Federal Court Cour fédérale

Date: 20240918

Docket: T-532-20

Citation: 2024 FC 1464

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 18, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

THE ASSOCIATION DES JURISTES D'EXPRESSION FRANÇAISE DU NOUVEAU-BRUNSWICK

Applicant

and

THE DEPARTMENT OF JUSTICE CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Association des juristes d'expression française du Nouveau-Brunswick [Association], the applicant in these proceedings, has applied to this Court for a remedy under section 77 of the *Official Languages Act*, RSC 1985, c 31 (4th supp) [Act]. The Association is

challenging the decision of the Department of Justice Canada [Justice Canada or the Department] dated March 28, 2013, to eliminate the core funding it had been receiving since 2003 [Decision]. The Association is seeking the following remedies:

> (a) A declaration that Justice Canada's decision to eliminate the core funding the Association had been receiving since 2003 [Decision] was contrary to subsections 41(1) and 41(2) of the Act; and
>
> (b) An order for damages payable to the Association for the amount of revenue lost thanks to the cancellation of core funding between April 1, 2014, and April 1, 2018, i.e. $340,000.00 plus pre-judgment interest of 7% per annum.

[2] Before the Court, the Association is arguing that (1) Justice Canada had a duty to consult the Official Language Minority Community [OLMC] of New Brunswick through the Association before making its decision, a duty arising from subsections 41(1) and 41(2) of the Act, as well as from the Federal Court of Appeal decision in *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, 2022 FCA 14 [*FFCB*]; (2) Justice Canada breached its duty to consult; (3) the elimination of core funding had a negative impact on the vitality and development of the New Brunswick OLMC; (4) Justice Canada failed to mitigate these negative repercussions; and (5) appropriate and just remedies consist of a declaration by the Court and a payment of damages in the amount of $340,000.00.

[3] Justice Canada has replied that (1) subsection 41(1) of the Act does not create a duty; (2) the duty to take positive measures under subsection 41(2) of the Act confers discretion as to the choice of measures since (a) the "ratchet" principle has been rejected and (b) the duty does not include the duty to consult; (3) Justice Canada has complied with the duty set out in

subsection 41(2) of the Act; and (4) the remedy sought, an award of damages, is not appropriate and just in the circumstances.

[4] In this case, the Court must consider whether the Association's complaint is well-founded (*FFCB* at para 169 citing *DesRochers v Canada (Industry)*, 2009 SCC 8 at para 35 [*DesRochers SCC*]; *Canadian Food Inspection Agency v Forum des Maires de la Péninsule Acadienne*, 2004 FCA 263 at paras 17, 20 [*Forum des Maires*]). The Association bears the burden of demonstrating that its complaint is well-founded.

[5] For the reasons set out below, the Court will dismiss the Association's application for a remedy since it has not demonstrated that its complaint is well-founded. The Court concludes that (1) the Association has not demonstrated that Justice Canada had a duty to consult of the nature it pleaded; (2) Justice Canada has demonstrated that it listened and was attentive to the needs of the New Brunswick OLMC and the Association; (3) the evidence shows that the new measures were taken to enhance the vitality of the OLMC; (4) the evidence submitted by the Association does not demonstrate that the Decision had a negative impact on the vitality and development of the New Brunswick OLMC or on the Association; and (5) the evidence demonstrates that Justice Canada nonetheless took steps to mitigate any possible repercussions.

II. Context

[6] In 2003, Justice Canada adopted the Action Plan for Official Languages [2003 Action Plan]. One of the objectives of this action plan is to ensure stable funding for associations of French-speaking jurists [AJEFs]. That same year, 2003, Justice Canada created the Access to

Justice in Both Official Languages Support Fund [Support Fund] so that it could implement the commitments announced in the 2003 Action Plan. The Support Fund is re-evaluated every five years in accordance with Treasury Board requirements, and on the basis of government priorities and the needs expressed by OLMCs. As part of the Support Fund, Justice Canada set up a core funding system for AJEFs.

[7] From 2004 to 2014, the Association received annual core funding under this Support Fund in amounts ranging from $70,000.00 to $85,000.00. The granting of this core funding was subject to a number of conditions regarding the use of the funds, including the obligation to submit a budget and to use the funds in accordance with the contribution agreement signed between the parties. The contribution agreement also provided for limits on the reallocation of funds between different expenditure categories by the Association. The Association nevertheless had sufficient flexibility to use the money as it saw fit to, for example, fund the hiring of an executive manager or other employees.

[8] On March 28, 2013, Justice Canada announced the adoption of a new departmental strategy amending the 2003 Action Plan. Under this new strategy, new priorities were established around the need to provide legal information directly to the community and to train justice system stakeholders. The new strategy focused on two priorities: information and training. However, it also relied in part on core funding shifting to project-based funding. From then on, Justice Canada would only fund activities that fell within the scope of the new strategy.

[9] On December 1, 2014, the Association filed a complaint with the Office of the Commissioner of Official Languages of Canada [the Commissioner].

