(2017-2020) 4 RDL 1

ENFORCING PART VII OF THE OFFICIAL LANGUAGES ACT: THE STRUCTURE OF S. 41 AS A LEGAL NORM

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ABSTRACT

Section 41 of the *Official Languages Act* is a critical component of Canada's language rights architecture but remains poorly understood from a legal perspective. This article explores in detail the nature and structure of s. 41 as a legal norm. The discussion is divided into three parts. Part I conducts a conceptual analysis based solely on the text of s. 41, in order to canvass more systematically than has been done to date the range of interpretive possibilities offered by that provision. To that end, I first consider whether s. 41(2) should be viewed as creating a "right", properly speaking, or rather some other form of duty, and what consequences this might have for its substantive content. Next, I explore in some detail the structure of that duty—or rather, the competing theories as to how that structure should be defined, which I label the Holistic Thesis and the Casuistic Thesis. Part II then sets out to resolve this fundamental ambiguity, and argues that the Casuistic Thesis ought to be preferred. I begin with a detailed analysis of the legislative history of the 2005 amendments to s. 41, which demonstrates that the Casuistic Thesis offers by far the best account of Parliament's intent in adopting those changes. I then briefly consider the specialized interpretive principles applicable to language rights measures, which also support this conclusion. Finally, in Part III, I offer a case study of the Casuistic Thesis in practice by analysing a relatively recent Federal Court decision involving Statistics Canada, which I argue was wrongly decided.

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INTRODUCTION

Part VII of the federal *Official Languages Act* (OLA) is a critical component of Canada's language rights architecture, not least because it currently provides the legislative basis for over $ 1.1 billion in spending by the federal government aimed at supporting official language minority communities (OLMCs).[1] Yet until very recently, the key operative provision of this part, section 41,[2] was viewed as non-justiciable by a range of influential actors, including the federal Department of Justice, a view that was ultimately accepted by the Federal Court of Appeal.[3] As a result, while considered important from a public policy standpoint, s. 41 initially

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1 Minister of Canadian Heritage and Official Languages, *Education, immigration, communities: roadmap for Canada's official languages, 2013-2018* (Ottawa: Government of Canada, 2013) at 1.

2 The text of s. 41 reads as follows:

41 (1) The Government of Canada is committed to
(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
(b) fostering the full recognition and use of both English and French in Canadian society.
(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.
(3) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner or Parliamentary Protective Service, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

41 (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.
(2) Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour mettre en œuvre cet engagement. Il demeure entendu que cette mise en œuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces.
(3) Le gouverneur en conseil peut, par règlement visant les institutions fédérales autres que le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique, le bureau du commissaire aux conflits d'intérêts et à l'éthique ou le Service de protection parlementaire, fixer les modalités d'exécution des obligations que la présente partie leur impose.

3 These decisions were based on a previous version of s. 41, as outlined further below: *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)*, 2004 FCA 263,

received little attention as a legal norm. In 2005, Part VII was amended to override this interpretation and make s. 41 clearly "executory". Members of the public now have the unequivocal right to apply to the Federal Court for a wide range of legal remedies when that provision has been violated.[4] Nevertheless, the content of s. 41 as a legal norm remains poorly understood. Very few cases involving s. 41 have ever reached the courts (both before and after the 2005 amendments), and existing judgments offer contradictory guidance on issues of fundamental importance.[5] In addition, there is a dearth of academic commentary on the subject. While the implementation of Part VII has been examined by the Commissioner for Official Languages[6] and the Senate,[7] and from the perspective of other disciplines, such as politics, sociology, and public policy and administration,[8] detailed analyses by

[2004] 4 FCR 276 [*Forum des maires*]. See also: *Procureur général des Territoires du Nord-Ouest c Fédération Franco-Ténoise*, 2008 NWTCA 5 at paras 346-47.

4 *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 77(1) [OLA].

5 For instance, compare Picard v Commissioner of Patents, 2010 FC 86, [2011] 2 FCR 192 [Picard] and Fédération des communautés francophones et acadienne du Canada v Canada (Attorney General), 2010 FC 999, [2012] 2 FCR 23 [FCFA v Canada]. These cases are discussed further below.

6 The Commissioner's office will often commission studies by outside specialists. The following have looked closely at Part VII and related issues: Jean-Claude LeBlanc et al, *A Blueprint for Action: Implementing Part VII of the Official Languages Act* (Office of the Commissioner of Official Languages, 1996); Linda Cardinal & Marie-Ève Hudon, *The Governance of Canada's Official Language Minorities: a Preliminary Study* (Office of the Commissioner of Official Languages, 2001) (electronic resource); Marc Johnson & Paule Doucet, *A Sharper View: Evaluating the Vitality of Official Language Minority Communities*, Report to the Commissioner for Official Languages of Canada (Ottawa: Commissioner of Official Languages, 2006).

7 *Implementation of part VII of the Official Languages Act: We can still do better*, Report of the Standing Senate Committee on Official Languages (Ottawa: Senate of Canada, 2010).

8 See, for instance: Martin Normand, "L'autonomie eu égard à la mise en oeuvre de la partie VII de la *Loi sur les langues officielles*" (2012) 1 Minorités linguistiques et société 229 at 240; Linda Cardinal et al, *Apprendre à travailler autrement : la gouvernance partagée et le développement des communautés minoritaires de langue officielle au Canada* (Ottawa: Chaire de recherche sur la francophonie et les politiques publiques, Université d'Ottawa, 2005) at 24; Linda Cardinal, Stéphane Lang & Anik Sauvé, "Les minorités francophones hors Québec et la ouvernance des langues officielles : portrait et enjeux" (2008) 26 Francophonies d'Amérique 209 at 213; Stéphanie Chouinard, "The Rise of Non-territorial Autonomy in Canada: Towards a Doctrine of Institutional Completeness in the Domain of Minority Language Rights" (2014) 13:2 Ethnopolitics 141 at 153-54; Éric Forgues & Mario Paris, "Impact de l'intervention de l'État sur les communautés minoritaires de langue officielle" (2005) 20 Francophonies d'Amérique 161 at 161; Rodrigue Landry, Éric Forgues & Christophe Traisnel, "Autonomie culturelle, gouvernance et communautés francophones en situation minoritaire au canada" (2010) 29:1 Politique et Sociétés at 110-11; Rodrigue Landry, "Autonomie culturelle, cultures sociétales et vitalité des communautés de langue officielle en situation minoritaire au Canada"

legal scholars are fairly thin on the ground.[9] This article aims to begin filling this gap by offering a detailed analysis of s. 41 as a legal norm.

An important threshold question in this respect has to do with the nature and extent of the constraints s. 41 imposes on federal institutions, as these are not immediately apparent from the text of the provision. Subsection 41(1) sets out a "commitment" to supporting the vitality and development of OLMCs, while s. 41(2) states that all federal institutions have a "duty" to take "positive measures" to implement that commitment. What this implies from a legal standpoint is quite unclear.

Thus far, the Attorney General of Canada (Attorney General) has taken the position that s. 41 merely confers an open-ended discretion on the federal government as a whole, and that it does not give rise to "precise obligations" which might empower the courts to order the adoption of "specific measures" in particular cases.[10] This

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[2004] 4 FCR 276 [*Forum des maires*]. See also: *Procureur général des Territoires du Nord-Ouest c Fédération Franco-Ténoise*, 2008 NWTCA 5 at paras 346-47.

