of LMCCs and that has beneficial, long-term and tangible effects should offer its services and communications in both official languages, whether or not the LMCC community rises to the mathematical threshold required by the Regulations and Part IV.

[39] A federal institution may violate its commitment to enhancing the vitality of LMCCs by failing to fully play its supportive institutional role. The future of LMCCs necessarily depends on members of the public who are immigrants and who speak the minority language or are inclined to learn it. The commitment by federal institutions, as codified in Part VII, must therefore be given concrete expression through actions that take into account immigration and demographic changes in LMCCs, for example.

2009), on line: Canadian Heritage <http://www.pch.gc.ca/pgm/lo-ol/entente-agreement/education/ab/2008-2009/08-09Entente-Education-AB-eng.cfm>.

[34] *Charter*, subs. 20(1)(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11; OLA, R.S.C. 1985 (4th Supp.), c. 31, s. 22. For further details on the "nature of the office", see section C.4. at pp. 19-21.

[35] Charter, at subs. 20(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11:

> Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
>
> *(a)* there is a significant demand for communications with and services from that office in such language; or
>
> *(b)* due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

C.3. Part IV of the OLA contributes to the vitality of LMCCs

[40] Beneficiaries under Part VII are also beneficiaries under Part IV.

[41] In identifying the beneficiaries under Part IV, the principles brought into play by Part VII must be considered: the existence and vitality of LMCCs as communities. Because Part VII is enforceable, the courts will have to look to it to justify identifying a larger number of beneficiaries who are entitled to the communications and services guaranteed by Part IV.

[42] Strictly speaking, beneficiaries under Part VII are LMCC communities.[36] Proof that LMCCs exist is sufficient to trigger the protection of Part VII when rights guaranteed by Part IV are in issue. If the service offered is closely connected with the primary industry in the region and the survival of the LMCC community, there is reason to believe that the federal institution is required to provide the service under Part VII.

[43] Part VII could also require that a federal institution provide services to an LMCC that false below the mathematical threshold provided by the Regulations made under Part IV, but that is an LMCC threatened by assimilation. These will include regions where disproportionate numbers of recent immigrants choose the majority language and thus where it would be beneficial to bring it to the immigrants' attention that the LMCC is recognized and it is possible to be served by federal institutions in the other official language.

[36] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 41(1).

C.4. Redefining the concepts of "significant demand" and "nature of the office"

[44] With respect to Part IV, the indicators used to calculate the quantitative threshold to be met in order to offer services in both official languages in a federal institution need to be re-examined.[37] Those criteria are "significant demand" and "nature of the office".

[45] First, "significant demand"[38] must be assessed by referring more to the context. Demand is important where an LMCC has institutions such as cultural centres or schools. In addition, a more generous definition of significant demand should be adopted where LMCCs will suffer negative effects because of a federal institution failing to act, taking insufficient action or taking a negative measure and thus discouraging the use of English or French. Part VII should therefore improve the narrow calculations used in the Regulations made under Part IV.

[46] Second, the criterion defined as the "nature of the office" of the federal institution calls for offices to be identified that support the development or recognition of LMCCs. Identifying them reflects the reality that some federal institutions are truly points of first contact for LMCCs, particularly in rural regions. For example, any military recruiting office in Canada that offers services in both official languages enhances the vitality of LMCCs in a beneficial, long-

[37] *Société des Acadiens v. Association of Parents,* [1986] 1. S.C.R. 549 at para. 141 (Wilson J.):

> The narrowness of s. 20(1), although it may very well be appropriate in terms of present resources and capabilities, seems to directly contradict the spirit of s. 16(1). … It is perhaps possible, however, to find latitude for growth by combining the message of s. 16(3) with the use in s. 20(1) of "significant demand for services and communications" and "reasonableness due to the nature of the office" as the determining factor in whether an individual has full rights under s. 20(1). … [P]resumably our understanding of what is significant and what is reasonable under present conditions will evolve at a pace commensurate with social change. Under the aegis of s. 16(3) Parliament and the legislatures may legislate as to what is a "significant demand" and what is "reasonable" in a manner that reflects heightened social expectations. Accordingly, it is only judicial development of the right in s. 20(1) that is hampered by the section's limited scope.