[10] In its complaint, the Association pointed out that its core funding had been eliminated for the last budget year and that this core funding enabled the Association to respond to the specific needs of French-speaking jurists and the Francophone population of New Brunswick. The Association cited subsections 41(1) and 41(2) of the Act and emphasized that the federal government had a duty to be proactive as well as a positive, constitutional and legislative duty to ensure the vitality of New Brunswick's Francophone community.

[11] The Association also alleged that Justice Canada's decision jeopardized the Association's survival. The Association pointed out that it was essential to the vitality, survival and maintenance of the acquired rights of New Brunswick Francophones, and that there were budget envelopes for the vitality of Francophone communities.

[12] On October 18, 2016, the Commissioner issued his final investigation report.

[13] The Commissioner began by describing the allegations in the Association's complaint, as follows:

> [TRANSLATION]
>
> [T]he decision by the Department of Justice Canada (Justice Canada) to eliminate core funding for the Association des juristes d'expression française du Nouveau-Brunswick (AJEFNB), provided under the Access to Justice in Both Official Languages Support Fund, has a negative impact on the vitality and development of the province's Francophone communities and is a breach of Part VII of the *Official Languages Act* (the *Act*).

[14] In terms of the questions analyzed and the methodology followed, the Commissioner stated that his investigation aimed to determine whether Justice Canada had taken into account

its obligations under Part VII of the Act when it decided to eliminate the Association's core funding. More specifically, the Commissioner analyzed the following two questions:

1) In its decision-making process, did Justice Canada consider the realities and needs of OLMCs, in this case, those of the New Brunswick Francophone community, with regard to access to justice in the minority language?

2) Did Justice Canada take into account the impact of the planned change in the funding program on the vitality of the New Brunswick Francophone community and, if so, did the Department take measures to mitigate this impact?

[15] In his analysis, the Commissioner highlighted the context of the process that led to the decision to review the funding formula for AJEFs. He noted that, in order to comply with Part VII of the Act, Justice Canada had to (1) assess the impact of the proposed changes on the vitality of the various OLMCs, taking into account their specific needs in terms of access to justice in the minority language; and (2) to mitigate any negative repercussions arising from these changes.

[16] Next, the Commissioner noted that Part VII of the Act does not oblige Justice Canada to always maintain the same funding programs, pursue the same directions or objectives, or maintain the same funding terms. He pointed out, however, that while the Support Fund was undoubtedly a positive measure in itself, the core funding provided to AJEFs was an important component of this support program.

[17] Thus, according to the Commissioner, it was not enough to inform AJEFs of the possibility that core funding might be abolished: Justice Canada had to take appropriate

measures to assess the repercussions of this possibility and to mitigate any negative repercussions.

[18] The Commissioner concluded that the investigation revealed that Justice Canada's changes to the core funding were made without analyzing the OLMCs' needs, assessing the possible negative repercussions of such a decision on the development and vitality of these communities, and taking measures to mitigate any negative repercussions.

[19] The Commissioner added that, although aware of its obligations under Part VII of the Act, Justice Canada chose to assess only the impact of the new direction of the Support Fund and to inform the AJEFs of the Decision. More specifically, the Commissioner noted that Justice Canada had not demonstrated that it had made a point of finding out the communities' real needs in terms of support for access to justice and the effects of the proposed changes to the method of funding an association that contributes to the vitality of Francophone communities, including that of New Brunswick, of which access to justice is an important component. The Commissioner believed that, in so doing, Justice Canada had contravened its obligations under Part VII of the Act, and he concluded that the Association's complaint was well-founded. He therefore recommended that Justice Canada:

1) analyze the needs of OLMCs with respect to supporting access to justice;

2) evaluate the impact on OLMCs of the planned changes to the Support Fund's objectives, taking into account their specific needs and their priorities in terms of access to justice in the language of the minority; and

3) evaluate the impact of eliminating AJEF core funding on the OLMC in each province that has an AJEF and take

> appropriate measures if the evaluation determines that the needs of the OLMCs are not being met.

[20] In February 2020, the Commissioner submitted his report on the follow-up to the recommendations and confirmed that the first two recommendations of his 2016 report had been implemented, while the third had been partially implemented.

[21] In April 2020, the Association applied for this remedy.

III. Issues

[22] The Association has asked the Court to decide the following questions:

1) Under Part VII of the Act, do federal institutions have a duty to consult OLMCs before making a decision that could potentially have a negative impact on their vitality and development?

2) If so, did Justice Canada breach this duty here?

3) Was Justice Canada's decision to eliminate core funding for AJEFs in accordance with the directives of the Access to Justice in Both Official Languages Support Fund: Strategy 2013–2018 susceptible of having a negative impact on New Brunswick's OLMC?

4) If so, did Justice Canada fail to take steps to mitigate those negative repercussions, such that its decision to eliminate core funding constituted a breach of its obligations under Part VII of the OLA?

5) What remedies are appropriate and just in the circumstances?

[23] In accordance with the teachings of the Federal Court of Appeal in *FFCB*, and given the wording of the complaint filed by the Association, the Court must answer the following questions:

1) Regarding the first element of the *FFCB* test, did Justice Canada have a duty to consult of the nature proposed by the Association? If so, did it fail to fulfill this duty?

