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2022 FCA 14

A-182-18

The Commissioner of Official Languages (*Appellant*)

v.

Employment and Social Development Canada and **the Canada Employment Insurance Commission** (*Respondents*)

and

The Attorney General of British Columbia, the **Association des juristes d'expression française du Nouveau-Brunswick** and **the Quebec Community Groups Network** (*Interveners*)

A-186-18

La Fédération des francophones de la Colombie-Britannique (*Appellant*)

v.

Employment and Social Development Canada and the **Canada Employment Insurance Commission** (*Respondents*)

and

The Attorney General of British Columbia, the Association des juristes d'expression française du Nouveau-Brunswick and **the Quebec Community Groups Network (*Interveners*)**

INDEXED AS: CANADA (COMMISSIONER OF OFFICIAL LANGUAGES) V. CANADA (EMPLOYMENT AND SOCIAL DEVELOPMENT)

Federal Court of Appeal, Noël C.J., de Montigny and Rivoalen JJ.A.—Vancouver, October 27 and 28, 2021; Ottawa, January 28, 2022.

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Canada (Human Resources Development) 2001 FCT 1365, [2002] 2 F.C. 164 (Lavigne F.C.), affd 2003 FCA 203, 308 N.R. 186 (Lavigne F.C.A.) holding that OLA not applying to employment assistance services provided by provinces under this type of agreement — Federal government, British Columbia initially signing co-management agreement ensuring continued application of OLA in delivery of employment assistance services in that province — Member organizations of FFCB received funding for their involvement in provision of employment assistance services — Despite co-management agreement, and continued involvement of Francophone organizations in delivery of employment assistance services, eventual full devolution to B.C. remained an issue of concern — Full devolution of employment assistance services took place with signing of Agreement in 2008 — Agreement includes linguistic clause pursuant to which B.C. agrees to ensure that services being offered are accessible in either official language where significant demand warrants — Linguistic clause not requiring British Columbia to preserve participation of Francophone organizations — Commissioner of Official Languages (Commissioner) concluded that complaints well founded under both Part IV, Part VII — Federal Court concluding that Part IV not applying to British Columbia — Concluding that sufficient positive measures taken by federal institutions, obligation under Part VII met — FFCB submitting, inter alia, that Federal Court erred in relying on Lavigne F.C. to establish that British Columbia acting within its own jurisdiction — Whether Federal Court erred in concluding that Part IV not applying to British Columbia, and in concluding that respondents took sufficient positive measures to satisfy obligation under Part VII — Issue of whether complaints well founded also considered — Federal Court not erring in holding it was bound by Lavigne F.C., Lavigne F.C.A. — Lavigne F.C. answering question of whether OLA applying to benefits, measures provided by province under type of agreement at issue in present case — Attempts to cast doubt on correctness of Lavigne F.C., Lavigne F.C.A. unpersuasive — Issue of whether federal institution can evade its constitutional responsibilities by delegating exercise of its powers to province not arising here because British Columbia exercising its own powers under Agreement — Appeal relating to OLA, Part IV dismissed — As to OLA, Part VII, must be interpreted as broadly as other Parts listed in OLA, s. 82(1) — Constitutional protection under Charter, s. 23 not the same as that under Part VII, should not be conflated with each other — Nevertheless, OLA has special status, is broad in scope — Federal Court's interpretation rendering Part VII essentially meaningless — Questions as to whether obligation to enhance vitality of official language minority communities met arising precisely in context of specific factual situation — Federal Court's interpretation also in direct conflict with OLA, s. 58(1), which requires that any complaint alleging failure to comply with OLA must refer to "particular instance or case" underlying alleged breach — Interpretation to be given to obligation under Part VII requiring federal institutions to be aware of, attentive to needs of official language minority communities, to consider impact that their decisions may have on these communities — Obligation set out in Part VII lending itself to two-step analysis — Federal institutions having to be sensitive to particular circumstances of official language minority communities, determine impact of their decisions, initiatives — Second, in implementing decisions, initiatives, federal institutions having to act to enhance vitality of these communities; or counter or mitigate negative repercussions — Complaints well founded — Federal Court not taking into account actual basis for complaints — Nothing included in Agreement to allow federal institutions to intervene in event Agreement implemented by British Columbia without taking objective of not adversely affecting French-speaking minority community into account — Such clause could have been included in Agreement without exceeding jurisdiction of federal government — Federal institutions had to provide for a right to intervene — Could not sign Agreement without acknowledging obligation towards British Columbia's French linguistic minority community under Part VII, and without giving

themselves means to enforce this obligation — Federal institutions ordered to terminate Agreement — Appeals relating to violation of obligation under OLA, Part VII allowed.

Constitutional Law — Distribution of Powers — Federal Court dismissing application by appellant Fédération des francophones de la Colombie-Britannique (FFCB) arising from complaints alleging that respondents failed to meet their language obligations under Official Languages Act (OLA), Parts IV, VII, and under Canadian Charter of Rights and Freedoms, s. 20(1) in entering into, implementing 2008 Canada–British Columbia Labour Market Development Agreement (Agreement) — Major reform of social programs announced in 1993 by federal government — Various partnership models envisaged by reform included full devolution agreement — Full devolution of employment assistance services took place with signing of Agreement in 2008 — Agreement includes linguistic clause pursuant to which B.C. agrees to ensure that services being offered are accessible in either official language where significant demand warrants — Linguistic clause did not require British Columbia to preserve participation of Francophone organizations in any way — Commissioner of Official Languages (Commissioner) concluded, inter alia, that complaints well founded under Part IV — Federal Court concluding that Part IV not applying to British Columbia — FFCB submitting that Federal Court erred in relying on Lavigne v. Canada (Human Resources Development) 2001 FCT 1365 to establish that British Columbia acting within its own jurisdiction — Issue of whether federal institution can evade its constitutional responsibilities by delegating exercise of its powers to province not arising here because British Columbia exercising its own powers under Agreement — British Columbia occupying exclusively field of activity previously shared with federal government — Acting for no one else, assuming functions that fall within its own jurisdiction.

These were appeals from a decision rendered by the Federal Court dismissing an application by the appellant Fédération des francophones de la Colombie-Britannique (FFCB) arising from complaints alleging that the respondents failed to meet their language obligations under Parts IV[1] and VII[2] of the *Official Languages Act* (OLA) and under subsection 20(1) of the *Canadian Charter of Rights and Freedoms* following the implementation of the 2008 *Canada–British Columbia Labour Market Development Agreement* (Agreement).

In 1993, the federal government announced its intention to conduct a major reform of social programs in order to establish a new approach to employment assistance services that would be more coordinated, that would be locally managed and that would better meet the needs of local communities. Various partnership models envisaged by the reform included a full devolution agreement under which provinces had to design and administer their own benefits and measures, with federal financial support. In *Lavigne v. Canada (Human Resources Development)* 2001 FCT 1365, [2002] 2 F.C. 164 (*Lavigne F.C.*), affd 2003 FCA 203, 308 N.R. 186 (*Lavigne F.C.A.*), the Federal Court, Trial Division (hereinafter the Federal Court) held that the OLA did not apply to employment assistance services provided by the provinces under this type of agreement. The FFCB took issue with the correctness of those decisions in the context of the present appeals. Official language minority communities expressed concerns about their fate if a full devolution agreement were chosen. In 1997, the federal government and British Columbia initially opted to sign a co-management agreement which ensured the continued application of the OLA in the delivery of employment assistance services in that province. Under a linguistic clause, clients in certain areas where demand was significant could be served in both official languages. Following the entry into force of the co-management agreement, the participation of Francophone organizations increased substantially and became an important tool for the promotion of linguistic duality in the province. Five organizations, all members of the FFCB, received funding from the Commission for their involvement in the provision of employment assistance services. Despite the co-management agreement and the

[1] The obligations set out in Part IV of the OLA, including the obligation to provide services to the public in either official language where demand warrants, apply to the provinces when they act in the name of the federal government.
[2] Part VII conveys the federal government's commitment to enhance the vitality of the English and French linguistic minority communities in Canada and sets out the obligation of federal institutions to take positive measures towards that end.

continued involvement of Francophone organizations in the delivery of employment assistance services, an eventual full devolution to B.C. remained an issue of concern. The full devolution of employment assistance services finally did take place with the signing of the Agreement in 2008. The Agreement includes a linguistic clause pursuant to which B.C. agrees to ensure that the services being offered are accessible in either official language where significant demand warrants. During the transition between the signing and the coming into force of the Agreement, British Columbia kept Francophone organizations involved in the provision of employment assistance services and extended their funding. It was proposed under British Columbia's new model that the province be split into several geographic areas and that a request for proposals be issued in order to designate single providers that would be responsible for offering the full range of employment services in each of these areas. To qualify, the single providers had to have the capacity to serve a variety of specialized populations, including Francophones. The Francophone organizations proposed that they form a consortium whose function would be to offer a distinct model designed "by and for" the Francophone community. According to British Columbia, the consortium was not necessary in order to ensure services in French because the single providers would assume this responsibility in each area where this requirement had to be met. The province instead suggested that the Francophone organizations could attempt to offer their services pursuant to subcontracting agreements with the single providers. In 2010, British Columbia informed five of the centres that were staffed by the Francophone organizations that they would no longer be receiving funding. It became clear that only a good will gesture on the part of British Columbia could have allowed the Francophone organizations to preserve their role in the provision of employment assistance services in the province. Indeed, the Agreement's linguistic clause did not require British Columbia to preserve their participation in any way. The complaints targeted the end of the funding for the Francophone organizations and their resulting disengagement, to the detriment of the French linguistic minority community. The appellant Commissioner of Official Languages (Commissioner) concluded that the complaints were well founded under both Part IV and Part VII of the OLA. According to the Commissioner's final report, the respondents did not ensure, as required under Part IV of the OLA, that British Columbia was in fact offering employment assistance services in both official languages in the areas where there was significant demand. As for Part VII, the Commissioner concluded that the federal institutions were aware of the concerns of British Columbia's linguistic minority community but did not bother to assess the potential impact that the model envisaged by the province would have on the vitality of the Francophone community following the signing of the Agreement.

The Federal Court determined, *inter alia*, that the measures contemplated by the Agreement fall under both the federal jurisdiction over unemployment insurance under subsection 91(2A) and the provincial jurisdictions under subsections 92(13) and (16) and section 93 of the *Constitution Act, 1867*. The Federal Court also determined that the provisions of the Agreement and the manner in which the benefits and measures are administered by British Columbia do not support the conclusion that the province is acting under the control of the federal institutions. Consequently, the Federal Court concluded that Part IV of the OLA does not apply to British Columbia. The Federal Court examined the text of subsections 41(1) and (2) of the OLA. It determined, *inter alia*, that the duty to take "positive measures" (emphasis in original) is undefined and signals that some deference must be given as to the choice of the measures, that the implementation of Part VII must be carried out while respecting the jurisdiction and powers of the provinces, and that the approach wherein federal institutions must be attentive to official language minority communities and must assess the impact of their decisions on those communities in order to meet the obligation under Part VII was rejected in *Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General)*. The Federal Court also determined that the fact that no regulations have been adopted pursuant to subsection 41(3) of the OLA means that the obligation under Part VII lacks the specificity needed to require federal institutions to take specific measures. The Federal Court concluded that sufficient positive measures were taken by the federal institutions and that these measures, together with the linguistic clause, contributed positively to the vitality and development of

the French-speaking community in British Columbia such that the obligation under Part VII was met.

The FFCB submitted that the Supreme Court decisions in *Eldridge v. British Columbia (Attorney General)* and *DesRochers v. Canada (Industry)* establish the rule that federal institutions cannot avoid their constitutional obligation by entrusting the implementation of a specific federal program to a province. The FFCB also submitted that Part IV applies to British Columbia even though it has concurrent constitutional jurisdiction to legislate in matters relating to employment benefits, and that the Federal Court erred in relying on *Lavigne F.C.* to establish that British Columbia was acting within its own jurisdiction. Regarding Part VII, the FFCB submitted that section 41 of the OLA imposes concrete obligations on federal institutions and establishes parameters that are sufficiently clear to be the subject of review by the courts. It also submitted that the fact that the Charter does not "constitutionalize" the measures taken in order to advance linguistic equality does not prevent the enactment of legislation to that effect, and that is precisely what section 41 seeks to achieve in requiring federal institutions to act so as to enhance the vitality of official language minority communities.

The main issues were whether the Federal Court erred in concluding that Part IV of the OLA does not apply to British Columbia, and in concluding that the respondents took sufficient positive measures to satisfy the obligation under Part VII of the OLA. The issue of whether the complaints were well founded was also addressed.

Held, the appeal relating to Part IV of the OLA should be dismissed; the appeal relating to Part IV of the OLA should be allowed.

The Supreme Court case law did not support the conclusion that *Lavigne F.C.* and *Lavigne F.C.A.* were wrongly decided or that the Federal Court erred in holding that it was bound by them. *Lavigne F.C.* and *Lavigne F.C.A.* preclude the application of Part IV, the Federal Court of Appeal and the Federal Court are bound by their own decisions unless they are shown to be "manifestly wrong". *Lavigne* answers the precise question of whether the OLA applies to benefits and measures provided by a province under the type of agreement at issue in the present case. The attempts to cast doubt on the correctness of *Lavigne F.C.* and *Lavigne F.C.A.* were unpersuasive. As for *Eldridge*, its relevance is no more apparent today than it was when *Lavigne F.C.* and *Lavigne F.C.A.* were decided. Even if it is accepted that a federal institution cannot evade its constitutional responsibilities by delegating the exercise of its powers to a province, this issue did not arise here because British Columbia is exercising its own powers under the Agreement. Furthermore, British Columbia is not being asked to implement a "specific … program" of the federal government. Rather, it is invited to occupy exclusively a field of activity that was previously shared with the federal government. British Columbia is acting for no one else, and the functions that it assumes fall within its own jurisdiction. The appeal relating to Part IV of the OLA therefore had to be dismissed.

As to Part VII of the LLO, which conveys the federal government's commitment to enhance the vitality of the English and French linguistic minority communities in Canada and sets out the obligation of federal institutions to take positive measures to deliver on it, It was necessary to determine the meaning to be given to this commitment. Part VII was not added to the Parts listed in subsection 82(1) of the OLA that are said to prevail over conflicting provisions of any other Act. It remains that Part VII must be interpreted broadly since it shares the same purpose, namely, to support the development of official language minority communities and to advance the equality of the two languages. The constitutional protection under section 23 of the Charter is not the same as that under Part VII of the OLA and the two should not be conflated. Nevertheless, the OLA has a special status and is broad in scope. The Federal Court's interpretation of Part VII essentially rendered it meaningless. In particular, the suggestion that the obligation set out in Part VII cannot target "a federal institution's program, [a] decision-making process, [a] particular initiative, or … a specific factual situation that may have been the subject of a complaint" is not defensible. Indeed, it

is mostly if not exclusively in the context of a specific factual situation that questions can arise as to whether the obligation to enhance the vitality of official language minority communities has been met. The Federal Court's interpretation was also in direct conflict with subsection 58(1) of the OLA, which requires that any complaint alleging a failure to comply with the OLA, including Part VII, must refer to the "particular instance or case" underlying the alleged breach. The courts called upon to hear applications arising from a complaint must be able to render a decision in light of the specific violations of Part VII that are being alleged, since it is the merit of the complaint that is the subject of an application under subsection 77(1). It is difficult to conceive how courts could rule on a Part VII complaint otherwise than on the basis of the specific violation that it alleges. Rather, the interpretation that had to be given to the obligation under Part VII requires federal institutions to be aware of and attentive to the needs of official language minority communities across the country and to consider the impact that the decisions that they are called upon to take may have on these communities. Only then can federal institutions be in a position to act in order to enhance the vitality of official language minority communities. This interpretation coincides with Canadian Heritage's understanding of the Part VII obligation as evidenced by the guide that it publishes for federal institutions. The Federal Court rejected this guide. The guide expresses an opinion that could have informed its decision. The opinion of the government entity responsible for the administration of the law that gives rise to an issue of statutory interpretation is often consulted by the courts as an interpretive aid. The measures set out in Part VII are elaborated by reference to the objective sought, namely, enhancing the vitality of official language minority communities. The interpretation of Part VII that led Canadian Heritage to adopt these measures is also consistent with the grammatical and ordinary sense of the words and takes the legislative context into account. The obligation set out in Part VII lends itself to a two-step analysis. Federal institutions must first be sensitive to the particular circumstances of the country's various official language minority communities and determine the impact that the decisions and initiatives that they are called upon to take may have on those communities. Second, federal institutions must, when implementing their decisions and initiatives, act, to the extent possible, to enhance the vitality of these communities; or where these decisions and initiatives are susceptible of having a negative impact, act, to the extent possible, to counter or mitigate these negative repercussions.

