Federal Court  Cour fédérale

Date: 20180523

Docket: T-1107-13

Citation: 2018 FC 530

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 23, 2018

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

LA FÉDÉRATION DES FRANCOPHONES DE LA COLOMBIE-BRITANNIQUE

Applicant

and

EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA AND THE CANADA EMPLOYMENT AND INSURANCE COMMISSION

Defendants

and

THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener

and

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Intervener

JUDGMENT AND REASONS

I. Overview

[1] This is an application filed under subsection 77(1) of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp) [OLA], pursuant to which the Fédération des francophones de la Colombie-Britannique [FFCB] argues that the defendants violated Parts IV and VII of the OLA and subsection 20(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], under a federal-provincial agreement on employment assistance services, entered into under section 63 of the *Employment Insurance Act*, SC 1996, c 23 [EIA]. Part IV of the OLA deals with communications with and services to the public delivered by federal institutions, while Part VII requires that federal institutions ensure that "positive measures" are taken to enhance the vitality of English and French communities.

[2] More specifically, the FFCB alleges that the defendants, Human Resources and Social Development Canada [HRSDC], now Employment and Social Development Canada [ESDC], and the Canada Employment Insurance Commission [Commission] failed to meet their linguistic obligations toward British Columbia's official language minority community [OLMC], the French linguistic minority, in entering into and implementing the Canada – British Columbia Labour Market Development Agreement signed in February 2008 [Agreement].

[3] In the spring of 2011, the FFCB filed several complaints with the Commissioner of Official Languages [Commissioner][1] alleging two main breaches of the OLA. Firstly, the change in the employment assistance service delivery model developed and implemented by the Government of British Columbia under the Agreement would hinder the development and vitality of the French-speaking minority community in the province. Secondly, the French-language employment assistance services provided in British Columbia would no longer be of equal quality or would no longer be available with the new model under consideration. Pursuant to his investigation under Parts IV and VII of the OLA, the Commissioner's final investigation report issued in April 2013 found that the defendants had failed to meet their obligations under the OLA. Following receipt of the Commissioner's final investigation report, the FFCB filed the current application in August 2013.

[4] The FFCB is seeking an order from this Court declaring that employment benefits and support measures available under the Agreement run counter to subsection 20(1) of the Charter and Parts IV and VII of the OLA. The FFCB also wishes to obtain an order directing ESDC and the Commission to comply with Part IV of the OLA by providing benefits and measures of equal quality for the French-speaking community, and to take the necessary steps (in terms of benefits and measures available under the Agreement) to meet the requirements of Part VII of the OLA. The FFCB also asks the Court to order the establishment of follow-up mechanisms, in collaboration with the French linguistic minority, to ensure compliance with the language obligations resulting from the Agreement and Part VII of the OLA.

[1] I use the masculine to refer to the Commissioner in these reasons, given the identity of the person who currently holds the position, but I am well aware that this identity has varied throughout the history of this case.

[5] This case therefore deals with the scope and interpretation of Parts IV and VII of the OLA in the context of a transfer payment agreement between the federal government and a provincial government for the administration of employment support services to help workers re-enter the work force. The Commissioner intervened in the proceedings to argue how, in his opinion, the sections of the OLA at issue in this case should be interpreted. After the service of a notice of constitutional question on the Attorneys General of all provinces (pursuant to section 57 of the *Federal Courts Act*, RSC 1985, c F-7), the Attorney General of British Columbia [AGBC] also intervened in this case.

[6] The FFCB's application raises the following main issues:

- Under the Agreement, does British Columbia provide employment assistance services "on behalf of" ESDC and the Commission within the meaning of section 25 of the OLA, making these federal institutions subject to Part IV of the OLA?

- Have ESDC and the Commission taken "positive measures" to fulfil their duties under Part VII of the OLA, specifically section 41?

- If there is a finding of breach or noncompliance with the OLA, what should the appropriate remedy be?

- How should the costs be awarded?

[7] For the reasons that follow, the FFCB's application must fail. I am of the view that, under the circumstances, Part IV does not apply to the Agreement between the federal government and British Columbia because the delivery of employment assistance services stipulated in the Agreement is a valid exercise of the province's legislative authority and, therefore, British Columbia is not acting "on behalf of" a federal institution. Also, I am satisfied that, in view of the proper interpretation of subsection 41(2) of the OLA and the evidence in the record, the federal institutions involved had taken "positive measures" within the meaning of Part VII of the OLA when the FFCB filed its complaint with the Commissioner. Since there was no breach or noncompliance with the OLA when the FFCB filed its complaint, the Court cannot order a remedy. However, the FFCB is entitled to its costs under the circumstances.

[8] Of course, the Court's decision responds first and foremost to the particular facts of this case. However, for both Part IV and Part VII of the OLA, the FFCB's application raises issues that may have further implications. The parties have pointed this out to the Court. With respect to Part IV, the defendants stated that the interpretation proposed by the FFCB and the Commissioner could undermine all federal-provincial labour market development agreements currently in place in Canada. With respect to Part VII, the FFCB and the Commissioner indicated that the interpretation of section 41 could have implications for the duty of all federal institutions to take positive measures to implement the federal government's commitment to enhance the vitality and development of linguistic minorities and promote both official languages. The Court has considered these issues in preparing these reasons.

II. Background

A. *The parties*

[9] The FFCB is a non-profit organization that has been representing British Columbia's French-speaking community since 1945. Its members include many Francophone organizations and groups.

[10] ESDC, formerly known as HRSDC, is the federal department responsible for developing, managing and delivering social programs and services that contribute to the development of human resources in Canada and to the skills of Canadians and social development in Canada. This includes employment insurance services. For its part, the Commission derives its jurisdiction from the *Department of Employment and Social Development Act*, SC 2005, c. 34, and is responsible for administering the EIA and producing an annual Employment Insurance Monitoring and Assessment Report, which the responsible minister tables in Parliament. ESDC and the Commission are both federal institutions within the meaning of section 3 of the OLA.

[11] The role of the primary intervener in this case, the Commissioner, is to ensure that federal institutions fulfil their legal language obligations and to receive complaints filed under the OLA alleging breaches or failures to comply with these obligations. The second respondent, the AGBC, represents the Province of British Columbia, which is party to the Agreement entered into with ESDC and the Commission. It seems to me important to note that while the FFCB's application raises a constitutional question of jurisdiction between Parliament and the provincial legislatures, and although labour market development agreements are closely analogous to the

Agreement are now in place in all provinces and territories in Canada, no provincial Attorney General other than the AGBC has intervened in the case.

B. *The Agreement*

[12] The Agreement at issue in this case was signed in February 2008 and deals with employment assistance programs and services in British Columbia. It stipulates that ESDC and the Commission will contribute financially to the costs of the province's employment assistance programs and services and related administrative costs, provided they are "similar" to the employment benefits and support measures established by the Commission in accordance with the EIA, and consistent with the purpose of Part II of the EIA and the guidelines set out in subsection 57(1).

[13] Before the Agreement was signed, HRSDC and the Commission, in conjunction with the province, were solely responsible for the delivery of employment assistance services in British Columbia. In fact, in 1997, following the amendments to the EIA pursuant to the reform of Canada's employment insurance system, HRSDC and the Commission signed a first co-management agreement with British Columbia on the development of the labour market in the province. Under the agreement, British Columbia assumed certain responsibilities with respect to employment assistance services. Pursuant to the agreement, the province had a role in designing and managing employment benefits and support measures, and in operating the National Employment Service [NES], but was not involved in the direct delivery of services resulting from these measures or the NES. Under the 1997 agreement, several Francophone member organizations of the FFCB received funding to provide employment assistance services to

Francophone client groups. The various Francophone organizations provided both “assisted” and “non-assisted” services. The so-called “assisted” services allowed clients to search for work independently or with the help of an employment counsellor, using support provided by data banks. The so-called “non-assisted” services included meetings between counsellors and the client, the organization of group workshops, job fairs, and assistance provided by a guidance counsellor. For their part, ESDC and the Commission retained primary responsibility for establishing and implementing employment benefits and support measures, including providing the necessary financial support to any person or organization responsible for directly providing services in British Columbia.

[14] Under the February 2008 Agreement, the Government of British Columbia assumed the lead role in the development and administration of employment benefits and support measures under Part II of the EIA, in particular, those that helped employment insurance clients re-enter the labour force. Pursuant to the Agreement and in accordance with section 63 of the EIA that underlies it, the federal government funds the cost of benefits and measures established by the Government of British Columbia. However, the province is now responsible for delivering employment assistance service programs funded by federal employment insurance funds and has primary responsibility for the delivery of benefits and measures. The Commission pays British Columbia approximately $300 million annually for employment programs established by the province under the Agreement[2].

[2] I note that HRSDC and British Columbia also entered into a parallel agreement in February 2008 entitled the Canada – British Columbia Labour Market Development Agreement. However, I will not address it in these reasons, because the FFCB did not make written or oral representations about it and instead focused on the Agreement.

[15] The Agreement and the Annexes contain about 50 pages. The main facts in this case can be summarized as follows: In terms of its objectives, the first expectations of the preamble to the Agreement indicate that Canada and British Columbia:

> [...] agree on the importance of the development of a skilled workforce and to the rapid re-employment of unemployed British Columbians;
>
> [...] support the vision of a provincial labour market development system, based on predictable funding to support British Columbia's economic growth, the creation of employment opportunities and reduction in the "productivity gap" through responsive and appropriate labour market services that build on the skills, abilities and potential of British Columbians;
>
> [...] support the creation of a cohesive, made in British Columbia system of services focused on addressing labour market challenges facing employers and employees across British Columbia; [and]
>
> [...] agree that they should to the extent possible, reduce unnecessary overlap and duplication in their labour market development programs.

[16] I also believe it is useful to reproduce the purpose of the Agreement, described in Article 2.1 as follows:

> **2.1.** The purpose of this Agreement is to:
>
> **(a)** implement, within the scope of Part II of the EI Act, new Canada-British Columbia arrangements in the area of labour market development that will enable British Columbia to assume an expanded role in the design and delivery of labour market development programs and services in British Columbia, to benefit clients;
>
> (b) provide for cooperative arrangements between Canada and British Columbia to reduce overlap and duplication in, and to

> harmonize and coordinate the delivery of, their respective employment programs and services; and
>
> (c) provide for the transfer of affected federal employees to British Columbia.
>
> [Emphasis added]

[17] British Columbia Benefits and Measures provided under the Agreement are described in greater detail in Articles 1.1, 1.2, 3.3 and 3.4 of the Agreement and Articles 3.3 and 3.4 of Annex 1. Essentially, benefits include employment services (in the form of wage subsidies and work experience), self-employment assistance, skills development and the earnings supplement. For their part, the province's measures include employment assistance services, labour market partnerships, support for research and innovation.

[18] Three provisions deal with the language obligations of the parties to the Agreement. Under Article 5.2 of the Agreement, British Columbia agrees to provide access to BC Benefits and Measures and carry out the functions of the National Employment Service "in either of Canada's official languages where there is a significant demand for the provision of the assistance, or the performance of those functions, in that language." This is the language clause. Article 5.3 of the Agreement requires that British Columbia use as a guideline the criteria for determining what constitutes "significant demand" as set out in the OLA and the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48 [Regulations]. Finally, under Article 5.4 of the Agreement, British Columbia "agrees to consult with representatives of the official language minority communities in British Columbia on the

provision of its BC Benefits and Measures under [the Agreement].” This is referred to as the consultation clause.

[19] The Agreement also provides for periodic evaluations of its implementation, exchange of personal information (including the language of communication, language of service and language of the intervention received) between the province and federal government, publication of an annual report submitted to Parliament by ESDC, and the creation of a Management Committee to oversee the operation of the Agreement.

[20] Although the Agreement was initialled in February 2008, the Commission remained responsible for providing employment benefits and support measures until February 2, 2009, the date British Columbia began assuming responsibility. To ensure the continuity of employment assistance services until its Employment Program of British Columbia [EPBC] was fully implemented, the Province of British Columbia then entered into temporary agreements with Francophone organizations. These agreements were essentially identical to those previously entered into between ESDC and these organizations and were already in place. British Columbia then developed a new employment assistance service delivery model, called a “one-stop shop” model, where a single regional agency became responsible for all employment assistance services, including French-language services, in each region of British Columbia. As a result, Francophones were no longer served by organizations whose primary purpose was to meet the needs of the French‑speaking community. As part of the province’s Business Transformation Project [BTP], it was decided not to renew funding for Francophone organizations. British Columbia informed affected organizations of this decision in September 2010.

[21] The FFCB has voiced its concerns with respect to services for Francophones since the Agreement was first considered in 2007. According to the FFCB, the "one-stop shop" model was the complete opposite of the "by and for" model, which was the only one that could provide the French-speaking community with employment assistance services of equal quality. Within a "by and for" model, the French-speaking community is responsible for providing employment assistance services to Francophones. In discussions and consultations that began with the federal government and the province as soon as the Agreement was considered, and which continued after it was signed, the FFCB proposed an alternative to the "one-stop shop" model, which was based on a consortium responsible for delivering all French-language employment assistance services in the province, thus maintaining the "by and for" approach. However, British Columbia decided not to use the model presented by the FFCB. The FFCB also voiced its concerns to the federal government during this period.

C. *EPBC*

[22] In March 2011, just before its new Employment Assistance Services Program (EPBC) came into force, British Columbia issued a call for tenders for service delivery in each region identified for service delivery in "one-stop shops." In this new program, Francophones are identified as a "specialized population." In addition, some parts of British Columbia, such as Victoria, Nanaimo, Vancouver, Abbotsford, Chilliwack, Kelowna, Kamloops, Penticton and Prince George, are identified as areas where the province must provide services in both English and French. I note that there were in fact 14 areas in British Columbia (including 6 in Vancouver) where demand was significant, and therefore employment assistance services had to be available and equivalent to services in English under the Agreement.

[23] The EPBC finally came into force on April 2, 2012. With the introduction of BC's new employment assistance service delivery model, all employment programs established by the province are now operating under the "one-stop shop" model, in which larger regional service delivery organizations are contracted by the Government of British Columbia. These organizations have been designated to provide the full range of employment assistance programs and services in each British Columbia geographic service area as a result of province-wide requests for proposals, including programs and services provided by the province to the French linguistic minority. Agreements that have been entered into with the various organizations include a clause stipulating the terms and conditions of services to be delivered in French.

[24] Since Francophone organizations, which were previously funded, did not have the institutional capacity to deliver the full range of services in both official languages using a "one-stop shop" model, they were only able to participate in the call for tenders as subcontractors for English-language organizations. For example, the Société francophone de Victoria [SFV] was subcontracted to provide French-language services in the Victoria area; Collège Éducacentre [Éducacentre] was subcontracted in the Chilliwack area; and La Boussole – Centre communautaire francophone [La Boussole] became a subcontractor for the Vancouver Downtown Eastside, Vancouver Midtown, Vancouver Northeast, Vancouver South and Vancouver Westside areas. All these organizations are members of the FFCB and provide French-language services to unemployed people. The SFV is the only organization that operates in a satellite office, which means that French-speaking clients are referred to it, whereas Éducacentre and La Boussole assign a French-speaking employment counsellor to work within the English-speaking organization that provides employment assistance services.

[25] According to the FFCB, when British Columbia began providing employment benefits and support measures under the Agreement as part of its EPBC and with its "one-stop shop" model, ESDC and the Commission no longer ensured that French-language employment assistance services of equal quality were available in British Columbia where there was significant demand for these services.

D. *Complaints to the Commissioner*

[26] In the spring of 2011, after the Agreement was signed but well before the EPBC came into force, the FFCB filed a complaint with the Commissioner, stating: 1) that FFCB members were in the best position to identify and meet the French-speaking community's employment assistance service needs; 2) they were no longer receiving funding; 3) that despite the linguistic clause contained in the Agreement, maintenance of French-language services was not guaranteed; 4) that English and French employment assistance services were not equivalent; and 5) that ESDC denied having an obligation to intervene on behalf of the French-speaking community. Although the FFCB's main complaint was not dated, the parties stated at the hearing before the Court that the date of the complaint to the Commissioner was June 15, 2011.

[27] In its complaint, the FFCB first denounced the elimination of employment assistance services in five centres in British Columbia formerly provided to Francophones through agreements with Francophone organizations. Secondly, it pointed out that the Agreement contained a language clause that the federal government had to ensure compliance by guaranteeing the maintenance of French-language services where warranted by significant

demand. Third, according to the FFCB, ESDC denied all responsibility and showed a lack of diligence by failing to assume its responsibilities to the French-speaking community.

[28] Between January and June 2011, the Commissioner received a total of four complaints regarding the ESDC and the Commission's conduct under the Agreement. The complainants all claimed that the change in the employment assistance service delivery model developed and implemented by the Government of British Columbia would hinder the development and vitality of the French-speaking minority community in British Columbia. They also argued that French-language employment assistance services would no longer be of equal quality to services provided in English or would not be available after the new model was introduced.

E. ***Commissioner's report***

[29] The Commissioner issued his final investigation report in April 2013, which found that employment centres in the province of British Columbia did not provide services of equal quality in both official languages. In his report, the Commissioner noted that ESDC did not ensure, as was required under section 25 of the OLA, that employment assistance services resulting from the implementation of the Agreement be actively offered by the province in both languages at employment services centres where there was significant demand. The Commissioner also determined that, with respect to its language obligations under the Agreement, ESDC had not "fully" discharged its responsibilities under Part VII of the OLA and had not taken "the necessary measures" to help British Columbia meet the language requirements specified in the Agreement. Also, according to the Commissioner, ESDC had not set up accountability mechanisms that would have made it possible to verify the extent to which British Columbia

complied with the language clauses of the Agreement. The Commissioner also determined that, despite consultations with representatives of the FFCB and the OLMC, ESDC had not demonstrated that it had evaluated the impact of the implementation of the new employment assistance service delivery model on the vitality of the French-speaking community in British Columbia.

[30] Based on his investigation and findings, the Commissioner made a series of recommendations to ESDC indicating the steps that the Commissioner thought ESDC needed to take to meet its obligations under the Parts IV and VII of the OLA. These recommendations included taking the steps needed to ensure the active offer of French-language services in designated bilingual employment centres and on the WorkBC website, as well as establishing concrete positive measures to mitigate the negative impact of the implementation of the new employment assistance services model on the vitality of the French-speaking community in British Columbia. In November 2015, while the application filed by the FFCB was already underway in this Court, the Commissioner issued his final follow-up report on his April 2013 recommendations. In this follow-up report, the Commissioner stated that, despite significant improvements, a lack of equivalence in French-language employment assistance services still persisted in British Columbia, and that the concrete positive measures taken by ESDC under Part VII of the OLA remained inadequate.

F. *The FFCB's application before the Court*

[31] The FFCB filed its application for remedy under section 77 of the OLA in June 2013.

[32] In its legal recourse, the FFCB argued that when the Agreement and the EPBC came into force, there was a decrease in employment assistance services provided by Francophone organizations in British Columbia as well as a decrease in French‑speaking clients due to lower funding. It added that employers found it more difficult to recruit French-speaking employees in the province. The Agreement had a detrimental effect on the vitality of the French-speaking community in British Columbia and on the delivery of French-language employment assistance services, since designated bilingual employment centres did not provide services of equal quality in French, both in the field and on the Internet. There was no active offer and, therefore, there was a failure to comply with both the substantive equality and the formal equality stipulated under the OLA.

[33] The FFCB submitted that it followed from the case law of the Supreme Court that British Columbia employment benefits and support measures, the pith and substance of which are intended to maintain ties with the labour market, fall within the exclusive jurisdiction of the Federal Government under subsection 91(2A) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (U.K.), reproduced in RSC 1985, Schedule II, No. 5 [CA 1867]. The FFCB maintained that, since the benefits and measures of the province established under section 59 and subsection 60(4) of the EIA fall within exclusive federal jurisdiction, obligations under subsection 20(1) of the *Charter* and sections 22 and 25 of the OLA are incumbent upon ESDC and the Commission. British Columbia, which is responsible for administering employment benefits and support measures under the Agreement, did so “on behalf of” ESDC and the Commission within the meaning of section 25 of the OLA, and ESDC and the Commission were required to ensure compliance with the *Charter* and Part IV of the OLA. Furthermore, according

to the FFCB, ESDC and the Commission exercised a degree of control over the management, administration and evaluation of the benefits and measures covered by the Agreement, and it follows that British Columbia provides its employment assistance services "on their behalf." In addition, the FFCB claimed that ESDC would also have an obligation, under Part VII of the OLA, to ensure compliance with the language obligations flowing from the Agreement, thereby fulfilling the commitment to enhance the vitality and promote the development of the French-speaking community.

[34] In terms of remedies for these various alleged breaches of the OLA, the FFCB asks the Court to:

- Declare the rights at issue with respect to Parts IV and VII of the OLA;
- Declare that Part IV applies to the employment assistance services provided for in the Agreement;
- Order the federal institutions concerned to propose an implementation plan as part of a Doucet-Boudreau type of structural order (see *Doucet-Boudreau v Nova Scotia (Minister of Education)*) 2003 SCC 62 at paras 60 and s), where the defendants would demonstrate what they did to comply with Part IV of the OLA;
- Declare that what the defendants did was not sufficient to fulfil the obligation to take the positive measures described in Part VII of the OLA;
- Set out parameters and indicators describing positive measures that would enable defendants to comply with subsection 41(2) of the OLA;

- Order the defendants to develop and implement formal and permanent monitoring mechanisms to ensure compliance with Part VII of the OLA;

- Order the defendants to require the province to fully comply with the Agreement and use monitoring mechanisms to which they are entitled under the Agreement; and

- Award costs to the FFCB, considering the right to costs provided for in section 81 of the OLA when an important and new principle is raised.

G. *Relevant Acts*

[35] The EIA and the OLA are the two main acts at the centre of this dispute.

(1) EIA

[36] The relevant provisions of the EIA are found in Part II, the purpose of which 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]" (section 56). To lighten the text, sections 56 to 63 of Part II of the EIA are reproduced in their entirety in Appendix I to these reasons. Below is a summary of its contents.

[37] Sections 58, 59 and 60 of the EIA describe the types of employment benefits and support measures that the Commission may establish. For example, employment benefits aim to help unemployed persons or persons whose employment insurance benefits have ended within the

previous 60 months to find employment, by encouraging employers to hire them and encouraging them to accept employment, helping them start businesses or become self-employed, providing them with employment opportunities and helping them obtain skills for employment. For their part, NES support measures are intended to help and support employment assistance services, the various labour market partners (employers, associations, organizations, etc.) as well as research and innovative projects.

[38] Subsection 57(1) of the EIA outlines guidelines for establishing employment benefits and support measures under Part II of the Act. These legislative guidelines include: 1) harmonization with provincial employment initiatives to avoid duplication; 2) reduction of dependency on unemployment benefits; 3) co-operation and partnership with other governments, employers and community organizations; 4) flexibility for implementation at the local level; 5) commitment by persons receiving assistance under the benefits and measures; and 6) a framework for evaluating the success of the assistance provided. A specific legislative language guideline (in paragraph 57(1)(d.1)) was added to the Act at the request of the Commissioner at the time. It provides for "availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language."

[39] Part II of the EIA provides the federal government and the Commission with various options for delivering employment assistance services. Under a first option, described in section 59, the Commission may establish employment assistance services. In this case, it acts as an institution of the federal government. A second model is described in section 62, which expressly stipulates that the Commission may "enter into an agreement or arrangement for the

administration of employment benefits or support measures on its behalf" by a third party, including another government or government agency in Canada (such as a province). Under this model, the province provides employment assistance services "on behalf" of the federal government and is financially compensated accordingly. Another option, set out in subsection 57(3) of the EIA, is a co-management agreement for the development, management and evaluation of the Commission's benefits and measures with the benefits and measures administered by ESDC, in complementarity with the province's benefits and measures and programs. In this scenario, the province collaborates in the development and implementation of federal measures in the province but does not take responsibility for them. Lastly, a final model is described in section 63 of the EIA. In this situation, the federal government withdraws from employment assistance services and allows provincial authorities to take over. Section 63 stipulates that the Commission may, with the approval of ESDC, enter into an agreement with a provincial government that provides for the payment of a financial contribution for costs of benefits or measures that are "similar" to those established by the Commission and are consistent with the purpose and guidelines of subsection 57(1) of the EIA.

[40] Historically, four provinces and one territory, including British Columbia in 1997, have signed a co-management agreement to provide employment assistance services. However, at the time of the FFCB's application, contribution agreements under section 63 of the EIA (the last model mentioned above) had been signed and were now in place with every province and territory in Canada. In fact, the preamble and Article 14.1 of the Agreement expressly state that the Agreement with British Columbia was entered into under section 63 of the EIA.

(2) OLA

[41] The OLA is a federal statute whose purposes include "ensuring respect for English and French as the official languages of Canada and the equality of status and equal rights and privileges as to their use in all federal institutions" (*Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau SCC*] at para 9). It also aims to clarify the powers and obligations of federal institutions with respect to official languages, and to support the development of English and French linguistic minority communities in Canada. In fact, "the OLA and its regulations form a comprehensive statutory regime that governs all matters related to language rights within federal institutions" (*Norton v Via Rail Canada*, 2009 FC 704 [*Norton*] at para 61).

[42] The OLA contains several parts. Parts I to VI of the Act establish a series of language rights in many contexts, including: debates and proceedings of parliament; legislative and other instruments; administration of justice; communications with the public; and language of work. More specifically, Part IV deals with communications with the public and the right for members of the public to be served by federal institutions in the official language of their choice. Part IV, section 21 provides for the right of members of the public to communicate with and receive services from federal institutions in the official language of their choice. Under section 22, federal institutions have a duty to ensure that members of the public can communicate with their offices and receive services of equal quality in either official language where there is significant demand for communications and services in that language. Section 25 stipulates that federal institutions have a duty to ensure that services provided to the public by third parties on their behalf are provided in either official language in any case where those services, if provided by

the institution, would be required under Part IV to be provided in either official language. Section 27 provides that federal institutions' duty in respect of communications and services in both official languages applies in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services. Finally, section 28 adds that federal institutions are required to ensure that their communications and services are actively offered in both official languages.

[43] Parts VII and VIII of the OLA describe the obligations and responsibilities of federal institutions in enhancing the vitality and development of English and French linguistic minority communities in Canada. Part VII is entitled "Advancement of English and French." Since 1988, subsection 41(1) has stated the federal government's overall commitment to "enhancing the vitality of the English and French linguistic minority communities in Canada" and supporting and assisting their development; and "fostering the full recognition and use of both English and French in Canadian society." Under subsection 41(2), amended in 2005, federal institutions have the duty to ensure that "positive measures are taken for the implementation of the commitments under subsection (1)."

[44] Part IX lists the duties and powers of the Commissioner, who, among other things, is required to carry out investigations and to report and make recommendations. Part X of the OLA deals with court remedies and subsection 77(1) stipulates that any person who has made a complaint to the Commissioner in respect of a language right or duty under the OLA may appeal to the Federal Court. Subsection 77(4) stipulates that where the Court concludes that a federal institution has failed to comply with the OLA, the Court may grant such remedy as it considers

appropriate and just in the circumstances. Finally, in Part XI, section 82 provides that the provisions of certain parts of the OLA, including Part IV, prevail over other federal statutes.

[45] The relevant provisions of the OLA are appended to these reasons.