2) Regarding the second element of the *FFCB* test, has the Association demonstrated that the Decision was susceptible of having a negative impact on the New Brunswick OLMC? If so, did Justice Canada act, to the extent possible, to counter or mitigate these negative repercussions?

3) If so, what remedies are appropriate and just in the circumstances?

IV. Analysis

A. *Legislative framework*

[24] At issue here are subsections 41(1), (2) and (3) of the Act. The Association has filed the text of these sections as they read at the time:

PART VII **ADVANCEMENT OF ENGLISH AND FRENCH**	**PARTIE VII** **PROMOTION DU FRANÇAIS ET DE L'ANGLAIS**
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 promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
(b) fostering the full recognition and use of both English and French in Canadian society.

Duty of federal institutions

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.

Regulations

(3) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Conflict of Interest and Ethics Commissioner, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

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.

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 et le bureau du commissaire aux conflits d'intérêts et à l'éthique, fixer les modalités d'exécution des obligations que la présente partie leur impose.

[25] At the time of this case, the Governor in Council had not made any regulations prescribing the manner in which any duties of federal institutions under Part VII of the Act were to be carried out.

[26] Subsections 77(1) and (4) of the Act provide as follows:

PART X	**PARTIE X**
Application for remedy	**Recours judiciaire**
77 (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.	**77 (1)** Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.
Order of Court	**Ordonnance**
(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.	**(4)** Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

B. *Interpretation of language rights under Part VII of the Act according to* FFCB

[27] *FFCB* was the first time that the Federal Court of Appeal was called upon to rule on the interpretation to be given to Part VII of the Act, which contains section 41. In paragraphs 125 and 126, the Federal Court of Appeal explained 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, the role of the Court being to determine the meaning to be given to this commitment and to the obligation to take positive measures to deliver on it.

[28] The Federal Court of Appeal also explained that the provisions of Part VII must be read "in their entire context and in their grammatical and ordinary sense of the words, harmoniously with the scheme of the OLA, its object and the intention of Parliament" (*FFCB* at para 111, 126).

[29] Still according to the Federal Court of Appeal, subsections 41(1) and (2) set out the obligation created by Part VII; they faithfully echo the quasi-constitutional purpose set out in paragraph 2(b) of the Act, namely, to support the development of English and French linguistic minority communities and advance the equality of the two languages (*FFCB* at para 130).

[30] In paragraphs 139 to 144 of its decision, the Federal Court of Appeal interprets the wording of the provisions of Part VII of the Act. It notes the wording of subsections 41(1) and (2) of the Act, and, at paragraph 139, stresses in particular the obligation of federal institutions to take positive measures:

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

[31] The Federal Court of Appeal points out that the reference to "'measures' (*des* *mesures* in the French text)" [emphasis in original] allows federal institutions to choose which measures to take, but the obligation to take measures is not thereby diminished. It also notes that the use of the word "ensure" implies an obligation that is ongoing. The obligation to take positive measures applies so long as a federal institution can act toward achieving the intended purpose.

[32] In paragraph 144 of its decision, the Federal Court of Appeal points out that subsection 41(3) of the Act "allows the Governor in Council to make regulations 'prescribing the manner in which any duties of [federal] institutions under [Part VII] are to be carried out'", and notes that "[t]he wording contemplates the making of regulations to guide the implementation of the obligation set out in Part VII, if the executive considers it useful to do so". The Federal Court of Appeal states that it is clear that the obligation to take positive measures arises under subsection 41(2) of the Act and exists independently of the adoption of a regulation. The Federal Court of Appeal reiterates this in paragraph 47 of *FFCB*, emphasizing that "the obligation to take positive measures is derived from the [Act] itself, and it is the manner in which this obligation is to be carried out that the Governor in Council 'may' prescribe by regulation".

[33] The Federal Court of Appeal holds that the obligation to enhance the vitality of official language minorities must be fulfilled through concrete actions, recognizable on the basis of the intended purpose, without the need for further specification by way of a regulation.

[34] Finally, in paragraph 163 of *FFCB*, the Federal Court of Appeal teaches us that the Part VII obligation lends itself to the following two-step analysis:

> 1) Federal institutions must first be sensitive to the particular circumstances of the country's various official language minority communities and determine the impact that the decisions and initiatives that they are called upon to take may have on those communities.
>
> 2) Second, federal institutions must, when implementing their decisions and initiatives, act, to the extent possible, to enhance the vitality of these communities; or where these decisions and initiatives are susceptible of having a negative

> impact, act, to the extent possible, to counter or mitigate these negative repercussions.

[35] It thus appears that the second element of the test established in *FFCB* aims to determine whether federal institutions have acted, to the extent possible, in such a way as to:

> (a) enhance the vitality of official language minorities in the implementation of their decisions and initiatives; or
>
> (b) counter or mitigate the negative repercussions of their decisions and initiatives where these are susceptible of having a negative impact.