9 A few legal scholars have undertaken a direct analysis of the legal effects of Part VII of the OLA: Ingride Roy, "Les diverses solutions « intégratives » et « autonomistes » offertes aux communautés de langue officielle du Canada pour préserver et développer leur spécificité" (2012) 1 Minorités linguistiques et société 115 at 133-38 [Roy]; Michel Doucet, "La partie VII de la *Loi sur les langues officielles* du Canada: une victoire à la Pyrrhus ou un réel progrès" (2007) 9 RCLF 31; Serge Rousselle, "Modifications a la Partie VII de la *Loi sur les langues officielles* : L'obligation de consulter" (2007) 9 RCLF 183 [Rousselle]; Michel Bastarache & Andréa Ouellet, *La portée juridique de la partie VII de la Loi sur les langues officielles du Canada* (1991) [Bastarache & Ouellet]; Michel Doucet, "La décision judiciaire qui ne sera jamais rendue : l'abolition du programme de contestation judiciaire du canada et la Partie VII de la *Loi sur les langues officielles*" (2008) 10 RCLF 27. Its potential effects are also mentioned in passing in a few other places: Pierre Foucher, "Autonomie des communautés francophones minoritaires du Canada : Le point de vue du droit" (2012) 1 Minorités linguistiques et société 90 at 108; Michel Bastarache et al, "Au-delà des nombres : le droit du public canadien à des services fédéraux dans la langue officielle de son choix" (2011) 35 Man LJ 14 at 47; François Larocque, Mark Power & Maxine Vincelette, "Élargissement du concept d'obligation fiduciaire au profit des communautés de langue française en situation minoritaire dans leurs relations avec l'État" (2012) 63 UNBLJ 370 at 413.

10 See for instance *Picard*, *supra* note 5. In that case, an application was brought against the Patent Office and the Commissioner of Patents alleging that the failure to translate all patents approved by the Commissioner was a breach of Parts II, III, IV and VII the OLA. The court declined to rule that patents must be translated *in toto*, holding that, although they are in some sense an official document, patents are nevertheless exempted from the bilingualism requirements imposed on federal laws and regulations or federal communications because they are primarily issued by private persons, and merely endorsed by the Commissioner of Patents after the fact. However, the court found that the Patent Office was nevertheless required under Part VII of the Act to consider the impact of its policies on the broader vitality of the French

argument, which echoes the approach taken by the courts to s. 41 before the 2005 amendments (when it was held to be merely declaratory, and thus non-justiciable),[11] has met with some success,[12] and continues to be advanced by the Attorney General in ongoing litigation.[13] On the other hand, given that the very purpose of those amendments was to overturn the pre-2005 case-law on the matter, it seems incongruous to interpret s. 41 as doing nothing but conferring a purely discretionary power. Indeed, at least one Federal Court judge has rejected the Attorney General's interpretation.[14] In light of this unclear and conflicting case law, it seems important to explore the question more thoroughly.

This article argues that the Attorney General's approach is untenable and ought to be rejected, on two distinct levels. First, section 41 must necessarily be read as imposing a distinct obligation on each federal institution, rather than a single general obligation on the federal government as a whole. Second, s. 41 can give rise to an obligation to adopt specific measures in particular circumstances, the nature and content of which will be dictated by the statutory mandate of the federal institution at issue. Although the language employed by Parliament may appear, when read in isolation, somewhat indeterminate, and thus seem to confer a very

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language as a vehicle for scientific research. Tremblay-Lamer J took note of the fact that the failure to provide any translation of patents meant that Francophone inventors had, in practice, to operate almost entirely in English, and that—perhaps as a result of this—few patents were ever issued in French. She therefore held that the Commissioner's failure to take steps to provide sufficient materials in French was a violation of the duty under subsection 41(2) of the OLA, and ordered that the patent abstracts be translated. In doing so, she rejected the position advanced by the Attorney General, namely that "Part VII does not impose precise obligations on federal institutions. Rather, it reflects a permanent commitment by the federal government and the fact that measures must be taken, at the discretion of the federal government, to implement that commitment. That discretion means that an applicant does not have a right, under Part VII, to specific measures" (para 61).

11 *Forum des maires*, *supra* note 3 at paras 38, 46.

12 *FCFA v Canada*, *supra* note 5. This case is discussed in greater detail in Part III of this article. On this same point, see also *Canada (Commissioner of Official Languages) v CBC*, 2014 FC 849, [2015] 3 FCR 481 [*Canada v CBC*] (overturned on appeal for other reasons, 2015 FCA 251, [2016] 3 FCR 55), especially at paras 41 and 57-66. Martineau J's decision ultimately did not turn on a ruling with respect to the specific nature and content of the obligations flowing from s. 41, but he considers the issue at some length. Although his initial position, stated at para 41, resembles that of the Attorney General in *Picard* and *FCFA v Canada*, as the analysis develops he arrives at a view much closer to the one being advanced in this article, and for broadly similar reasons.

13 See the reply factum of the Defendants (« Mémoire des faits et du droit des défendeurs (en réponse au mémoire du Commissaire aux langues officielles) ») in Société Franco-manitobaine v Procureur général du Canada et al, Docket T-310-15 (FC) at paras 13-16.

14 *Picard*, *supra* note 5.

broad discretion on federal institutions, properly interpreted it does in fact impose specific obligations. I illustrate this by considering the case of Statistics Canada ("StatsCan"), whose obligations were at issue in *Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General)*.[15] I argue that this case was wrongly decided, and that the court ought to have granted the order sought by the applicant.

The questions raised by the Attorney General's argument, and by the interpretation of s. 41 more generally, are highly complex, and this article does not aim to provide a comprehensive account of the content of that provision. My primary aim is to analyse the structure of s. 41 as a legal norm, with a view to clarifying the general circumstances in which it will be enforceable by the courts. I do not attempt to define the protected interests, namely the "vitality" and "development" of official language minority communities, although I allude to them in passing.

The article as a whole is divided into three parts. In Part I, I engage in some basic conceptual analysis based solely on the text of s. 41, in order to canvass in a systematic way the range of interpretive possibilities offered by that provision. First, I consider whether s. 41(2) should be viewed as creating a "right", properly speaking, or rather some other form of duty, and what consequences this might have for its substantive content. Second, I explore in some detail the structure of that duty—or rather, the competing theories as to what that structure is, which I have labelled the Holistic Thesis and the Casuistic Thesis. In Part II, I set out to resolve this fundamental ambiguity, and argue that the Casuistic Thesis ought to be preferred. I begin with a detailed analysis of the legislative history of the 2005 amendments, which demonstrates that the Casuistic Thesis offers, by far, the best account of Parliament's intent in adopting those changes. I then briefly consider the specialized interpretive principles applicable to language rights measures, which also support this conclusion. Finally, in Part III, I turn to the above-mentioned case involving StatsCan, using this as a case study of the Casuistic Thesis in practice.

[15] FCFA v Canada, supra note 5.

PART I – CONCEPTUAL ANALYSIS

A - Rights vs duties

1) ABSOLUTE AND RELATIVE OBLIGATIONS

At first blush, it may seem that the most obvious question to ask is whether Part VII can be said to create any "rights". Section 41 is described as a "language rights" provision by those who support an expansive interpretation.[16] Others, who wish to limit its legal effects, deny that it creates or entrenches any rights, and assert that it merely imposes an "obligation" on the federal government.[17] The upshot, according to the latter view, is that the implementation of s. 41 is entirely a matter of executive discretion, as it does not confer an entitlement to "specific measures".[18] The claim that s. 41 creates a right, by contrast, would seem to imply the existence of just such an entitlement. Thus, a great deal would appear to turn on the question of whether or not s. 41 can be said to create any "rights".

The argument for saying that s. 41 does not create rights trades on a familiar distinction between rights and duties. While these are often connected in practice, they are conceptually distinct.[19] Though rights necessarily imply the existence of a correlative duty, [20] the opposite is not always true. Duties can exist which are not grounded in a right, and which do not give rise to one.[21]

This distinction is often framed in procedural terms. Hart, for instance, argued that "it is … characteristic of those laws that confer rights (as distinguished from those that only impose obligations) that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorized to act on his behalf."[22] Austin, for his

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16 See, for instance: Rousselle, *supra* note 9 at 184; Roy, *supra* note 9 at 135.

