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**Working Paper**

**Submitted in support of the presentation by counsel Érik Labelle  
Eastaugh, PhD**

**Associate Professor and Director of the International Observatory for  
Language Rights, Faculty of Law, Université de Moncton**

**Before the Standing Senate Committee on Official Languages as part of its study of  
Bill C-13, An Act to amend the Official Languages Act, to enact the Use of French  
in Federally Regulated Private Businesses Act and to make related amendments to  
other Acts**

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Bill C-13 contains a number of amendments to Part VII of the *Official Languages Act* (OLA) intended to remedy the deficiencies in the current version. Such amendments were deemed necessary due to, among others, the Federal Court’s decision in *Fédération des francophones de la Colombie-Britannique (FFCB)*.<sup>1</sup> In this case, the Federal Court interpreted section 41 of the OLA, which has the effect of effectively rendering it non-justiciable, and therefore meaningless. Given that the Federal Court’s findings were largely based on the fact that section 41 is expressed in very general (or excessive) terms, C-13 seeks to clarify obligations under Part VII to avoid this type of approach in future.

The approach used in drafting C-13 makes sense, and the proposed version marks an improvement in several areas in relation to the current version. However, it should be noted that the bill was drafted before the Federal Court of Appeal issued its decision in *FFCB*, which profoundly altered the Federal Court’s findings with respect of the interpretation of section 41.<sup>2</sup> Generally, the proposed amendments are consistent with the Federal Court of Appeal’s interpretation. First, C-13 would amend some aspects of the wording of section 41, which paved the way for the Federal Court’s restrictive interpretation.<sup>3</sup> It would also add clarifications that are not in the current version, but which are consistent with the findings in *FFCB*, such as the provision recognizing the existence of an obligation to consult,<sup>4</sup> and the provision imposing the obligation to adopt a Francophone immigration policy.<sup>5</sup>

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<sup>1</sup> *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530.

<sup>2</sup> *Canada (Commissioner of Official Languages) v. Canada (Employment and Social Development)*, 2022 FCA 14.

<sup>3</sup> In French, it would replace the indefinite article “des” before “mesures positives” at subsection 41(2) (which would be subsection 41(5)) with the definite article “les,” which would address one of the textual basis for the Federal Court’s findings. In English, it would add the definite article “the” before “positive measures.”

<sup>4</sup> Bill C-13, An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts, 1st Session, 44th Parliament, 2023, clause 21 (to amend the OLA to add subsection 41(8)).

<sup>5</sup> *Ibid*, Section 23 (to amend the OLA to add section 44.1).

However, some additions are likely to have a mixed or negative impact because the primary objective is to make Part VII more (not less) binding. More specifically, the proposed subsection 41(7) is likely to represent a significant setback.<sup>6</sup>

Subsection 41(7) would add a requirement for federal institutions to “take into account the direct negative impacts that its structuring decisions may have on the commitments under subsections (1) to (3) in order to consider the possibilities for mitigating those negative impacts.” The basic idea itself is laudable, and the addition is consistent with the Federal Court of Appeal’s findings in *FFCB*:

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.<sup>7</sup>

However, the wording of C-13 does not seem to go as far as the *FFCB* judgment. In *FFCB*, the obligation to take into account the negative impacts applies to any decision susceptible of having an impact on the vitality and development of official language minority communities, whereas the proposed paragraph 41(7)(b) would only apply to “structuring” decisions. In addition, C-13 would impose the obligation to “consider” the possibilities for mitigating the negative impacts, while the *FFCB* case provides for an obligation to take mitigating measures “to the extent possible.” If the

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<sup>6</sup> *Ibid*, section 21 (to amend the OLA to add a subsection 41(7)).

<sup>7</sup> *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, supra, Note 2 at para 163.

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amendments are taken literally, they are likely to mark a significant setback compared to the current state of law.