[38] *Charter*, at subs. 20(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.

term and tangible manner. By communicating with recruits in both official languages, this important federal institution considers the linguistic majority and minority to be two substantively equal communities, by serving them according to their respective needs. That is a beneficial, long-term and tangible effect, since that office, by virtue of its nature, makes concrete use of both official languages while contributing to the vitality of LMCCs.

[47] Federal institutions must necessarily comply with the mathematical thresholds prescribed by the Regulations made under Part IV. The Office of the Commissioner of Official Languages acknowledged in 2004 that the identification process does not always meet the objectives of the OLA. According to the 2001 census, for example, 64 post offices were not required to offer services in both official languages. In spite of that, those 64 post offices always offered services in both languages. We might think that Canada Post recognizes the negative impact that the disappearance of services like this can have on these fragile communities.[39] It will therefore sometimes be necessary to use a more flexible method in identifying beneficiaries under Part VII and the OLA as a whole where this is likely to have beneficial, long-term and tangible effects for LMCCs.

[39] Office of the Commissioner of Official Languages of Canada, *Annual Report 2003-2004,* (January 2009), on line: www.ocol-clo.gc.ca <http://www.olcol-clo.gc.ca/html/ar_ra_2003_04_e.php#chap2>.

D. A NEW MODEL FOR THE APPLICATION OF PART VII OF THE OLA BY FEDERAL INSTITUTIONS AND THE COURTS

D.1. What is a "positive measure" within the meaning of Part VII of the OLA?

[48] A positive measure within the meaning of Part VII is a measure taken by a federal institution that is implemented by it and the effects of which are beneficial, long-term and tangible for LMCCs. The role of Part VII is to ensure that in their operations federal institutions take into account both of the linguistic communities they must serve.

D.2. Area to which Part VII of the OLA applies

[49] There is a legal remedy[40] for violation of Part VII. Accordingly, the courts will have to develop precise criteria for determining when a federal institution has violated Part VII.[41] This report explores three scenarios, which occur when a federal institution:

[40] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 77(1).

[41] Note that this analysis is based on *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71. The late Chief Justice Dickson, writing for the majority, proposed a legal test for determining when a Charter guarantee has been infringed:

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> … Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, … [s]ome limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied,

(1) takes a negative measure;

(2) takes insufficient action; or

(3) fails to take a positive measure.

[50] Table G.1. at p. 34 of this report summarizes these three scenarios.

[51] First, Part VII will be enforceable in the courts if the LMCC establishes that the federal institution in question is a federal institution within the meaning of subsection 3(1) of the OLA.[42]

[52] If the institution is not a federal institution within the meaning of subsection 3(1) of the OLA, Part VII does not govern the decisions made by officials and the Federal Court has no authority to intervene.

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it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.

[42] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 3(1) "federal institution":

> "federal institution" includes any of the following institutions of the Parliament or government of Canada:
> (*a*) the Senate,
> (*b*) the House of Commons,
> (*c*) the Library of Parliament,
> (*c.1*) the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner,
> (*d*) any federal court,
> (*e*) any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of Parliament or by or under the authority of the Governor in Council,
> (*f*) a department of the Government of Canada,
> (*g*) a Crown corporation established by or pursuant to an Act of Parliament, and
> (*h*) any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown,
> but does not include
> (*i*) any institution of the Council or government of the Northwest Territories or of the Legislative Assembly or government of Yukon or Nunavut, or
> (*j*) any Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people;

[53] Second, it must be determined whether the failure to act, insufficient action or negative measure taken by a federal institution has a negative effect on the vitality of the LMCC.

[54] When LMCCs are unable to demonstrate that the failure to act, insufficient action or negative measure taken by a federal institution has had a negative effect on their vitality, no violation of Part VII will be established.

[55] LMCCs will sometimes be able to discharge their burden of proving that by failing to act, taking insufficient action or taking a negative measure a federal institution has harmed their vitality. The effect of that conclusion should be to place the burden on the federal institution to justify its actions.