H. *Interpretation of language rights*

[46] It must be emphasized that language rights are a cornerstone of Canadian society. The OLA is a fundamental law of the land, closely linked to the values and rights set out in the Canadian Constitution, including the *Charter*. The Supreme Court recognized that the OLA has a quasi-constitutional status (*Thibodeau SCC* at para 12; *DesRochers v Canada (Industry)*, 2009 SCC 8 [*DesRochers SCC*] at para 2; *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 [*Lavigne SCC*] at para 25; *R. v Beaulac*, [1999] 1 SCR 768 [*Beaulac*] at para 21). Many parts of the OLA have a constitutional anchor, for example, subsection 20(1) of the *Charter* for the language of service and subsection 16(1) for the language of work. Subsection 20(1) of the *Charter* reads as follows:

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	**20. (1)** Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :
(a) there is a significant demand for communications with and services from that	**a)** l'emploi du français ou de l'anglais fait l'objet d'une demande importante;

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.	**b)** l'emploi du français et de l'anglais se justifie par la vocation du bureau.

[47] From the outset, it is important to bear in mind the principles of interpretation applicable to language rights. On this point, there is no fundamental disagreement between the parties. However, I must point out that although they generally agree on the applicable principles of interpretation, the parties do not agree on the proper interpretation of Part IV and Part VII of the OLA.

[48] Language rights in Canada "are meant to protect official language minorities in this country and to insure the equality of status of French and English" and they "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities" [Emphasis in original] (*Beaulac* at paras 25, 41; *DesRochers SCC* at para 31). Courts are required to give the OLA a liberal and purposive interpretation (*DesRochers SCC* at para 31; *Air Canada v Thibodeau*, 2012 FCA 246 [*Thibodeau FCA*] at para 12). Language rights must therefore be given a broad and liberal interpretation in order to promote the survival and development of official language minorities in Canada (*DesRochers SCC* at para 31; *Beaulac* at para 25). In *Re Manitoba Language Rights*, [1985] 1 SCR 721 at p 744, the Supreme Court unanimously explained the role of language rights in Canadian society:

> […] The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap

> between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

[49] At paragraph 24 of *Beaulac*, the Supreme Court further enshrined the guiding principle that the OLA protects and contemplates a substantive equality of language rights in Canada:

> This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State […]. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation.

[50] Consequently, since *Beaulac*, "restrictive interpretations of language rights have evaporated in favour of a purposive approach infused with the principle of substantive equality" (*Canada (Attorney General) v Shakov*, 2017 FCA 250 [*Shakov*] at para 116 (dissenting reasons, but not on this point); *DesRochers SCC* at para 31; *Lavigne SCC* at para 22). Therefore, administrative barriers cannot be used as an excuse to justify the failure to provide services in the minority language. Indeed, "an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language" (*Beaulac* at para 39). More specifically, the provisions of Part IV of the OLA must be interpreted in a manner consistent with the preservation and development of official language communities in Canada: "[s]ubstantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation" (*DesRochers SCC* at para 31).

[51] Both substantive rights and obligations under the OLA and the procedural mechanisms surrounding language rights must be given a broad and liberal interpretation. This is the case for subsection 77(2) of the OLA (*Dionne v Canada (Attorney General)*, 2015 FC 862 at para 17). In the same spirit, subsection 77(4) of the OLA, which confers a wide remedial authority upon the courts, should be "interpreted generously to achieve its purpose" (*Thibodeau SCC* at para 112). This approach is consistent with the view that language rights must be interpreted "as a fundamental tool for the preservation and protection of official language communities where they do apply", which can only be achieved if procedural mechanisms are supported by this broad and liberal approach (*Beaulac* at para 25).

[52] However, this does not mean that the ordinary rules of statutory interpretation have no place in interpreting the OLA (*Thibodeau SCC* at para 112; *Charlebois v Saint John (City)*, 2005 SCC 74 [*Charlebois*] at para 23; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 [*Bell ExpressVu*] at para 62). On the contrary, the modern approach to statutory interpretation, which requires us to read the words of an Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, continues to apply even with respect to language rights (*Caron c Alberta*, 2015 SCC 56 at para 38; *Thibodeau SCC* at para 112; *Lavigne SCC* at para 25, quoting E. A. Driedger, *Construction of Statutes*, 2nd ed, Toronto, Butterworths, 1983 at p 87; see also, regarding the modern approach to statutory interpretation, *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23 and *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [*Rizzo*] at para 21).

[53] I must rule on the FFCB's application in light of these principles.

III. Analysis

A. *Preliminary issues*

[54] Two preliminary issues must be addressed before dealing with the two main issues in dispute arising from the FFCB's application. They concern, on the one hand, the jurisdiction of the Federal Court and, on the other hand, the requirements of the court remedy under section 77 of the OLA.

(1) Jurisdiction of the Federal Court decision

[55] In its submission, the AGBC challenges the jurisdiction of this Court to hear the application filed by the FFCB on the ground that it would in fact raise a question of division of legislative powers between Parliament and the provincial legislatures under sections 91 and 92 of the CA 1867. However, the AGBC maintains it would be clear from the Supreme Court's decision in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 [*Windsor*] that this Court has exclusive jurisdiction to resolve disputes and issues arising expressly from the federal system, and that the CA 1867 is not a "law of Canada" under which the jurisdiction of the Federal Court can be established. Because constitutional law is neither federal nor provincial, it cannot, according to the AGBC, form the basis of an application for relief such as the one the FFCB seeks to assert in this Court (*Windsor* at para 64). The AGBC argues that the Federal Court, as a tribunal created under section 101 of the CA 1867 and whose role is limited to enforcing federal

statutes, does not have jurisdiction to hear questions of division of powers under sections 91 and 92 of the CA 1867.

[56] I do not agree with the AGBC's arguments in this regard. Instead, I am of the view, as are the FFCB, the defendants and the Commissioner, that this Court has jurisdiction to deal with all the issues raised by this case.

[57] To determine whether the Federal Court has jurisdiction to hear a case, the test established by the Supreme Court in *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 [*ITO*], and reaffirmed in *Windsor*, states that three conditions must be met: 1) There must be a statutory grant of jurisdiction by the federal Parliament; 2) There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and 3) The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the CA 1867 (*ITO* at p 766). Furthermore, in order to decide whether the Federal Court has jurisdiction based on the criteria set out in *ITO*, it is necessary to first determine "the essential nature or character" of the application (*Windsor* at para 25). While reiterating the branches of the *ITO* test, the Supreme Court pointed out in *Windsor* that, in order to grant jurisdiction to the Federal Court, "the pith and substance" of the remedies sought before the Court must necessarily be based on an Act of Parliament, but that constitutional texts alone cannot confer jurisdiction on the Court (*Windsor* at paras 41, 59; *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2017 FC 1119 at paras 69, 84, 87-88; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 [*Bilodeau-Massé*] at paras 63-65; *Apotex Inc v Ambrose*, 2017 FC 487 at para 85).

[58] Contrary to the submissions made by the AGBC, there is no doubt that all three tests of the *ITO* ruling are met in this case. First of all, the AGBC's position that this Court does not have jurisdiction to rule on a dispute involving the theory of sharing or of interjurisdictional immunity is based on a mischaracterization of the main issue of the FFCB's application. In this case, the pith and substance of the application for remedy concerns the duty of federal institutions to comply with Part IV of the OLA with respect to communications with the public and the provision of services, and to ensure the actual implementation of positive measures to enhance the vitality of Canada's English and French linguistic communities within the meaning of Part VII of the Act. Similarly, the purpose of the order sought by the FFCB is to direct ESDC and the Commission to fulfil their obligations to provide service of equal quality in both official languages and consider the needs of the minority French-speaking community. Thus, the defendants' compliance, as federal institutions, with their language obligations under the OLA constitutes the "pith and substance" of the FFCB's application. The main issue of the application, and its raison d'être, is first and foremost the application, interpretation and scope of the OLA. It is totally inaccurate to characterize the FFCB's application for relief as primarily involving concurrent or exclusive jurisdiction.

[59] I would add that the facts in *Windsor* are inherently different from those underlying the FFCB's application before the Court in this case. *Windsor* dealt with whether a set of provincial rules, in this case a municipal bylaw, can apply to a federal undertaking. The remedy sought in *Windsor* was to have the Court declare the provincial rules inapplicable under section 52 of the *Constitution Act, 1982*. In *Windsor*, the Supreme Court was of the view that the CA 1867 is not a "law of Canada" because it was not enacted by Parliament (*Windsor* at para 61, citing *Northern*

Telecom Canada Ltd v Communication Workers of Canada, [1983] 1 SCR 733 [*Northern Telecom*] at p 745). Consequently, the Supreme Court determined that the CA 1867 is not a "law of Canada" within the meaning of federal statutes (*Windsor* at para 62). Since the applicant was not seeking relief under an Act of Parliament and under a federal right, but was seeking relief under constitutional law (CA 1867), the Supreme Court held in *Windsor* that the first part of the *ITO* test was not met, and there was no need to consider whether the second and third parts of the test were met (*Windsor* at paras 58, 65).

[60] Admittedly, the FFCB is asking this Court to find that employment assistance services provided under the Agreement fall within exclusive federal jurisdiction, that they are delivered by British Columbia "on behalf of" a federal institution, and that Part IV of the OLA applies to the Agreement pursuant to section 25 of the OLA. However, the set of rules referred to in the FFCB's application is not a constitutional text but the OLA itself, a federal statute enacted by Parliament. In this case, the jurisdiction of the Court in matters relating to a complaint made under the OLA is expressly provided for in that Act. Section 76 of the OLA refers to the Federal Court, and section 77 (under which the FFCB initiated its application for remedy) expressly grants jurisdiction to this Court in respect of any application for remedy filed by a person who has made a complaint in respect of a right or duty under specific sections of the Act. The OLA is a "law of Canada" and is the legal basis for the FFCB's application.

[61] In addition, the FFCB is not seeking a declaration in respect of the division of legislative powers between the two levels of government. In this case, the question of constitutional jurisdiction over the benefits and measures described in the Agreement is an ancillary and collateral issue that the Court must settle in order to rule on language obligations applicable

under the OLA, in the context of the implementation of the Agreement. This Court has jurisdiction to rule on such a matter related to an issue arising under a federal statute. *Windsor* does not remove the Court's power to consider and rule on questions of constitutional law (*Bilodeau-Massé* at paras 49-50, 72, 80, 83). It is not necessary for a statute to specifically grant the Court the power to rule on the constitutional questions raised by a case, or to provide for a particular procedural vehicle, insofar as the branches of the *ITO* test are met (*Northern Telecom* at pp 741-745; *Windsor* at paras 70-71). The Court has jurisdiction when the question is raised in connection with a proceeding or principal action based on the application of federal law (*Northern Telecom* at p 745). In the case before the Court, Parliament expressly conferred jurisdiction to the Court, under sections 76 and 77 of the OLA, over applications for remedy involving alleged noncompliance with the OLA by a federal institution. Because the Court has jurisdiction on the merits of the case, it follows that it has jurisdiction to rule on related or adjacent constitutional questions.

[62] This is therefore enough to find that the first branch of the *ITO* test for conferring jurisdiction on the Court is met.

[63] Also, the second and third branches of the *ITO* test are not problematic in this case. With respect to the second criterion, it is clear that the OLA, in particular Parts IV and VII, contains the legal rules on which the Court must rely in determining the outcome of the dispute between the parties. In this sense, it constitutes a "body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction" (*ITO* at p 766). With respect to the third branch of the test, there is no doubt that the OLA is an Act of Parliament that complies with the constitutional limits established under section 101 of the CA 1867, which was

validly enacted under the federal residuary power provided for in section 91 of the CA 1867 (*Jones v A.G. of New Brunswick*, [1975] 2 SCR 182 at p 189).

[64] For all these reasons, the Court has full jurisdiction to rule on all questions that may arise in this case.

[65] Furthermore, I would point out that the FFCB is not applying to this Court for any relief against British Columbia, nor to have it recognize that a provincial entity is a "federal institution" within the meaning of the OLA; on the contrary, the relief sought by the FFCB only applies to the defendants, ESDC and the Commission, both of which are federal institutions with duties under the OLA. In *Lavigne*, this Court already agreed that a question under section 25 of the OLA was an issue that it could respond to even if, in that case, the Quebec defendants were not themselves "federal institutions" (*Lavigne v Canada (Minister of Human Resources Development))*, [2002] 2 FC 164 [*Lavigne FC*] at paras 85-87, affirmed by 2003 FCA 203 [*Lavigne FCA*] [together, *Lavigne*]).

(2) Application for remedy under section 77 of the OLA

[66] The circumstances of the application filed by the FFCB, including the fact that it filed its complaint with the Commissioner prior to the actual implementation of the Agreement, make it necessary to specify the parameters of a court remedy initiated under section 77 of the OLA.

[67] The central issue raised by the application filed by the FFCB is the allegation of a failure by ESDC and the Commission to fulfil their obligations under the OLA. This application is

based on section 77 of the OLA, which refers to both the trigger of the application (a complaint alleging a breach of or noncompliance with the OLA) and the order that may be issued by the Court ("such remedy as it considers appropriate and just"). Subsection 77(1) stipulates that "[a]ny 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." For its part, subsection 77(4) gives the Court the power to grant "such remedy as it considers appropriate and just in the circumstances."

[68] Relying on *Canadian Food Inspection Agency v Forum des Maires de la Péninsule Acadienne*, 2004 FCA 263 [*Forum des maires*], the FFCB and the Commissioner maintain that the "time of the alleged breach" determines the merits of the complaint, and that the alleged breach is not necessarily limited to the facts existing when the complaint was filed with the Commissioner. I do not agree with the position taken by the FFCB and the Commissioner regarding the scope they are asking the Court to give to the terms of the application set out in section 77 of the OLA. In my view, the jurisprudence of the Supreme Court and the Federal Court of Appeal, by which I am bound, is clear: the merits of the complaint must be weighed against the facts that existed at the time the complaint was filed with the Commissioner. These facts establish whether the federal institution failed to comply with the OLA. The evidence produced by the FFCB with respect to alleged breaches that occurred after the complaint was filed in 2012, 2013 or 2014 cannot be used to establish the merits of the complaint under section 77.

(a) ***Facts existing at the time of the complaint***

[69] In the case of an application under section 77, the Court is required to perform a two-step analysis. The Court must first determine whether there was in fact noncompliance with the OLA at the time the complaint was filed with the Commissioner, based on the evidence at that time. And, if there was noncompliance with the OLA at the time of the complaint, then the Court must determine the appropriate and just remedy, based on the state of noncompliance at the time of the hearing and the Court's decision. There is therefore a distinction to be made between the existence of an alleged breach of the OLA at the time the complaint was filed and the remedy that the Court may order much later, following the hearing before it. In *Forum des maires*, Décary J.A. explained that "[t]he remedy is constantly shifting in the sense that even if the merit of the complaint is determined as it existed at the time of the alleged breach, the remedy, if there is one that is appropriate and just, must be adapted to the circumstances that prevail at the time when the matter is adjudicated" (*Forum des maires* at para 20). Although the merits of the complaint are assessed at the time it was filed with the Commissioner and in view of the facts that existed then, the remedy to be granted is assessed at the time of the Court's decision and according to the circumstances prevailing on that date (*DesRochers SCC* at paras 34, 37, 42; *Forum des maires* at paras 20, 53).

[70] Now, according to the FFCB and the Commissioner, the words "as it existed at the time of the alleged breach" used by Décary J.A. in *Forum des maires* do not necessarily mean the same thing as "at the time the complaint was filed." According to the FFCB, the alleged breach in this case was that the employment assistance service delivery model developed and implemented by the Government of British Columbia would hinder the development and vitality of the French-speaking minority community in the province. In addition, French-language

employment assistance services would no longer be of equal quality to services provided in English or would not be available after the new model was introduced. Thus, according to the FFCB, if the merits of the complaint must be determined at the time of the alleged breach, and the complaint alleges that the effects of a new program will breach Parts IV and VII of the OLA, the assessment of the merits of the complaint should necessarily include the potential effects of this new model.

[71] I disagree. In my view, the case law does not distinguish between the time of the alleged breach and the date the complaint was filed, in order to determine the merits of the complaint. Quite the opposite, in *DesRochers SCC*, which followed *Forum des maires*, the Supreme Court explicitly stated that the time of the alleged breach is equivalent to the date the complaint was filed, and that the facts existing at the time the complaint was filed must be considered for the purpose of determining the merits of the application under section 77. As Charron J. stated in *DesRochers SCC*, "[t]he merits of the complaint are determined as of the time of the alleged breach, and the facts that existed as of the date the complaint was filed with the Commissioner are therefore determinative of the outcome of the application" [Emphasis added] (*DesRochers SCC* at para 34; *Forum des maires* at para 20). I note that in its ruling the Supreme Court repeated this statement no less than three times (*DesRochers SCC* at paras 34, 37, 42). I would add that, even in *Forum des maires*, Décary J.A. does not only refer to "the time of the alleged breach" but also further down in his rules where he refers to "the complaint at the time it was filed" (*Forum des maires* at para 53). The Court is bound by these interpretations. In fact, to dispel any doubt that may have persisted, Charron J. even stated that the question was "resolved long ago" (*DesRochers SCC* at para 42).

[72] Admittedly, the case law indicates that the facts upon which the complaint before the Commissioner is based may have changed. However, the fact that this change occurred between the time the complaint was filed with the Commissioner and the hearing before the Court in no way affects the jurisdiction of the Court established under section 77. The question is not whether the facts before the Court are the same as those before the Commissioner when the complaint was filed, but whether the same facts in the complaint have changed since then. The remedy to be granted, if any, will be measured at the time of the decision to be rendered by the Court. Thus, "if the alleged deficiencies have all been remedied at the time of the trial, and if the complaint is then no longer justified, the judge may choose not to order any relief, except for example in the form of costs" (*Forum des maires* at para 53).

[73] There may have been a violation of rights or failure to meet the obligations of the OLA at the time the complaint was filed without a remedy having to be ordered at the time of the Court's decision. Both these findings of fact refer to two different temporal spaces and both must be determined by the Court. In certain situations, the passage of time may have made it possible to remedy the breach cited. This was the case in *Forum des maires*. However, the passage of time cannot give rise to a breach or noncompliance that did not exist when the complaint was filed. There can be no remedy for a breach or noncompliance that would exist at the time of the Court's decision if that breach or noncompliance had not yet occurred or existed at the time the complaint was filed with the Commissioner. In other words, fresh evidence before the Court can be used to demonstrate or improve existing breaches of the complaint, but it cannot be used to retroactively validate an application and extend its merits beyond the date the complaint was filed.

[74] Although related, the two facets of the remedy under section 77 are distinct. The broad power of the Court to grant "such remedy as it considers appropriate and just" in the event of a breach of the OLA cannot be confused with the scope of the remedy before the Court, the extent of which is defined by the complaint filed with the Commissioner. Section 77 clearly requires the Court to determine that a federal institution has failed to comply with the provisions of the OLA before it may grant a remedy (*CBC/Radio-Canada v Canada (Commissioner of Official Languages)*, 2015 FCA 251 [*CBC FCA*] at paras 43-44, 47). It is incumbent on the Court to make findings with respect to the federal institution's conduct, based on the evidence before it, and to decide whether there was a failure to comply with the OLA on the date of the complaint (*CBC FCA* at para 48).

(b) *The roles of the Commissioner and the courts*

[75] It is important to bear in mind that the Commissioner and the Court play different and separate roles, and that the Commissioner's findings are not binding on the Court, which hears the matter *de novo* in the context of an application under section 77 (*DesRochers SCC* at paras 36, 64; *Forum des maires* at para 20). The role of the Commissioner was clearly described in *Lavigne SCC*. In its ruling, the Supreme Court indicated that "it is [the Commissioner's] job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions", to ensure that "the objectives of that Act are implemented" and to "conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the

Official Languages Act, was not complied with" (*Lavigne SCC* at para 35). The Supreme Court added that the Commissioner "[follows] an approach that distinguishes [him] from a court", given that his "unique mission is to resolve tension in an informal manner" (*Lavigne SCC* at para 38). It also indicated that one reason that the office of ombudsman was created was to address the limitations of legal proceedings (*Lavigne SCC* at para 38).

[76] In *Forum des maires*, Décary J.A. echoed these statements and also explained that the Commissioner's role is similar to that of an ombudsman (*Forum des maires* at para 21). The court remedy set out in section 77 of the OLA is designed to "verify the merits of the complaint, not the merits of the Commissioner's report" (*DesRochers SCC* at para 35, citing *Forum des maires* at para 17). As pointed out by the Federal Court of Appeal, the Commissioner "is not a tribunal," because he does not, strictly speaking, render a decision; he receives complaints, conducts an inquiry, and makes a report that includes recommendations. In short, "[t]he remedy, at that level, is political" (*Forum des maires* at para 16). The role of the Court is to give the OLA some "teeth," so that "members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone" (*Forum des maires* at para 17).

[77] The Court must therefore conduct its own examination of the facts in its assessment of the merits of the complaint and the sufficiency of the facts at the time the complaint was filed, in addition to what the Commissioner may have concluded (*DesRochers SCC* at para 36). The Court is not bound by the Commissioner's findings and his investigative reports may be contradicted like any other evidence. This does not mean that the Commissioner's reports are useless and meaningless. Far from it, they are part of the evidence before the court. But the

usefulness or weight of these reports is relative, and they are certainly not determinative of the merits of the application under section 77 of the OLA.

[78] The reference to the fact that the merits of the application are assessed based on the date the complaint was filed also reflects the extent to which the complainant relies on the specific facts alleged in its original complaint to the Commissioner. Subsection 58(1) of the OLA stipulates that 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." [Emphasis added]. The provision reflects the requirement that there be a specific factual basis in the complaint, allowing the federal institution to know what it must respond to, from the time the complaint is filed.

(c) *Anticipated or apprehended facts*

[79] Another point should be clarified. The allegations in the FFCB's complaint were often written in the future and conditional tenses because the EPBC and the new employment assistance services program were not yet in effect at the time the complaint was filed, June 15, 2011. The FFCB admits this. However, the FFCB alleges that its complaint nevertheless has merit (as of the date it was filed) because it dealt with the concerns of the French‑speaking minority, for whom the EPBC would not provide substantively equal service delivery. The FFCB argues that it would not only be logical to assess the complaint in light of these concerns, but

also to assess them based on the potential impact of the new British Columbia program on the province's French-speaking minority community. The FFCB also contends that, in assessing its merits, the context of the complaint must be considered in the full dynamics of the remedies described in the OLA. However, the complaint was filed in the spring of 2011; the Commissioner's preliminary report was published in 2012 (the parties then commented on it). The Commissioner's final report was produced in April 2013. The Commissioner's follow-up report was published in March 2014 (the parties then commented on it), and the final follow-up report was finally published in November 2015. Throughout this period, things changed, and previously anticipated fears were sometimes realized. The FFCB therefore submits that since it followed the OLA's dispute resolution process before going to court, it would be unreasonable if all these elements were not considered in determining the merits of the complaint. Ignoring them would mean that a complainant may have to file a new complaint in order to be granted the court remedy provided for in the OLA if new facts on which the complainant wishes to rely arise in the meantime.

[80] The FFCB adds that, according to the evidence in the record, many of its fears of June 2011 have materialized. According to the Commissioner's report, between May and July 2012, one year after the complaint was filed by the FFCB, the Commissioner conducted a telephone, online and in person survey at the locations where the Francophone organizations mentioned by the FFCB are situated. Following this survey, the Commissioner found that clients wishing to obtain French-language services had to overcome language barriers that do not exist for clients wishing to obtain English-language services. Similarly, the many affidavits filed by the FFCB identified several examples of experiences reported by Francophones in British Columbia in

2013 and 2014, which describe deficiencies in the offer of French-language employment assistance services following implementation of the Agreement, the EPBC and the "one-stop shop" model.

[81] I do have some sympathy for the situation in which the FFCB finds itself, but I must point out that, for the most part, the facts it cites occurred well after the complaint was filed with the Commissioner. Although the FFCB's arguments do have some appeal, based on my reading of section 77 and the case law that interpreted it, as generous as it may be, I do not find that facts written in the future and conditional tenses can be considered "facts that existed" at the time the complaint was filed with the Commissioner. In other words, a complainant cannot raise concerns, fears or apprehensions about possible noncompliance with the OLA as evidence of the existence of such noncompliance with the OLA at the time the complaint was filed with the Commissioner, when these fears became factual realities only after the date of the complaint. This is easy to explain: how could a court sanction a federal institution for breaching or failing to comply with the OLA at the time of the complaint when the facts that underlie the breach or noncompliance have not yet occurred? An application under section 77 is not for a preventive remedy; it is for a curative remedy that provides relief for an infringement of language rights existing at the time of the complaint. The seeds of an apprehended or anticipated breach are not enough.

[82] In short, any concerns, fears or apprehensions at the time of the complaint but which only materialize later (as is the case here in many respects) cannot be considered facts existing at the time of the complaint for purposes of a court remedy under section 77 of the OLA. In response to

a question from the Court at the hearing, counsel for the Commissioner acknowledged that there were no precedents where an application under section 77 was based on language rights violations that occurred only after a complaint was filed. The Court did not find any such precedents either.

[83] I cannot ignore the fact that the FFCB decided when to file the complaint. It opted to file its complaint on June 15, 2011, quite hastily, by and large, considering that the entry into force of the EPBC and the implementation of the new employment assistance services program covered by the Agreement did not occur until much later. It was its choice, but this choice cannot have the effect, even after a long court process, of modifying the requirements stipulated by the OLA and the case law. An applicant opting for a remedy under section 77 of the OLA has the option of filing the complaint with the Commissioner and its court remedy at any time, subject to the associated requirement at the time the Commissioner's investigative report is filed. However, in all cases, the facts demonstrating noncompliance with the OLA must exist at the time of the complaint. This may sometimes mean that a complainant will have to file a new complaint with the Commissioner, when it turns out that the events that led to the breach of the OLA did not occur until after the date of its initial complaint. It may seem incongruous, but that is what section 77 and the case law that interpreted it say.

(d) ***Stare decisis***

[84] I understand that language rights must be given a broad and liberal interpretation that can foster the vitality and development of official language minorities in Canada. However, this broad and liberal interpretation does not authorize the Court to depart from the text of the OLA

or deviate from the rule of *stare decisis*. I would like to comment on this rule, given the recent comments of the Supreme Court on this subject in *R. v Comeau*, 2018 SCC 15 [*Comeau*] and the fact that I will refer to it later in these reasons. According to what is sometimes called vertical *stare decisis*, "a lower court is bound by particular findings of law made by a higher court to which decisions of that lower court could be appealed, directly or indirectly" (*Tuccaro v Canada*, 2014 FCA 184 at para 18). This rule is a fundamental principle of our legal system, to which trial courts must adhere. The Supreme Court forcefully reiterated this in *Comeau*, where it stated the following at paragraph 26:

> Common law courts are bound by authoritative precedent. This principle — *stare decisis* — is fundamental for guaranteeing certainty in the law. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. This is called vertical *stare decisis*. Without this foundation, the law would be ever in flux — subject to shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo.

[85] Adherence to well-established jurisprudence and legal rules supports the virtues of uniformity and predictability, two key principles that underlie the rule of law and the rule of vertical *stare decisis*. This rule establishes the principle that lower courts are bound by decisions of higher courts in the same administration and decisions of the Supreme Court. Of course, lower courts have the right to make a distinction based on the background facts before them. However, it is not open to them to refuse to follow the decision of a higher court on the grounds that they consider that the decision of the superior court was rendered erroneously, or that another interpretation should have prevailed.

