Federal Court  Cour fédérale

Date: 20240927

Docket: T-496-19

Citation: 2024 FC 1529

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 27, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

FRANÇOIS CHOQUETTE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, the applicant, François Choquette, takes issue with the Final Report of the Commissioner of Official Languages [Report] in which the Commissioner dismissed Mr. Choquette's complaint.

[2] Essentially, Mr. Choquette takes issue with the scope of the investigation into his complaint. In his view, the investigation conducted by the Commissioner of Official Languages was unreasonable in that it focused on section 41 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [Act or OLA], to the detriment of an investigation that would have addressed the specific responsibilities of the Minister of Canadian Heritage under section 43 of the Act. Because, according to the applicant, the Commissioner did not meaningfully grapple with the issues raised, his conclusion was not reasonable.

[3] It should be noted at the outset that this application for judicial review is to be decided on the basis of the Act as it stood at the time the investigation took place. The Act has since been considerably amended, and the new version came into force on June 20, 2023 (RS 2023, c 15). Section 41 has been amended by adding numerous new subsections, while subsections (2) and (3) have been adjusted. A new article 41.1 has been added. Section 42 as it stood at the time of the Commissioner's investigation no longer exists and has been replaced with a section relating to the conduct of Canada's external affairs and the promotion of French in Canadian diplomatic relations. A new section 42.1 recognizes the role played by the Canadian Broadcasting Corporation. Section 43 has also been amended. Although it is subsections 41(1), 41(2) and 43(1) that will be given significant consideration, I am reproducing sections 41 to 43 as they were at the time:

Government policy	**Engagement**
41 (1) The Government of Canada is committed to	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
(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.

promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

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, Parliamentary Protective Service or office of the Parliamentary Budget Officer, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

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, le Service de protection parlementaire ou le bureau du directeur parlementaire du budget, fixer les modalités d'exécution des obligations que la présente partie leur impose.

Coordination

42 The Minister of Canadian Heritage, in consultation with other ministers of the Crown,

Coordination

42 Le ministre du Patrimoine canadien, en consultation avec les autres ministres fédéraux,

shall encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41.

suscite et encourage la coordination de la mise en œuvre par les institutions fédérales de cet engagement.

Specific mandate of Minister of Canadian Heritage

Mise en œuvre

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

43 (1) Le ministre du Patrimoine canadien prend les mesures qu'il estime indiquées pour favoriser la progression vers l'égalité de statut et d'usage du français et de l'anglais dans la société canadienne et, notamment, toute mesure :

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

a) de nature à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement;

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

b) pour encourager et appuyer l'apprentissage du français et de l'anglais;

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

c) pour encourager le public à mieux accepter et apprécier le français et l'anglais;

(d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally and, in particular, to offer provincial and municipal services in both English and

d) pour encourager et aider les gouvernements provinciaux à favoriser le développement des minorités francophones et anglophones, et notamment à leur offrir des services provinciaux et municipaux en français et en anglais et à

French and to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;

leur permettre de recevoir leur instruction dans leur propre langue;

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

e) pour encourager et aider ces gouvernements à donner à tous la possibilité d'apprendre le français et l'anglais;

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

f) pour encourager les entreprises, les organisations patronales et syndicales, les organismes bénévoles et autres à fournir leurs services en français et en anglais et à favoriser la reconnaissance et l'usage de ces deux langues, et pour collaborer avec eux à ces fins;

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

g) pour encourager et aider les organisations, associations ou autres organismes à refléter et promouvoir, au Canada et à l'étranger, le caractère bilingue du Canada;

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

h) sous réserve de l'aval du gouverneur en conseil, pour conclure avec des gouvernements étrangers des accords ou arrangements reconnaissant et renforçant l'identité bilingue du Canada.

Public consultation

(2) The Minister of Canadian Heritage shall take such measures as that Minister

Consultation

(2) Il prend les mesures qu'il juge aptes à assurer la consultation publique sur

considers appropriate to ensure public consultation in the development of policies and review of programs relating to the advancement and the equality of status and use of English and French in Canadian society.	l'élaboration des principes d'application et la révision des programmes favorisant la progression vers l'égalité de statut et d'usage du français et de l'anglais dans la société canadienne.

I. The facts

[4] The facts giving rise to the filing of a complaint with the Commissioner of Official Languages are the following.

[5] Mr. Choquette claims that the Act was violated in connection with an [TRANSLATION] "agreement" between the Minister of Canadian Heritage and Netflix. The Act sets out obligations for the government (s 41), and more specifically for the Minister of Canadian Heritage (s 43), regarding the promotion of official languages. These obligations were allegedly violated in what was in fact a Netflix investment agreement reached under the *Investment Canada Act*, RSC 1985, c 28 (1st Supp).

[6] It was on September 28, 2017, that an [TRANSLATION] "agreement" was announced under which Netflix would invest $500 million dollars in original productions in Canada over the next five years. In addition, Netflix was to invest $25 million dollars to support French content on the Netflix platform through a market development strategy in Canada. This announcement appears to have been made in parallel with the roll-out of the federal government's strategy for cultural and creative industries in a digital world.

[7] The day after the Netflix investment agreement was announced, the Minister of Canadian Heritage, in a radio interview, declared that [TRANSLATION] "not only do we have an additional $500 million in our ecosystem for our producers, but we also have a $25 million development strategy for the Quebec market". The sum of $500 million dollars does not include an investment threshold for French-language productions. This view of the investment is confirmed in an op-ed, published on September 30, 2017, in La Presse, under the Minister's signature (Applicant's Record, Tab 3B)).

[8] Mr. Choquette's complaint was not long in coming. He was then a Member of Parliament. I reproduce his complaint here as it appears on the record. It is dated November 2, 2017, and it seems to be unequivocal:

[TRANSLATION]

Complaint about the agreement between Netflix and the Government of Canada

(Our Ref.: 2017-1705-EI)

> The agreement between the government and Netflix does not consider linguistic minority communities. This clearly contravenes Part VI (Participation of English-speaking and French-speaking Canadians) and Part VII (Advancement of English and French) of the Official Languages Act.
>
> Mélanie Joly has stated on several Quebec media platforms that the $25 million envelope would be dedicated to the development of Quebec-only French-language content (interview with Paul Arcand on 98.5 FM). The information has been confirmed by Netflix. As it told radio host Paul Arcand on 98.5 FM. This revelation was confirmed by Netflix in a press release issued on October 10, in which the French-speaking community outside Quebec was completely forgotten.
>
> Francophone communities outside Quebec are completely excluded from this agreement. The minority francophone cultural industry is concerned about this agreement.

Source: https://onfr.tfo.org/entente-canadanetflix-le-double-discours-de-la-ministere-joly

François Choquette

November 2, 2017

Plainte sur l'entente de Netflix et le gouvernement du Canada

(N/Réf. : 2017-1705-EI).

L'accord entre le gouvernement et Netflix ne considère pas les communautés en minorité linguistique *(sic)*. Ceci contrevient clairement à la partie VI (participation des Canadiens d'expression française et anglaise) et VII (Promotion du français et de l'anglais) de la Loi sur les langues officielles.

Mélanie Joly a déclaré sur plusieurs tribunes médiatiques québécoises que l'enveloppe de 25 millions $ seraient consacrés au développement du contenu francophone seulement québécois (Entrevue avec Paul Arcand au 98,5 FM). L'information a été confirmé par Netflix. Comme elle l'a affirmé à l'animateur de radio, Paul Arcand, sur le 98,5 FM. Une révélation que confirmait Netflix, dans un communiqué paru le 10 octobre et dans lequel la francophonie de l'extérieur *(sic)* du Québec était complètement oubliée.

La francophonie de l'extérieur du Québec *(sic)* est complètement écartée *(sic)* de cette entente. L'industrie culturelle francophone minoritaire est préoccupée par cette entente.

Source : https://onfr.tfo.org/entente-canadanetflix-le-double-discours-de-la-ministre-joly/

François Choquette

Le 2 novembre 2017

As the applicant himself states in his memorandum of fact and law, his complaint essentially criticizes Canadian Heritage's failure to [TRANSLATION] "consider official language minority communities in the Netflix agreement" (para 13).