D.3. Federal institutions should justify all negative measures

[56] Tables G.1 and G.1.1 show the following in graphic form.

[57] A federal institution that takes a measure that has a negative effect on an LMCC should be required to justify its actions. To do that, the federal institution should answer the following three questions:

(1) Is the objective sufficiently important to justify a negative measure?[43]

(2) Is there a rational connection between the negative measure taken by the federal institution and the sufficiently important objective of the negative measure?[44]

(3) Does the negative measure constitute minimum impairment of the vitality of LMCCs?[45]

[43] *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 69.

[44] *Ibid.*, at para. 70.

[45] *Ibid.*, at para. 71.

[58] This analysis offers a federal institution a choice of methods for achieving valid objectives, while assigning some accountability, in the eyes of LMCCs. The analysis proposed has the merit of offering officials and judges a concrete method for weighing the importance of federal institutions being able to govern against the importance of the commitment to enhancing the vitality of LMCCs codified in Part VII.

D.3.1. Sufficiently important objective

[59] The objective of the federal institution will be sufficiently important if it relates to a pressing or substantial concern.[46]

[60] A federal institution's budgetary considerations[47] alone should not justify violation of the commitment to enhancing the vitality of LMCCs. It is possible to imagine that another financial crisis might be so severe that federal institutions would have to take remedial measures, even if those measures violated the commitment to support the vitality of LMCCs – provided, obviously, that those measures were proportional both to the financial crisis and to their impact on the rights guaranteed by Part VII.

[46] *Ibid.*, at para. 69.

[47] Peter W. Hogg, *Constitutional Law*, loose-leaf, 5th ed., Vol. 2, Scarborough, Ont., Thomson Carswell, 2007, at para. 38.9(f): "Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter." See also *Newfoundland (Attorney General) v. N.A.P.E.*, [1988] 2 S.C.R. 204; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 64.

D.3.2. There must be a rational connection between the negative measure taken by the federal institution and the sufficiently important objective of the negative measures

[61] This second criterion calls for an analysis of the rationale behind the negative measure.

[62] More specifically, there must be a rational connection between the sufficiently important objective and the negative measure taken by the federal institution. That means that the negative measure used must not be arbitrary, unfair or based on irrational considerations to achieve the objective.

[63] For example, there must be a rational connection between eliminating a program to support LMCCs and the sufficiently important objective of reducing expenses.[48]

[64] On the other hand, where several options are available to a federal institution, it should, wherever possible, select the option that will not negatively affect the vitality of LMCCs. For example, a federal institution could allocate human resources to one location rather than another, after considering the impact of its decisions on an LMCC.

[65] At a minimum, Part VII should provide a mechanism for reducing the incidence of decisions that are arbitrary or unfair to LMCCs.[49] For example, reallocating human resources for budgetary reasons is certainly a rational decision. However, the decision to transfer employees to one region rather than another is not rational if the federal institution is not achieving real savings.

[48] *Fédération des communautés francophones et acadienne du Canada inc. v. Her Majesty the Queen in Right of Canada*, T-622-07 [Settled out of court] (F.C.).

[49] *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 70.

D.3.3. The negative measure must minimally impair LMCCs

[66] A negative measure taken by a federal institution must impair the vitality of LMCCs to the minimum possible extent. A negative measure should not impair the vitality of LMCCs for no reason. At a minimum, a negative measure should not impair the vitality of LMCCs unless, and to the extent that, such a consequence is necessary for the achievement of the federal institution's objective.

[67] In other worlds, a federal institution should use the least infringing means of achieving its objective.[50] If a federal institution's objective is sufficiently important to impair the vitality of an LMCC, but that negative measure negatively affects the LMCC "as little as possible",[51] clearly the violation should be considered to be minimal. On the other hand, the measure would be invalid if the impairment of the LMCC's vitality was not the minimum possible.