Since the general objective of the amendments appears to be to extend the scope of the obligations based on the commitment under subsection 41(1), one could admittedly claim that they should not be interpreted in a manner that narrows the scope of the obligations recognized in *FFCB*. However, the Department of Justice has systematically submitted restrictive interpretations of Part VII at every phase of its evolution, and there is therefore a good chance that it will do so with this one. The best thing would therefore be to amend the wording of C-13 to address any reasonable doubt in this respect and safeguard the hard-won gains of more than 30 years of effort.

By way of illustration, the wording of the proposed subsection 41(7) (clause 21 of Bill C-13) could be amended as described below. The suggested amendments reflect the terms used by the Federal Court of Appeal in *FFCB* in order to remove any possibility of an interpretation that would be inconsistent with the ruling:

<b>English version</b>	
<p><b>[Proposed version]</b></p> <p><b>Potential to take positive measures and negative impacts</b></p> <p>(7) In carrying out its mandate, every federal institution shall, on the basis of analyses,</p> <p>(a) consider whether positive measures could potentially be taken under subsection (5);</p> <p>(a.1) subject to the regulations, take the necessary measures to promote, when negotiating agreements with the provincial and</p>	<p><b>[Current version]</b></p> <p><b>Duty to study the potential to take positive measures and negative impacts</b></p> <p>(7) On the basis of analyses <u>carried out in accordance with this Part</u>, every federal institution shall, in carrying out its mandate, <u>and in particular when developing and implementing its decisions and initiatives</u>, <del>consider whether</del> <u>inquire as to the potential for taking</u> positive measures <del>could potentially be taken</del> under subsection (5).</p> <p><del>(a.1) subject to the regulations, take the necessary measures to promote, when</del></p>

<p>territorial governments, including funding agreements, that may contribute to the implementation of the commitments under subsections (1) to (3), the inclusion in those agreements of provisions establishing the parties' duties under the agreements respecting official languages; and</p> <p>(b) consider the possibilities for avoiding, or at least mitigating, the direct negative impacts that its structuring decisions may have on the commitments under subsections (1) to (3).</p>	<p><del>negotiating agreements with the provincial and territorial governments, including funding agreements, that may contribute to the implementation of the commitments under subsections (1) to (3), the inclusion in those agreements of provisions establishing the parties' duties under the agreements respecting official languages; and</del></p> <p><del>(b) consider the possibilities for avoiding, or at least mitigating, the direct negative impacts that its structuring decisions may have on the commitments under subsections (1) to (3).</del></p> <p><b>Agreements with the provinces and territories</b></p> <p><u>(7.1) Subject to the regulations, take the necessary measures to promote, when negotiating agreements with the provincial and territorial governments, including funding agreements, that may contribute to the implementation of the commitments under subsections (1) to (3), the inclusion in those agreements of provisions establishing the parties' duties under the agreements respecting official languages; and</u></p> <p><b><u>Negative impacts</u></b></p> <p><u>(7.2) If it concludes that an activity falling within the scope of subsection (7) is susceptible of having a negative impact with respect to the commitments under subsections (1) to (3), every federal institution must act, to the extent possible, to avoid, or, if they cannot be reasonably avoided, to counter or mitigate them these negative repercussions.</u></p>
<p><b>French version</b></p>	
<p><b>Potentiel de prise de mesures positives et impacts négatifs</b></p> <p>(7) Dans la réalisation de leur mandat, les institutions fédérales, sur la base d'analyses, à la fois :</p>	<p><b><u>Obligation d'étudier le potentiel de prise de mesures positives et impacts négatifs</u></b></p> <p>(7) Sur la base d'analyses effectuées conformément à la présente partie, les institutions fédérales, dans la réalisation de leur mandat, notamment dans l'élaboration et la</p>

a) considèrent le potentiel de prise de mesures positives au titre du paragraphe (5);

**a.1)** sous réserve des règlements, prennent les mesures nécessaires pour favoriser, lorsqu'elles négocient avec les gouvernements provinciaux et territoriaux des accords — de financement ou autres — qui peuvent contribuer à la mise en œuvre des engagements énoncés aux paragraphes (1) à (3), l'inclusion dans ces accords de dispositions qui établissent les obligations incombant aux parties en matière de langues officielles dans le cadre de ceux-ci;

**b)** considèrent les possibilités d'éviter ou, à tout le moins, d'atténuer les impacts négatifs directs que leurs décisions structurantes pourraient avoir sur les engagements énoncés aux paragraphes (1) à (3).

mise en œuvre de leurs décisions et initiatives, ~~a) considèrent~~ se renseignent sur le potentiel de prise de mesures positives au titre du paragraphe (5).