[9] The Commissioner's investigation follows. An investigator contacted an official at Canadian Heritage on December 7 and 29, 2017. He asked questions about the Netflix [TRANSLATION] "agreement" and pointed out that subsection 41(2) of the Act imposes a duty on federal institutions to take positive measures to implement the commitment made under subsection 41(1). Canadian Heritage also has a special duty under section 43 of the Act. The

investigator inquired about the existence of Canadian Heritage's analysis of "positive measures" to promote the advancement of official languages, as well as the "positive measures" taken as part of the Netflix [TRANSLATION] "agreement".

[10] The answers to the questions provided on February 8, 2018 did not seem to satisfy the Commissioner's investigators. On the one hand, the *Investment Canada Act*, which was at issue for Netflix's proposed investment, limited the disclosure of information; on the other hand, there were complaints that the answers received did not contain information useful to the consideration of Part VII (where sections 41 to 43 were found) of the Act.

[11] In March 2018, the investigators continued to complain of insufficient information. Additional information still did not satisfy the investigators, thus allowing them to decide the merits of the complaint. Despite further documents sent by Canadian Heritage in May 2018, the lead investigator stated being satisfied that the complaints were well-founded on May 15, 2018. He prepared his preliminary report.

[12] This first draft of the report has not been found, but it does appear that the investigator concluded that the complaints were well-founded; it would include reference to section 43 of the Act since his superiors asked him to withdraw any reference to this section. Here are two passages reported by the applicant in paragraphs 24 and 25 of his memorandum. They are taken from an exchange between two public servants who appear to be commenting on the first draft of the report prepared by the lead investigator. As can be seen, the second passage responds to the first. Both passages mark the agreement between them:

> Remove all reference to 43 – I don't think our arguments are strong enough for including this and in general, I don't think we need it. They have obligations under 4b1 for their programs just like any other fed institution and this is our strongest argument.
>
> [TRANSLATION]
>
> [I]t seems to me that 43.1 [*sic*] was not investigated. I don't know why he wanted to take it into account. I noted it on page 1 of the report as well. . . .It's an investigation that, as you say, deals with [Canadian Heritage's] obligations under sections 41 and 42.

[13] The second version of the preliminary report still concluded that the complaints were well-founded but made no mention of section 43. It is dated May 22, 2018. On May 23, my colleague Justice Gascon rendered his decision in *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530, [2019] 1 FCR 243 [*Fédération des francophones de la Colombie-Britannique*]. This prompted the Assistant Commissioner of Official Languages to say that it was necessary to discuss whether the draft was still valid.

[14] Additional questions were sent by the Commission's investigators to Canadian Heritage. They were interested in the "positive measures" being taken in general. The relevant part of the e-mail sent by the investigator on July 31 reads as follows:

> [TRANSLATION]
>
> You mention in your previous answers that [Canadian Heritage] is taking several positive measures (generally speaking) to enhance the vitality and support the development of [official language minority communities], and to foster the full recognition and use of both English and French in Canadian society (in accordance with section 41 of Part VII of the [OLA]).
>
> a. Please provide recent and specific examples of positive measures taken by [Canadian Heritage] to enhance the vitality and support the development of [official language minority

communities] in Canada (with supporting evidence and documentation, if applicable).

b. Please provide recent and specific examples of positive measures adopted by [Canadian Heritage] to foster the full recognition and use of both English and French in Canadian society (with supporting evidence and documentation, if applicable).

[15] A preliminary investigation report was submitted to the applicant on October 3, 2018: complaints about the Netflix agreement are unfounded. “Positive measures” have been taken by Canadian Heritage to foster the development and vitality of official language minority communities to promote the status of English and French. The commitment under section 41 requires that “positive measures” be taken, but these “need not relate to any specific program, decision or agreement of the federal institution”. Canadian Heritage has taken positive measures, in keeping with its commitment under Part VII of the Act. The preliminary report was sent to the applicant for comment.

[16] On October 19, 2018, the applicant criticized the preliminary report. Claiming to have received legal advice, Mr. Choquette submitted further comments on November 23, 2018: the Commissioner’s conclusions were unreasonable since, he said, [TRANSLATION] “the report deals incompletely with the complaint under Part VII of the OLA”. This preliminary report does not deal with section 43, which, according to the Commissioner, would impose specific, binding obligations on Canadian Heritage. These are different from those set out in section 41, the applicant said.

[17] A meeting with officials from the Office of the Commissioner of Official Languages [OCOL] on December 13 did not produce the results the applicant had hoped for. The officials

confirmed that the arguments raised did not alter the conclusion reached in the preliminary report.

[18] The Report, which is the subject of the application for judicial review, came on February 21, 2019. Given that positive measures were taken by Canadian Heritage, Mr. Choquette's complaint had to be dismissed.

II. The decision under judicial review

[19] The decision states that the investigation took into account Part VII and the spirit of the Act. It specifically refers to subsections 41(1) and (2) and paragraph 43(1)(f) as part of the legal framework applicable in this case. The purpose of the investigation was indeed to determine whether Canadian Heritage had complied with its obligations under Part VII of the Act.

[20] The decision, which is 17 pages long, sets out the problems posed by online video streaming services, which are [TRANSLATION] "fundamentally transforming the television viewing habits of Canadians" (decision, para. 5.1.1). The fact that the vast majority of content offered is in English is seen as an obstacle to the flourishing and survival of the country's francophone culture. It is therefore deemed essential that these platforms offer more French-language content. But these platforms also entail risks for Canadian culture as a whole in the digital environment.

[21] The report situates Netflix's investment in the face of this problem:

> [TRANSLATION]

> In the context of the launch of Creative Canada, on September 28, 2017, Minister Joly announced the signing of an investment with Netflix under which the company will create Netflix Canada, its first production house outside the United States, and invest a minimum of $500 million in original productions in Canada over the next five years. Entered into under the *Investment Canada Act*, the investment includes a further $25 million in French-language content, based on a market development strategy for Canada. Specifically, as Netflix has confirmed, this additional sum is intended to support various cultural events and organizations that encourage diverse new Canadian talent, including women, Francophones and Indigeous peoples.
>
> In some of the Minister's first public speeches about the Netflix investment, she indicated that the $25 million would be dedicated to Quebec cultural content. In other speeches, the Minister made no mention of this sum, stating that the objective would be to ensure that Netflix meets its commitment to invest $500 million in Canadian productions. Netflix's Director of Global Public Policy, Corie Wright, did mention the $25 million in a public statement and said it will be used to "ensure Netflix Canada reaches vibrant Canadian production communities, including the French-language community in Quebec." Finally, on November 2, 2017, during an appearance before the House of Commons Standing Committee on Canadian Heritage, Guylaine Roy, Associate Deputy Minister of PCH [Canadian Heritage] and Director of Investments under the *Investment Canada Act*, stated that "[t]he 25$ million recognizes the effort that will be made to work in the francophone markets. In particular, it is to bring francophone producers in Quebec and outside Quebec closer to Netflix, and to give them the opportunity to do so-called pitch days, or to have a more direct contact. It is a recognition that beyond the 500$ million there is a specific effort that has been made to approach Francophone markets. We have made the point to Netflix that in Canada there are two markets."
>
> (Decision, para 5.1.2, p 5.)

[22] The Report describes the complaint that was investigated as involving Canadian Heritage. The complaint was about the inconsistency of the discourse in regards to Netflix's investment of $25 million dollars. While the Act makes it an [TRANSLATION] "obligation to foster the full recognition and use of both English and French in society" (decision, para 5.2), this equality

should be reflected in the Netflix investment. It is alleged that this would have required a much higher sum than the 25 million announced.

[23] The Commissioner also acknowledges that the complaint alleges a lack of language clauses, as it will be difficult to enforce French content without them. The absence of a clause targeting official language minority communities in the Netflix [TRANSLATION] "agreement" would make Canadian Heritage in violation of Part VII of the Act.

[24] Canadian Heritage responds that positive measures have been taken to meet its obligations under Part VII. Indeed, the decision describes a number of initiatives claimed by Canadian Heritage. It cites the Action Plan for Official Languages – 2019-2023: Investing in Our Future, which is a "horizontal platform of new initiatives implemented by seven federal partner institutions and coordinated by PCH" (decision, para 5.3.1.). Over $346 million dollars was invested in official languages support programs in 2017-2018, seeking to support official language minority communities, aiming to promote the use of English and French within Canadian society.