C. *Evidence before the Court*

[36] In support of its application for a remedy under section 77 of the Act, the Association filed two affidavits with the Court. The first is from Philippe Morin, sworn on September 2, 2022. Mr. Morin was an employee of the Association, first as project officer from July 2016 to March 2019 and then as executive manager from April 2019 to April 2021. Mr. Morin testified about the Association's history and mission, the effects of the introduction and elimination of core funding, and the complaint to the Commissioner. He introduced 44 exhibits into evidence.

[37] The Association's second affidavit is that of Professor Stéphanie Chouinard, expert witness, sworn on August 31, 2022 in which she answered, among others, the following questions:

> 1) What factors contribute to a language's sociolinguistic vitality?

2) How important is public funding in maintaining a civil society capable of meeting the sociolinguistic needs of French-speaking minorities in Canada?

3) More specifically, what is the effect of public funding on the autonomy of French-language minority institutions in Canada?

[38] Professor Chouinard is a political scientist by training. She specializes in language rights and policies, institutional completeness, and the autonomy of official-language minority communities in Canada.

[39] Justice Canada filed the affidavit of Mathieu Langlois, sworn on December 9, 2022. Mr. Langlois has been an employee of Justice Canada since June 2001, and has been with the Official Languages team since September 2009. Mr. Langlois discussed the history of the funding program since its inception in 1981, and the core funding of AJEFs since 2003. He also talked about the program's changing objectives over time, the context leading up to the granting of core funding to AJEFs in 2003 and the shifting of this core funding to project-based funding in 2013, and the context leading up to the reinstatement of core funding in 2018. He introduced 40 exhibits into evidence.

[40] All three witnesses were cross-examined, and the transcripts of these cross-examinations are before the Court.

[41] The Commissioner's report is useful as evidence. However, it must be borne in mind that the goal of the application under section 77 of the Act is to verify the merits of the complaint,

not the merits of the Commissioner's report (*FFCB* at para 169 citing *DesRochers SCC* at paras 36, 64; *Forum des Maires* at paras 17, 20).

[42] The Commissioner's conclusions are not binding on the Court hearing the matter de novo: they may be supplemented or contradicted by any other evidence (*DesRochers SCC* at para 36; *Forum des Maires* at para 21).

D. *Test in* FFCB

(1) Regarding the first element of the FFCB test, did Justice Canada have a duty to consult of the nature proposed by the Association? If so, did it fail to fulfill this duty?

[43] In connection with the first of the two elements of the test established by the Federal Court of Appeal in paragraph 163 of its decision in *FFCB*, the Association submits an argument that it describes as procedural. The Association maintains that the obligation to be sensitive to the particular circumstances of OLMCs and to take their interests into account can only be met by consulting OLMC representatives.

[44] The Association maintains that this duty to consult is rooted in the *FFCB* decision, in the legislative debates that preceded the version of section 41 of the Act as amended in 2005, in the *Guide for Federal Institutions: Official Languages Act. Part VII, Promotion of English and French*, 2007 [Guide for Federal Institutions on Part VII] and in the parallel it draws with the case law on sections 20 and 23 of the *Canadian Charter of Rights and Freedoms* (*Mahe v Alberta*, [1990] 1 SCR 342 at pp 362, 372; *DesRochers SCC* at para 53).

[45] The Association argues that in its case, and despite the fact that no regulations have been made by the Governor in Council (the executive) under subsection 41(3) of the Act, it would be appropriate for the Court to go a step further than the Federal Court of Appeal in *FFCB* and decide that Justice Canada should have consulted the Association.

[46] While acknowledging that this duty has yet to be considered by the courts, the Association maintains that the duty to consult arises from section 41 of the Act. The Association also states that this duty has clear parallels with the duty to consult Indigenous peoples under section 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act (UK)*, 1982, c 11 [*Constitution Act, 1982*], which is triggered when the government is about to make a decision that may adversely affect the interests of an Indigenous group that are the subject of a recognized or claimed Aboriginal title or treaty right *(Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 35 [*Haida Nation*]).

[47] Drawing on the duty to consult Indigenous peoples, the Association argues that the duty to consult under section 41 of the Act includes, at a minimum, the following elements at the "minor" end of the spectrum: (1) the duty to give the affected OLMC notice of the proposed decision; (2) the duty to disclose information to the OLMC; and (3) the duty to discuss with the OLMC any issues raised by it in response to the notice (*Haida Nation* at para 43).

[48] The Association maintains that, in its case, this consultation can justifiably be regarded as a prescribed manner in which a duty of the institution is to be carried out, despite the absence of a regulation made in accordance with subsection 41(3) of the Act. In fact, at the hearing, the

Association argued that the Court has the power to substitute itself for the Governor in Council and prescribe the manner in which measures are to be carried out, even in the absence of a regulation to that effect, but only in relation to the facts of this case.

[49] More specifically in relation to the facts of this case, the Association maintains that it has represented the Acadian and Francophone community of New Brunswick on this issue since at least 2003 and that Justice Canada was therefore obliged to consult the Association before making its decision.