[86] Therefore, it is not open to me to disregard the precedents set out in *DesRochers SCC* and *Forum des maires* regarding applications under section 77, unless the circumstances mirror the exceptions set out in *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*]. I am not sure that these factors have been met in this case. No new legal issues are raised in the formulation of the FFCB's application, and the circumstances or evidence in the record "[do not] fundamentally shift the parameters of the debate" with respect to the complaint of infringement of linguistic rights and duties filed in Court (*Carter* at para 44, citing (*Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42; *Comeau* at para 29). *Carter* established a narrow exception, and the standard of review for a question that has already been decided is not easy to meet (*Comeau* at paras 31, 34).

B. *Part IV of the OLA*

[87] I would like to comment on the first substantive issue raised by the FFCB, the argument that there was a breach of Part IV of the OLA in the provision of employment assistance services under the Agreement. To decide whether Part IV was violated, Part IV and its provisions must apply in the context of the Agreement and the benefits and measures provided by British Columbia. Under Part IV and section 25 of the OLA, the ESDC and the Commission's duty to ensure that British Columbia employment and support benefits are provided in both official languages in the province, and that British Columbia public servants who provide them can communicate with the public in either official language, can only arise if British Columbia is a third party acting "on behalf of" ESDC and the Commission as federal institutions. Under section 25, where a third party acts "on behalf of" a federal institution, the government has the duty to ensure that the third party provides services in accordance with Part IV of the OLA as if

it were the federal institution itself that provided them. As the Commissioner rightly points out, the purpose of the section is to prevent federal institutions from divesting themselves of their language obligations when they use third parties.

[88] The question at issue is therefore whether, under the Agreement, British Columbia provides employment assistance services "on behalf of" ESDC and the Commission within the meaning of section 25 of the OLA, making these federal institutions subject to Part IV of the OLA. The FFCB and the Commissioner argue that this is the case and that ESDC and the Commission are thus bound by sections 21, 22 and 28 of the OLA.

[89] The FFCB and the Commissioner cite two grounds in support of their position. The first argument is that under the division of federal and provincial powers, Parliament has exclusive jurisdiction to provide the benefits and measures covered by the Agreement, pursuant to subsection 91(2A) of the CA 1867, which gives Parliament jurisdiction over unemployment insurance. According to the FFCB, although in *Lavigne FC*, this Court found that there was concurrent jurisdiction between federal and provincial legislators with respect to labour market activities, this analysis needs to be reconsidered in light of the Supreme Court's subsequent decisions in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 [*Reference re EIA*] and *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 [*CSN*]. In both cases, the Supreme Court held that Parliament has jurisdiction over any measure whose pith and substance is to maintain or restore ties between persons who may become or are unemployed and the labour market. The FFCB, supported in this regard by the Commissioner, contends that, according to the principles developed in these two cases, the

benefits and measures recommended by the Agreement fall within the exclusive jurisdiction of Parliament in matters of unemployment insurance. However, says the FFCB, if British Columbia's benefits and measures fall within this exclusive federal jurisdiction, there is necessarily a delegation of powers on the part of the defendants to British Columbia under the Agreement, making section 25 of the OLA and section 20 of the *Charter* applicable. I note in passing that the FFCB and the Commissioner did not deal extensively with the *Charter*; their submissions were more focused on the OLA.

[90] As their second ground of appeal, the Commissioner added that, while the Court is of the view that there are concurrent jurisdictions between the federal and provincial governments in matters of employment assistance services and that the pith and substance of the benefits and measures, including those related to training, fall under provincial jurisdiction, the Court must perform an analysis of the "degree of control" that the defendants exercise over the province under the Agreement, similar to the analysis performed by the Federal Court of Appeal in *DesRochers v Canada (Department of Industry)*, 2006 FCA 374 [*DesRochers FCA*]. And if the Court determines that the defendants have sufficient control over British Columbia within the meaning of *DesRochers FCA*, the Commissioner argues that it follows that the province is acting "on behalf of" a federal institution within the meaning of section 25 of the OLA.

[91] For the reasons that follow, I do not agree with the position taken by the FFCB and the Commissioner. Instead, I am of the view that Part IV of the OLA does not apply in this case for three reasons.

[92] First, the Court already decided in *Lavigne FC*, affirmed by the Federal Court of Appeal in *Lavigne FCA*, that an agreement such as the one at issue in this case falls within the concurrent jurisdiction between Parliament and the provincial legislatures, that is, matters involving labour market activities, and that section 25 of the OLA does not apply. The more recent jurisprudence of the Supreme Court in no way undermines the findings of Lemieux J. in *Lavigne FC*. The Court is bound by this precedent affirmed by the Court of Appeal, and there is no reason to dissociate itself from it.

[93] In any event, by creating and providing its own benefits and measures under the Agreement, British Columbia is acting within its legislative jurisdiction. As the evidence submitted by the defendants demonstrates, the pith and substance of the Agreement is to create employment opportunities, increase productivity in British Columbia and develop the province's labour market through a wide variety of programs. The Agreement therefore falls under provincial jurisdiction over property and civil rights in the province, matters of a purely local or private nature, and education provided for in subsections 92(13) and 92(16) and section 93 of the CA 1867. As a result, British Columbia is not acting "on behalf of" or under the control of a federal institution. ESDC and the Commission have not delegated to British Columbia the responsibility to create and provide employment benefits and support measures funded by the Agreement, because they fall under its own legislative authority. Thus, there are grounds to disregard the doctrine of interjurisdictional immunity introduced by the FFCB and the Commissioner and instead rely on the double aspect theory, rooted in the principle of cooperative federalism, according to which a matter may be subject to both provincial and federal constitutional jurisdiction.

[94] Finally, the control exercised by ESDC and the Commission over British Columbia benefits and measures, if they do have any control, is essentially financial. Regardless of the control test used, I am not persuaded, based on the evidence in the record, that the defendants exercise a degree of control within the meaning of *DesRochers FCA* and section 25 of the OLA, such that British Columbia would be acting "on behalf of" a federal institution under the Agreement.

(1) *Lavigne, Reference re EIA* and *CSN*

[95] The main argument submitted by the FFCB and the Commissioner regarding Part IV of the OLA was already settled in *Lavigne*. I am bound by the decisions of this Court and the Federal Court of Appeal in *Lavigne FC* and *Lavigne FCA* where they held that the OLA does not apply to benefits and measures provided by a province under a labour market development agreement between the federal government and the province.

(a) Decision in *Lavigne*

[96] In *Lavigne*, decided in December 2001, the Court had to rule on an application for relief similar to that of the FFCB, in which the applicant, Mr. Lavigne, sought a declaration that the OLA (and in particular Part IV of the Act) applied to a labour market agreement between the Government of Canada and the Government of Quebec. Following its jurisdictional analysis, the Court expressly found that Canada and Quebec had "concurrent constitutional jurisdiction to enact the statutory provisions" on which the labour market development agreement under study at time was based (*Lavigne FC* at para 76). According to Lemieux J., this constitutional

jurisdiction for the enactment of the relevant Quebec legislation was based on subsections 92(13) and 92 (16) of the CA 1867 (entitled "Property and Civil Rights in the Province") and "Generally all Matters of a merely local or private Nature in the Province"), as well as on section 93 dealing with education (*Lavigne FC* at para 75).

[97] The argument that the powers exercised by the province of Quebec were delegated to it by the federal government was set aside. Instead, the Court found that Emploi-Québec was not dependent on federal authorization for its activities and owed nothing to it (*Lavigne FC* at para 81). In fact, according to Lemieux J., it was clear that Emploi-Québec was carrying out its functions in the "area of labour market activities" provided for in the agreement at issue "such as active employment measures pursuant to provincial legislative authority" (*Lavigne FC* at para 80). The judge then noted that what happened here was that "the federal government withdrew from the field and, in lieu of carrying out those activities, funded Emploi-Quebec through" the agreement in question (*Lavigne FC* at para 82). Thus, Lemieux J. found that there was concurrent jurisdiction over labour market activities, that the province could legislate on all matters covered by the labour market agreement, and that section 25 of the OLA did not apply.

[98] I note that in its decision, the Court directly addressed the question of whether the provincial legislature had jurisdiction. I also note that, in *Lavigne*, the Commissioner at the time did acknowledge, in a December 1999 notice, that Part IV of the OLA did not apply once the agreement at issue was implemented (except for the NES) and that the federal government had the discretion to stop providing services in the event that a province undertook to provide them

(*Lavigne FC* at para 12). Needless to say, this position stands in sharp contrast with the one defended today by the Commissioner in this case.

[99] The Federal Court of Appeal affirmed the trial decision, referring to Lemieux J.'s comments that the federal government had withdrawn from the area of benefits and employment measures in favour of funding the benefits and employment measures through the provincial institution exercising authority in accordance with its legislative jurisdiction (*Lavigne FCA* at paras 1-2). The reasons of the Federal Court of Appeal are brief but clear: "the Canada-Quebec Labour Market Implementation Agreement (LMIA) does not constitute a delegation of functions from federal to provincial authorities and the [OLA] does not apply to services provided by Emploi-Québec" (*Lavigne FCA* at para 2).

[100] Moreover, the distinction made by Lemieux J. with regard to the *Contraventions Act* case still applies (*Lavigne FC* at paras 83-87). In *Canada (Commissioner of Official Languages) v Canada (Department of Justice Canada)*, 2001 FCT 239 [*Contraventions*], the key element of Blais J.'s analysis finding that section 25 of the OLA applied was the existence of a federal statute dealing with non-criminal federal infractions administered by provincial authorities. In other words, provincial authorities derived their right to act not from provincial legislation or regulations, but from federal legislation and regulations. This was a clear delegation of federal responsibilities.

(b) *Reference re EIA* and *CSN*

[101] The FFCB and the Commissioner argue that the combination of *Reference re EIA* and the Supreme Court's decision in *CSN* rejects the reasoning in *Lavigne*, because the highest court in Canada has now held that federal legislative jurisdiction over unemployment insurance includes the provision of several income replacement and employment assistance benefit measures under the EIA. They argue that these decisions support the exclusive nature of federal jurisdiction and mean that all income replacement and employment assistance measures are now only authorized pursuant to federal jurisdiction over unemployment insurance provided for in subsection 91(2A) of the CA 1867.

[102] I disagree. In my view, at no time did *Reference re EIA* and *CSN* order or suggest that employment assistance services, and in particular employment benefits and support measures such as those covered by the Agreement, fall under exclusive federal jurisdiction. In *Reference re EIA* and *CSN*, the Supreme Court simply confirmed that federal jurisdiction over unemployment insurance included both maternity benefits and some employment assistance programs comparable to those covered by the Agreement. However, the Supreme Court was not asked to rule, nor did it rule, on the scope of provincial legislatures' jurisdiction over the benefits and measures at issue, or on the exclusive nature of federal jurisdiction.

[103] Thus, in *Reference re EIA*, the Supreme Court held that Parliament had the legislative authority to grant maternity benefits based on the power assigned to it under subsection 91(2A) of the CA 1867. Writing on behalf of the Supreme Court, Deschamps J. clarified the

interpretation and scope of subsection 91(2A) and stated that sections 22 and 23 of the EIA, which provided for special benefits for pregnant women and parents when they had to leave the labour market, were a valid exercise of federal jurisdiction. In its decision, the Supreme Court clearly described what it considered to be the four characteristics of an employment insurance plan: (1) It is a public insurance program based on the concept of social risk (2) the purpose of which is to preserve workers' economic security and ensure their re‑ entry into the labour market (3) by paying temporary income replacement benefits (4) in the event of an interruption of employment" (*Reference re EIA* at para 48). It further stated that, as measures for providing replacement income during an interruption of work, maternity benefits were consistent with "the essence of the federal jurisdiction over unemployment insurance, namely the establishment of a public insurance program the purpose of which is to preserve workers' economic security and ensure their re‑ entry into the labour market by paying income replacement benefits in the event of an interruption of employment" (*Reference re EIA* at para 68).

[104] Deschamps J. also held that subsection 91(2A) of the CA 1867 must be given a generous interpretation in light of current changes in Canadian society. She wrote that "[t]he jurisdiction over unemployment insurance must be interpreted progressively and generously. It must be considered in the context of a measure that applies throughout Canada and the purpose of which, according to the intention of the framers of the constitutional amendment, is to curb the destitution caused by unemployment and provide a framework for workers' re‑ entry into the labour market" (*Reference re EIA* at para 47).

[105] However, the Supreme Court did not refer to exclusive federal jurisdiction. Far from it. Rather, the Court said that characterizing the unemployment insurance plan in this way does not mean, however, that it can be associated exclusively with any one head of power" [Emphasis added] (*Reference re EIA* at para 38). Furthermore, the court noted that "[t]he power of one level of government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level to control another aspect within its own jurisdiction" (*Reference re EIA* at para 8). It thus expressly recognized that the existence of federal jurisdiction does not replace provincial jurisdiction and that assistance and employment creation measures may have a double aspect, giving both levels of government the right to legislate.

[106] Deschamps J. referred to this duality on several occasions in her reasons. She pointed out that "[t]he term "social measure" has a number of aspects that may be associated just as validly with property and civil rights as with unemployment insurance" (*Reference re EIA* at para 38). Citing the example of the employment insurance benefits paid to workers who are laid off as a result of bankruptcy, she said that "[t]he measure, which affects property and civil rights, is undeniably social in nature, but it is also in the nature of unemployment insurance" (*Reference re EIA* at para 38). In conclusion, she said "[t]he provincial legislatures have jurisdiction over social programs, but Parliament also has the power to provide income replacement benefits to parents who must take time off work to give birth to or care for children" (*Reference re EIA* at para 77).

[107] Because social measures related to the labour market can fall under both provincial and federal jurisdiction, the Supreme Court indicated that the pith and substance of the provision must be assessed to determine whether it falls within the scope of federal or provincial

jurisdiction, or perhaps even both (*Reference re EIA* at paras 8-9, 13). In her analysis, Deschamps J. explained that sections 22 and 23 of the EIA do not grant maternity leave and that the purpose of the provisions in question is to "provide replacement income during an interruption of work" (*Reference re EIA* at para 68). According to the judge, the pith and substance of these provisions was consistent with "the essence of the federal jurisdiction over unemployment insurance" [Emphasis added] (*Reference re EIA* at para 68). But, clearly, Deschamps J. did not exclude the concurrent jurisdiction of provincial legislators in matters of labour market activities.

[108] In *CSN*, the Supreme Court considered programs similar to the employment benefits and support measures involved in this Agreement. The Court analyzed so-called active measures taken under section 59 of the EIA to combat unemployment. Specifically, the Court looked at programs established under the provisions regarding wage subsidies paid to employers as a springboard to possible regular employment (subsection 59(*a*) of the EIA); earnings supplements for employees interested in low‑paid jobs (subsection 59(*b*)); self‑employment assistance to encourage the creation of small businesses (subsection 59(*c*)); job creation partnerships involving businesses and community organizations in areas with high unemployment rates (subsection 59(*d*)); and skills loans or grants for workers seeking to obtain advanced skills (subsection 59(*e*) (*CSN* at para 11).

[109] In *CSN*, LeBel J., on behalf of the Court, affirmed the principles established in *Reference re EIA*, including the guiding principle that subsection 91(2A) should be interpreted progressively and generously, subject to the limitations imposed by the CA 1867 (*CSN* at

paras 29-31). It was then for the Court to assess whether the pith and substance of "the impugned measure is consistent with the natural evolution" of subsection 91(2A). (*Reference re EIA* at para 44; *CSN* at para 29).

[110] The Court found that the jurisdiction of Parliament conferred in subsection 91(2A) of the CA 1867 involved more than just paying unemployment insurance benefits, and that providing employment insurance services to maintain or restore ties between persons who may become or are unemployed and the labour market was within this federal jurisdiction (*CSN* at para 42). The Court reviewed the measures provided for in Part II of the EIA and found that, in pith and substance, these measures fell within the jurisdiction of subsection 91(2A) of the CA 1867, given their purpose of maintaining or restoring ties between persons who may become or are unemployed and the labour market.

[111] However, although subsection 91(2A) allows Parliament to take more active measures to help maintain or restore ties between persons who may become or are unemployed and the labour market, the Supreme Court did, however, specify that its scope was not unlimited. LeBel J. stated the following at paragraph 42:

> […] This federal power does not, of course, authorize Parliament to create parallel education systems despite the connections between work and training and many other aspects of life in society. It may not be interpreted in the abstract without regard for the federal constitutional context. It must be exercised in a manner consistent with the general framework of the division of powers. This being said, the power may legitimately be exercised to its full extent, having regard to the context, including the problems created by changes in the labour market and the increase in structural unemployment. The labour market has changed since 1940, and the way the federal power under s. 91 (2A) is exercised can reflect this. However, the exercise of the federal power does

> not negate the provincial powers over education and labour market training, which relate to other aspects of these problems in the labour market.

[112] Thus, the Court expressly referred to the existence of concurrent jurisdictions between the federal and provincial governments. Both the FFCB and the Commissioner focus on the passages stating the federal power "does not negate the provincial powers over education and labour market training, which relate to other aspects of these problems in the labour market." They see it as setting a limit on provincial jurisdiction over labour market activities. I cannot agree with this narrow reading of LeBel J.'s sentence. When the reasons for the judgment are read in their entirety and context, including repeated references to the joint jurisdiction of both levels of government and the legacy of *Reference re EIA*, I am of the view that the narrow interpretation proposed by the FFCB and the Commissioner is inconsistent with the decision. *CSN* does not provide valid grounds for finding that the Court intended to restrict or limit provincial jurisdiction over employment assistance services. On the contrary, it seems to me that the Supreme Court implicitly recognized the existence of provincial jurisdiction, and the fact that the labour market support measures have a double aspect that allows for the adoption of both federal and provincial laws and measures.

[113] It is important to note that nowhere in the Supreme Court's decision is there any reference to <u>exclusive</u> jurisdiction. Counsel for the FFCB and the Commissioner acknowledged at the hearing before this Court that *CSN* did not explicitly recognize that Parliament has exclusive power over employment assistance services. In fact, *CSN* only broadened federal jurisdiction over employment insurance and established the principle that federal jurisdiction under subsection 91(2A) of the CA 1867 must be interpreted in a broad and open-ended manner.

However, expanding federal jurisdiction does not mean that exclusivity is being granted. Similarly, expanding federal jurisdiction in a spirit of progressive interpretation does not mean narrowing provincial jurisdiction in the area of activity. Parliament's jurisdiction may be extended without amputating provincial legislatures' jurisdiction to intervene in the field of activity at issue.

[114] In *CSN* (as in *Reference re EIA*), the Supreme Court had to determine whether the federal government could create and provide ancillary or additional benefits and measures to income replacement benefits under Part I of the EIA. It had to decide whether Parliament's legislative authority over unemployment insurance could extend to certain employment assistance measures under the EIA. Although it validated the benefits and measures provided by the federal legislature at that time, the Supreme Court did not in the same breath attribute to Parliament an exclusive power in the matter (*Reference re EIA* at paras 38, 47; *CSN* at para 42). The misunderstanding, if I may characterize the FFCB and the Commissioner's proposed approach this way, is that they are attributing a purpose to the *Reference re EIA* and *CSN* decisions, which in my view, they simply did not have. In these two cases, the Supreme Court did not have to determine whether the province involved (the province of Quebec in both cases) had jurisdiction over the benefits and measures at issue; moreover, the Court did not discuss the extent of provincial jurisdiction in its decisions. In the absence of an explicit statement in this regard, *CSN* or *Reference re EIA* do not, in my view, provide grounds for the granting of any exclusive jurisdiction. The pith and substance of a law or measure is not synonymous with exclusive jurisdiction (*Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 22).

(c) Conclusion on the impact of *Reference re EIA* and *CSN*

[115] For these reasons, I agree with the defendants and the AGBC that *CSN* and *Reference re EIA* do not alter the findings in *Lavigne*, which addressed the issue of provincial jurisdiction and determined that the provincial legislature does indeed have concurrent jurisdiction over activities related to problems affecting labour market operation. Both *Reference re EIA* and *CSN* point in the same direction, and it is inaccurate to present them as precedents ruling that the delivery of employment assistance services would fall under exclusive federal jurisdiction.

[116] According to the evidence in the record (the affidavit of Mark Goldenberg, former Assistant Deputy Minister at ESDC), *Lavigne FCA* and *Lavigne FC* dealt with a similar labour market development agreement that was virtually identical to the Agreement involving British Columbia. Furthermore, they are both dependent on the same provisions of the EIA, in particular sections 57, 59 and 63. Essentially, the same factual and legal situation that existed in *Lavigne* prevails today in the case of the Agreement, and I agree with the defendants that this precedent binds the Court. There is no reason to disregard it or allow it to be re-examined. Once again, the rule of vertical *stare decisis* mentioned above applies. Admittedly, I recognize that *Lavigne* was decided in a different context from the one before the Court, that Mr. Lavigne was not represented by counsel and that he did not directly submit arguments challenging the province's jurisdiction in the circumstances. However, I am not persuaded that there is a reason not to follow this decision affirmed on appeal.

[117] I concede that the law is constantly evolving, that courts can make incremental changes to the law in response to obligations of justice and fairness and that "*stare decisis* is not a straitjacket that condemns the law to stasis" (*Carter* at para 44). However, the standard of review for a question that has already been decided is not easy to meet. The rule of *stare decisis* is fundamental to our legal system and remains the presumed starting point for any analysis to settle the state of the law on a given point.

[118] It is therefore not open to me to disregard the mandatory precedent of the Federal Court of Appeal in *Lavigne*, unless the circumstances mirror the exceptions set out in *Carter*. Here again, the *Carter* factors have not been met. No new legal issues are raised in the FFCB's argument with respect to Part IV of the OLA and, again, the circumstances and the type of evidence in the record do not "fundamentally shift the parameters of the debate" on labour market activities, or the benefits and measures under consideration (*Comeau* at para 31; *Carter* at para 44). I do not see in the record before me any of the elements that would allow me to find that the FFCB met the criteria set out in *Carter*, and therefore this is not a case where the Court might consider not being bound by the *Lavigne FC* and *Lavigne FCA* decisions. Following the FFCB and the Commissioner's invitation would not lead to "a responsible, incremental change to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning" (*Paradis Honey Ltd v Canada*, 2015 FCA 89 [*Paradis Honey*] at para 118). The result of what they propose would, instead, "completely throw into doubt the outcomes of previous cases", which the Federal Court of Appeal warned against (*Paradis Honey* at paras 116-118; *Gligbe v Canada*, 2016 FC 467 at para 16).

(2) British Columbia's legislative jurisdiction

[119] I now turn to the question of whether, even notwithstanding the decisions in *Lavigne*, *Reference re EIA* and *CSN*, British Columbia can be considered to be actually operating within its legislative jurisdiction when it creates and provides its own employment benefits and support measures under the Agreement. For the reasons that follow, I am of the view that the pith and substance of British Columbia's benefits and measures are indeed within the province's jurisdiction, and there is no federal government delegation in this case. This is a situation where the double aspect theory applies, and where the doctrine of interjurisdictional immunity defended by the FFCB and the Commissioner plays no role.

[120] A jurisdictional analysis is required to determine whether British Columbia provides employment assistance services on behalf of ESDC and the Commission within the meaning of section 25 of the OLA. The first step in this analysis is to "determine whether the level of government or the entity exercising delegated powers possesses the authority under the Constitution to enact the impugned statute or adopt the impugned measure" (*Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 [*Rogers*] at para 34; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*] at para 22; *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*] at para 25). The question is, what is the purpose or "pith and substance" of the benefits and measures referred to in the Agreement, and which head(s) or area(s) of jurisdiction are they connected to (*Bank of Montreal v Marcotte*, 2014 SCC 55 [*Marcotte*] at paras 48 and s)? In order to conclude whether some EIA measures relating to maternity benefits fell within federal jurisdiction over

unemployment insurance, the Supreme Court noted that it must first assess their pith and substance and determine the extent to which they are related to the head of power of the legislator concerned (*Reference re EIA* at para 8).

(a) *The pith and substance of benefits and measures under the Agreement*

[121] The analysis of pith and substance involves identifying the dominant characteristic and the main purpose of a law or measure. That is, what it is intended to do and why (*Rogers* at para 79). It must consider both the main purpose of the law or measure and its legal and concrete effects (*Rogers* at para 36; *CSN* at para 33). As the defendants rightly argue, the analysis must focus on the purpose itself, without confusing the purpose with the means employed to achieve it (*Quebec (Attorney General) v Canada (Attorney General))*, 2015 SCC 14 [*Long guns*] at para 29). In other words, in this case, what are the main purpose and effects of British Columbia's benefits and measures?

[122] The analysis requires a detailed review of the evidence in the record, including the circumstances in which the measure was adopted (*Rogers* at para 36). It also requires "the adoption of a flexible approach tailored to the modern conception of federalism, which allows for some overlapping and favours a spirit of co‑operation" (*Rogers* at para 93). In this case, pith and substance depend on the facts, the provisions of the Agreement, the context of its enactment, and its implementation by the province. We must therefore look at both the context and text of the EIA, which underpins the Agreement, and the actual provisions of the Agreement, the facts surrounding its signature and its implementation by British Columbia. In my view, a careful and

detailed analysis of the evidence in the record demonstrates three things. First, that the dominant characteristic of the benefits and measures funded by the Agreement is to stimulate the development of the labour market in British Columbia through a multitude of programs. Second, that the province has full control under the Agreement. Third, that these benefits and measures are therefore definitely matters that fall within British Columbia's legislative jurisdiction.

(i) The EIA and the context of the Agreement

[123] First, I want to put this into context. It is important to consider the history of Part II of the EIA in determining the primary objectives of the Agreement. It shows that recognition of provincial employment assistance jurisdiction was the initial impetus behind the employment insurance reform undertaken by the federal government in the 1990s and the adoption of the various options provided under the EIA for the delivery of employment assistance services. For example, in the restructuring of the Canadian employment insurance plan that resulted in Part II of the EIA, Parliament recognized and took for granted provincial legislative jurisdiction over benefits and measures contemplated by the EIA. In the more specific scenario of contribution agreements under section 63 of the EIA, the intent was to give provinces full control and flexibility over the creation and administration of their own benefits and measures. Obviously, this is an important factor to be considered here.

[124] The voluminous affidavit evidence produced by the defendants (including the affidavits of Mark Goldenberg and Duncan Shaw, Director responsible for the Employment Insurance Branch, Part II and labour market development partnerships within the ESDC Skills and Employment Branch) demonstrates that under the EIA: (1) the federal government has gradually

withdrawn from designing and delivering the employment benefits and measures described in Part II of the Act; (2) British Columbia, like all other provinces and territories in Canada, is now responsible for designing and delivering employment benefits and support measures, in accordance with its legislative and executive jurisdiction in respect of any person in the province (regardless of whether the person receives employment insurance benefits); and 3) the federal government's contribution to British Columbia benefits and measures is essentially financial.

[125] The Agreement is based on the employment insurance reform that began in the 1990s. According to the evidence provided in Mark Goldenberg's affidavit, the review of employment insurance programs in the early 1990s reflected the transition from passive income replacement measures to more active measures focused on job creation, training and skills development. As part of this new employment insurance approach, recognition of the provinces' jurisdiction over employment assistance services was the basic premise of the proposed reform. Admittedly, at source, Part II of the EIA gives the Commission the authority to provide benefits and take measures. But the whole scheme of Part II is based on the exercise of provincial legislative power in active measures to combat unemployment and promote employment. In other words, the idea behind Part II of the EIA was to design a framework to assess the appropriateness of employment assistance services in conjunction with each provincial government, and to transfer management of labour market development programs to provincial authorities. That is in fact what happened. Today, the Canadian employment services landscape is one where responsibilities have been devolved to all provinces from coast to coast pursuant to contribution agreements under section 63.