[25] Other programs mentioned include the Canada Media Fund, to monitor issues related to audiovisual production, and the Collaborative Agreement for the Development of Arts and Culture in Francophone Minority Communities of Canada. In addition to Canadian Heritage, other partners include the National Arts Centre, the Canada Council for the Arts, the National Film Board of Canada, the Canadian Broadcasting Corporation, Telefilm Canada and the Fédération

culturelle canadienne-française. The TV5 program is a unique showcase for French-language productions on the international market.

[26] The Commissioner then turns to the Netflix investment. Having noted the existence of confidentiality rules concerning the investment under the *Investment Canada Act* (the test applied is that of the likelihood that the proposed investment constitutes a net benefit to Canada), the Commissioner sets about explaining how the obligations of Part VII of the Act are taken into account. It reads as follows:

> PCH explained the process by which Part VII obligations are taken into account in the context of major investment proposals in the Canadian cultural sector, such as the case with the Netflix proposal. The Cultural Sector Investment Review (CSIR) Branch administers the *Investment Canada Act* with respect to the acquisition or creation of cultural businesses in Canada by non-Canadians. During the evaluation of planned investments in the Canadian cultural sector, CSIR examines, among other things, the compatibility of proposed investments with national cultural policies and with official languages obligations, and the benefit to OLMCs [official language minority communities] resulting from investments. If relevant, the investor is informed of the importance of ensuring the availability of cultural content in both official languages and, as a result, he can propose commitments for OLMCs, as needed, to demonstrate the net benefit for Canada.
>
> Finally, PCH noted that it is important to remember that, as part of the announcement of its investment in Canada, Netflix has committed to invest at least $500 million over the next five years in original Canadian productions, which will be distributed on Netflix's global platform. As part of this investment, Netflix will continue to work with producers, production companies, broadcasters, creators and other Canadian partners to produce original Canadian content in both French and English.
>
> The federal institution mentioned that Netflix is also committed to supporting Canadian content in French on its platform through a market development strategy for Canada. Focusing on a $25-million investment, this strategy will include producer presentation days, recruitment activities and other promotional and market development activities. PCH mentions that this investment must be

> seen as a positive measure adopted by the federal institution in the context of the Netflix investment in Canada.
>
> (Decision, para 5.3.1, pp 8–9.)

[27] It should also be noted that not only are the details of the agreement confidential, but no documents have been made available to prove that the obligations of Part VII of the Act will in fact be taken into account. It is therefore only on a case-by-case basis that Canadian Heritage officials determine whether the legal obligations for which the investor is responsible have been met.

[28] The Commissioner then proceeds to determine whether Canadian Heritage has met its obligations, and more specifically that of "supporting the vitality and development of OLMCs and advancing the equality of status and use of English and French within Canadian society" (decision, para 6.1).

[29] Noting that it is an obligation of means to take positive measures without hindering the development and vitality of these communities or the use of the official languages in Canada, the Commissioner concluded that positive measures had been taken (subsection 41(2) of the Act). Not only has Canadian Heritage demonstrated several positive measures, but no clear and convincing evidence has been put forward of any specific negative impact resulting from the fact that minority communities would not be specifically targeted by the agreement. The Commissioner stated as follows:

> Based on the information that is publicly available, it is, however, unclear whether Netflix considers that the additional $25 million which it pledged to invest in Francophone content will be devoted to Quebec content only or to content from OLMCs as well.

> Although there is no specific obligation under Part VII of the Act for the $25 million commitment to also target OLMCs, the investigation determined that the information on whether or not OLMCs will benefit from the aforementioned commitment to French content was inconsistent. It is unclear to what extent Netflix was informed of the specific needs of Francophone communities outside of Quebec, and PCH did not provide any information to clarify these elements during the investigation, even though it was asked to do so. The institution stated in its response that, when it is relevant, an investor is informed of the importance of ensuring the availability of cultural content in both official languages and, as a result, he can propose commitments for OLMCs. However, no indication was given of whether Netflix was explicitly informed of the needs and interests of OLMCs outside of Quebec. Although this lack of clarity in terms of what the Netflix proposal includes does not constitute a violation under Part VII of the Act since there is no clear proof of harm to OLMCs having occurred, PCH is encouraged to take into account the needs of OLMCs and provide clarity to the public with respect to the $25 million pledge in the Netflix investment proposal and for whom it is intended (e.g., beneficiaries).
>
> (Decision, para 6.2, pp 9–10.)

In addition, the Commissioner encourages the adoption of a best practice to better identify the potential negative impacts of investment proposals in the cultural sector and on the status of English and French in Canadian society.

[30] The decision also discusses comments made by Mr. Choquette regarding the investigation conducted. He complained that details of the Netflix investment had not been obtained. As for the interpretation to be given to Part VII of the Act, the complainant argued for a broad and liberal interpretation of Part VII. This would make the “clear and compelling evidence” test inappropriate; in the same vein, the interpretation of “positive measures” as sufficient is too generous. This practically frees federal institutions from their obligations, rendering Part VII ineffective.

[31] Mr. Choquette also complained that the Commissioner had not conducted his investigation in light of section 43 of the Act, which deals specifically with Canadian Heritage's obligations. According to the applicant, the obligations in section 43 are more important than those in section 41. This would be the case for paragraph 43(1)(f), which requires the Minister to take such measures as the Minister considers appropriate " to encourage and cooperate with the business community […] to offer services in both English and French and to foster the recognition and use of both languages ". He also argued that the *Investment Canada Act* does not require that the Netflix "agreement" not be disclosed.

[32] The Commissioner rejects these submissions. Of particular relevance to our case is the response regarding the application of section 43. He states that the investigation conducted took into account Part VII in its entirety, including of course section 43. In fact, he quotes paragraph 43(1)(f) of the Act. The legal framework within which it operated refers specifically to section 43(1), in paragraph 2 of the decision.

[33] Positive measures "do not have to specifically target a particular federal institution's program, decision-making process, initiative, or Office of the Commissioner of Official Languages Final Investigation Report 14 even the specific factual situation that gave rise to a complaint with the Office of the Commissioner" (decision, para 7.3). In other words, each initiative does not have to be measured individually, as federal institutions have a general obligation to take positive action. Canadian Heritage has satisfied the Commissioner that several positive measures have been adopted by the Commissioner. The duty to do no harm had not been breached, since the evidence did not establish that any harm had been caused to minority

“communities”. Accordingly, the Commissioner concluded that his “investigation did not uncover evidence that harm has occurred in relation to OLMCs or the status of both official languages with respect to the Netflix investment agreement” (decision, para 8). Even though clear and compelling evidence that harm had occurred was not presented in relation to either of the commitments of section 41 in relation to the Netflix investment proposal, it does not preclude that negative or adverse effects will ever occur. It is understood that new complaints could be filed.

[34] Nonetheless, the Commissioner expresses concerns about online streaming services. He makes the following proposal in paragraph 8 of the decision:

> I therefore encourage the federal institution to consider taking positive measures moving forward in consideration of the needs and interests of OLMCs with regard to the specific challenges they are facing with respect to on-line streaming services. More particularly, in the context where increased on-line streaming has the potential to have negative impacts on Francophone communities outside of Quebec which are now required to Office of the Commissioner of Official Languages Final Investigation Report 15 compete on a global platform and market where the language by default is more often than not English, PCH is in a privileged position as a federal institution that coordinates many programs for the benefit of OLMCs to be able to analyze these impacts on communities and develop concrete measures to enhance their vitality and development.

III. The parties' arguments

A. *The applicant*

[35] The error that led to an unreasonable decision within the meaning of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], is alleged to be the failure to investigate and address section 43 in the Commissioner's Report.

[36] Section 43 imposes [TRANSLATION] "additional" obligations on the Minister of Canadian Heritage. The applicant's attention is drawn to paragraphs 43(1)(a) and (f), which are among the measures (the list is not exhaustive) to be taken by the Minister.

[37] The applicant sees a different obligation between section 41 and subsection 43(1). In the case of paragraph 41(2), the federal institution ensures that positive measures are taken to implement the commitment made in subsection 41(1), whereas subsection 43(1) refers instead to the taking of measures.