Based on the evidentiary record, the complaints were well founded. The Federal Court did not take into account the actual basis for the complaints and it conducted its analysis on the basis of the wrong legal principle. The evidence shows that it is indeed the Agreement that allowed British Columbia to end the participation of the Francophone organizations in the provision of employment assistance services. It was useful to focus on the conduct of the federal institutions before and after the Agreement was signed. Neither the linguistic clause nor the commitment to consult the Francophone community required British Columbia to preserve in one way or another the role of the Francophone organizations or to ensure that the Agreement was implemented so as not to adversely affect the French-speaking minority community. Surprisingly, nothing was included in the Agreement to allow the federal institutions to intervene in the event that it was implemented by British Columbia without taking this objective into account. Such a clause could have been included in the Agreement without exceeding the jurisdiction of the federal government. The federal institutions had to provide for a right to intervene in the event that British Columbia was to be unyielding. While Part VII does not preclude the taking of negative measures, it does require that they be accompanied by positive measures in order to offset or at least mitigate the negative effects. Nothing was done in this respect. The federal institutions could not sign the Agreement without acknowledging the obligation they had and continue to have towards British Columbia's French linguistic minority community under Part VII, and without giving themselves the means to enforce this obligation in the event that the implementation of the Agreement by British Columbia was carried out to the detriment of this community. The appeals insofar as they relate to the violation of the obligation under Part VII of the OLA were allowed. The federal institutions were ordered to provide British Columbia the notice referenced in article 24.0 of the Agreement indicating their intention to terminate the Agreement in its present form as of April 1, 2024.

STATUTES AND REGULATIONS CITED

An Act to amend the Official Languages Act (promotion of English and French), S.C. 2005, c. 41.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 16, 20(1), 23, 24(1).

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act*, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 91(1A),(2A),(3), 92(13),(16), 93, 102, 106.

Employment Insurance Act, S.C. 1996, c. 23, ss. 57(1)(d.1),(2),(3), 62, 63.

Federal Courts Act, R.S.C., 1985, c. F-7, s. 52(b)(i).

Official Languages Act, R.S.C., 1985 (4th Supp.), c. 31, ss. Preamble, 2(b), 25, 41, 42, 43, 58(1), 77, 79, 82(1).

TREATIES AND OTHER INSTRUMENTS CITED

Canada – *British Columbia Labour Market* Development Agreement, signed April 25, 1997, Art. 7.2, 17.3.

Canada – British Columbia Labour Market Development Agreement, signed February 20, 2008, Art. 1.2, 5.2, 5.3, 5.4, 23.0. 24.0, 25.0.

CASES CITED

FOLLOWED:

Lavigne v. Canada (Human Resources Development), 2001 FCT 1365, [2002] 2 F.C. 164, affd 2003 FCA 203, 308 N.R. 186, [2003] 4 F.C. D-81.

APPLIED:

Picard v. Canada (Commissioner of Patents), 2010 FC 86, [2011] 2 F.C.R. 192; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

DISTINGUISHED:

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, (1997), 151 D.L.R. (4th) 577; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383.

CONSIDERED:

Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General), 2010 FC 999, [2012] 2 F.C.R. 23; *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, 208 D.L.R. (4th) 577; *R. v. Beaulac*, [1999] 1 S.C.R. 768, (1999), 173 D.L.R. (4th) 193; *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2003] 3 F.C. D-16, 220 D.L.R. (4th) 149; *Canadian Food Inspection Agency v. Forum des maires de la Péninsule acadienne*, 2004 FCA 263, [2004] 4 F.C.R. 276; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201; *Mahe v. Alberta*,

[1990] 1 S.C.R. 342, (1990), 68 D.L.R. (4th) 69; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, 447 D.L.R. (4th) 1.

REFERRED TO:

Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669; *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511; *Desrochers v. Canada (Industry)*, 2006 CAF 374, [2007] 3 F.C.R. 3; *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 S.C.R. 194; *R. v. MacKenzie*, 2004 NSCA 10, 221 N.S.R. (2d) 51; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, (1998), 156 D.L.R. (4th) 385; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3; *Canada (Official Languages) v. CBC/Radio-Canada*, 2014 FC 849, [2015] 3 F.C.R. 481, revd on other grounds 2015 FCA 251, [2016] 3 F.C.R. 55; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, (1983), 144 D.L.R. (3d) 193; *Schwartz v. Canada*, [1996] 1 S.C.R. 254, (1996), 133 D.L.R. (4th) 289; *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, (1990), 123 N.R. 83 (C.A.); *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, (1995), 129 D.L.R. (4th) 609; *Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080, (1993), 101 D.L.R. (4th) 567; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, (1991), 83 D.L.R. (4th) 297.

AUTHORS CITED

Canada. Canadian Heritage. Guide for Federal Institutions. Part VII (Promotion of French and English) of the Official Languages Act. Ottawa: Canadian Heritage, 2007.

Hogg, Peter W. *Constitutional Law of Canada*, 4th ed. Scarborough, Ont.: Carswell, 1997.

APPEALS from a decision rendered by the Federal Court (2018 FC 530, [2019] 1 F.C.R. 243) dismissing an application by the appellant la Fédération des francophones de la Colombie-Britannique arising from complaints alleging that the respondents failed to meet their language obligations under Parts IV and VII of the *Official Languages Act* (OLA) and under subsection 20(1) of the *Canadian Charter of Rights and Freedoms* in entering into and implementing the *Canada–British Columbia Labour Market Development Agreement* (Agreement) signed in 2008. Appeal relating to Part IV of the OLA dismissed; appeal relating to Part IV of the OLA allowed.

APPEARANCES

Nicolas Rouleau and *Isabelle Bousquet* for appellant Commissioner of Official Languages.

Giacomo Zucchi and *Maxime Chambers-Dumont* for appellant Fédération des francophones de la Colombie-Britannique.

Ian Demers and *Lisa Morency* for respondents Employment and Social Development Canada and Canada Employment Insurance Commission.

Érik Labelle Eastaugh for intervener Association des juristes d'expression française du Nouveau-Brunswick.

Audrey Mayrand for intervener Quebec Community Groups Network.

SOLICITORS OF RECORD

Commissioner of Official Languages, Gatineau, for appellant Commissioner of Official Languages.

Power Law, Ottawa, for appellant Fédération des francophones de la Colombie-Britannique.

Deputy Attorney General of Canada for respondents Employment and Social Development Canada and Canada Employment Insurance Commission.

Attorney General of British Columbia for intervener Attorney General of British Columbia.

Caza Saikaley LLP, Ottawa, for intervener l'Association des juristes d'expression française du Nouveau-Brunswick.

Power Law, Montréal, for intervener Quebec Community Groups Network.

The following is the English version of the reasons for judgment rendered by

THE COURT:

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INTRODUCTION [TABLE OF CONTENTS]

[1] The Fédération des francophones de la Colombie-Britannique and the Commissioner of Official Languages (the appellants, and the FFCB and the Commissioner, respectively) are both appealing a decision (2018 FC 530) rendered by Justice Gascon of the Federal Court (trial judge) whereby the FFCB's application for a remedy pursuant to subsection 77(1) of the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 (the OLA), was dismissed.

[2] The proceeding arises from four complaints endorsed by the Commissioner alleging that the respondents, Human Resources and Skills Development Canada (HRSDC), since renamed Employment and Social Development Canada (ESDC), and the Canada Employment Insurance Commission (the Commission) (collectively the respondents or the federal institutions) failed to meet their language obligations under Parts IV and VII of the OLA and under subsection 20(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter), in entering into and implementing the Canada–British Columbia Labour Market Development Agreement signed in February 2008 (the Agreement). The Agreement was entered into pursuant to section 63 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the EIA).

[3] The trial judge refused to grant the remedy sought by the FFCB, finding that under the Agreement, British Columbia (B.C. or the province) was not acting "on … behalf" of ESDC and the Commission as required under section 25 of Part IV of the

OLA and that these entities took sufficient positive measures to fulfil their duties under Part VII, specifically section 41.

[4] In support of its appeal, the FFCB maintains that on the basis of the law and the evidence the trial judge was bound to conclude that the Agreement as well as the employment benefits and support measures that it authorizes violate subsection 20(1) of the Charter and Parts IV and VII of the OLA.

[5] The Commissioner takes issue with the portion of the decision that deals with Part VII. He maintains that although the trial judge correctly stated the principles applicable to the interpretation of language rights, he did not take into account Parliament's intention to make federal institutions accountable for their obligations under Part VII on a case-by-case basis.

[6] The respondents ask that we dismiss the appeals on the ground that Part IV does not apply to B.C. and that the evidence supports the trial judge's conclusion that they took sufficient positive measures to satisfy the obligation under Part VII of the OLA.

[7] The Attorney General of B.C., in his capacity as intervener, asks that we uphold the trial judge's decision, whereas the Quebec Community Groups Network (QCGN) and the *Association des juristes d'expression française du Nouveau-Brunswick* (AJEFNB) invite us to set it aside, each substantially agreeing with the position of the parties they support.

[8] For the reasons set out below, we are of the view that the trial judge correctly concluded that Part IV of the OLA and subsection 20(1) of the Charter do not apply to B.C. in its implementation of the Agreement. However, he misinterpreted the obligation cast upon federal institutions under Part VII of the OLA.

[9] After conducting our own analysis on the basis of the applicable legal test, we conclude that the federal institutions failed to meet their obligation towards B.C.'s French linguistic minority community under Part VII of the OLA and that the complaints are to that extent well founded. It follows that the appeals, insofar as they pertain to the breach of the Part VII obligation, must be allowed.

[10] The relevant provisions of the EIA, of the OLA and of the Charter, as they read at the time of the complaints, are appended to these reasons.

THE FACTS [TABLE OF CONTENTS]

[11] The battle waged by B.C.'s French linguistic minority community with respect to language rights in relation to employment assistance services in the province dates back to the 1990s. It is worthwhile to go back to its origins and trace its history up to the filing of the complaints in 2011 in order to understand the issues involved.

[12] In 1993, the federal government announced its intention to conduct a major reform of social programs across the country. One of the goals was to establish a new approach to employment assistance services that would be more coordinated, that

would be locally managed and that would better meet the needs of local communities. The ultimate purpose was for the federal government to withdraw from this field of activity in favour of the provinces, while providing the financial support that would allow them to assume this role. This initiative ultimately led to the adoption of the EIA on June 30, 1996.

[13] Part II of the EIA provided for the various partnership models envisaged by the reform. Subsection 57(3) authorized the Commission to establish employment benefits and support measures (benefits and measures) under three types of intergovernmental agreements:

- a co-management agreement that provided for greater cooperation between the two levels of government. Under this type of agreement, the Commission retained responsibility for establishing and ensuring the provision of benefits and measures. There was therefore no transfer of funds, but the province was involved in the design and management of the benefits and measures, usually through a joint management committee (subsection 57(2) of the EIA);

- an agreement allowing the Commission to mandate the provinces to administer the benefits and measures themselves "on … behalf" of the Commission (section 62 of the EIA);

- a full devolution agreement under which provinces had to design and administer their own benefits and measures, with federal financial support, provided that the measures introduced by the provinces were "similar" to those offered by the Commission and consistent with the purpose and guidelines set out in Part II of the EIA (section 63 of the EIA).

[14] When the EIA was enacted, it was clear that the OLA would apply to the delivery of employment assistance services in the provinces under the first type of agreement since the Commission continued to assume this responsibility directly, as well as under the second type of agreement since in this context the provinces were required to act "on … behalf" of the Commission within the meaning of section 25 of the OLA (see also the affidavit of Mark Goldenberg, at paragraphs 79 to 81, appeal book, page 6292). As we shall see, the application of the OLA to the third type of agreement was not as clear, and the matter was settled a few years later by the courts, which held that the OLA did not apply to employment assistance services provided by the provinces under this type of agreement (*Lavigne v. Canada (Human Resources Development)*, 2001 FCT 1365, [2002] 2 F.C. 164 (*Lavigne FC*), affd *Lavigne v. Canada (Minister of Human Resources Development)*, 2003 FCA 203, 308 N.R. 186, [2003] 4 F.C. D-81, (*Lavigne FCA*)). As will be seen, the FFCB takes issue with the correctness of those decisions in the context of the present appeals.

[15] Following the publication of the bill that led to the adoption of the EIA, official language minority communities with the support of the Commissioner expressed concerns about their fate if this third option were chosen. Shortly before the bill became law, the Commissioner wrote the Minister of HRSDC pointing out that the bill did not

reflect or take into account the commitment made by the federal government to enhance the vitality and support the development of official language minority communities, pursuant to Part VII of the OLA (affidavit of Mark Goldenberg, Exhibit MG-7: appeal book, at pages 7174 and 7175).

[16] It was in response to these concerns that the guideline now set out in paragraph 57(1)(d.1) of the EIA was added to the bill to require participating provinces to provide service recipients with "availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language". The clauses that were inserted to give effect to this guideline in the devolution agreements that were subsequently signed with the provinces and territories came to be known as "linguistic clauses".

[17] Despite the addition of this guideline, the French linguistic minority community in B.C. remained fearful of the potential effects of a full devolution agreement. A few months after the enactment of the EIA, the president of the FFCB, Diane Côté, wrote to the then Minister of HRSDC, Pierre Pettigrew, expressing concern about the potential harm to this community:

> [TRANSLATION]
>
> In British Columbia, past experience with the ability, and even the willingness, of British Columbia government authorities to provide adequate mechanisms to meet the aspirations of the Francophone community gives us reason to believe that the level of service provided to our community will only deteriorate if labour market development programs are entrusted to the province. For example, section 530 of Canada's *Criminal Code* allows for a trial in the official language of the accused's choice. However, the administration of the courts is the responsibility of the provincial Ministry of the Attorney General, and the latter is still unable, seven years after the legislative provisions providing for it came into force, to respond adequately to this language right. You will therefore understand that without an administrative agreement that clearly guarantees and defines the language rights of the French-speaking population in British Columbia, we are quite justified in having concerns about the province's commitment on this issue.
>
> (Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9804 and 9805)

[18] One of the areas of concern was that, under the third option, there was no obligation on the provinces to enhance the vitality and the development of official language minority communities, as required by section 41 of the OLA, and no recourse to the Commissioner was provided in this regard. The FFCB's letter ends as follows:

> [TRANSLATION]
>
> … We fear that the situation will be most difficult for the French-speaking population in British Columbia if the agreement currently being negotiated does not include precise language regarding the parties' responsibilities in language matters. We ask that you intervene immediately with your negotiators to give them specific instructions on the necessary elements with respect to language rights that should be an essential condition for signing an agreement with British Columbia.

> I believe that the government must act on this issue and reiterate its commitment to Canada's linguistic duality by ensuring that such administrative agreements leave no room for interpretation by the provinces as to the services we are entitled to expect in our official language.
>
> (Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9804 and 9805)

[19] These concerns were alleviated somewhat two months later when the federal government and B.C. initially opted to sign a co-management agreement (*Canada–British Columbia Labour Market Development Agreement* (1997)) which, as noted above, ensured the continued application of the OLA in the delivery of employment assistance services in B.C.

[20] This co-management agreement was entered into on April 25, 1997, and was in effect for just over ten years. Under the terms of the agreement, the federal government retained responsibility for the establishment of benefits and measures while B.C. participated in their design and management. B.C. was also involved in setting objectives and priorities (Final Investigation Report of the Office of the Commissioner of Official Languages dated April 2013, at page. 3; affidavit of Hovan Baghdassarian, at paragraphs 45 to 59: appeal book, at pages 2298 and 2699 to 2702).

