



Objective 2018/2023:

**Modernizing and dividing up the
*Protocol for Agreements for
Minority-Language Education and
Second-Language Instruction*
to enhance the vitality of
Francophone and Acadian communities**

**Fédération nationale des conseils scolaires francophones,
Commission nationale des parents francophones
and
Fédération des communautés francophones et acadiennes du Canada**

September 2016

Table of Contents

Executive summary and recommendations	1
Introduction	3
The FNCSF: national voice of the communities in the area of French first language elementary and secondary education	6
The Protocol must be modernized and divided up in 2018	7
Methodology, organization of the memorandum, and limitations	8
1 The Protocol has not been meeting the needs of the communities since it was first signed back in 1970	10
1.1 The Protocol and the agreements arising from it allow the provinces and territories to unilaterally determine the needs of the communities in the area of elementary and secondary education, without the agreement of the communities.....	12
1.2 The Protocol and the agreements arising from it do not allow the Department of Canadian Heritage or the school boards to require full accountability to determine the purposes for which the funds are used	15
1.2.1 The changes made to accountability mechanisms in the Protocol (and the agreements arising from it) remain inadequate	16
1.2.2 The use of the federal funds made by provincial and territorial governments continues to be a constant concern	18
1.3 Funds earmarked for elementary and secondary education are too often used to finance the “core costs” of that education, as guaranteed by section 23 of the <i>Charter</i> , and not the “additional costs” of that education	21
2 Modernizing and dividing up the Protocol would be a positive move in terms of public policy	24
2.1 There is no legal obstacle to modernizing and dividing up the Protocol, even without the consent of the provinces and territories	24
2.1.1 Section 23 of the Charter provides that minority French-language school boards have their own legal personality, distinct from that of the provincial or territorial government, which allows them to enter into agreements...24	
2.1.2 Provincial and territorial laws empower minority French-language school boards to enter into such agreements with the Department of Canadian Heritage.25	

2.1.3	The Department of Canadian Heritage is empowered to enter into agreements with the FNCSF and its member school boards	26
2.2	What is asked for is no more than what the federal government has already agreed to do with First Nations.....	29
2.3	The Department of Canadian Heritage must deliver on its commitment toward the development of the communities (part VII of the <i>Official Languages Act</i>) and the obligations imposed by section 23 of the <i>Charter</i>	31
2.4	The asymmetry between Quebec’s Anglophone minority and the communities makes it possible for a <i>Tripartite Additional Agreement</i> excluding Quebec to be signed, if necessary.....	34
3	What the FNCSF, the CNPF and the FCFA are asking for	36
3.1	Elementary and secondary education must be the subject of a <i>Tripartite Additional Protocol</i>	36
3.2	The <i>Tripartite Additional Protocol</i> must allow the communities themselves to determine their priorities for elementary and secondary education	37
3.3	The <i>Tripartite Additional Protocol</i> must include a definition of “additional expenditures” that excludes the costs provinces and territories must incur to fulfil their constitutional obligations	38
	Conclusion: Objective 2018/2023 – From words to action!.....	39

Executive summary and recommendations

This memorandum sets out the need to modernize and divide up the *Protocol for Agreements for Minority-Language Education and Second-Language Instruction* (the “Protocol”) when it is renewed in 2018, in order to enhance the vitality of Francophone and Acadian communities (the “communities”).

Since 1970, the Department of Canadian Heritage has entered into Protocols with the provincial and territorial governments respecting the terms and conditions of transfers of federal funds to finance the *additional costs* of minority-language education and second-language instruction. The Department of Canadian Heritage has then entered into a bilateral agreement with each province and territory.

The Protocol (and the bilateral agreements arising from it) suffers from three fundamental shortcomings that significantly undermine the effectiveness of the federal government’s efforts:

1. These instruments allow the provinces and territories to unilaterally determine the education needs of the minority, which contravenes section 23 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). Nor is there any requirement that the communities accept these instruments or even that they be consulted about them or their implementation.
2. These instruments do not allow the Department of Canadian Heritage or the school boards to require effective accountability on the part of the Ministries of Education to determine the purposes for which the funds are used.
3. Funds earmarked for French first language elementary and secondary education (outside Quebec) are too often used to finance the core costs of that education (as guaranteed by section 23 of the *Charter*) and not the truly additional costs of that education.

These are historical shortcomings, which have been repeatedly brought to the attention of the Department of the Secretary of State and of the Department of Canadian Heritage since the first Protocol was signed in 1970. The Fédération nationale des conseils scolaires francophones (“FNCSF” – National Federation of French-Language School Boards), on behalf of its 28 members, the 28 minority French-Language school boards, with the support of the Commission nationale des parents francophones (“CNPF” – National Francophone Parents Commission) and the Fédération des communautés francophones et acadienne (“FCFA” – Federation of Francophone and Acadian Communities), are demanding that the Protocol be modernized and divided up.

The Protocol has never been modified to respond to major changes in minority French-language elementary and secondary education, including the entrenchment of section 23 of the *Charter* in 1982 and the recognition of the right to school governance by the Supreme Court of Canada in *Mahé v. Alberta* in 1990. Thirty-five years after the adoption of section 23 of the *Charter*, the Protocol does not meet the needs of the communities.

It is no longer acceptable for the Protocol to be produced through closed-door negotiations. The communities must be given a real voice in elementary and secondary education.

In concrete terms, the FNCSF, the CNPF and the FCFA demand the adoption in 2018 of a *Tripartite Additional Protocol* entitled “*Protocol on Section 23 of the Charter: Additional Expenditures for Minority French-language Elementary and Secondary Education*”.

This new agreement would be “tripartite” as it would be between the Department of Canadian Heritage, the Council of Ministers of Education, Canada (the “CMEC”) and the FNCSF. Moreover, it would be distinct from (and parallel to) the existing Protocol, which will be renewed in 2018. This new agreement would exclusively cover minority French-language elementary and secondary education.

The adoption of the *Tripartite Additional Protocol* would not affect the terms and conditions set out in the existing Protocol, but would remove minority French-language elementary and secondary education from its scope.

One thing is certain: the *Tripartite Additional Protocol* must allow the communities to accept its terms, so that the provincial and territorial governments do not unilaterally determine the priorities for minority French-language elementary and secondary education. The FNCSF, the CNPF and the FCFA demand that the current provisions be revised to impose a clear, effective, binding obligation to consult with the communities.

The proposals to modernize and divide up the Protocol and to adopt a *Tripartite Additional Protocol* are not radical. The federal government already enters into agreements directly with the communities and with other analogous groups. For example, today it would be unthinkable to enter into an agreement for the benefit of a First Nation without including that nation as a signatory.

Furthermore, the adoption of a *Tripartite Additional Protocol* covering only French first language elementary and secondary education would mean no more than the implementation of a 2005 recommendation of the Standing Senate Committee on Official Languages, presented to the Government of Canada:

Recommendation 5: That the federal government and its partners develop a new framework for the administration of the Official Languages in Education Program for the purposes of: [...]

c) ensuring the direct participation of French-language school boards in the negotiation of education agreements;

d) separating minority-language and second-language education programs in the negotiation of education protocols and agreements; [...]

Unfortunately, this recommendation was rejected by the Conservative government of the day.

The adoption of a *Tripartite Additional Protocol* would be a positive move in terms of public policy, but it is also required by the *Charter* and the *Official Languages Act*. As it stands, the Protocol is not consistent with the legal and constitutional obligations of the Department of Canadian Heritage and the provincial and territorial governments. It must therefore be modernized and divided up in order to rectify this situation, which has continued far too long, undermining the development of the communities.

Introduction

[1] As early as 1968, the Royal Commission on Bilingualism and Biculturalism (the “Laurendeau-Dunton Commission”) recognized the importance of education for the survival of the French language in minority communities throughout Canada. One of the recommendations of the Laurendeau-Dunton Commission pertained to the financing of what are referred to as “additional” expenditures by the provinces for minority-language education:

We recommend that the federal government accept in principle the responsibility for the additional costs involved in providing education in the official language minority.¹

[2] In 1968, these provincial expenditures were deemed to be “additional” to the amounts normally spent on education (in the majority language) by the provinces, in view of the absence of a right (constitutional or, in most provinces, statutory) to education in the minority language. The aim of the federal initiative was to encourage Ministries of Education to support (or further support) their Francophone communities.² In the 1970s, there were very few if any minority language elementary and secondary education programs and even fewer minority schools³ (except of course in Quebec, where the Anglophone minority already had its own educational institutions). Constitutional obligations with respect to minority language education did not exist until 1982, when the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)⁴ came into effect. Indeed, the purpose of those constitutional obligations was precisely to redress the wrongs of the past.⁵

[3] In 1969, the Right Honourable Pierre Elliott Trudeau announced that with its spending power, the federal government was prepared to support the development of the French language (and the communities) by funding part of the education covered today by section 23 of the *Charter*.⁶ In response to that commitment by Prime Minister Trudeau, the Government of Canada signed the first Protocol for the period between 1970-1971 and 1973-1974.⁷

¹ Canada, *Report of the Royal Commission on Bilingualism and Biculturalism: Education*, Book II, Ottawa, Queen’s Printer, 1968, para. 502 at p. 193 [Laurendeau-Dunton Commission].

² Canada, *Speech from the Throne*, 30th Parliament, 3rd Session (October 18, 1977) at p. 9. See also Fédération des francophones hors Québec, *À la recherche du milliard: Analyse critique des programmes fédéraux de langues officielles dans l’enseignement* [Tracking Down the Billion: A Critical Analysis of Federal Official Languages in Education Programs], Ottawa, 1981 at p. 12 [FFHQ, “À la recherche du milliard,” 1981].

³ *Reference re Education Act of Ontario and Minority Language Education Rights*, (1984) 10 DLR (4th) 491 at pp. 23-25 and 33-37 (Canlii); Canada, Commissioner of Official Languages, *Annual Report: 1981*, Ottawa, Department of Supply and Services Canada, March 1982, at pp. 42-44 [pinpoint references pages from the French version].

⁴ *Canadian Charter of Rights and Freedoms*, s. 23, part I of the *Constitution Act, 1982*, constituting Schedule B of the *Canada Act 1982* (UK), 1982, c. 11 [Charter].

⁵ *Mahé v. Alberta*, [1990] 1 SCR 342 at pp. 363-364.

⁶ Canada, *Constitutional Conference: second meeting*, Ottawa, Queen’s Printer, February 10-12, 1969 (February 11, 1969) at p. 243 [pinpoint references pages from the French version] (Pierre Elliott Trudeau).

⁷ Secretary of State, *Descriptive and Financial Summary of federal-provincial programmes for the Official languages in education 1970-1971 to 1982-83*, Ottawa, Education Support Programmes Branch, 1983 at p. 1 [Department of the Secretary of State, “Financial Summary”].

[4] Today, federal minority language education funding falls under the “Minority Language Education component” of the “Official Languages Funding Programs” of the Department of Canadian Heritage (formerly “OLEP”). This component aims

to improve the provincial and territorial supply of programs and activities to provide education in the language of official-language minority communities (Anglophones in Quebec and Francophones outside Quebec), at all levels of education. It also aims to increase the production and dissemination of knowledge and innovative methods and tools to support teaching in the language of the minority.⁸

[5] The “Minority Language Education” component covers four key documents, which must be seen as existing along a continuum, since each document is governed by the previous one:

1. Since 1983, the Government of Canada has entered into the Protocol with the CMEC (which represents the provincial and territorial governments nationally).
2. Once the Protocol has been signed, each province and territory negotiates a bilateral agreement with the Department of Canadian Heritage to implement the Protocol.
3. Since at least 2000, each province and territory is also required to adopt an action plan⁹ in which it identifies the province or territory’s objectives for the federal funding and describes the expected results of the programs introduced.¹⁰
4. Finally, since at least 2003, the budget and the broad areas of intervention set out in the Protocol and the agreements arising from it have come out of the “Roadmap for Official Languages” (or “Action Plan for Official Languages” depending on the government of the day).¹¹

[6] It should also be noted that as part of the “Minority Language Education component,” the Department of Canadian Heritage also funds three other programs that affect French first language elementary and secondary education: summer language scholarships, an official language monitor program and an exchange program.¹² These three programs are offered to

⁸ Ministry of Canadian Heritage, “Minority Language Education – Funding,” online: Canadian Heritage <<http://canada.pch.gc.ca/eng/1459539742677/1459539789262>>.

⁹ See generally the explanation given by the Minister of Canadian Heritage of the day, Lisa Frulla, in Parliament of Canada, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session, no. 10 (April 12, 2005) 9:10 (Lisa Frulla).

¹⁰ See for example *Canada – Newfoundland and Labrador Agreement for Minority-Language Education and Second-Language Instruction 2000-01 to 2002-03*, art. 3.

¹¹ See generally the explanation given by the Minister of Canadian Heritage of the day, Lisa Frulla, in Parliament of Canada, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session, no. 10 (April 12, 2005) 9:15 (Lisa Frulla). See also generally the explanation of the Official Languages Support Program given by the Standing Senate Committee on Official Languages in *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at pp. 41-42. Since 2003, the Government of Canada has adopted the following three action plans: 1) Canada, *The Next Act: New Momentum for Canada’s Linguistic Duality: The Action Plan for Official Languages*, Ottawa, **2003** ; 2) Canada, *Roadmap for Canada’s Linguistic Duality, 2008-2013: Acting for the Future*, Ottawa, 2008 ; 3) Canada, *Roadmap for Canada’s Official Languages, 2013-2018: Education, Immigration and Communities*, Ottawa, 2013.

¹² Firstly, the language monitor and scholarship program is managed by the CMEC. This program allows young people to find jobs as teaching assistants. See CMEC, “Financial and Administrative Guide 2016-2017,” at p. 2, online: my Odyssey <<http://www.myodyssey.ca/data/documents/00000018.pdf>>, which explains that the Language Monitor Program includes a “stream” for French as a first language:

In the [French as a first language] stream, language assistants are assigned to regions where francophones live in a language minority setting but where French is used at all times in educational

students in minority French-language schools and language monitors are sent to the schools.¹³

[7] Although they have evolved since 1970, the instruments under the “Minority Language Education” component were never adapted in response to the three major milestones in French first language elementary and secondary education. The Protocol and the agreements arising from it have not been modernized to take into account (1) the adoption of the *Charter* in 1982, (2) the legal repercussions of the Supreme Court of Canada’s decision in *Mahé* in 1990¹⁴ (i.e. the right to school governance by and for the communities), or (3) the establishment of minority Francophone schoolboards in all provinces and territories since 1990¹⁵.

[8] The communities have long been demanding that the Protocol be modernized. Consequently, this memorandum by the FNCSF, the CNPF and the FCFA does not offer new solutions that have never been proposed to the Department of Canadian Heritage. In fact, the communities are asking for nothing more than what the Standing Senate Committee on Official Languages recommended to the Government of Canada in 2005:

Recommendation 5 : That the federal government and its partners develop a new framework for the administration of the Official Languages in Education Program for the purposes of: [...]

c) ensuring the direct participation of French-language school boards in the negotiation of education agreements;

d) separating minority-language and second-language education programs in the negotiation of education protocols and agreements; [...]¹⁶.

institutions. Together with teachers, language assistants for French as a first language help to develop students’ knowledge of their language and culture and build their cultural identity by instilling pride and a sense of belonging to the francophone world.