[50] The Association specifies that consultations should have been held directly with the Association and specifically address New Brunswick's needs. In its view, consultation with a pan-Canadian organization such as the Fédération des associations de juristes d'expression française de common law [FAJEF] on the general needs of the Francophone minority does not meet this requirement. The Association adds that Justice Canada did not notify it that it was going to eliminate core funding; that, in order to be valid, a notice must clearly communicate the content of a proposed decision; and that the Association's evidence shows that it never received any communication from Justice Canada stating that it was proposing to eliminate core funding. Finally, the Association maintains that the burden of proving that consultations were held therefore lies with Justice Canada and that this proof has not been made, since the Association was not consulted in the required manner about the elimination of core funding.

[51] Justice Canada replies that the obligation to take positive measures under subsection 41(2) of the Act does not create obligations, that it is exclusively up to the

institutions to choose the positive measures they wish to take and that this choice is within their discretion (*FFCB* at para 140). Justice Canada adds that this subsection does not specifically include a duty to consult.

[52] Justice Canada maintains that it is up to federal institutions to determine the appropriate approach on the basis of the particular circumstances of each case. In particular, Justice Canada points out that the Association's position amounts to a ratchet, whereas the ratchet principle has been rejected (*Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA) at paras 90–95).

[53] Justice Canada responds that the duty to consult in Indigenous matters cannot be transposed to this case. It points out that this duty derives from the principle of the honour of the Crown and the rights guaranteed by subsection 35(1) of the *Constitution Act, 1982* (*Haida Nation* at para 25). Thus, according to Justice Canada, unlike the duty to consult in Indigenous matters, which is a constitutional requirement that cannot be removed or limited by the Act (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 63), the duty to take positive measures towards linguistic minorities arises from the Act, which prescribes the manner in which it is to be carried out. Justice Canada adds that, in the absence of a specific duty to consult in the Act, the manner in which federal institutions fulfill their obligations remains at their discretion.

[54] Finally, Justice Canada replies that the Court cannot substitute itself for the Governor in Council to determine, in the absence of regulations, the manner in which its obligation should be carried out.

[55] The Court agrees with Justice Canada's position that the Court cannot substitute itself for the Governor in Council in establishing, in the absence of regulations, the manner in which its obligation should be carried out. The Act, as it read at the time of the facts, clearly provided that the role of prescribing the manner in which any duties of federal institutions are to be carried out fell to the Governor in Council. The separation of powers is a constitutional principle at the heart of our democratic system, and it is not for the Court to overstep its role in enforcing the Act, much less make law, as suggested by the Association (*New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at p 389). The jurisprudence relating to sections 20 and 23 of the Charter, cited by the Association, does not seem useful in this case.

[56] Furthermore, contrary to what the Association states in paragraph 52 of its memorandum, the Court saw no mention in the Commissioner's report confirming that [TRANSLATION] "the Department had not complied with its duty to consult under section 41 of the Act".

[57] As mentioned above, the Commissioner concluded that Justice Canada had a duty to assess the repercussions of the proposed changes on the vitality of the various OLMCs, taking into account their specific needs in terms of access to justice in the minority language, and, in the event of negative repercussions, take measures to mitigate them. More specifically, the

Commissioner concluded that Justice Canada had not demonstrated that it had made a point of finding out the communities' real needs in terms of support for access to justice and the effects of the proposed changes to the method of funding an association that contributes to the vitality of Francophone communities, including the Francophone community in New Brunswick, of which access to justice is an important component.

[58] In the Commissioner's report, the Court does not see any implicit or explicit conclusions to the effect that Justice Canada had a duty to consult OLMCs or the Association in the manner described by the Association before making its decision. In any event, as mentioned previously, the Court is not bound by the Commissioner's conclusions, and the evidence on the record does not persuade the Court that Justice Canada did indeed have a duty to consult the OLMCs under section 41 of the Act.

[59] In fact, the legislative debates that preceded the adoption of the then version of section 41 of the Act, as well as the Guide for Federal Institutions on Part VII, do not reveal that Parliament had intended to impose an obligation to consult each and every stakeholder who might be affected by a measure, but—through the use of the expression "as required"—show rather that this is a possible, but optional, approach.

[60] Thus, as the Federal Court of Appeal pointed out in *FFCB*, the only duty arising from Part VII is that of taking positive measures. The duty to consult suggested by the Association is a manner in which the duty of taking positive measures can be carried out. However, under subsection 41(3) of the Act, the manner in which that duty is to be carried out can only be

prescribed by the Governor in Council (*FFCB* at para 147), and nothing suggests that the Court can substitute itself for the Governor in Council if the latter fails to make regulations to this effect.

[61] Moreover, subsection 43(2) of the Act as it was in force at the time of the facts expressly provided that the Minister of Canadian Heritage was to take measures 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", which was not provided for in section 41. As pointed out by Justice Canada, this tends to demonstrate that, when Parliament wishes to deal with consultation in the Act, it does so expressly.

[62] In addition, the Court was not persuaded that, in this case, section 41 of the Act created a duty for Justice Canada—inspired by the duty to consult in Indigenous matters and the content of that duty—to consult the Association, which would include notice and the duty to discuss any questions raised by the OLMC in response to the notice.