[21] The services offered by the Commission under the co-management agreement complemented certain employment programs already offered by B.C. (affidavit of Hovan Baghdassarian, at paragraphs 8 to 21: appeal book, at pages 2687 to 2692). To avoid duplication of financial assistance, clients eligible for both were referred to HRSDC by the province (affidavit of Duncan Shaw, at paragraphs 96 and 104: appeal book, at pages 8644 and 8646).

[22] Under the linguistic clause (Article 7.2 of the co-management agreement), clients in certain areas where demand was significant (i.e. Vancouver (including New Westminster), Victoria, Abbotsford, Chilliwack, Penticton, Prince George, Kelowna, Kamloops and Nanaimo) could be served in both official languages (affidavit of Viviane Beaudoin, at paragraph 10: appeal book, at pages 4391 and 4392).

[23] The provision of "employment assistance services" was carried out primarily through specific organizations involved in the community, with the financial support of the Commission. In order to ensure that these services were available to members of the French linguistic minority community in their language, the Commission provided funding to Francophone organizations (affidavit of Hovan Baghdassarian, at paragraph 60; affidavit of Duncan Shaw, at paragraphs 62, 67 and 70 to 72: appeal book, at pages 2702 and 8636 to 8638).

[24] Following the entry into force of the co-management agreement, the participation of Francophone organizations increased substantially and became an important tool for the promotion of linguistic duality in the province. Francophone organizations took great pride in developing a wide range of assisted and unassisted services that they offered to members of the Francophone community seeking employment (affidavit of Réal Roy,

at paragraph 10; affidavit of Duncan Shaw, at paragraphs 73 to 75: appeal book, at pages 1825, 8638 and 8639).

[25] As regards unassisted services or “self-service” activities, Francophone organizations provided tools to job seekers such as computer resources giving them access to databases for job searches and the preparation of applications, a library of reference material and job banks tailored to Francophones (affidavit of Christian Francey, at paragraphs 35, 36 and 44; affidavit of Yvon Laberge, at paragraphs 27 to 31; affidavit of Tanniar Leba, at paragraph 13; affidavit of Lise Morin, at paragraphs 6 to 8: appeal book, at pages 415, 418, 778, 779, 1559, 1697 and 1698).

[26] Clients of the Francophone organizations also had access to multiple “assisted” services and activities; they were referred to in this way because they were offered under the supervision of employment counsellors. These included the following:

- Case management: an employment counsellor or coach would meet with the client to identify the client’s employment needs. Together with the client, the counsellor would develop a return-to-work action plan and would follow up with the client. Assistance could be provided, for example, in résumé preparation or career planning, but also in applying for employment insurance benefits. Follow-up included in-person and telephone meetings as well as communication of new job opportunities.

- Group workshops: job search and career planning group workshops were organized and covered topics such as skills development, cover letter/résumé preparation, networking and interview techniques.

- Online services: clients were given the opportunity to communicate virtually with an employment counsellor.

- Job fairs: once or twice per year, job fairs were organized in Vancouver to bring together French-speaking employees and potential employers that offered a bilingual work environment.

- Employment cafés: as a networking activity, an employer could be invited to give a presentation to individuals interested in the field.

- Regional response: an employment counsellor based in the major centres could travel to more remote areas, as needed, to provide employment assistance services in French in that community.

- Guidance counsellors: a guidance counsellor was available to answer questions about employment status or career choices and to help understand and overcome obstacles to job searches.

(Affidavit of Christian Francey, at paragraphs 37 to 44; affidavit of Yvon Laberge, at paragraphs 32 to 43; affidavit of Tanniar Leba, at paragraphs 14 and 15, affidavit of

Lise Morin, at paragraphs 9 to 15: appeal book, at pages 416 to 418, 779 to 781, 1559, 1698 and 1699)

[27] The FFCB, the recognized representative of the interests of the French linguistic minority community in the province, had a lot to do with this. Five organizations, all members of the FFCB, received funding from the Commission for their involvement in the provision of employment assistance services: Collège Éducacentre (Éducacentre), Société francophone de Victoria (SFV), La Boussole – Centre communautaire francophone (La Boussole), Centre francophone de services à l'emploi de l'Okanagan (CFSEO), and Centre d'intégration pour immigrants africains (CIIA). These organizations served different areas, specifically, Vancouver, Victoria, Prince George, Kelowna, Penticton and New Westminster. While distinct from each other, they shared as a common thread their fundamentally Francophone character.

[28] At the time of the coming into force of the EIA, the role of these organizations in B.C. was still in its infancy. It was through the partnership with HRSDC following the signing of the co-management agreement that some of these organizations were able to open their doors and others to expand the scope of their services. To this end, the organizations entered into annually renewed contracts with HRSDC, which described in detail the employment assistance services that they were to offer to the Francophone linguistic minority community and providing for the necessary funding (affidavit of Christian Francey, at paragraphs 7 to 9; affidavit of Yvon Laberge, at paragraphs 18, 19 and 23; affidavit of Tanniar Leba, at paragraphs 8 to 10; affidavit of Lise Morin, at paragraphs 2 to 5; Final Investigation Report of the Office of the Commissioner of Official Languages dated April 2013, at pages 1 and 3; affidavit of Duncan Shaw, at paragraph 75, Exhibits DS-9 and DS-14: appeal book, at pages 407, 408, 776, 777, 1558, 1559, 1697, 2296, 2298, 8639, 9266 to 9394 and 9558).

[29] Despite the co-management agreement and the continued involvement of Francophone organizations in the delivery of employment assistance services, an eventual full devolution to B.C. remained an issue of concern. Indeed, the co-management agreement provided that B.C. could make a request towards that end at any time, if it saw fit to do so (Article 17.3 of the co-management agreement).

[30] On January 12, 1998, the FFCB sent a letter to HRSDC outlining the safeguards it expected in the event of full devolution and asked the Minister to [TRANSLATION] "undertake not to sign any agreement with B.C. which does not provide for measures to meet the requirements of Part VII of the Official Languages Act, particularly section 41" (affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9806 and 9807). The letter states that the [TRANSLATION] "Francophone community's immediate concern is that the provincial government does not appear willing to put in place a mechanism of cooperation that would have the effect of better identifying the needs of our community and proposing initiatives to address them."

[31] On June 11, 1998, after learning that B.C. had officially requested the full devolution of labour market development measures, the FFCB again raised its concerns with Minister Pettigrew:

[TRANSLATION]

> The past and present actions of our provincial government leaders, led by Premier Glen Clark, cannot help but raise serious concerns about the level of service in our official language that the provincial government would provide. The way to alleviate our concerns is to include specific clauses in any devolution agreement that address the issue of the application of the *Official Languages Act*.

(Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9812 and 9813)

[32] The letter reiterates that specific guarantees are required [TRANSLATION] "because of the high risk that once the provincial government is responsible for delivery of the measures … it will not respect the services to which we should have access in our language." The FFCB concluded by stressing that, in the absence of sufficient guarantees, it would be preferable for the federal government to remain responsible for its share of employment assistance services in B.C.:

[TRANSLATION]

> If the provincial government cannot be persuaded to accept a maximum level of responsibility for applying the *Official Languages Act*, I would like to know if it would be possible for the federal government to remain responsible for measures inherent to the development of labour markets for the Francophone community. …
>
> I believe that you have had the opportunity to understand the unfavourable political context in which British Columbia's Francophone community finds itself and to see the lack of consideration, in any form, that we receive from provincial political authorities. Without strong leadership on your part, Canada will not be able to pride itself of its official bilingual status from coast to coast.

(Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9812 and 9813)

[33] The Minister replied on August 26, 1998, indicating that for each province that opts for a full devolution, the agreements provide for [TRANSLATION] "firm commitments on official languages" and that this was a [TRANSLATION] "priority" in the negotiations. In particular, he explained that the linguistic clauses would require that programs and services be offered in English upon request in Quebec and in both official languages in New Brunswick to reflect the particular circumstances of each province (Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9810 and 9811).

[34] This response raised significant concerns, the FFCB being of the opinion that the content of the linguistic clauses should rather be geared to address the fragility of the linguistic minority community in the province where the devolution takes place. In its October 16, 1998, letter, the FFCB wrote the following:

[TRANSLATION]

> It goes without saying that if the agreement were limited to linguistic clauses that reflect the prevailing linguistic reality of the provincial government, the content would be meagre for the Francophone community of our province. For us, it is important that the Francophone

public have access to quality services in their language, and have recourse to the Commissioner of Official Languages in cases where service is not available.

Moreover, I would like you to confirm that special initiatives for our development, such as the Éducacentre training project, the Chambre de commerce franco-colombienne's entrepreneurship centre or the Francophone associations' employment projects, will always be accessible in accordance with the spirit of section 41 of the *Official Languages Act*. …

(Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9814 and 9815)

[35] In his February 18, 1999, response, the Minister of HRSDC referred again to the linguistic clause and explained that the official language minority community in B.C. has nothing to worry about:

[TRANSLATION]

… I can only restate my firm intention to ensure that a new Canada-British Columbia labour market development agreement will ensure that programs and services are available in French where demand justifies it.

… As I have personally assured you, your community will be informed of the linguistic clauses in any future Canada-British Columbia agreement before that agreement is signed.

(Affidavit of Duncan Shaw, Exhibit DS-18: appeal book, at pages 9816 and 9817)

[36] Shortly before then, in April 1998, the Task Force on Government Transformations and Official Languages was established following a recommendation made by the Commissioner. The Task Force, in conducting its review, became aware of the particular situation of the French linguistic minority community in B.C. and it shared its observations with Minister Pettigrew:

[TRANSLATION]

During these consultations, almost all the associations visited identified labour market development agreements as being one of the most important transformations to have occurred within government in recent years that impacts significantly on official language minority communities. I would like to draw your attention more particularly to the representations made by the FFCB concerning talks between your Department and British Columbia to allow the province to take more responsibility for active employment measures supported by employment insurance funds.

Indeed, FFCB representatives expressed to the Task Force members their deep concern regarding access, in French, to the services and programs concerned once responsibility for delivery is transferred to the province. The FFCB raises British Columbia's political context and how little consideration the provincial government gives to the Francophone community. It would like a firm commitment on your part that you will require the province to undertake to respect the *Official Languages Act*. It is not the role of the Task Force to interfere in the ongoing negotiations with British Columbia. We feel it is appropriate, however, for your Department to require a firm commitment from the province with regard to providing programs and services in French.

The Task Force cannot ignore this request and we are sharing it with you, knowing that your kind attention can be counted on, regarding the way forward on this matter.

(Affidavit of Mark Goldenberg, Exhibit MG-16: appeal book, at pages 7519 and 7520)

[37] The Minister of HRSDC responded to the Task Force by restating his commitment [TRANSLATION] "to ensuring that the rights of official language communities are protected in all agreements" and, with regard to B.C., that if an agreement were to be signed, it would include [TRANSLATION] "clear commitments that will allow access to programs and services in both official languages where the significance of the demand warrants it" (affidavit of Mark Goldenberg, Exhibit MG-16: appeal book, at pages 7521 and 7522).

[38] These exchanges came to a standstill for a time before resuming in full force eight years later following the tabling in the House of the March 19, 2007, budget. On that occasion, the federal government announced that it was offering a complete transfer of employment assistance programs to all provinces that had yet to sign a full devolution agreement.

[39] On April 27, 2007, the FFCB sent an email to HRSDC's Skills and Employment Branch, expressing the concerns raised in the province by the start of the federal-provincial negotiations towards a full devolution of employment assistance programs in favour of B.C. The email explains the importance of the continued participation of the Francophone organizations in order to meet the needs of the Francophone community:

> [TRANSLATION]
>
> Through the federal government's support for official language communities, through the support of your Department, a certain number of Francophone organizations offer a broad … range of employment services—some for years, including at the Collège Éducacentre and at La Boussole, and others recently negotiated, including at the Centre d'intégration des immigrants africains. These support programs are essential for our community, and their effectiveness no longer needs to be demonstrated. The figures are available for consultation, as you know.
>
> We believe that the relationship between the Francophone community and the provincial government is good. The Intergovernmental Relations Secretariat, through the Office of Francophone Affairs and its minister, has opened up many doors for us, but there is no doubt that this devolution of power could be catastrophic and call into question all of this programming. We know that during negotiations, the federal government can impose a linguistic clause designed to twist the arm of the provincial government and the provincial department(s) that will be responsible for managing these programs. This clause must be legally enforceable, and the provincial government must not be able to ignore it. We also know that in British Columbia, unlike in New Brunswick, our community has no official status; everything is left to the discretion and good will of the provincial government.
>
> We also know, from experience, that even federal funds destined to provide services to Francophones are not always allocated to Francophone organizations for the delivery of these services. The Francophone immigration file in our province is the most flagrant example of this. I would like to start the dialogue and share these concerns with you. I know that in British Columbia, some employees in your Department are already aware that the Francophone community is ready to do everything in its power to ensure that the programs that we successfully deliver will not be threatened or questioned in any way. I

> have received a few calls, which allowed me to share the determination of the entire Francophone community.
>
> (Affidavit of Réal Roy, Exhibit B: appeal book, at pages 1889 and 1890)

[40] On May 14, 2007, the president of the FFCB sent another letter, this time directly to the Minister of HRSDC at the time, Monte Solberg. The letter reiterated the importance of the ongoing participation of Francophone organizations in the delivery of employment assistance services in B.C.:

> One of the success stories of our community is related to a partnership we have developed over the years with the federal government, with the ministry you are now in charge of, Human Resources and Social Development. Employment related programs as designed by your ministry have being [*sic*] offered by Francophone staff in Francophone institutions for the last 15 years. The number of Francophone service providers has increased every year and the number of Francophone clients supported in a crucial period of their lives is also growing constantly.
>
> …
>
> We would like to believe that during the negotiations that will take place, you will include a linguistic clause that the province has an obligation, a duty to respect, an executory clause that could not be overridden. The provincial ministry managing those programs would bear the same responsibility as its federal counterpart previously did.
>
> It is true that the Francophone community of British Columbia is supported by its provincial government and by the Minister responsible for Intergovernmental Affairs, the Honorable John van Dongen.
>
> But we are aware that the devolution of powers has its drawbacks, the funding of Francophone immigration services remains an issue for our community, as you well know. In British-Columbia settlement services for Francophone immigrants are still exclusively the responsibility of service providers from the community at large.
>
> (Affidavit of Réal Roy, Exhibit C: appeal book, at pages 1892 and 1893)

[41] Three months later, Minister Solberg reiterated the position taken by the federal government over the years, namely that a linguistic clause corresponding to the text of paragraph 57(1)(d.1) of the EIA would ensure the protection of B.C.'s Francophone linguistic minority community (Affidavit of Réal Roy, Exhibit D: appeal book, at page 1895).

[42] The last noteworthy exchange during the period that led to the full devolution took place at a meeting in September 2007, when the FFCB tried to alert federal officials in charge of the final negotiations to the particular plight of the French linguistic minority community in B.C. and to the importance of including an [TRANSLATION] "airtight" linguistic clause in an eventual agreement (Affidavit of Réal Roy, Exhibit E: appeal book, at page 1899).

[43] The full devolution of employment assistance services finally took place a few months later. The Agreement was signed by the parties (B.C. being represented by its

responsible minister and Canada being represented by the Commission and HRSDC) on February 20, 2008. The Agreement provides that it will become effective on February 2, 2009, a date that coincides with the date on which the co-management agreement ceases to be in effect (Articles 2.4 and 3.1 of the Agreement). B.C. was the second last jurisdiction in the country to assume full and exclusive responsibility for employment assistance services, Yukon being the last (affidavit of Mark Goldenberg, at paragraphs 119 and 120: appeal book, at page 6300).

[44] The Agreement is open-ended and remains in place to this day. It may be terminated at any time with two years' notice, in which case the parties agree to work together to ensure that services to clients will not be unduly affected or interrupted (Articles 23.0 and 24.0 of the Agreement). The Agreement may also be amended at any time with the mutual consent of the parties (Article 25.0 of the Agreement).

[45] With regard to the use of official languages in the provision of services, the Agreement includes a linguistic clause pursuant to which B.C. agrees to ensure that the services being offered are accessible in either official language where significant demand warrants (Articles 5.2 and 5.3 of the Agreement). B.C. also agrees to consult the French linguistic minority community "on the provision of … Benefits and Measures" that it would be called upon to manage (Article 5.4 of the Agreement).