Secondly, the Scholarship Program allows 8,000 students per year to go to another province or territory where their language is the majority language. Thirdly, the exchange program allows more than 2,000 students per year to improve their second official language and familiarize themselves with the culture of another province: Canada, *Roadmap for Canada’s Official Languages, 2013-2018: Education, Immigration, Communities*, Ottawa, 2013 at pp. 6 and 18.

¹³ The scholarship and language monitor programs are not governed by the Protocol or the agreements arising from it: see article 4 of the Protocol.

¹⁴ *Mahé v. Alberta*, [1990] 1 SCR 342.

¹⁵ This problem was also identified by Victor Goldbloom, the Commissioner of Official Languages of Canada, in 1996 in one of his annual reports:

Major changes occurring in the legislative environment which forms the basis of the Program may not have been sufficiently noticed. Far-reaching official language minority educational rights were granted on April 17, 1982, following the adoption by Parliament and by all provincial legislatures (except the Quebec National Assembly) of Section 23 of the *Canadian Charter of Rights and Freedoms*. New major official languages legislation was tabled in the House of Commons in June 1987 and Part VII of the (new) *Official Languages Act* came into effect on September 15, 1988.

(Canada, Commissioner of Official Languages, *A Blueprint for Action: Implementing Part VII of the Official Languages Act, 1988*, Ottawa, 1996, online: Office of the Commissioner of Official Language <http://www.officiallanguages.gc.ca/html/stu_etu_021996_e.php>).

¹⁶ Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: a Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005), p. 50.

[9] The modernization of the Protocol and the adoption of a *Tripartite Additional Protocol* are not radical proposals. Quite the contrary. The federal government already enters into agreements directly with the communities and with other analogous groups. Indeed, today it would be unthinkable to enter into an agreement for the benefit of a First Nation, particularly in the area of education, without including that nation as a signatory.

[10] This memorandum was prepared by the FNCSF, the CNPF and the FCFA. The latter two organizations have played a very important role historically advocating for minority language education. The CNPF is the national voice of parents in Francophone minority communities, and fought for many years for the establishment of the French-language school boards that exist today. The CNPF plays a leadership role in the area of early childhood at the national level and provides support to its member organizations, which include Francophone and Francophile parents throughout the country.

[11] The FCFA successfully lobbied for the entrenchment of education rights in the *Charter* in the 1970s and 1980s, when it operated under the name “Fédération des francophones hors Québec” (“FFHQ” – Federation of Francophones Outside Quebec). The FCFA is the national and international voice of the communities and their primary interlocutor with the federal government. It has 20 members: twelve representative provincial and territorial Francophone associations and nine national organizations representing areas of activity and clienteles including education, culture, justice, elders, youth, women, families, literacy and skills development, community newspapers, and health.

[12] This memorandum has also received the support of the 28 French-language school boards that belong to the FNCSF. The Association des conseils scolaires des écoles publiques de l’Ontario (“ACÉPO” – which represents Ontario’s four public French-language school boards, the Association franco-ontarienne des conseils scolaires catholiques de l’Ontario (“AFOCSC” – which represents Ontario’s eight French-language school boards and the Fédération des conseils d’éducation du Nouveau-Brunswick (FCÉNB which represents New Brunswick’s three French-language school boards called “districts”) have also given it their support.

The FNCSF: national voice of the communities in the area of French first language elementary and secondary education

[13] The FNCSF is the leading national voice of the communities in the area of French first language elementary and secondary education, just as the CMEC is the political voice of the Ministers of Education of all the provinces and territories.

[14] The FNCSF is a not-for-profit organization founded in 1990 which supports 28 minority French-language school boards, commissions, districts and divisions in Canada’s nine provinces and three territories in which English is the majority language.¹⁷

¹⁷ Fédération nationale des conseils scolaires francophones, “Our Profile,” online: < <http://fnscsf.ca/english/>>.

[15] The FNCSF is run by a board of directors comprised of fourteen elected members and plays a political role. The organization's primary objectives include the following:

1. to advocate for the education rights of Francophones and Acadians with the federal government;
2. to support the demands of its provincial and territorial members;
3. to advocate for its members at the national level; and
4. to promote cooperation among the school boards at the national level.

[16] The Regroupement national des directions générales de l'éducation ("RNDGE" – National Association of School Superintendents from the 28 minority French-language school boards), plays an administrative and pedagogical role. The FNCSF and the RNDGE have distinct roles and mandates at the national level, but their priorities are closely aligned. The RNDGE, which was founded in 2000, serves to leverage pedagogical and cultural, administrative and political activities. The RNDGE:

1. ensures the success and well-being of pupils and staff members at French-language schools;
2. promotes a sense of belonging to the French language and Francophone culture;
3. contributes to the development of leadership in its members in the advancement of French-language education; and
4. improves the effectiveness of the delivery and implementation of the educational services provided to all pupils and staff members at the country's minority French-language schools.¹⁸

The Protocol must be modernized and divided up in 2018

[17] The Protocol and the bilateral agreements arising from it suffer from three fundamental shortcomings which significantly undermine the effectiveness of the federal government's efforts:

1. These instruments allow the provinces and territories to unilaterally determine the education needs of the minority, which contravenes section 23 of the *Charter*. Nor is there any requirement that the communities accept these instruments or even that they be consulted about them or their implementation.
2. These instruments do not allow the Department of Canadian Heritage or the school boards to require effective accountability on the part of the Ministries of Education to determine the purposes for which the funds are used.
3. Funds earmarked for French first language elementary and secondary education (outside Quebec) are too often used to finance the core costs of that education (as

¹⁸ Fédération nationale des conseils scolaires francophones, "Qu'est-ce que le RNDGE" ["What is the RNDGE?"], online: <<http://fnscsf.ca/rndge/quest-ce-que-le-rndge/>> [French only].

guaranteed by section 23 of the *Charter*) and not the truly additional costs of that education.

[18] The next Protocol will cover the period from 2018 to 2023. The FNCSF, the CNPF and the FCFA are demanding that the Protocol be modernized and divided up in order to address its historical and systemic shortcomings.

[19] The FNCSF, the CNPF and the FCFA propose that in 2018, a *Tripartite Additional Protocol* be adopted, entitled “*Protocol on Section 23 of the Charter: Additional Expenditures for Minority French-language Elementary and Secondary Education*”.

[20] This new agreement would be “tripartite” since it would be between the Department of Canadian Heritage, the Council of Ministers of Education, Canada (the “CMEC”) and the FNCSF. It would be distinct from (and parallel to) the existing Protocol, which will be renewed in 2018. This new agreement would exclusively cover minority French-language elementary and secondary education.

[21] The adoption of the *Tripartite Additional Protocol* would not affect the terms and conditions set out in the existing Protocol, but would remove minority French-language elementary and secondary education from its scope.

[22] One thing is certain: the *Tripartite Additional Protocol* must allow the communities to accept its terms, so that the provincial and territorial governments do not unilaterally determine the priorities for minority French-language elementary and secondary education. The FNCSF, the CNPF and the FCFA demand that the current provisions be revised to impose a clear, effective, binding obligation to consult with the communities.

[23] Not only does the renewal of the Protocol in 2018 offer a golden opportunity to finally modernize that instrument and divide it up in order to address the historical and systemic shortcomings that have been raised by the communities since at least 1981; it would also improve public practice by creating a more effective model of governance, and it would allow the Department of Canadian Heritage and the provincial and territorial governments to meet their legal, and specifically constitutional, obligations.

Methodology, organization of the memorandum, and limitations

[24] The shortcomings outlined in this memorandum and the solutions advocated were identified through an analysis of the communities’ elementary and secondary education needs expressed by the members of the FNCSF, the CNPF and the FCFA. In order to formulate the solutions advocated, the following sources were consulted: the majority of the protocols and bilateral agreements,¹⁹ the action plans for official languages, reports on federal funding since 1970, and evidence given before the committees responsible for issues around official languages.

¹⁹ The analysis was conducted in part using the agreements with Newfoundland and Labrador, a province with a small community spread throughout the province, and British Columbia, one of the most populous provinces with a rapidly-growing Francophone community. For the period from 2013-2018, the analysis was conducted using the agreements with all the provinces and territories.

[25] The shortcomings in the Protocol (and the agreements arising from it) and the need for it to be modernized have been on the agendas of the various organizations of the FNCSF since at least 2001, and have been the subject of discussions within the RNDGE since 2001. They have also been on the agenda of the CNPF since at least 1996. The issue has been raised in major reports issued by the FFHQ (now the FCFA) and the CNPF, in 1981²⁰ and 1996²¹ respectively. Numerous decision-makers, government actors and law-makers from every jurisdiction have been made aware of it by the FNCSF, the CNPF and the FCFA.

[26] This memorandum is made up of three parts. **Part One** identifies the historical and systemic shortcomings of the Protocol and the agreements arising from it. Essentially, this part demonstrates that these instruments do not meet the communities' needs.

[27] **Part Two** demonstrates that modernizing and dividing up the Protocol would be a positive move in terms of public policy, and would allow the Department of Canadian Heritage and the provincial and territorial governments to meet their legal and constitutional obligations.

[28] **Part Three** describes the concrete actions that should be taken in 2018 in order to achieve the expected result (the adoption of a *Tripartite Additional Protocol*).

[29] This memorandum considers only the shortcomings of the Protocol (and the agreements arising from it) with regard to French first language elementary and secondary education, the only element of the Protocol that is explicitly protected by a provision of the *Charter*. This memorandum does not address federal funding for postsecondary education or for second language instruction (either immersion or second language instruction in majority schools).

[30] Also, this memorandum deals only with the need to modernize and divide up the Protocol and does not specifically address the bilateral agreements between the federal government and the provinces and territories. Ideally, those agreements need to be modernized and divided up in the same way as the Protocol, but that is a subsequent step.

[31] It is important to note that the needs of Francophone and Acadian communities are different from the needs of Anglophone communities in Quebec. The FNCSF, the CNPF and the FCFA do not represent Anglophone communities in Quebec and take no position in this memorandum on the applicability of the recommendations to that context.

²⁰ FFHQ, "À la recherche du milliard," 1981.

²¹ Commission nationale des parents francophones, *Où sont passés les milliards \$?* [Where did the billions go?], Saint-Boniface, 1996 [CNPF, "Où sont passés les milliards," 1996].

1 The Protocol has not been meeting the needs of the communities since it was first signed back in 1970

[32] The communities recognize the major contribution the Protocol has made to their development and the commitment of the Department of Canadian Heritage and the CMEC to their development. However, although the adoption of the Protocol was an important development for the communities in 1970, this development does not adequately meet the needs of the communities or the legal obligations of the Department of Canadian Heritage and the provincial and territorial governments.

[33] The Protocol and the bilateral agreements arising from it suffer from three fundamental shortcomings that significantly undermine the effectiveness of the federal government's efforts:

1. These instruments allow the provinces and territories to unilaterally determine the education needs of the minority, which contravenes section 23 of the *Charter*. Nor is there any requirement that the communities accept these instruments or even that they be consulted about them or their implementation.
2. These instruments do not allow the Department of Canadian Heritage or the school boards to require effective accountability on the part of the Ministries of Education to determine the purposes for which the funds are used.
3. Funds earmarked for French first language elementary and secondary education (outside Quebec) are too often used to finance the core costs of that education (as guaranteed by section 23 of the *Charter*) and not the truly additional costs of that education.

[34] These are historical shortcomings that have been repeatedly brought to the attention of the Department of the Secretary of State and the Department of Canadian Heritage. Despite numerous reports,²² numerous pleas²³ and even recommendations from the Standing Senate

²² FFHQ, "À la recherche du milliard," 1981; CNPF, "Où sont passés les milliards," 1996.

²³ House of Commons, Standing Committee on Broadcasting, Films and Assistance to the Arts, *Evidence*, 30th Parliament, 1st Session, no. 46 (April 27, 1976) at p. 18 (Peter Roberts, responding to the question asked by the Honourable Serge Joyal regarding accountability under the Protocol); Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002), at 16:45 (Marc Boily on the lack of consultation with Francophone and Acadian communities); Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002) at 17:30 (Paul Charbonneau); Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 37th Parliament, 2nd Session, no. 12 (October 23, 2003 in Edmonton) (Pierre Desrochers on behalf of the Fédération des conseils scolaires de l'Alberta [Federation of Alberta School Boards] on consultations); Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 37th Parliament, 2nd Session, no. 11 (October 22, 2003, in Winnipeg) (Denis Ferré on behalf of the Division scolaire francophone de la Saskatchewan [Saskatchewan Francophone School Division] arguing that the school division should be involved in negotiations for the next agreement); Parliament of Canada, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session no. 17, (February 15, 2005) at p. 10 (Paul Charbonneau); Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 40th Parliament, 3rd Session, no. 18 (March 21, 2011) at p. 16 (Senator Fortin-Duplessis on the lack of accountability in the Protocol and the agreements arising from it); Parliament of Canada, Standing Committee on Official Languages, *Evidence*, 41st Parliament, 1st Session, no. 82 (May 23, 2013) at p. 3 at 16:15 (Roger Paul); Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 40th Parliament, 3rd Session, no. 18 (March 21, 2011) at p. 7 (André Poulin-Denis on the shortcomings in the bilateral agreements).

Committee on Official Languages²⁴ that the Protocol be modernized and divided up, it still does not meet the needs of the communities²⁵ or the legal and specifically constitutional obligations of the Department of Canadian Heritage and the provincial and territorial governments²⁶.

[35] Section 23 of the *Charter* gives parents who belong to the communities the right to provide a French first language education to their children²⁷. Section 23 of the *Charter* also gives community members a right to school governance and exclusive control over issues affecting language and culture, a right exercised through minority French-language school boards²⁸.

[36] It is important to note that the role played by the school in the communities goes beyond primary and secondary education. In this regard, the French-language Civic Community School initiative (“ÉCC” – *École communautaire citoyenne*) mobilizes all community stakeholders. It is a space for learning, socialization and identity building that forms an integral part of the community it serves. The ÉCC is a partnership aimed at redefining the relationship between the community and the school to engage all members and promote the success of learners of all ages and the vitality of the communities. The objective of the ÉCC approach is to mobilize pupils, school staff, parents and the various partners and engage them in the political, economic and sociocultural life of their Francophone community. In order to achieve this, French-language school boards, through their schools, promote the three aims of the ÉCC: engagement, success, and the continuum.

[37] The needs of the communities in the area of elementary and secondary education must certainly be at the heart of the process of renewing and implementing the Protocol. In partnership with the communities, the FNCSF is the organization in the best position to inform the Department of Canadian Heritage and the CMEC of the communities’ needs in the area of elementary and secondary education and above all to defend those needs.

²⁴ Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at pp. 50-51.