D.3.4. Conclusion from the analytical grid proposed

[68] A federal institution may not be able to demonstrate that a decision is sufficiently important to justify a violation of Part VII. Sometimes, such violations will be neither rational nor minimal. It will then be open to the court to grant such remedy as it considers appropriate and just in the circumstances.[52]

[69] However, an application by an LMCC to the Federal Court that did not meet the three tests set out above would be dismissed.

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[50] Peter W. Hogg, *Constitutional Law*, loose-leaf, 5th ed., Vol. 2, Scarborough, Ont., Thomson Carswell, 2007, at para. 38.11(a).

[51] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 139; *R. v. Oakes,* [1986] 1 S.C.R. 103 at para. 70.

[52] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 77(4).

D.3.5. Application of Part VII of the OLA: example of a negative measure[53]

[70] *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)* offers an example of a negative measure.

[71] The Canadian Food Inspection Agency (the Agency) transferred four seasonal inspector positions from its Shippagan office, located on the Acadian Peninsula in northeastern New Brunswick, to the Shediac office in the southeast, but the employees were to be managed out of the office in Black Harbour in the southwest. The Agency claimed the transfer was necessary to rationalize inspection activities in the Acadian Peninsula, given the decline in the fisheries and the transfer of raw fish products from Shippagan to the processing plants in southwest New Brunswick.

(1) Is the Agency a federal institution within the meaning of subsection 3(1) of the OLA?

[72] **Yes.** The Agency meets the criteria of the definition of federal institution.[54] It was created under the *Canadian Food Inspection Agency Act*[55] and is part of the Department of Agriculture and Agri-food.

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

[54] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 3(1).

[55] R.S.C. 1997, c. 6.

(2) Is the Agency's decision to transfer its human resources harmful to the vitality of the LMCC of the Acadian Peninsula?

[73] **Yes.** The Agency's decision to eliminate bilingual positions in the Acadian Peninsula has a harmful effect because job opportunities are particularly precarious in the Acadian Peninsula as a result of the weak economy.[56] The decision is harmful to the status and use of the two official languages in the Acadian Peninsula. The decision therefore has a negative effect on the vitality of the LMCC[57] in the Acadian Peninsula.

(3) Is the Agency's objective sufficiently important to justify the negative measure?

[74] **Yes.** The Agency's decision is related to a pressing or substantial concern: the decline in the fisheries sector and the transfer of the processing industry.

(4) Is there a rational connection between the Agency's decision to transfer its employees and its objective of keeping up with the decline in the fisheries sector and the shift in the industry?[58]

[75] **No.** It is to be expected that the Agency would want to keep up with the decline in the fisheries; that is rational, since the Agency necessarily wants to optimize its human resources based on the industry's needs.

[76] Nonetheless, neither the number nor the bilingual nature of the positions is changing. As well, the managers in Black Harbour in southwest New Brunswick still have to travel, at significant expense. This means that the decision to transfer its employees to one region rather than another is not rational, since the Agency cannot demonstrate any real savings.

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[56] *Forum des maires de la Péninsule acadienne et la Société des acadiens et acadiennes du Nouveau-Brunswick inc. v. Canada (Food Inspection Agency)*, [2004] 4 F.C.R. 276 at para. 2, 68-69 (F.C.A.).

[57] OLA, R.S.C. 1985 (4th Supp.), c. 31, subs. 43(1)(*a*).

[58] *Ibid.*, at para. 70.

(5) Is the interference with the LMCC on the Acadian Peninsula minimal?

[77] **No.** In making its decision, the Agency did not take into account the number of bilingual employees remaining to enable it to offer service in both official languages, in accordance with Part IV.[59] Four jobs were lost in the Acadian Peninsula, one of the most economically disadvantaged regions in Canada. Accordingly, the consequences of the transfer are enormous, when the Agency could have moved positions to Shediac or the Acadian Peninsula.

[78] The Agency should at least have consulted the LMCC before making its decision.[60]

(6) Conclusion

[79] A violation of Part VII has been established, and the Federal Court may make the order it considers appropriate and just in the circumstances.[61]

D.4. Can federal institutions be required to take positive measures?

[80] Tables G.1 and G.1.s at pages 34 and 36 show the following in graphic form.