[46] The transition between the signing and the coming into force of the Agreement was extended until B.C. implemented its Employment Program of British Columbia (EPBC) and its "one-stop shop" model in April 2012. During this period, B.C. kept Francophone organizations involved in the provision of employment assistance services and extended their funding, which stood around $2.4 million per year (affidavit of Christian Francey, at paragraphs 13 and 14, affidavit of Yvon Laberge, at paragraphs 20, 21 and 23; affidavit of Tanniar Leba, at paragraph 11; affidavit of Réal Roy, Exhibit M; affidavit of Hovan Baghdassarian, at paragraphs 88 to 90, 95 and Exhibit HB-13: appeal book, at pages 409, 777, 1559, 2193, 2709, 2710, 3392 and 3393).

[47] This extended transition period was used by B.C. to undertake a series of consultations at several levels in order to improve the transformation it envisaged (Business Transformation Project). This initiative led to consultations with the representatives of the French linguistic minority community, as required by Article 5.4 of the Agreement (affidavit of Hovan Baghdassarian, at paragraphs 64 to 73; affidavit of Duncan Shaw, at paragraphs 170 to 173: appeal book, at pages 2703 to 2706, 8663 and 8664).

[48] It was proposed under B.C.'s new model that the province be split into 73 geographic areas and that a request for proposals be issued in order to designate single providers that would be responsible for offering the full range of employment services in each of these areas. To qualify, the single providers had to have the capacity to serve a variety of specialized populations, including Francophones, immigrants, persons with disabilities, Indigenous peoples and youth (affidavit of Christian Francey, at paragraphs 19 and 24 to 27; affidavit of Yvon Laberge, at paragraphs 45, 51 to 57 and Exhibit H;

affidavit of Tanniar Leba, at paragraphs 25 and 26: appeal book, at pages 411 to 413, 782 to 784, 1486 to 1551, 1561 and 1562).

[49] In order to preserve their role in the provision of employment assistance services to B.C.'s linguistic minority community, the five Francophone organizations proposed that they form a consortium whose function would be to offer a distinct model designed "by and for" the Francophone community. The consortium would be funded by a separate envelope. This proposal was presented in September 2010 and promptly rejected by B.C. in the following month (affidavit of Christian Francey, at paragraphs 18 and 20 to 23; affidavit of Yvon Laberge, at paragraphs 46 to 50; affidavit of Tanniar Leba, at paragraphs 27 to 30; affidavit of Réal Roy, at paragraphs 52 to 55 and Exhibit P: appeal book, at pages 410 to 412, 782, 783, 1562, 1563, 1839, 1840 and 2206 to 2213).

[50] According to B.C., the consortium was not necessary in order to ensure services in French because the single providers would assume this responsibility in each area where this requirement had to be met. B.C. instead suggested that the Francophone organizations could attempt to offer their services pursuant to subcontracting agreements with the single providers (affidavit of Tanniar Leba, at paragraphs 31 and 32; affidavit of Réal Roy, at paragraphs 57 to 62 and 75; affidavit of Hovan Baghdassarian, at paragraphs 76 to 81 and Exhibit HB-10: appeal book, at pages 1563, 1840 to 1842, 1846, 2706, 2707 and 3326 to 3338).

[51] In the fall of 2010, B.C., relying on a series of reasons pertaining to efficiencies, informed five of the centres that were staffed by the Francophone organizations that they would no longer be receiving funding (affidavit of Yvon Laberge, at paragraph 24; affidavit of Tanniar Leba, at paragraph 33; affidavit of Lise Morin, at paragraph 17; affidavit of Réal Roy, at paragraph 56, Exhibit Q; Final Investigation Report of the Office of the Commissioner of Official Languages, at pages 1 and 4, affidavit of Hovan Baghdassarian, Exhibit HB-15: appeal book, at pages 778, 1563, 1700, 1840, 2215, 2296, 2299 and 3421 to 3468). The FFCB again asked the federal government to intervene.

[52] In a letter sent in January 2011 to the Minister of HRSDC at the time, Diane Finley, the FFCB was indignant about the devastating consequences that the closure of the five centres would have on the French linguistic minority community. The Minister responded five months later, entirely avoiding the issue surrounding the continued participation of the Francophone organizations. Minister Finley indicated that the linguistic clause would be respected and invited the FFCB to raise issues pertaining to the method of delivery of employment assistance services with the B.C. government:

…

> The Government of Canada expects that the Government of British Columbia will honour its official language commitments under the Canada-British Columbia LMDA. Human Resources and Skills Development Canada officials have received assurances from the provincial government on several occasions that it will continue to provide French language labour market services where numbers warrant.

> Should you continue to have concerns related to labour market service delivery in British Columbia, I would encourage you to contact the Minister responsible, the Honourable Harry Bloy, British Columbia Minister of Social Development and Minister Responsible for Multiculturalism.
>
> …
>
> (Affidavit of Réal Roy, Exhibit U: appeal book, at pages 2237 and 2238).

[53] It became clear to everyone, following this last response, that only a good will gesture on the part of B.C. could have allowed the Francophone organizations to preserve their role in the provision of employment assistance services in the province. Indeed, the linguistic clause, which the federal government brandished over the years as the ultimate response to the concerns of Francophone organizations, did not require B.C. to preserve their participation in any way. The only obligation imposed on B.C. by this clause was to ensure that the services would be available in both official languages at the point of contact with the public, where demand warrants (Articles 5.2 and 5.3 of the Agreement).

[54] A few days after receiving Minister Finley's response, the FFCB filed its complaint with the Commissioner. It is worth reproducing the essential components of the complaint in full:

> [TRANSLATION]
>
> Please accept this letter as a complaint filed by the FFCB with the Office of the Commissioner of Official Languages further to the cancellation, in five B.C. centres, of employment services previously offered to Francophones through agreements signed with the Department of Human Resources and Skills Development. It affects La Boussole in Vancouver, Kelowna, Penticton and Prince George and the Centre d'intégration des immigrants africains in New Westminster.
>
> Further to the devolution of federal government powers to the provincial government under a bilateral agreement, the British Columbia Ministry of Social Development notified these organizations of the withdrawal of their funding in 2011 and of the fact that they would no longer be able to offer employment services to Francophone clients.
>
> The signed agreement, however, contained a linguistic clause to the effect that the federal department must ensure compliance by guaranteeing that services are maintained, the importance of which is well established. The demand for these services remains pressing even when there are now no organizations that can meet this demand.
>
> The federal Department of Human Resources and Skills Development accepted no responsibility and demonstrated a lack of commitment. This provincial decision, which Ottawa cannot ignore, is a serious infringement of the rights of Francophones in British Columbia. This decision will have devastating consequences for Francophones and on the community in which these individuals live and will negatively affect the development and vitality of our community.
>
> (Affidavit of Réal Roy, Exhibit CC: appeal book, at pages 2271 and 2272).

[55] Three other complaints had been filed in the preceding months. Like the one filed by the FFCB, each target the end of the funding for the Francophone organizations and their resulting disengagement, to the detriment of the French linguistic minority community (affidavit of Serge Dancoste, Exhibit A; affidavit of Tanniar Leba, Exhibit B; affidavit of Duncan Shaw, Exhibits DS-38 and DS-39: appeal book, at pages 337 to 339, 1576, 10281 to 10288).

[56] It should be noted that after the complaints were filed, the attempts made by the Francophone organizations to continue their activities, within the model introduced by B.C. in April 2012, failed miserably. Some obtained occasional subcontracts, but scant funding led to the dismissal of almost all of their employees. Even the SFV, the only one of the five Francophone organizations that obtained a subcontract to operate its own centre, was forced to dismiss half of its employees and sublet part of its office space.

[57] After conducting his investigation, the Commissioner concluded that the complaints were well founded under both Part IV and Part VII of the OLA. According to his final report, published in April 2013, HRSDC did not ensure, as required under Part IV of the OLA, that B.C. was in fact offering employment assistance services in both official languages in the areas where there was significant demand. As for Part VII, the Commissioner concluded that the federal institutions were aware of the concerns of B.C.'s linguistic minority community but did not bother to assess the potential impact that the model envisaged by B.C. would have on the vitality of the Francophone community following the signing of the Agreement. Moreover, the federal institutions took no measures in order to allow them to counter the negative impact of the implementation of the Agreement in the event that it would adversely affect B.C.'s French linguistic minority community (Final Investigation Report of the Office of the Commissioner of Official Languages dated April 2013, at pages 17 to 19: appeal book, at pages 2312 to 2314).

[58] The application before the Federal Court was filed in August 2013 but was suspended to allow the parties to explore the possibility of a settlement. The matter was finally heard in May 2017, and the decision dismissing the application was rendered on May 23, 2018. The appeals were set to be heard in May 2020 on consent, but the public health crisis intervened before they could be heard. The parties subsequently insisted on the appeals being argued in person with the result that the hearing did not take place until October last.

DECISION UNDER APPEAL [TABLE OF CONTENTS]

[59] The trial judge's reasons consist of 157 pages and 300 paragraphs. The following is a summary of the essential points.

[60] The trial judge notes at the outset of the analysis that two agreements were signed by the Government of Canada and B.C. in February 2008—the other being the Canada–British Columbia Labour Market Development Agreement—but that only the one involving labour market development (the Agreement) was at issue before him

(Reasons, at paragraph 14). He explains that at the time, funding approximating $300 million was paid annually by the federal institutions to B.C. pursuant to this Agreement.

[61] According to the trial judge's reading of the complaints, they were aimed at the new employment assistance services program (the EPBC) and the "one-stop shop" model implemented by B.C. in April 2012 (Reasons, at paragraphs 22 to 25). After identifying these two initiatives as the source of the complaints, he reviews the Commissioner's final report, which concluded that the complaints were well founded (Reasons, at paragraphs 29 and 30).

[62] The trial judge then addresses the application filed by the FFCB and describes the applicable legal regime and the principles that guide the interpretation of language rights (Reasons, at paragraphs 31 to 53). He continues by explaining why, in assessing the validity of the complaint filed by the FFCB, he must limit his review to the facts as they stood at the time it was filed (Reasons, at paragraphs 66 to 82). He concludes this discussion by faulting the FFCB for having filed its complaint hastily, given that the EPBC and the "one-stop shop" model were introduced after it was filed (Reasons, at paragraph 83).

[63] The judge then examines the complaints in the light of Part IV of the OLA and asks whether, for the purpose of the Agreement, B.C. is acting "on … behalf" of the federal institutions as these words appear in section 25. He first dismisses the FFCB's argument that unemployment insurance is an exclusive federal jurisdiction. In so doing, he relies on *Lavigne FC*, as affirmed by *Lavigne FCA*, and explains why, in his view, these decisions were not overtaken by the Supreme Court's decisions in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669 (*Reference re EIA*), and *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511 (*CSN*) (Reasons, at paragraphs 87 to 89 and 101 to 118).

[64] Rather, the trial judge concludes that the measures contemplated by the Agreement come within concurring jurisdictions. They fall under both the federal jurisdiction over unemployment insurance under subsection 91(2A) and the provincial jurisdictions under subsections 92(13) and (16) and section 93 of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act*, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5]. Thus, both the federal government and the provinces, including B.C., can legitimately act within the field of activity covered by the Agreement under their respective jurisdictions (Reasons, at paragraphs 146 to 151).

[65] The fact that the benefits and measures contemplated by the Agreement are not provided under a B.C. statute, contrary to the situation in *Lavigne FC*, does not change the fact that employment assistance services provided under the Agreement are within B.C.'s jurisdiction considering the mandate given by the province to the minister who signed the Agreement on its behalf (Reasons, at paragraph 151).

[66] The trial judge also rejects the Commissioner's argument that even if there is concurrent jurisdiction, the analysis of the "degree of control" that the federal institutions exercise over B.C. pursuant to the Agreement—following this Court's analysis in *DesRochers v. Canada (Industry)*, 2006 FCA 374, [2007] 3 F.C.R. 3 (*DesRochers FCA*)—leads to the conclusion that they exercise sufficient control to hold that B.C. is acting "on [their] behalf". In his view, if control exists, it is essentially financial (Reasons, at paragraphs 90 to 94). The provisions of the Agreement and the manner in which the benefits and measures are administered by B.C. do not support the conclusion that B.C. is acting under the control of the federal institutions (Reasons, at paragraphs 158 to 178).

[67] The trial judge then addresses the question as to whether B.C., by creating and offering its own benefits and measures under the Agreement, is exercising its own legislative authority. He concludes that such is the case (Reasons, at paragraphs 119 to 134) since the "Commission only funds these measures: it does not determine, deliver or administer them" (Reasons, at paragraph 135; see also paragraph 138).

[68] In short, the Agreement is a funding agreement pursuant to which transfer payments are made for the development of the labour market in the province and under which the management of employment assistance services is left under the exclusive control of the province, which provides them in the course of a valid exercise of its own jurisdiction. It follows that B.C. is acting neither "on … behalf" of the federal institutions nor under their control. Consequently, Part IV of the OLA does not apply to it (Reasons, at paragraphs 180 to 182).

[69] The trial judge then addresses the complaints with Part VII in mind. In his view, there is no doubt that the federal institutions were subject to the obligation set out in Part VII and that this continues to be the case, even in the context of the Agreement. He concludes, however, that according to his interpretation of subsection 41(2) of the OLA and his assessment of the evidence, the federal institutions took sufficient positive measures to meet this obligation (Reasons, at paragraphs 183 to 185).

[70] After refusing the Commissioner's invitation to use the policy adopted by Canadian Heritage (Guide for Federal Institutions. Official Languages Act, Part VII: Promotion of English and French, 2007 (the Guide)) as a tool of statutory interpretation (Reasons, at paragraphs 186 and 187), he summarizes the parties' arguments (Reasons, at paragraphs 188 to 201). The trial judge begins his analysis by emphasizing the distinction between Part IV and Part VII of the OLA. In his view, Part VII, in contrast with Part IV, enacts duties but does not create corresponding rights (Reasons, at paragraph 204). Moreover, subsection 82(1) does not give Part VII paramountcy over any other legislation, contrary to other parts of the OLA, particularly Part IV (Reasons, at paragraph 205).

[71] The trial judge then turns to the text of subsections 41(1) and (2) of the OLA. In his view, the duty to take "positive measures" [emphasis in original] ("*des mesures positives*", with emphasis on the use of the word "*des*" in the French text) is undefined and signals that some deference must be given as to the choice of the measures

(Reasons, at paragraphs 207–208). Moreover, the measures must be “positive”, that is, meant to have a positive effect. That said, “[t]here is no explicit or implicit threshold in subsection 41(2). The subsection simply imposes the general duty to take ‘positive measures’” (Reasons, at paragraph 210). Moreover, “the qualifier ‘*positives*’ (in the French text) [is used] without providing further clarification or restrictions” (Reasons, at paragraph 213).

[72] The trial judge continues his textual analysis by pointing to the second sentence of subsection 41(2), which makes clear that the implementation of Part VII must be carried out while respecting the jurisdiction and powers of the provinces (Reasons, at paragraph 218). He goes on to reject the Commissioner’s submission that, in order to meet the obligation under Part VII, federal institutions must be attentive to official language minority communities and must assess the impact of their decisions on those communities. According to the trial judge, this approach was rejected by the Federal Court in *Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General)*, 2010 FC 999, [2012] 2 F.C.R. 23 (*FCFA*) (Reasons, at paragraphs 216, 217 and 242).

[73] The trial judge then turns to subsection 41(3) of the OLA, which provides that the Governor in Council may make regulations “prescribing the manner in which any duties of those institutions under this Part are to be carried out” (Reasons, at paragraph 219). In his view, the fact that no regulations have been adopted means that the obligation under Part VII lacks the specificity needed to require federal institutions to take specific measures (Reasons, at paragraphs 220 and 221). According to him, this is the view that was expressed by Senator Jean-Robert Gauthier, who sponsored the bill that led to the adoption of *An Act to amend the Official Languages Act (promotion of English and French)*, S.C. 2005, c. 41 (*Act to amend the OLA, 2005*) (Reasons, at paragraphs 222, 230 to 232 and 293).