[38] The applicant also sees a different objective between the two provisions. Subsection 41(1) speaks in terms of "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". Subsection 43(1) is instead worded as taking measures to "advance the equality of status and use of English and French in Canadian society". Mr. Choquette sees a more binding obligation in subsection 43(1) because additional measures are prescribed. He notes that paragraph 43(1)(a) corresponds to the

general commitment of subsection 41(1), but that the other paragraphs, and particularly paragraph 41(1)(f) (encourages companies to provide their services in both official languages), are more restrictive. It follows, argues the applicant, that ignoring these specific obligations renders the decision unreasonable.

[39] The applicant again argues that it is manifest that the Commissioner did not sufficiently investigate his complaint in terms of section 43. He points to an email exchange between junior officials within the Commissioner's Office who were reviewing the very first draft of the preliminary report prepared by the lead investigator, in which he apparently made comments about section 43. I say "apparently" because this first draft has not been found. What has come to light is an exchange in which a supervisor says that reference to section 43 is not required because it is the obligations under section 41 that constitute the "strongest argument". His correspondent said that it was an inquiry concerning "obligations 41 and 42" (the exchange is reproduced in paragraph 12 of these reasons). It should be noted that at the time this exchange of messages took place, the opinion of the lead investigator favoured the conclusion that the complaint was well-founded. Things have obviously changed since then, since the Commissioner, after considering all the evidence, including that obtained after the *Fédération des francophones de la Colombie-Britannique* decision, concluded that the complaint was unfounded.

[40] Whatever the obligations under section 41, the applicant argues that the Commissioner should have considered the more specific obligations under section 43. He is not specific in this regard. It is unclear what the difference might have been. His arguments that a separate analysis

was required were not accepted. No changes were made to the Report, other than to state that it was the whole of Part VII of the Act that was taken into account, which obviously includes section 43. In the applicant's view, this is false (memorandum of fact and law, para 73).

[41] As for the argument about the reasonableness of the decision, in the administrative law sense, it is found in paragraph 75 of the applicant's memorandum. I reproduce it in full because, in my opinion, it overstates the scope of paragraph 128 of *Vavilov*, from which the passages quoted in the text are taken. I will come back to this in my analysis:

> [75] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada determined that a decision is unreasonable when a decision maker's "failure to meaningfully grapple with key issues or central arguments raised by the parties" may show whether the decision maker was "actually alert and sensitive to the matter before it". This requirement is based on the principles of justification and transparency. It is therefore essential for a decision-maker to draft reasons with care and attention in order to "assur[e] parties that their concerns have been heard" and "alert the decision maker to inadvertent gaps and other flaws in its reasoning".

[42] Ultimately, the failure to deal separately with article 43 is what is unreasonable. This, it seems, was the [TRANSLATION] "key issue formulated by the applicant in his complaint as well as in his response to the preliminary inquiry report" (memorandum of fact and law, para 76). Since, says the applicant, sections 43 and 41 are different, the Commissioner was not indeed alert and sensitive to the matter before him.

B. *The respondent*

[43] According to the respondent, the issue of section 43 of the Act was never at the heart of Mr. Choquette's complaint. Indeed, the Court reproduced it in paragraph 8 of these reasons. There is no reference to section 43. It related, for our purposes here, to Part VII of the Act. The Commissioner dealt with this in his general consideration of the complaint. This was consistent with the wording of the complaint, the nature of the obligations found in the complaint, the nature of the obligations found in Part VII, and the Commissioner's discretion in conducting his investigations.

[44] Netflix, in seeking to incorporate Netflix Canada, had to submit to the review mechanism for major investments by non-Canadians and meet its requirements, all under the *Investment Canada Act*. Foreign investments in the cultural sector are reviewed by the Minister of Canadian Heritage, while those in other sectors of the economy are reviewed by the Minister of Innovation, Science and Economic Development. This is not a Canadian Heritage/Netflix agreement, but a ministerial decision taken under the *Investment Canada Act*. The respondent insists that what was being discussed was Netflix's investment, which had to meet the requirements of the *Investment Canada Act*. This was not an agreement between Netflix and Canadian Heritage.

[45] In any event, the respondent emphasizes that the investigation conducted did not ignore section 43. As early as December 7 and 29, 2017, the questionnaire sent to Canadian Heritage by the Office of the Commissioner's investigator included questions related to section 43, even though it was not as such at the heart of the complaint. If it was agreed to withdraw the

references to section 43 after a first draft of the preliminary report, it was simply because the arguments for its application were not sufficient. It should be remembered that this first draft concluded with a positive response to the complaint. It was only after additional questions regarding the positive measures taken by Canadian Heritage had been asked and answered that the tide turned within the Office of the Commissioner to conclude that the complaint was unfounded.

[46] When the applicant was offered the opportunity to comment on the Commissioner's preliminary report, he raised the point in November 2018 that it did not deal with section 43. But the respondent points out, correctly in my view, that no explanation is given by the applicant how the facts raised in his complaint could reveal a breach of section 43.

[47] It is worth noting that the applicant indicated at a meeting with the Assistant Commissioner that he did not wish to pursue his complaint under Part VI after it was explained to him why the report made no mention of it. Furthermore, the respondent informs us that the applicant, after having availed himself of the remedy permitted under section 77 of the Act concerning the Netflix investment, withdrew from it three years later, on April 11, 2022. This is relevant.

[48] The respondent seeks to establish the legal framework to be applied. He points out that it is recourse to Part X of the Act, and section 77 thereof, that allows complaints to be adjudicated. This in itself limits the scope of an application for judicial review, which will thus be limited to the investigation. Judicial intervention in these circumstances will only be appropriate if the

investigation is procedurally unfair or, according to *Oleinik v Canada (Privacy Commissioner)*, 2011 FC 1266, "[i]f the report had material omissions, reached unreasonable conclusions, contained unsustainable inferences, misconstrued the factual and legal context or evinced a bias or pre-disposition on the part of the investigator, the Court could intervene" (para 11). This case law is applied because of the close relationship between the *Privacy Act*, RSC 1985, c P-21, and the Act.

[49] The respondent also points out that the Commissioner enjoys a certain discretion, since if in the course of investigating any complaint it appears to the Commissioner that any further investigation is unnecessary, the Commissioner may refuse to investigate the matter further (subsection 58(3)). He is also solely responsible for his investigation, as explained in *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 SCR 773:

> 36 As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

According to the respondent, this provides a good indication that Parliament wished to confer on the Commissioner a healthy dose of deference.

[50] The only criticism levelled at the Commissioner is that he ultimately failed to investigate section 43 of the Act. The Commissioner took this into account. The investigation had to deal with an alleged contravention of Part VII, and the investigation report confirms that it did deal with Part VII: the Commissioner took section 43 into account, as he stated in the Report itself. Indeed, Canadian Heritage answered the questions about section 43.

[51] In the respondent's view, it is necessary to consider the wording of the complaint, the obligations created by Part VII and the Commissioner's discretion in conducting his investigation. The complaint concerned Part VII. It was only at the very end that the applicant clearly raised section 43 (letter to the Commissioner of Official Languages dated November 23, 2018). He was reacting to the preliminary report. Accordingly, it was reasonable to deal with section 43 in the context of an investigation required for an alleged violation of Part VII of the Act.

[52] Indeed, section 43 does not create a specific obligation. Paragraphs (a) to (h) are examples of the types of measures to be taken when the Minister of Canadian Heritage considers them appropriate to accomplish the mission of "advancing the equality of status and use of English and French within Canadian society". These are only examples, says the respondent, because Parliament uses the word "notamment" [in the French version] just before its enumeration.

[53] Sections 41 and 43 share common objectives. The government's commitment in section 41 is to "enhance the vitality of the English and French linguistic minority communities", by

"supporting their development", and "fostering the full recognition and use of both English and French". What about section 43? The Minister of Canadian Heritage "advance[s] the equality of status and use" of the two official languages, by taking measures to "enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development" (para 43(1)(a)). Thus, both subsection 41(1) and subsection 43(1) deal with the same purposes and objectives. This leads the respondent to argue that it was reasonable for the Commissioner to treat the whole under the heading "Part VII".