[81] A two-step analysis could help to determine when federal institutions can be required to take positive measures.

[82] The first question is whether a federal institution is already involved in a particular area. It will be easier to establish that a federal institution is required

[59] OLA, R.S.C. 1985 (4th Supp.), c. 31, Part IV.

[60] *Forum des maires de la Péninsule acadienne v. Canada (Agence canadienne d'inspection des aliments)*, [2004] 1 F.C.R. 136 at paras. 47-51.

[61] OLA, R.S.C. 1985, (4th Supp..), c.31, at subs. 77(4).

to take a positive measure if it is already involved in a particular area and therefore need only modify existing programs.

[83] That being said, where a federal institution is not already involved in a particular area, it would ordinarily be more difficult to prove a violation of Part VII, because situations are rare where it would be open to a court to compel or force a federal institution to become involved in a new area.

[84] The second question is whether the savoir effect or purpose of the failure to act or insufficient action on the part of the federal institution impairs the vitality of the LMCCs sufficiently to justify intervention under Part VII.

[85] Where the effect or purpose of the failure to act or insufficient action on the part of the institution will not significant impair the vitality of the LMCCs, no violation of Part VII will be proved. Where the effect or purpose of the failure to act or insufficient action on the part of the institution significantly impairs the vitality of the LMCCs, there will be a violation of Part VII and the Federal Court may make the order it considers appropriate and just in the circumstances.[62]

[86] Under Part VII, a federal institution is committed to enhancing the vitality of LMCCs. This means that failure to take a positive measure, or taking insufficient action, may result in the application of Part VII. However, it will be very important to assess the effects or purpose of the failure to act or insufficient action on the part of the federal institution very carefully before considering compelling the federal institution to take a positive measure within the meaning of subsection 41(2) of Part VII.

[62] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 77(4).

D.4.1. Application of Part VII of the OLA: example of a failure to act or insufficient action[63]

[87] Industry Canada creates an economic development program for rural regions in Ontario, the "Community Development Program". It is to be implemented by SADCs, Sociétés d'aide au développement des collectivités. The local organization responsible for the project in a particular community, Huronia, is unable to provide services in French on an equal basis with the services offered in English. The LMCC complains to the Commissioner of Official Languages.

(1) Is Industry Canada a federal institution within the meaning of subsection 3(1) of the OLA?

[88] **Yes.** Industry Canada meets the definition of federal institution in subsection 3(1) of the OLA[64].

(2) Is Industry Canada's insufficient action harmful to the vitality of the official language minority group in Huronia?

[89] **Yes.** The unequal services offered by the local organization in charge of the project in both official languages undermines the vitality of the LMCC.[65]

(3) Is Industry Canada already involved in community economic development?

[90] **Yes.** Industry Canada has offered an economic development service to both official language communities in the Huronia region for a long time.

[63] *DesRochers v. Canada (Industry)*, [2009] 1 S.C.R. 194.

[64] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 3(1).

[65] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subss. 41(1), 41(3).

(4) Is the consequence or purpose of Industry Canada's insufficient action harmful to the vitality of the official language minority group in Huronia?

[91] **Yes.** Every time the LMCC does not receive a service of equal quality in French, it receives the message that it is better to proceed in English and abandon any effort to continue to live in French.

[92] A direct consequence of that message will also be an increase in the rate of assimilation of the LMCC because some of its members will be persuaded that their efforts to live in French are futile.[66]

(5) Conclusion

[93] A violation of Part VII has been established, and the Federal Court may make the order it considers appropriate and just in the circumstances.[67]

E. REDIRECTION OF THE COMMITMENT BY FEDERAL INSTITUTIONS: MORE EMPHASIS ON THE COMMUNITY ASPECT

[94] The OLA does not give full effect to its objectives if Part VII is interpreted in a vacuum. The OLA must be interpreted holistically. Applying that idea, Part VII must be analyzed in connection with the other parts of the OLA. The Federal Court of Canada held very recently[68] that Part VII sometimes requires that a federal institution take a positive measure.[69] It is essential that the scope of the obligation imposed on federal institutions by Part VII be clarified.