[74] In the trial judge’s view, the general duty to act does not create an obligation to take “measures that would directly ensure the vitality of the English and French linguistic minority communities or the advancement of both official languages” (Reasons, at paragraph 226). That obligation would be too specific. Even the corollary duty “to act in such a way so as not to hinder” remains vague and imprecise: “without regulations specifying its scope and scale, subsection 41(2) cannot include the requirement of increased specificity or connection with particular programs or factual situations” (Reasons, at paragraphs 227 and 235; see also paragraphs 249 to 253). Moreover, the obligation under Part VII could not be “directly related to the specific factual framework of the complaint filed with the Commissioner” (Reasons, at paragraph 244).

[75] Finally, the trial judge considers whether, in light of the general obligation under Part VII, the FFCB’s complaint was well founded at the time it was filed, that is, on June 15, 2011 (Reasons, at paragraph 259). On the basis of his reading of the complaint, the negative measures at issue would have been taken by B.C., not by the federal institutions. Specifically, the negative impact on the French linguistic community is attributable to the implementation by the province of the EPBC and its “one-stop shop”

model (Reasons, at paragraph 281), neither of which were in place on June 15, 2011 (Reasons, at paragraphs 282 to 288).

[76] In any event, the trial judge concludes that sufficient positive measures were taken by the federal institutions prior to June 15, 2011. These include the insertion of the consultation clause in Article 5.4 of the Agreement, the consultations that took place thereafter, the guidelines provided by Canadian Heritage and various initiatives taken by ESDC within its institutional mandate. In order to highlight the importance he attributes to these measures, he writes (Reasons, at paragraph 276):

> …. There is a vast watershed of measures. The flow starts further upstream with principles and guidelines at the level of Canadian Heritage and ESDC. It cascades downward, subsequently irrigating an array of more local initiatives….

[77] In the trial judge's view, these measures, together with the linguistic clause, contributed "positively to the vitality and development of the French-speaking community in [B.C.]", such that the obligation under Part VII was met (Reasons, at paragraph 260; see also paragraphs 261 to 279).

[78] At the end of his analysis, the trial judge recognizes that these measures do not remedy the specific problem pertaining to B.C.'s decision to do away with the participation of the Francophone organizations. The trial judge also recognizes that positive measures to counter this adverse effect would have contributed even more to the growth and vitality of the Francophone linguistic minority community in B.C. However, in the absence of regulations specifying their obligation under Part VII, the federal institutions could not be sanctioned for their omission (Reasons, at paragraph 268).

[79] The trial judge therefore dismissed the FFCB's application under Part VII. His ultimate conclusion is that "there was no failure to comply… at the time that the FFCB filed its complaint" (Reasons, at paragraph 299).

POSITIONS OF THE PARTIES [TABLE OF CONTENTS]

A. *The appellants and their supporting interveners* [TABLE OF CONTENTS]

- The FFCB [TABLE OF CONTENTS]

[80] According to the FFCB, the trial judge erred in law in his application of both Part IV and Part VII. Had he adopted the correct interpretation of either part, he would necessarily have found that the complaints had merit at the time they were filed (memorandum of the FFCB, at paragraphs 66 to 88).

[81] Regarding Part IV, the FFCB submits that the trial judge erred in limiting his analysis to section 25 of the OLA and to the question of whether B.C. was acting under the control of the federal institutions. He was required to also consider subsection 20(1) of the Charter since the purpose of Part IV is to give effect to this provision (memorandum of the FFCB, at paragraphs 13 and 14).

[82] The FFCB relies on *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, (1997), 151 D.L.R. (4th) 577 (*Eldridge*) and *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 S.C.R. 194 (*DesRochers SCC*) which, it submits, establish the rule that federal institutions cannot avoid their constitutional obligation by entrusting the implementation of a specific federal program to a province. The FFCB contends that this is the precise role assigned to B.C. pursuant to the Agreement, as it must provide the services and measures in a manner consistent with the guidelines of the EIA (memorandum of the FFCB, at paragraphs 15 to 24).

[83] In the alternative, the FFCB, citing paragraph 51 of *DesRochers FCA* in support, maintains that regardless of *Eldridge*, the trial judge should have found that B.C. was acting under the control of the federal institutions given the considerable supervisory authority that they exercised (memorandum of the FFCB, at paragraph 25).

[84] Thus, Part IV applies to B.C. even though it has concurrent constitutional jurisdiction to legislate in matters relating to employment benefits. The trial judge also erred in relying on *Lavigne FC* to establish that B.C. was acting within its own jurisdiction. According to the FFCB, although *Lavigne FC* is authority for the proposition that a section 63 agreement does not constitute a delegation of power to the provinces, it does not follow that "the OLA does not apply to benefits and measures" offered by B.C. pursuant to the Agreement (memorandum of the FFCB, at paragraphs 26 to 29; citing Reasons, at paragraph 95).

[85] Regarding Part VII, the FFCB submits that section 41 of the OLA imposes concrete obligations on federal institutions and establishes parameters that are sufficiently clear to be the subject of review by the courts (memorandum of the FFCB, at paragraph 31).

[86] In this respect, the trial judge erred in concluding that the obligation cast on federal institutions to take positive measures does not impose a specific obligation. He also erred in giving undue weight to the absence of regulations. This approach renders Part VII meaningless since it implies that any step taken by the federal institutions would suffice, regardless of its relationship to the issue raised by a complaint (memorandum of the FFCB, at paragraphs 30 and 36 to 69).

[87] According to the FFCB, the obligation to enhance the vitality of linguistic minority communities requires more than simple consultations; it requires, at minimum, that consideration be given to their needs and concerns. To this end, the obligation set out in section 41 requires federal institutions to adopt mechanisms to verify the impact of the measures taken. Federal institutions may choose these mechanisms, but having none is not an option (memorandum of the FFCB, at paragraphs 40 to 42 and 50 to 54).

[88] Finally, the trial judge should not have limited the scope of Part VII on the basis of his rejection of the ratchet principle, and this, despite the decision of the Ontario Court of Appeal in *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 (*Lalonde*). The fact that the Charter does not "constitutionalize" the measures taken in order to advance linguistic

equality (*Lalonde*, at paragraph 92) does not prevent the enactment of legislation to that effect, and that is precisely what section 41 seeks to achieve in requiring federal institutions to act so as to enhance the vitality of official language minority communities and not hinder them (memorandum of the FFCB, at paragraphs 43 to 49).

[89] As to the relief, the FFCB essentially asks that we remedy the failure of the federal institutions to meet the obligations imposed on them by Parts IV and VII of the OLA. In particular, it proposes that the responsibility of providing services in French be entrusted to Francophone organizations that have a mandate to serve the Francophone community in B.C. and that would take its needs into account (memorandum of the FFCB, at paragraph 91).

- The Commissioner [TABLE OF CONTENTS]

[90] The Commissioner does not question the trial judge's findings insofar as Part IV is concerned. As to Part VII, the Commissioner emphasizes that the trial judge's interpretation renders the Part VII obligation too general to be justiciable. Relying on the administrative policy published by Canadian Heritage and parliamentary debates, the Commissioner maintains that this obligation applies in the context of every decision or initiative taken by a federal institution. Thus, subsection 41(2) imposes an obligation to verify the impact that those decisions and initiatives can have on official language minority communities and counter their negative impact by the adoption of positive measures, if need be (memorandum of the Commissioner, paragraphs 12 to 48).

[91] The Commissioner also refers to subsection 58(1) of the OLA and to *Picard v. Canada (Commissioner of Patents)*, 2010 FC 86, [2011] 2 F.C.R. 192 (*Picard*) to assert that only an analysis of the precise factual situation underlying a complaint would be consistent with the statutory mandate conferred on the courts by subsection 77(1) of the OLA and consistent with a broad and liberal interpretation of language rights (memorandum of the Commissioner, at paragraphs 49 to 58; citing *Picard*, at paragraph 68).

[92] Finally, the Commissioner is of the view that the government measure targeted by the complaint is the 2008 Agreement and the negative impact that it had on the Francophone community. It follows that facts evidencing this negative impact are relevant, whether they took place before or after the complaint was filed (memorandum of the Commissioner, at paragraphs 76 to 81; citing section 77 of the OLA).

- The AJEFNB

[93] The intervener the AJEFNB generally supports the arguments raised by the appellants. With respect to Part IV, it submits that *Lavigne FC* must be repudiated because that decision allows questions relating to the division of powers to override constitutional obligations regarding language rights (memorandum of the AJEFNB, at paragraphs 65 to 71).

[94] Moreover, *Lavigne FC* would be inconsistent with *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383

(*SANB*). According to the AJEFNB, this decision stands for the proposition that as soon as one level of government cooperates with another order of government by acting voluntarily in the areas of jurisdiction of its partner, it is subject to the latter's linguistic obligations. According to the AJEFNB, this is what B.C. does pursuant to the Agreement (memorandum of the AJEFNB, at paragraphs 59 to 64).

- The QCGN

[95] The intervener the QCGN shares the appellants' vision and understanding of the Part VII obligation and insists that this is the only interpretation that is consistent with the principle of substantive equality and the objective set out in paragraph 2(b) of the OLA to give effect to section 16 of the Charter (memorandum of the QCGN, paragraphs 6 to 47).

[96] According to the QCGN, the trial judge erred in concluding that Part VII cannot be used to revive Part IV obligations. On the contrary, Part VII contemplates going beyond Part IV obligations when such an approach is necessary to avoid harm to linguistic minority communities and to comply with the principle of substantive equality (memorandum of the QCGN, at paragraphs 48 to 58; citing Reasons, at paragraph 206).

B. *The respondents and the Attorney General of B.C.* [TABLE OF CONTENTS]

- ESDC and the Commission [TABLE OF CONTENTS]

[97] According to the respondents, the trial judge correctly held that the complaint filed by the FFCB was premature. The respondents submit that the complaint did not target the Agreement, but was rather aimed at the anticipated reduction in funding for the Francophone organizations and the fear that services in French would no longer be offered after the introduction of the EPBC (memorandum of the respondents, at paragraphs 35 to 41).

[98] The respondents add that B.C. cannot be made subject to the obligations imposed on the federal institutions under Part IV of the OLA because B.C. is acting within its own jurisdiction. Indeed, although the benefits and measures are funded by the federal institutions, they are designed by B.C. and are not created by the Agreement or by section 63 of the EIA (memorandum of the respondents, at paragraphs 46 to 49).

[99] The absence of provincial legislation authorizing the implementation of the Agreement does not alter the situation in any way, since the benefits and measures are offered pursuant to the explicit mandate given by B.C. to its Minister of Economic Development, as a signatory to the Agreement. Since Parliament's jurisdiction over official languages is ancillary to its areas of legislative authority, B.C. cannot be made subject to the obligations of either the OLA or subsection 20(1) of the Charter (memorandum of the respondents, at paragraphs 50 to 59; citing *R. v. Beaulac*, [1999] 1 S.C.R. 768, (1999), 173 D.L.R. (4th) 193, at paragraph 14 (*Beaulac*)).

[100] The respondents maintain that the trial judge properly followed the reasoning set out in *Lavigne FC*, since that decision was affirmed on appeal (*Lavigne FCA*) and the facts were essentially the same (memorandum of the respondents, at paragraph 69).

[101] Like the one at issue in *Lavigne FC*, the Agreement is a general funding framework that does not direct B.C. as to what to do. If there are any conditions, they are derived from the federal government's spending power and B.C. is bound only to the extent that it agrees to abide by these conditions. In this context, the suggestion that B.C. is acting on behalf of the respondents disregards the division of powers and would impose on the provinces linguistic obligations that they do not have (memorandum of the respondents, at paragraph 68; reply memorandum of the respondents, at paragraphs 33 to 37).

[102] Regarding Part VII of the OLA and more precisely subsection 41(2), the respondents argue that in requiring federal institutions to take "positive measures" (*des mesures positives* in the French text) [emphasis in original], Parliament did not intend to dictate the precise measures that they should take or the specific methodology that they should use in order to meet the commitment to enhance the vitality of official language minority communities (memorandum of the respondents, at paragraphs 70 to 74). Nor can the eminently important objective of the OLA be used to transform an obligation of means into an obligation of result (reply memorandum of the respondents, at paragraphs 20 to 26).

[103] In the absence of a regulation made under subsection 41(3) of the OLA, the obligation of federal institutions to take positive measures is subject to no specific terms or conditions. According to the respondents, the important role that the trial judge attributes to regulations respects the hierarchy of norms, and it is rather the courts that would be overstepping their role and usurping the role of the executive if they were to impose specific terms (memorandum of the respondents, at paragraphs 75 to 78; reply memorandum of the respondents, at paragraphs 40 and 41).

[104] According to the respondents, the trial judge was correct in rejecting the ratchet principle, since it is inconsistent with the broad discretion afforded to the federal institutions in choosing the appropriate positive measures in each case. The objective of advancing substantive equality does not have the effect of crystallizing the measures taken to the point where they cannot be changed or replaced (memorandum of the respondents, at paragraphs 79 and 80; reply memorandum of the respondents, at paragraphs 12 to 14; citing *Lalonde* and *R. v. MacKenzie*, 2004 NSCA 10, 221 N.S.R. (2d) 51 (*MacKenzie*)).

[105] The trial judge was also correct in holding that sufficient positive measures had been taken by the federal institutions. First, ESDC consulted with members of the B.C. Francophone community both before and after the Agreement was entered into. In addition, a commitment was obtained from B.C. to further consult, which it did, not to mention the many other measures taken, independent of the Agreement (memorandum of the respondents, at paragraphs 82 to 85 and 88, citing Reasons, at paragraphs 260 to 279 and Article 5.4 of the Agreement).

[106] In conclusion, the respondents submit that even if the Court were to find that a violation of the OLA existed at the time the complaint was filed, no remedy should be granted since the failure targeted by the complaint has since been remedied because French-language services that are compliant with the Agreement are now offered in B.C. (memorandum of the respondents, at paragraphs 87 to 91).

- The Attorney General of B.C. [TABLE OF CONTENTS]

[107] The intervener the Attorney General of B.C. chose not to appear at the hearing of the appeal in Vancouver, but did file a memorandum. The arguments outlined are limited to Part IV and whether B.C. was acting within its own constitutional powers when it entered into and implemented the Agreement.

[108] Specifically, the Attorney General of B.C. argues that the FFCB wrongly asserts that B.C., in implementing the Agreement, is giving effect to a specific federal program or acting on behalf of the federal institutions. First, the test developed in *Eldridge* is used for determining whether the Charter applies to a private entity, not to a province. Second, the intent behind section 63 of the EIA is not to impose a federal scheme on the provinces, but rather to give them full control over the creation and implementation of benefits and measures in matters of employment assistance (memorandum of the Attorney General of B.C., at paragraphs 12 to 25; citing *Eldridge*, at paragraph 44).

ANALYSIS AND DECISION [TABLE OF CONTENTS]

A. *Standard of review* [TABLE OF CONTENTS]

[109] As we are dealing with two appeals, the standard of review established by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, is applicable. It follows that questions of law, including the determination of the applicable legal principles, are subject to the standard of correctness while the application of those principles to the facts in issue is subject to the standard of palpable and overriding error in the absence of an extricable legal principle. If the trial judge conducts his analysis on the basis of the wrong legal principle, no deference is owed.

B. *Interpretation of language rights* [TABLE OF CONTENTS]

[110] At the outset of his analysis, the trial judge reviewed the principles of interpretation applicable to language rights (Reasons, at paragraphs 46 to 53). He pointed out that the OLA is a fundamental law that is closely linked to the values and rights set out in the Constitution and, in particular, in subsections 20(1) and 16(1) of the Charter, which deal with language of service and language of work.

[111] Therefore, "in all cases" language rights must be interpreted "purposively, in a manner consistent with the preservation and development of official language communities" (Reasons, at paragraph 48, citing *Beaulac*, at paragraph 25). That said, the modern approach to statutory interpretation, which requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its object and the intention of Parliament, continues to apply

even with respect to language rights (Reasons, at paragraph 52, citing *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at paragraph 38; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at paragraph 112; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 (*Lavigne SCC*), at paragraph 25; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1999), 154 D.L.R. (4th) 193, at paragraph 21).

[112] The appellants do not question the principles of interpretation so described. Only the trial judge's application of these principles to the legal provisions at issue is challenged on appeal.