17 *Picard*, *supra* note 5 at para 59.

18 *Ibid* at para 51.

19 Joseph Raz, *The morality of freedom* (Oxford: Clarendon Press, 1986) at 210 [Raz].

20 See, for example, *ibid* at 166. Judicial endorsements of this view can be found in *R v Beaulac*, [1999] 1 SCR 768, 173 DLR (4th) 193 at para 20, and Wilson J's dissent in *MacDonald v City of Montreal*, [1986] 1 SCR 460, 27 DLR (4th) 321 at para 159 [*MacDonald*].

21 Leslie Green, "Two views of collective rights" (1991) 4 Can JL & Jurisprudence 315 at 317.

22 Herbert Lionel Adolphus Hart, "Definition and theory in jurisprudence" in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) at 35 [Hart].

part, distinguished between "absolute" obligations and "relative" ones, only the latter of which had a correlative right.[23]

Given that section 41(2) is, on its face, framed as a duty, we might legitimately ask whether it falls within the category of Austin's "absolute" obligations, or whether it is, instead, a rights-creating norm. By asserting that s. 41 merely creates an "obligation" and not a "right", the Attorney-General in *Picard* was clearly invoking this kind of distinction.[24] However, the OLA itself provides a ready answer to this question. Since 2005, Part VII is subject to judicial enforcement by individual petition. Any party with standing to bring a claim to Federal Court under Part X of the Act can apply for a remedy if s. 41(2) has been breached. Insofar as the distinction between absolute and relative obligations consists in the ability of individuals to enforce them directly, it seems clear that the duty imposed by s. 41(2) is relative, and therefore has one or more correlative rights.[25] As Bentham noted, "[w]hat you have a right to have me made do, is that which I am liable according to law upon a requisition made on your behalf to be punished for not doing".[26]

In other words, given that the distinction between "absolute" and "relative" obligations is largely procedural in nature,[27] the OLA is unambiguous. Under the relevant rules set out in Part X, members of the group that s. 41 is intended to benefit (OLMCs) have standing to enforce violations of the duty it imposes in court. While that standing is not exclusive, exclusivity of standing is not itself a necessary

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[23] "A relative obligation is incumbent upon one party, and correlates with a right residing in another party. Changing the expression, a relative obligation corresponds or answers to a right, or implies, and is implied by, a Right. Where an obligation is absolute, there is no right with which it correlates. There is no right to which it corresponds or answers. It neither implies, nor is implied by a right." John Austin, *Lectures on jurisprudence, or, The philosophy of positive law*, 5th ed/rev and edited by Robert Campbell (London: JMurray, 1885) at 347 (electronic resource).

[24] See note 10.

[25] Consider the comments of the Supreme Court in *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 SCR 443 at para 46: "Whether, in the regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward… However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged." [emphasis added].

[26] Cited in: Hart, *supra* note 22 at 34.

[27] Robert Alexy, *A theory of constitutional rights* (Oxford: Oxford University Press, 2002) at 112 [Alexy].

property of rights,[28] and so this distinction seems of little significance. On this level at least, the distinction asserted by the Attorney General in *Picard* amounts to little more than a "verbal controversy".[29]

2) SUBJECTIVE RIGHTS AND PUBLIC INTEREST STANDING

Nevertheless, there is a further wrinkle to this question, which has to do with the relationship between the rules on standing and the existence of a right. The rules on standing under Part X of the OLA are exceptionally broad, to the point of potentially blurring the line between absolute and relative obligations in a way that has some possible implications for the interpretation of s. 41.

An application to the Federal Court for a judicial remedy can be made by any person who has filed a complaint about the issue with the Commissioner of Official Languages.[30] A complaint to the Commissioner, for its part, can be made "by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue".[31] Because the rule specifies that the complainant need not speak the language at issue, it is not necessary that a person be directly affected by the putative violation in order to have standing to file a complaint.[32] Anyone with knowledge of a breach may initiate proceedings before the Commissioner and, ultimately, before the Federal Court.

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[28] Consider the holding in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 where the Supreme Court of Canada stated that any person may challenge the constitutionality of a law under the Charter when they are the subject of enforcement proceedings under that law, even if they themselves are incapable of bearing the right allegedly being violated. The fact that Big M Drug Mart, as a corporation, might not itself directly benefit from s. 2 (freedom of religion), but could still obtain enforcement of that provision, does not prevent it from being described as a right.

[29] John William Salmond, *Salmond on jurisprudence*, 11th ed by Glanville Williams (London: Sweet & Maxwell, 1957) at 265.

[30] OLA, *supra* note 4, s 77(1).

[31] *Ibid*, s 58(2).

[32] *Forum des maires*, *supra* note 3 at para 18.

Thus, the OLA in effect grants public interest standing[33] to all members of the public, whether as individuals or as a group.[34] This may arguably have some relevance to the question of whether or not s. 41 creates a right.

The paradigm case of an "absolute", non-rights-creating obligation is a duty imposed by a penal statute, the enforcement of which is left entirely to public authorities. While all members of the public are *beneficiaries* of the duty, it cannot be said to confer on them a subjective right.[35] A similar example would be the duty to refrain from committing a public nuisance, which is a duty towards "the public at large" or "indeterminate portions of the public" which does not give rise to a correlative individual right.[36]

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[33] The issue was very recently argued in the context of an interlocutory motion to file supplementary affidavit: *Dionne c Bureau du surintendant des institutions financières*, 2016 CF 506. Locke J held (at para 25) that applications under Part X of the OLA are in the public interest. See also: *Thibodeau v Air Canada*, 2005 FC 1156, [2006] 2 FCR 70 at paras 73-80, and *Thibodeau v Air Canada*, 2011 FC 876, [2013] 2 FCR 83 (overturned in part, 2012 FCA 246, [2013] 2 FCR 155 (affirmed, [2014] 3 SCR 340, 377 DLR (4th) 193)) at paras 97-106. The concept of public interest standing is defined as follows: "if there is a serious justiciable issue as to the law's invalidity, 'a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court'": *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 at para 18, citing *Minister of Justice of Canada v Borowski*, [1981] 2 SCR 575, 130 DLR (3d) 588. Interestingly, section 58(2) of the OLA appears to be even more liberal than this, as it does not (on its face at least) impose any requirement that the applicant demonstrate that there is no other reasonable and effective way in which the issue may be brought to the courts.

[34] On a related issue, see: *Canada (Commissioner of Official Languages) v Canada (Department of Justice)*, 2001 FCT 239, 194 FTR 181 at paras 95-102 [*Canada v Canada*]. In proceedings initiated under Part X of the OLA, both the Commissioner of Official Languages and the complainant made arguments based on the Charter, which is not expressly listed as a basis for an application to the Federal Court under Part X. Nevertheless, both were granted public interest standing to make those arguments.

[35] Consider this example, which Alexy uses to illustrate this point: "The law which introduces a protectionist import duty in the interest of certain industries is to the *advantage* of workers in those industries, it *supports* them and *protects* them in their work, and yet it does not grant them any *rights*. All there is, is a *reflex-effect*, a relationship which bears great similarity to a right, but which must therefore be distinguished all the more carefully from it": Translation of a German case, R. v. Ihering, *Geist des römischen Rechts auf den versichiedenen Stufen seiner Entwicklung*, part 3, 5th ed (Leipzig, 1906), cited in Alexy, *supra* note 27 at 112.

[36] John William Salmond, *Salmond on Jurisprudence*, 11th ed by Glanville Williams (Sweet & Maxwell 1957) 265, cited by Wilson J in *MacDonald*, *supra* note 20 at para 156.