[126] The employment insurance reform of the day was therefore rooted in respect for the legislative powers of the provinces. During the mid-1990s review of its employment insurance programs, the federal government found that: 1) it needed to adopt a new client-based approach that allowed for decentralized decision-making whose primary responsibility would be to enable unemployed persons to return to work; (2) needs assessment and employment counselling by all partners required better coordination; and 3) that the responsibilities of the various levels of government and all federal, provincial and territorial programs should be reviewed.

[127] Part II of the EIA therefore provided for the federal government's withdrawal from employment assistance services to avoid duplication in employment insurance services, some of which are under federal jurisdiction and others under provincial jurisdiction. This means that the federal government is withdrawing to give the provinces free rein in labour market development activities. As provided for in section 58 of the EIA, each provincial government was invited to work with the federal government and enter into any partnership agreement under Part II of the EIA. As a result, the federal government proposed various options to the provinces for the provision of employment assistance services, which are reflected in the Act and expressed various ways of taking into account provincial jurisdiction in the provision of these services. These options have been described above in the presentation of the content of Part II of the EIA.

[128] The benefits and measures covered a wide range of labour market development initiatives. The benefits and measures contemplated under Part II are described in section 59 and subsection 60(4) of the EIA. The Commission established five types of employment benefits under section 59 of the EIA: (a) wage subsidies; (b) targeted earnings supplements; (c) self-

employment assistance; (d) job creation partnerships; and e) skills development assistance. They are broad in scope and deal with many aspects of employment assistance and labour market development. The purpose of benefits is to enable participants to obtain employment. These are employment benefits to help "participants", who include not only unemployed people, but also people who are still unemployed and no longer receiving employment insurance benefits.

[129] Support measures established by the Commission under subsection 60(4) of the EIA include: (a) employment assistance services; (b) labour market partnerships; and (c) research and innovation. As with employment benefits, the provinces' agreement is required for labour market training and skills development measures, and the measures are not intended for employees unless they are facing a loss of their employment. The definition of "participant" varies according to the nature of the measure, but it extends beyond unemployment insurance beneficiaries. The purpose of the measures is to support the National Employment Service.

[130] Benefits and measures must be established in accordance with the guidelines set out in subsection 57(1) of the EIA. These legislative guidelines reflect concerns related to several aspects of labour market development activities. They include: harmonization with provincial employment initiatives to avoid duplication; reduction of dependency on unemployment benefits; co-operation and partnership with other governments, employers and community organizations; flexibility for implementation at the local level; commitment by persons receiving assistance under the benefits and measures; and a framework for evaluating the success of the assistance provided.

[131] More specifically, a legislative language guideline (paragraph 57(1)(d.1)) provides for availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language. This language clause was necessary for contribution agreements under section 63, unlike other forms of collaboration with provinces, according to ESDC, where the OLA continued to apply (Mark Goldenberg's affidavit). The inclusion of this provision in Part II of the EIA necessarily acknowledges that the provinces may provide benefits and measures; if this matter were solely under federal jurisdiction, the provision would not be necessary because the federal government is already subject to the OLA.

[132] As previously mentioned, the Agreement was entered into pursuant to section 63 of the EIA, and not under the other provisions of Part II of the EIA. The text of the Act is instructive. Section 63 provides that the Commission may 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." It allows the provinces to create their own benefits and measures with a financial contribution from the federal government. This is done in accordance with the guidelines set out in subsection 57(1), with a focus on better coordination of federal, provincial or municipal programs; reduced duplication and overlap; improved client services; a better response to the needs of the regional and local labour market; and compliance with official language requirements.

[133] The term “similar benefits and measures” used in section 63 is not repeated in sections 61 and 62 of the EIA, which deal with other options available to the provinces. The wording of the section clearly suggests that Parliament intended to give the Commission the power to make financial contributions to benefits and measures that Parliament did not itself develop and would not provide. It does not refer to benefits and measures of the Commission or established “on behalf of” the Commission, but “similar” benefits and measures. These benefits and measures are therefore developed by someone other than the Commission. Moreover, Parliament’s failure to specify in section 63 that these benefits and measures would be provided “on behalf of” the Commission (while section 62 expressly uses this expression) is revealing.

[134] The whole context of the adoption of Part II of the EIA, and the more specific wording of section 63, reflect the federal government’s stated intention when it undertook the employment insurance reform in the mid-1990s: out of respect for provincial jurisdiction and the desire to eliminate duplication of programs, the federal government announced that it wanted to gradually withdraw from benefits and measures and contribute financially to benefits and measures that the provinces would develop and provide. The defendants’ voluminous affidavit evidence, which has not been contradicted, provides the details.

[135] This legislative context of the Agreement supports the finding that the benefits and measures provided for in contribution agreements under section 63 (and thus through the Agreement) do not fall under federal jurisdiction, but rather under provincial legislative jurisdiction. The Commission only funds these measures: it does not determine, deliver or

administer them. In short, Part II of the EIA recognizes the promotion of development of multiple aspects of the labour market as an area of provincial jurisdiction.

(ii) Contents of the Agreement

[136] The contents of the Agreement echo the principles established by Part II and section 63 of the EIA. All the most important elements of the Agreement indicate that British Columbia is in charge of designing and implementing its own employment assistance programs. They also reflect the full extent of the benefits and measures being considered to help develop labour markets in the province and the exercise of control by provincial authorities, not a delegation of authority by ESDC and the Commission. All of the foregoing is consistent with a connection to an area of provincial jurisdiction.

[137] First, I would like to discuss the objectives and purpose of the Agreement, which are described in the preamble, Article 2.1 and Annexes 1 and 3 of the Agreement. Like contribution agreements under section 63 of the EIA, the general purpose of the Agreement is to enable British Columbia to create its own benefits and measures with the Commission's financial contribution. The provisions of the Agreement describe multiple objectives involving a wide range of issues related to the design and delivery of labour market development programs in British Columbia. They include:

- Promoting the development of a skilled workforce and the rapid re-employment of unemployed British Columbians;

- Supporting the creation of employment opportunities;

- Providing services that build on the skills, abilities and potential of British Columbians;

- Providing services focused on addressing labour market challenges;

- Seeking cooperative arrangements with the federal government to reduce overlap and duplication in development programs;

- Developing employment assistance measures;

- Assisting individuals to prepare for, obtain, and maintain employment and to reduce their dependency on various government forms of income support;

- Addressing issues such as skill shortages, human resource planning, recruitment, retention, access to labour market information, and reducing barriers to labour market participation; and

- Taking into account changes in client needs, labour market conditions and evaluation findings.

[138] What about the benefits and measures themselves? Articles 1.1 and 1.2 of the Agreement and Articles 3 and 4 of Annex 1 expressly refer to British Columbia's responsibility to create and provide its own benefits and measures (they refer to "BC Benefits and Measures") funded by the Commission. These Articles demonstrate that the Agreement does not stipulate the content of the eligible employment benefits and support measures or dictate the terms and conditions under

which they are to be provided by British Columbia. BC Benefits and Measures are its own, and the province has the freedom to determine and establish them.

[139] Article 1.1 expressly refers to sections 59 and 60(4) of the EIA to provide a framework for the definition of "employment benefit" and "support measure". With respect to the definition of benefits and measures, Article 1.2 of the Agreement simply states that the term "means British Columbia Benefits and British Columbia Measures." The province's measures and benefits are then defined as follows:

> "British Columbia Benefit" means a labour market development program set out in Annex 1, as amended from time to time, that is provided by British Columbia under Article 3 with funding transferred under this Agreement and that is designed to enable EI Clients to obtain employment;
>
> "British Columbia Measure" means a labour market development program set out in Annex 1, as amended from time to time, that is provided by British Columbia under Article 3 with funding transferred under this Agreement 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; or
>
> (c) research and innovation projects to identify better ways of helping persons prepare for, return to or keep employment, and be productive participants in the labour force.
>
> [Emphasis added]

[140] Articles 3.0 and 4.0 of Annex 1 detail the benefits and measures contemplated by the Agreement. Article 3.0 states that British Columbia will provide "a broad range of services to enable EI Clients to obtain employment", and stipulates that benefits include employment services, self-employed assistance, skills development and an earnings supplement. Article 4 states that British Columbia will provide employment assistance services. I consider it useful to reproduce them in their entirety. They read as follows:

> **3.0 BC benefits and measures**
>
> British Columbia will provide a broad range of services to enable EI Clients to obtain employment.
>
> **a) Employment services**
>
> Employment services will be made available to encourage employers to hire to the fullest extent possible, EI Clients who are at risk of extended periods of unemployment and/or provide participants with short term work experience to help them acquire skills needed by local employers. Benefits will be used to:
>
> Employment Services – Wage Subsidy Component
>
> I. Support training on the job and work placement activities will include targeted wage subsidies to employers and work tools or equipment, short term training and other employment related supports.
>
> Employment Services – Work Experience Component
>
> II. Develop employment partnerships with employers and community groups that provide meaningful work experience opportunities for EI Clients and which also help develop the community and local economy.
>
> **b) Self employment assistance**
>
> British Columbia will provide self employment services to assist EI Clients to start businesses and become self employed. Services

may include entrepreneurship training, individualized coaching and client supports.

c) Skills development

British Columbia will implement a benefit for the education and training of EI Clients so they can obtain the skills necessary for employment.

This benefit will include the costs ordinarily paid by British Columbia over and above the amounts recovered through tuition fees, with respect to each EI Client receiving financial assistance under Skills Development and attending a publicly funded training institution.

d) Earnings supplement

British Columbia may implement targeted earnings supplements to enable some people currently on EI or who are long-term unemployed people to accept low-wage jobs. Temporarily topping up low-wage salaries means that people who would not enter at the lower wage rate can re-enter the work force.

4.0 British Columbia measures

a) Employment Assistance Services

Employment Assistance Services will be used to help clients to obtain employment. Services may include needs determination, employment counseling, job search training and provision of labour market information.

British Columbia will provide services to meet the needs of specific client groups and local communities through a service delivery network that is further described in Annex 3.

Employment Assistance Services will be used to support the delivery of National Employment Service functions and will be available to unemployed persons and job seekers.

b) Labour Market Partnerships

> Through work with employer and employee groups, sectoral associations and other partners, British Columbia will facilitate labour market activities that promote labour force development, workforce adjustment and effective human resources planning.
>
> It is understood that Labour Market Partnerships may be used to provide assistance for employed persons who are facing becoming unemployed.
>
> **c) Research and innovation**
>
> British Columbia will develop a provincial measure to support research, planning and innovative activities that address the needs of those in the British Columbia labour market.
>
> [Emphasis added]

[141] Wide-ranging in scope and formulation, but all seeking to achieve the same objective, these benefits and measures can only lead to one finding: the object and purpose of British Columbia benefits and measures funded under the Agreement encompass many issues and activities related to labour market promotion and development. And the benefits and measures are delivered through a wide variety of programs. The finding is the same with regard to their legal and practical effects. From a legal standpoint, the Agreement and the EPBC allow for their implementation. In practical terms, the defendants' affidavit evidence shows that British Columbia has implemented them since the EPBC came into force and has introduced multiple labour market development assistance initiatives in the province.

[142] What about the clients eligible to receive the benefits and measures? Once again, they include a variety of people living in British Columbia. For example, Article 3.5 of Annex 3 of the Agreement, which deals with the delivery of services provided under the Agreement, states

that the province "will provide service to a broad range of clients including employers, unemployed persons, EI clients, social assistance recipients and under employed persons." Employment insurance clients referred to in the benefits section include both active and former EI claimants.

[143] In addition, the Agreement and the evidence submitted by the defendants make it clear that, if there is a financial contribution from the federal government, the province develops and administers the benefits and measures. They are the province's own benefits and measures, and British Columbia is responsible for implementing them and for integrating federal public servants transferred to its programs. The evidence in Duncan Shaw's affidavit indicates that the requirement of similarity is flexible and gives the province latitude: it is sufficient if the benefits and measures established by the province are generally of the same nature. British Columbia also selects service delivery sites (Article 3.4 of Annex 3). Article 2.3 of Annex 1 states that "British Columbia will be responsible for selecting priority clients for British Columbia benefits and measures", but only EI Clients will be given access to British Columbia Benefits funded under the Agreement. Another example of the province's autonomy is that British Columbia can modify benefits and measures as it sees fit, without prior approval from the federal government. Article 3.3 stipulates that "British Columbia may make ongoing modifications to the design of its BC Benefits and Measures to ensure responsiveness to client need, labour market conditions, and evaluation findings."

[144] Admittedly, Article 3.4 adds that, where any question arises as to whether a proposed modification to a British Columbia Benefit or British Columbia Measure affects its consistency

with the guidelines and purpose of Part II of the EIA or its similarity to the employment benefits and support measures established under Part II, "it will be referred to the Designated Officials for a determination." However, the Designated Officials are from both parties and neither has control over the other.

(iii) Finding on pith and substance

[145] What do these provisions of the Agreement and its implementation tell us? Two things. On the one hand, it appears that the primary purpose of the benefits and measures covered by the Agreement, and their legal and practical effects, involve many aspects of labour market development in British Columbia. The benefits and measures are designed to overcome current or potential barriers that prevent or would prevent people from re-entering the labour market, and to help people re-enter the labour market more quickly. Although they encompass the maintenance or restoration of ties between people who require (or may require) employment insurance and the labour market—as described by LeBel J. in *CSN*—they also include training, education and labour market promotion and development activities. On the other hand, the evidence on the contents of the Agreement and its implementation makes it clear that British Columbia has the final say in developing and delivering benefits and measures. There is no delegation or control by ESDC or the Commission.

(b) *Relation to an area of provincial jurisdiction*

[146] Now, can we relate this pith and substance of the benefits and measures covered by the Agreement to an area of provincial jurisdiction? There is no doubt about it. These matters—the

wide range of labour market promotion and development activities—fall under provincial jurisdiction over property and civil rights, all matters of a purely local or private nature, and education, pursuant to subsections 92(13) and 92(16) and section 93 of the CA 1867. This Court has already established that these areas of jurisdiction cover labour market activities (*Lavigne FC* at paras 75-76).

[147] Because of their impact on a wide range of labour market promotion and development issues, the employment benefits and support measures set out in the Agreement fall within British Columbia's jurisdiction over employment and "social measures." Although the Supreme Court recognized jurisdiction in Parliament over maternity and employment benefits in *Reference re EIA* and *CSN*, it also noted that provinces have concurrent jurisdiction with Parliament with regard to social measures relating to employment assistance: "[t]here can be no doubt that a public unemployment insurance plan, in addition to the fact that it concerns insurance relating to contracts of employment, is also a social measure" (*Reference re EIA* at para 38; *CSN* at paras 42-49). Thus, the provinces retain all their property and civil rights jurisdiction over the creation of social measures or social and employment programs in general, and employment training and labour market development programs.

[148] It is true that federal jurisdiction over unemployment insurance is dynamic and ever-changing, and although Parliament can enact certain measures provided by the federal government, this does not mean that the provinces lose their jurisdiction to create and provide similar measures. For the reasons mentioned above, I do not agree with the FFCB's view that, based on its reading of *CSN*, subsection 92(13) and section 93 of the CA 1867 do not grant the

provinces the power to develop and administer benefits and measures designed to maintain or restore ties between unemployed persons and the labour market. The pith and substance of a measure do not automatically lead to exclusive jurisdiction over it.

[149] In my opinion, it must be concluded that the benefits and measures covered by the Agreement are consistent with matters that fall under both provincial and federal jurisdiction, and that their pith and substance have a "double aspect" that can be regulated both by the federal government under subsection 91(2A) of the CA 1867 on unemployment insurance and/or by the provinces under subsections 92(13) and 92(16) or section 93. This double aspect theory, which the Supreme Court has supported more extensively since *Canadian Western Bank*, means that the federal aspect of an activity can be governed by a federal statute and in its provincial aspect by a provincial statute, both of which are valid. It allows "governments at two levels to enact similar statutes or regulations "when the contrast between the relative importance of the two features is not so sharp" (*Rogers* at para 50, citing *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at p 182). Market development and efficient market operation as well as labour market activities, as a general subject, are a prime example. Each level of government is entitled to adopt employment assistance benefits and measures within the limits of its legislative jurisdiction (*Reference re EIA* at para 77).

[150] For these reasons, I find that British Columbia is not an institution of the Government of Canada and that it is not acting "on behalf of" a federal institution in developing and delivering its benefits and measures under the Agreement. It is acting quite narrowly within the scope of the legislative powers granted to it.

[151] I note that, unlike the situation in *Lavigne FC*, the benefits and measures contemplated by the Agreement have not been created and are not provided under a British Columbia statute or regulation. There is only one group of federal statutes here; the Agreement was entered into by the province's Minister of Economic Development. However, this does not change anything and does not prevent employment services from validly falling under the province's legislative authority as part of the mandate of the Minister, who represented British Columbia when the Agreement was signed. The principle of division of powers applies not only to legislative power but also to executive power (*Bonanza Creek Gold Mining Co v The King* (1916), 26 DLR 273 (PC) at pp 284-285; see also *Maritime Bank (Liquidators of) v New Brunswick (Receiver General)*, [1892] AC 437 (PC) at para 7). Thus, British Columbia has jurisdiction to create benefits and measures in the exercise of both its executive and legislative powers. It is sufficient that the Minister who entered into the Agreement on behalf of the provincial government did so in accordance with the Minister's mandate or apparent mandate. The FFCB does not dispute this.

(c) *Doctrine of interjurisdictional immunity*

[152] I would like to make an additional comment. Based on their reading of *CSN*, the FFCB and the Commissioner are asking the Court to embrace the doctrine of interjurisdictional immunity. I cannot concur with this position. This proposal runs counter to the recent principles laid down by the Supreme Court regarding the division of powers and would be a significant departure from case law. Instead of an approach that involves a departure from the current state of law, I prefer to choose an approach that ensures continuity.

[153] Co-operative federalism has prevailed since *Canadian Western Bank*. As the Supreme Court recently pointed out in *Comeau*: "[a]n expansive interpretation of federal powers is typically met with calls for recognition of broader provincial powers, and vice versa; the two are in a symbiotic relationship" (*Comeau* at para 79). The principle of co-operative federalism, and the double aspect theory associated with it, mean that on any matter not exclusive to either level of government both can—within the limits of their respective powers—legislate on certain aspects of the matter (*Canadian Western Bank* at para 37). It is based on "the careful and complex balance of interests captured in constitutional texts" (*Comeau* at para 82). The interpretation of the division of powers to be favoured by the courts is therefore one of flexibility, which does not underestimate the autonomy of provincial legislatures or the scope of Parliament's jurisdiction.

[154] Thus, where possible, modern co-operative federalism supports the concurrent operation of statutes enacted by governments at both levels (*Rogers* at para 85), if they encroach on the other jurisdiction only incidentally, without trenching on its "core" (*COPA* at para 27). It advocates the adoption of an approach involving concurrent federal and provincial powers, as opposed to applying the outdated concept of "watertight compartments" to establish exclusive jurisdictions (*Rogers* at para 85). It also involves the enactment of many federal-provincial agreements through which provincial institutions deliver certain federally funded services and programs. The Agreement and the benefits and measures it contains are consistent with this trend.

[155] In this context of co-operative federalism, several Supreme Court decisions since *Reference re EIA* and *CSN* have reiterated that the doctrine of interjurisdictional immunity, which the FFCB and the Commissioner want to see the Court espouse, has a limited scope. It should be applied with restraint, because a broad application of this doctrine would be "inconsistent [...] with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote" (*Canadian Western Bank* at para 42; *Marcotte* at para 63). In recent years, the Supreme Court has in fact denounced the excessive use of interjurisdictional immunity and encouraged "relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government" (*Long guns* at para 17).

[156] Today, the application of the doctrine of interjurisdictional immunity is generally limited to situations already dealt with by courts in the past (*Canadian Western Bank* at paras 67, 77). Moreover, it was first and foremost recognized in situations involving works, persons or undertakings, where the vital and essential elements of their activities absolutely needed to be protected (*Canadian Western Bank* at paras 41, 54-67). This was the case in matters involving federal transportation and communications companies. Finally, the doctrine of interjurisdictional immunity protects the "core" of a legislative head of power from being impaired by a government at the other level, and only if the effect of the encroachment on the protected power is sufficiently serious (*Rogers* at para 59; *COPA* at para 26; *Canadian Western Bank* at para 48). These three attributes were present when the Supreme Court recently recognized and upheld the federal government's exclusive jurisdiction over radiocommunication in *Rogers*: (1) a situation

already covered by precedent; 2) a federal undertaking where the siting of the radiocommunication antenna systems is vital; and 3) an issue at the core of federal power.

[157] In this case, it seems clear to me that the doctrine of interjurisdictional immunity cannot be applied. None of the three identified tests are satisfied. First, there are no decisions (including *Reference re EIA* and *CSN*) that have recognized Parliament's exclusive jurisdiction over employment assistance services funded by the Agreement or that have applied this doctrine to these activities. In fact, labour market activities were not considered "a field of exclusive federal jurisdiction" in *Lavigne*, according to the Federal Court of Appeal (*DesRochers FCA* at paras 48-49). Second, British Columbia's employment benefits and support measures are not related to a vital or essential aspect of a federal undertaking or work. Third, these employment benefits and support measures are not part of the "core" of federal jurisdiction over unemployment insurance and do not interfere with the exercise of Parliament's jurisdiction in this area. On the contrary, the federal government consents to the development and provision of employment assistance services by provincial authorities in the EIA and sees them as complementary to its actions in the area of unemployment insurance. No rulings, and in particular not *CSN*, have characterized benefits and measures such as those contemplated by the Agreement as being at the "core" of Parliament's jurisdiction over unemployment insurance. They are not income replacement benefits under Part I of the EIA or insurance measures. The essence of the federal unemployment insurance power refers to something else (*Reference re EIA* at para 48; *CSN* at paras 31-32).

(3) Degree of control

[158] As a second reason for arguing that British Columbia would be acting "on behalf of" a federal institution, the Commissioner contends that, while the Court is of the view that if there are concurrent jurisdictions and that the pith and substance of the benefits and measures at issue also fall under a provincial head of power, it must conduct an analysis of the "degree of control" exercised by the defendants on the province, such as that conducted by the Federal Court of Appeal in *DesRochers FCA*. In his April 2013 final investigation report, the Commissioner himself found that there was a "sufficient level of control" to trigger the application of section 25 of the OLA. I refer first and foremost to the Commissioner in this section because, on this point, the FFCB was content with filing rather timid representations before the Court.

[159] I do not share the Commissioner's opinion. Regardless of the control test used, I am not satisfied, based on the evidence in the record—that British Columbia exercises a degree of control within the meaning of *DesRochers FCA* and section 25 of the OLA—it would be acting "on behalf of" a federal institution. The ESDC and the Commission's control over British Columbia benefits and measures, if they have any, remains essentially financial.

(a) *Control test*

[160] In *DesRochers FCA*, the Federal Court of Appeal clarified the meaning of the words "on its behalf" used in section 25 of the OLA. *DesRochers FCA* dealt with an application for remedy under section 77 of the OLA alleging a breach of Parts IV and VII of the OLA by a private body, North Simcoe Business Development Centre [North Simcoe], which was acting on behalf of

Industry Canada. The Federal Court of Appeal indicated that to act on behalf of another person is to "act for that person or for the benefit or in the interest of that person" (*DesRochers FCA* at para 43). Thus, a third party may act on behalf of another when he exercises delegated authority, as in *Contraventions*, where the Province of Ontario and the municipalities were acting on behalf of the federal government in the implementation of the Canadian *Contraventions Act* (*DesRochers FCA* at para 46).

[161] In *DesRochers FCA*, the Federal Court of Appeal did not establish the threshold that must be met in order to trigger the application of section 25 of the OLA. However, it pointed out that a mere financial contribution by the federal government to a third person is not sufficient to trigger the application of section 25 of the OLA. (*DesRochers FCA* at para 54). That being said, Létourneau J.A., writing for the Court bench, nevertheless formulated the following test, at paragraph 51 of the decision:

> At the end of the day, the issue is whether, given the facts and circumstances of the case, the third party is providing the services of a federal institution or a federal government program with the accreditation, agreement, confirmation, consent, acceptance or approval of the institution or the government. In the affirmative, it must be held that this third party is acting on behalf of a federal institution within the meaning of section 25 of the OLA. And the third party is required to provide these services in both official languages if, I repeat, the federal institution or federal government were themselves subject to this obligation.
>
> [Emphasis added]

[162] Consequently, providing services with the "accreditation, agreement, confirmation, consent, acceptance or approval" of the federal government is the test to be used to measure the degree of control. In its analysis of the review of the degree of control over North Simcoe, the

Federal Court of Appeal took into account the federal government's control over the "definition, nature and scope of the activities of the program and eligible activities, over the costs of these activities and over the results that are sought" (*DesRochers FCA* at para 58). At paragraphs 60 to 62 of the decision, Létourneau J.A. reviewed the numerous activities provided by North Simcoe. He held that the design of the program in question, the eligibility criteria and the reporting obligations had been established by the federal institution, and that the third party was acting "on behalf of" the federal government. The Federal Court of Appeal also noted the language clause in the contract between the federal government and North Simcoe, which provided, among other things, that the third party must announce and advertise its services in both official languages and that communications with the public must also comply with the same requirements (*DesRochers FCA* at para 62). Furthermore, Létourneau J.A. considered that a significant number of policies related to the administrative and financial functioning of North Simcoe could not be amended without the approval of the federal Minister (*DesRochers FCA* at para 63).

[163] As the Commissioner has submitted, the analysis of the degree of control specified by the Federal Court of Appeal generally considers two aspects of the relationship between the federal institution and the third party involved: 1) the specification of the nature and the scope of the activities provided for in the agreement in question; and 2) the supervisory power of the federal authority over the activities of the third party. In his submissions, the Commissioner listed some other more specific parameters which, in his view, should be considered in the assessment. I agree that these are good guidelines for the analysis. However, establishing the degree of control is first and foremost a matter of the Courts assessing the evidence and the facts in light of the principles set out by the Federal Court of Appeal in *DesRochers FCA*. Given this precedent, I do

not believe that it is necessary to change the wording of the test, further specify the parameters that the courts should follow in their assessment of the evidence or decree a threshold to be achieved in order to have "sufficient" control for the purposes of section 25 of the OLA. It is sufficient, in each case, to carefully weigh the criteria based on the factual circumstances specific to the situation and the evidence submitted and to make a finding on a balance of probabilities. It is common practice for the courts to perform this type of exercise.

(b) *Agreement provisions and implementation*

[164] In his final investigation report, the Commissioner soon found a "sufficient level of control" on the part of ESDC based on what he characterized as involvement "to some extent" or a "certain role" played by the federal government in the management of the Agreement. In his defence, the Commissioner did not have access to the more compelling affidavit evidence that the Court has before it today. In my view, this evidence calls for more moderation. For the reasons that follow, I am not persuaded that the federal institutions involved in this matter exercise the same degree of control as the federal institution did in *DesRochers FCA*. Instead, I am of the opinion that, given the evidence in the record, the delivery of benefits and measures by British Columbia is not subject to the "accreditation, agreement, confirmation, consent, acceptance or approval" or overall control of ESDC or the Commission, with respect to the definition, nature and scope of the benefits and measures contemplated in the Agreement, the management and administration of these activities, their costs or the results that are sought.