C. *Part IV of the OLA* [TABLE OF CONTENTS]

[113] The obligations set out in Part IV of the OLA, including the obligation to provide services to the public in either official language where demand warrants, apply to the provinces when they act in the name of the federal government, or more specifically "on its behalf" (section 25 of the OLA).

[114] Before the trial judge, the FFCB relied on *Reference re EIA* and *CSN* to argue that B.C. was acting "on … behalf" of the federal institutions because the measures implemented under the Agreement fall within the exclusive jurisdiction of the federal government in matters relating to unemployment insurance (Reasons, at paragraph 89). Instead, the trial judge concluded that the provincial legislature has concurrent jurisdiction in such matters, citing in support the decision of the Federal Court in *Lavigne FC*, as affirmed by this Court in *Lavigne FCA* (Reasons, at paragraphs 87 to 118).

[115] The Commissioner, for his part, referred to *DesRochers FCA* in an effort to persuade the trial judge that the "degree of control" exercised by the federal institutions over B.C. under the Agreement was sufficient to hold that the province was acting "on … behalf" of those institutions for the purposes of section 25 of the OLA (Reasons, at paragraph 90). The trial judge rejected this argument pointing out that the federal institutions only supplied the funding and that the benefits and measures were provided by B.C. on its own initiative and under its own constitutional authority. Specifically, it is B.C. that determines, delivers and administers these benefits and measures (Reasons, at paragraph 135) and the province agreed to abide by the conditions set out in the Agreement in the exercise of its own legislative authority under subsections 92(13) and (16) or section 93 of the *Constitution Act, 1867*. Again, the trial judge ultimately relied on *Lavigne FC* and *Lavigne FCA* as well as paragraph 54 of *DesRochers FCA* to conclude that the fact that the federal government provides the funding does not mean that B.C. is acting "on … behalf" of the federal institutions (Reasons, at paragraphs 158 to 178).

[116] Like the trial judge, we are of the view that *Lavigne FC* and *Lavigne FCA* preclude the application of Part IV. However, the FFCB and the AJEFNB ask that we either repudiate these decisions because they were incorrectly decided or ignore them on the basis that they were overtaken by *Eldridge* and *SANB*.

[117] Like the Federal Court, we are bound by our own decisions unless they are shown to be "manifestly wrong" (*Miller v. Canada (Attorney General)*, 2002 FCA 370, [2003] 3 F.C. D-16, 220 D.L.R. (4th) 149, at paragraph 10). *Lavigne FC*, upheld by the Court in *Lavigne FCA*, was decided in a context nearly identical to the one at hand and has stood as authority for more than 20 years. Contrary to the assertion made by the FFCB, *Lavigne FC*—at paragraphs 55 and 80 to 83—answers the precise question of whether the OLA applies to benefits and measures provided by a province under the type of agreement at issue in the present case (memorandum of the FFCB, at paragraph 29).

[118] Adopting a different tack, the AJEFNB submits that those decisions should not be relied on because Mr. Lavigne, the complainant in *Lavigne FC*, was self-represented. The suggestion is that the Court did not have the benefit of fulsome arguments. The AJEFNB maintains that neither *Eldridge* nor subsection 20(1) of the Charter were brought to the Court's attention and adds that the Commissioner did not appear in that proceeding.

[119] These attempts to cast doubt on the correctness of *Lavigne FC* and *Lavigne FCA* are unpersuasive. While it is true that the Commissioner did not appear, his report was part of the record before the Federal Court, and the recommendation that it embodied was followed by the Court (*Lavigne FC*, at paragraphs 12, 13 and 68). As for subsection 20(1) of the Charter, it was indeed raised in argument and found not to apply because, like B.C. in this case, Quebec was acting on its own account pursuant to the agreement it had entered into (*Lavigne FC*, at paragraphs 52, 95 and 105).

[120] As for *Eldridge*, its relevance is no more apparent today than it was when *Lavigne FC* and *Lavigne FCA* were decided. This is because even if we were to accept that based on *Eldridge*, a federal institution cannot evade its constitutional responsibilities by delegating the exercise of its powers to a province (*Eldridge*, at paragraph 42), that issue does not arise here because B.C. is exercising its own powers under the Agreement (*Lavigne FC*, at paragraphs 71 to 87; *Lavigne FCA*, at paragraph 2). Furthermore, B.C. is not being asked to implement a "specific … program" of the federal government (*Eldridge*, at paragraph 42). Rather, it is invited to occupy exclusively a field of activity that was previously shared with the federal government.

[121] *SANB* also arises in a context that is completely different from the one at hand. In that case, the federal institution in question—the RCMP—assumed by way of contract the responsibility of providing police services to the province of New Brunswick. That is the context in which it was held that the RCMP was bound by the linguistic obligations imposed by the province for which it was acting. In contrast, B.C. is acting for no one else, and the functions that it assumes fall within its own jurisdiction.

[122] It follows that the alleged inconsistency with the jurisprudence of the Supreme Court does not exist. Without making any assumption about the scope that the Supreme Court might give to its own decisions if it were called upon to pronounce on the matter, those decisions do not allow us to conclude that *Lavigne FC* and *Lavigne FCA* were wrongly decided or that the trial judge erred in holding that he was bound by them.

[123] Therefore, the appeal relating to Part IV of the OLA must fail.

D. *Part VII of the OLA* [TABLE OF CONTENTS]

[124] This is the first time that this Court is called upon to rule on the interpretation to be given to Part VII in its current form.

[125] Part VII conveys the federal government's commitment to enhance the vitality of the English and French linguistic minority communities in Canada and sets out the obligation of federal institutions to take positive measures towards that end. The appellants submit that the trial judge's interpretation of this obligation is restrictive to the point that no effect can be given to the federal government's commitment.

[126] It is therefore necessary to determine the meaning to be given to this commitment and to the obligation to take positive measures to deliver on it. To this end, we must read the provisions embodied by Part VII in their entire context, according to the grammatical and ordinary sense of the words, harmoniously with the scheme of the OLA, its object and the intention of Parliament.

▪ The context surrounding Part VII [TABLE OF CONTENTS]

[127] The obligation set out in Part VII is part of the Government of Canada's formal commitment to enhancing the vitality and supporting the development of the English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and use of English and French in Canadian society (Preamble to the OLA). This commitment is inspired by the principle of the protection of minorities and the advancement of the equality of status and use of English and French set out in subsection 16(3) of the Charter (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385, at paragraphs 79 to 82; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, (1998), 156 D.L.R. (4th) 385, at paragraph 176).

[128] In *Beaulac*, the Supreme Court enshrined the notion of substantive equality in our understanding of the language rights protected by the OLA, but this notion of equality could not at the time be transposed to Part VII of the OLA because the promise that it reflected was political, rather than legal. This Court stated the following in *Canadian Food Inspection Agency v. Forum des maires de la Péninsule acadienne*, 2004 FCA 263, [2004] 4 F.C.R. 276 (*Forum des maires*), five years after *Beaulac* (*Forum des maires*, at paragraph 39):

> It is true that the protection of language rights constitutes a fundamental constitutional objective and requires particular vigilance on the part of the courts, and that the courts must generously construe the texts that confer these rights, but it is also necessary that these be rights to protect and not policies to define. [Emphasis added.]

This finding led the Court to conclude, at the time, that Part VII was not justiciable (*Forum des maires*, at paragraph 44).

[129] It is in the wake of this decision that subsections 41(2) and (3) were incorporated into the OLA in November 2005 (*Act to amend the OLA, 2005*), and that Part VII was added to the provisions of the OLA that may give rise to a court remedy. These amendments address the shortcoming identified in *Forum des maires* and make Part VII justiciable, thereby transforming "policies to define" into "rights to protect".

- The purpose of subsections 41(1) and (2) [TABLE OF CONTENTS]

[130] Subsections 41(1) and (2) set out the obligation created by Part VII. There is no need to conduct an extensive search to ascertain their purpose. They faithfully echo the quasi-constitutional purpose set out in paragraph 2(b) of the OLA, namely, to support the development of English and French linguistic minority communities and advance the equality of the two languages. It is with this purpose in mind that we must interpret subsections 41(1) and (2).

[131] We note that, although Part VII has been subject to judicial oversight since 2005, it was not added to the Parts listed in subsection 82(1) of the OLA that are said to prevail over conflicting provisions of any other Act. This is because, unlike these other parts—namely Part I ("Proceedings of Parliament"), Part II ("Legislative and Other Instruments"), Part III ("Administration of Justice"), Part IV ("Communications with and Services to the Public") and Part V ("Language of Work")—which provide for specific obligations that the legislator can identify with precision and prioritize, Part VII can be applied to an unlimited number of situations that do not lend themselves to that kind of exercise.

[132] Because it is impossible to identify with any precision the situations in which the obligation set out in Part VII can apply, the legislator left it to the courts to settle any conflict with other legislation. It remains that, like the other parts listed in subsection 82(1), Part VII must be interpreted broadly since it shares the same purpose, namely, to support the development of official language minority communities and to advance the equality of the two languages (at paragraph 2(b) of the OLA).

[133] It is helpful to consider the purpose of Part VII in light of the Supreme Court's rich body of case law on language rights. In *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201 (*Solski*), the Supreme Court establishes that language rights "cannot be analysed in the abstract, without regard for the historical context of the recognition thereof or for the concerns that the manner in which they are currently applied is meant to address" (*Solski*, at paragraph 5).

[134] With this in mind, the concerns that Part VII is meant to address are not unlike those protected by the constitutional entitlement to minority language education (section 23 of the Charter). In *Mahe v. Alberta*, [1990] 1 S.C.R. 342, (1990), 68 D.L.R. (4th) 69 (*Mahe*), the Supreme Court refers to section 23 of the Charter and explains that it seeks "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population" (*Mahe*, at page 362).

[135] More recently, in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, 447 D.L.R. (4th) 1 (*Conseil scolaire francophone de la C.-B.*), the Supreme Court refers to the purpose of this provision, stating that it "is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of those communities" (*Conseil scolaire francophone de la C.-B.*, at paragraph 15).

[136] To be clear, the constitutional protection under section 23 of the Charter is not the same as that under Part VII of the OLA and the two should not be conflated. Nevertheless, the OLA has a special status and is broad in scope in that it governs situations where "the existence of language communities and the manner in which those communities perceive their future" are in issue (*Solski*, at paragraph 4). Given the crucial role of Part VII in promoting bilingualism (*Lavigne SCC*, at paragraph 23), preventing the erosion of language communities is also part of the objectives that must guide the "positive measures" to be taken under subsection 41(2).

[137] Moreover, since 2005 and unlike the situation that prevailed when *Forum des maires* was decided, these measures must also be guided by the standard of substantive equality (*DesRochers SCC*, at paragraph 31). As recognized by the Supreme Court, substantive equality sometimes requires that the services received by official language minorities be different from those received by the majority. This different treatment is based on the idea that "their particular circumstances and needs" must be taken into account (*Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at paragraph 31).

- The wording of the provisions in Part VII [TABLE OF CONTENTS]

[138] In our view, an interpretation of Part VII that gives effect to the grammatical and ordinary sense of the words allows for the intended purpose to be achieved.

[139] According to subsection 41(2): "Every federal institution has the duty to ensure that positive measures are taken for the implementation" of the commitment under subsection 41(1), namely "enhancing the vitality of the English and French linguistic minority communities … and supporting and assisting their development" and "fostering the full recognition and use of both English and French".

[140] The phrase "has the duty", or "*[i]l incombe*" in the French text, is unequivocal. It requires federal institutions to act in order to achieve the purpose set out in paragraph 2(b) and reiterated in subsection 41(1). The reference to "measures" (*des mesures* in the French text) allows federal institutions to choose which measures to take, but the obligation to take measures is not thereby diminished.

[141] The word "ensure" implies an obligation that is ongoing. The obligation to take positive measures applies so long as a federal institution can act towards achieving the intended purpose.

[142] It is by the taking of "positive measures" that federal institutions are invited to act. The intention is to mobilize the federal administration and use it in order to enhance the

vitality of official language minority communities through the decisions and initiatives that it is called upon to take. The duty to “enhance” necessarily entails a duty not to harm, as the trial judge acknowledged (Reasons, at paragraphs 227 to 229; see to the same effect *Canada (Official Languages) v. CBC/Radio-Canada*, 2014 FC 849, [2015] 3 F.C.R. 481, at paragraph 33 (*CBC FC*), revd on other grounds 2015 FCA 251, [2016] 3 F.C.R. 55).

[143] The last sentence of subsection 41(2) specifies, for greater certainty, that the implementation of positive measures must be carried out while respecting the jurisdiction of the provinces. It goes without saying that the federal government can only regulate official languages in areas that are within its jurisdiction. We note that in the present case, any obligation set out in the Agreement in order to enhance the vitality of the French linguistic minority community—for example, B.C.’s obligation to consult regarding the measures that it adopts—is binding on the province only because it has agreed to comply.

[144] Lastly, subsection 41(3) allows the Governor in Council to make regulations “prescribing the manner in which any duties of [federal] institutions under [Part VII] are to be carried out”. The wording contemplates the making of regulations to guide the implementation of the obligation set out in Part VII, if the executive considers it useful to do so. Moreover, it is clear from the text of subsection 41(2) that the obligation arises under that provision and exists independently of the adoption of a regulation.

- The interpretation of the trial judge [TABLE OF CONTENTS]

[145] The trial judge’s interpretation of Part VII essentially renders it meaningless. In his view, “section 41 does not impose specific and particular duties” (Reasons, at paragraph 216), and in the absence of a regulation specifying the “general duty” to take positive measures, this duty lacks the specificity that it could and should have (Reasons, at paragraph 221). It follows that the implementation of “some positive measures” is sufficient to meet the obligation set out in Part VII (Reasons, at paragraph 240), and that there is no “minimum… threshold” to meet (Reasons, at paragraph 250). In particular, positive measures cannot be aimed at countering the adverse effect of a specific government program or of a particular initiative because such an approach would give the obligation a degree of specificity beyond its general scope. Moreover, this would encroach on the discretion given to federal institutions under subsection 41(2) to adopt positive measures of their choice (Reasons, at paragraph 244). Again, only a regulation could allow for a particular program or a specific situation to be targeted by a complaint (Reasons, at paragraph 248).

[146] With all due respect to the trial judge, his interpretation of Part VII departs from its text, ignores its purpose and gives the regulation a significance that the legislator did not contemplate.

[147] Parliament may delegate to the Governor in Council (the executive) the power to impose an obligation by regulation, but this is not the approach set out in Part VII. As

the text indicates, the obligation to take positive measures is derived from the OLA itself, and it is the manner in which this obligation is to be carried out that the Governor in Council "may" prescribe by regulation. The obligation to enhance the vitality of linguistic minority communities contemplates concrete actions, recognizable on the basis of the intended purpose, without the need for further specification by way of a regulation.

[148] The trial judge construes the remarks made by Senator Jean-Robert Gauthier before the Standing Senatorial Committee on Official Languages on March 11, 2004, as going the other way. In particular, he cites the following passage (Reasons, at paragraph 232, citing *Forum des maires*, at paragraph 44):

> At the present time, there are no regulations governing Part VII of the *Official Languages Act*. Consequently, there are none for section 41. Having legislation without regulations is like having a watchdog with no teeth, or such a tiny one that no one could take it seriously. The law must be enforceable, and of course must therefore have regulations. [Emphasis added by the trial judge.]

[149] The meaning to be given to Part VII does not depend on the opinion given by Senator Gauthier, but his view is of interest given the crucial role that he played in bringing about the 2005 amendment (see in this regard *Forum des maires*, at paragraph 44). We agree with the Commissioner that Senator Gauthier cannot be taken to have said that a regulation was necessary in order to give effect to the obligation set out in Part VII. We note in particular the later passage to which the Commissioner refers at paragraph 61 of his memorandum:

> I think it might be useful to state that the amendment seeks only to clarify the government's power to pass regulations. Part VII is the only part of the act that does not give the government the explicit power to pass regulations. Even Part VI, which deals with equitable participation, refers to the government's commitment, as does Part VII. The purpose of my amendment is to correct this omission from the act. … This is a discretionary power. The government is not required to pass any regulations. [Emphasis added by the Commissioner.]

[150] In our view, a full reading of Senator Gauthier's statements does not support the trial judge's assessment of this position.