[54] Finally, the Commissioner's investigative powers are broad and discretionary. He could conduct his investigation on the basis of Part VII. This approach is informed by his interpretation of his enabling statute, because he is responsible for ensuring that the objectives of the Act are achieved. The chosen approach is not procedural in that a separate analysis of section 43 is not required. It is not an omission.

IV. Analysis

Application for judicial review and remedy under section 77 of the Act

[55] If this case reaches the Federal Court several years after the application was filed, it is because the applicant had chosen to conduct two applications in parallel: an application for judicial review and an application for remedy under section 77 of the Act. The application for judicial review was stayed by order dated August 29, 2019, to allow the parties to proceed with the court remedy under section 77. As pointed out by the respondent, it was only in April 2022

that Mr. Choquette withdrew from this last remedy. The record does not reveal why this was the case.

[56] Like the judge responsible for the proceedings in the court remedy (not to be confused with an application for judicial review) under section 77, this remedy asks the Court to rule on the merits of the complaint. This is not the same as seeking judicial review of the investigation report or process (order dated April 4, 2022, in T-605-19).

[57] This difference was explained in *Canadian Food Inspection Agency v Forum des Maires de la Péninsule Acadienne*, 2004 FCA 263, [2004] 4 FCR 276 [*Forum des Maires de la Péninsule Acadienne*]. Indeed, the Federal Court of Appeal clearly states that it is an error to refer to the proceeding as an application for judicial review (para 15). A remedy under section 77 is more akin to an action. A person who seeks "to verify the merits of the complaint" (para 17) undertakes a remedy under section 77. The attack on judicial review concerns the report made. One has little to do with the other.

[58] The fact that a court remedy is akin to an action means that the case can be heard *de novo*. An applicant is not even limited to the evidence revealed by the Commissioner's investigation. The remedy available under section 77 is also broader, being whatever the Court "considers appropriate and just in the circumstances" (subsection 77(4) of the Act). An application for judicial review cannot examine the merits of the complaint. In this case, Mr. Choquette would have had to pursue his court remedy. The applicant chose to abandon his recourse under section 77 a little over two months after the Federal Court of Appeal (*Canada*

(Commissioner of Official Languages) v Canada (Employment and Social Development), 2022 FCA 14 [*Canada (Employment and Social Development)*]) overturned the decision in *Fédération des francophones de la Colombie-Britannique* (above). However, it seems that it was this decision that gave rise to the Commissioner's further investigation, in which he concluded that Canadian Heritage had adopted numerous positive measures with regard to minority language communities. This aspect cannot be revisited in the present application for judicial review. An application for judicial review is a review based on the file as it existed at the time the decision was rendered. It is not concerned with the merits of a complaint that could have been the subject of a section 77 application, or with the evolution of the law since *Canada (Employment and Social Development).*

Application for judicial review

[59] Mr. Choquette prepared his own application for judicial review, without using the services of a counsel. Mr. Choquette describes his complaint as alleging [TRANSLATION] "that Canadian Heritage (PCH) failed to adopt positive measures in the Netflix agreement to promote French-language production outside Quebec, disregarding its obligations in relation to the development and vitality of official language minority communities". This is basically the same as the wording in his application for remedy under section 77, which was filed just over two weeks after the application for judicial review (T-605-19).

[60] In any event, in the notice of application before this Court, which must contain a complete and concise statement of the grounds to be argued and the relief sought, the applicant is asking that the investigation be redone after the Commissioner's conclusions have been

withdrawn. The investigation should ensure that [TRANSLATION] "the agreement between PCH and Netflix" is made available to the Commissioner. It is perhaps under the heading "The grounds for the application are" that we find the information needed to understand the application for remedy. That section contains the following:

> [TRANSLATION]
>
> c. The complaint under Part VII is not dealt with fully in the Report, which reveals an unduly narrow, and therefore unreasonable, understanding of its scope
>
> a. The Report fails to deal with section 43 of the *OLA*, which imposes specific obligations on PCH.

The applicant provides no further details as to what would warrant a court decision to the effect that the impugned decision is unreasonable without addressing the merits of the complaint, as this aspect of the case is considered in a proceeding under section 77.

Standard of review

[61] On judicial review, the standard of review is reasonableness unless one of the exceptions set out in the legislation applies. None of these exceptions have been raised. The scope of the rule was explained at paragraph 25 of *Vavilov*:

> [25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's

> interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

The parties do not dispute that reasonableness is the appropriate standard to apply. The Court agrees.

[62] Although reasonableness review must remain rigorous, the fact remains that the starting point for judicial review (unlike a proceeding under section 77 of the Act) is the principle of judicial restraint, which is shown through an appropriate posture of respect for the administrative decision (*Vavilov* at paras 13–14). The Supreme Court asks reviewing courts to develop an understanding of the reasoning that led to the decision. A decision is reasonable and is owed deference from the reviewing court if it is based on an inherently coherent and rational chain of analysis and if it is justified in relation to the relevant factual and legal constraints (*Vavilov* at paras 85, 101). Reviewing courts must not seek to substitute themselves for the administrative decision maker, and they must "refrain from deciding the issue themselves" (*Vavilov* at para 83). The reviewing court does not conduct a *de novo* analysis to determine what, in its opinion, is the correct solution. As can be seen, judicial review is a very different procedure from that provided for in section 77 of the Act.

[63] The burden is on applicants to show that the decision is unreasonable (*Vavilov* at para 100). What are the hallmarks of reasonableness? They are "justification, transparency and intelligibility — and whether [the decision] is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). It follows, of course, that an applicant must satisfy the reviewing court that there is a serious shortcoming that will be considered in context. *Vavilov*, at paragraph 94, provides the following parameters:

> [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

This is the burden that an applicant must discharge; otherwise, the applicant will fail.

Relevant sections

[64] I would like to comment briefly on sections 41 to 43 of the Act. In *Canada (Employment and Social Development)*, which reversed the decision in *Fédération des francophones de la Colombie-Britannique* regarding an application for remedy under section 77 of the Act, the Federal Court of Appeal stated that Part VII "conveys the federal government's commitment to enhance the vitality of the English and French linguistic minority communities in Canada and sets out the obligation of federal institutions to take positive measures towards that end".

[65] Subsection 41(1) of the Act establishes this formal commitment. It is in three parts:

- Enhancing the vitality of linguistic minority communities.
- Supporting and assisting their development.

- Fostering the full recognition and use of both English and French in Canadian society.

As the Court of Appeal noted in *Canada (Employment and Social Development)* at paragraph 128, it was subsection 41(1) that was considered to be preventing Part VII, as it then stood, from being justiciable (citing *Forum des maires de la péninsule acadienne*, at paragraph 44).

[66] Therefore, it was more a question of a formal commitment in the form of an aspiration than the creation of rights. Paragraph 46 of *Forum des maires de la péninsule acadienne* reads as follows:

> [46] My reading of the Act thus leads me to the conclusion that section 41 is declaratory of a commitment and that it does not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever.

What became subsection 41(1) was simply section 41 in 2004. In 2005, Parliament amended the section, adding subsections 41(2) and (3). In addition, Part VII became a part of the Act in respect of which one could apply for a remedy under Part X (section 77). Part VII was therefore made justiciable.

[67] With these amendments, "[e]very federal institution", listed in subsection 3(1) of the Act, "has the duty ('il incombe') to ensure ('de veiller') that positive measures are taken for the implementation of the commitments under subsection (1)".

[68] The section 42 of the Act to be considered in this case existed before the 2005 amendment. The Minister of Canadian Heritage was given a coordinating role in the implementation of the formal commitment. Specifically, the Minister "shall encourage and

promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41". Under section 44 of the Act, the Minister of Canadian Heritage must submit an annual report "on the matters relating to official languages for which that Minister is responsible". That is a major role.

[69] Canadian Heritage is a federal department like any other. Federal departments are "federal institutions" within the meaning of subsection 3(1) of the Act, and Canadian Heritage is a department within the meaning of section 2 of the *Financial Administration Act*, RSC 1985, c F-11, as required by the definition of "department" in subsection 3(1) of the Act. There is therefore no doubt that taking positive measures under section 41(1) of the Act to implement the formal commitment also applies to Canadian Heritage.