[63] I tend to agree with Justice Canada that the duty to consult in Indigenous matters cannot be transposed to the context of the Act. The historical and constitutional foundations of the duty to consult in Indigenous matters are distinct from those of the duty to take positive measures towards linguistic minorities under the Act. The scope of these two obligations is also distinct simply because the manner in which the duty under the Act is to be carried out can be prescribed by regulation, which is not the case for the duty to consult in Indigenous matters.

[64] The Court therefore concludes that the analytical framework established by the Federal Court of Appeal in *FFCB* does not include the formal duty to consult proposed by the Association and does not support the inference that such a duty can be imposed in the absence of regulations to that effect.

[65] The Association did not otherwise argue that Justice Canada was not sensitive to the particular circumstances of the OLMC and did not determine the impact the decisions and initiatives had on the OLMC, as it was required to do under the first element of the *FFCB* test established by the Federal Court of Appeal. Accordingly, the Court cannot, as requested by the Association, conclude that Justice Canada failed to meet this requirement, on the basis that it did not consult the Association.

[66] In addition, the Court notes that the evidence on the record reveals that as early as 2011 Justice Canada informed the AJEFs, including the Association, that the future of core funding was uncertain. This uncertainty was also discussed in March 2012, at a consultation session attended by representatives of the Department, the FAJEF and the various AJEFs, including the Association. And in March 2013, during a teleconference to which all AJEFs and FAJEF were invited, Justice Canada informed stakeholders that core funding would be shifted to project-based funding. Justice Canada then put in place a transition plan to help AJEFs prepare for the new program directions. In this context, Justice Canada met with the Association to discuss the business plan it had submitted as part of this transition plan, and the various options available for possible projects.

[67] Finally, this case is distinct from *FFCB*: here, the Association is arguing that the Court should impose a provision for the manner in which a duty of the institution is to be carried out despite the fact the Act expressly provides that the manner in which a duty is to be carried out may be prescribed by the Governor in Council by regulation, and that no regulations to that effect have yet been enacted. In *FFCB*, the Court was not concerned with recognizing or assessing the manner in which a duty is carried out, but rather with analyzing whether positive measures provided for in the Act had been taken; the fact that no regulations had yet been enacted was therefore not at stake before the Federal Court of Appeal.

[68] In short, the Association has not persuaded the Court that Part VII of the Act contains the duty to consult it is proposing. The Association has not raised any other violations on the part of Justice Canada in relation to the first part of the test set out in *FFCB*. Rather, Justice Canada has demonstrated that it was sensitive to the particular circumstances of the various OLMCs, and that it determined the impact of its Decision on these communities.

> (2) Regarding the second element of the *FFCB* test, has the Association demonstrated that the Decision is susceptible of having a negative impact on the New Brunswick OLMC? If so, did Justice Canada act, to the extent possible, to counter or mitigate these negative repercussions?

[69] In relation to the second element of the two-prong test set out by the Federal Court of Appeal in paragraph 163 of *FFCB*, the Association submits what it calls a substantive argument. The Association maintains that Justice Canada's decision to eliminate core funding had a negative impact on the vitality and development of the New Brunswick OLMC.

[70] The Association adds that the Decision had real negative repercussions, that these negative repercussions were not limited to it as an organization, but that these repercussions hindered the vitality and development of the New Brunswick OLMC by undermining its institutional completeness. The Association adds that Justice Canada has not taken any measures to mitigate the impact of these negative repercussions.

[71] In addition, the Association argues that the elimination of core funding forced it to abandon the activities at the heart of its institutional mandate in favour of only those pre-approved by Justice Canada, resulting in a complete loss of autonomy. The Association notes that it found itself between a rock and a hard place: either it could give up its autonomy to implement pre-approved but more “lucrative” projects, or it could retain a measure of autonomy but be forced to make cuts to its managerial staff and significantly reduce the activities at the heart of its mandate. The Association chose autonomy, even if it meant putting itself on life support, rather than becoming, for all practical purposes, an agent of the state.

[72] The Association is relying on the affidavit of Professor Chouinard to prove the negative repercussions of the Decision on the OLMC, and on that of Mr. Morin to demonstrate the negative repercussions on its own operations.

[73] Mr. Morin, testifying on behalf of the Association, stated that to survive financially after the core funding was eliminated, the Association had to fire its executive manager and abolish the position entirely. He added that the loss of the executive manager resulted in the loss of the Association’s corporate memory and the reduction of its activities to the simple administrative

tasks required to keep it alive and carry out the projects accepted and funded by Justice Canada. According to Mr. Morin, in concrete terms, the elimination of core funding meant that the Association was no longer able to carry out the activities essential to its primary mandate.

[74] Relying on Mr. Morin's testimony, the Association points out that, assuming the Association had maintained its executive management by accepting funding for a community justice center, as permitted by Justice Canada, this executive management would not have been able to carry out the activities essential to its primary mandate, as these were not approved by Justice Canada. The Association adds that managing a community justice center would have monopolized most of its resources anyway and would also have duplicated services that were already available in New Brunswick. For these reasons, the Association's members decided not to create a community justice center and therefore not to benefit from this source of funding offered by Justice Canada. As a result, the Association says, it survived on life support for the four fiscal years from 2014–2015 to 2017–2018, until Justice Canada restored core funding in 2019.