[151] More significantly, the suggestion that a regulation is required in order for specific measures to be taken would bring the obligation set out in Part VII to a standstill and defeat its purpose rather than contribute to its achievement. The text of subsection 41(3) allows for a reading that achieves the intended purpose.

[152] The suggestion that this obligation cannot target "a federal institution's program, [a] decision-making process, [a] particular initiative, or … a specific factual situation that may have been the subject of a complaint" (Reasons, at paragraph 250) is no more defensible. Indeed, it is mostly if not exclusively in the context of a specific factual situation that questions can arise as to whether the obligation to enhance the vitality of official language minority communities has been met. Again, the trial judge's interpretation of Part VII would render it ineffective.

[153] This interpretation is also in direct conflict with subsection 58(1) of the OLA, which requires that any complaint alleging a failure to comply with the OLA, including Part VII, must refer to the "particular instance or case" underlying the alleged breach. The courts called upon to hear applications arising from a complaint must be able to render a decision in light of the specific violations of Part VII that are being alleged, since it is the merit of the complaint that is the subject of an application under subsection 77(1). It is difficult to conceive how courts could rule on a Part VII complaint otherwise than on the basis of the specific violation that it alleges. Only an interpretation that disregards the purpose of Part VII could allow for the obligation that it imposes to be assessed without taking into account the particular facts that underlie a complaint.

[154] Beyond the inconsistency it creates, the interpretation proposed by the trial judge is contrary to *Picard*, one of two other Federal Court decisions dealing with the Part VII obligation (apart from *CBC FC*). In that case, Justice Tremblay-Lamer explains why the merits of a complaint filed pursuant to Part VII must be determined on the basis of a particular decision rather than on the basis of the general policy of the federal institution in question (*Picard*, at paragraph 68):

> However, I believe that the courts must limit themselves to the factual circumstances relating to a particular decision rather than examining the government's entire language policy every time an application under Part VII is brought before them. The courts are simply not equipped to assess the government's language policy as a whole: that assessment is political in nature. Parliament is in a better position than the courts to make that assessment. However, the courts are used to ruling concerning the factual circumstances relating to a particular decision, and it is logical to assume that by creating a legal remedy for violations of Part VII, Parliament intended precisely to call on their expertise in the matter.

[155] The trial judge attempts to distinguish this decision on the basis that unlike the case before him, the federal institution in *Picard* (the Patent Office) had not taken any positive measures and had done nothing to fulfill the Part VII obligation (Reasons, at paragraph 247, see also at paragraph 226). Yet, Justice Tremblay-Lamer does not allude to an absence of positive measures; she analyzes the one proposed by the federal institution—making available abstracts of patent applications in the other official language—and concludes that this measure was insufficient to meet the obligation set out in Part VII (*Picard*, at paragraphs 12, 62, 63 and 69). It follows that the distinction made by the trial judge did not allow him to bypass *Picard*. This decision stands squarely in his way and gives the Part VII obligation a meaning that is diametrically opposed to the one that he gave.

[156] The trial judge also relies on the other Federal Court decision dealing with Part VII as it now reads—*FCFA*—to conclude that section 41 does not require federal institutions to consider the impact that their decisions may have on official language minority communities (Reasons, at paragraphs 216, 217 and 242). *FCFA*, however, does not stand for that proposition.

[157] *FCFA* deals with whether Part VII, and in particular subsection 41(2), imposed on Statistics Canada the obligation to use the long-form questionnaire in conducting the

2011 census. This questionnaire had five questions regarding language, rather than the short-form one, which had only three. The premise for the application made in that case was that only the mandatory long-form questionnaire could provide the federal institutions with the reliable data that was necessary to allow them to take positive measures in conformity with their Part VII obligation (*FCFA*, at paragraphs 28 and 29).

[158] Justice Boivin, sitting then as a member of the Federal Court, rejected the premise that data from the short-form questionnaire "will be unreliable to the point of being unusable" (*FCFA*, at paragraph 35). After making this finding, he went on to conclude that Part VII did not require Statistics Canada to use the long-form questionnaire in order to meet the obligation set out in Part VII. According to that reasoning, it is clear that if Justice Boivin had found that the short-form questionnaire did not provide federal institutions with sufficient information to allow them to take positive measures, he would have required that the long-form questionnaire be used.

[159] Our interpretation of the obligation under Part VII indeed requires federal institutions to be aware of and attentive to the needs of official language minority communities across the country and to consider the impact that the decisions that they are called upon to take may have on these communities. Only then can federal institutions be in a position to act in order to enhance the vitality of official language minority communities. This interpretation coincides with Canadian Heritage's understanding of the Part VII obligation as evidenced by the Guide that it publishes for federal institutions. According to the version of the Guide that was in force in 2008, when the Agreement was signed, federal institutions were to, among other things:

- make employees aware of the needs of official language minority communities (at page 10);
- determine whether the policies and programs have an impact on these communities, including the devolution of services (at page 11);
- ask themselves certain key questions about the potential impact on these communities when making decisions such as abolishing a program or eliminating a service point (at page 12);
- if it has been established that the initiative could have a negative impact on these communities, and if the decision to take this initiative is maintained, identify which measures are planned to counteract any disadvantages (at page 12);
- if the initiative is likely to involve other levels of government, identify the actions that can be taken to ensure the third party's commitment to fostering the development of these communities (at page 13).

[160] The new version of the Guide published on May 30, 2019, invites federal institutions to abide by essentially the same requirements. However, a notice to the reader inserted in order to acknowledge the binding effect of the decision of the trial judge, points out that the indicated measures go beyond the scope of section 41 of the OLA.

[161] The trial judge rejected the Guide, holding that it was evidence that the Commissioner, as an intervener, could not file. We are of the view that the Guide expresses an opinion that could have informed his decision. Although by no means determinative, the opinion of the government entity responsible for the administration of the law that gives rise to an issue of statutory interpretation is often consulted by the courts as an interpretive aid (*F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at paragraphs 25 and 26; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, (1983), 144 D.L.R. (3d) 193, at page 37 S.C.R.; *Schwartz v. Canada*, [1996] 1 S.C.R. 254, (1996), 133 D.L.R. (4th) 289, at paragraphs 23, 25 and 27). In the case at hand, Canadian Heritage's understanding of the Part VII obligation and the measures set out in the Guide in order to comply with it reflect the point of view of the entity responsible for its application (sections 42 and 43 of the OLA).

[162] These measures are elaborated by reference to the objective sought, namely, enhancing the vitality of official language minority communities. They are consistent with the purpose of the OLA—supporting the development of these communities—a consideration that becomes particularly important when interpreting quasi-constitutional provisions (*Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, (1990),123 N.R. 83 (C.A.), at page 386 [of F.C.]; *Lavigne SCC*, at paragraph 23). The interpretation of Part VII that led Canadian Heritage to adopt these measures is also consistent with the grammatical and ordinary sense of the words and takes the legislative context into account.

[163] As suggested by the Commissioner, when interpreted this way, the obligation set out in Part VII lends itself to a two-step analysis. Federal institutions must first be sensitive to the particular circumstances of the country's various official language minority communities and determine the impact that the decisions and initiatives that they are called upon to take may have on those communities. Second, federal institutions must, when implementing their decisions and initiatives, act, to the extent possible, to enhance the vitality of these communities; or where these decisions and initiatives are susceptible of having a negative impact, act, to the extent possible, to counter or mitigate these negative repercussions.

[164] It is with this approach in mind that the conduct of the federal institutions should be assessed in order to determine whether the complaints are well founded.

E. *Was the obligation under Part VII met?* [TABLE OF CONTENTS]

- The complaints [TABLE OF CONTENTS]

[165] Four complaints were filed. Only the one filed by the FFCB was the subject of the application before the trial judge, but they all inform the debate (section 79 of the OLA). The complaints must be examined in the historical context that led to their filing and in light of the obligation under Part VII of the OLA rather than those set out in Part IV. They each allege essentially the same thing: the federal institutions acted to the detriment of the French linguistic minority community in allowing B.C. to cut the funding of the

Francophone organizations and remove them from the role they were playing in the delivery of employment assistance services.

[166] The complaint filed by the FFCB refers to the employment assistance services that were previously offered by the Francophone organizations at five centres in Vancouver, Kelowna, Penticton, Prince George and New Westminster. It states that these organizations were notified that their funding had been withdrawn such that they would no longer be taking part in the delivery of these services.

[167] According to the FFCB's complaint, the disengagement of the Francophone organizations took place following the devolution in favour of B.C. pursuant to the Agreement. The complaint criticizes the federal institutions—only the predecessor to ESDC is mentioned, but the Commission fits the bill as well—for having done nothing to prevent the Francophone organizations from being excluded from the role they played in the delivery of services for the benefit of the members of B.C.'s Francophone minority community. The complaint specifies that this occurred despite the fact that the Agreement contained a linguistic clause, thereby alluding to the hope, which has since faded, that this clause would compel B.C. to maintain the participation of the Francophone organizations in the delivery of employment assistance services. It is this continued participation that is at the core of the complaint in the face of the federal institutions' failure to ensure it. The complaint concludes by highlighting the [TRANSLATION] "devastating" effect that this disengagement was going to have on B.C.'s French linguistic minority community.

- The Commissioner's report [TABLE OF CONTENTS]

[168] After conducting his investigation, the Commissioner concluded that HRSDC had not met its obligation under Part VII and that the complaints in that regard were well founded. In particular, HRSDC had failed to assess the impact of the new service delivery model implemented by B.C. on the vitality of the province's French linguistic minority community and on its identity building. According to the Commissioner's report, HRSDC did not even consider the possibility of taking measures to offset the probable negative impact resulting from the implementation of the Agreement (Final Investigation Report of the Office of the Commissioner of Official Languages dated April 2013, at page 20: appeal book, at page 2315). The Commissioner also criticized HRSDC for not putting in place the necessary mechanisms to ensure that B.C. would abide by the linguistic clause.

[169] As regards the Commissioner's conclusion pertaining to the linguistic clause, we note that the reference made to this clause in the complaint filed by the FFCB is incidental to the disengagement of the Francophone organizations. As explained below, the linguistic clause could in no way address the concern raised by the complaints. On this point, we note that the Commissioner's report is useful as evidence, but the goal of the application under section 77 of the OLA is to verify the merits of complaints, not the merits of the Commissioner's report (*DesRochers SCC*, at paragraphs 36 and 64; *Forum des maires*, at paragraphs 17 and 20).

- Are the complaints well founded? [TABLE OF CONTENTS]

[170] The trial judge did not consider the complaints as written because, in his view, the Part VII obligation cannot target a particular measure or a precise situation that is the subject of a complaint. He therefore did not take into account the actual basis for the complaints in addition to conducting his analysis on the basis of the wrong legal principle. We could refer the matter back to him for redetermination in accordance with the applicable legal test, but given that the complaints are now ten years old and that the evidence is essentially documentary and not contentious, the interests of justice compel us to conduct our own analysis and draw our own conclusions regarding the merits of the complaints (*Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, (1995), 129 D.L.R. (4th) 609, at paragraph 33; *Federal Courts Act*, R.S.C., 1985, c. F-7, subparagraph 52(b)(i)).

[171] The complaints must be examined holistically on the basis of the alleged violation, that is, the federal institutions' failure to act in response to B.C.'s decision to end the participation of the Francophone organizations in the delivery of employment assistance services after the Agreement was signed.

[172] The evidence shows that it is indeed the Agreement that allowed B.C., three years after signing it, to end the participation of the Francophone organizations in the provision of employment assistance services. The Agreement gave B.C. the responsibility to design and provide these services based on its particular needs and invited it to establish its own model, which ultimately led to the withdrawal of the funding previously given to the Francophone organizations and to the introduction of its "one-stop shop" model. It is useful to focus on the conduct of the federal institutions before and after the Agreement was signed.

[173] The devolution to B.C. is total. The Agreement gives B.C. exclusive control over how employment assistance services are delivered in the province.

[174] At the request of the federal institutions, a linguistic clause, which ensures the use of the official language of the minority community concerned where demand warrants, was inserted (Article 5.2 of the Agreement). The Agreement also contains a clause requiring B.C. to consult with the Francophone community with respect to the measures that it provides under the Agreement (Article 5.4 of the Agreement), an obligation that was complied with.

[175] As we have seen, the negative impact that a full devolution could have on B.C.'s French linguistic minority community was the subject of multiple exchanges between the FFCB and the federal government as early as 1997. Suffice it to recall that when the federal government finally invited B.C. to take full responsibility for employment assistance ten years later, the FFCB, in a final *cri de cœur*, once again asked that the participation of the Francophone organizations be preserved. In the email sent to HRSDC's Skills and Employment Branch in April 2007, the FFCB pointed out that the support programs offered by the Francophone organizations are [TRANSLATION] "essential" and that the Agreement could have a

[TRANSLATION] “catastrophic” impact on the French linguistic minority community in the absence of adequate protection (affidavit of Réal Roy, Exhibit B: appeal book, at pages 1889 and 1890).

[176] It is not difficult to understand and appreciate the importance of the role that the Francophone organizations played in the provision of employment assistance services for B.C.’s fragile French-speaking minority community. This unavoidable avenue for the members of that community seeking employment and the regular and continuous interaction engendered by the involvement of the Francophone organizations—be it in case management, in the provision of assisted or unassisted services, of online services or through the organization of group workshops and job fairs, etc.—were central to the French linguistic minority community’s identity building. It is worth recalling that the federal institutions were keenly aware of those programs and their crucial importance for this community, since they and their predecessors had authorized and funded these programs over the years (affidavit of Duncan Shaw, Exhibit DS-9: appeal book, at pages 9266 to 9394).

[177] Apart from the vital role French schools play for B.C.’s French linguistic minority community as a “setting for socialization” (*Conseil scolaire francophone de la C.-B.*, at paragraph 1), it is difficult to imagine a more useful and effective socialization tool than this network of employment assistance services for bringing members of the Francophone community together and ensuring its survival.

[178] In the letter sent to the Minister of HRSDC on May 14, 2007, the president of the FFCB stated that the French-speaking community expected B.C. to take on the linguistic obligations that were assumed by the federal government before the Agreement was signed (affidavit of Réal Roy, Exhibit C: appeal book, at pages 1892 and 1893). The Minister’s response, like those received before and after, resorts again to the linguistic clause. He states that the Agreement, like all of those signed to date with other provinces or territories, would include a commitment by B.C. to offer services in both official languages where demand warrants (affidavit of Réal Roy, Exhibit D: appeal book, at page 1895).

[179] Yet, as events would prove, this clause contemplates but one thing, i.e., that interaction with the public take place in French where demand warrants. It does nothing to address the concerns raised by the Francophone organizations over the years. Neither the linguistic clause nor the commitment to consult the Francophone community required B.C. to preserve in one way or another the role of the Francophone organizations or to ensure that the Agreement was implemented so as not to adversely affect the French-speaking minority community. Surprisingly, nothing was included in the Agreement to allow the federal institutions to intervene in the event that it was implemented by B.C. without taking this objective into account.

[180] Such a clause could have been included. The funding offered to B.C. under the Agreement results from an exercise of the spending power under subsections 91(1A) and (3) and sections 102 and 106 of the *Constitution Act, 1867*, which allows the federal government to attach certain criteria to the financial assistance it offers to provinces,

without thereby intruding into the provinces' areas of jurisdiction (*Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080, (1993), 101 D.L.R. (4th) 567; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, (1991), 83 D.L.R. (4th) 297; see also Peter W. Hogg, *Constitutional Law of Canada*, 4th ed,. Scarborough, Ont.: Carswell, 1997, at pages 160 and 161). The federal institutions acknowledge that they could have included this type of clause in the Agreement without exceeding the jurisdiction of the federal government (reply memorandum of the respondents, paragraphs 32 to 34), but they did not.

[181] This, despite the fact that it was clear at the time the Agreement was signed that the OLA did not apply to B.C. There was also no doubt that, in the absence of a contractual clause, B.C. would be under no obligation to be sensitive to the survival of its French linguistic minority community or to the importance of the continued participation of the Francophone organizations in the provision of employment assistance services. We note in this respect that at the time of the signing of the Agreement, B.C. was one of two, among all the provinces and territories, that had not adopted any laws, regulations or formal policies aimed at protecting its official language minority community, and that today it is the only one (see the letter sent to the registry by counsel for the respondents dated November 5, 2021, that lists the measures taken by the provinces and territories in relation to language rights over the years).