[70] In other words, subsection 43(1) of the Act forms part of the positive measures to be taken by Canadian Heritage. The measures that the Minister of Canadian Heritage considers appropriate to advance the equality of status and use of official languages in Canada are obviously positive measures; otherwise, they would not be intended to advance the equality of status and use of Canada's official languages.

[71] The positive measures fall into various categories. Paragraph 43(1)(a) repeats verbatim the wording of the formal commitment to enhance the vitality of linguistic minorities and support and assist their development. The other paragraphs of subsection 43(1) with the exception of paragraph (h), which deals with agreements with governments of foreign states, all speak in terms of encouraging activities or actors. If appropriate, positive measures could be to

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

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

(d) and (e) encourage and assist provincial governments in official language matters;

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

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

[72] The applicant did not complain directly in his original complaint about a problem specific to subsection 43(1). It was not until his writing dated November 23, 2018, that he alleged that the preliminary report had failed to deal fully with his complaint (at 8-9/13). He then claimed that the obligations were more binding. His argument, which was not accepted by the Commissioner in the Report, was that subsection 43(1) is worded “shall take” (“prend”), whereas subsection 41(2) refers to a duty to “ensure” that positive measures are taken. That allegedly made a difference.

[73] With respect, this is not persuasive. Subsection 43(1) obviously uses “shall” (and the present indicative in the French text) in the imperative sense (*Interpretation Act*, RSC 1985, c I-21, s 11), but the obligation is qualified by the fact that the Minister of Canadian Heritage

shall take such measures as that Minister considers appropriate ("estime indiquées"), which introduces an element of discretion as to the specific measures to be taken. In other words, the obligation remains, but the measures are left to the discretion of the Minister, who will take whatever action the Minister considers appropriate. The same type of obligation is found in subsection 41(2) because the obligation does not end with "ensure", since federal institutions "have the duty" ("incombe") to ensure that positive measures are taken, that is, there is an ongoing obligation to ensure that positive measures are taken. Nowhere have I found any indication that subsection 41(2) is intended to be permissive. That would significantly weaken what is required of federal institutions in terms of the formal commitment set out in subsection 41(1). In fact, the Court of Appeal in *Canada (Employment and Social Development)* adopted an interpretation that is binding on this Court:

> [140] The phrase "has the duty", or "*[i]l incombe*" in the French text, is unequivocal. It requires federal institutions to act in order to achieve the purpose set out in paragraph 2(b) and reiterated in subsection 41(1). The reference to "measures" (*des mesures* in the French text) allows federal institutions to choose which measures to take, but the obligation to take measures is not thereby diminished.
>
> [141] The word "ensure" implies an obligation that is ongoing. The obligation to take positive measures applies so long as a federal institution can act towards achieving the intended purpose.
>
> [Emphasis in the original]

I find it difficult to understand how the ongoing obligation in subsection 41(2) should be diminished, as the applicant ultimately claims, in favour of an obligation in subsection 43(1) that is allegedly more binding; although subsection 43(1) is written in the imperative, as is subsection 42(1), it also entails taking measures that are considered appropriate. In an attempt to create a meaningful distinction between sections 41 and 43, the applicant diminishes the binding nature of subsection 41(2) by giving the word "ensure" a less binding meaning and by

disregarding the imposed duty connoted by the word “shall”. As the Federal Court of Appeal decision states, far from diminishing the obligation, the word “ensure” creates an ongoing obligation.

[74] The applicant also saw a different purpose between subsections 41(1) and 43(1). He submitted that measures “to advance the equality of status and use” of official languages in subsection 43(1) is not the same as the commitment to “fostering the full recognition and use of both English and French in Canadian society” in subsection 41(1). Comparing so formal a commitment with the “purpose” of subsection 43(1) in order to claim that the purpose of the commitment is different from that of subsection 43(1) seems dangerous to me. The types of positive measures referred to in subsection 43(1) make it possible to fulfill the commitments set out in subsection 41(1), as do the positive measures referred to in subsection 41(2).

[75] In one case, the aim is to advance equality and, in the other, Parliament announces the commitment to foster the full recognition and use (“pleine reconnaissance et usage”) of both official languages, that is, their equality. It would be surprising, to say the least, if the formal commitment were less than the effort to implement the subsection 43(1) commitment. The full recognition and use of official languages appears to be nothing more than equality of status and use of those languages. If there is a distinction between subsections 41(1) and 43(1), it is that one recognizes the commitment to full recognition and use of official languages, whereas the other states that the Minister of Canadian Heritage must advance equality to achieve the commitment. Nevertheless, subsection 41(2) requires that all federal institutions take positive measures to implement the commitments set out in subsection 41(1), which include advancing the equality of

status and use of official languages, that is, their full recognition and use. The broad and generous interpretation of the official languages legislation requires a result such as this. The distinction that the applicant is seeking to introduce does not create any difference between the subsections. They are consistent and say essentially the same thing.

[76] Lastly, the applicant suggested that the various paragraphs of subsection 43(1) should include taking positive measures not included in the formal commitments in subsection 41(1), for which positive measures must be taken to implement them under subsection 41(2). This statement also seems surprising to me. The appropriate measures referred to in subsection 43(1) are those that advance the equality of status and use of official languages. As noted above, this is fully consistent with the formal commitments set out in subsection 41(1). It may be useful to recall the purpose of the Act :

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	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

the work of federal institutions;	en œuvre des objectifs de ces institutions;
(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and	b) d'appuyer le développement 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) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.	c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles.
[Emphasis added.]	[Je souligne.]

[77] The Act, when read as a whole as it should be, is built around its purpose, which is reflected in the formal commitments in subsection 41(1). Federal institutions are obviously involved, including Canadian Heritage. In his attempt to establish his argument that Canadian Heritage's obligation is "broader", the applicant refers to paragraphs (d), (e) and (f) of subsection 43(1), which are apparently considered outside the scope of subsection 41(1), thereby making subsection 43(1) broader than the formal commitments in subsection 41(1).

[78] With respect, I do not agree that that is true. The federal government has a broad commitment that encompasses advancing the equality of status and use of both official languages in Canadian society. This is precisely why, in subsection 43(1), Parliament requires that measures considered appropriate be taken to advance equality. The suggestion that provincial governments, the business community, labour organizations and voluntary organizations are

excluded from what the Act is trying to accomplish except under paragraphs 43(1)(d), (e) and (f), which refer specifically to them, is inconsistent with the very preamble to the Act, which also refers specifically to them:

Preamble	**Préambule**
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;	Attendu : 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 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	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

language educational rights and to enhance opportunities for all to learn both English and French;	faciliter pour tous 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,
…	[…]
[Emphasis added.]	[Je souligne.]

The preamble itself recognizes the government's commitment to provincial governments and corporate entities. This is not a commitment made exclusively by Canadian Heritage.

[79] The preamble is part of the Act and is "read as a part of the enactment intended to assist in explaining its purport and object" (*Interpretation Act*, s 13). Without a doubt, promoting bilingualism is an integral part of the Act and is the government's business. In my opinion, it would take much more to demonstrate that outreach to provincial governments or corporate entities is not part of the government's commitment to "fostering the full recognition and use of both English and French in Canadian society" (s 41(1) *in fine*). At the very least, it would be

necessary to explain how the preamble to the Act, which specifically recognizes this commitment for the whole of government, can be eliminated.

Incomplete investigation

[80] The Commissioner disposed of the argument that his investigation was incomplete because he had not dealt specifically with section 43 by stating that he had "taken into account the whole of Part VII, including section 43" (Report at 14 of 17). To clarify that paragraph 43(1)(f) of the Act had been taken into account, he stated, [TRANSLATION] "[S]ubsection 43(1) has been added to the 'Legal Framework' section of this Investigation Report. Since the investigation already took into account section 43 of Part VII, my conclusions remain the same" (Report at 15 of 17). The Report does indeed define the legal framework by referring to subsections 41(1) and (2), as well as paragraph 43(1)(f). The Commissioner states that his "investigation also took into account relevant sections of the *Investment Canada Act* regarding the communication or disclosure of privileged information and evidence relating to investment proposals" (Report at 2 of 17).