[75] The Association submits that, given the negative repercussions of the Decision, the burden is on Justice Canada to demonstrate that it acted "to the extent possible, to counter or mitigate these negative repercussions". The Association argues that Justice Canada's evidence does not demonstrate that any mitigation measures were taken, other than the granting of transitional funding to enable AJEFs to develop a business plan taking into account the needs of the communities served by them and Justice Canada's access to justice priorities, namely the Information and Training pillars.

[76] Justice Canada replies that the Association has not demonstrated that the Decision had a negative impact on the New Brunswick OLMC or the Association. Justice Canada notes that Mr. Morin's affidavit constitutes the only evidence to demonstrate such a negative impact, but points out that Mr. Morin was not an employee of the Association at the time of the Decision, that his affidavit contains only general and unsupported claims as to the alleged impacts, and that his cross-examination demonstrates that the Court must approach his testimony with caution.

[77] The concerns set out in paragraphs 80 to 84 of Justice Canada's memorandum regarding Mr. Morin's cross-examination have been established and affect the reliability of his testimony regarding the impact of the Decision. The Court notes that on cross-examination, Mr. Morin acknowledged that he had not been involved in the discussions with Justice Canada representatives on issues related to the funding granted to the Association between 2003 and 2019. He also acknowledged that he had not attended the various meetings organized by Justice Canada in 2012 and 2014. The Court will therefore give little weight to his affidavit, which seeks to demonstrate the impact of the Decision on the Association's operations.

[78] The Court notes, however, that Mr. Morin's cross-examination reveals that he did not make quantitative comparisons of the tasks performed before and after the Decision was made prior to signing his affidavit. For example, on cross-examination, counsel for Justice Canada asked Mr. Morin whether, prior to signing his affidavit, he had searched the Association's files for the number of memorandums written prior to 2013 and the number of memorandums written between 2013 and 2018. Mr. Morin replied that it was more a general statement to the

effect that the number of memorandums in various files had decreased. Later, counsel for Justice Canada asked how the diligent monitoring of the simultaneous publication of bilingual judgments in New Brunswick had been affected after the Decision, and Mr. Morin replied that he had not verified how this monitoring had been affected. It therefore appears that there is insufficient evidence of the impact of the Decision on the tasks the Association was able to perform.

[79] Furthermore, Justice Canada notes that the cross-examination of Professor Chouinard reveals that she did not analyze the impact of the shift from core funding to project funding, which is the subject of the Decision, on either the Association's activities or those of the New Brunswick OLMC itself. Justice Canada adds that, moreover, the opinions Professor Chouinard cited were expressed in a context where the authors were analyzing internal governance within the Acadian Francophone community and the issue of a lack of central coordination in setting priorities among the various sectors of activity within this community. According to Justice Canada, core funding had not been at issue, and no conclusions should be drawn from Professor Chouinard's expertise. Justice Canada states that her testimony must be considered with caution, given the factual matrix of this case, at the heart of which is the elimination of core funding.

[80] In contrast, Mr. Langlois, who has been working with Justice Canada's Official Languages team since September 2009, first testified that, as part of the transition to the project-based funding model, Justice Canada put in place transitional funding for the 2013–

2014 fiscal year equivalent to the core funding received by the organizations affected by core funding being redirected and that the Association had benefited from transitional funding.

[81] In his affidavit, Mr. Langlois stated that he himself had been present at a meeting with a consultant the Association had tasked with assisting it in drawing up its business and programming plan within the transitional funding framework. He added that in the feedback Justice Canada had sent the Association on its business and programming plan, the Department had stated that expenses related to the organization's management activities could be included in project-specific budgets. Mr. Langlois stated that, following this feedback letter, two meetings were organized between Justice Canada and the Association, one of which he attended, to discuss funding and its terms and conditions. Mr. Langlois stated that, at the meeting he attended, the Association was informed that the justice information hubs were not necessarily the only model for delivering legal information services directly to the public.

[82] In his affidavit, Mr. Langlois also stated that it was possible for AJEFs to obtain sufficient funding to maintain their executive management, without setting up such hubs. He referred in particular to the example of the Association des juristes d'expression française de la Colombie-Britannique.

[83] Finally, Mr. Langlois pointed out that New Brunswick's OLMC had been able to benefit from 22 different projects, led by five of the local entities, in addition to the transition funding granted to the Association, amounting to a total of $4,322,549 in approved investments between 2013 and 2018.

[84] On cross-examination, Mr. Langlois reiterated that the opening of a justice information hub was not a condition of project-based funding and that the changes to the Support Fund were intended to offer AJEFs greater flexibility.

[85] Thus, the Court finds that the Association's allegation that the Decision had a negative impact on its operations and on the New Brunswick OLMC is, on a balance of probabilities, not supported by the evidence. The testimonies of Mr. Morin and Professor Chouinard are not conclusive, while that of Mr. Langlois, for Justice Canada, establishes that (1) the repercussions of the Decision are not negative, since, while the Association certainly benefited from slightly less funding overall, it did not lose out on any opportunities because of this reduced funding; (2) the Association obtained slightly more than four times the amount of funding per project between 2014 and 2018 compared with 2008 to 2013; and (3) the evidence that tasks ceased to be performed or were drastically reduced as a result of the loss of core funding is unconvincing.