If, then, the rules on standing under the OLA are meant to empower individuals as agents of the public as a whole, rather than subjective rights-holders, this might plausibly have some bearing on the interpretation of provisions like s. 41, which are described in terms of duties rather than rights. One might say that duties imposed on federal institutions (as opposed to measures that explicitly confer a subjective right, like s. 4(1) of the OLA[37]) exist to serve the public interest, rather than to protect individual rights. This reading of the Act could be reinforced by highlighting the role afforded the Commissioner, both in the initial complaints process and later in the judicial context, where he is empowered to prosecute, with the benefit of public funds, claims initiated by private complainants.[38] The Commissioner, as a public official carrying out a statutory mandate, is bound to act in the public interest.[39]

In response, one could of course seek to recast the above examples of absolute obligations in the language of rights. One might say that "the public", as a whole, is granted a right—the right to be free from nuisances—and that the representative or agent of the public, the state, is granted the power to exercise that right. Viewed in these terms, the conceptual distinction between an absolute and a relative obligation appears to dissolve, making it irrelevant as a matter of statutory interpretation.

Nevertheless, an important distinction arguably remains—the distinction, that is, between a duty corresponding to a "privately" enforceable right and one that does not vest a right in any determinate person other than the state. If a legal right vests in the state as a stand-in for the public at large, this might be because the underlying moral right is collective in nature, meaning that individuals, as such, have no subjective claim to the right.

We can illustrate this possibility by using Raz's concept of a collective right. Raz asserts that there exists a certain class of goods, public goods, to which no individual right can exist.[40] Examples include the existence of a cultured society, or self-determination. Although individuals may have an interest in securing access

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37 "4. (1) English and French are the official languages of Parliament, and everyone has the right to use either of those languages in any debates and other proceedings of Parliament."

38 See OLA, *supra* note 4, s 78.

39 The Commissioner has a "social mission of such broad scope": *Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773, 214 DLR (4th) 1 at para 35. See also: *Canada v Canada*, *supra* note 34 at paras 95-102.

40 Raz, *supra* note 19 at 198: "A good is a public good in a certain society if and only if the distribution of its benefits in that society is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefits." This definition essentially mirrors the one used by economists, who define a public good as non-exclusionary and non-

to such goods, that interest is not sufficient to justify the imposition of a duty to provide them, as the interference with other interests that this would entail is too great.[41] However, the collective interest of the public at large may be enough to validate these intrusions.[42]

Whether or not this is an adequate account of collective rights as a general matter,[43] there are certainly cases in which it holds true. It therefore serves to demonstrate that the existence of a public duty to provide a good, grounded in a right belonging to the public as a whole, does not always imply the existence of an individual right to that particular good. Moreover, as Raz also points out, rights-based public duties do not exhaust the range of cases in which there are "absolute" duties, given that duties can be justified on grounds other than rights.[44] In other words, a public duty could be justified on the basis of some other moral or policy consideration having nothing to do with rights, which would also obviate any claim that there exists a subjective moral right to its performance.

Based on this line of thought, one might attempt to argue that the s. 41 duty, while enforceable by way of "private" petition, does not correspond to any (individual or collective) subjective moral right. Of course, the immediate impact of such a conclusion is likely to be quite mitigated. The s. 41 duty is explicitly framed in terms of the interests of OLMCs, rather than the public at large, for the obligations of federal institutions are defined in terms of the "vitality" and "development" of these communities. A court will have no choice but to consider those interests, whatever they are. Nevertheless, it would still be possible for one to argue that the s. 41 duty is *justified* on the basis of a general public interest, rather than OLMC interests, even though its content is defined in terms of the latter. This could in principle have some impact on the way in which the duty is interpreted.

There is in fact some precedent for such an approach under international law. The European Charter for Regional and Minority Languages (ECRML)—which similarly aims to support and protect vulnerable minority languages—was

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rival. On this point, see Denise Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38:1 UTLJ 1 at 3 [Réaume].

41 According to Raz, *supra* note 19 at 203, given the nature of a collective good, providing it "affects the life and imposes constraints on the activities of the bulk of the population, in matters which deeply affect them."

42 *Ibid* at 208.

43 And it may not be: Réaume, *supra* note 40 at 6; Dwight G Newman, *Community and collective rights: a theoretical framework for rights held by groups* (Oxford: Hart, 2011) at 76.

44 Raz, *supra* note 19 at 210.

conceived, not as a minority rights treaty, but as an instrument for protecting a cultural heritage belonging to all member states of the Council of Europe. The ECRML is described both in official documents and in academic commentary as following a "cultural approach", because it is focused on the preservation of languages and not linguistic minorities.[45] When the treaty was first drafted in the early 1980's, it was believed that the goal of protecting endangered languages would be better served by this approach, rather than one revolving around individual or collective rights for minority language speakers.[46] Minorities, as such, were thought to be adequately protected by the existing human rights framework,[47] and the conventional wisdom at the time was that a rights-centered approach to altering state language policy would fail to gain any traction, given the widespread perception that robust minority-specific rights are a threat to political stability.[48] It was hoped that a charter centered on protecting cultural diversity, rather than minorities, might avoid this pitfall, while still providing substantial protection for the languages concerned.[49]

The underlying premise of the cultural approach is that cultural diversity constitutes an *asset,* the value of which redounds to the benefit of society as a whole, not just the individual members of a minority whose cultural or linguistic particularities are the target of special protective measures. It is therefore analogous to the logic

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45 As the Explanatory Report states, "the charter's overriding purpose is cultural. It is designed to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage... not linguistic minorities." Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages*, European Treaty Series-148 (Strasbourg, 1992) at paras 10-11.

46 S Gramstad, "The Charter's monitoring mechanism: a practical perspective" in *Minority language protection in Europe: Into a new decade*, Regional or Minority Languages No 8 (Strasbourg: Council of Europe Publishing, 2010) 29 at 29.

47 Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report, H (95) 10 (Strasbourg: Council of Europe, 1995) at para 2.

48 This perception was largely a legacy of the Minorities Treaties system put in place between the first and second world wars. The rights created by those treaties were widely thought to have contributed significantly to the destabilization of the European political order. Will Kymlicka, *Multicultural citizenship: a liberal theory of minority rights* (Oxford: Clarendon Press, 1995) at 57-58.

49 Secretary General of the Council of Europe, Application of the European Charter for Regional or Minority Languages - Biennial report by the Secretary General to the Parliamentary Assembly, Doc. 11442 (Parliamentary Assembly of the Council of Europe, 2007): "The Charter's departure from the traditional approach of protecting ethnic groups, preferring instead to emphasize the protection and promotion of their languages, was aimed also at those States that claim to have no national minorities."

underpinning environmental protection in most states.[50] Though measures intended to protect a particular aspect of the environment, like a beautiful lake, may benefit some individuals more than others (i.e. those living closest to the lake), the underlying purpose or justification for the regulation is the view that all those who inhabit that jurisdiction benefit in some way from its continued existence. Similarly, under the "cultural approach", cultural diversity is seen as benefiting all those who can or do come in contact with it, whether or not they themselves happen to be "practitioners" of a protected culture.[51]

Although the OLA clearly does not adhere to this approach in a wholesale way, there are some points of similarity between it and the ECRLM. For instance, one of the purposes of the OLA is to protect the English and French *languages*, as such, quite apart from any specific legal rights that might be created for individuals or groups. As Part VII as a whole is entitled "Advancement of English and French", it seems logical to think that s. 41(2) has some connection with this objective, and that its measures might in fact be justified in terms of a broader public interest in maintaining OLMCs.[52] Furthermore, the courts have on occasion emphasized the importance of language rights provisions to the political stability of Canada as a whole, making them a matter of general rather than merely special interest.[53]

If one were to conclude that the s. 41 duty is justified by a general public interest rather than a special one, this could in principle have some impact on the extent of that duty. It is certainly conceivable that there might be situations in which the public interest in the vitality of OLMCs is markedly less intense than that of these groups themselves. More generally, the public interest might be satisfied by smaller and less vibrant linguistic minorities than OLMCs themselves would prefer. If the s. 41 duty were held to be grounded in a public interest, and not the subjective

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50 Jean-Marie Woehrling, The European Charter for Regional or Minority Languages: a critical commentary (Strasbourg: Council of Europe, 2005) at 20.