[81] The Commissioner concluded that the complaint regarding Part VII of the Act was unfounded because the Minister of Canadian Heritage had taken positive measures to enhance the vitality of official language minority communities and support and assist their development, and to foster the full recognition and use of both English and French in Canadian society. The validity of the Commissioner's conclusions is not before this Court, since Mr. Choquette has chosen to discontinue his application for remedy under section 77. Examining the merits of the

Report would have been possible in that proceeding, but it is not the purpose of an application for judicial review.

[82] This brings us to the issue of whether there was a failure to investigate with respect to section 43. To succeed, the applicant must establish an omission that is unreasonable within the meaning of *Vavilov*. In my opinion, the applicant has not succeeded.

[83] The complaint that the Commissioner was required to investigate was straightforward. The applicant stated that the agreement between the government and Netflix did not take minority language communities into consideration. This, he said, was a breach of Part VII. He then discussed statements made by the then Minister of Canadian Heritage regarding an envelope that would be devoted to the development of [TRANSLATION] "French-language, Quebec-only content". Francophones outside Quebec were allegedly forgotten.

[84] However, these allegations are not specific. The Federal Court of Appeal noted in *Canada (Employment and Social Development)* (above) that, under section 58 of the Act, a complaint must refer to the "particular instance or case" in support of the complaint. The Court of Appeal further stated that "[t]he courts called upon to hear applications arising from a complaint must be able to render a decision in light of the specific violations of Part VII that are being alleged, since it is the merit of the complaint that is the subject of an application under subsection 77(1). It is difficult to conceive how courts could rule on a Part VII complaint otherwise than on the basis of the specific violation that it alleges" (para 153). The applicant chose to discontinue his application for remedy in this case. Nonetheless, the lack of detail does

not make it easy for an applicant who is complaining that an investigation into a rather vague allegation has not sufficiently dealt with section 43 of the Act.

[85] Essentially, the applicant is reiterating before the Court the arguments he set out in his writing dated November 23, 2018, after he received the preliminary report. He claims that the Minister of Canadian Heritage has additional responsibilities and obligations. He states that they are different, reiterating the concept of an imperative obligation under subsection 43(1), as opposed to the mere obligation under subsection 41(2) to "ensure" that positive measures are taken. He also reiterates that the objectives of sections 43 and 41 are different. He further alleges that the section 43 obligations are more binding. Faced with these considerations, the Commissioner allegedly disregarded the specific obligations. As I tried to explain earlier, these claims do not hold water.

[86] The applicant appears to be relying on email exchanges between OCOL officials in response to the very first draft of a preliminary report. Although the investigator recommended declaring the complaint well-founded, his colleagues told him to abandon the section 43 angle because it was unnecessary, it would be a weaker argument and Canadian Heritage had the same obligations as other federal institutions. That was the best argument, the lead investigator's colleagues seemed to be saying. Moreover, the preliminary report at the time sought to conclude that the complaint was well-founded. As we have seen, a lot of water flowed under the bridge after this email exchange early in the investigation.

[87] The applicant is attempting to show from this brief evidence that the investigation was insufficient. I am not persuaded. In fact, this exchange confirms that, at the time of the first draft, the investigation did deal with section 43, but it was deemed unnecessary because the section 41 obligations were the stronger argument. As I stated earlier, this initial draft was not entered into evidence because, apparently, it was never found. There is no clear, convincing and cogent evidence before this Court (*Canada (Attorney General) v Fairmont Hotels Inc,* 2016 SCC 56, [2016] 2 SCR 720 at para 36) that no investigation was conducted. Rather, the email excerpts submitted suggest the opposite. There is no evidence as to whether the investigation was sufficient. Speculation based on suspicion is not enough.

[88] The applicant delved into the decision at first instance in *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*. That case is an application for remedy (section 77 of the Act) that deals only with section 41, not section 43. The Commissioner found that Employment and Social Development and the Canada Employment Insurance Commission had breached the Act in the context of a federal-provincial agreement on employment assistance services for the official language minority community in British Columbia. Simply put, British Columbia's francophone community complained that the "one-stop shop" approach to providing employment assistance services to the francophone community did not comply with the Act. This Court was required to hear an appeal under section 77, and it concluded that positive measures had been taken under subsection 41(2). The Court of Appeal disagreed (2022 FCA 14).

[89] After the Federal Court decision was published, a preliminary report then in preparation was suspended and additional questions were submitted to Canadian Heritage regarding general measures it had allegedly taken. In the end, after receiving additional information from Canadian Heritage, the Commissioner was satisfied that the complaint should not succeed. However, since the merits of the complaint in this case are not at issue, the Commissioner's reliance on positive measures by Canadian Heritage is not relevant to the issue of whether an investigation under section 43 was sufficient.

[90] At best, the applicant seeks to take advantage of an *obiter dictum* at paragraph 212 of the Federal Court decision, in which the judge comments on the difference between subsections 43(1) and (2) and subsection 41(2). The duties under subsections 43(1) and (2) are said to be more specific and wider in scope. From this *dictum* regarding section 43 of the Act, which was not considered in that case, the applicant seeks to identify a difference between sections 41 and 43 that would have called for further investigation into section 43. Apart from the fact that it is far from clear what is meant by "wider in scope", and that the *dictum* relates to a provision not considered in the context of that case (the Commissioner found the complaint well-founded on the basis of section 41 in that case), it is sufficient for our purposes to note that the Federal Court of Appeal rejected "the interpretation of Part VII [section 41] [that] essentially renders it meaningless" (*Canada (Employment and Social Development)* at para 145). That said, the *dictum* has little bearing on how subsection 43(1) is to be interpreted.

[91] Section 41 is clearly wider in scope than this Court anticipated, in that subsection 41(2) may require positive measures in the context of a federal-provincial agreement that fails to fulfill

its language obligations to an official language minority community. This issue could perhaps have been considered if the applicant had not discontinued his application for remedy under section 77. However, the application for judicial review is significantly narrower, and the investigation is taken as it was concluded on February 21, 2019. Instead, the Court must determine whether the Commissioner's investigation was unreasonably short, even though the Commissioner explicitly stated that he had considered the duties created by section 43 of the Act.

[92] The only attempt to demonstrate unreasonableness is found in two paragraphs of the memorandum of fact and law (paras 75, 76). It is argued (at para 76) that the Commissioner failed to deal separately with section 43 even though this was a key issue. Paragraph 75 has already been reproduced at paragraph 41 of these reasons. The applicant also argues that the decision did not meaningfully address the arguments raised, which shows a lack of attention and sensitivity.

[93] For the argument to be accepted by the Court, the applicant must show that that is a sufficiently serious shortcoming such that the decision does not exhibit the requisite degree of justification, transparency and intelligibility. Is there a failure of rationality internal to the reasoning process? Is this an untenable decision in light of the relevant factual and legal constraints? Here, the administrative decision maker has clearly stated that his investigation included section 43 of the Act.

[94] What does the applicant provide regarding unreasonableness? The separate treatment of section 43 was a key issue he raised in his complaint and in his November 23, 2018, response to

the preliminary report. As the two provisions, sections 41 and 43, are [TRANSLATION] “separate” and do not have the same purpose, this would be a serious shortcoming.

[95] It should of course be noted that the applicant’s complaint did not refer to section 43. The complaint, reproduced in full at paragraph 8 of these reasons, makes no mention of it. Moreover, the available evidence suggests that the investigation included a section 43 component. In addition, the applicant never stated why it was necessary to have what was, in his opinion, a fuller investigation.

[96] His submissions to the Commissioner merely stated that the section 43 obligations would be more onerous than the subsection 41(2) obligations to ensure that positive measures were taken to implement the formal commitment in subsection 41(1). He claimed, without demonstrating it, that advancing the equality of status and use is a [TRANSLATION] “different objective” from the formal undertaking and that subsection 43 is wider in scope than the formal undertaking because certain paragraphs of subsection 43(1) refer specifically to other levels of government and to corporate entities, as if this were exclusive to Canadian Heritage, even though the preamble to the Act commits the Government of Canada to cooperating with provincial governments and to encouraging the business community, labour organizations and voluntary organizations to foster the recognition and use of both official languages. According to the applicant’s reading of sections 41 and 43, this would mean that the obligations arising from the government’s formal commitment would be less than those specifically stated for Canadian Heritage. As stated earlier, this would be surprising because Parliament has established a broad formal commitment that flows directly from the preamble to the Act and that creates firm

obligations for federal institutions. To create a distinction between sections 41 and 43, the applicant would diminish the obligations imposed on federal institutions under subsection 41(2).