(i) Benefits and measures under the Agreement

[165] The terms and conditions of the Agreement and British Columbia's benefits and measures, and the evidence filed on their implementation by the province since the EPBC came into force—including Duncan Shaw's affidavit and those of Hovan Baghdassarian and Sergei Bouslov, both Executive Directors of the British Columbia Ministry of Social Development and Social Innovation—do not demonstrate that the province is acting for ESDC and the Commission or for the benefit of the federal government in developing, implementing and managing employment assistance services under the Agreement, at any level. In short, the Agreement establishes only a general financial framework that states the conditions that British Columbia must meet to obtain the Commission's financial contribution under section 63 of the EIA.

[166] I would point out that the Agreement flows from section 63 of the EIA, which stipulates that the Commission may enter into an agreement with a provincial government providing for the payment of a contribution relating to benefits and measures similar to the Commission's employment benefits. The fact that the Agreement was entered into under this section, and not under section 62, which states that the Commission may enter into an agreement with a third party to administer an employment benefit "on its behalf," is a first element supporting the finding that British Columbia is not acting on behalf of the defendants.

[167] British Columbia's benefits and measures as such have already been thoroughly reviewed above. It is clear from this review that the federal government has no control or authority over the range of activities under the Agreement, identification of eligible benefits and measures, or how employment assistance services are to be provided or delivered. Rather, the elements of the

Agreement, and the evidence (not contradicted) submitted on its implementation, indicate that British Columbia oversees the planning and delivery of its own benefits and measures. The text of the Agreement and the affidavit evidence from representatives of both British Columbia and ESDC (including the affidavits of Hovan Baghdassarian and Duncan Shaw) demonstrate that British Columbia has full latitude to provide and administer its services and measures, allocate the financial contribution it receives from the Commission and control service quality.

[168] As a result, the province has adopted the "one-stop shop" model in the EPBC. British Columbia may also change the design of its benefits and measures to meet client needs, labour market requirements or assessment results, all subject to audit by designated officials. However, these designated officials are from both parties, not only from the federal government. No party has the final say, and this type of audit does not constitute a form of accreditation, consent, acceptance or approval within the meaning of *DesRochers FCA*. The evidence in the record does not reflect the federal government's actual exercise of control in this regard.

[169] In terms of redistribution of funding, the province decides who will receive the federal government funds. According to Duncan Shaw's affidavit, redistribution of the federal government's financial contribution is at the sole discretion of British Columbia, which is free to choose the individuals or entities that will benefit from them, with minimal support from the Commission. In other words, the province is free to do what it wants with its money insofar as the benefits and measures are "similar" to those established by the Commission, and EIA guidelines are followed. The federal government is not involved in managing the funds.

(ii) Agreement administration and management

[170] The provisions of the Agreement and its implementation provide useful information on the implementation and administration of benefits and measures. The autonomy of British Columbia, and the absence of control, are reflected in both the wording of many provisions and how benefits and measures are implemented under the Agreement. For example, contracts with service providers are written by British Columbia. In fact, the initial invitation to tender was launched by British Columbia after it had reviewed its programs and selected the "one-stop shop" model. The province then administered the invitation to tender, drafted the language clauses and signed contracts with companies that, as subcontractors, deliver employment assistance services in the various regions that British Columbia has identified. The evidence shows that the subcontractors administered the benefits and measures in accordance with the invitation to tender issued by the province, and that the language clause inserted in the various contracts drafted by British Columbia was negotiated by the province without ESDC's assistance or approval. Thus, the province is committed to taking meaningful action for linguistic minorities as part of its ultimate responsibility for developing and delivering its services and measures.

[171] The Agreement contains provisions on the evaluation of the performance of benefits and measures but, here again, they reflect the lack of control by ESDC and the Commission. To measure the effectiveness of the Agreement, Article 3.2 stipulates, for example, that British Columbia will provide the federal government with annual plans prepared by the province on performance evaluation. This annual British Columbia plan must set out labour market issues,

the array of BC Benefits and Measures, and projected expenditures for each benefit and measure. The information is used for the ESDC Departmental Performance Report.

[172] Articles 8, 9 and 11 of the Agreement provide that the Commission must assess the performance of benefits and measures and that the province must commit to such periodic assessments. Article 11 deals with monitoring and assessment reports. Yes, it provides that the federal government will "monitor and assess the effectiveness of the assistance provided by British Columbia under the BC Benefits and Measures." However, all this is done to prepare an annual monitoring and assessment report which the responsible minister will table in Parliament. According to Duncan Shaw's affidavit, the purpose of this performance evaluation is to ensure that the financial contribution is adequate and the objectives of the Agreement are achieved. In terms of performance evaluation tools, Article 18 of the Agreement requires an annual financial statement, certified by the Auditor General of British Columbia, setting out the amount of program expenditures in respect of benefits and measures. Thus, performance is measured by an annual financial statement certified by the province, not the federal Auditor General or federal officials. Again, this does not reflect a form of control by the federal government.

[173] That being said, some financial auditing of the amounts allocated to the province is consistent with a finding of absence of sufficient control, because it is necessary for purposes of reporting to Parliament on the amounts spent, and for the Auditor General's annual report on the Employment Insurance Operating Account. This, again, is not synonymous with accreditation, confirmation or approval within the meaning of *DesRochers FCA*. In fact, as counsel for the defendants pointed out at the hearing, the annual plan and the performance appraisal bring to

mind what the Federal Court of Appeal described in paragraph 57 of *DesRochers FCA*, sound measures for managing public funds.

[174] I also note the limited monitoring of employment assistance services delivered by ESDC. Instead, British Columbia has developed its own governance framework composed of several committees and panels to oversee the implementation of various aspects of the benefits and measures provided under the EPBC, including services to the French linguistic minority. Hovan Baghdassarian's affidavit deals with this extensively.

[175] In terms of management, the Agreement is written in such a way that neither party has decision-making power over the other. The parties have joint management powers. Article 22 of the Agreement establishes a federal-provincial Management Committee, which meets at least twice annually, is co-chaired by both parties to the Agreement and provides a forum to exchange information and have discussions related to labour market challenges facing employers, employees and unemployed individuals across the province. It is composed of representatives of both levels of government and decisions are made by consensus. As Duncan Shaw stated in his affidavit, this is a forum for sharing and discussion to support the parties to the service agreements, foster an integrated approach and coordinate administrative and operational efficiencies, as well as to share labour market expertise. It is not an organizational structure where the federal government could dictate to British Columbia how it should manage the benefits and measures it has developed and implemented. The Management Committee is an advisory body that seeks to optimize the federal government's financial contribution rather than oversee service delivery by the province.

[176] There is some consultation, but consultation is not equivalent to control. I hasten to point out that the term “consultation” does not appear in the list of six terms expressing the concept of control made by the Federal Court of Appeal in *DesRochers FCA*. A consultation is not the same as an approval or agreement. Also, I am not persuaded that the fact that the federal government plays a certain advisory role in managing the Agreement demonstrates a sufficient level of control to meet the requirements of *DesRochers FCA*.

[177] Similarly, an “Official LanguagesWorking Group” was created in 2013 to review services provided to Francophones in British Columbia and help implement the language clause of the Agreement. This committee, established by the province, reviews services provided to the French‑speaking minority and the implementation of the language clause of the Agreement. In addition, a letter of agreement renewing British Columbia’s commitment to provide French-language benefits and measures in accordance with the language clause of the Agreement has also been signed, without any instructions from ESDC to British Columbia.

(iii) Finding on the degree of control

[178] Ultimately, I am not persuaded that the evidence in the record is sufficiently clear and compelling to find that, on a balance of probabilities, the federal government exercises a sufficient “degree of control” over British Columbia’s activities and that, in delivering its benefits and measures under the Agreement, the province would be acting for the benefit of ESDC or the Commission. The provisions of the Agreement and the manner in which benefits and measures are actually administered by British Columbia point in the opposite direction. This

is therefore not a situation where, for this additional reason, section 25 of the OLA comes into play.

(4) Merits of the application at the time of the complaint

[179] If British Columbia had acted "on behalf of" a federal institution and Section 25 and Part IV applied, then the merit of the FFCB's complaint would have to be demonstrated to the Commissioner, i.e. the existence of a violation of the language rights described in Part IV at the time the complaint was filed, based on the facts at that time and the evidence before the Court. However, having determined that, pursuant to the Agreement, British Columbia is not under the control of ESDC or the Commission, that neither body has delegated its duties to British Columbia and that the province provides its employment assistance services in accordance with its legislative jurisdiction, I do not have to consider whether the FFCB's application under Part IV was well founded at the time of its complaint to the Commissioner, June 15, 2011.

(5) Finding on Part IV

[180] For all these reasons, I find that Part IV of the OLA does not apply to employment assistance services covered by the Agreement. It follows that there has been no breach of section 25 of the OLA or subsection 20(1) of the *Charter* in this case. I understand that employment assistance services are of utmost importance to British Columbia's French-speaking community, as FFCB President Réal Roy pointed out in his affidavit. After all, work "is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society" (*Reference Re Public*

Service Employee Relations Act (Alta.), [1987] 1 SCR 313 at para 91). Like language, work is an essential component of a person's identity (*Shakov* at paras 111-112 (dissenting reasons, but not on this point)).

[181] I also know that section 25 of the OLA is there to prevent the federal government, in the context of third-party agreements, from avoiding the application of the OLA and its language of service obligations, doing indirectly what it could not do directly, and negating substantive equality in terms of status and use of the minority language (*DesRochers FCA* at para 72). However, in this case, the transfer payment agreement between the federal government and British Columbia regarding labour market development in the province has delegated the administration of employment assistance services to a provincial authority and delivering them is a valid exercise of the province's legislative jurisdiction. British Columbia does this without being controlled by ESDC or the Commission.

[182] Language rights must be given a broad and liberal interpretation to promote the survival and vitality of official language minorities in Canada. However, this generous interpretation does not allow the Court to depart from the text of OLA and disregard what the constitutional division of powers between Parliament and the provinces authorizes.

C. *Part VII of the OLA*

[183] I turn now to the second substantive issue raised by the FFCB, the argument that there was a breach of Part VII of the OLA, and specifically section 41 of the Act. In order to decide whether ESDC and the Commission failed to comply with section 41, this provision (and more

generally Part VII) must again apply in the context of the Agreement and the benefits and measures provided by British Columbia. This is not disputed. Subsection 41(1) of the OLA states that "[t]he 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." Subsection 41(2) stipulates that "[e]very federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1)." There is no doubt that ESDC and the Commission are federal institutions subject to this duty and that they are bound even under a federal-provincial labour market development agreement like the one negotiated with British Columbia. This applies even if employment assistance services provided by the province under the Agreement are within the scope of its legislative authority.

[184] However, the analysis does not stop there. The issue is whether, based on the facts and applicable law, ESDC and the Commission have actually fulfilled their duty to take "positive measures" to honour the commitment described in section 41.

[185] For the reasons that follow, I am satisfied that, in view of the proper interpretation of subsection 41(2) of the OLA and the evidence in the record, the federal institutions involved had taken "positive measures" within the meaning of Part VII of the OLA when the FFCB filed its complaint with the Commissioner. This is therefore not a situation where ESDC and the Commission have failed to fulfil their duties under Part VII. The FFCB and the Commissioner maintain that the defendants should have taken more measures, should have been more focused

on employment assistance services or should have taken more specific measures in light of the language clause of the Agreement, to better support the vitality of the French-speaking minority in British Columbia. However, in doing so (and I say so with respect), they misunderstand the content and scope of the duty to ensure that "positive measures are taken" in subsection 41(2) of the OLA. The issue is not whether other positive measures could have been taken by the defendants, or whether it would be possible or desirable to take these other measures. The issue is whether the defendants have taken measures and whether they help achieve the objectives of section 41.

(1) Preliminary question regarding the Guide

[186] A short preliminary question must be addressed. In his written submissions, the Commissioner suggests that the Guide for Federal Institutions on Part VII (Promotion of French and English) of the *Official Languages Act*, 2007 [Guide] developed by the Minister of Canadian Heritage [Canadian Heritage] should be used to assess whether federal institutions have fulfilled their duty to take positive measures under section 41. The defendants objected that the Commissioner cited the Guide in support of his claims because the Guide would be inadmissible in evidence.

[187] As I indicated at the hearing, I agree with the defendants that the Guide is inadmissible in the context of the FFCB's application. The February 2017 order that authorized the Commissioner to intervene did not, however, authorize the Commissioner to submit additional evidence. In any case, the Guide was never submitted as evidence by the parties in this case.

Furthermore, no one disputes that the Court could not take judicial notice of this document. In these circumstances, it is therefore inadmissible, and I did not take it into account in my decision.

(2) Submissions of the parties

[188] The parties disagree on the scope of section 41 and the requirement that federal institutions take "positive measures". This is the crux of the dispute over Part VII of the OLA.

(a) *FFCB*

[189] The FFCB pleads that the defendants have not fulfilled their duty to take positive measures under the Agreement, a duty they cannot delegate to British Columbia. According to the FFCB, the analysis of section 41 of the OLA must be based on the factual context of the case, including the fact that the French-speaking community is the beneficiary of the language clause provided for in Article 5.2 of the Agreement. However, according to the FFCB, the vitality of the French-speaking community depends on the actions taken by ESDC and British Columbia under the Agreement.

[190] At the hearing before the Court, the FFCB emphasized that the adoption and implementation of the "one-stop shop" model and its adverse effects on employment assistance services to French-speaking British Columbians constituted a "negative measure" providing context for considering the duty stipulated under section 41. Also, the FFCB says the positive measures acceptable under section 41 must involve the same area, linguistic community and policy sector as this negative measure resulting from the Agreement.

[191] The FFCB maintains that, while the inclusion of the language clause in the Agreement may be a positive measure, it does not exempt the defendants from fulfilling their duties under section 41 because, in practice this clause and all the provisions related to implementing and monitoring the language obligations of the Agreement are applied in an arbitrary and chaotic manner to the detriment of the French‑speaking minority. The FFCB therefore argues that British Columbia's 2010-2011 French-language services review, conducted in accordance with Article 9 of the Agreement, is unreliable. According to the FFCB, the results of the review were limited to terse formulaic reiterations that French-language services are available where there is sufficient demand and that consultations were held. The FFCB finds this clearly insufficient.

[192] Furthermore, the FFCB alleges that Article 10.1 of the Agreement, which stipulates that ESDC must use certain personal information provided by British Columbia (including information relating to clients' official language) to monitor and evaluate employment assistance services, no longer works. According to the FFCB, the evidence demonstrates that, in practice, data collected on clients' official language are not complete and that the Management Committee (established under Article 22 of the Agreement) never addressed the issue. Finally, the FFCB notes that the 2011, 2012 and 2012–2013 reports filed by ESDC in Parliament under Article 11.1 of the Agreement do not address the availability or quality of delivery of employment assistance services in the minority language. The FFCB also complains that English-language organizations determine whether French-language services have been provided by British Columbia and that unilingual provincial public servants rely on these organizations to provide them. Neither the province nor the defendants verify the accuracy of the information provided. Finally, the FFCB

argues that, in developing French-language service delivery, the province does not consider the unique needs of the French-speaking community.

[193] At the hearing, the FFCB clarified the type of remedial orders the Court could issue in the circumstances. Below is a list of some of them. According to the FFCB, the Court could:

- Ask ESDC to propose a plan to the French-speaking community and the Commissioner for fulfilling the duties under the Agreement in order to comply with Part VII;

- Declare that what the defendants are doing is inconsistent with Part VII and insufficient, and state parameters or indicators as to what positive measures would enable the federal institution to comply with section 41;

- Order the defendants to develop and implement formal and permanent monitoring mechanisms under the Agreement; or,

- Order ESDC to require full compliance with the Agreement, use the monitoring mechanisms provided for in the Agreement and use the data to which it is entitled under the Agreement.

(b) ***The Commissioner***

[194] The Commissioner focused his submissions on the principles of interpretation and the legal test which, in his opinion, should prevail in section 41 of the OLA. He maintains that the interpretation of Part VII must be guided by Parliament's intention, the implementation of

subsection 16(3) of the *Charter*, which provides for advancing the equality of status and use of English and French. According to the Commissioner, the purpose of the provisions of section 41 of the OLA is to ensure that the vitality of official language minority communities and the full use of English and French are core factors in the decision-making process of federal institutions.

[195] The Commissioner is of the opinion that the duty to take "positive measures" stipulated in section 41 of the OLA includes three aspects: 1) information gathering and impact analysis of decisions under consideration; 2) the duty to act so that the vitality of official language minorities is not impeded; and 3) the duty to act proactively to fulfil the federal government's commitment.

[196] The Commissioner also argues that in assessing the duties under Part VII, the Court must assess the positive measures taken by the federal institution in the specific factual context that is the subject of the complaint to the Commissioner. Thus, not all measures taken by an institution can enable it to fulfil its duties under Part VII. In other words, positive measures must be examined in a specific context. The Commissioner therefore recognizes that federal institutions enjoy a certain discretion regarding the implementation of positive measures.

[197] Finally, the Commissioner suggests more specifically that, in the context of transfer payment agreements, a federal institution should be required to comply with the Treasury Board Secretariat's Policy on Transfer Payments [Policy], which states that when programs support activities that benefit members of both official language communities, their design and delivery must respect the obligations of the federal government under Part VII of the OLA. According to

the Commissioner, the adoption of a language clause is at the top of the list. However, the Commissioner also says the requirements for positive measures have not all been met because a federal institution has inserted a language clause in a federal-provincial agreement. In his submissions, he described the detailed steps regarding the language clause that, in his view, should be followed to meet the requirements of Part VII and the Policy. According to the Commissioner, the positive measures requirement has not been fulfilled if the federal government does not take any measures to support the province in implementing the language clauses. The Commissioner says that under Part VII, a federal institution must take "all possible measures" (counsel for the Commissioner referred to "all measures that would be reasonable" at the hearing before the Court) to ensure that the province can fulfil its language obligations. The Commissioner argues that, at a minimum, the institution must verify that the province has the capacity to comply with the language clause and has the means to evaluate and enforce its implementation.

[198] At the hearing, the Commissioner added that the scope of the positive measures referred to in Part VII of the OLA must cover something other than what is already provided for elsewhere in the OLA, for example in Part IV. Thus, a measure that merely fulfils a duty under Part IV on language of service would not be a positive measure under Part VII.

(c) *ESDC and the Commission*

[199] ESDC argues that subsection 41(2) of the OLA does not impose any specific duties on federal institutions and leaves them full discretion in developing and implementing "positive measures". According to ESDC, the only duty that is justiciable is a general duty to act, and the

Court cannot impose specific requirements or implementation procedures on federal institutions. The role of the Court would therefore be limited to determining whether the federal institution has taken "positive measures". ESDC contends that in this case, the many positive measures it had implemented at the time the FFCB filed its complaint demonstrate that it complied with Part VII. ESDC further submits that, contrary to the Commissioner's argument, subsection 41(2) of the OLA does not include a general duty not to harm OLMCs, or a requirement to gather information or perform impact analyses.

[200] ESDC also says section 41 of the OLA cannot be used to impose requirements that services provided under Part IV of the OLA be of equal quality; nor can section 41 be interpreted as imposing formal and permanent mechanisms to ensure the implementation of EIA guidelines. In addition, subsection 41(2) of the OLA expressly provides that the discretion conferred by section 41 shall be exercised "while respecting the jurisdiction and powers of the provinces." ESDC says the Court may therefore not order ESDC to take every possible positive measure that the FFCB and the Commissioner have cited without encroaching on British Columbia's legislative jurisdiction.

[201] Finally, ESDC points out that the language clause inserted in the Agreement is not pursuant to a requirement in the OLA and the duty to take "positive measures." Instead, it arises from subsection 63(1) of the EIA under which, in the case of contribution agreements such as the Agreement, similar benefits and measures provided by the province must meet the guidelines in Part II of the EIA. These guidelines require, among other things, that services be available "in either official language where there is significant demand."

(3) Interpretation of section 41

[202] The application made by the FFCB pursuant to Part VII first requires that the scope and extent of the duty to take "positive measures" contained in section 41 be clarified. In accordance with the well-accepted method of statutory interpretation, the actual text of the Act, its context and purpose must be considered. We must examine the language used by Parliament in its overall context by following the ordinary and grammatical meaning, which is consistent with the scheme of the Act, its focus and Parliament's intention. Of course, the broad and liberal interpretation of language rights that must prevail continues to guide the process.

(a) *Text of the Act*

[203] Let us first consider the text of the Act.

(i) Part VII

[204] First, it should be noted that Part VII differs from other parts of the OLA, including Part IV, which is also central to this case. Part VII enacts duties, while Part IV creates rights. As the Supreme Court stated, "[i]t is clear simply from the wording of the enactment that the distinction between Part IV and Part VII is important" (*DesRochers SCC* at para 23). In fact, Part VII of the OLA is different from the rest of the OLA (*Picard v Commissioner of Patents*, 2010 FC 86 [*Picard*] at para 75). Thus, as the defendants rightly argued, the question that arises when referring to Part VII is not to determine whether a measure is in "breach" of that Part, but rather to know whether the federal institution has taken "positive measures". The provisions of

section 41 do not confer rights on Canadians from linguistic minorities. Instead, they impose on federal institutions the duty to work for the benefit of the English and French communities. There is therefore a fundamental difference in the wording of Part IV and Part VII.

[205] The OLA does not give Part VII the same status as other parts of the Act: "[s]ubsection 82(1) is particularly revealing in this regard, since it establishes the paramountcy of certain Parts only of the Act over any other Act of Parliament, and Part VII is not one of those Parts" (*Forum des maires* at para 26). Only Parts I to V of the OLA have this paramountcy. There is some "asymmetry" in the Act, to use the term employed by Décary J.A. in *Forum des maires*. This asymmetry reflects Parliament's intention not to treat all parts of the OLA the same way and on the same basis. Of course, Part VII must be read in harmony with the rest of the OLA and with its fundamental objectives of protecting linguistic minorities and promoting Canada's official languages, but it plays in a different key. It cannot be put on the same footing as the other parts. The language used in Part VII and Parliament's treatment of Part VII in the OLA clearly reflect this.

[206] Incidentally, the case law establishes more specifically that section 41 of the OLA cannot become a mere repetition of Part IV or be used to revive the duties of Part IV under the guise of a duty to take "positive measures" under Part VII. Part VII covers other provisions than Part IV (*Picard* at para 77). In other words, the rights under Part IV cannot be reincarnated under the duties of Part VII and reappear under the guise of positive measures. The Commissioner agreed with this interpretation at the hearing before the Court. This means that the purpose of the duty to take positive measures cannot be to indirectly impose the statutory scheme of Part IV on a

situation where that scheme does not apply directly. This principle is equally valid in the context of transfer payment agreements such as the Agreement.

(ii) Subsection 41(2)

[207] Turning now to the words used in subsection 41(2), the Act says that "[e]very federal institution has the duty to ensure that positive measures are taken" [French text: incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives] [Emphasis added]. [In the French text,] "des" is an indefinite article, and it can be inferred that the provision does not establish a minimum threshold or a minimum number of positive measures to be achieved. The text suggests that it is a general duty to do something, not a duty to achieve a specific outcome. The only requirement is that the measures be "positive".

[208] The use of the indefinite article "des" also suggests that federal institutions have been granted discretion. The case law also establishes that the text of section 41 leaves considerable latitude to federal institutions in the choice of positive measures. In *Picard*, Tremblay-Lamer J. recognized that "the decisions of federal institutions to give effect to the government's commitment under Part VII are entitled to a certain deference on the part of the courts" (*Picard* at para 75). In the same vein, Martineau J. said in *Canada (Commissioner of Official Languages) v CBC*, 2014 FC 849, rev'd on other grounds by 2015 FCA 251 [*CBC FC*] that "[t]he choice of which positive measures would be best to carry out the government's commitment is, in principle, left up to each institution, subject, of course, to applicable regulations and to any powers of supervision or coordination that the Minister of Canadian Heritage and Official Languages and the President of the Treasury Board may have over the matter" (*CBC FC* at

para 41). In the absence of a regulation that could limit its scope, the discretion left to federal institutions remains intact. This is easy to explain. Federal institutions are in the best position to determine, within their institutional mandate, what specific positive measures are most reasonable and appropriate to fulfil the commitment to enhance the vitality of linguistic minorities and foster the full recognition and use of English and French in Canadian society.

[209] The term "positive measures" is not defined in the OLA. It is not repeated elsewhere in the Act; the term is only used in section 41. According to counsel for the defendants at the hearing, the word "positive" simply means "for the benefit of." Turning now to what dictionaries have to say, *Le Petit Robert,* 2018 defines the adjective "positif" as: "Opposé à négatif ou neutre A. sens courant : 1. Qui affirme qqch. [quelque chose]. Qui affirme du bien de qqn [quelqu'un], qqch [quelque chose]. […] 3. Qui a un contenu réel, construit ou organisé." *Le Petit Larousse Illustré,* 2018 defines the term as follows: "1. Qui repose sur qqch [quelque chose] de concret; réel. […] 4. Qui a un effet favorable; constructif." Finally, the *Canadian Oxford Dictionary*, 2nd Edition, 2004 provides the following definitions for the adjective "positive": "[…] 2 a. Having a helpful and constructive intention or attitude towards something. […] 3. Formally or explicitly stated; definite, unquestionable. […] 8. Tending in a direction naturally or arbitrarily taken as that of increase or progress." . . . .

[210] It can be inferred from these definitions that, in the context of section 41, "positive" measures will be concrete measures taken with the intention of producing a positive outcome for the benefit of linguistic minorities in Canada and that they are a constructive step in fulfilling the commitment in subsection 41(1), which is to enhance the vitality and support the development of

linguistic minorities and foster the advancement of both official languages. However, one thing does seem certain: the concept of "sufficiency" to which the FFCB referred at length during the hearing is not included in the text of section 41. There is no explicit or implicit threshold in subsection 41(2). The subsection simply imposes the general duty to take "positive measures". The test for measuring whether the duty imposed on federal institutions has been fulfilled is not sufficiency; it is relevance, in the sense that the measures must be "positive". It is this quality that is at issue and which the courts must assess based on the evidence before them. Also, when the FFCB claims that the defendants failed to comply with their duty under Part VII because they failed to take "sufficient positive measures", it adds a qualifier and a requirement that is not in the provision.

[211] We must also consider the "measures" aspect of the term "positive measures" in subsection 41(2). I note that the word "measures" used by Parliament in section 41 is not foreign to the OLA. Far from it. It is a word that Parliament uses frequently in the OLA, at least 20 times. Parliament uses it in different parts and for different types of rights and duties. And Parliament adds qualifiers to the word "measures" that are sometimes quite different, which define the weight of the duties it intends to impose on the persons and institutions involved in taking the measures. The following terms can be identified in the OLA:

- "appropriate measures", in French "les mesures voulues" [Emphasis added] (section 28 on active offer, in Part IV);

- "any regulations that the Governor in Council considers necessary […]", in French "les mesures d'incitation qu'il [le gouverneur en conseil] estime

nécessaires pour que soient effectivement assurés […]", [Emphasis added] (section 33 on making regulations under Part IV);

- "such measures […] as can reasonably be taken", in French "toutes autres mesures possibles", [Emphasis added] (subsection 36(2) on minimum duties regarding the language of work in prescribed regions, in Part V);

- "any other measures that are to be taken", in French "toute autre mesure" [Emphasis added] (paragraph 38(1)(*b*) on potential regulations on the language of work, in Part V);

- "such measures that the Minister considers appropriate […] and […] measures to", in French "les mesures qu'il estime indiquées […] et, notamment, toute mesure", [Emphasis added] (subsection 43(1) on the implementation of section 41 by Canadian Heritage, in Part VII);

- "such measures as that Minister considers appropriate", in French "les mesures qu'il juge aptes à assurer la consultation", [Emphasis added] (subsection 43(2) on implementation by Canadian Heritage, in Part VII);

- "all actions and measures […] with a view to ensuring", in French "toutes les mesures visant à assurer la reconnaissance", [Emphasis added] (subsection 56(1) on the duty of the Commissioner, in Part IX).