~~a.1) sous réserve des règlements, prennent les mesures nécessaires pour favoriser, lorsqu'elles négocient avec les gouvernements provinciaux et territoriaux des accords — de financement ou autres — qui peuvent contribuer à la mise en œuvre des engagements énoncés aux paragraphes (1) à (3), l'inclusion dans ces accords de dispositions qui établissent les obligations incombant aux parties en matière de langues officielles dans le cadre de ceux-ci;~~

~~b) considèrent les possibilités d'éviter ou, à tout le moins, d'atténuer les impacts négatifs directs que leurs décisions structurantes pourraient avoir sur les engagements énoncés aux paragraphes (1) à (3).~~

#### **Ententes avec les provinces et territoires**

(7.1) Sous réserve des règlements, prennent les mesures nécessaires pour favoriser, lorsqu'elles négocient avec les gouvernements provinciaux et territoriaux des accords — de financement ou autres — qui peuvent contribuer à la mise en œuvre des engagements énoncés aux paragraphes (1) à (3), l'inclusion dans ces accords de dispositions qui établissent les obligations incombant aux parties en matière de langues officielles dans le cadre de ceux-ci.

#### **Impacts négatifs**

(7.2) Si elles constatent qu'une activité visée par le paragraphe (7) est susceptible d'avoir un impact négatif par rapport aux engagements énoncés aux paragraphes (1) à (3), les institutions fédérales doivent agir, dans la mesure du possible, afin d'éviter, ou, si elles ne peuvent être raisonnablement évitées, de pallier ou atténuer les répercussions négatives.

The purpose of adding the words “in particular when implementing its decisions and initiatives” to subsection 41(7) is to better align the wording of the basic obligation to take positive measures with the Federal Court of Appeal’s decision in *FFCB*, by stressing that this obligation applies in an ongoing manner in all the mandates of federal institutions.<sup>8</sup> These institutions can therefore not claim that they do not have any obligation in a specific decision on the grounds that they have already taken positive measures in a different context. As the Federal Court of Appeal has already recognized this principle, the proposed addition is not strictly necessary; however, it confirms that that it is the correct interpretation and that Parliament does not intend to step back from it.

Generally, subsection 41(7) has been restructured to make it clearer and more consistent with *FFCB*. In my proposed version, subsection 41(7) would only focus on the obligations of federal institutions to make proactive efforts to inquire as to the potential for taking positive measures. Subsection 41(7.1) would focus on the obligation to include such measures in federal-provincial agreements, and has been attached to the duty to study the potential to take positive measures in the current version (paragraph 41(7)(a.1)). The substance of the obligation has not been amended, but it would be distinguished from the general obligation to inquire as to the potential for taking positive measures in order to explicitly recognize that this is a distinct obligation. Subsection 41(7.2) would apply if a federal institution finds that a decision or initiative that it is preparing to take is likely to have a negative impact on the interests under subsections 41(1) to (3). The proposed provision states that,

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<sup>8</sup> According to the Federal Court of Appeal, subsection 41(2) of the OLA (which is equivalent to the proposed subsection 41(5)), outlines “an obligation that is ongoing. The obligation to take positive measures applies as long as a federal institution can act towards achieving the intended purpose.” *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, 2022 FCA 14 at para 141.

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pursuant to the Federal Court of Appeal's decision in *FFCB*, federal institutions must, to the extent possible, avoid, or counter or mitigate unavoidable negative repercussions.<sup>9</sup> It would therefore have the impact of addressing the apparent gap between C-13 and the current state of law.

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<sup>9</sup> *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development social)*, *supra* Note 2 at para 163.

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