[86] In other words, and as Justice Canada points out, the Association continued to receive funding from Justice Canada and to deliver direct services to the New Brunswick OLMC in order to ensure its vitality while maintaining its own existence. In fact, the evidence reveals that it was open to the Association to shift its business model in order to obtain funding similar to that preceding the Decision, provided that it could submit funding applications in connection with specific projects for the benefit of the New Brunswick OLMC. This would have enabled the Association to retain its executive management.

[87] In addition, Justice Canada argues that its new direction, in particular the shift from core funding to project funding, was established to foster the vitality of OLMCs. It adds that the new direction was based on studies and information that showed that the conception of access to justice was evolving and becoming more citizen-centered as opposed to the more traditional framework, which was centered on the judiciary and its players; and more particularly, that self-representation had become very common in the justice system.

[88] Accordingly, Justice Canada conducted a series of consultations with academics and government and non-government partners, including the FAJEF and the AJEFs in some consultations, which revealed that OLMCs needed more concrete services and assistance to deal with the legal problems of everyday life. Moreover, according to Justice Canada, these consultations also revealed that the core funding that was initially intended to provide the FAJEF and AJEFs with leverage had a variable effect depending on the region. It is against this backdrop that Justice Canada established the new, more client-focused direction and modified the funding of the Support Fund to ensure that public funds directly benefitted OLMCs.

[89] In my opinion, the evidence on the record leaves no room for doubt that the Department's new direction, in particular the shift from core funding to project-based funding, was established to foster the vitality of OLMCs.

[90] Finally, the Court notes that the facts of this case are distinct from those in *FFCB*. In *FFCB*, the Federal Court of Appeal concluded like the Commissioner that the federal

institutions had not even attempted to assess the impact that the agreement in this case would have on British Columbia's linguistic minority (*FFCB* at para 186).

[91] In this case, and as previously mentioned, the evidence shows that Justice Canada informed the AJEFs as early as 2011 of the possibility that core funding might be modified and held meetings with the AJEFs in 2012 and 2014. Although funding was not explicitly on the agenda at these meetings, Mr. Langlois stated on cross-examination that the subject was discussed at these meetings. This is supported by the evidence. Justice Canada tabled a discussion paper on the funding of AJEFs produced by the FAJEF dated February 15, 2012. In addition, the Association chair's report for 2011–2012, also filed in evidence by Justice Canada, indicates that the Association's position on the issue of its funding, among other things, was presented at a Canada-wide consultation held on May 22, 2012. It therefore appears that Justice Canada at the very least informed the AJEFs of the possibility of the redirection of core funding and that the AJEFs, including the Association, had the opportunity to present their concerns regarding this possibility.

[92] In *FFCB*, the Federal Court of Appeal recognized that British Columbia's Francophone linguistic minority was so fragile that it was on the verge of disappearing and that this justified the termination of the agreement, which did in fact have a negative impact on the minority's vitality (*FFCB* at paras 190, 193). However, in this case, the evidence does not establish that the Decision had negative repercussions, let alone that it weakened the New Brunswick OLMC or the Association. In this regard, the Court would like to mention the conclusion of the final

report on the 2017 evaluation of the Access to Justice in Both Official Languages initiative, which includes the Support Fund, to the effect that:

> Although AJEF representatives noted their opposition to the end of core funding, and spoke of how their associations' activities have shifted as a result, none indicated that the needs of their OLMCs were no longer being met. Interview respondents spoke about the impact of the funding model change on their associations' operations, but not on the OLMCs they serve.
>
> [Emphasis added.]

[93] In this case, the Association has not established that the changes to its activities, in particular the dismissal of its executive management and the reduction of its tasks, were attributable to the Decision.

[94] Considering the above, the Court concludes that the evidence does not establish that the Decision was susceptible of having a negative impact on the New Brunswick OLMC. Even if the Court were to find that the Decision was indeed susceptible of having such an impact, the Court would conclude that the evidence shows that Justice Canada acted to mitigate these negative repercussions by offering transitional and project funding, from which the Association did in fact benefit. The Association's complaint is therefore unfounded.

E. *What remedies are appropriate and just in the circumstances?*

[95] In view of its conclusion regarding the Association's unfounded complaint, the Court need not answer this question.

V. Conclusion

[96] The Association's application is dismissed. The Association has not demonstrated that Part VII of the Act imposes a duty to consult and that Justice Canada failed to fulfill this duty. It has also not shown that the Decision was susceptible of having a negative impact on the New Brunswick OLMC, or that Justice Canada failed to act, to the extent possible, to counter or mitigate these negative repercussions.

[97] In accordance with the parties' submissions, no costs will be awarded.

JUDGMENT in T-532-20

THIS COURT ORDERS as follows:

1. The application of the applicant, the Association, is dismissed.

2. There is no order as to costs.

"Martine St-Louis"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

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