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[66] Affidavit of Raymond DesRochers in *DesRochers v. Canada (Industry)*, [2009] 1 S.C.R. 194, at paras. 30-32.

[67] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 77(4).

[68] *Picard v. Canada (Office de la propriété intellectuelle)*, 2010 FC 86 [not yet translated].

[69] *Ibid.* The Federal Court ordered the Patent Office to offer service in the other official language even though this is not required by Part IV, which deals specifically with services and communications.

[95] The analysis prescribed by Part VII must redirect the commitment by federal institutions in order to prioritize community-related considerations in relation to promoting official languages and the vitality of LMCCs. This is consistent with the idea of substantive equality that has been recognized by the courts.[70] LMCCs experience the challenges of linguistic assimilation every day. They are therefore in the best position to identify the mechanisms most likely to counter assimilation. Accordingly, any effort made to achieve substantive equality should include collaborating with LMCCs. Collaboration with LMCCs is a prerequisite to achieving substantive equality.

[96] Under subsection 43(2)[71] of the OLA, the Minister of Canadian Heritage must consult the public in implementing Part VII.

[97] In addition to the duty consult, and in light of the principle of substantive equality, it is important to find a way to institutionalize direct collaboration between federal institutions and institutions in LMCCs that are already working to enhance their vitality. Federal institutions' programs will have greater success in complying with the spirit of the OLA if they collaborate more with LMCCs.

[98] It is up to federal institutions to rework their policies in relation to the communities and institutions of LMCCs. There are several ways of doing this and there are already examples of such policies. Some LMCC educational institutions collaborate with federal institutions.[72] A federal institution could also contribute

[70] *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 25.

[71] OLA, R.S.C. 1985 (4th Supp.), c. 31, at subs. 43(2):

> (2) The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to ensure public consultation in the development of policies and review of programs relating to the advancement and the equality of status and use of English and French in Canadian society.

[72] For example, Sainte-Anne school serves both as an educational institution and as a community centre. One of its objectives is "to plan, develop, administer and coordinate the overall community development of the French linguistic community within the boundaries of the geographic area designated …". *Centre communautaire Sainte-Anne Act,* S.N.B. 1977, c. C-1.1.

to the vitality of LMCCs by collaborating with hospitals located in or serving LMCCs.[73] As well, it would be advantageous to some federal institutions to collaborate with institutions in LMCCs whose status is protected by legislation[74] or by the Charter.[75]

[99] Ultimately, it is more effective for federal institutions to implement Part VII using a model that takes into account the importance of the LMCC institutions. That interpretation allows for collaboration between LMCCs and federal institutions. Heightened collaboration between federal institutions and LMCCs is the best approach. It would contribute to giving the principle of substantive equality concrete shape and to achieving the commitment of federal institutions to enhancing the vitality of LMCCs.

[73] See, for example, *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] 56 O.R. (3d) 577 (C.A.).

[74] See, for example, the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. O-1.1; *Engagement With The Francophone Community Under Section 16 of the Act*, O. Reg. 515/09. These regulations were made under the *Local Health System Integration Act, 2006*, S.O. 2006, c. 4.

[75] *Charter,* at subs. 16.1(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11. As in the case of 16.1(1), the importance of LMCCs having "the right to distinct educational institutions and such cultural institutions as are necessary for the preservation and promotion of those communities" should be recognized".