51 See, for example: François Grin, "Combining immigrant and autochtonous language rights: a territorial approach to multilingualism" in Robert Phillipson, Mart Rannut & Tove Skutnabb-Kangas, eds, *Linguistic human rights: overcoming linguistic discrimination*, Contributions to the sociology of language ; 67 Y (Berlin: De Gruyter, 1994) at 34.

52 In fact, s. 41(1)(b) of the OLA states that the Government of Canada is committed to "fostering the full recognition and use of both English and French in Canadian society."

53 "[R]ights regarding the English and French languages … are basic to the continued viability of the nation", *R v Mercure*, [1988] 1 SCR 234 at p 269, 48 DLR (4th) 1 [*Mercure*], recently reiterated in *Thibodeau v Air Canada*, 2014 SCC 67, [2014] 3 SCR 340 at para 4 [*Thibodeau*]. The OCA made similar comments in a related case: "No doubt with a view to the future strength and unity of the country, [the Charter] has made provision for minority language education rights", *Reference re Education Act of Ontario and Minority Language Education Rights*, 47 OR (2d) 1, 10 DLR (4th) 491 (OCA) at para 80.

interest of OLMCs, this could therefore result in a lower threshold of protection. By contrast, to say that the duty is justified by an underlying right of OLMCs is to create a presumption that general considerations of public interest are not a sufficient reason to override or minimize it.[54] Rights violations are assumed to be exceptional and place a heavy burden on governments seeking to justify them.[55]

This is an important question, but for the moment it can be set aside. While the *intensity* of the s. 41 duty may vary in some cases depending of which of these two modes of justification one adopts, its basic structure as a legal norm is unaffected by them. Either way, it remains the case that the s. 41 duty is directly enforceable by its putative beneficiaries, and thus constitutes—from a legal standpoint, if not necessarily a normative one—a species of subjective right. The debate over its content therefore cannot turn on the distinction between an absolute and a relative obligation, as Parliament has clearly opted to establish the latter.

B - The structure of s. 41(2)

The true controversy, it seems to me, has to do not with the right/duty dichotomy, but with another aspect of the Attorney General's argument, namely, whether s. 41(2) can be said to impose any "precise obligations", such that a complainant would be entitled to "specific measures" of some kind.[56] Whether or not the Attorney General's position is correct on this point does not depend upon whether one characterizes the duty set out in s. 41(2) as being "relative" or "absolute", as this distinction is irrelevant here. It is perfectly coherent to say that a duty, while enforceable by private (i.e. non-governmental) parties, is minimalistic, at least insofar as its justiciable content is concerned.[57]

On the Attorney General's reading of it, s. 41(2) imposes a unitary and indivisible obligation on the federal government as a whole, and leaves the choice of means or fulfilling it entirely to the government's discretion. A court seized of a complaint under s. 41 must therefore

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[54] In *Canada v CBC*, *supra* note 12 (overturned on appeal for other reasons, 2015 FCA 251, [2016] 3 FCR 55) at para 42, Martineau J made this very point with respect to section 41, albeit without describing it as being justified by an underlying right.

[55] See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at para 66; *Mercure*, *supra* note 53 at pp 267-68.

[56] *Picard*, *supra* note 5 at para 61.

[57] There may of course also be political consequences, which are not within the power of the courts to enforce: *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1.

> have regard to all of the government's activities in respect of official languages, while giving great deference to the government's discretionary choices. In particular, that deference should be expressed in reluctance to order or direct the expenditure of public funds, a matter within the authority of elected representatives.58

In short, if some part of the federal government is taking measures to support the vitality and development of OLMCs, there can be no breach of s. 41 in any particular case, even if the specific institution against whom the complaint has been brought has taken no action whatsoever. As a result, Part VII cannot be said to impose precise obligations on particular institutions, and no party is entitled to request that the court order specific measures of any kind, other than those flowing from the generally applicable rules of administrative law.[59]

This interpretation in fact consists of two distinct claims: that the s. 41(2) duty is (1) unitary, rather than manifold; and (2) simple, rather than complex. Each of these claims is mistaken, although explaining why is more straightforward for the first than it is for the second. In the remainder of this section, I will explore these distinctions in an attempt to map out the range of possible interpretations we might place on s. 41(2). I conclude that there are two basic schemas that one could apply when interpreting that provision, which I label the Holistic Thesis and the Casuistic Thesis.

1) A UNITARY OR MANIFOLD OBLIGATION?

The assertion that s. 41(2) imposes a *single* duty on the *entire* federal government, viewed as a unified whole, is clearly mistaken. Firstly, this notion is squarely at odds with the language of s. 41(2) itself, which states that "[e]very federal institution has the duty" to take the requisite measures. The obligation is framed in terms of individual federal institutions, suggesting that each of them has a free-standing duty towards OLMCs. If Parliament had intended for the obligation to apply to the federal government as a whole, it would have used the term "Government of Canada", which appears elsewhere in the Act.[60] "Federal institution" is a defined term with a much narrower meaning than "Government of Canada", as it refers to sub-components of the latter.[61] In fact, the original version

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58 *Picard*, *supra* note 5 at para 60.

59 *Ibid* at para 61.

60 For example, s. 10(1): "The Government of Canada shall take all possible measures to ensure that any treaty or convention between Canada and one or more other states is authenticated in both official languages."

61 OLA, *supra* note 4, s 3(1).

of s. 41 referred only to the latter; a reference to federal institutions was only added as part of the 2005 amendments. The clear implication of this change was therefore to stipulate (or at least clarify) that each *part* of the government has its own obligations under Part VII of the Act.

This reading is reinforced by s. 42 of the OLA, which states that the Minister of Heritage must "encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41". If the Attorney General's view were correct, and the s. 41(2) duty applied to the federal government as a whole, the latter could, if it wished, channel all s. 41 programs and measures through a single department. However, Parliament's choice to impose a duty on Heritage Canada to coordinate activities across the federal government makes sense only if one assumes that each federal institution is expected to take measures in furtherance of s. 41 on its own initiative. The Attorney General's interpretation would therefore render s. 42 entirely superfluous. The better view is to recognize, as Martineau J did in *Canada (Commissioner of Official Languages) v CBC*, that

> in a singular manner, Part VII of the OLA expresses the will of Parliament to place the federal apparatus at the service of a larger societal project that will encompass and surpass it, namely, the advent of a Canada that fully recognizes the equality of English and French, and in which official language minorities flourish. Bringing such an ambitious project to fruition will require a comprehensive, coordinated and a necessarily polycentric approach.62

2) A SIMPLE OR COMPLEX DUTY? THE TWO THESES

The other component of the Attorney General's position—that the s. 41(2) duty amounts to nothing more than a requirement to do something rather than nothing—is on firmer ground from a strictly textual standpoint. The wording of s. 41(2) does not, on its face, appear to dictate the use of any particular measure.[63] It is therefore not unreasonable to believe that federal institutions enjoy substantial discretion in selecting the means for carrying out their duties under that provision. Like all discretionary power, it would be limited (a point I will discuss further below), but there is some force to the argument that s. 41 does not, as a general matter, impose "specific obligations", if by that one means an obligation to take a particular measure in specific circumstances. At the very least, it seems certain that federal

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62 *Canada v CBC*, *supra* note 12 at para 37.

63 For ease of reference, here is the language of that provision once again: "Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1)."

institutions enjoy *some* measure of discretion. The real question is therefore what constraints are placed on that discretion by s. 41 as a whole.