²⁵ See in particular FFHQ, “À la recherche du milliard,” 1981 at p. 41, which concluded in 1981 that the Protocol “is characterized by shortcomings that are much too large to allow it to effectively serve the education needs of Francophone communities outside Quebec.” In a report published in 1996, Victor Goldbloom, Commissioner of Official Languages, wrote the following:

In these vast areas of activities, with a few exceptions, federal-provincial agreements have totally ignored the particular circumstances and needs of minority official language communities. Even in areas of obvious interest to minority official language communities, such as culture, enhancing their vitality and supporting their development has simply never been a consideration.

Canada, Commissioner of Official Languages, *A Blueprint for Action: Implementing Part VII of the Official Languages Act, 1988*, Ottawa, 1996, online: Office of the Commissioner of Official Languages <http://www.officiallanguages.gc.ca/html/stu_etu_021996_e.php>.

²⁶ Since the first Protocol was signed in 1970, changes have been made to its terms, including an accountability mechanism (which unfortunately is not always effective) starting in 1983, and reference to section 23 of the *Charter* in its preamble. However, these changes have proved to be inadequate. The Protocol does not consider the real needs of the communities or their right to school governance and control.

²⁷ *Mahé v. Alberta*, [1990] 1 SCR 342 at pp. 363-364.

²⁸ *Mahé v. Alberta*, [1990] 1 SCR 342 at pp. 371-372 and 377; *Association des parents de l'école Rose-des-vents and Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, [2015] 2 SCR 139 at para. 34.

1.1 The Protocol and the agreements arising from it allow the provinces and territories to unilaterally determine the needs of the communities in the area of elementary and secondary education, without the agreement of the communities

[38] The provisions of the Protocol (and the agreements arising from it) for consultation with the communities are inadequate and ineffective.

[39] Moreover, even in provinces and territories where the communities are consulted, and even when the consultations are conducted properly, the architecture of the Protocol (and the agreements arising from it) allows provincial and territorial governments to impose their priorities with regard to elementary and secondary education and the programs and projects to be financed with federal funds. This can be done without the communities' consent, on issues relating to language and culture, which fall under the right to management and control²⁹.

[40] Since at least 1988³⁰, the Protocol (or the agreements arising from it) have provided that a provincial or territorial government must consult "interested groups and associations, in particular representatives of the school boards [...]" on the programs implemented as part of this agreement, where this is deemed necessary."³¹

[41] Although the agreements provide that a provincial or territorial government must consult "interested groups and associations, in particular representatives of school boards" when developing its action plan,³² the agreements do not require that the consultations lead to acceptance of the needs and priorities identified by the minority. Nonetheless, the communities have a right to school governance and exclusive control over matters relating to language and culture³³. The communities must establish their own priorities and these must not be imposed on them by the provincial or territorial government.

[42] According to the Protocol, the Government of Canada "may" also "consult with interested associations and groups about the programs provided for in this Protocol."³⁴

[43] The Protocol does not require the Department of Canadian Heritage or the provincial and territorial governments to consult with the communities. Moreover, when "consultations" take place, they deal with subjects that are within the existing parameters of the provisions of the Protocol (or the agreements arising from it).

²⁹ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018, between the Government of Canada and the Council of Ministers of Education, Canada, preamble.

³⁰ In the Protocol for Agreements for Minority-Language Education and Second-Language Instruction 1988, the provision regarding consultation (article 13) was formulated in a slightly different way than in 2013:

the Government of Canada, within its jurisdiction, intends to consult with interested associations and groups with regard to the programs established under the Protocol. Also, within its jurisdiction, each provincial government agrees to consult with interested associations and groups with regard to the educational programs established under this Protocol, where this is deemed necessary. [translation]

³¹ See for example, Canada-Alberta Agreement on Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018, art. 10.2 of Schedule 1.

³² See for example, Canada-Yukon Agreement on Minority-Language Education and Second Official-Language Instruction 2013-2014 to 2017-2018, Schedule 1, art. 10.1.

³³ *Mahé v. Alberta*, [1990] 1 SCR 342 at pp. 371-372 and 377.

³⁴ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018 between the Government of Canada and the Council of Ministers of Education, Canada, art. 9.4.

[44] The preamble to the Protocol specifically provides that it is the provincial and territorial governments that set priorities in education:

WHEREAS education is a provincial/territorial jurisdiction and the provincial/territorial governments are responsible for establishing plans, determining objectives, defining the contents, setting priorities and evaluating their programs in education.³⁵

[45] The Protocol also sets out general concepts around federal funding, and it is the agreements (or their action plans) that provide the details of federal funding for each province and territory. According to the Department of Canadian Heritage: “The division between primary and secondary within the budgets of each province is negotiated bilaterally, on a case-by-case basis, based on the particular needs of the province or territory [...]”³⁶

[46] Although it is obviously true that education is a provincial jurisdiction, the Protocol (and the agreements arising from it) disregards the unique constitutional status of minority language elementary and secondary education. The communities are responsible for planning, establishing objectives, determining content, setting priorities and evaluating French first language elementary and secondary education programs.³⁷

[47] The fact that the architecture of the Protocol (and the agreements arising from it) ignores the communities’ right to school governance and control is particularly clear in the action plans adopted by the provinces and territories. Ultimately, after the consultations, when they take place, priorities and projects to be funded are chosen by the provincial or territorial government. For example:

1. According to the Manitoba action plan:

One of the BEF’s key activities for fulfilling this mandate is regular meetings with everyone working in French-language education or French instruction at the K-12 and postsecondary levels. These meetings enable the BEF to zero in on the challenges of, and opportunities for, French-language education and French instruction in Manitoba.

The initiatives described in this action plan have thus been chosen by the BEF in order to nourish these opportunities and reduce the threats facing minority French education in Manitoba.³⁸

2. According to the Ontario action plan:

The initiatives have been identified by the French-Language Education Policy and Programs Branch (FLEPPB) and the Ministry of Training, Colleges and University’s Regional Services

³⁵ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018 between the Government of Canada and the Council of Ministers of Education, preamble.

³⁶ Parliament of Canada, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session, no. 10 (April 12, 2005) 9:40 a.m. (Hubert Lussier).

³⁷ The Supreme Court of Canada recognized this fact in *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3, para 53:

The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

³⁸ Canada-Manitoba Agreement on Minority-Language Education and Second Official-Language Instruction 2013-2014 to 2017-2018, at p. 23, Schedule 3.

Branch (French as a Second Language), in consultation with their partners, for the teaching of French as a Minority Language [...] at the elementary, secondary [...] levels.³⁹

3. The Prince Edward Island action plan states:

Both of the province's school boards, the FLSB and the ELNB, were consulted in September 2013 as part of preparing this action plan to identify their priorities. [T]heir results were taken into account during the preparation of the action plan.⁴⁰

[48] However, in the case of Prince Edward Island, the Commission scolaire de langue française de l'Île-du-Prince-Édouard reports that there was no consultation, but that the provincial government reviewed the Commission scolaire's strategic plan to determine the priorities of the minority.

[49] Both the inadequacy of the consultations, either with regard to the action plan or the implementation of programs under the agreements, and the fact that the terms of the Protocol are imposed on the communities despite the fact that they have not accepted its provisions, have both been denounced by numerous stakeholders. For example:

1. In 2002, Marc Boily, the president of the Fédération nationale des conseillères et conseillers scolaires francophones [National Federation of Francophone School Trustees], in his testimony before the Standing Joint Committee on Official Languages, highlighted the lack of transparency in the Protocol:

Without a national approach based on school boards [i.e. minority French-language school boards], we will end up with all kinds of funding for small projects, a real mishmash, led by community groups and unions involved in the jurisdiction of our boards. What's more, this would happen without our consent, without consultation and even without formal notice.⁴¹

2. In 2003, lawyer Pierre Desrochers, then president of the Fédération des conseils scolaires de l'Alberta [which represents Alberta's French-language school boards], in his testimony before the Standing Senate Committee on Official Languages, stressed the fact that the school boards were not informed of the content of the negotiations:

As regards the negotiations, we are completely in the dark. We have no idea where we are at.⁴²

3. In 2005, Paul Charbonneau, executive director of the FNCSF and former executive director of the CNPF, in his testimony before the Standing Senate Committee on Official Languages, called into question the consultations that had been undertaken:

[i]t clearly states "when deemed necessary". However, I would say that in most provinces, when it is deemed necessary, it lasts no more than a half an hour. Sometimes we are consulted, but that

³⁹ Canada-Ontario Agreement on Minority-Language Education and Second Official-Language Instruction 2013-2014 to 2017-2018, Schedule 3, p 4.

⁴⁰ Canada Prince Edward Island Agreement on Minority-Language Education and Second Official-Language Instruction 2013-2014 to 2017-2018, Schedule 3, p. 10.

⁴¹ Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002), at 16:45 (Marc Boily).

⁴² Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 37th Parliament, 2nd Session, No. 12 (October 23, 2003 in Edmonton), p. 23 (Pierre Desrochers).

does not necessarily mean that what we say will be presented to the federal government by the province.⁴³

4. According to Graham Fraser, the Commissioner of Official Languages for Canada, in 2009:

[i]t is [...] regrettable that the provisions of the protocol that deal with the importance of provinces and territories consulting the associations and groups affected by these two issues are not applied equally from one location to another.⁴⁴

1.2 The Protocol and the agreements arising from it do not allow the Department of Canadian Heritage or the school boards to require full accountability to determine the purposes for which the funds are used

[50] Under the first two Protocols and the interim agreements until 1982,⁴⁵ the provisions negotiated by the Department of Canadian Heritage did not allow for the tracking of the federal funds, and this left the door open to widespread abuse.

[51] Between 1970 and 1983, numerous stakeholders raised serious doubts about the use to which the federal funds were put by provincial and territorial governments:⁴⁶

1. In 1977, in a comprehensive report on the assistance provided to the communities by the federal government between 1968 and 1976, Professor René-Jean Ravault recommended to the Secretary of State that an accountability mechanism be established to allow the Government of Canada to ensure that the money invested was actually used to support minority language education.⁴⁷
2. In 1979, federal member of parliament Jean-Robert Gauthier denounced the lack of accountability provisions in the Protocol:

I am thinking here of the question of accounting, the matter of giving publicly a breakdown of expenditures made by the provinces, so that not only the people of the provinces concerned might know what is going on in their own province, but also all Canadians might be fully aware of the amounts spent on those objectives, namely encouraging and compensating the provinces for the additional expenditures incurred for the teaching of the second language and the education of the minorities [...] The problem is as follows: we, who live in a minority situation, do not have the assurance that those provinces spend the federal funds for the objectives which we think are pursued by the federal government.⁴⁸

⁴³ House of Commons, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session, no. 17, (February 15, 2005), p. 10 (Paul Charbonneau).

⁴⁴ Canada, Office of the Commissioner of Official Languages, *Beyond Obligations: Annual Report 2009-2010*, vol. 1, Ottawa, Public Works and Government Services Canada, 2010, p. 5.

⁴⁵ Secretary of State, "Financial Summary" at p. 1; FFHQ, "À la recherche du milliard," 1981 at p. 45.

⁴⁶ See House of Commons, Standing Committee on Broadcasting, Films and Assistance to the Arts, *Evidence*, 30th Parliament, 1st Session, no. 46 (April 27, 1976) at p. 18 (Serge Joyal). See also Report on the conference "Le bilinguisme en éducation" at p. 29, *Le Petit courrier*, September 22, 1977 at p. 3; *L'Évangéline*, November 2, 1977, these three sources as cited in FFHQ, "À la recherche du milliard," 1981 at pp. 45 and 47-48.

⁴⁷ René-Jean Ravault, *La Francophonie clandestine: ou, de l'aide du Secrétariat d'État aux communautés francophones hors-Québec de 1968 à 1976* [*The Underground Francophonie: or, On the Secretary of State's Assistance for Francophone Communities Outside Quebec from 1968 to 1976*], Report presented to the Directorate for Official Language Minority Groups, Secretary of State, Ottawa, June 1977, at pp. 323-324 and 429-430.

⁴⁸ House of Commons, *Hansard*, 30th Parliament, 4th Session (February 15, 1979) at p. 3296 (Jean-Robert Gauthier).

3. In 1981,⁴⁹ the FFHQ identified numerous cases in which a government had not used the funds from the Protocol for the purposes stipulated by it, including:
 - a) We object to the fact that funds earmarked for the purpose of encouraging the development of bilingualism in education find their way into the provinces' consolidated funds and are used to finance either existing services or, in the worst cases, the building of highways and other kinds of projects that have nothing whatsoever to do with education.⁵⁰ [translation]
 - b) In 1973-1974, the Union de parents et de contribuables francophones (UPCF) [Union of Francophone Parents and Taxpayers] pointed out that between 1970-71 and 1972-73, of the \$34.6 million paid by the federal government to the government of Ontario as formula payments for the French-language instruction of Ontario Francophones, the Francophone school system only received approximately 17 million or a little less than half of the funds to which it was entitled [...] Also according to figures provided by the UPCF, while for the year 1973-74 the Francophone [school] system should have received \$82.80 for each pupil enrolled full-time in the Francophone system at the elementary level, the Conseil des écoles catholiques romaines de Carleton [Carleton Roman Catholic School Board] received only \$47.36, representing a loss of around \$35.44 per pupil. When this is multiplied by the number of Francophone pupils enrolled in that school board (around 6,000) for the year 1973-1974, the loss is in excess of \$200,000.⁵¹ [translation]
4. In March 1982, Maxwell Yalden, the Commissioner of Official Languages for Canada, recommended "that provincial governments be accountable to voters as to how that money is spent" [translation].⁵²

[52] Since that time, the Protocol (and the agreements arising from it) has been modified to establish accountability mechanisms. However, these mechanisms remain inadequate. Unfortunately, the problems raised by the communities in the 1970s and 1980s remain.

1.2.1 The changes made to accountability mechanisms in the Protocol (and the agreements arising from it) remain inadequate

[53] Since 1983, the Protocol and the agreements arising from it have been modified at least three times to establish accountability mechanisms.

[54] Firstly, in 1983, in response to the criticisms raised by the FFHQ in its 1981 report⁵³ and those laid out above, the Secretary of State and the CMEC agreed to add an accountability clause to the Protocol.⁵⁴ However, it was not an effective mechanism,

⁴⁹ In 1977 the FFHQ had already pointed out various deficiencies in accountability: Fédération des francophones hors Québec, *Les héritiers de Lord Durham [The Heirs of Lord Durham]*, vol. 1, 2nd ed., Ottawa, 1977 at pp. 68-71.

⁵⁰ FFHQ, "À la recherche du milliard," 1981 at p. 45.

⁵¹ Union de parents et de contribuables francophones (UPCF), Carleton Section, "Le Scandale des programmes ontariens de bilinguisme en éducation" [The Scandal of Ontario Bilingualism in Education Programs] (1974) at pp. 1 and 9 as cited in FFHQ, "À la recherche du milliard," 1981 at p. 46.

⁵² Canada, Commissioner of Official Languages, *Annual Report 1981*, Ottawa, Department of Supply and Services, 1981 at p. 60 [pinpoint references pages from the French version].