[212] I pause here to note that, even within the brief Part VII, the framework of the duties in respect of "measures" created by Parliament is not always of the same order: the duty imposed on Canadian Heritage in subsections 43(1) and 43(2) is more specific and wider in scope than the one in subsection 41(2), Parliament ordering that federal institution to "take such measures as [it] considers appropriate to advance [...]" and "such measures as [it] considers appropriate to ensure public consultation [...]" [Emphasis added]. This is different from the duty to take "positive measures" contained in subsection 41(2).

[213] In short, even within the OLA itself, Parliament wanted the concept of "measures" to be one of variable geometry. However, when, in the same Act, Parliament uses the word "measures" sometimes with the article "les" [in the French text], sometimes with the qualifiers "possible", "appropriate" or "necessary", sometimes with the adjective "all", one cannot ignore the fact that in subsection 41(2) Parliament was content to speak of "positive measures" to be taken by federal institutions, with the indefinite article "des" and the qualifier "positives" [in the French text], without providing further clarification or restrictions. Parliament does not say "necessary measures"; it does not say "appropriate measures"; it does not say "all possible measures." Clearly, the text of the Act reveals that the expression "positive measures" does not mean the same thing as these other types of measures. It clearly does not have the same attributes of comprehensiveness, necessity, precision or sufficiency found elsewhere in the OLA.

[214] This is not surprising, because this more general and less specific nature of the duty in subsection 41(2) echoes the general purpose of Part VII, the advancement of English and French. Unlike Parts I to V of the OLA, Part VII is not intended to protect or establish specific language

rights. Here again, when the FFCB and the Commissioner speak of “necessary measures” or “all possible measures” when referring to the duty allegedly incumbent upon the defendants under section 41, they are on the wrong track. They are in fact borrowing from other parts of the OLA that prescribe actions on language rights and the protection of those rights. This is the case, for instance, in situations where Parliament uses the word “measures” in Part IV on the language of communication and service delivery or in Part V on the language of work. If Parliament had intended to speak of “necessary” positive measures, “all reasonable measures” or “positive” measures in section 41, it would have done so expressly, as it did not hesitate to do in other provisions within the OLA itself.

[215] Given that he is involved in protecting and defending language rights and is invested under the OLA with the mandate to foster the recognition of the status of both official languages in Canada, it is easy to understand that this is how the Commissioner wants to read Part VII of the OLA and how he would like to see it interpreted and applied by the courts. It is also easy to imagine that linguistic minorities in Canada (including the French-speaking minority in British Columbia that the FFCB represents) would want the same thing. However, that is not what the text of section 41 says.

[216] In short, section 41 does not impose specific and particular duties on federal institutions. The language used in subsection 41(2) is devoid of all specificity. With this in mind, the Court has already determined that subsection 41(2) of the OLA does not prescribe a specific framework or methodology. (*Fédération des communautés francophones et acadienne du Canada v Canada (Attorney General)*, 2010 FC 999 [*FCFA*] at para 41). In *FCFA*, Boivin J. was of the opinion that

positive measures cannot be interpreted as including the duty to use a specific data collection method. The Court ruled that Part VII of the OLA did not require the federal government to collect census information through a long-form questionnaire, because there was no requirement in the OLA, and no provisions in the *Statistics Act*, RSC 1985, c S-19, contained any language obligations. Thus, section 41 does not require any particular methodology or framework.

[217] In this regard, the prerequisite that the Commissioner uses as the first part of the test, which he suggests the Court use to determine what constitutes the duty to take "positive measures", goes beyond the language of the provision. I agree with the defendants that in seeking to require a method for federal institutions to perform impact analyses and gather information, the Commissioner is attempting to make section 41 a control measure that is not consistent with the language and purpose of the provision. In my view, this part cannot be one of the parameters that can help the courts determine the scope of the duty to take "positive measures".

(iii) Provincial jurisdiction

[218] Two other important comments must be made about the text of the Act. On the one hand, subsection 41(2) of the OLA expressly requires that "positive measures" be taken for the implementation of the commitment to enhance the vitality of linguistic minorities and foster the full recognition of both official languages. This implementation shall "be carried out while respecting the jurisdiction and powers of the provinces." Positive measures cannot encroach upon provincial jurisdiction and erode the valid exercise of these powers. This is obviously a

major consideration for employment assistance services under the Agreement, which are validly provided by British Columbia within its legislative jurisdiction.

(iv) Subsection 41(3) and the regulations

[219] The second comment deals with subsection 41(3) of the OLA, which expressly authorizes the federal government to make regulations "prescribing the manner in which any duties of those institutions under this Part are to be carried out." The very structure of the duty created in section 41 provides for the adoption of regulations that will specify the manner in which the duty is to be executed and implemented. However, the federal government has not yet adopted any regulations under this section of the Act. I will have more to say about this later in the discussion of the context surrounding the adoption of section 41; it is a significant factor in this case.

[220] The FFCB submits that subsection 41(3) only says 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" (fixer les modalités d'exécution des obligations que la présente partie impose", in the French version), and it then would be out of the question to make regulations stipulating what positive measures might be. According to the FFCB, the provision would simply describe the technical arrangements for fulfilling duties, not what positive measures can include. I am not of the same view and do not agree with that interpretation of subsection 41(3). On the contrary, I am of the opinion that here Parliament is clearly referring to regulations on the manner in which to carry out the duty to take "positive measures" to enhance the vitality of English and French linguistic minority communities in Canada and foster the use of both official languages. Parliament is therefore addressing the manner in which this general duty should be

expressed and the requirements that federal institutions may be subject to in carrying out the general duty.

[221] The entire structure and scheme of section 41 is articulated around a first paragraph that describes the federal government's commitment to linguistic minorities, and a second paragraph that imposes the general duty of federal institutions to take positive measures, and a third paragraph which provides for the adoption of more specific procedures for its application and implementation through regulations. Since regulations have yet to be adopted, it follows that the exact nature of the duty in subsection 41(2) remains general and indeterminate to this day, and the duty does not have the specificity that regulations were expected to provide.

(b) *Context of the Act*

[222] Reviewing the context in which section 41 was adopted supports and clarifies exactly what the text of the provision indicates. The current version of section 41 of the OLA was created in November 2005 when Parliament enacted Bill S-3, *An Act to amend the Official Languages Act (promotion of English and French)*, SC 2005, c. 41. The current subsections 41(2) and 41(3) were then added to the Act through an amendment incorporating this new duty to take "positive measures" to implement the commitment in section 41. Bill S-3 was the result of an initiative by the late Senator Jean-Robert Gauthier, aptly described by Décary J.A. as "one of the most fervent defenders of language rights in Canada" (*Forum des maires* at para 44). This bill was initiated in response to the federal government's position that section 41 has only declaratory power and is not executory. The amendment also responded to the Federal Court of Appeal's decision in *Forum des maires*, where the Court concluded that

section 41 did not create any right or duty that could at that time be enforced by the courts (*Forum des maires* at para 46). The purpose, to use the words that Senator Gauthier seems to have originally popularized, was to give Part VII of the OLA "teeth."

[223] It is now well established that records of parliamentary debates can help determine Parliament's intention and interpret legislation, insofar as they are relevant and reliable, and not too much importance is attached to them (*Rizzo* at paras 31, 35; *R v Morgentaler*, [1993] 3 SCR 463 at p 484). In the case of the 2005 amendment that created the current subsection 41(2) of the OLA, these parliamentary debates provide useful insights into the scope of the duty to take "positive measures". Legislative history and parliamentary debates are particularly revealing of Parliament's intent regarding (1) the general nature of the duty to take "positive measures" and (2) the expected role of the regulations contemplated in subsection 41(3) in the structure and implementation of this duty. Both elements point to a lack of specificity in the scope of the duty to take "positive measures" described in subsection 41(2).

(i) General duty to act

[224] As the parties agreed at the hearing before the Court, the intention of the amendment to section 41 was not to introduce an obligation of result in the "positive steps" to be taken. Instead, as the Commissioner said in his submissions, the intent was to create a "duty to act." Parliamentary debates preceding the adoption of the 2005 amendment echo what transpires from the text of the Act, i.e. the general nature of the duty described in section 41.

[225] During the debates, then-Commissioner Dyane Adam referred to the duty, saying that it obligated the federal government to act and to be proactive in the implementation of Part VII (*Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (October 6, 2005) at p 0905 (Dyane Adam)). The Commissioner confirmed that the amendment created neither an obligation of means, nor an obligation of result, but an "obligation to act" (*Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (October 6, 2005) at p 0905 (Dyane Adam)). Moreover, in order to avoid any ambiguity as to the nature of the duty, the House of Commons Committee had agreed to amend the original version of the bill proposed by Senator Gauthier to replace the words "positive measures to ensure the implementation of this commitment" with "positive measures to implement this commitment" [Emphasis added.]; the reason for the change being that the word "ensure" could have been interpreted as imposing an obligation of result, which was not desired (*Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (October 6, 2005) at pp 0905–15, 0930, 0950, 1005, 1030 (Dyane Adam, Marc Godbout, Paule Brunelle and Guy Côté)).

[226] Several other testimonies heard in the parliamentary debates on Bill S-3 confirm that the amendment to section 41 of the OLA and the inclusion of the duty to take "positive measures" were not intended to create an obligation of result or a duty to take measures that would directly ensure the vitality of the English and French linguistic minority communities or the advancement of both official languages (see for example: *Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (October 6, 2005) at pp 0940–45 (Pierre Poilievre and Dyane Adam); *Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 38 (June 14, 2005) at p 1035 (Pierre Foucher); *Evidence of the Standing Committee on*

Official Languages, 38th Parl, 1st Sess, No 41 (September 28, 2005) at p 1620 (Irwin Cotler); *Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (September 28, 2005) at p 1720 (Michel Francoeur)). Thus, a duty to take positive measures within the meaning of subsection 41(2), is instead an obligation of means imposed on federal institutions, i.e. a duty to take measures for the benefit of OLMCs to meet the commitment in subsection 41(1). In other words, it appears from the parliamentary debates that section 41 creates an obligation. "The government has a responsibility to take action, and will be held accountable if it fails to do so" (*Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 38 (June 14, 2005) at p 1035 (Pierre Foucher).

[227] Today, the Commissioner says that this obligation to take "positive measures" entails not only the duty to act, but also the duty to do no harm. The defendants respond that this is not mentioned in the text of the Act and that subsection 41(2) does not impose any such "duty to do no harm". I think a slightly more nuanced position must prevail. It is true that, in the parliamentary debates at the time, there is no express mention that the obligation to take "positive measures" also includes an obligation for federal institutions to do no harm; the participants always referred to an <u>obligation to act</u> (see *Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (October 6, 2005) at pp 0905-1000 (Dyane Adam)). I also agree that the text of the Act refers only to "positive" measures. However, it seems to me that the obvious and implicit corollary of an obligation to take "positive measures" is that the negative aspect of the measures contemplated must be part of the equation. I would not express it in terms of an "obligation to do no harm" but rather, in the context of this "obligation to act" which is not disputed, in terms of "an obligation to act in such a way so as not to hinder"

the fulfilment of the commitment set out in subsection 41(1). If I adopt a liberal and purposive interpretation consistent with the preservation and development of official languages in Canada, I do not see how the assessment of a general duty to act in a positive manner might not include a consideration of adverse effects that the measures contemplated by the federal institutions could have on the linguistic minorities in question.

[228] I believe this is how "positive measures" must be understood: they include an obligation to act not only actively but also in a manner that does no harm. Interpreting "positive measures" this way does not add to the text of the Act; it gives the text it its full grammatical and ordinary meaning, in harmony with the scheme of the Act, the object of the Act, and the intention of Parliament, while keeping in mind the broad and liberal approach that must prevail in matters of language rights. In *CBC FC*, Martineau J. had recognized that Part VII of the OLA, specifically section 41, "imposes an obligation to act in a manner that does not hinder the development and vitality of Canada's Anglophone and Francophone minorities" [Emphasis added] (*CBC FC* at para 33).

[229] That said, I agree with the defendants that this obligation to act in a manner that does no harm cannot result in importing the ratchet principle into Part VII, a principle rejected by the courts (*Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3d) 505 (ON CA) at paras 90-94).

(ii) Power to make regulations

[230] Legislative history and preparatory work are also instructive, and quite compelling, regarding the meaning and role of subsection 41(3), which gives the federal government the power to make regulations on the duties created by section 41 are to be fulfilled. It is clear from the parliamentary debates that the commitment to take "positive action" was to be accompanied by the adoption of regulations on fulfilling that commitment. It was taken for granted, in the context of the amendment to section 41, that the federal government would adopt regulations to clarify the content of the general duty to take "positive measures".

[231] It is clear from the parliamentary debates that the regulations adopted under subsection 41(3) provided the mechanism to give "teeth" to section 41 and the duty to take "positive measures". As Senator Gauthier, the sponsor of the bill, said at the time, [TRANSLATION] "an act without regulations is a watchdog with no teeth. Some would even say that it is a lapdog." [Emphasis added] (*Proceedings of the Standing Senate Committee on Official Languages*, 38th Parl, 1st Sess, No 1 (October 18, 2004) at p 20 (Jean-Robert Gauthier)). And the senator added:

> The power to make regulations would enable the government to specify the extent of the obligations on federal institutions regarding community development. […]
>
> In addition, as an example, such regulations could impose a duty on institutions: first, to determine whether their policies and programs have impacts on the promotion of linguistic duality and the development of minority communities, from the initial elaboration of policies through to their implementation; second, institutions would have to consult affected publics as required, especially representatives of official language minority communities, in connection with the development or

> implementation of policies or programs; and three, they should be able to describe their actions and demonstrate that they have considered the needs of minority communities.
>
> *Proceedings of the Standing Senate Committee on Official Languages*, 38th Parl, 1st Sess, No 1 (October 18, 2004) at pp 21–22 (Jean-Robert Gauthier)
>
> [TRANSLATION] It is rather difficult to go before the courts when an act has no regulations, when we do not know how to implement it. […] What we need are clear and precise directives to know how to implement the act. Regulations are needed.
>
> *Debates of the Senate*, 1st Session, 38th Parliament, Volume 142, Issue 7 (October 21, 2004) at pp 1550-1600 (Jean-Robert Gauthier)
>
> [Emphasis added]

[232] Senator Gauthier was also quoted by Décary J.A. in *Forum des maires* in terms that could not be clearer given the need for regulations to effectively enforce section 41 and Part VII of the OLA (*Forum des maires* at para 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]

[233] The then-Commissioner concurred, adding that the amendment "will allow the government to specify by means of regulations how institutions must act in order to support the development of the communities and to promote full recognition of French and English" [Emphasis added] (*Evidence of the Standing Committee on Official Languages*, 38th Parl,

1st Sess, No 44 (October 6, 2005) at p 0905 (Dyane Adam)). According to Ms. Adam, the only way to ensure that the duty to take "positive measures" was fulfilled was to adopt regulations to ensure that positive measures do not depend on the goodwill of decision-makers (*Evidence of the Standing Committee on Official Languages*, 38th Parl, 1st Sess, No 44 (October 6, 2005) at p 0930 (Dyane Adam):

> This bill also affords the opportunity to make regulations, which are a very important tool. Regulations are, as it were, the guidelines issued by the government to achieve the object of the act. Since the federal machinery is very big and there are a number of players, it is important that we all have the same understanding of our obligations and the same guidelines. That's what we don't have right now. So the bill is definitely a positive addition.
>
> […] The idea would be to pass regulations and then, of course, to establish oversight and monitoring mechanisms to evaluate their performance on an annual basis, as all federal institutions must now be evaluated. The departments will be able to assess their performance not just on the basis of the other objectives of the act, but also on this aspect of our act.
>
> [Emphasis added]

[234] The words of an Act take their colour from their surroundings (*Bell ExpressVu* at para 27) and here, the parliamentary history of section 41 depicts a context in which the term "positive measures" described a general duty to act for federal institutions, and only regulations to be adopted under subsection 41(3) could provide these institutions with more specificity and clarification. Based on the comments made during the parliamentary debates on the adoption of the 2005 amendments, it is clear that Parliament's intention was to use regulations to clarify and determine how federal institutions could comply with the duty to take "positive measures" and thus provide clarification where subsection 41(2) is silent. These parliamentary debates confirm what the structure of section 41 and the three subsections that compose it have established.

[235] In many respects, what the FFCB and the Commissioner suggest and want in their interpretation of the scope of the duty to take "positive measures" in subsection 41(2) is the matter that was supposed to come under regulations pursuant to subsection 41(3) of the OLA. Their proposals are consistent with Senator Gauthier's views regarding potential regulations. For example, greater specificity is sought on the type of positive measures to be adopted; the requirement for a specific method for assessing the needs of OLMCs; or a closer connection between the positive measures contemplated and the specific policies, programs or situations of federal institutions. I agree with the FFCB that although regulations are yet to be enacted, Part VII can still be enforced. However, in my view, 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 that the FFCB and the Commissioner wish to lend it. Parliament's intention was that this specificity was to be provided through regulations. Without these clarifications, which can only be provided through regulations that have yet to be enacted, the courts cannot sanction federal institutions for failing to comply with duties that the OLA does not impose on them. Or at least not yet.

[236] In short, in a context where there is the power to make regulations and where both the structure and intent of section 41 were to have regulations provide the necessary clarifications for fulfilling the general duty to take "positive measures", the Court cannot construe that duty as including the duty to take specific positive measures and punish federal institutions for failing to take them. By asking me to clarify, as they wish, the scope of federal institutions' duty to take "positive measures", the FFCB and the Commissioner would in fact want me to usurp the function of the federal government and venture into an area where the executive has abstained

from treading — or has refused to tread — until now, although the legislative power has given it the tools and responsibility to do so for over 12 years.

[237] The government is of course free to choose to remain on the sidelines, but it is not for the courts to usurp its role and dictate the specific rules of the game in terms of federal institutions' duty to take positive measures. That would run counter to the intention of Parliament, which clearly stipulated that the specificity of the duty would be provided through regulations. As the Supreme Court recently pointed out, the rule of law rests on the difference and the balance that must be struck between the legislature, the executive and the judiciary (*Comeau* at para 83).

[238] By enacting subsection 41(2) and extending the court remedy under section 77 in Part VII, Parliament has already given section 41 "teeth", as Senator Gauthier put it. To continue in the spirit of this canine metaphor that seems to have stuck to Part VII since the genesis of the 2005 amendment, if the federal government wants to give teeth to section 41, as well as to the duty to take positive measures, it can do this by exercising its regulatory authority. This is what was expected of it when the duty was created. It is not up to the Court to step into the shoes of the executive branch and intervene where the federal government has chosen not to. As Martineau J. rightly said in *CBC FC*, the remedy set out in section 77 does not allow the Court to "enter into the political arena in any way and to assume political power by dictating to the government and federal institutions which programs to establish under section 41 of the OLA" (*CBC FC* at para 67). That is the role and work of the executive branch, which expressly has the power to act under subsection 41(3) of the OLA.

(c) *The purpose of section 41*

[239] A final word on the purpose of the Act. Section 41 of the OLA refers to a "commitment" by the federal government to enhancing the vitality and development of OLMCs and advancing the use of both official languages in Canada. This commitment reflects the broad outlines of one of the expectations in the preamble to the Act and also echoes the very purpose of the OLA described in subsection 2(b). In addition, Part VII of the OLA, entitled "Advancement of English and French", is based on subsections 16(1) and 16(3) of the *Charter*, because it codifies the federal government's duty to ensure the development of official language communities.

[240] Despite all the discretion enjoyed by federal institutions under subsection 41(2), the fact remains that every federal institution "has the duty to ensure" that "positive measures" are taken to enhance the vitality of official language minority communities and achieve real equality between Canada's two official language communities. In this sense, however broad the discretion that may be read in subsection 41(2), and however general the duty of federal institutions may be, the exercise of this discretion must lead to the adoption of some positive measures by federal institutions and the need for indicators upon which they (and the courts) can rely to determine what does and does not constitute an acceptable positive measure. However, discretion must be exercised within certain bounds.

(4) Attributes of "positive measures"

[241] What can we learn from this review of the text, context and purpose of section 41 of the OLA? In the current statutory scheme of Part VII, what are the attributes of the duty to take

"positive measures" that should guide the courts in assessing the evidence and determining whether, in a particular case, a federal institution has fulfilled its duty?

(a) *Frameworks proposed by the Commissioner and the FFCB*

[242] The Commissioner proposed a three-part test to help define the attributes of "positive measures". For the reasons mentioned above, I am of the view that the specificity of the information gathering method described in part one of the test is sufficient to disqualify it. Allowing the test proposed by the Commissioner would be to impose a framework and methodology that is simply not provided for in section 41 and that the case law has rejected (*FCFA* at para 41). However, the other two parts of the test, the duty to act actively and consider the adverse effects of the measures, i.e. the duty to act in a manner that does no harm, are guidelines that federal institutions and courts must follow in assessing the existence of "positive measures".

[243] The FFCB (supported by the Commissioner) suggested that acceptable positive measures should involve the same linguistic community, area (the province), and scope of application as the subject of the complaint file with the Commissioner and the alleged infringement on the vitality of the linguistic minority concerned. I agree with the criteria of the same linguistic community and area given the language of the federal government's commitment in subsection 41(1): it refers to enhancing the vitality "of the English and French linguistic minority communities in Canada", and a broad and liberal interpretation of this provision is consistent with the idea that we can refer here to specific linguistic communities in a part of Canada (a province).

[244] However, the requirement that positive measures be limited to specific initiatives or programs of federal institutions or directly related to the specific factual framework of the complaint filed with the Commissioner includes a degree of specificity that is not in the text of the Act, does not fall within its context or purpose and that, in the absence of regulations to that effect, would not be consistent with the general scope of the duty imposed on federal institutions by subsection 41(2).

[245] The FFCB and the Commissioner rely on the judgment in *Picard* to argue that the positive measures in section 41 should be related to the particular circumstances of the situation in question and should, therefore, in this case, be positive measures in relation to the employment assistance services provided by British Columbia under the Agreement. I consider this to be an incorrect and overly narrow reading of *Picard*.

[246] In *Picard*, Tremblay-Lamer J. had concluded that failing to make patents available in both official languages violated Part VII of the OLA and the duty to take "positive measures", and she had ordered a remedy accordingly. Tremblay-Lamer J. had determined that the fact that the federal government takes positive measures to enhance the vitality of linguistic communities and promote the use of English and French in Canadian society was not sufficient to meet its obligation as a federal institution (in this case, the Patent Office) under Part VII. She made specific reference to "the federal government's efforts in relation to language policy" (*Picard* at para 67) and "the government's entire language policy" (at para 68) and found that actions and positive measures of such a general nature are not sufficient for a federal institution to fulfil the duty imposed by Part VII. Tremblay-Lamer J. added, again at paragraph 68, that the courts "are

used to ruling concerning the factual circumstances relating to a particular decision." I am not persuaded that it can be inferred from these comments that the Court construed the term "positive measures" to mean measures restricted to a particular decision of the federal institution or the specific situation related to a complaint. Rather, it outlined the opposition between the obligation of the Patent Office "as a federal institution" and the broader language policy of the entire government (*Picard* at para 69).

[247] I note that in *Picard*, it was not disputed that the Patent Office itself had not taken any positive measures to fulfil the commitment in section 41. It had not done anything. In my opinion, *Picard* only establishes that general measures taken at the level of the entire federal government, and not directly or indirectly related to the federal institution concerned, cannot by themselves constitute positive measures within the meaning of section 41 sufficient for an institution to meet its obligation. I concur. However, nowhere does the judgment establish or even suggest that positive measures taken in the general framework of the federal institution's operation and mandate cannot constitute "positive measures". The narrow connection which, according to the FFCB and the Commissioner, should be required to establish the existence of a "positive measure" would, in my opinion, imply a level of specificity that is not apparent from the text, context and purpose of the Act or the case law and would remove the measure of discretion that federal institutions enjoy under subsection 41(2) and the deference that the courts must give them in the choice of measures.

[248] In other words, there is nothing in the current wording of subsection 41(2) as it should be interpreted or in *Picard* to suggest that the positive measures prescribed by Part VII of the OLA

must be targeted for a program, decision-making process, factual situation or specific initiative of a federal institution that may have been the subject of a complaint to the Commissioner. Subsection 41(2) says "federal institutions" have a duty. That may be something the government will want to include in regulations under subsection 41(3), as allowed under the Act, but as things now stand, I cannot give the requirement to take "positive measures" such scope without disregarding what the Act says and how section 41 was constructed by Parliament.

(b) ***Scope of the duty to take "positive measures"***

[249] In my opinion, the following parameters are identified in the review of the text, context and purpose of section 41. The duty to take "positive measures" is a general obligation to act; it is not an obligation to achieve results. This duty to act involves both the dimension of acting actively to fulfil the commitment described in subsection 41(1) and acting in a manner that does not interfere with it. In order to constitute "positive measures" within the meaning of subsection 41(2) of the OLA, the initiatives of federal institutions must be concrete measures taken with the intention of having a favourable impact on linguistic minorities in Canada and must constitute a constructive step in the commitment to enhance their vitality, support their development and foster the advancement of both official languages. They must also be measures that directly or indirectly benefit the OLMC affected by the complaint filed with the Commissioner in a given province or territory. In addition, the subsection 41(2) requirement deals with positive measures that must target areas other than those already covered by other parts of the OLA, such as Part IV on communications with and services to the public.

[250] In the absence of regulations that would further specify their content, these positive measures need only fall within the general framework of the federal institution's operation and mandate. As a result, federal institutions enjoy a broad discretion in establishing positive measures, and they do not have to take "all", "possible," "appropriate" or "necessary" measures to fulfil the subsection 41(1) commitment. In the absence of regulations that would further specify the type or scope of positive measures to be taken, there is no minimum or sufficient threshold that positive measures must meet or any particular specificity required for acceptable measures. Thus, in the present state of the law, positive measures do not have to be targeted for a federal institution's program, decision-making process, or particular initiative, or for a specific factual situation that may have been the subject of a complaint to the Commissioner.

[251] Considering the second part of subsection 41(2), it is also understood that positive measures must respect the jurisdiction and powers of the provinces. I would add that, with respect to the interpretation that should be given to subsection 41(2) and in the absence of regulations that could establish specific criteria, the requirements for "positive measures" are not different under a federal-provincial transfer payment agreement such as the Agreement; the requirement that federal institutions must meet under subsection 41(2) is no higher, more specific or stringent.

[252] The positive nature of the measures and their connection to the federal institution's operation and mandate and its benefit to the OLMCs are questions of fact that the courts can assess on a case by case basis. It is sufficient for the courts, based on their assessment of the evidence before them in each particular situation, to be satisfied, on a balance of probabilities,

that the federal institution has actually taken steps to fulfil its duty in light of the parameters that I have just stated.