At this point, it is worth noting that there are at least two axes along which the legal constraints on s. 41(2) discretion must necessarily operate. The first is the *eligibility* of a given measure, while the second is its *sufficiency*. By eligibility, I am referring to whether or not a particular measure counts as a "positive measure" within the meaning of s. 41. Sufficiency, by contrast, refers to the question of whether the measures taken by a given institution are enough to discharge its duty under s. 41(2). Constraints will necessarily exist along each of these fronts, regardless of one's ultimate position on the question we are examining here—i.e. whether s. 41(2) imposes "precise obligations" to take "specific measures". Even if one accepts the reading of s. 41(2) defended by the Attorney General in *Picard*, the "something", in order to count as such, must meet some criterion for eligibility, and it must be non-trivial to count as genuine action.[64]

However, I will put the question of eligibility aside for the time being, as the more pressing concern is the structure of the sufficiency criterion. Broadly speaking, we might say that there are two plausible theories as to the structure of that criterion, as evidenced by the cases argued to date. One theory, derived from the Attorney General's position in *Picard*—though modified to take into account the fact that the "unitary thesis" is clearly unsound, as outlined above—would be that federal institutions have a holistic duty to take positive measures (the "Holistic Thesis"). That is, each institution would have a duty to take positive measures, the choice of which would be left entirely to its discretion, subject only to a standard of reasonableness,[65] to be applied in the aggregate. No one would be entitled to apply to the Federal Court for an order requiring a federal institution to take this or that

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[64] During the Senate hearings on the 2005 amendments, the lawyers for the Department of Justice conceded that a decision to spend only $1 on OLMC programs could be quashed on grounds of irrationality or unreasonableness: Senate of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001-02. Issue No. 27: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French)* at 18 [Senate of Canada].

[65] *Ibid*.

specific action; at most, one could obtain a declaration that the institution had failed to adopt sufficient measures.[66] This would appear to be the holding in *FCFA*.[67]

The alternative theory would be that the criterion of sufficiency is more targeted than this. Under this theory, *individual* measures or actions could be assessed by the courts for their sufficiency, as well as the overall package of measures adopted by the institution as a whole. This in turn would imply (or rather presume) that there exist obligations to act in particular circumstances or contexts (the "Casuistic Thesis"). This broadly reflects the holding in *Picard*.

At first glance, it may appear as though there is a very strong textual argument in favour of the Holistic Thesis. This argument rests on the observation that the reference to "positive measures" is indeterminate, which suggests, when read in isolation, that Parliament intended to leave the choice of which measures to adopt to the discretion of federal institutions themselves. However, such an argument cannot withstand serious scrutiny. Statutory language must not be read in isolation, or without giving any thought to the underlying purpose of the provision. In that vein, one must necessarily keep in mind that s. 41(2) was intended to apply to all federal institutions, of which there are several dozen operating in countless different fields. As the Supreme Court has noted, it is important that public law standards provide flexibility when they apply to "the full galaxy of federal decision-makers … who operate in different decision-making environments under different statutes with distinct grants of decision-making powers".[68] Thus, the indeterminate character of the expression used to denote the substantive content of the s. 41(2) duty could simply flow from the fact that Parliament sought to impose a generic duty on a highly disparate range of entities.

How then are we to decide which of the Two Theses is correct? Ultimately, this ambiguity will have to be resolved using sources outside s. 41 itself, mainly the Parliamentary debates leading to the 2005 amendments and the principles of interpretation applicable to language rights norms. However, before turning to

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66 In light of recent judgments, it would be difficult, in the context of such a duty, to obtain anything in the way of a mandatory order from the courts. Given the very open-ended nature of the duty, the only sensible relief would be a structural order of the sort issued in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*]. Yet in a recent case under the OLA, the Supreme Court struck down a structural order granted by the Federal Court for lack of clarity: *Thibodeau*, *supra* note 53 at paras 119-32. Given the comparative specificity of the legal obligations at issue in that case relative to those flowing from the Holistic Thesis, it seems highly unlikely that any structural order defensible in terms of the latter would pass muster with the courts.

67 See note 12.

68 Canada (Citizenship and Immigration) v Khosa, [2009] 1 SCR 339 at paras 28, 33.

those sources, it would be helpful to spell out in somewhat greater detail the possibilities available when interpreting s. 41(2) based on the text alone. More specifically, I would like to briefly consider some of the different types of legal constraints that might apply under each of the Two Theses. This will give us a better sense of the practical consequences of selecting one over the other, and thus better enable us to assess how well each thesis aligns with the purpose and aims of s. 41, as revealed by its legislative history and the relevant interpretive principles.

3) A BRIEF TYPOLOGY OF LEGAL CONSTRAINTS

While all legal norms have in common that they count as reasons for action in the context of the legal system,[69] it is often necessary to distinguish between different types of legal norms, because their effect on judicial decision-making can vary. In this vein, Cass Sunstein has outlined a typology of legal constraints on discretion which will be helpful in thinking through the options presented by s. 41(2). Four of Sunstein's categories are of particular interest to us here: rules, standards, factors and principles.[70]

a) Rules

According to Sunstein, a rule can be defined as "the full or nearly full before-the-fact assignment of legal entitlements, or the complete or nearly complete before-the-fact specifications of legal outcomes".[71] In other words, the aim of a rule is to specify the content of the law as much as possible in advance of particular cases, leaving very little to the judgment of individual decision-makers. A speed limit is the paradigm case of a rule. In the purest of cases, rules require only that one ascertain the facts, as the law is already known.[72] Rules will of course usually be justified by some principle or policy consideration. However, the latter tend to be much broader than the rule itself. One might therefore add that a rule "captures the background principle or policy in a form that from then on operates independently".[73] As a result, it can be over- or under-inclusive relative to the underlying policy or principle.

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69 Alexy, *supra* note 27 at 45.

70 Sunstein also lists rules with exclusions, presumptions, guidelines and analogies as part of his typology. However, those categories are not relevant here. See generally: Cass R Sunstein, *Legal reasoning and political conflict* (New York ; Oxford: Oxford University Press, 1996) at 21–33 [Sunstein].

71 *Ibid* at 22.

72 *Ibid*.

73 Kathleen M Sullivan, "Foreword: The Justices of Rules and Standards" (1992) 106 Harv L Rev 22 at 58 [Sullivan].

b) Standards

Standards, by contrast, are somewhat more open-textured than rules. Standards are norms that rely on terms whose meaning is indeterminate, i.e. which cannot be known fully in advance: for example, a requirement that conduct be "reasonable", or that guilt be proved "beyond a reasonable doubt".[74] The content of standards must therefore be established casuistically, because their concrete requirements cannot be stated fully in the abstract.[75] As a result of this, a standard "tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation".[76] Nevertheless, standards are like rules in that they have a binary character, and are "always either fulfilled or not".[77]

c) Factors

In some cases, however, the legal constraints on discretion do not have such a binary character. Instead, the legislator has enumerated a list of factors that must be considered, and on which any decision must ultimately be based, without intending to draw any particular line. This type of approach is especially common in administrative law.[78] A factor-based norm requires the decision-maker to engage in what Sunstein calls "weighing",[79] or what is sometimes called "balancing".[80] Although the relevant considerations have been stipulated in advance, their relative importance can only be assessed on a case-by-case basis. Because of this, factors tend to produce a "range" of possible outcomes, rather than stipulating a binary evaluation.[81]

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74 Sunstein, *supra* note 70 at 27.

75 Compare the above examples of a standard with the rule stating that one may not drive faster than 100km/h on the highway. The content of that requirement does not require any appreciation of the particular circumstances of individual cases. (Whether or not there are valid excuses is a different question).

76 Sullivan, *supra* note 73 at 58.

77 Alexy, *supra* note 27 at 46. Alexy makes this statement in reference to "rules", but his concept of a rule is broader than Sunstein's and encompasses what the latter calls a standard.

78 See, for example, Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur, 2003 SCC 54, [2003] 2 SCR 504 at para 41; Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 174 DLR (4th) 193 at paras 21-28 [Baker].