⁵³ FFHQ, "À la recherche du milliard," 1981 at p. 45:

We find ourselves in a situation that is ambiguous to say the least. While the federal government, between 1970-71 and 1978-79, spent a very substantial amount of money in formula contributions (\$960,911,279) no control mechanisms are as yet in place to determine exactly how the provinces used that money, and how it is actually being used to meet the original objectives of the program. [translation]

⁵⁴ Protocol for Agreements between the Government of Canada and the Provincial Governments for Minority-Language Education and Second-Language Instruction 1983, art. IV(3):

The Government of Canada and all the provincial governments agree that they must be able to demonstrate to their respective legislative assemblies and to the general public that the financial

particularly as it rarely allowed the communities to determine the purposes for which the federal funds were used.

[55] Secondly, the accountability mechanism in the Protocol evolved once again in 1998: the signatory parties agreed that provincial and territorial governments would submit an “action plan.”⁵⁵

[56] Thirdly, in the 2013 Protocol, the signatory parties agreed on the need to ask the provinces and territories to complete an “annual report containing a financial statement of actual expenditures and contributions related to its action plan”⁵⁶ and a “periodic report presenting the progress made in each area of intervention funded based on the indicators and targets identified in its action plan.”⁵⁷

[57] Although this is a clear improvement compared to the total absence of any accountability mechanism in the first two Protocols, these three changes remain inadequate in that they do not allow the communities to determine the purposes for which the funds are used. When the communities receive a copy of the action plan from a provincial or territorial government or reports required under the Protocol or the agreements arising from it⁵⁸, almost without exception these documents do not allow the communities to “track” the federal funds. Indeed, a number of the action plans do not allow the purposes for which the funds are used to be determined.

assistance paid by the Government of Canada to the provinces contributes to the maintenance and development of minority-language education programs and second-language instruction programs, which is the purpose for which those funds were approved. To that end, all the provincial governments agree to submit to the Government of Canada, on an annual basis, information demonstrating that the contributions of the Government of Canada are tied to the additional costs incurred by the maintenance and development of minority-language education programs and second-language instruction programs offered in support of the objectives set out in article I, so that the Government of Canada is able to provide Parliament and taxpayers with satisfactory assurance that this is the case. [translation: official English version unavailable]

⁵⁵ For the period from 1998-99 to 2002-03, see the Protocol for Agreements for Minority-Language Education and Second-Language Instruction 1998-99 to 2002-03, art. 4.1 and, for example, the Canada-British Columbia Special Agreements on Investment Measures for Quality Education in the Language of the Minority, 2000-01 to 2003-04 (September 26, 2001), art. 2, Schedule 2. For the period 2013-14 to 2017-18, see the Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18, art. 3.6, and, for example, the Canada-Manitoba Agreement on Minority-Language Education and Second Official-Language Instruction 2013-14 to 2017-18, art 5.1.

⁵⁶ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18, art 8.1:

The Government of Canada and the provincial/territorial governments agree that the principles of transparency, accountability, consistency, accuracy, timeliness and clarity will guide reporting related to this Protocol. The provision of information by the parties will be compatible with their respective policies and legislation, including those related to the protection of privacy and freedom of information.

See also the Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18, art. 8.3, and, for example, the Canada-Manitoba Agreement on Minority-Language Education and Second Official-Language Instruction 2013-14 to 2017-18, Schedule 1, art. 2.9.

⁵⁷ See the Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18 between the Government of Canada and the Council of Ministers of Education, art. 8.4, and, for example, the Canada-Manitoba Agreement on Minority-Language Education and Second Official-Language Instruction 2013-14 to 2017-18, Schedule 1, art. 2.10.

⁵⁸ Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 37th Parliament, 2nd Session, no. 12 (October 23, 2003 in Edmonton) at p. 23 (Pierre Desrochers).

[58] For example, in Nova Scotia's action plan, as indicated in the table reproduced below, the provincial government plans to invest a total of 3.5 million dollars to support projects in the intervention area "Provisions of programs". When reviewing initiative 4, "Support services," it is impossible to know all the projects funded using the 1.5 million dollars per year, or the recipients of the funds.⁵⁹

Planned contributions	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	Total
By area of intervention						
Canada	\$1,766,931	\$1,766,931	\$1,766,931	\$1,766,931	\$1,766,931	\$8,834,655
Nova Scotia	\$1,766,931	\$1,766,931	\$1,766,931	\$1,766,931	\$1,766,931	\$8,834,655
Subtotal	\$3,533,862	\$3,533,862	\$3,533,862	\$3,533,862	\$3,533,862	\$17,669,310
By initiative						
1. Teaching resources - Development and distribution of teaching resources as well as coordination of teaching resource procurement for grade primary to grade 12 by the Centre provincial des ressources pédagogiques (CPRP) in cooperation with the curriculum development team.	\$740,000	\$740,000	\$740,000	\$740,000	\$740,000	
2. Curriculum development agreement for grade primary to grade 12 - An agreement between the province and the CSAP entrusts curriculum development and implementation to the CSAP. The new programs will include: <i>Sciences Humaines</i> (grade primary to grade 8), <i>Développement personnel et social</i> (grade primary to grade 9), <i>Mathématiques</i> (high school), <i>Français</i> (high school), <i>Arts plastiques</i> (grade primary to grade 12) and <i>Sciences de la nature</i> (grade primary to grade 9). Final approval remains with the DEECD.	\$913,913	\$913,913	\$913,913	\$913,913	\$913,913	
3. Individual initiatives - The DEECD coordination of new initiatives issued by the DEECD and funding for additional costs linked to the initiative, as required.*	\$172,000	\$172,000	\$172,000	\$172,000	\$172,000	
4. Support services - Curriculum approval, implementation and evaluation of French first-language programming. In addition, funding for special projects and the CSAP's minority-language fund, so it can implement projects and resources that meet the DEECD requirements for program support. The CSAP receives support for its Virtual School, online courses and related promotion. Translation and adaptation of existing teaching resources and various supporting documents.	\$1,607,949	\$1,607,949	\$1,607,949	\$1,607,949	\$1,607,949	

1.2.2 The use of the federal funds made by provincial and territorial governments continues to be a constant concern

[59] Since section 23 of the *Charter* was adopted in 1982,⁶⁰ the rules of the game have completely changed in the area of French first language elementary and secondary education. Since the early 2000s, with the establishment of minority French-language school boards and the changes made to the *Official Languages Act* that had the effect of making part VII of that Act justiciable,⁶¹ the situation for minority language education has evolved considerably. However, the Protocol (and the agreements arising from it) maintains the status quo, disregarding the new obligations of the Department of Canadian Heritage and provincial and territorial governments.

[60] The following points summarize what has happened since 1983:⁶²

1. According to the CNPF in 1996:

⁵⁹ Canada-Nova Scotia Agreement on Minority-Language Education and Second Official-Language Instruction 2013-2014 to 2017-2018, Schedule 3, p 15.

⁶⁰ *Canadian Charter of Rights and Freedoms*, s. 16-23, part I of the *Constitution Act, 1982*, constituting Schedule B of the *Canada Act (UK)*, 1982, c. 11.

⁶¹ *Official Languages Act*, RCS 1985, c. 31.

⁶² See CNPF, "Où sont passés les milliards," 1996 at p. 1: "In the past, the Official Languages Commissioner and our parents in the regions hit a brick wall when trying to obtain documents, and when the documents existed at all, they disclosed virtually nothing at all." [translation]

a review of the detailed summaries prepared by Canadian Heritage shows that the OLEP grants were simply used to pay wages, transport pupils and heat buildings – in short, anything but contribute to the additional costs they were intended to cover.⁶³ [translation]

2. In 2000, the Nova Scotia Ministry of Education stated “that it felt free to spend the money from the Official Languages in Education Program as it saw fit.”⁶⁴ [translation]
3. In 2002, the vice-president of the CNPF reiterated the conclusions of the 1996 report (*Où sont passés les milliards*) to the Standing Joint Committee on Official Languages:

Over the last 32 years, the federal government has spent close to \$10 billion on official languages in education. One would be hard pressed to say where this money was spent. The provinces will never tell. Often, this is because the money was placed in a pooled fund and they no longer know what was done with it. They provided for their own education system, which is often very basic, as regards minority needs. Let me refer you to a study done in 1996, *Where did the billions go?*. This question, moreover, has never been answered, except with regard to the large sums granted to McGill University.⁶⁵

4. In 2006, the Yukon Ministry of Education reallocated more than 2 million dollars, over a period of four years, that were intended for the territory’s French-language school commission, in order to respond to certain needs in English-language schools and their immersion programs, without obtaining the consent of the Francophone school commission, contrary to the terms of the *Canada – Yukon Agreement on Minority-Language Education and Second Official-Language Instruction 2005-2006 to 2009-2010*⁶⁶.
5. Graham Fraser, the Commissioner of Official Languages for Canada, in his 2009-2010 annual report, stated that:

The signatories of the protocol would [...] have to be transparent in terms of how the amounts would actually be spent.⁶⁷

6. Once again according to Graham Fraser, this time in 2010, as part of testimony before the Standing Senate Committee on Official Languages:

One of the real challenges is how to ensure that the money Ottawa spends on second-language education actually is devoted to second-language education [...] I know that Canadian Heritage has made a serious effort to track the money as best it can, but I have been told by federal

⁶³ CNPF, “Où sont passés les milliards,” [Where Did the Millions Go?] 1996 at p 1. The concept of additional expenditures through the various Protocols and agreements is defined in section 2.4 of this memorandum.

⁶⁴ “Patrimoine Canada s’interroge ... et se veut rassurant,” [Heritage Canada Wonders ... and Tries to be Reassuring] *Le courrier de la Nouvelle-Écosse*, June 16, 2000, as cited in Mark Power et al., “Le soutien financier accordé par le Ministère du Patrimoine canadien pour l’enseignement dans la langue de la minorité: constats et proposition de réforme” [The Financial Support Provided by the Department of Canadian Heritage for Minority-Language Education: Findings and a Proposal for Reform] (2010) 12 RCLF 163 at p. 184.

⁶⁵ Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002), at 17:00 (Jean Giroux-Gagné).

⁶⁶ *Commission scolaire francophone du Yukon n° 23 v. Yukon (AG)*, 2011 YKSC 57 at paras. 837-854; Mark Power et al., “Le soutien financier accordé par le Ministère du Patrimoine canadien pour l’enseignement dans la langue de la minorité : constats et proposition de réforme” (2010) 12 RCLF 163 at p. 182.

⁶⁷ Canada, Officer of the Commissioner of Official Languages, *Beyond Obligations: Annual Report 2009-2010*, vol. 1, Ottawa, Public Works and Government Services Canada, 2010, p. 6.

officials that, to a certain extent, once they moved to no-strings funding, it became very difficult to hold the provincial governments to spending it where they said they were going to spend it.⁶⁸

7. According to Senator Fortin-Duplessis in 2011:

[d]uring the hearings, I asked the Minister of Canadian Heritage how much was allocated to transfers for education. He answered the question easily, but when we got to Quebec City and invited a number of deputy ministers to come and testify, we were never able to find out how the funds were administered. [...] Only in the agreements on economic development was it possible to get that information [...].⁶⁹

8. Once again, Graham Fraser, this time in 2010:

a former provincial minister of education actually confessed to me that once the cheque arrived from the federal government there are all kinds of needs and that they are under a lot of pressure to simply move that money into the envelope and then spend it as they see fit.⁷⁰

9. According to the executive director of the FNCSF, Roger Paul, in 2014, before the Standing Senate Committee on Official Languages:

Currently, it is almost impossible to know exactly how these amounts are being used. In some provinces and territories, it seems that considerable amounts intended for education in French as a first language were used to develop immersion programs. There is a significant need when it comes to French-language education, and federal contributions set aside for it are essential to deploying a French-language education system [...] At first sight, one might suspect that, if it is true for the Yukon, it might also be true elsewhere; one might also wonder why it happens. I feel that it may happen, because the accounting is not rigorous enough.⁷¹

10. In a 2015 report, the Standing Senate Committee on Official Languages stated that:

Some testimony before parliamentary committees in recent years has shown that the education sector has ongoing accountability problems. Organizations such as the FNCSF and CPF have reported having trouble determining how federal government funding is being used by provincial or territorial education departments [...] Anglophone and francophone minority communities are troubled by the lack of transparency in the use of federal government funding. In response to their concerns, the Minister of Canadian Heritage and Official Languages said that the premiers of the provinces and territories could be encouraged to provide more information, but did not propose any concrete solutions to change practices.⁷²

[61] The FNCSF, the CNPF and the FCFA were therefore encouraged to read the Government of Canada's response to the 2015 Senate report, which opens the door to changes for the Protocol to be renewed in 2018:

With respect to the next intergovernmental collaborative cycle regarding the teaching of official languages [in 2018], the approaches identified will also be included in future discussions with provincial and territorial

⁶⁸ Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 40th Parliament, 3rd Session, no. 10 (October 4, 2010), p. 5 (Graham Fraser).

⁶⁹ Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 40th Parliament, 3rd Session, no. 18 (March 21, 2011), pp 16-17 (Fortin-Duplessis).

⁷⁰ Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 40th Parliament, 3rd Session, no. 10 (October 4, 2010), p. 5 (Graham Fraser).

⁷¹ Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 41st Parliament, 2nd Session, no. 9 (November 24, 2014), pp. 82 and 85 (Roger Paul).

⁷² Standing Senate Committee on Official Languages, *Aiming Higher: Increasing bilingualism of our Canadian Youth*, June 2015, pp. 38-39.

governments so that progress can be made towards the major objective of increasing bilingualism in Canada⁷³.

1.3 Funds earmarked for elementary and secondary education are too often used to finance the “core costs” of that education, as guaranteed by section 23 of the *Charter*, and not the “additional costs” of that education

[62] Expenditures for minority language elementary and secondary education that exceed the level required for a province or territory to fulfil its obligations under section 23 of the *Charter* are not and must not be considered to be “core” expenditures; they are the truly “additional” expenditures that must be financed by the federal funds under the Protocol.

[63] Originally, the Protocol was to contribute to what were called the “additional” costs of minority-language education.⁷⁴ Although the 1970 Protocol did not define the concept of “additional costs,” the concept was defined by the Laurendeau-Dunton Commission in 1968:

The objective of a suitable education for the minority-language students is shared by both provincial and federal authorities, but the federal government has special reasons for having this education provided as soon as possible. This does not mean that the federal government should pay for minority-language schools; the basic costs of education must remain a provincial responsibility. But it is reasonable to expect that the federal government should reimburse the provincial government for the *extra* costs involved.⁷⁵

Provincial governments are responsible for the basic costs of education, and it can be argued that the cost of providing a suitable education for the provincial minority is included in this responsibility.⁷⁶

[64] At that time, section 23 of the *Charter* had not yet been entrenched in the *Charter*. The objective of the 1970 Protocol was to encourage the provinces and territories, through financial contributions, to fund French first language elementary and secondary education. They were essentially start-up funds for French first language elementary and secondary education. Thirty years after the adoption of the *Charter*, the federal funds are no longer start-up funds.