F. CONCLUSION

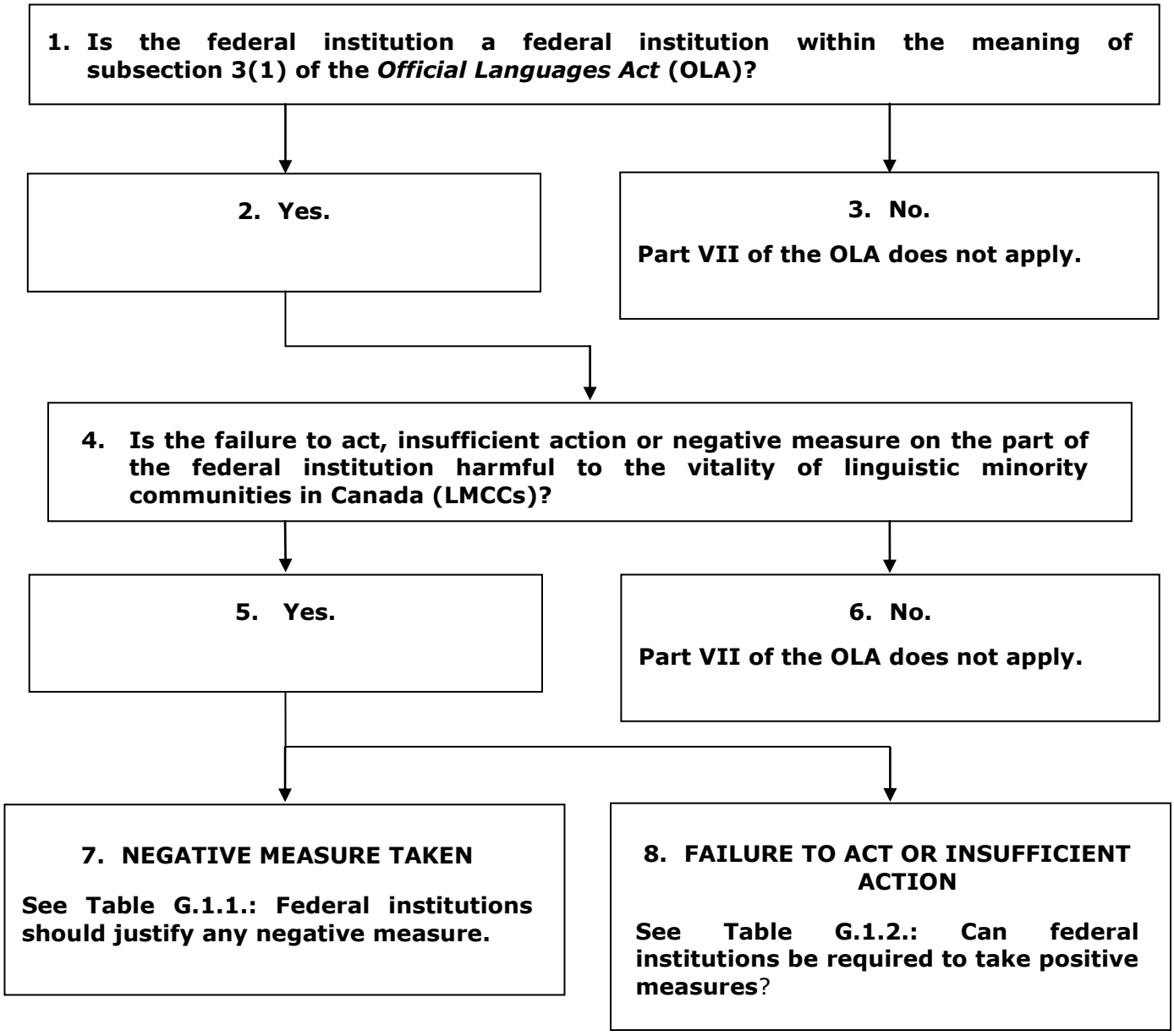
[100] It is important, first, to acknowledge that "positive measures" within the meaning of Part VII are measures taken by a federal institution and applied by that institution, the effects of which are beneficial, long-term and tangible for LMCCs. The special role of Part VII is to ensure that federal institutions take both linguistic communities they are required to serve into consideration in all actions they undertake.

[101] It is possible to break down the situations in which Part VII may be used as a tool for achieving substantive equality. More specifically, Table G.1.1. in this report graphically illustrates the ways in which federal institutions should justify any negative measure. Table G.1.2. outlines an analysis for determining when federal institutions could be required to take positive measures.