79 Sunstein, *supra* note 70 at 28.

80 Sullivan, *supra* note 73 at 60.

81 For example, consider *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*].

For instance, the limits on regulatory power are often structured using a list of factors, which constrain the decision-making *process* leading up to the enacting of regulations, without imposing a binary determination as to the validity of the content of the final decision.[82] Unfortunately, this feature of regulatory power is easily obscured by the fact that regulations are subject to judicial review on the basis of "reasonableness", which appears to indicate that there is, in fact, a binary norm in operation. But describing the adoption of the regulations (as opposed to the decision to quash them) as the *application* of a standard would be misleading, and so the distinction is an important one.

Despite this fundamental difference, however, factors and standards are often closely connected, as the above example of judicial review suggests. The content of standards is often defined *in terms of* various factors, which is why standards are generally difficult to define with any precision in the abstract. The question of whether or not a person has met her duty of care under the law of negligence is a good example. Determining whether or not a person has exercised reasonable care requires that one balance a variety of factors, the precise nature and weight of which cannot be determined in advance of knowing the facts of a given case. Furthermore, there may in fact be a range of potentially reasonable courses of action that person might have taken. However, in the final analysis, the court is required to make a binary determination as to "reasonableness".

d) Principles

Finally, principles, as legal norms, are "both deeper and more general legal rules".[83] As Sunstein uses the term, its meaning is somewhat flexible. A principle can be a proposition that *justifies* a rule or set of rules—e.g. the principle that one ought to keep one's promises is held to justify many of the rules of contract law. Principles in this sense generally do not offer a direct or concrete resolution to specific cases, but may serve to guide the interpretation of applicable rules. On the other hand, the term principle can also be used to describe "explicitly formulated" propositions that, rather than justifying a rule, bear directly on the resolution of a case as a relevant factor (e.g. the principle that laws ought to be interpreted as non-

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[82] In this vein, consider ss. 3 and 5 of the *Broadcasting Act*, SC 1991, c 11, which define the factors on the basis of which the regulatory power of the Canadian Radio-television and Telecommunications Commissions must be exercised. See generally: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 SCR 489 at paras 14-33.

[83] Sunstein, *supra* note 70 at 30.

retroactive, if possible).[84] Although they apply directly, they do not constitute rules, because they function as factors of variable weight.

In Sunstein's view, what both examples have in common is that they are norms that "bear on cases without disposing of them".[85] Sunstein is also careful to distinguish between this concept of a principle, and propositions that are often described as "principles" in legal parlance, but in fact function as standards, like the "principle" that discrimination on the basis of race is presumptively invalid. For the sake of clarity, I will refer to the first kind of principle as a "justificatory principle", the second as an "operative principle", with the third being simply a species of standard.

e) The composition of the Two Theses

Using the above typology, how might we describe the composition of the Two Theses? *Prima facie,* neither of them can be described as incorporating a rule, even a complex one. It simply does not seem plausible to think that this provision amounts to a "full or nearly full before-the-fact assignment of legal entitlements", as Sunstein puts it. Subsequent case-law could of course change this by defining the duty in very specific and technical ways, but that is not the present state of the law, nor does such an outcome seem very likely. This leaves standards, factors and principles as the primary candidates for describing the content of s. 41(2).

The Holistic Thesis, for its part, would appear to hold that any constraints on discretion flowing from s. 41(2) consist in a series of factors, rather than a standard. Recall that the Holistic Thesis asserts that each institution has a duty to take positive measures, the choice of which is left entirely to its discretion, subject only to a standard of reasonableness, to be applied to the aggregate of all measures taken by the institution. This structure is not compatible with the notion that a federal institution is held to a particular standard when performing its duty under s. 41. A standard, by its very nature, is a normative proposition that one *applies* to a given set of facts, in order to produce what is, ostensibly at least, a pre-determined outcome. The Holistic Thesis, by contrast, does not suggest that the s. 41(2) decision-maker is called upon to apply a single proposition to determine the correct outcome. Rather, it implies the existence of Hohfeldian power.[86] That is, federal institutions are granted a legal capacity or ability—along with the duty to use it—which can be used to produce a wide array of legally acceptable outcomes.

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84 *Ibid* at 31.

85 *Ibid*.

86 Wesley Newcomb Hohfeld, Fundamental legal conceptions as applied in judicial reasoning: and other legal essays (New Haven: Yale University Press, 1923) at 50-60.

A legal power must of course have limits, both in terms of the *types* of measures it authorizes and the *reasons* for which it can be exercised. However, such constraints—especially those relating to reasons—generally take the form of a prescribed list of "relevant" factors, as I noted above. Such factors can both specify what is a relevant consideration and what is a *necessary* one, for it is often the case that a "factors constraint" requires the decision-maker not merely to pick and choose considerations à la carte, but also to consider each one and weigh it against the others. However, factors do not set out a rule or standard to be applied. Rather, they are best thought of as defining the building blocks out of which a range of lawful actions can be constructed.

The Casuistic Thesis, on the other hand, suggests that s. 41 incorporates at least one standard. Recall that, under this theory, individual measures or actions could be assessed by the courts for their sufficiency. In *Picard*, for instance, the Federal Court ruled that, having decided to make patents available online, the Patent Commissioner had an obligation under s. 41 of the OLA to translate the abstracts of those patents in order to ensure that francophone inventors were not forced to assimilate by having to conduct all of their research in English.[87] Thus, the specific decision not to translate the patent abstracts was subject to review on the basis of a standard emanating from s. 41. The content of that standard could not be specified until the Patent Commissioner had made the decision to publish all patents online, but once those facts were established, a "precise obligation" crystalized, entitling the court to order the adoption of "specific measures".

PART II – THE ARGUMENT FOR THE CASUISTIC THESIS

Now that we have a clearer picture of the interpretive choices available and what they imply by way of legal constraints on executive action, we can attempt to resolve the ambiguity and decide which of the Two Theses provides the best fit for s. 41(2). In this section, I will advance two arguments as to why the Casuistic Thesis is the better option. First, drawing on the legislative history of the 2005 amendments, I will show that the Casuistic Thesis provides the best description of what Parliament intended to achieve by enacting them. Second, I will argue that the principles of the language rights interpretive paradigm strongly favour this interpretation.

[87] *Picard*, *supra* note 5 at paras 58, 65-67.

A - The legislative history of the 2005 amendments

Although s. 41 was originally enacted in 1988 as part of a total overhaul of the OLA, the Parliamentary debates on that bill provide very little information about how Part VII was understood from a legal perspective. In fact, a comprehensive study of these debates has shown that there were virtually no questions regarding Part VII when the 1988 OLA reform bill was in committee.[88] As a result, the committee hearings on Senator Gauthier's various amendment bills are the main source of information regarding Parliament's understanding of s. 41, both before and after the 2005 changes.

Before delving into those debates, however, it will be helpful to briefly consider the nature and structure of the old s. 41. The legislative changes that ultimately became the 2005 amendments were motivated by the way in which the old s. 41 had been interpreted, first by the Department of Justice and then later by the courts. Thus, in order to understand what Parliament sought to accomplish by amending Part VII, we must first define what it was that it sought to reject.

1) THE OLD S. 41: A JUSTIFICATORY PRINCIPLE

There is no doubt that the old s. 41 was less restrictive than its current incarnation.[89] While the 1988 OLA reform bill was in committee, the Secretary of State asserted that the original Part VII spoke the "language of encouragement" rather than the

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[88] In fact, the only questions came from Senator Gauthier himself, who was an MP at the time. See the testimony of Professor Linda Cardinal before the House of Commons while the 2005 amendments were being studied: House of Commons of Canada, *Standing Committee on Official Languages, Evidence, Vol. 42, 1st Session, 38th Parliament (2004-2005)* (2005) at 2 [House of Commons of Canada].

[89] The text of the old version read as follows :

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

41. Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

"language of command".[90] Later, both the Department of Justice and the courts concluded that it was merely "declaratory" and not "executory".