[65] Much has changed in education since the Laurendeau-Dunton Commission did its work. The provinces and territories invest much more in that area (for both majority and minority programs) and the courts have confirmed that section 23 of the *Charter* confers a right to “substantive” equivalence in education. Because the communities’ circumstances and needs are different, the concept of substantive equality provides for the possibility, under certain circumstances, of treating them differently from the majority so as to ensure that the communities receive, among other things, an education in French of equivalent quality to that provided to the majority.⁷⁷ The notion of “basic” costs covers more today than it did in the late

⁷³ See “Government Response to the Report of the Standing Senate Committee on Official Languages Entitled *Aiming Higher: Increasing Bilingualism of our Canadian Youth*”, 2016, online: <<http://www.parl.gc.ca/Content/SEN/Committee/412/ollo/rep/rep06GovResponse-e.pdf>> p. 10.

⁷⁴ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018 between the Government of Canada and the Council of Ministers of Education, Canada, preamble:

“Whereas, further to the report of the Royal Commission on Bilingualism and Biculturalism, the Government of Canada believes that the provision of minority-language education and second-language instruction results in additional costs for the provincial/territorial governments and is prepared to contribute toward these additional costs” (emphasis added).

⁷⁵ Laurendeau-Dunton Commission, para. 502, at pp. 192-193.

⁷⁶ Laurendeau-Dunton Commission, para. 501, at p. 192.

⁷⁷ *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3 at para. 31; *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 SCR 201 at para. 20; *R. v. Beaulac*, [1999] 1 SCR 768 at para. 22. See also Michel Bastarache,

1960s. For example, full-time junior kindergartens were additional expenditures in Ontario when only French-language schools offered such a program, but that is no longer the case now that a similar publicly-funded program is offered throughout the province in both English and French.

[66] The concept of “additional costs” was briefly defined for the first time in the Protocol before 1983.⁷⁸ The definition was reworked and improved in 1984. The FNCSF, the CNPF

“Le principe d’égalité des langues officielles” [The Principle of Official Language Equality] in M. Bastarache and M. Doucet, ed., *Les droits linguistiques au Canada* [Language Rights in Canada], 3rd edition, Cowansville, Éditions Yvon Blais, 2014 at pp. 104-105. Substantive equality between elementary and secondary education in the minority and majority languages is particularly important on the financial level. According to the Supreme Court of Canada in *Mahé v. Alberta*, [1990] 1 SCR 342, p. 378:

It should be stressed that the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools. Special circumstances may warrant an allocation for minority language schools that exceeds the per capita allocation for majority schools. I am confident that this will be taken into account not only in the enabling legislation, but in budgetary discussions of the board.

In 2015, in *Association des parents de l’école Rose-des-vents and Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2015 SCC 21 at para. 33, the Supreme Court of Canada confirmed that minority-language elementary and secondary education incurs additional costs per person and must therefore be funded accordingly, by the province:

The focus in giving effect to s. 23 rights, then, should be on substantive equivalence, not on per capita costs and other markers of formal equivalence. In the present case, there is evidence that the CSF receives a 15% premium in its operational funding from the Province, as compared to other school boards in the province. Given economies of scale, higher per capita costs for a minority language board or school are not unexpected (*Mahé*, at p. 378). However, there is no particular per capita number that will satisfy the requirements of s. 23 in any given instance. Rather, what is paramount is that the educational experience of the children of s. 23 rights holders at the upper end of the sliding scale be of meaningfully similar quality to the educational experience of majority language students.

⁷⁸ The lack of a definition was considered to be problematic and was pointed out repeatedly. See for example Canada, Secretary of State, *Evaluation of the Official Languages in Education Program: Final Report*, Program Evaluation Directorate, by Peat, Marwick and Partners in collaboration with Stacy Churchill, Ottawa, Secretary of State, May 1987, at p. ii. According to research conducted by the FFHQ for its 1981 report, *À la recherche du milliard*, 1981:

[a]t a public meeting on November 19, 1979, representatives from the Ministry [in Ontario] admitted that the [Carleton] School Board had used the grants earmarked for the French language modules and the grants earmarked for French second language instruction to uniformly reduce the pupil-teacher ratio throughout the system [...] During that public meeting, one of the representatives admitted that when he audited the additional expenditures for educational services, he randomly selected invoices connected with the French-language schools. It was impossible for him to identify which expenditures were additional and which were basic. In the list of expenditures he considered acceptable, he included amounts for expenditures such as carpet repairs, installing a bell outside a school and installing an inside communication system in another as expenditures associated with teaching materials (Association des enseignants franco-ontariens [Franco-Ontarian Teachers’ Association], *L’utilisation des subventions supplémentaires pour les modules de langue française au Conseil des écoles catholiques romaines de Carleton* [The Use of Additional Grants for French Language Modules in the Conseil des écoles catholiques romaines de Carleton], 1980, at p. 6, as cited in FFHQ, “À la recherche du milliard,” 1981 at p. 52).

Moreover, according to a report by the Secretary of State during the renegotiation of the Protocol in the 1970s: [i]n practice, it was impossible to define or measure these [additional] expenditures, or to establish their relationship with the various formulas that were arbitrarily adopted in 1970. It seems clear in this regard that “additional expenditures” are not the same in all provinces or under all circumstances, and that they depend on certain features, [...] general and linguistic – of the school systems and educational services. As a result, we were not able to evaluate the usefulness of the payments made according to the formulas agreed upon in relation to the concept adopted by the Royal Commission [translation] (Secretary of State, *Discussion Paper: Negotiation of new Federal-Provincial Agreements for Bilingualism in Education*, 1978 at p. 12 [pinpoint references pages from the French version] as cited in FFHQ, “À la recherche du milliard,” 1981 at p. 57).

and the FCFA expressed their concern that the 1984 definition of the term “additional costs” had been dropped:

Additional costs are generally understood to mean the costs or expenditures [...] that can be demonstrated to be over and above the costs the province would incur to fulfil its obligation to provide an education to its residents if it did not offer French-language education programs or French second language instruction programs⁷⁹.

[67] The FNCSF, the CNPF and the FCFA demand that at the very least, a definition similar to the 1984 definition be adopted in the 2018 Protocol. That definition of additional costs will remove the ambiguity that has existed for years with regard to the objective of the Protocol, and answer the many criticisms that have been levelled at it.

[68] It should be recalled that the CNPF concluded in 1996 that the federal funds were not always used to cover the additional costs of minority language education:

[f]irst because the distribution of the funds ignores s. 23 and because it has been in large part misused. The provinces and territories have been its main beneficiaries, since the money has primarily been used to reduce the basic cost of educating a student in their mother tongue or second language.⁸⁰ [translation]

[69] According to four of the action plans under the current Protocol:

1. In Manitoba, the federal funding is used, among other things, to “update and develop curricula, including learning outcome frameworks and implementation documents, according to the Ministry curriculum cycle” and to “develop support documents for French FL1, Mathematics K to 12, Science, Social Studies [...]”⁸¹ [translation]
2. In Saskatchewan, the federal funding is used, among other things, to “update and develop curricula from kindergarten through grade 12.”⁸² [translation]
3. In Ontario, the federal funds are used, among other things, to fund “[d]evelopment, translation and adaptation, production, purchase (as applicable) and management of French-language educational resources that support the implementation of the curriculum in Ontario’s French-language schools.”⁸³
4. In Prince Edward Island, the Ministry of Education confirmed through an access to information request that the funds from the Protocol were used to finance 13.75 regular teaching positions to provide French first language education.

[70] Clearly, these are not “additional” expenditures, since they are costs that the provinces or territories must incur to meet their obligation to educate their residents in French and to ensure substantive equivalence in education: such expenditures must therefore not be paid using federal funds.

⁷⁹ See for example, Canada British Columbia Agreement on Official Languages in Education 1984, art. II.

⁸⁰ CNPF, “Où sont passés les milliards,” 1996 at p. 7.

⁸¹ Canada-Manitoba Agreement on Minority-Language Education and Second Official-Language Instruction 2013-14 to 2017-18, Schedule 3 at p. 25, section 1.2, at para. 1.

⁸² Canada-Saskatchewan Agreement on Minority-Language Education and Second Official-Language Instruction 2013-14 to 2017-18, Schedule 3 at p. 13.

⁸³ *Canada-Ontario Agreement on Minority-Language Education and Second Official-Language Instruction 2013-2014 à 2017-2018*, Schedule 3, p. 38.

2 Modernizing and dividing up the Protocol would be a positive move in terms of public policy

[71] Modernizing and dividing up the Protocol would clearly be a positive move in terms of public policy. It would allow the government to meet its legal obligations.

2.1 There is no legal obstacle to modernizing and dividing up the Protocol, even without the consent of the provinces and territories

[72] Minority French-language school boards are empowered to enter into agreements with third parties, including the Department of Canadian Heritage.⁸⁴

2.1.1 Section 23 of the Charter provides that minority French-language school boards have their own legal personality, distinct from that of the provincial or territorial government, which allows them to enter into agreements

[73] Section 23 of the *Charter* confers upon community representatives, i.e. the French-language school boards in partnership with the communities, a right to school governance and control. According to the Supreme Court of Canada, among the areas in which “the minority language representatives should have exclusive authority to make decisions” is “the making of agreements for education and services for minority language pupils.”⁸⁵

[74] Clearly, the provinces and territories continue to play an important role in minority-language elementary and secondary education. However, in the context of minority-language elementary and secondary education, the provinces and territories may only make decisions “in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority.”⁸⁶

[75] For all decisions that have a direct impact on the linguistic and cultural aspects of minority-language elementary and secondary education, the school boards, in partnership with their communities, are the agencies best qualified to identify and respond to their needs.

[76] Section 23 of the *Charter* grants school governance “by and for” the communities, recognizing that “minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns.”⁸⁷ The French-language school boards, working in partnership with their communities, are the organizations best placed to inform the government of the communities’ position regarding the allocation of resources for minority-language elementary and secondary education.

⁸⁴ Mark Power et al, “Le soutien financier accordé par le Ministère du Patrimoine canadien pour l’enseignement dans la langue de la minorité: constats et proposition de réforme” (2010) 12 RCLF 163 at p. 190.

⁸⁵ *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 377.

⁸⁶ *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 at para. 53, [2000] 1 SCR 3.

⁸⁷ *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 372.

2.1.2 Provincial and territorial laws empower minority French-language school boards to enter into such agreements with the Department of Canadian Heritage

[77] The provincial and territorial school acts contain provisions that empower minority French-language school boards to enter into agreements.⁸⁸

[78] For example, in New Brunswick, the *Education Act* specifically provides that:

50(4.1) Subject to sections 50.1 and 50.2, a superintendent, on behalf of and subject to any policies or directives of the District Education Council concerned, may enter into agreements with a municipality, a rural community, the Government of Canada or any other government or a person or organization for the purpose of carrying out the authorities and responsibilities of the District Education Council or the superintendent under this Act.⁸⁹

In Alberta, the *School Act* includes a similar provision, which applies to both majority school boards and French-language school boards:

62 (2) A board may, with the prior approval of the Minister, enter into an agreement with [...] (ii) the Government of Canada or any agent of the Government of Canada⁹⁰.

In Saskatchewan, the *Education Act, 1995* provides that:

88 (1) [...] the conseil scolaire may [...] (b) enter into agreements for any purpose considered necessary and advantageous to the quality and efficiency of educational and related services to the pupils of the division scolaire francophone with [...] vii) the Government of Canada or an agency of that Government.⁹¹

In Nova Scotia, the *Education Act* provides that:

64 (1) A school board is accountable to the Minister and responsible for the control and management of the public schools within its jurisdiction in accordance with this Act and the regulations.

(3) A school board may [...] c) enter into agreements, including tuition agreements, for the provision of services and benefits.⁹²

⁸⁸ Alberta: *School Act*, RSA 2000, c S-3, art 62(2)(a)(ii) ; Saskatchewan: *Education Act, 1995*, SS 1995, c. E-0.2, s. 88(1)(b)(vii); Manitoba: *Public Schools Act*, CCSM c. P250, s. 48(1)(q)(iii)-(v); Quebec: *Education Act*, CQLR c. I-13.3, s. 214; New Brunswick: *Education Act*, SNB 1997, c. E-1.12, s. 50(4.1); Prince Edward Island: *School Act*, RSPEI 1988, c S-2.1, s. 8(2)(i), 49(e); Newfoundland and Labrador: *Schools Act, 1997*, SNL 1997, c. S-12.2, s. 76(1)(b); Nova Scotia: *Education Act*, SNS 1995-96, c. 1, s. 64, ss. (1), (3); Yukon: *Education Act*, RSY 2002, c. 61, s. 118(1).

⁸⁹ *Education Act*, SNB 1997, c. E-1.12, s. 50(4.1).

⁹⁰ *School Act*, RSA 2000, c S-3, s. 62(2)(a)(ii). Similarly, in Quebec, the *Education Act* provides that: 214 (2) A school board may also enter into an agreement with a department or agency of the Government, or, with the authorization of the Government and subject to the conditions it determines, with a department or agency of the Government of Canada or the government of another province of Canada (*Education Act*, CQLR c. I-13.3, s. 214(2)).

⁹¹ *Education Act, 1995*, SS 1995, c. E-0.2, s. 88(1).

⁹² *Education Act*, SNS 1995-96, c. 1, s. 64, ss. (1), (3).

2.1.3 *The Department of Canadian Heritage is empowered to enter into agreements with the FNCSF and its member school boards*

[79] The enabling legislation of the Department of Canadian Heritage specifically allows the Honourable Mélanie Joly, Minister of Canadian Heritage, to enter into agreements directly with “the government of any province [or territory] or any agency thereof,” which necessarily includes a minority school board,⁹³ even in areas of provincial jurisdiction. In fact, the Government of Canada already enters into agreements directly with organizations that are under provincial or territorial jurisdiction (see examples below).

[80] Although education is an area of provincial and territorial jurisdiction,⁹⁴ the federal government is free to expend funds for education and may subject the granting of such funds to any conditions it deems to be desirable.⁹⁵

[81] It should be noted that the federal government regularly enters into agreements with third parties, including organizations that represent communities, in areas of provincial jurisdiction. There is nothing exceptional about what is proposed in this memorandum.

[82] Firstly, as part of the Official Languages Funding Program, the Department of Canadian Heritage has entered into bilateral agreements directly with the communities in areas other than education, i.e. cooperation agreements.⁹⁶ The Department of Canadian Heritage provides funds to the communities in the area of community programs⁹⁷ even though that is an area of provincial jurisdiction.⁹⁸ Those agreements establish a framework for cooperation to promote the vitality and development of the communities.⁹⁹

⁹³ *Department of Canadian Heritage Act*, SC 1995, c. 11, s. 4-5. According to the *Interpretation Act*, SRC 1985, c. I-21, s. 35(1) the term “province” includes the Yukon, the Northwest Territories and the territory of Nunavut; see also *Official Languages Act*, SRC 1985, c. 31, s. 43(1) and 45.

⁹⁴ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 93, reproduced in SRC 1985, Schedule II, no. 5.