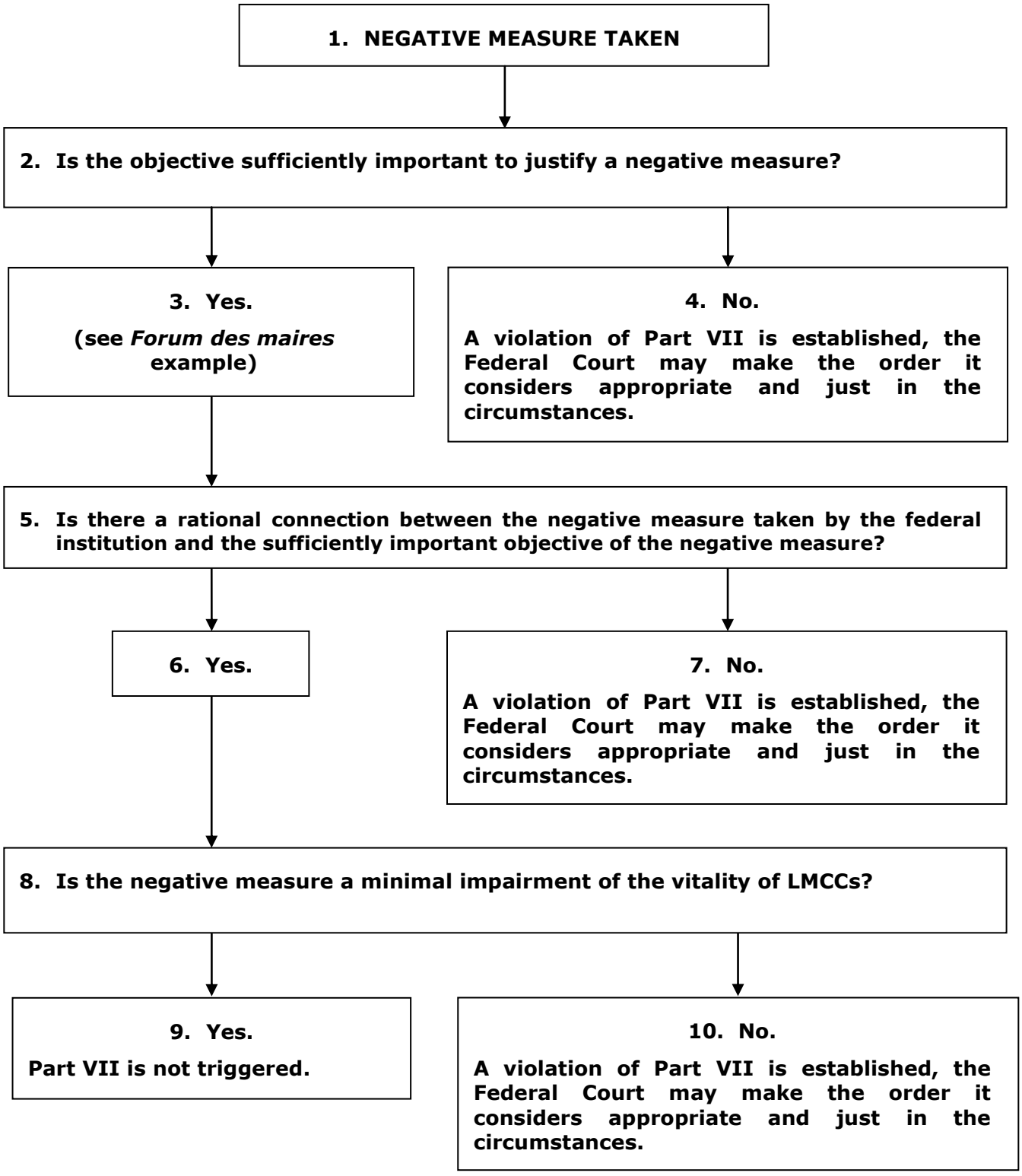
[102] It is in the interest of federal institutions to adopt mechanisms for collaborating with communities and institutions in LMCCs. Participation by LMCCs is necessary so that federal institutions are able to comply with the commitment in Part VII.

G. TABLES

G.1. Part VII of the OLA as a tool for achieving substantive equality



G.1.1. Federal institutions should justify any negative measure



G.1.2. Can federal institutions be required to take positive measures?