[182] At the same time, the Agreement invited B.C. to establish an integrated range of services with a focus on effectiveness, a goal that was difficult to reconcile with the tailored program offered to the French linguistic minority community before the Agreement was signed. There was thus an obvious tension between the objective of efficiency contemplated by the Agreement and the obligation that the federal institutions had, and continue to have, to enhance the vitality of this community and not to hinder it. Needless to say, the federal institutions could not disregard this obligation for reasons of efficiency.

[183] The federal institutions argue—citing *MacKenzie*, at paragraphs 55 to 57, and *Lalonde*, at paragraph 95—that there is no constitutional imperative requiring that they keep in place the employment assistance measures that were provided before the Agreement was signed (reply memorandum of the respondents, at paragraphs 12 to 14). They could indeed modify or replace them, but unlike the situation prevailing in those two cases, they had to do so in compliance with the obligation cast upon them under Part VII to enhance the vitality of the linguistic minority community and not to hinder it.

[184] Given the objective of efficiency and the lack of a contractual provision requiring B.C. to be sensitive to the precarious situation of its official language minority community, it should come as no surprise that the province, after having taken over the management of employment assistance measures under the Agreement, quickly opted for the "one-stop shop" model and brought an end to the particularized service that was offered to the French linguistic minority community. It is also not surprising that the Francophone organizations were unable to convince B.C. to consider the negative

impact that this decision would have on this community given that B.C. is under no obligation to act so as to protect it or ensure its survival.

[185] The Minister of HRSDC, Diane Finley, admitted that she was powerless in the face of B.C.'s decision in her letter of June 2, 2011, responding to a final attempt by the FFCB to have the federal government intervene. After twice stating that B.C. was now solely responsible for the provision of employment assistance services in the province, she advised the FFCB that going forward, any concern that it had would have to be raised with the B.C. government (affidavit of Réal Roy, Exhibit U: appeal book, at pages 2237 and 2238).

[186] As the Commissioner concluded following his investigation, the federal institutions did not even attempt to assess the impact that the Agreement was going to have on B.C.'s French linguistic minority community (Final Investigation Report of the Office of the Commissioner of Official Languages, dated April 2013, at page 19: appeal book, at page 2314). Recognizing that the federal institutions may have entertained the hope that B.C. would be more receptive to the plea of the community in favour of the continued participation of the Francophone organizations when the Agreement was entered into, they had to provide for a right to intervene in the event that B.C. was to be unyielding. While Part VII does not preclude the taking of negative measures, it does require that they be accompanied by positive measures in order to offset or at least mitigate the negative effects. Nothing was done in this respect.

[187] Given the circumstances surrounding the signing of the Agreement with B.C. in 2008—in particular the very precarious situation of the French linguistic minority community in B.C.; the importance of the role of the Francophone organizations in the provision of employment assistance services for this community; the fact that the federal institutions were keenly aware of this role and its importance for this community; the fact that, in accordance with established precedents, the OLA would not apply to B.C.; the absence of any provincial laws, regulations or formal policies aimed at protecting this community—the federal institutions could not sign the Agreement without acknowledging the obligation they had and continue to have towards B.C.'s French linguistic minority community under Part VII, and without giving themselves the means to enforce this obligation in the event that the implementation of the Agreement by B.C. was carried out to the detriment of this community.

[188] It is this failure to act that is the subject of the complaints, and based on the evidentiary record, one can only conclude that they are well founded.

- What would be an appropriate and just remedy in the circumstances?

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[189] B.C.'s French linguistic minority community has suffered the negative impact of the Agreement for ten years now. It is impossible to turn back the clock, but it is still possible to act prospectively. In this regard, we note that the obligation set out in Part VII is an ongoing one such that the federal institutions are to this day required to act to counter the negative impact of the Agreement that they signed on this community.

[190] The fact that B.C.'s French linguistic minority community is now fragile to the point that it is on the verge of disappearing does not justify leaving it to its fate. Just recently, in *Conseil scolaire francophone de la C.-B.*, the Supreme Court forcefully and vehemently reminded us that the particular vulnerability of B.C.'s French linguistic minority community demands extra vigilance when it comes to the violation of its language rights, with a concern focused on the present. Both judges of the majority and those in dissent agreed on this point (*Conseil scolaire francophone de la C.-B.*, at paragraphs 144, 156 to 159 for the majority and at paragraphs 261 to 264 for the dissent). That case concerned rights protected under section 23 of the Charter, but the objective of preventing the erosion of official language communities that guided the Supreme Court's analysis in that case must similarly guide our own analysis. It is not surprising that, in both cases, the courts have broad discretion to remedy the situation since they can grant any remedy that they "[consider] appropriate and just in the circumstances" (subsection 24(1) of the Charter and subsection 77(4) of the OLA).

[191] The power to grant a remedy that is appropriate and just in the circumstances is very broad, but only the federal institutions are subject to it. At the present time, the federal institutions cannot do anything whatsoever to enhance the vitality of B.C.'s French linguistic minority community or to protect it because the Agreement that they signed does not recognize their obligation under Part VII of the OLA or provide for any means to ensure that it is complied with in the implementation of the Agreement. Nor does the Agreement allow the federal institutions to intervene directly in the provision of employment assistance services in B.C. since, according to the terms of the Agreement, such matters are under the exclusive control of the province.

[192] The federal institutions cannot remain parties to an agreement that prevents them from honouring their ongoing obligation towards B.C.'s French linguistic minority community. It follows that, as a first step, the Agreement must be terminated, unless it can be renegotiated so as to allow the federal institutions to act in compliance with their obligation under Part VII.

[193] Second, the remedial action must be ascertained. At this stage, we need not determine what the federal institutions could have done, but how to remedy the harm that was caused. As we have seen, the negative impact that resulted from the Agreement and from the failure of the federal institutions to take action is the dismantling of the employment assistance services network that they had set up with the participation of the Francophone organizations. This network was unique in its design and constituted an irreplaceable socialization tool. The task being to remedy, to the extent possible, the negative impact of the Agreement on the vitality of B.C.'s French linguistic minority community with a focus on its survival, restoring this network stands out as the appropriate and just remedy in the circumstances.

[194] The Agreement imposes time constraints that prevent us from giving immediate effect to this remedy. Even though the Agreement may be amended at any time, the parties have agreed that two years' notice, calculated from April 1 of each year, must be given in order to terminate it (Articles 1.2, 24.0 and 25.0 of the Agreement). The

magnitude of the Agreement and the importance of terminating it while ensuring that services to clients are not unduly affected or interrupted justify this notice period.

[195] In light of the foregoing, it is appropriate to order that the remedy be carried out as follows: the federal institutions must provide B.C., within 60 days of the date of this judgment, the notice referenced in Article 24.0 of the Agreement indicating their intention to terminate the Agreement in its present form as of April 1, 2024. In the meantime, nothing will prevent the federal institutions from trying to amend the Agreement by mutual consent in order to insert terms giving them the right to require that the Agreement be implemented in compliance with their obligation towards B.C.'s French linguistic minority community under Part VII of the OLA. As soon as they are able to act, either under an amended Agreement or after its termination, the federal institutions must, to the extent possible, restore the network of employment assistance services with the participation of the Francophone organizations based on the model that existed before the signing of the Agreement, while taking into account the current needs of B.C.'s French linguistic minority community.

DISPOSITION [TABLE OF CONTENTS]

[196] For the foregoing reasons, the appeals insofar as they relate to the violation of the obligation under Part VII of the OLA are allowed with costs in favour of the FFCB, and rendering the judgment that the Federal Court should have rendered, the FFCB's application under Part VII is allowed and the remedy described in paragraph 195 is granted pursuant to subsection 77(4) of the OLA.

[197] The Federal Court, consisting of the trial judge or any other judge designated by the Chief Justice, remains seized of the application in order to deal with any issue surrounding the execution of the remedy thus granted.

APPENDIX

Employment Insurance Act, S.C. 1996, c. 23

PART II

EMPLOYMENT BENEFITS AND NATIONAL EMPLOYMENT SERVICE

Purpose

56 The purpose of this Part is to help maintain a sustainable employment insurance system through the establishment of employment benefits for insured participants and the maintenance of a national employment service.

Guidelines

57 (1) Employment benefits and support measures under this Part shall be established in accordance with the following guidelines:

(a) harmonization with provincial employment initiatives to ensure that there is no

unnecessary overlap or duplication;

(b) reduction of dependency on unemployment benefits by helping individuals obtain or keep employment;

(c) co-operation and partnership with other governments, employers, community-based organizations and other interested organizations;

(d) flexibility to allow significant decisions about implementation to be made at a local level;

(d.1) availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language;

(e) commitment by persons receiving assistance under the benefits and measures to

(i) achieving the goals of the assistance,

(ii) taking primary responsibility for identifying their employment needs and locating services necessary to allow them to meet those needs, and

(iii) if appropriate, sharing the cost of the assistance; and

(f) implementation of the benefits and measures within a framework for evaluating their success in assisting persons to obtain or keep employment.

Working in concert with provincial governments

(2) To give effect to the purpose and guidelines of this Part, the Commission shall work in concert with the government of each province in which employment benefits and support measures are to be implemented in designing the benefits and measures, determining how they are to be implemented and establishing the framework for evaluating their success.

Agreements with provinces

(3) The Commission shall invite the government of each province to enter into agreements for the purposes of subsection (2) or any other agreements authorized by this Part.

…

Employment benefits for insured participants

59 The Commission may establish employment benefits to enable insured participants to obtain employment, including benefits to

(a) encourage employers to hire them;

(b) encourage them to accept employment by offering incentives such as temporary earnings supplements;

(c) help them start businesses or become self-employed;

(d) provide them with employment opportunities through which they can gain work experience to improve their long-term employment prospects; and

(e) help them obtain skills for employment, ranging from basic to advanced skills.

…

Support measures

60 (4) In support of the national employment service, the Commission may establish support measures to support

(a) organizations that provide employment assistance services to unemployed persons;

(b) employers, employee or employer associations, community groups and communities in developing and implementing strategies for dealing with labour force adjustments and meeting human resource requirements; and

(c) research and innovative projects to identify better ways of helping persons prepare for, return to or keep employment and be productive participants in the labour force.

…

Financial assistance

61 (1) For the purpose of implementing employment benefits and support measures, the Commission may, in accordance with terms and conditions approved by the Treasury Board, provide financial assistance in the form of

(a) grants or contributions;

(b) loans, loan guarantees or suretyships;

(c) payments for any service provided at the request of the Commission; and

(d) vouchers to be exchanged for services and payments for the provision of the services.

…

Agreements for administering employment benefits and support measures

62 The Commission may, with the approval of the Minister, enter into an agreement or arrangement for the administration of employment benefits or support measures on its behalf by a department, board or agency of the Government of Canada, another government or government agency in Canada or any other public or private organization.

Agreements for paying costs of similar benefits and measures

63 (1) The Commission may, with the approval of the Minister, enter into an agreement with a government or government agency in Canada or any other public or private organization to provide for the payment of contributions for all or a portion of

(a) any costs of benefits or measures provided by the government, government agency or organization that are similar to employment benefits or support measures under this Part and are consistent with the purpose and guidelines of this Part; and

(b) any administration costs that the government, government agency or organization incurs in providing the benefits or measures.

…

Official Languages Act, R.S.C. 1985 (4th Supp.), c. 31

Preamble

WHEREAS the Constitution of Canada provides that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada;

AND WHEREAS the Constitution of Canada provides for full and equal access to Parliament, to the laws of Canada and to courts established by Parliament in both official languages;

AND WHEREAS the Constitution of Canada also provides for guarantees relating to the right of any member of the public to communicate with, and to receive available services from, any institution of the Parliament or government of Canada in either official language;

AND WHEREAS officers and employees of institutions of the Parliament or government of Canada should have equal opportunities to use the official language of their choice while working together in pursuing the goals of those institutions;

AND WHEREAS English-speaking Canadians and French-speaking Canadians should, without regard to their ethnic origin or first language learned, have equal opportunities to obtain employment in the institutions of the Parliament or government of Canada;

AND WHEREAS the Government of Canada is committed to achieving, with due regard to the principle of selection of personnel according to merit, full participation of English-speaking Canadians and French-speaking Canadians in its institutions;

AND WHEREAS the Government of Canada is committed to enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and use of English and French in Canadian society;

AND WHEREAS the Government of Canada is committed to cooperating with provincial governments and their institutions to support the development of English and French linguistic minority communities, to provide services in both English and French, to respect the constitutional guarantees of minority language educational rights and to enhance opportunities for all to learn both English and French;

AND WHEREAS the Government of Canada is committed to enhancing the bilingual character of the National Capital Region and to encouraging the business community, labour organizations and voluntary organizations in Canada to foster the recognition and use of English and French;

AND WHEREAS the Government of Canada recognizes the importance of preserving and enhancing the use of languages other than English and French while strengthening the status and use of the official languages;

…

PURPOSE OF ACT

Purpose

2 The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

…

PART IV

COMMUNICATIONS WITH AND SERVICES TO THE PUBLIC

Communications and Services

Rights relating to language of communication

21 Any member of the public in Canada has the right to communicate with and to receive available services from federal institutions in accordance with this Part.

Where communications and services must be in both official languages

22 Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities

(a) within the National Capital Region; or

(b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

…

Services Provided on behalf of Federal Institutions

Where services provided on behalf of federal institutions

25 Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

…

General

Obligations relating to communications and services

27 Wherever in this Part there is a duty in respect of communications and services in both official languages, the duty applies in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services.

Active offer

28 Every federal institution that is required under this Part to ensure that any member of the public can communicate with and obtain available services from an office or facility of that institution, or of another person or organization on behalf of that institution, in either official language shall ensure that appropriate measures are taken, including the provision of signs, notices and other information on services and the initiation of communication with the public, to make it known to members of the public that those services are available in either official language at the choice of any member of the public.

…

PART VII

ADVANCEMENT OF ENGLISH AND FRENCH

Government policy

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.

Duty of federal institutions

(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.

Regulations

(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, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

Coordination

42 The Minister of Canadian Heritage, in consultation with other ministers of the Crown, shall encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41.

Specific mandate of Minister of Canadian Heritage

43 (1) The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to advance the equality of status and use of English and French in Canadian society and, without restricting the generality of the foregoing, may take measures to

(a) enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development;

(b) encourage and support the learning of English and French in Canada;

(c) foster an acceptance and appreciation of both English and French by members of the public;

(d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally and, in particular, to offer provincial and municipal services in both English and French and to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;

(e) encourage and assist provincial governments to provide opportunities for everyone in Canada to learn both English and French;

(f) encourage and cooperate with the business community, labour organizations, voluntary organizations and other organizations or institutions to provide services in both English and French and to foster the recognition and use of those languages;

(g) encourage and assist organizations and institutions to project the bilingual character of Canada in their activities in Canada or elsewhere; and

(h) with the approval of the Governor in Council, enter into agreements or arrangements that recognize and advance the bilingual character of Canada with the governments of foreign states.

…

PART IX

Investigations

Investigation of complaints

58 (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied with

in the administration of the affairs of any federal institution.

…

PART X

COURT REMEDY

…

Application for remedy

77 (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

…

Order of Court

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

…

Evidence relating to similar complaint

79 In proceedings under this Part relating to a complaint against a federal institution, the Court may admit as evidence information relating to any similar complaint under this Act in respect of the same federal institution.

…

PART XI

GENERAL

Primacy of Parts I to V

82 (1) In the event of any inconsistency between the following Parts and any other Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:

(a) Part I (Proceedings of Parliament);

(b) Part II (Legislative and other Instruments);

(c) Part III (Administration of Justice);

(d) Part IV (Communications with and Services to the Public); and

(e) Part V (Language of Work).

…

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]

Official Languages of Canada

Official languages of Canada

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

…

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

…

Communications by public with federal institutions

20 (1) 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.

…

Minority Language Educational Rights

Language of instruction

23 (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

> **(a)** applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
>
> **(b)** includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

…

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

…

Application of Charter

Application of Charter

32 (1) This Charter applies

> **(a)** to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> **(b)** to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.