⁹⁵ *YMHA Jewish Community Centre of Winnipeg Inc v. Brown*, [1989] 1 SCR 1532 at pp. 1548-1549; Henri Bun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel* [Constitutional Law], 5th ed., Cowansville, Yvon Blais, 2008 at pp. 427 to 430; Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed., Toronto, Carswell, 2006 at pp. 6-16; Jean Leclerc, “Vers une pensée politique fédérale: la répudiation du mythe de la différence québécoise ‘radicale’” [Toward a Federal Political Thought: the repudiation of the myth of Quebec’s ‘radical’ difference] in André Pratte, ed., *Reconquérir le Canada* [Reconquering Canada], Montreal, Voix Parallèles, 2007, 39 at pp. 51-52. *Contra*: Eugénie Brouillet, *La négation de la nation: l’identité culturelle québécoise et le fédéralisme canadien* [The Negation of the Nation: Quebec’s cultural identity and Canadian federalism], Sillery (QC), Septentrion, 2005 at pp. 278-289; *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91(1A), 91(3), 106, reproduced in SRC 1985, Schedule II, no. 5.

⁹⁶ House of Commons, Standing Committee on Official Languages, *The Economic Situation of Official Language Minority Communities: Building Sustainable and Growing Economies*, Third Report of the Standing Committee on Official Languages (March 2015) at pp. 4-5, note 12, online: Government of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=7875975&Language=E&File=18>>, citing House of Commons, Standing Committee on Official Languages, *Evidence*, 41st Parliament, 2nd Session, no. 20 (April 10, 2014), 8:45 (Jean-Pierre Gauthier); Mark Power et al., “Le soutien financier accordé par le Ministère du Patrimoine canadien pour l’enseignement dans la langue de la minorité: constats et proposition de réforme” (2010) 12 RCLF 163 at p. 201.

⁹⁷ Department of Canadian Heritage, “Official Languages: Official Languages Support Programs (OLSP) – Communities: Cooperation Agreements between the Department of Canadian Heritage and Official Language Minority Communities » (February 7, 2011), Government of Canada Web Archives (Library and Archives Canada), online: <<http://bac-lac.cloudapp.net:8080/wayback/20120402195745/http://www.pch.gc.ca/pgm/lo-ol/entente-agreement/comm/index-fra.cfm>>.

⁹⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 92(13), reproduced in SRC 1985, Schedule II, no. 5; L. Cardinal and M.-E. Hudon, “The Governance of Canada’s Official Language Minorities: A Preliminary Study,”

[83] For example, the Department of Canadian Heritage entered into a bilateral agreement with the Acadian and Francophone community of Newfoundland and Labrador, represented by the Fédération des francophones de Terre-Neuve et du Labrador, in 2010:

The Department of Canadian Heritage and the community representative, on behalf of the Francophone community of Newfoundland and Labrador, have signed this agreement.

FOR THE DEPARTMENT OF CANADIAN HERITAGE:

James Moore

August 5, 2010

Date: _____

The Honourable James Moore
Minister of Canadian Heritage
and Official Languages

FOR THE COMMUNITY:

Jules Custodio

August 20, 2010

Date: _____

Jules Custodio
Chair
Fédération des francophones de Terre-Neuve et du Labrador, inc.

[84] The budget for that agreement is in excess of 4 million dollars, funds used to support a range of community initiatives and provide the Acadian and Francophone community of Newfoundland and Labrador with certain development tools.¹⁰⁰

[85] Secondly, Health Canada, in an area of provincial and territorial jurisdiction,¹⁰¹ also delivers funds directly to the communities.¹⁰² In 2005, the assistant deputy minister in the federal Department of Health stated that:

For a few years now, our department has been working in close collaboration with the consultative committees for the French-and-English-speaking minority communities to address the three interdependent priorities identified by the communities themselves [...] Health Canada is pleased with the success of the governance model that we are using to implement the Action Plan. It is innovative because it encourages the communities for taking responsibility for their health. This has enabled us to invest more in the communities and less in our own administrative overhead [...] [the federal Minister of Health had decided] [...] to trust the communities [...] and, as far as possible, to give them control over the budgets allocated to them, within a framework, of course, since we nevertheless have to ensure that those public funds are properly spent and spent for the purposes for which they were provided. Ultimately, we have to

November 2001, particularly part 2.3.1, online: Office of the Commissioner of Official Languages <http://www.ocolclo.gc.ca/html/stu_etu_112001_e.php>.

⁹⁹ See for example *Cooperation agreement to promote the development and vitality of the Francophone community of Newfoundland and Labrador between Canadian Heritage and the Francophone and Acadian community of Newfoundland and Labrador*, August 2010, art. 5 and 12 [NLL Cooperation Agreement].

¹⁰⁰ NLL Cooperation Agreement. See for example art. 2.2, para. 20

¹⁰¹ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 92(7), reproduced in SRC 1985, Schedule II, no. 5.

¹⁰² See in particular House of Commons, Standing Committee on Official Languages, *Communities Speak Out: Hear our Voice: The Vitality of Official Language Minority Communities* (May 2007) at p. 58 as cited in Mark Power et al., "Le soutien financier accordé par le Ministère du Patrimoine canadien pour l'enseignement dans la langue de la minorité: constats et proposition de réforme" (2010) 12 RCLF 163 at p. 197. See also House of Commons, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session, no. 25 (April 7, 2005) at 9:40 (Jean-Claude d'Amours): "So it's the health network that receives the money and decides how to manage it." The 2003-2008 action plan for official languages earmarked investments of "119 million dollars dedicated to health as part of measures aimed at community development." [translation]

ensure that the results for which we provided those funds have been achieved [...] it's easier for people in the field to identify initiatives that will produce results. They'll be much more involved in them than if the initiative was designed somewhere in a big tower in Ottawa.¹⁰³

[86] In this regard, education does not differ from health; both are areas of “provincial jurisdiction” in which the federal government has chosen to invest, through its spending power, in order to promote community development.

[87] Finally, there are occasions when the Government of Canada delivers funds directly to communities without going through the provincial or territorial governments, even in areas of provincial jurisdiction. For example, Innovation, Science and Economic Development Canada, Employment and Social Development Canada, Western Economic Diversification Canada and the Federal Economic Development Agency for Southern Ontario deliver funds directly to the communities to support community economic development,¹⁰⁴ even though that is an area of provincial jurisdiction.¹⁰⁵ Through the Roadmap for Canada's Official Languages 2013-2018, the federal government is investing around 110 million dollars over five years in economic development initiatives.¹⁰⁶ The funds for some Roadmap initiatives are sent directly to the communities.

[88] Moreover, the “Enabling Fund for official language minority communities” of the Department of Employment and Social Development Canada is another of the many examples of amounts channeled directly to the communities by the federal government in an area of provincial/territorial jurisdiction:

Its goal is to make “a sustained effort to enable community-wide economic development and to grow the economic advantages of linguistic duality.” Specifically, the Fund supports the operations and activities of 14 not-for-profit organizations: the Réseau de développement économique et d'employabilité Canada (RDÉE Canada), 12 provincial and territorial RDÉEs, and the Community Economic Development and Employability Corporation (CEDEC), which represents the interests of Quebec's anglophone communities.¹⁰⁷

¹⁰³ House of Commons, *Evidence*, Standing Committee on Official Languages, 38th Parliament, 1st Session, no. 25 (April 7, 2005) at 9:05 and 9:50 (Marc Nouvet). Graham Fraser, the Commissioner of Official Languages for Canada, concluded in his 2006-2007 annual report that: “[h]ealth care has without a doubt been the most successful area of the Action Plan. Anglophone and Francophone minority communities declare themselves satisfied with the Plan's results in this area.” (Canada, Office of the Commissioner of Official Languages, *Annual Report 2006-2007*, Ottawa, 2007, p. 14).

¹⁰⁴ Mark Power et al., “Le soutien financier accordé par le Ministère du Patrimoine canadien pour l'enseignement dans la langue de la minorité: constats et proposition de réforme,” (2010) 12 RCLF 163 at p. 199.

¹⁰⁵ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 92(13), reproduced in SRC 1985, Schedule II, no. 5.

¹⁰⁶ House of Commons, Standing Committee on Official Languages, *Response of the government to the Third Report of the Standing Committee on Official Languages: Study on the Economic Situation of Canada's Minority Linguistic Communities: Building Sustainable and Growing Economies* (July 22, 2015) (Shelly Glover), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=2&DocId=8059305&File=0>>.

¹⁰⁷ House Commons, Standing Committee on Official Languages, *The Economic Situation of Official Language Minority Communities: Building Sustainable and Growing Economies*, Third Report of Standing Committee on Official Languages (March 2015), pp. 2-3, section 1.2.1.1 <<http://www.parl.gc.ca/content/hoc/Committee/412/LANG/Reports/RP7875975/langrp03/langrp03-e.pdf>>, citing House of Commons, Standing Committee on Official Languages, *Evidence*, 41st Parliament, 2nd Session, no. 20 (April 10, 2014), 9:05 (Stephen Johnson, Director General, Corporate Planning and Management, Strategic Policy and Research, Department of Employment and Social Development). See also House of Commons, Standing Committee on Official Languages, *Response of the government to the Third Report of the Standing Committee on Official Languages: Study on the Economic Situation of Canada's Minority Linguistic Communities: Building Sustainable and Growing Economies* (July 22, 2015) (Shelly Glover, Canadian Heritage) online:

[89] The FNCSF, the CNPF and the FCFA are asking only that the Protocol be modernized and divided up, taking inspiration from the examples given by the Department of Canadian Heritage in the cooperation agreements, by the Department of Health, and in the area of economic development.¹⁰⁸

2.2 What is asked for is no more than what the federal government has already agreed to do with First Nations

[90] Today it would be unthinkable to enter into an agreement for the benefit of a First Nation without that nation being a signatory to the agreement. The same should be true in the context of French first language education. Indeed, the federal government enters into various types of tripartite agreements with First Nations, and thus directly with them, including agreements regarding police services¹⁰⁹ and education.

[91] Similar to the “Minority Language Education” component of the Official Languages Funding Program, the Government of Canada set up the “Education Partnerships Program (“EPP”), a funding program to support First Nations by supporting tripartite education partnerships (among First Nations, provinces, and the Government of Canada).¹¹⁰

[92] Under the PPE, the federal government funds regional First Nations organizations to “support their participation in tripartite partnerships and to support joint initiatives directed to First Nation schools and to support activities intended to strengthen the capacity development of the organization.”¹¹¹ Ten tripartite agreements have been signed, with the aim of ensuring that the education received by First Nations pupils is equivalent to that provided to pupils in the majority:

<<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=2&DocId=8059305&File=0>>; see Mark Power et al., “Le soutien financier accordé par le Ministère du Patrimoine canadien pour l’enseignement dans la langue de la minorité: constats et proposition de réforme,” (2010) 12 RCLF 163 at p. 200 for a summary of similar initiatives in the Roadmaps prior to 2013.

¹⁰⁸ Indeed, the need to “import” these initiatives from the Official Languages Funding Programs into the “Minority Language Education” component was raised by a federal member of parliament in 2005 before the House of Commons Standing Committee on Official Languages. See House of Commons, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session, no. 26 (April 12, 2005) at 10:25 (Raymond Simard, member for Saint-Boniface from 2002 to 2008).

¹⁰⁹ “Agreements on Self-Administered Police Services” are negotiated by Canada, the provincial or territorial government, and the community or a group of communities when the Government of Canada wishes to provide a financial contribution covering the expenses of a police service authorized or established by the government of the province or territory and one or more Inuit or First Nations communities, when those communities are responsible for coordinating the police service. See generally Public Safety Canada, “Indigenous Policing” (August 3, 2016), online: <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/brgnl-plcng/index-en.aspx>> ; Canada, Public Safety Canada, *2014-2015 Evaluation of the First Nations Policing Program: Final Report*, March 17, 2016, Ottawa, Public Safety Canada, at pp. 3-4, online: <<http://www.securitepublique.gc.ca/cnt/rsrscs/pblctns/vltn-frst-ntns-plcng-2015/vltn-frst-ntns-plcng-2015-en.pdf>>:

2.3.1: The [First Nations Policing Program], a contribution program, is delivered through tripartite policing agreements among the federal government, provincial or territorial governments, and communities. The federal and provincial/territorial governments provide parallel financial contributions (52% federal and 48% provincial/territorial).

¹¹⁰ Indigenous and Northern Affairs Canada, “Education Partnerships Program – National Program Guidelines 2015-2016 – Introduction” (June 18, 2015), online: <<https://www.aadnc-aandc.gc.ca/eng/1320335380835/1320335427045#chp1>>.

¹¹¹ Indigenous and Northern Affairs Canada, “Education Partnerships Program – National Program Guidelines 2015-2016 – Broad Parameters” (June 18, 2015), online: <<https://www.aadnc-aandc.gc.ca/eng/1320335380835/1320335427045#chp3>>.

The Parties agree that the provision of Second Level Services by FNEC is intended to support First Nations and First Nation Schools to deliver quality education programs and services, which meet standards that allow students, where applicable, to transfer without academic penalty, at similar levels of achievement, between First Nation Schools and Provincial Public Schools.¹¹²

[93] In contrast to the situation with French first language elementary and secondary education, the federal government and provincial and territorial governments recognize the need for First Nations to be parties to the agreements that govern the funding of their education system.¹¹³ As the lines of signatures reproduced below illustrate, the First Nations Education Steering Committee (“FNEC”)¹¹⁴ – an organization whose mission is to “facilitate discussion about education matters affecting First Nations [and] to promote and support the provision of quality education to First Nations learners in BC”¹¹⁵ – is a full signatory to the Tripartite Education Framework Agreement with British Columbia:

This Agreement has been executed by the duly authorized representatives of Canada British Columbia and FNEC.

HER MAJESTY IN RIGHT OF CANADA, as represented
by the Minister of Indian Affairs and Northern Development

The Honourable John Duncan, P.C., M.P.,
Minister of Indian Affairs and Northern Development

HER MAJESTY IN RIGHT OF BRITISH COLUMBIA,
as represented by the Minister of Education

The Honourable George Abbott,
Minister of Education

FIRST NATIONS EDUCATION STEERING COMMITTEE,
as represented by its President

Tyrone McNeil,
President

¹¹² See for example Tripartite Education Framework Agreement between Canada, British Columbia and FNEC, signed on January 27, 2012, art. 3.1, online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1327671439967/1327674065864>>. Government du Canada, “First Nation education partnerships and agreements,” *Indigenous and Northern Affairs Canada*, online: <<https://www.aadnc-aandc.gc.ca/eng/1308840098023/1308840148639>>.

¹¹³ For example, according to the preamble of the Tripartite Education Framework Agreement with British Columbia:

Individual First Nations have primary decision-making responsibility for First Nation Schools, including the management and delivery of education programs and services.

Tripartite Education Framework Agreement, British Columbia and FNEC, signed on January 27, 2012, online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1327671439967/1327674065864>>.

¹¹⁴ First Nations Education Steering Committee, « About FNEC », online: <<http://www.fnesc.ca/about-fnesc/>>.

¹¹⁵ First Nations Education Steering Committee, « About FNEC », online: <<http://www.fnesc.ca/about-fnesc/>>.