[97] In my view, when the Commissioner conducts an investigation under Part VII, he must take into account all the provisions of that part. He states that he has done so in this case.

[98] In support of his argument that the decision is unreasonable, the applicant relies on only two paragraphs of *Vavilov*, namely, the two subsections (127 and 128) under the heading "Submissions of the Parties". This section of the Supreme Court judgment discusses factors to consider in determining whether a decision is justified in relation to the relevant legal and factual constraints. The Court identifies certain legal and factual considerations that constrain the exercise of powers. The Court identifies seven, and its list is not exhaustive:

- Governing statutory scheme.
- Other statutory or common law.
- Principles of statutory interpretation.
- Evidence before the decision maker.
- Submissions of the parties.
- Past practices and decisions.
- Impact of the decision on the individual to whom it applies.

[99] The Supreme Court, in its explanation of the relevance of these elements, states that "[t]hey are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached" (*Vavilov* at para 106). Of the seven

elements that can be considered in determining whether there is a loss of confidence that leads to the conclusion that the decision is unreasonable, the applicant relies on only one, the fifth.

[100] By skilfully combining passages from paragraph 75 of the factum and paragraph 128 of *Vavilov*, the applicant seeks to create obligations that decisively establish the reasonableness of a decision. It seems to me that the passages chosen need to be put into context.

[101] Justification and transparency require that a decision maker meaningfully account for the central issues and concerns raised. As we have seen, Mr. Choquette did not raise the difference between sections 41 and 43 of the Act in his original complaint, but he did mention it to the Commissioner in his comments on the preliminary report, which concluded that his complaint was unfounded. He stated that the Commissioner had not dealt with section 43. The Commissioner responded directly to this criticism by explicitly stating in the Report that paragraph 43(1)(f) of the Act formed part of the legal framework for his investigation and that he had taken it into account. To me, it does not seem possible to claim that the Commissioner did not hear the applicant's concerns and arguments when the Commissioner responded to them directly and explicitly: section 43 was not omitted.

[102] The applicant argues at paragraph 75 of his memorandum that *Vavilov* held [TRANSLATION] "that a decision is unreasonable where a decision maker '[fails] to meaningfully grapple with key issues or central arguments raised by the parties' that may demonstrate that the decision maker was 'actually alert and sensitive to the matter before it'". I have underlined the passages taken from paragraph 128 of *Vavilov*.

[103] However, it seems to me that the applicant is seeking to set the bar very high if we do not consider the context in which the two passages are quoted and if we link the passages with the words [TRANSLATION] "that may demonstrate that the decision maker was". The two passages of paragraph 128 are actually linked in the text by the words "may call into question whether the decision maker was". The two are not the same. Failing to meaningfully grapple with key issues does not demonstrate a lack of attention and sensitivity to the matter at hand, but it does call into question whether this was in fact done. The reviewing court raises questions because it could then "lose confidence in the outcome reached" (*Vavilov* at para 106). Here, there is no doubt that that was done by the Commissioner. The application of paragraph 43(1)(f) was part of his investigation. Having received the applicant's comment that section 43 had been omitted from his investigation, the Commissioner responded directly in his final report that the section had not been omitted.

[104] The applicant stated in his factum (at para 73) that [TRANSLATION] "it is therefore wrong to conclude that 'the investigation already took into account section 43 of Part VII', as stated by OCOL in the final investigation report". In my opinion, such a serious allegation requires more than the applicant has been able to demonstrate.

[105] The applicant also places an essential obligation on the decision maker to draft "reasons with care and attention to '<u>assure the parties that their concerns have been heard</u>' and to '<u>alert the decision maker to inadvertent gaps and other flaws in its reasoning</u>'". Again, the underlined passages are taken directly from paragraph 128 of *Vavilov*. But the connotation they are intended to have does not seem consistent with the words of the Supreme Court when the passages are

read in context. With respect, that is not how I read it. The Court is not so much imposing an essential obligation as reminding us of the discipline of the written word by referring to paragraph 39 of *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817. The Supreme Court encourages administrative decision-makers to "[draft] reasons with care and attention" because this can alert them to gaps and errors and will assure parties that the question has been heard. This is a good practice. Flawed reasons can obviously cause a loss of confidence in the decision. The goal must therefore be to prepare reasons with care and attention.

[106] The context in which paragraph 128 of *Vavilov* is presented is also important. The Supreme Court stated that the reviewing court cannot expect decision makers to "respond to every argument or line of possible analysis" (citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 at para 25). That would have a paralyzing effect. This is the context in which the passages cited by the applicant are found.

[107] There is no doubt that the culture of justification is part of our law (*Vavilov* at paras 2, 14). At the same time, justification is interpreted on the basis of the record and taking into account the administrative context (*Vavilov* at paras 91, 92). I reproduce the following two paragraphs.

> [91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be

> divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
>
> [92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

The applicant alleged in his November 23 letter that the investigation had not dealt with the allegedly more binding obligations of section 43. In my view, to demonstrate that the decision was unreasonable, it would have been necessary to show a lack of response from the Commissioner or establish a serious deficiency. Was there a response?

[108] Here again, one seems to have been given in the final report. The Commissioner is explicit: His investigation took into account section 43, and this did not change his conclusion that the complaint, which referred only to Part VII, was unfounded. In the absence of more specific comments on what subsection 43(1) could add, the Court finds that an adequate response to the applicant's comment was given. The Commissioner responded to the concern raised.

[109] In my opinion, the response to the applicant's general comment regarding the preliminary report, which did not mention section 43, is proportional to the comment made. No indication was given as to how the investigation under section 43 should have, or could have, led to a different outcome. On the contrary, the Commissioner explicitly stated that section 43, and particularly paragraph 43(1)(f), was part of the investigation and that the outcome of the

investigation is the same. Merely claiming that section 43 is different from section 41 did not bring grist to the mill. This is clearly not the Commissioner's reading of it, and this reading seems to me to be entirely reasonable when one considers the text in context, considering the structure of Part VII at the time and the legislative intent reflected in the preamble to the Act and section 2. The whole of government is involved, not only Canadian Heritage. That is the purpose of the Act. A more detailed allegation might perhaps have required a more detailed response. However, in the absence of better details, the statement that the investigation included section 43 was sufficient. Indeed, one wonders what more the applicant could have expected.

V. Conclusion

[110] On judicial review, the Court does not rule on the merits of the complaint, and therefore on the Commissioner's decision to dismiss it for the reasons he has given regarding the existence of positive measures taken by the Minister of Canadian Heritage to enhance the vitality of official language minority communities and support and assist their development. Rather, the question is whether the claim that section 43 differs from section 41, requiring a separate investigation despite the Commissioner's explicit declaration, could render the Report unreasonable. I do not think so. The Commissioner was explicit and sections 41 and 43 do not justify any doubt about the Commissioner's statement.

[111] I simply note that these are measures taken by Canadian Heritage that are directly supported by the wording of sections 41 and 43. Suffice it to say one last time that paragraph 43(1)(a) states that the Minister of Canadian Heritage shall take measures "to enhance the vitality of the English and French linguistic minority communities in Canada and support and

assist their development". These are the same words that form an important part of the formal commitment. The third element of the formal commitment is also found in subsection 41(1) and the opening words of subsection 43(1). Positive measures to meet the commitment are positive measures whether they are taken under subsection 41(2) or subsection 43(1). The Commissioner investigated and concluded that the positive measures were sufficient to conclude that the complaint was unfounded. This finding on the merits of the complaint is not before this Court on judicial review.

[112] The application for judicial review must therefore be dismissed. It has not been shown that the Commissioner of Official Languages failed to consider section 43 of the *Official Languages Act* in reviewing the applicant's complaint alleging a violation of Part VII (Advancement of English and French), which could have rendered his decision unreasonable. Since the applicant has failed to discharge this burden, the Court can only dismiss the application for judicial review.

[113] No costs.

JUDGMENT in T-496-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No costs.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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