[253] This analysis of the text, context and purpose of section 41 also reflects something fundamental. By making regulations under subsection 41(3), the federal government could further clarify the scope and requirements of what constitutes acceptable "positive measures" and, for example, establish what the FFCB and the Commissioner are seeking: a degree of specificity or sufficiency that "positive measures" should meet; a requirement that positive measures be related to a particular program, decision or initiative of the federal institution or even to the situation raised in the underlying complaint to the Commissioner; or that "positive measures" in the context of transfer payment agreements meet more stringent criteria for establishing and monitoring language clauses. However, in the absence of regulations specifying and enacting such parameters, a court cannot find that a federal institution would not have fulfilled its general duty to take "positive measures" on the basis that it would have failed to fulfil a more specific duty that the Act, as it now stands, does not require it to fulfil.

(c) *Role of the courts*

[254] I must therefore conclude that, for the most part, the interpretation advocated by the FFCB and the Commissioner is not supported by the text of the Act, considering the interpretation that should be given to the Act based on its context, purpose and jurisprudence. In the present state of the law, I could not acquiesce in the interpretation they propose without finding myself importing into the Act terms and elements that are not there. That is something

the courts are not allowed to do. Both the Supreme Court and the Federal Court of Appeal recently reaffirmed this.

[255] When interpreting legislation, the role of the courts is to focus on what the "legislator actually said, not on what one might wish or pretend it to have said" (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 202 (dissenting reasons, but not on this point); *Schmidt v Canada (Attorney General)*, 2018 FCA 55 [*Schmidt*] at para 28). In interpreting and enforcing laws, the courts must carefully examine the text of the legislation, as well as its context and purpose, to determine what it actually says (*Schmidt* at para 27; *Canada v Cheema*, 2018 FCA 45 at para 80; *Williams v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at paras 48-49). They must not overstep their interpretive role and adopt an approach that would confer upon them a legislative or executive role (*Comeau* at para 75). Legislative review must be objective and detached, without regard to external considerations, personal opinions or politics.

[256] In short, as counsel for the defendants argued, the courts must always interpret the text of the Act according to its wording, its overall context, including its history, internal logic and statutory context, and they cannot make the text of the Act say what it does not say (*R v DAI*, 2012 SCC 5 [*DAI*] at paras 25, 49). They cannot extend a provision beyond the words used by Parliament and the expressed legislative will and end up "import[ing] a requirement into the section that Parliament did not place there" (*DAI* at para 26).

[257] This is also true in matters of language rights. The broad and liberal interpretation advocated in language matters must not disregard the accepted rules of interpretation (*Thibodeau SCC* at para 112; *Charlebois* at paras 23-24; *DesRochers FCA* at para 41). As Décary J.A. pointed out in *Forum des maires*, "it is not because a statute is characterized as quasi-constitutional that the courts must make it say what it does not say" (*Forum des maires* at para 40). Admittedly, the courts must always consider the legal system as "enactments remedial" and every enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (*Interpretation Act*, RSC 1985, c I-21, section 12). This of course means that in the context of the OLA, language rights must always be given a broad and liberal interpretation, in a manner consistent with the preservation and development of official language communities in Canada. (*Beaulac* at para 25; *FCFA* at para 26). However, a broad and liberal interpretation of language rights cannot transform a general duty to act into a series of targeted requirements when Parliament did not say so and did not intend to say so, and specifically gave the executive branch the right and the duty to do so. That would be to ignore the restraint that Parliament clearly exercised in Part VII, and to impose language obligations on federal institutions that the legislative and executive branches have so far refrained from imposing on them.

(5) Existence of "positive measures" within the meaning of section 41

[258] I must now determine whether, based on the facts of this case and the interpretation that should be given to the scope of the duty to take "positive measures", ESDC and the Commission did take positive measures. Again, the issue that I must rule on is not whether other positive measures could be taken by the federal institutions involved or could be possible or desirable.

The issue is whether, after having reviewed the evidence in the record, I am satisfied on a balance of probabilities that the federal institutions had taken positive measures and had fulfilled their duty to do so under section 41. For the reasons that follow, I conclude that they did.

(a) *Merits of the application at the time of the complaint*

[259] As with the application under Part IV, the merits of the FFCB's application under Part VII are assessed at the time the complaint filed with the Commissioner, June 15, 2011. Both applications are governed by the same provision, section 77 of the OLA, which establishes the conditions under which the Court has jurisdiction to act. The Court must therefore assess whether, in fact, there was non-compliance with Part VII on that date. Tremblay-Lamer J. followed this approach in *Picard* when she found that the patents were not available in both official languages at the time of the complaint. Boivin J. also adopted this approach in *FCFA*, where he held that there was no legislative duty, at the time of the order abolishing the long-form census, requiring the government to use a certain type of questionnaire.

(b) *Measures taken by ESDC and the Commission*

[260] In my view, a thorough, detailed review of the evidence in the record can lead to only one conclusion: at the time the FFCB filed its complaint, the federal institutions had taken several "positive measures" within the meaning of section 41 of the OLA. These measures involved: 1) inserting the consultation clause in Article 5.4 of the Agreement; 2) effective consultations with representatives of the French linguistic minority, both before the signing of the Agreement and in the transitional phase that led to British Columbia's adoption and implementation of the EPBC;

and 3) various initiatives taken by ESDC within its institutional mandate, which have a positive impact on the French linguistic minority in British Columbia. The purpose and successful outcome of these concrete positive measures was to contribute positively to the vitality and development of the French-speaking community in British Columbia, in the delivery of employment assistance services under the Agreement but also, more generally, as part of ESDC's human resources and skills development mandate in Canada.

(i) Consultation clause

[261] First, the evidence in the record (and in particular the affidavits of Duncan Shaw, Sergei Bouslov and Hovan Baghdassarian) demonstrated not only that Article 5.4 stipulating that British Columbia agrees to consult with representatives of the French-speaking communities on the provision of benefits and measures under the Agreement was included in the Agreement, but that ESDC was involved in the process to persuade provincial authorities to include it. In doing so, the federal institution helped create a consultation framework for the benefit of the province's French-speaking community.

[262] This consultation clause was in addition to Articles 5.2 and 5.3 of the Agreement, which stipulate that British Columbia agrees to provide access to its benefits and measures in French where there is significant demand, and that British Columbia must use the Official Languages Regulations as a guideline to determine what constitutes significant demand. However, according to the defendants, the language clause of Article 5.2 is not a "positive measure" within the meaning of section 41 of the OLA because it is an initiative not taken pursuant to the terms

of the commitment under subsection 41(1) of the OLA, but in accordance with the explicit guideline in this regard set out in paragraph 57(1)(d.1) of the EIA.

(ii) Effective consultations

[263] The evidence produced by the defendants also referred to consultations with the French linguistic minority. These consultations took place in 2007–2008, before the signing of the Agreement, and then after 2008 during the transitional phase leading to British Columbia's development of the EPBC, including during the BTP period. The affidavits of Duncan Shaw and Sergei Bouslov indicated that representatives from ESDC and the province met with FFCB representatives many times over the years, before and after the EPBC was implemented. The evidence showed that meetings were held with 13 French-speaking organizations during the BTP. Although in Réal Roy's affidavit, the FFCB argued that these consultations did not result in a meaningful and effective consideration of the grievances of the French-speaking community, the evidence of the consultations was not contradicted. In fact, the evidence in the record indicates that the consultations were successful in answering the FFCB's questions, and the purpose of the consultations was to understand the OLMC's expectations and concerns. Similarly, Hovan Baghdassarian, also from the British Columbia Ministry of Social Development and Social Innovation, stated in his affidavit that French-speaking communities in British Columbia were consulted by both levels of government between 2008 and 2010 as part of discussions on the adoption of the new employment assistance services delivery program and that measures were therefore taken to help better serve the French-speaking community.

[264] According to the FFCB, the evidence of noncompliance with Part VII developed in Réal Roy's affidavit and the many documents attached to it was apparently attributable to the fact that the consultations did not produce the outcomes expected by the FFCB. The FFCB was quick to express its fears (as early as April and May 2007) in connection with the start of the federal-provincial negotiations on the Agreement, insisting on the need to include a language clause in the negotiations with the province. (I note in passing that this was actually done in the end, with the introduction of the linguistic clause in Article 5.2 of the Agreement). Between 2008 and 2010, the consortium made up of FFCB and its members developed a French-language service delivery model that was submitted to the province in September 2010. However, following the consultations, British Columbia rejected the FFCB's model, believing that its own "one-stop shop" model would address the French-speaking community's concerns and could incorporate the consortium's proposals. The evidence indicates that the province and the federal government did consult with the FFCB, considered some of its observations and tried to assuage the FFCB's concerns (Hovan Baghdassarian's affidavit). The consultations also resulted in a requirement to include a clause on French-language services in contracts with subcontractors. It is therefore inaccurate to say, as the FFCB maintained in its complaint to the Commissioner, that ESDC did not attempt to know and consider the needs and interests of the French-speaking community in the development of the EPBC.

[265] The FFCB and the Commissioner dwelled on what they considered to be positive measures that ESDC apparently failed to take. For example, in his April 2013 final investigation report, the Commissioner noted, with respect to a breach of section 41 of the OLA, the fact that ESDC failed to ensure that the province and federal government held consultations with the

FFCB in French in 2009 and 2010. He also pointed out that the consultations—conducted in 2008 and 2009 in response to the concerns expressed—failed to assess the likely impact of the new "one-stop shop" model on the availability of French-language employment services and on the vitality of British Columbia's French-speaking community. ESDC's failure to ensure that consultations with the French linguistic minority were conducted in French is regrettable. I concede that it would have been an additional positive factor. However, considering all the evidence on the actual consultations held with the French-speaking community, I am not persuaded that this is sufficient to show that this consultation initiative was not a positive measure. The fact that the FFCB consortium's proposal was ultimately not adopted as such does not mean that the specific needs of the community were not heard and considered in the development and implementation of British Columbia's new employment assistance service delivery model. The written evidence of both ESDC and provincial representatives (Duncan Shaw, Sergei Bouslov and Hovan Baghdassarian) reflects the opposite. The evidence shows the provincial authorities' response to the consortium and subsequent adjustments to the program.

[266] The federal government could certainly choose to stipulate pursuant to regulations under subsection 41(3) that consultation becomes a positive measure only if it involves effective consideration and incorporation of the representations made by the OLMCs consulted. However, that is not what section 41, as written and correctly interpreted, currently provides.

[267] According to Réal Roy's affidavit, the FFCB also complained to ESDC about the response to the January 2011 letter sent by the FFCB to the then-Minister outlining its concerns about what the FFCB considered the new employment assistance service delivery model's

clearly devastating impacts on the French-speaking community. In its June 2011 response, ESDC said the Agreement included provisions (the language clause and the consultation clause) to provide French-language employment assistance services and that the federal government expected British Columbia to fulfil its language commitments. I do not share the FFCB's opinion that this letter reflected a kind of abdication by ESDC. Instead, the letter explained that the province was responsible under the Agreement. ESDC had already taken positive measures at that time (such as the consultation clause) and in that letter acknowledged British Columbia's authority under the Agreement to provide its own benefits and measures and to provide employment assistance services. This response was fully consistent with subsection 41(2) of the OLA, which states that the implementation of the federal government's commitment to the vitality of Canada's English and French linguistic minorities shall be carried out "while respecting the jurisdiction and powers of the provinces."

[268] All in all, the fact that British Columbia did not ultimately adopt the alternative model submitted by the consortium does not mean that there have been no meaningful consultations aimed at enhancing the vitality of the French‑speaking minority. Rather, the evidence indicates that consultations were conducted with this concern in mind. Once again, the FFCB and the Commissioner would have liked to see more measures introduced, and that they be more specific or more directly related to the delivery of employment assistance services covered by the Agreement. This is reasonable, and I realize that adding such measures would probably have contributed even more to the growth and vitality of the French linguistic minority in British Columbia — beyond what ESDC had already accomplished. However, that is not what the federal institution is required to do under the current version of section 41 of the Act. And in the

absence of any regulations that could clarify the degree of specificity desired by the FFCB and the Commissioner, that would not lead me to find that ESDC and the Commission failed to comply with their legal obligations under Part VII and could be sanctioned for these omissions. Although there may be other positive measures that the federal institution could have taken, this does not mean that it did not take any.

(iii) ESDC's broader initiatives

[269] The evidence filed by the defendants indicates that, at the time the FFCB submitted its complaint, ESDC had also taken many initiatives consistent with its institutional mandate to ensure that the needs of British Columbia's French-speaking community were considered. I am satisfied that these are concrete "positive measures" that have been favourable to the French linguistic minority and for its benefit.

[270] The affidavit of Ouassim Meguellati, Director General at ESDC, contains many examples and provides many details about broader initiatives taken by the federal institution that have contributed positively to the development and vitality of linguistic minorities in Canada, including British Columbia's French linguistic minority. For instance, he mentions:

- Mechanisms and activities to ensure that the French-speaking community's needs are considered in the development of policies, programs and initiatives, and an analysis of the impact of these actions on official languages is performed;

- An integrated official languagesnetwork within ESDC, which includes coordinators of Parts IV and VII of the OLA at the national, regional and branch levels, and ensures greater clarity and efficiency;

- An integrated consultation framework for OLMCs to prepare and conduct dialogue sessions with national OLMC associations;

- Measures to obtain adequate information on the needs and situation of OLMCs; and

- The Results-based action plan for the implementation of section 41 of the *Official Languages Act*, 2010-2014 [Action Plan].

[271] At this point, I would like to comment on the Action Plan. A review of the Action Plan shows that it is very detailed and contains several elements of ESDC initiatives with respect to British Columbia's French‑speaking minority in terms of employment and labour market services. Its content is divided into various sections and covers the consultation, communications, program delivery and accountability activities that ESDC has implemented. Under the various headings, there are elements that affect the British Columbia region. I concede that not all aspects of the Action Plan are relevant to British Columbia. The somewhat exaggerated examples that counsel for the FFCB used during the hearing before the Court were not relevant to British Columbia. However, many other parts and initiatives of the Action Plan definitely are. In my opinion, this Action Plan and the others that followed illustrate ESDC's core focus on ensuring that its duties under Part VII are fulfilled. The federal institution, throughout its whole structure, is concerned about its performance in terms of fulfilling its duties

under Part VII of the OLA, at a level of detail that reveals a keen focus on the results and impact of the measures on OLMCs. I do not see how I could describe these initiatives by ESDC as anything other than "positive measures" in this case.

[272] The FFCB also refers to this Action Plan but notes the laconic responses to questions in the April 2011 "Canada – British Columbia Labour Market Development Agreement (LMDA) Year 2 Review Questionnaire" regarding the availability of French-language services where there is a significant demand (Article 5.2 of the Agreement) and regarding consultations (Article 5.4 of the Agreement). These responses were simply yes to the question of whether services were available in French where there was a significant demand and whether consultations were held, with brief explanations. I acknowledge that these responses are brief and provide little information on the situation and the underlying data, but I am not persuaded that this discredits the argument that these initiatives by ESDC are "positive measures". Yes, there could have been more consultations, but these answers confirm that there were effective consultations and summarize them. The answers refer, among other things, to a document that explains how, according to British Columbia, the new employment assistance services model will respond to the concerns expressed by the French linguistic minority. In my view, they reflect that the measures taken fall squarely within the scope of "positive measures".

[273] I would further note, in terms of broader initiatives that nevertheless involve ESDC, that the affidavit of Jean-Pierre Gauthier, Director General, Official Languages Branch, Department of Canadian Heritage, mentions the interdepartmental coordination overseen by Canadian Heritage, including the accountability framework created to fulfil the federal government's

commitment under section 41 of the OLA, in consultation with other federal departments. This evidence indicates that the interdepartmental coordination approach was renewed in 2011-2012 with 170 federal institutions. ESDC is one of these institutions. It has permanent dialogue mechanisms that foster discussions with OLMCs, including British Columbia's French-speaking community. This interdepartmental coordination also includes the Roadmap for Canada's Linguistic Duality 2008-2013, of which ESDC is a partner organization.

[274] I recognize that these are more global initiatives, closely related to the general government policies deemed insufficient in *Picard* to qualify as "positive measures" for a particular federal institution. However, in this case, the evidence in the record establishes a connection between these general policies to the specific government institution at issue, ESDC, and shows how these policies affect the measures taken by ESDC. As such, I consider that this is evidence, which may be a little less compelling, but may be added to the assessment of "positive measures" taken by ESDC as part of its institutional mandate.

(iv) More targeted initiatives in British Columbia

[275] Ouassim Meguellati's affidavit does not only refer to the Action Plan and the more global measures. It also provides many other concrete examples of the more specific and targeted positive measures taken by ESDC in British Columbia to fulfil its commitment under section 41 of the OLA, which have benefited the French linguistic minority. These measures, which are consistent with ESDC's institutional mandate and involve human resources and labour market development, include but are not limited to:

- Approximately $520,000 of annual funding for the Société de développement économique de la Colombie-Britannique through the Enabling Fund for Official Language Minority Communities, whose mandate is to represent the economic sector of the French-speaking community by fostering the growth of the business community, promoting Francophone entrepreneurship and disseminating economic information to the community. The Fund also provided funding to French‑speaking businesswomen;

- $3.4 million allocated in 2010-2011 to various organizations including Éducacentre (member of the FFCB) under the Adult Learning, Literacy and Essential Skills Program for 17 projects focusing on literacy development and evaluation as well as the implementation of initiatives and tools for developing essential skills in the workplace that meet the needs of OLMCs;

- The ESDC Office of Literacy and Essential Skills, which provided $314,000 to Éducacentre to facilitate the acquisition or improvement of literacy skills for French‑speaking immigrant families in British Columbia;

- The ESDC-led Youth Employment Strategy, which, from 2007-2008 to 2011-2012, provided funding to several Francophone organizations to help young people between the ages of 15 and 30 successfully transition to the labour market; and

- The ESDC homelessness program which provides funding to several organizations, including La Boussole (also a member of the FFCB).

(c) *Finding on ESDC's positive measures*

[276] The evidence adduced by the respondents regarding the measures taken by ESDC, which has not been contradicted, thus refers to multiple initiatives representing different levels of intervention by the federal institutions involved. It soon shows that at the time of the FFCB's complaint, the defendants had indeed taken "positive measures". Not only did the federal institutions take several general initiatives, they also implemented more targeted employment strategies that directly or indirectly enhance the vitality and promote the development of British Columbia's French linguistic minority. This evidence of "positive measures" produced by the defendants is awkward, ranging from the broadest to the most detailed level. 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, such as those described in Ouassim Meguellati's affidavit.

[277] I am satisfied that, when analyzed as a whole, the evidence in the record meets the requirements of subsection 41(2) of the OLA interpreted as it should be, and accordingly ESDC and the Commission have fulfilled their duty to take "positive measures". The initiatives described above are concrete measures that aim to have a positive impact on British Columbia's French linguistic minority and constitute a constructive step in fulfilling the commitment to enhance its vitality and promote its development. They fall within the scope of ESDC's institutional mandate and respect the jurisdictions and powers of the provinces.

[278] This is sufficient to dispose of the FFCB's application under Part VII and dismiss it.

[279] I note that in addition to the positive measures that had been introduced at the time the complaint was filed, Ouassim Meguellati's affidavit also reports on several other targeted initiatives that have continued to be undertaken by ESDC in British Columbia since the FFCB filed its complaint. In his follow-up report, the Commissioner, too, had emphasized that things had improved. I also note that, according to the evidence provided in Sergei Bouslov's affidavit dated January 2016, Francophones in British Columbia now benefit from more employment assistance services than before, because they are available in French even in areas where there is no significant demand. The FFCB's affidavit evidence, which dates from 2013 and 2014, does not contradict him. Of course, these elements are not material in determining whether ESDC has fulfilled its duty under subsection 41(2) of the OLA because they are subsequent to the filing of the FFCB's complaint. However, I think it is important to note that, according to the evidence before me, the employment assistance services situation for British Columbia's French‑speaking minority has continued to progress favourably since the Agreement came into force, and British Columbia established the EPBC.

(6) The issue of "negative measures"

[280] Nonetheless, I should like to make two additional comments, given the submissions made by the FFCB and the Commissioner on these issues. The first comment deals with what the FFCB has referred to as "negative measures". The second addresses the issue of language clauses.

[281] At the hearing, the FFCB put a great deal of emphasis on what it called the negative measures that ESDC had to counteract and correct, and which arose from the implementation of

the Agreement. The FFCB does not say Part VII prohibits negative measures. Instead, it argues that if the exercise under subsection 41(2) is to assess whether positive measures have been taken, the Court must also look at the other side of the coin and determine whether negative measures have been taken. In other words, the factual context at issue must be taken into account to determine what will be sufficient in terms of positive measures. This context must include negative measures, if there are any. Also, the FFCB argues that Part VII would first require that we determine whether a negative measure exists. The next step would be to see whether the government institution has taken the positive measures needed to attenuate or mitigate the impact of this negative measure, taking into account the linguistic community in question, the area and the policy sector. According to the FFCB, ESDC's positive measures, even considered as a whole, fail to address, in a meaningful and sufficient way at least, the significant negative effects of the "one-stop shop" model and its adverse impact on the status of French and the French-speaking community in British Columbia[3].

[282] As I said above, I do not agree that the proper interpretation of subsection 41(2) allows us to read into the general duty imposed on federal institutions the requirement for this close connecting link that the FFCB would like to see the Court give it. In addition, I have already found that, in this case, the evidence did in fact demonstrate that ESDC had taken "positive measures". That said, even if I were to accept the FFCB's approach and took for granted that "negative measures" should be considered in the sense that the FFCB understands it, the evidence here is not sufficiently clear and compelling to demonstrate that there was a negative

[3] I note that, in this case, the FFCB does not refer to "negative measures" taken by ESDC itself. What is at issue is the new employment assistance service delivery model developed by British Columbia under the Agreement, through its legislative authority. Because this is not a "negative measure" taken by ESDC, we should rather speak of

impact at the time the FFCB's complaint was filed, which would have triggered a duty for ESDC and the Commission to take appropriate positive measures to offset them. As at June 15, 2011, the evidence did not demonstrate the existence of an adverse or negative situation for the French linguistic community, attributable to the Agreement, that would have required ESDC to take a compensatory positive measure. This evidence is not on the record, largely because of the FFCB's decision to hastily file its complaint in June 2011, before the EPBC and the "one-stop-shop" employment assistance services model were introduced. My reasons are as follows.

[283] The FFCB stated that when it filed its complaint in June 2011, Francophone organizations in British Columbia no longer provided employment assistance services. According to the FFCB, the numerous affidavits it filed from several of its members showed that in terms of employment assistance services in the province, there was a lack of French-speaking staff, French-language services and greetings in French; very little written material was available in French; there were few counsellors to provide French-language services, and there was a lack of French-language signage. However, as counsel for the defendants pointed out at the hearing, this evidence contained facts suggesting that French-language services were not of equal quality since the EPBC was established in April 2012, well after the FFCB filed its complaint. The FFCB's affidavits do not focus on the quality of French-language service delivery. Instead, they refer to the quality of French-language service delivery under the EPBC in 2013 and 2014, as well as the decrease in funding for the activities of some FFCB member organizations. The Commissioner's final investigation report also referred to facts observed in 2012, which did not exist at the time the complaint was filed.

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a factual context that would have adverse or negative repercussions on the vitality of the French-speaking community in the province arising from the new employment assistance services model.

[284] Having considered all the evidence in the record, I agree with the defendants that until April 2012, when the EPBC was launched and the "one-stop shop" model came into effect, employment assistance services were provided in French in British Columbia, and the preponderance of the evidence does not show that service quality was lacking. The five Francophone centres mentioned by the FFCB in its complaint were not closed. Rather, the funding they received from the province was either cut or reduced. The evidence also indicates that the "by and for" model (i.e. Francophone organizations that provide services to Francophones) which, according to the FFCB, would have been the only viable alternative, was not the predominant model in British Columbia even before the EPBC was launched. According to Hovan Baghdassarian's affidavit, of the 32 organizations receiving funding to provide employment services to Francophones in 2009, 27 were bilingual organizations and 5 were Francophone organizations. Hovan Baghdassarian's affidavit also indicated that Francophones in the province continued to have access to the same programs and services in their communities from February 2009 until the EPBC was launched in April 2012. Details are provided for Vancouver, Kelowna, Prince George and Penticton. In addition, the FFCB's evidentiary record does not deal with the status of services delivered by other employment service providers in the areas at issue in 2009, 2010 or 2011. On the other hand, the affidavit evidence submitted by the defendants indicates that there were service centres that were to provide French-language employment assistance services in the various regions.

[285] I acknowledge that some of the evidence relates to the spring of 2011 and precedes the filing of the complaint. I note that the affidavit of Serge Dancoste, whose [employment] file was transferred from the Okanagan French Employment Services Centre in Kelowna to WorkBC –

West Kelowna operated by Global Transition Consulting in preparation for the closure of the Okanagan Centre, reported that there was a lack of French-language services available at WorkBC in the winter of 2011. The affidavit of Yvon Laberge, Director of Éducacentre in Vancouver, indicated that Éducacentre stopped providing employment assistance services in Prince George in February 2011. Aline Cyr's affidavit mentioned that she went to WorkBC – West Kelowna operated by Global Transition Consulting in February 2011 after her file was transferred from the Okanagan French Employment Services Centre (when it closed in March) and could not receive French-language services. However, in March, she was contacted by the centre and met with a new employee who spoke French. The affidavit of Tannia Lebar, Executive Director of La Boussole, indicated that she was only able to obtain funding as a subcontractor following the invitation to tender for the new program in March 2011, because La Boussole was not large enough and lacked the expertise to deliver services at the scale required by the new program.

[286] However, most of the evidence in the record relates to alleged breaches of the OLA that occurred after the Agreement was implemented in April 2012, long after the FFCB's complaint was filed on June 15, 2011. Also, I must note that the negative impacts in June 2011 reported by the FFCB were at best tenuous and very limited. Instead, I am of the view that, on a balance of probabilities, the evidentiary record as a whole does not show a change in employment assistance services for the French‑speaking minority prior to the introduction of the province's new program. Thus, at the time the complaint was filed, it could not be logically inferred that the impacts of the EPBC and the "one-stop shop" model would lead to a reduction or cancellation of French-language employment assistance services. Similarly, the evidence in the record does not

indicate that there had been an adverse effect at that time on the vitality and development of the French linguistic minority in British Columbia. In other words, there was no situation to be remedied or mitigated because "negative measures" had been taken.

[287] The FFCB argues that, given what the Agreement intended to put in place, even if it was not clear how everything would actually work out and be implemented, it would be sufficient to establish that there was a breach of Part VII of the OLA. I do not share that opinion. As I noted above, the application for remedy under section 77 requires noncompliance with the relevant provisions of the OLA as of the date of the complaint and based on the facts that existed at the time the complaint was filed. Even in the situation presented by the FFCB, one cannot simply anticipate a possible and potential violation of a right to French-language services of equal quality and allege that the federal institution failed to take appropriate "positive measures" as a remedy when there are still no negative measures to be corrected. I do not want to downplay the evidence in the FFCB affidavits indicating that in 2013-2014 the quality of French-language employment assistance services seemed inadequate in some locations and parts of British Columbia and that there appeared to have been some deficiencies in the quality of French-language websites and the availability of services to be provided by French-speaking people. Perhaps there was an unfavourable situation at that time that would have required ESDC to take compensatory positive measures, in line with the approach advocated by the FFCB. But these facts did not exist at the time the FFCB filed its complaint in June 2011.