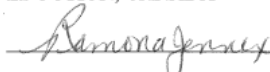
[94] The FNCSF is an equivalent partner to the FNESC in that it is the voice of the minority community in the field of education, which is protected under the constitution. The FNCSF, the CNPF and the FCFA are asking for nothing more than that this best practice from the field of First Nations education be imported into the Protocol:

GOVERNMENT OF CANADA



The Honourable Shelly Glover
Minister of Canadian Heritage and
Official Languages

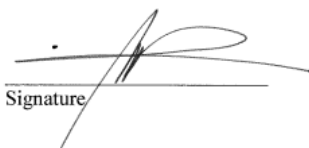
COUNCIL OF MINISTERS OF
EDUCATION, CANADA



The Honourable Ramona Jannex
Chair
Council of Ministers
of Education, Canada (CMEC)

WITNESS

Nathalie Podeszinski
Name in block letters



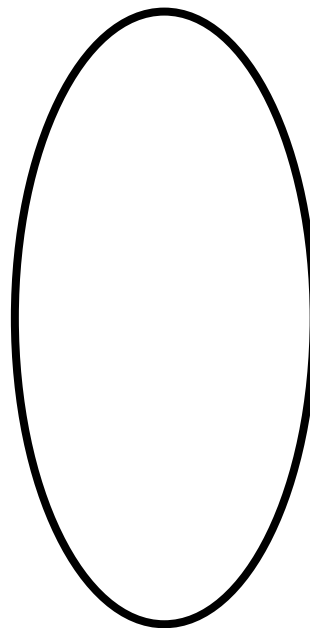
Signature

WITNESS

FRANK DUON
Name in block letters



Signature



[95] In fact, what is proposed in this memorandum does not require the Department of Canadian Heritage and the CMEC to do anything radical. As Senator Robichaud put it in 2011: "It is not like we have to go to the moon and back to solve the problem. What you are telling us is simple"¹¹⁶!

2.3 The Department of Canadian Heritage must deliver on its commitment toward the development of the communities (part VII of the *Official Languages Act*) and the obligations imposed by section 23 of the *Charter*

[96] The commitment of the Department of Canadian Heritage to promote the development of official language minority communities under part VII of the *Official Languages Act* gives rise to positive obligations. These obligations apply to the government when it enters into agreements that involve spending money in an area of provincial jurisdiction as is the case with the Protocol.

[97] Part VII of the *Official Languages Act* codifies various commitments made by the Department of Canadian Heritage toward the communities:

41 (1) The Government of Canada is committed to enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and fostering the full recognition and use of both English and French in Canadian society.

¹¹⁶ Senate, *Proceedings of the Standing Senate Committee on Official Languages*, 40th Parliament, 3rd Session, no. 18 (March 21, 2011) at p. 22.

(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. [...]

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

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

b) encourage and support the learning of English and French in Canada; [...]

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

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

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

45 Any minister of the Crown designated by the Governor in Council may consult and may negotiate agreements with the provincial governments to ensure, to the greatest practical extent but subject to Part IV, that the provision of federal, provincial, municipal and education services in both official languages is coordinated and that regard is had to the needs of the recipients of those services.

[98] At the very least, modernizing the Protocol and dividing it up through the adoption of a *Tripartite Additional Protocol* between the Department of Canadian Heritage, the CMEC and the FNCSF (as the representative of the communities in the area of French first language elementary and secondary education) would certainly be positive steps toward implementing the federal government's commitment under part VII of the *Official Languages Act*. Such measures would contribute to the achievement of the purpose of paragraphs 43(1)(a), (b), (d) and (g) of the *Official Languages Act*, reproduced above.

[99] Furthermore, as described in detail above, the consultation measures currently in place do not require a provincial or territorial government to take into account the interests and needs of the communities when the Protocol is signed, even if the communities are consulted. Although the provision of funding in the area of French first language education is a positive measure, part VII also requires Canadian Heritage to take steps to ensure that the funds are actually used for the purposes for which they are intended. The absence of an effective accountability mechanism in the Protocol prevents the Department of Canadian Heritage from ensuring that the measures it may believe to be "positive" actually are. As explained above, in a number of cases, funds from the Protocol have been allocated for purposes other than those for which they were intended. For example, when a province or territory uses funds earmarked for the communities to finance education in English or immersion programs, that use harms the communities by widening the equivalence gap between the education provided to the majority and that provided to the Francophone minority.

[100] Finally, the Honourable Mélanie Joly, Minister of Canadian Heritage, is required under paragraph 42(2) of the *Official Languages Act*, to consult the public about programs to advance the equality of status and use of English and French in Canadian society. As pointed out by the Commissioner of Official Languages for Canada, Victor Goldbloom, in 1996, the OLEP is the cornerstone of those programs:

[t]he Department of Canadian Heritage should view the Official Languages in Education Program, a component of its recently (partly) redesigned Official Languages Support Program, as a key means to giving full effect to the intent and spirit of Section 23 of the *Canadian Charter of Rights and Freedoms* and of Part VII of the *Official Languages Act*, and should take the necessary steps so that current multilateral and bilateral agreements, upon renewal, become more effective tools in ensuring full implementation of both commitments set out in Section 41 of the *Act*.¹¹⁷

[101] Consequently, the FNCSF, the CNPF and the FCFA must be consulted on its renewal; the Department of Canadian Heritage must therefore take the present memorandum and the demands set out in it into account.

[102] In addition to the requirements of part VII of the *Official Languages Act*, the federal government is required, when acting in the area of education, to comply with section 23 of the *Charter*. Although education is an area of provincial jurisdiction,¹¹⁸ by entering into the Protocol, the Department of Canadian Heritage has chosen to intervene in that area. The fact that Parliament does not have jurisdiction to legislate in the area of education does not mean that the Department of Canadian Heritage can enter into agreements and provide funding in that area with impunity, without regard for its obligations under section 23 of the *Charter*:

Although education is primarily a provincial and territorial responsibility, the federal government is involved by virtue of its power to spend and to transfer money to the provinces and territories to support their social programs. [...] Further, like the province and territories, the federal government has obligations under section 23 of the *Charter* and shares responsibilities with respect to the obligation to provide instruction in the language of the official-language minority at the primary and secondary levels, where numbers warrant.¹¹⁹

[103] The Protocol requires that the federal funding respond to the needs identified by the *province* (or territory).¹²⁰ The Protocol totally disregards the measure of management and exclusive control over issues affecting language and culture that is guaranteed to the communities under section 23 of the *Charter*.¹²¹ The Protocol even makes it possible for the Ministry of Education of a province or territory to transfer funds between the intervention areas

¹¹⁷ Canada, Commissioner of Official Languages, *A Blueprint for Action: Implementing Part VII of the Official Languages Act, 1988*, Ottawa, Department of Public Works and Government Services Canada, 1996, online: Office of the Commissioner of Official Languages for Canada <http://www.officiallanguages.gc.ca/html/stu_etu_021996_e.php>.

¹¹⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 93, reproduced in RSC 1985, Schedule II, no. 5.

¹¹⁹ Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at pp. 3-4.

The following members of the Standing Senate Committee on Official Languages for the 38th Parliament, 1st Session participated in this study: Jack Austin, P.C., John M. Buchanan, P.C., Q.C., Maria Chaput, Gerald J. Comeau, Eymard G. Corbin (Chairman), Mobina S.B. Jaffer, Noël A. Kinsella, Viola Léger, Lowell Murray, P.C. and Claudette Tardif. The following senators also participated in the work of the committee on this study: Rose-Marie Losier-Cool and Wilbert Joseph Keon.

¹²⁰ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18 between the Government of Canada and the Council of Ministers of Education, preamble and art. 7.3.2.

¹²¹ *Mahé v. Alberta*, [1990] 1 SCR 342 at pp. 371-372.

set out in the action plan. Thus, even if the communities are consulted, it is possible for a provincial or territorial government to ignore them and modify the priorities, with the approval of the Department of Canadian Heritage (only).¹²² Once again, there is no obligation to consult the communities, much less to obtain their consent.

[104] The Protocol recognizes only the role of the Ministry of Education of a province or territory and assumes that it speaks on behalf of the minority communities in the area of elementary and secondary education, and this is a clear violation of the right to school governance and control guaranteed by section 23 of the *Charter*.

[105] By agreeing to sign a Protocol and agreements that allow this, the federal government prevents the communities from exercising the measure of management and control, in contravention of section 23 of the *Charter*.

[106] In order to rectify the historical and systemic shortcomings of the Protocol, the Department of Canadian Heritage must, both under the *Official Languages Act* and under the *Charter*, modernize and divide up the Protocol.

2.4 The asymmetry between Quebec's Anglophone minority and the communities makes it possible for a *Tripartite Additional Agreement* excluding Quebec to be signed, if necessary

[107] The FNCSF does not represent Quebec's English-language school commissions, and the CNPF does not represent Anglophone parents in Quebec. The same goes for FCFA. Consequently, they take no position regarding any demands the latter may have with regard to the Protocol. That being said, there can be no doubt that there is a clear asymmetry between the reality and needs of Quebec's minority Anglophone community, which has strong institutions and whose survival is not under threat, and the reality and needs of the Francophone and Acadian communities, which must constantly fight against linguistic and cultural assimilation.

[108] Speaking in 2010, the Commissioner of Official Languages for Canada, Graham Fraser, expressed the view that it was important to apply the Protocol asymmetrically:

Key federal government initiatives, such as the *Roadmap for Canada's Linguistic Duality*, should keep in mind the specific challenges and needs of Quebec's English-speaking community because in many regards they are different from those faced by francophone minority communities. The English-speaking community has its own set of political, social, economic and cultural circumstances.¹²³

[109] In view of Quebec's unique linguistic dynamics, an asymmetrical approach may be indicated.

[110] A *context-sensitive* approach to the implementation of the government's obligations with regard to language is also supported by case law. In *Solski (Tutor of) v. Quebec (AG)*, the Supreme Court of Canada confirmed that the government must "take into account the very real differences between the situations of the minority language community in Quebec and the

¹²² Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18 between the Government of Canada and the Council of Ministers of Education, art. 7.4.3.

¹²³ Senate, *Proceedings of the Standing Committee on Official Languages*, 40th Parliament, 3rd Session, no. 10 (October 4, 2010) at p. 3 (Graham Fraser).

minority language communities of the territories and the other provinces.”¹²⁴ In another case, the Supreme Court of Canada also stated that “different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province.”¹²⁵

[111] Thus, from both public policy and legal perspectives, there is nothing to prevent the Department of Canadian Heritage from (1) entering into a Protocol that applies only to the Francophone and Acadian communities and (2) entering into a Protocol that is distinct from the one that deals with Quebec.

[112] There are several precedents for federal-provincial agreements that exclude one or more provinces. That was the case with the manpower training agreement with Quebec in 2014.¹²⁶ While Quebec was not part of the *Canada Job Grant*¹²⁷, Quebec and Canada signed a separate agreement on manpower training for around 116 million dollars.

[113] Even in the area of minority language education, the Department of Canadian Heritage already signs a bilateral agreement with Quebec with different provisions from the agreements with the other provinces and territories¹²⁸.

¹²⁴ *Solski (Tutor of) v. Quebec (AG)*, 2005 SCC 14 at para. 34.

¹²⁵ *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 SCR 839 at p. 851.

¹²⁶ Hugo de Grandpré and Paul Journet, “Québec et Ottawa s’entendent sur la formation de la main-d’oeuvre” [Quebec City and Ottawa reach an agreement on manpower training] (March 4, 2014), *La Presse*, online: <<http://affaires.lapresse.ca/economie/quebec/201403/04/01-4744560-quebec-et-ottawa-sentendent-sur-la-formation-de-la-main-doeuvre.php>>.

¹²⁷ Government of Canada, “Canada Job Grant: Information by Province or Territory: ESDC,” online: <http://www.esdc.gc.ca/en/job_grant/info.page?&_ga=1.156266488.274873543.1473609005>.

¹²⁸ Canada-Quebec Agreement on Minority-Language Education and Second-Language Instruction 2014-2015 to 2017-2018, preamble, s. 3.2, 5.1 and Schedule 3.

3 What the FNCSF, the CNPF and the FCFA are asking for

[114] The Protocol will expire and must be renewed in 2018. Once the Protocol is signed, the agreements can be negotiated. The FNCSF, the CNPF and the FCFA are demanding that changes be made to the Protocol to modernize it and divide it up.

3.1 Elementary and secondary education must be the subject of a *Tripartite Additional Protocol*

[115] It is no longer acceptable for the Protocol to be produced through closed-door negotiations. The communities must be given a real voice in elementary and secondary education. The FNCSF, the CNPF and the FCFA therefore propose that a *Tripartite Additional Protocol* be adopted in 2018, entitled “*Protocol on Section 23 of the Charter: Additional Expenditures for Minority French-language Elementary and Secondary Education.*”

[116] This new agreement would be “tripartite” as it would be between the Department of Canadian Heritage, the CMEC and the FNCSF. Moreover, it would be distinct from and parallel to the existing Protocol, which will be renewed in 2018. This new agreement would exclusively cover French first-language education outside Quebec (thus excluding immersion programs, postsecondary education and funding for Francophone community organizations, which would continue to be under the Protocol). The adoption of the *Tripartite Additional Protocol* would not affect the terms and conditions set out in the existing Protocol, but would remove French first-language elementary and secondary education from its scope, which would inevitably have the effect of reducing the amount of money administered by the existing Protocol.

[117] One thing is certain: the *Tripartite Additional Protocol* must allow the communities to accept its terms, so that the provincial and territorial governments do not unilaterally determine the priorities for minority French-language elementary and secondary education. The FNCSF, the CNPF and the FCFA demand that the current provisions be rewritten to impose a clear, effective, binding obligation to consult with the communities.

[118] The Protocol covers much more than French first language elementary and secondary education as guaranteed by section 23 of the *Charter*. It also covers second official language instruction at the elementary, secondary and postsecondary levels, official language instruction in Quebec, French first language instruction at the postsecondary level, and continuing education in both official languages.¹²⁹ However, French first language elementary and secondary education enjoys legal protection, unlike the other types of education funded by the Protocol.

[119] Dividing up the existing Protocol would also be in line with the Organisation for Economic Co-operation and Development (OECD) principles of “good public governance,” cited by the Commissioner of Official Languages for Canada in his annual report. According to the OECD and Graham Fraser, a program provides good public governance if it meets the following criteria:

¹²⁹ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18 between the Government of Canada and the Council of Ministers of Education, preamble and art. 7.1.1.

1. Accountability: government (particularly ministers and senior officials) is able and willing to “show the extent to which its actions and decisions are consistent with clearly-defined and agreed-upon objectives.”
2. Transparency: the actions and decision-making processes of ministers and federal organizations are open to scrutiny by “other parts of government, civil society and, in some instances, outside institutions and governments.”
3. Efficiency and effectiveness: government strives to provide citizens with quality services that are based on their needs, and ensures that these outputs meet stated objectives.
4. Responsiveness: government has the capacity and flexibility to respond to societal changes, take into account the expectations of its various constituents, and critically re-examine the role of the State.
5. Forward vision: government is able to anticipate future problems and issues based on current data and trends and to “develop policies that take into account future costs and anticipated changes.”
6. Rule of law: “government enforces equally transparent laws, regulations and codes.”¹³⁰

[120] In order to satisfy these criteria, the Minister of Canadian Heritage must modernize and divide up the existing Protocol, which still does not meet the requirements for accountability, transparency, efficiency and effectiveness, responsiveness, or rule of law.

3.2 The *Tripartite Additional Protocol* must allow the communities themselves to determine their priorities for elementary and secondary education

[121] Since the *Tripartite Additional Protocol* governs the amounts to be allocated to French first language elementary and secondary education, it must have not only the Department of Canadian Heritage and the CMEC, but also the FNCSF as signatories.

[122] The move towards a *Tripartite Additional Protocol* is consistent with the principle of subsidiarity, which underlies the division of powers under the Constitution:

law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.¹³¹

[123] The principle of subsidiarity underlies the concept of governance and control of minority-language elementary and secondary education by and for the communities.¹³² The

¹³⁰ Canada, Office of the Commissioner of Official Languages, *Beyond obligations: Annual Report 2009-2010*, vol. 1, Ottawa, Public Works and Government Services Canada, 2010 at p. 18, citing the website of the Organisation for Economic Co-operation and Development, Principal elements of good governance, online version (French only) (www.oecd.org/document/48/0,3343,fr_2649_33735_1814576_1_1_1_1,00.html) consulted on March 31, 2010.

¹³¹ 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para. 3, [2001] 2 SCR 241; Peter W Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed., Toronto, Carswell, 2008 at pp. 5-12.

¹³² *Mahé v. Alberta*, [1990] 1 SCR 342 at p. 372:

Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such

FNCSF is much closer to the communities (particularly as it works in partnership with them) and is thus better placed than the Department of Canadian Heritage and the CMEC to identify the communities' education needs.

3.3 The *Tripartite Additional Protocol* must include a definition of “additional expenditures” that excludes the costs provinces and territories must incur to fulfil their constitutional obligations

[124] The FNCSF, the CNPF and the FCFA demand that the costs provinces and territories must incur to fulfil their constitutional obligations henceforth be excluded from the scope of “additional expenditures.”

[125] With regard to additional expenditures, the FNCSF, the CNPF and the FCFA are asking only that the *Tripartite Additional Protocol* include a similar definition for federal funding under the Protocol to the one that already applies in the area of complementary federal infrastructure funding.¹³³

[126] According to the schedule to the agreements entitled “Administrative Procedures and Conditions – Capital Projects,” “Canada’s participation is conditional on British Columbia demonstrating that the spaces funded by Canada are over and above existing school standards, as applicable.”¹³⁴ Federal funding of infrastructure is limited to additional expenditures, which are not paid by the provincial or territorial government. For example, federal funding may be used to build a gymnasium that is larger than provincial or territorial standards to serve as a community gymnasium or a space for a Francophone daycare.¹³⁵

[127] Additional expenditures include amounts allocated to programs that are not offered to the majority but constitute positive measures that foster the development of the communities, for example, education for preschool-aged children, a full-time kindergarten program (where one is not offered to the majority) or the opening of a new program where it is not clear that numbers warrant a school. It should be noted that the notion of basic costs is evolving and becoming broader with time; as a result, the characterization of expenditures must be revisited regularly.

neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.

¹³³ Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-14 to 2017-18, art. 7.3.1.7.

¹³⁴ See for example Canada British Columbia Agreement on Minority-Language Education and Second Official-Language Instruction 2013-14 to 2017-18, Schedule 2, art. 2.3 at p. 1.

¹³⁵ For example, British Columbia received a \$15 million investment between 2001 and 2005 to help build community spaces in French-language schools: Canada-British Columbia Auxiliary Agreement on Capital Projects 2001-2005.

Conclusion: Objective 2018/2023 – From words to action!

[128] This is not the first time Francophone and Acadian communities have informed the government of the need to adopt a *Tripartite Additional Protocol* that separates minority-language elementary and secondary education from the other programs funded by the Protocol. Indeed, this demand has been made repeatedly to the Department of Canadian Heritage (or the Department of the Secretary of State) since 1970.

[129] In 2002, testifying before the House of Commons Standing Committee on Official Languages, the president of the Fédération nationale des conseillères et conseillers scolaires francophones, Marc Boily, stressed the importance of giving the communities a place at the negotiating table and including them as signatories of the Protocol and the agreements arising from it:

Throughout Canada, we manage our own schools. However, the relationship in the area of French as a first language, between the federal government and the provinces has not changed since we received the right to manage our own boards. Not much has changed in the way we are funded or in our negotiations and consultations. It is as if the creation of a single francophone level of government based on the Constitution has not changed a thing. It is time that the Government of Canada acknowledges, or even notices, our presence and realizes how much power it really has in the area of minority education. [...] As is the case with the CMEC, we are a partner which must be taken into account. It is up to the federal government to recognize the fact by transforming two-party agreements with departments into three-party agreements.¹³⁶

[130] In 2002, the CNPF proposed to the House of Commons Joint Committee on Official Languages that funds from the Protocol be delivered directly to the minority:

Stop giving provincial governments additional funds provided for the education of the French language minority. Give these funds directly to the minority school boards elected to govern our schools, while making sure that the provinces will not be able to penalize them by taking the money back. Make the connection between section 23 of the *Charter of Rights and Freedoms* and section 41 of the *Official Languages Act* by supporting organizations mandated to strengthen our official language minority communities.¹³⁷

[131] Also in 2002, the FNCSF echoed the view of the CNPF:

The federal government grants \$140 million for that every year. We don't exactly know where that money is going. Right now I'm trying to find out on behalf of the school boards. First, I have to get my hands on the bilateral agreements. I have to ask the provinces for the figures and they don't always give them to me. I calculated there was a difference of \$40 million between what is spent and what we are supposed to be getting. We could include the school boards in those bilateral agreements as the federal power allows this. If there were an agreement between Heritage Canada, the Department of Education and our school boards, we could officially tell the federal government where its money is going to and we would especially know how much money we're actually getting. There is money for us and we don't even know if it exists. It would be much easier to be accountable to the government [...] It's not a matter of taking money away from them [the provinces]. The facts must be a recognition that when the agreements were negotiated there were no school boards and that, as school boards can be included in the agreements, we have to

¹³⁶ Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002), at 16:45 (Marc Boily).

¹³⁷ Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002), at 17:05 (Jean Giroux-Gagné).

make sure that those who spend the money and those who need the money are sitting at the same table as the departments and Heritage. The federal government has the power to do this.¹³⁸

[132] In 2003, Marc Gignac, then executive director of the Fédération des parents francophones de Colombie-Britannique, speaking before the Standing Senate Committee on Official Languages, raised the possibility of signing a separate Protocol for minority language elementary and secondary education:

There is currently a lot of confusion about these various funding programs, their allocation criteria and the bodies responsible for managing them. In British Columbia, the Conseil scolaire francophone has a lot of trouble planning its actions, as it does not really know how much funding will be allocated to it. And once it knows, we'll nearly be at the end of the school year. That's why we think it would be wise for the federal government to study the possibility of creating a permanent funding program exclusively for francophone minority education. [...] For a long time we've been wondering why the federal government would not agree to negotiate agreements exclusively for minority language education.¹³⁹

[133] In 2003, testifying before the Standing Senate Committee on Official Languages, the superintendent of the Division scolaire fransaskoise underlined the importance of institutionalizing practices that worked well at the provincial level in order to remove the federal funds from the vagaries of politics. This is exactly what the FNCSF, the CNPF and the FCFA are requesting:

How do we view negotiations under the official languages program in the education sector? In Saskatchewan, our applications have to go through the department. We have good relations with the department. Our applications are processed, and the funding is provided. However, that situation creates some problems. When the officials change or when there is a new government, we risk losing that good relationship. We would like to be at the bargaining table. We could then make our demands and describe the situation we are dealing with.¹⁴⁰

[134] In 2003, the testimony of Yolande Dupuis, president of the Division scolaire franco-manitobaine, was similar:

we must be at the bargaining table on the Official Languages in Education Program because we are in the best position to make known our needs and our views on the best ways to meet them [...] We believe that a distinction must be drawn within OLEP between teaching of French as a first language and the teaching of French as a second language. The two programs address different needs and different clientele. Consideration should be given to reaching a federal-provincial agreement for the purpose of fully carrying out the mission laid down by section 23 of the Charter [...] Initially, the Bureau d'éducation française du Manitoba, which had been established for the immersion question, negotiated with the provinces. Nothing changed when schools management by the francophone minority came about. The formulas have not been readjusted in seven years.¹⁴¹

[135] On February 14 and March 7 and 21, 2005, the Standing Senate Committee on Official Languages heard many witnesses asking that a tripartite Protocol be signed:

To address the lack of consultation, a number of witnesses called for the establishment of a mechanism for tripartite agreements allowing school boards to sit directly at the bargaining table. The Committee

¹³⁸ Parliament of Canada, Standing Joint Committee on Official Languages, *Evidence*, 37th Parliament, 1st Session, no. 30 (March 19, 2002), at 17:25 and 17:30 (Paul Charbonneau).

¹³⁹ Senate, Standing Senate Committee on Official Languages, *Evidence*, 37th Parliament, 2nd Session, no. 13 (October 24, 2003) at pp. 2 and 7 (Marc Gignac).

¹⁴⁰ Senate, Standing Senate Committee on Official Languages, *Evidence*, 37th Parliament, 2nd Session, no. 11 (October 22, 2003) at p. 24 (Bernard Roy).

¹⁴¹ Senate, Standing Senate Committee on Official Languages, *Evidence*, 37th Parliament, 2nd Session, no. 10 (October 21, 2003) at p. 43 (Yolande Dupuis).

believes that school board representatives are in the best position to understand and express the needs of the Francophone minority. Denis Ferré, representing the [Division scolaire francasquoise], said, "we are the only Francophone school division in the province. So it should not be too complicated to include us in the negotiations. A school board is a legitimate level of government."¹⁴²

[136] Also in 2005, in the light of comments from various witnesses and its interpretation of the case law,¹⁴³ the Standing Senate Committee on Official Languages¹⁴⁴ developed two specific, practical recommendations for the Conservative federal government:

In light of these comments, the Committee has concluded that members of the Francophone community in a minority setting must have greater involvement in the negotiation of education agreements and in the distribution of funding, in particular because these aspects of the process are so closely tied in with their identity. Francophone school boards should be entitled to directly participate in the process of negotiating the education agreements and, in this way, also be the voice of the community associations and lobby groups.¹⁴⁵

Recommendation 5: That the federal government and its partners develop a new framework for the administration of the Official Languages in Education Program for the purposes of:

- a) providing equitable and stable funding for education to Francophone communities in a minority setting;
- b) reviewing the process of negotiation of the protocol and the involvement of the Council of Ministers of Education, Canada;
- c) ensuring the direct participation of French-language school boards in the negotiation of education agreements;
- d) separating minority-language and second-language programs in the negotiation of education protocols and agreements; and
- e) respecting the deadlines for the renewal of the protocol and bilateral education agreements.¹⁴⁶

Recommendation 6: That the federal government, through the Official Languages in Education Program, implement:

¹⁴² Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at p. 49.

¹⁴³ The Standing Senate Committee on Official Languages cites the Supreme Court of Canada in *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3, 2000 SCC 1, at para. 45, to support recommendation 5:

Empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.

¹⁴⁴ The following members of the Standing Senate Committee on Official Languages of the 38th Parliament, 1st Session participated in this study:

Jack Austin, P.C., John M. Buchanan, P.C., Q.C., Maria Chaput, Gerald J. Comeau, Eymard G. Corbin (Chairman), Mobina S.B. Jaffer, Noël A. Kinsella, Viola Léger, Lowell Murray, P.C. and Claudette Tardif. The following senators also participated in the work of the committee on this study: Rose-Marie Losier-Cool and Wilbert Joseph Keon.

¹⁴⁵ Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at p. 50.

¹⁴⁶ Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at pp. 50-51.

a) effective accountability and reporting mechanisms to ensure that the allocation of federal funds corresponds to the objectives of the federal government and the expectations of Francophone communities in a minority setting; and

b) better evaluation measures to determine whether the expected results have been achieved.¹⁴⁷

Recommendation 8: That Canada develop a national policy on early childhood and primary, secondary and post-secondary education, which:

a) includes long-term federal commitments, partnerships with all stakeholders, and an accountability framework; and

b) takes into consideration the particular needs of Francophone communities in a minority setting and rights-holders under s. 23 of the *Charter*.

In November 2006, the Conservative government refused to implement the Senate Committee's Recommendation 5, responding that "[n]egotiations on this partnership will [...] remain between the two orders of government."¹⁴⁸ The Conservative government did not justify its decision, but simply recapitulated the objectives of the Protocol and reiterated the fact that it results in major investments in the area of minority language elementary and secondary education.¹⁴⁹

[137] In 2005, the executive director of the FNCSF, Paul Charbonneau, expressed concerns to the House of Commons Standing Committee on Official Languages regarding the management of federal funds:

We have always deplored the fact that the agreement with the provinces has not changed since we've obtained our school boards. However, the school boards should have made a difference [...] Now, when there are negotiations between a province and the federal government on education, we don't even know what action plan the province is putting forth. We will often hear about it 6 or 12 months after the money has been spent.¹⁵⁰

[138] In 2011, students from the Common Law in French Program recommended once again to the Standing Senate Committee on Official Languages that bilateral agreements on minority language education be between the Department of Canadian Heritage and the communities:

One of our concerns is that all these are in the same agreement. We suggest that there be different agreements because there are different issues. There should be one agreement for first-language education and one for second-language education in order to promote greater transparency and accountability. The problems are similar, but the issues are different. So we need separate agreements. We believe that they could correct the problem.¹⁵¹

¹⁴⁷ Standing Senate Committee on Official Languages, *Interim Report: French-Language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, 38th Parliament, 1st Session, (June 2005) at p. 52.

¹⁴⁸ Canadian Heritage, *Government Response to the Sixth Report of the Standing Senate Committee on Official Languages: French-language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, Ottawa, Public Works and Government Services Canada, (November 2006) at pp. 6.

¹⁴⁹ Canadian Heritage, *Government Response to the Sixth Report of the Standing Senate Committee on Official Languages: French-language Education in a Minority Setting: A Continuum from Early Childhood to the Postsecondary Level*, Ottawa, Public Works and Government Services Canada, (November 2006) at pp. 6-7.

¹⁵⁰ House of Commons, Standing Committee on Official Languages, *Evidence*, 38th Parliament, 1st Session no. 17, (February 15, 2005) at p. 10 (Paul Charbonneau).

¹⁵¹ Senate, *Proceedings of the Standing Committee on Official Languages*, 40th Parliament, 3rd Session, no. 18 (March 21, 2011) at p. 7 (André Poulin-Denis) and p. 10 (Joseph Morin).

[139] This demand transcends political party lines, and this was recognized by Senator Mockler, a Conservative member of the Standing Senate Committee on Official Languages,

You have a very good recommendation [...] because it is good work.¹⁵²

[140] Thus, the system of federal funding for French first language education has been shown by many to be dysfunctional. The solutions proposed in this memorandum, including modernizing and dividing up the Protocol, are not new ideas. It is high time for them to be implemented, to ensure that Francophone and Acadian communities thrive.

¹⁵² Senate, *Proceedings of the Standing Committee on Official Languages*, 40th Parliament, 3rd Session, no. 18 (March 21, 2011) at p. 21 (Senator Mockler).