[288] Even if I accept the approach proposed by the FFCB to consider "negative measures" and the need for appropriate corrective positive measures, in this case, there is an evidentiary issue

regarding the existence of a breach of subsection 41(2) of the OLA because of the date on which the FFCB decided to file its complaint. I can understand its fears and its desire to act preemptively in response to the impending arrival of a new employment assistance services model that would disrupt existing habits and programs. However, the OLA outlines the definition of the remedy under section 77, and the Court must determine whether the defendants breached the Act, based on the facts that existed at the time of the FFCB's complaint. However, I do not find the evidence on that date sufficiently clear and compelling, on a balance of probabilities, to conclude that there was a breach of French-language employment assistance services delivery, or that the "one-stop shop" model—which was not yet in place and in force—adversely affected the vitality and growth of the French‑speaking minority in the province. There were concerns about changing the model, but not the evidence required to show that, intrinsically or systemically, a program change and a transition to a "one-stop shop" model would lead to a reduction in employment assistance services for the French‑speaking minority, or adversely affect the vitality and development of the French linguistic minority. Consequently, the argument that ESDC therefore had to take appropriate positive measures to compensate for this unfavourable situation is not tenable. The evidence may have been different at a later date, but this is not the case before me.

(7) Language clauses

[289] I should briefly address the issue of language clauses discussed by the Commissioner. In short, the submissions, which he made regarding a process for using Part VII of the OLA to ensure compliance with language clauses incorporated in transfer payment agreements, go far beyond the facts of this case. As argued by the defendants, and I agree, the language clause

inserted in Article 5.2 of the Agreement is not based on section 41 of the OLA and is not the result of a "positive measure" taken by ESDC and the Commission. Rather, it is the implementation of a statutory requirement imposed by Parliament in the EIA. The language clause of the Agreement is based on a guideline set out in paragraph 57(1)(d.1) of the EIA. It provides that, under a federal-provincial labour market development agreement under section 63, the province will assume obligations similar to those otherwise stipulated under section 22 of the OLA regarding the right to receive services in either official language where there is significant demand. The language clause of the Agreement is therefore not related to the defendants' duty under section 41. I do not have to deal with it in the context of this application under Part VII.

[290] There is no doubt that basically, the inclusion of the language clause in the Agreement contributes to the promotion and recognition of French as well as the vitality and growth of British Columbia's French-speaking community in terms of employment assistance services delivery, by extending the scope of section 22 of the OLA to a provincial authority. In general, the inclusion of language clauses in transfer payment and funding agreements extends language obligations where the OLA, and in particular Part IV, does not apply, and section 25 does not come into play. Such clauses could in fact be negotiated and put in place by a federal institution pursuant to its duties under Part VII of the OLA. However, this is not the case in the matter before us.

[291] I also note that, as in this case, insofar as a provincial authority provides employment assistance services pursuant to its legislative authority, Part VII of the OLA could not be used to indirectly subject to the Agreement to Part IV of the Act, under the guise of monitoring the

language clause. In this case, the Commissioner's argument regarding the monitoring and verification obligations of the language clause would amount to regulating, through Part VII, the benefits and measures provided by British Columbia in the exercise of its legislative authority. ESDC and the Commission have no language obligations pursuant to Part IV under the Agreement, and they cannot be revived under the guise of Part VII. Such a measure would, for all intents and purposes, be an intrusion into provincial jurisdiction, which subsection 41(2) of the OLA does not allow.

(8) Conclusion on Part VII

[292] For all these reasons, I am satisfied that, in light of the proper interpretation of section 41 of the OLA and the evidence in the record, ESDC and the Commission had taken "positive measures" within the meaning of Part VII of the OLA at the time that the FFCB's filed its complaint with the Commissioner. This is therefore not a situation where they failed to fulfil their duties under Part VII of the OLA. There is no behaviour to be sanctioned here. The FFCB and the Commissioner would have liked the defendants to have taken more measures, or measures more targeted at the employment assistance services covered by the Agreement, to better support the vitality of British Columbia's French-speaking minority. Unfortunately, this is not what section 41 says or requires, as it now stands.

[293] It is undeniable, in my opinion, that the scope of the duty contained in section 41 is hamstrung by the absence of regulations. And, it must be said, this regulatory silence and the resulting vagueness are probably detrimental to the linguistic minorities in Canada, who may be losing a potential benefit under Part VII. As I recall, Senator Gauthier's expectation during the

2005 amendments was to have the regulations clarify the scope of the general duty to act created by the new subsection 41(2), which he sponsored. For the reasons stated, the remedies sought by the FFCB and the Commissioner are not supported in the current Act, as drafted, structured and implemented. However, it is easy to see that the remedies they cited could be subject to regulations under subsection 41(3).

[294] If it is the wish and will of the federal government that more specific "positive measures", deemed necessary to help achieve the objectives of the OLA and further enhance the vitality of linguistic minorities in Canada, be expressly stipulated under section 41, the executive branch has the means to do so. Regulations could better gauge the requirements of Part VII in terms of "positive measures" to be taken by federal institutions, for example by specifying that the measures be related to more targeted programs or initiatives of federal institutions, or that more specific measures be stipulated in transfer payment agreements that include language clauses.

[295] I accept that it is more difficult to achieve substantive linguistic equality if the guidelines for doing so are not sufficiently clear. Even if we focus on substantive equality, we may end up moving away from it if the path we take does not provide the signage needed to get there. Government is responsible for clarifying these guidelines, when Parliament has given it the means to do this through regulations, as is the case here regarding federal institutions' duty to take "positive measures" under section 41.

D. *Remedy*

[296] In terms of the remedy, the text of subsection 77(4) of the OLA is unambiguous. Subsection 77(4) of the OLA provides that "[w]here, 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." The Court can only intervene if it concludes that there is a breach of the OLA (here, Part IV or Part VII, section 41) and finds a failure to comply with the OLA (*Picard* at para 70; *Lavigne FC* at para 63). Having found that Part IV does not apply to employment assistance services covered by the Agreement, and that there was no failure to comply with Part VII at the time that the FFCB filed its complaint, I cannot make an order granting remedies. In the absence of a failure to comply with the provisions of the OLA, subsection 77(4) simply does not allow it.

E. *Costs*

[297] In terms of costs, subsection 81(2) of the OLA provides that "[w]here the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result." The FFCB contends that this case meets the requirement of an important new principle within the meaning of subsection 81(2) of the OLA because there is little case law regarding the scope of Part VII of the OLA. Also, in terms of Part IV, the particular factual context of this case (a federal-provincial partnership) was not addressed by the courts in light of the Supreme Court's more recent jurisprudence on labour and employment.

[298] I agree with the FFCB that its application raised a number of new issues, including the scope of the duties under Part VII of the OLA. In addition, with respect to both Part IV and Part VII, the application raised questions about the requirements of the remedy under section 77 and the effects of a language clause in a federal-provincial transfer payment agreement, issues that had not yet been addressed in court decisions. Consequently, the case contained important and novel questions regarding the scope of the OLA, entitling the FFCB to costs even if it did not succeed on the merits of its application. To echo Tremblay-Lamer J.'s comments, the FFCB "did Canadians a service by making [the issue] a subject of public debate" (*Picard* at para 84). I note that the Court has also frequently awarded costs to the unsuccessful applicant in several other cases involving applications under the OLA (*DesRochers SCC* at para 5; *Thibodeau FCA* at para 81; *Forum des maires* at para 83; *Norton* at paras 130-131).

IV. Conclusion

[299] For all these reasons, the FFCB's application is dismissed. In the circumstances, Part IV does not apply to the Agreement with British Columbia because the delivery of employment assistance services stipulated in the Agreement is a valid exercise of the province's legislative authority and, therefore, British Columbia is not acting "on behalf of" a federal institution. Also, I am satisfied that, in view of the proper interpretation of subsection 41(2) and the evidence in the record, the federal institutions involved had taken "positive measures" within the meaning of Part VII of the OLA when the FFCB filed its complaint with the Commissioner. Since there was no failure to comply with a provision of the OLA when the FFCB filed its complaint, the Court cannot order a remedy. However, the FFCB is entitled to its costs under the circumstances.

[300] As requested by the defendants, the style of cause is amended by replacing “Human Resources and Skills Development Canada” with “Employment and Social Development Canada” as the respondent.

JUDGMENT in T-1107-13

THIS COURT'S JUDGMENT is that:

1. The Fédération des francophones de la Colombie-Britannique's application is dismissed;

2. The style of cause is amended by replacing "Human Resources and Skills Development Canada" with "Employment and Social Development Canada" as the respondent;

3. The applicant is entitled to its costs.

"Denis Gascon"

Judge

APPENDIX I

The relevant provisions of the EIA read as follows:

PART II	**PARTIE II**
EMPLOYMENT BENEFITS AND NATIONAL EMPLOYMENT SERVICE	**PRESTATIONS D'EMPLOI ET SERVICE NATIONAL DE PLACEMENT**
Purpose	**Objet**
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.	**56** La présente partie a pour objet d'aider à maintenir un régime d'assurance-emploi durable par la mise sur pied de prestations d'emploi pour les participants et parle maintien d'un service national de placement.
Guidelines	**Lignes directrices**
57 (1) Employment benefits and support measures under this Part shall be established in accordance with the following guidelines:	**57 (1)** Les prestations d'emploi et les mesures de soutien prévues par la présente partie doivent être mises sur pied conformément aux lignes directrices suivantes :
(a) harmonization with provincial employment initiatives to ensure that there is no unnecessary overlap or duplication;	**a)** l'harmonisation des prestations d'emploi et des mesures de soutien avec les projets d'emploi provinciaux en vue d'éviter tout double emploi et tout chevauchement;
(b) reduction of dependency on unemployment benefits by helping individuals obtain or keep employment;	**b)** la réduction de la dépendance aux prestations de chômage au moyen de l'aide fournie pour obtenir ou conserver un emploi;
(c) co-operation an partnership with other governments, employers, community-based organizations and other	**c)** la coopération et le partenariat avec d'autres gouvernements, des employeurs, des organismes

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

communautaires et tout autre organisme intéressé;

d) la flexibilité pour permettre que des décisions importantes relatives à la mise en œuvre soient prises par les agents locaux;

d.1) la possibilité de recevoir de l'aide dans le cadre de prestations ou de mesures dans l'une ou l'autre des langues officielles là où l'importance de la demande le justifie;

e) l'engagement des personnes bénéficiant d'une aide au titre d'une prestation d'emploi ou d'une mesure de soutien :

(i) à s'attacher à la réalisation des objectifs visés par l'aide fournie,

(ii) à assumer la responsabilité première de déterminer leurs besoins en matière d'emploi et de trouver les services nécessaires pour les combler,

(iii) s'il y a lieu, à partager les coûts de l'aide;

f) la mise en œuvre des prestations et des mesures selon une structure permettant d'évaluer la pertinence de l'aide fournie pour obtenir ou conserver un emploi.

Concertation avec les gouvernements provinciaux

(2) Pour mettre en œuvre l'objet et les lignes directrices de la présente partie, la Commission doit travailler de concert avec le gouvernement de chaque province dans laquelle une prestation

implemented in designing the benefits and measures, determining how they are to be implemented and establishing the framework for evaluating their success.

d'emploi ou une mesure de soutien doit être mise en œuvre à mettre sur pied la prestation ou la mesure, à fixer les modalités de sa mise en œuvre et à concevoir le cadre permettant d'évaluer la pertinence de l'aide qu'elle fournit aux participants.

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.

Accords avec les provinces

(3) La Commission doit inviter le gouvernement de chaque province à conclure avec elle un accord pour l'application du paragraphe (2) ou tout autre accord prévu par la présente partie.

Definition of *insured participant*

58 In this Part, ***insured participant*** means an insured person who requests assistance under employment benefits and, when requesting the assistance, is an unemployed person for whom a benefit period is established or whose benefit period has ended within the previous 60 months.

Définition de *participant*

58 Dans la présente partie, ***participant*** désigne l'assuré qui demande de l'aide dans le cadre d'une prestation d'emploi et qui, à la date de la demande, est un chômeur à l'égard de qui une période de prestations a été établie ou a pris fin au cours des soixante derniers mois.

Employment benefits for insured participants

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

Prestations d'emploi pour participants

59 La Commission peut mettre sur pied des prestations d'emploi en vue d'aider les participants à obtenir un emploi, notamment des prestations visant à :

(a) encourage employers to hire them;

a) inciter les employeurs à les engager;

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

b) les encourager, au moyen d'incitatifs tels que les suppléments temporaires de revenu, à accepter un emploi;

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

c) les aider à créer leur entreprise ou à devenir travailleurs indépendants;

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

d) leur fournir des occasions d'emploi qui leur permettent d'acquérir une expérience de travail en vue d'améliorer leurs possibilités de trouver un emploi durable;

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

e) les aider à acquérir des compétences — de nature générale ou spécialisée — liées à l'emploi.

National employment service

Service national de placement

60 (1) The Commission shall maintain a national employment service to provide information on employment opportunities across Canada to help workers find suitable employment and help employers find suitable workers.

60 (1) La Commission maintient un service national de placement fournissant de l'information sur les possibilités d'emploi au Canada en vue d'aider les travailleurs à trouver un emploi convenable et les employeurs à trouver des travailleurs répondant à leurs besoins.

Duties of the Commission

Fonctions

(2) The Commission shall

(2) La Commission doit :

(a) collect information concerning employment for workers and workers seeking employment and, to the extent the Commission considers necessary, make the information available with a view to assisting workers to obtain employment for which they are suited and assisting employers to obtain workers most suitable to their needs; and

a) recueillir des renseignements sur les emplois disponibles et sur les travailleurs en quête d'emploi et, dans la mesure où elle le juge nécessaire, mettre ces renseignements à la disposition des intéressés afin d'aider les travailleurs à obtenir des emplois correspondant à leurs aptitudes et les employeurs à trouver les travailleurs répondant le mieux à leurs besoins;

(b) ensure that in referring a worker seeking employment

b) faire en sorte que les travailleurs mis en rapport avec

there will be no discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act* or because of political affiliation, but nothing in this paragraph prohibits the national employment service from giving effect to

un employeur éventuel ne soient l'objet d'aucune discrimination fondée sur des motifs de distinction illicite, au sens de la *Loi canadienne sur les droits de la personne*, ou sur les affiliations politiques; toutefois, le présent alinéa n'a pas pour effet d'interdire au service national de placement de donner effet :

(i) any limitation, specification or preference based on a *bona fide* occupational requirement, or

(i) aux restrictions, conditions ou préférences fondées sur des exigences professionnelles justifiées,

(ii) any special program, plan or arrangement mentioned in section 16 of the *Canadian Human Rights Act*.

(ii) aux programmes, plans ou arrangements spéciaux visés à l'article 16 de la *Loi canadienne sur les droits de la personne*.

Regulations

(3) The Commission may, with the approval of the Governor in Council, make regulations for the purposes of subsections (1) and (2).

Règlements

(3) La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements pour l'application des paragraphes (1) et (2).

Support measures

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

Mesures de soutien

(4) À l'appui du service national de placement, la Commission peut mettre sur pied des mesures de soutien ayant pour but d'aider ou de soutenir :

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

a) les organismes qui offrent des services d'aide à l'emploi aux chômeurs;

(b) employers, employee or employer associations, community groups and communities in developing and implementing strategies for dealing with labour force

b) les employeurs, les associations d'employés ou d'employeurs, les organismes communautaires et les collectivités à développer et à mettre en application des

adjustments and meeting human resource requirements; and

stratégies permettant de faire face aux changements au sein de la population active et de satisfaire aux exigences en matière de ressources humaines;

(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.

c) la recherche et l'innovation afin de trouver de meilleures façons d'aider les personnes à devenir ou rester aptes à occuper ou à reprendre un emploi et à être des membres productifs du marché du travail.

Limitation

(5) Support measures established under paragraph (4)(b) shall not

(a) provide assistance for employed persons unless they are facing a loss of their employment; or

(b) provide direct federal government assistance for the provision of labour market training without the agreement of the government of the province in which the assistance is provided.

Restrictions

(5) Les mesures prévues à l'alinéa (4)b) :

a) ne sont pas destinées à des employés, sauf s'ils risquent de perdre leur emploi;

b) ne peuvent fournir d'aide directe du gouvernement fédéral pour de la formation liée au marché du travail sans l'accord du gouvernement de la province intéressée.

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;

Soutien financier

61 (1) Afin de soutenir la mise en œuvre d'une prestation d'emploi ou d'une mesure de soutien, la Commission peut, conformément aux modalités approuvées par le Conseil du Trésor :

a) fournir des subventions et des contributions;

b) consentir des prêts ou se rendre caution de prêts;

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

c) payer toute personne pour les services fournis à sa demande;

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

d) émettre des bons échangeables contre des services et honorer ces bons.

Provincial agreement

Accord de la province intéressée

(2) The Commission may not provide any financial assistance in a province in support of employment benefits mentioned in paragraph 59(e) without the agreement of the government of the province.

(2) La Commission ne fournit aucun soutien financier à l'appui d'une prestation d'emploi prévue à l'alinéa 59e) sans l'accord du gouvernement de la province où cette prestation doit être mise en œuvre.

Transitional payments for educational institutions

Services fournis par des établissements d'enseignement

(3) Payments under paragraph (1)(c) include the following transitional payments, which may not be made under this section more than three years after it comes into force:

(3) Les paiements que peut faire la Commission au titre de l'alinéa (1)c) comprennent notamment les paiements ci-après, qui sont de nature transitoire et ne peuvent être faits plus de trois ans après la date d'entrée en vigueur du présent article :

(a) payments to a public or private educational institution for providing a course or program of instruction or training at the request of the Commission under employment benefits authorized by paragraph 59(e); and

a) le paiement des droits exigés par un établissement d'enseignement public ou privé pour dispenser les cours ou programmes d'instruction ou de formation qu'elle demande dans le cadre d'une prestation d'emploi prévue à l'alinéa 59e);

(b) payments to a province in respect of the course or program if it is provided by a public educational institution and there is an agreement between the government of the

b) le versement à une province d'une indemnité afférente aux cours ou programmes si ceux-ci sont dispensés par un établissement d'enseignement public et qu'il existe, entre le

province and the Commission to remunerate the province for all or part of the cost of providing the course or program.

gouvernement de cette province et la Commission, un accord visant l'indemnisation — totale ou partielle — de la province à l'égard des frais engagés pour dispenser ces cours ou programmes.

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.

Accord d'administration des prestations d'emploi et des mesures de soutien

62 La Commission peut, avec l'approbation du ministre, conclure un accord ou un arrangement avec un ministère ou organisme du gouvernement du Canada, un gouvernement ou un organisme public canadien ou tout autre organisme pour qu'il administre une prestation d'emploi ou une mesure de soutien pour son compte.

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

Accords de contribution relatifs à des prestations ou des mesures similaires

63 (1) La Commission peut, avec l'approbation du ministre, conclure avec un gouvernement ou un organisme public canadien, ou tout autre organisme, un accord prévoyant le versement à celui-ci d'une contribution relative à tout ou partie :

(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

a) des frais liés à des prestations ou mesures similaires à celles prévues par la présente partie et qui correspondent à l'objet et aux lignes directrices qui y sont prévus;

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.

Insured participants

(2) An agreement may be entered into under subsection (1) with a government even if the benefits provided by that government are provided only for an ***insured participant*** as defined in section 58 as it read immediately before June 23, 2015, the text of which is set out in Schedule III.

b) des frais liés à l'administration de ces prestations ou mesures par ce gouvernement ou organisme.

Participants

(2) Un accord peut être conclu en vertu du paragraphe (1) avec un gouvernement même si les prestations fournies par celui-ci le sont uniquement au bénéfice d'un ***participant*** au sens de l'article 58, dans sa version antérieure au 23 juin 2015, dont le texte figure à l'annexe III.

APPENDIX II

The relevant provisions of the OLA read as follows:

Preamble	**Préambule**
	Attendu :
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;	que la Constitution dispose que le français et l'anglais sont les langues officielles du Canada et qu'ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du 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;	qu'elle prévoit l'universalité d'accès dans ces deux langues en ce qui a trait au Parlement et à ses lois ainsi qu'aux tribunaux établis par celui-ci;
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;	qu'elle prévoit en outre des garanties quant au droit du public à l'emploi de l'une ou l'autre de ces langues pour communiquer avec les institutions du Parlement et du gouvernement du Canada ou pour en recevoir les services;
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;	qu'il convient que les agents des institutions du Parlement ou du gouvernement du Canada aient l'égale possibilité d'utiliser la langue officielle de leur choix dans la mise en œuvre commune des objectifs de celles-ci;

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;

qu'il convient que les Canadiens d'expression française et d'expression anglaise, sans distinction d'origine ethnique ni égard à la première langue apprise, aient des chances égales d'emploi dans les institutions du Parlement ou du gouvernement du 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;

que le gouvernement fédéral s'est engagé à réaliser, dans le strict respect du principe du mérite en matière de sélection, la pleine participation des Canadiens d'expression française et d'expression anglaise à ses 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;

qu'il s'est engagé à favoriser l'épanouissement des minorités francophones et anglophones, au titre de leur appartenance aux deux collectivités de langue officielle, et à appuyer leur développement et à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne;

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

qu'il s'est engagé à collaborer avec les institutions et gouvernements provinciaux en vue d'appuyer le développement des minorités francophones et anglophones, d'offrir des services en français et en anglais, de respecter les garanties constitutionnelles sur les droits à l'instruction dans la langue de la minorité et de faciliter pour tous

rights and to enhance opportunities for all to learn both English and French;

l’apprentissage du français et de l’anglais;

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;

qu’il s’est engagé à promouvoir le caractère bilingue de la région de la capitale nationale et à encourager les entreprises, les organisations patronales et syndicales, ainsi que les organismes bénévoles canadiens à promouvoir la reconnaissance et l’usage du français et de l’anglais;

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;

qu’il reconnaît l’importance, parallèlement à l’affirmation du statut des langues officielles et à l’élargissement de leur usage, de maintenir et de valoriser l’usage des autres langues,

[…]

[…]

PURPOSE OF ACT

OBJET

Purpose

Objet

2 The purpose of this Act is to

2 La présente loi a pour objet:

(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;

a) d’assurer le respect du français et de l’anglais à titre de langues officielles du Canada, leur égalité de statut et l’égalité de droits et privilèges quant à leur usage dans les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l’administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en œuvre des objectifs de ces institutions;

(b) support the development of

b) d’appuyer le développement

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

des minorités francophones et anglophones et, d'une façon générale, de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais;

c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles.

[…]

PARTIE IV

COMMUNICATIONS AVEC LE PUBLIC ET PRESTATION DES SERVICES

COMMUNICATIONS ET SERVICES

Droits en matière de communication

21 Le public a, au Canada, le droit de communiquer avec les institutions fédérales et d'en recevoir les services conformément à la présente partie.

Langues des communications et services

22 Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés, pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans

la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

(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

SERVICES FOURNIS PAR DES TIERS

Where services provided on behalf of federal institutions

Fourniture dans les deux langues

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.

25 Il incombe aux institutions fédérales de veiller à ce que, tant au Canada qu'à l'étranger, les services offerts au public par des tiers pour leur compte le soient, et à ce qu'il puisse communiquer avec ceux-ci, dans l'une ou l'autre des langues officielles dans le cas où, offrant elles-mêmes les services, elles seraient tenues, au titre de la présente partie, à une telle obligation.

[…] […]

GENERAL

DISPOSITIONS GÉNÉRALES

Obligations relating to communications and services

Obligation : communications et services

27 Wherever in this Part there is a duty in respect of communications and services

27 L'obligation que la présente partie impose en matière de communications et 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.

dans les deux langues officielles à cet égard vaut également, tant sur le plan de l'écrit que de l'oral, pour tout ce qui s'y rattache.

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.

Offre active

28 Lorsqu'elles sont tenues, sous le régime de la présente partie, de veiller à ce que le public puisse communiquer avec leurs bureaux ou recevoir les services de ceux-ci ou de tiers pour leur compte, dans l'une ou l'autre langue officielle, il incombe aux institutions fédérales de veiller également à ce que les mesures voulues soient prises pour informer le public, notamment par entrée en communication avec lui ou encore par signalisation, avis ou documentation sur les services, que ceux-ci lui sont offerts dans l'une ou l'autre langue officielle, au choix.

[…]

[…]

PART VII

ADVANCEMENT OF ENGLISH AND FRENCH

PARTIE VII

PROMOTION DU FRANÇAIS ET DE L'ANGLAIS

Government policy

41 (1) The Government of Canada is committed to

Engagement

41 (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du

français et de l’anglais dans la société canadienne.

(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.

Obligations des institutions fédérales

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

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, office of the Conflict of Interest and Ethics Commissioner or Parliamentary Protective Service, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

Règlements

(3) Le gouverneur en conseil peut, par règlement visant les institutions fédérales autres que le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique, le bureau du commissaire aux conflits d’intérêts et à l’éthique ou le Service de protection parlementaire, fixer les modalités d’exécution des obligations que la présente partie leur impose.

[…]

[…]

PART X

COURT REMEDY

PARTIE X

RECOURS JUDICIAIRE

[…]

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.

Limitation period

(2) An application may be made under subsection (1) within sixty days after

(a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1),

(b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or

(c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5),

or within such further time as

[…]

Recours

77 (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

Délai

(2) Sauf délai supérieur accordé par le tribunal sur demande présentée ou non avant l'expiration du délai normal, le recours est formé dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou de l'avis de refus d'ouverture ou de poursuite d'une enquête donné au titre du paragraphe 58(5).

the Court may, either before or after the expiration of those sixty days, fix or allow.

Application six months after complaint

(3) Where a complaint is made to the Commissioner under this Act but the complainant is not informed of the results of the investigation of the complaint under subsection 64(1), of the recommendations of the Commissioner under subsection 64(2) or of a decision under subsection 58(5) within six months after the complaint is made, the complainant may make an application under subsection (1) at any time thereafter.

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.

Other rights of action

(5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

[…]

PART XI

GENERAL

Primacy of Parts I to V

82 (1) In the event of any inconsistency between the following Parts and any other

Autre délai

(3) Si, dans les six mois suivant le dépôt d'une plainte, il n'est pas avisé des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou du refus opposé au titre du paragraphe 58(5), le plaignant peut former le recours à l'expiration de ces six mois.

Ordonnance

(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

Précision

(5) Le présent article ne porte atteinte à aucun autre droit d'action.

[…]

PARTIE XI

DISPOSITIONS GÉNÉRALES

Primauté sur les autres lois

82 (1) Les dispositions des parties qui suivent l'emportent sur les dispositions

Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:

incompatibles de toute autre loi ou de tout règlement fédéraux :

(a) Part I (Proceedings of Parliament);

a) partie I (Débats et travaux parlementaires);

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

b) partie II (Actes législatifs et autres);

(c) Part III (Administration of Justice);

c) partie III (Administration de la justice);

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

d) partie IV (Communications avec le public et prestation des services);

(e) Part V (Language of Work).

e) partie V (Langue de travail).

***Canadian Human Rights Act* excepted**

Exception

(2) Subsection (1) does not apply to the *Canadian Human Rights Act* or any regulation made thereunder.

(2) Le paragraphe (1) ne s’applique pas à la *Loi canadienne sur les droits de la personne* ni à ses règlements.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1107-13
STYLE OF CAUSE:	FÉDÉRATION DES FRANCOPHONES DE LA COLOMBIE-BRITANNIQUE v. EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA AND THE CANADA EMPLOYMENT INSURANCE COMMISSION AND THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA
PLACE OF HEARING:	OTTAWA, ONTARIO
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JUDGMENT AND REASONS:	GASCON J.
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