In fact, based on the definitive court ruling on the matter, it might even be argued that the old s. 41 had no legal content whatsoever. The Federal Court of Appeal stated that this provision did "not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever".[91] Given the context and the categorical way in which this statement was phrased, it could be taken to mean that even judicial review of executive action taken under the auspices of s. 41, based on general principles of administrative law, would be impossible.[92] If that were the case, s. 41 would effectively have no legal content to speak of.

However, it seems unlikely that the FCA meant to go quite this far. Although it never clearly stated what it took the legal effect of s. 41 to be, it would appear as though the court viewed this provision as an example of what I called above a "justificatory principle". The court seemed to think that s. 41 was analogous to s. 2 of the OLA and s. 16(1) of the Charter, in that it established a broad principle on which subsequent, more detailed measures would be based.[93] On this reading, although the old s. 41 did not constrain the executive's freedom to act, much less require that specific measures be taken, it could be said to provide legislative authorization to take measures with a view to enhancing the vitality of OLMCs.[94]

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90 Linda Cardinal, Review of Bill S-3 - Presented to the Standing Committee on Official Languages of the House of Commons (Ottawa, Ontario, 2005) at 4.

91 *Forum des maires*, *supra* note 3 at para 46.

92 Although the application was held to have been made under the remedial provisions of the OLA, the court did consider the possibility that an application for judicial review could be made to enforce provisions not included within the scope of the OLA's own remedial power. *Ibid* at para 32.

93 The court quoted at length from a passage in *Beaulac*, *supra* note 20 in which Bastarache J explores the legal foundations of the principle of substantive equality in language rights law. The FCA highlighted a specific statement dealing with s. 16(1) of the Charter and s. 2 of the OLA, apparently with the intention of suggesting that s. 41 played the same function as these provisions, i.e. to establish a principle on which subsequent, more detailed measures would be based. *Forum des maires*, *supra* note 3 at para 41.

94 This line of analysis is of course premised on the notion that s. 2 of the OLA, or s. 16(1) of the Charter, have no distinct substantive content of their own, as the FCA appears to have thought. There is certainly case-law supporting this view (see: *Association des Gens de l'Air du Québec Inc, et al v Minister of Transport (Canada)*, [1977] 2 FC 22), although that reading is by no means obviously correct (see Le Dain JA's (as he then was) reasons in *Assn des gens de l'air du Quebec Inc v Canada (Minister of Transport)*, [1978] 2 FC 371 (FCA)). On the question of whether s. 16 of the Charter has any substantive content, see generally: Grégoire Webber, "The Promise of Canada's Official-Languages Declaration" in Joseph Eliot Magnet, ed, *Official Languages of Canada: new essays* (LexisNexis Canada, 2008).

Accordingly, federal institutions whose mandate did not explicitly refer to such matters could have relied on the old s. 41 in order to justify an exercise of their discretionary powers in a manner intended to have that effect.

Nevertheless, even with this more generous reading of the FCA's reasons, s. 41 provided little if anything in the way of legal constraints. The most one could possibly argue, based on this view, is that federal institutions had an obligation to consider the vitality of OLMCs as part of their decision-making process—thus, that it constituted a "factor" limiting their discretion. Yet even this would be difficult to establish, given that, in the original wording, s. 41 stated only that the "Government of Canada" was committed to enhancing the vitality of OLMCs, and made no mention of individual federal institutions.[95]

It is interesting to note however that the Department of Justice seemed willing, initially at least, to accept that s. 41 might have more of a binding effect than this. In their testimony before the Senate Committee charged with examining Senator Gauthier's original draft amendments, DoJ officials suggested that s. 41 might well impose some obligation to act. Furthermore, asked to comment on a hypothetical scenario in which the federal government budgeted only one dollar for Part VII measures, their response was to say that there would be an administrative law remedy available in such a case, as a decision of this kind could be characterized as irrational.[96] That position appears to have been abandoned by the time the issue reached the courts. However, had it been sustained, the old s. 41 would have resembled the Holistic Thesis, with the caveat that the duty to act might have fallen on the government as a whole, rather than individual federal institutions. This will be relevant when it comes to determining which of the Two Theses best describes what the 2005 amendments were meant to accomplish.

2) THE SENATE HEARINGS: MAKING S. 41 ENFORCEABLE ON A CASE-BY-CASE BASIS

Senator Gauthier first presented a bill to amend Part VII in 2001. The reason for the amendments was twofold: (1) dissatisfaction with the way in which the old s. 41 had been implemented by the federal government, a problem partly attributed to the wording of the original text; and (2) concern that the provision would be treated as unenforceable by the courts.[97] As a result, there was a lively debate in committee

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95 See note 89.

96 Senate of Canada, *supra* note 64 at 18.

97 While the FCA's ruling in *Forum des maires*—which was to be the definitive statement on the matter—would not come until 2004, there was already one judgment holding that the old Part VII did not give rise to a judicial remedy. *Canada v Canada*, *supra* note 34 at paras 88-90.

over the precise nature of the old s. 41 as a legal norm, and the consequences (if any) of adopting Gauthier's bill.[98] These discussions provide a reasonably clear picture of what the amendments were expected to accomplish.

In my view, the Casuistic Thesis provides the best description of what the committee and the various witnesses it heard from expected the "new and improved" s. 41 to achieve. A detailed summary of the discussion would be tedious and require too much space, but the dominant themes most relevant to us here can be described as follows:

a. Was the old s. 41 executory or declaratory? If so, what would Gauthier's amendment change?
b. The lack of clarity in what was expected/required of federal institutions, and the lack of certainty and predictability in OLMC funding and programs;
c. Comparisons with ss. 23 and 16.1 of the Charter

a) Executory, not declaratory

One of the main topics of discussion was the question of whether the old s. 41 was executory or merely declaratory, and if the latter, what amendments might be needed to correct this. Although some leading scholars had argued that the old s. 41 created a "self-executing" obligation—i.e. one that was enforceable through the courts[99] —the majority of views expressed before the Senate committee was that it was merely declaratory. As a result, the ultimate purpose of Gauthier's amendments became to correct this flaw and ensure that OLMCs had access to meaningful court oversight of the way in which s. 41 was implemented.

Senator Beaudoin, a member of the committee who was also a well-known constitutional scholar, sought to describe the gap between the legal effect of the "pathological" (i.e. original) version of s. 41 and the underlying ideal using the concept of "directory" versus "mandatory" statutes.[100] In Anglo-Canadian law,

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98 The Senate Standing Committee on Legal and Constitutional Affairs held extensive hearings on the bill and heard from roughly 30 witnesses, including the Department of Justice, the Commissioner for Official Languages, Heritage Canada, the FCFA, the Law Reform Commission of Canada, the leading expert on statutory interpretation, Prof Ruth Sullivan, and a range of experts on language rights.

99 See, for example, Bastarache & Ouellet, *supra* note 9, which was referred to during the hearings.

100 Beaudoin referred to the argument made by the Manitoba Court of Appeal that British law maintained a distinction between "directory" and "mandatory" statutes, and that s. 23 was of

there is a general distinction between "statutory provisions that are mandatory in the sense that failure to comply with them will lead to invalidity of the Act in question, and directory, in the sense that failure to comply will not necessarily lead to such invalidity."[101] In the case of s. 23 of the Manitoba Act, for instance, this distinction had been used by the Manitoba Court of Appeal to excuse its decision not to declare null and void acts of the legislature not passed in both English and French, for it characterized the bilingualism requirement as directory and not mandatory.[102] Senator Beaudoin argued that s. 41 was (or ought to be) "mandatory" in this sense. Thus, he appears to have been implying that it should impose one or more conditions precedent on the *validity* of executive decisions.[103]

What those conditions might be, Beaudoin unfortunately never specified. However, some indications can be found in the brief of the Fédération des communautés francophones et acadiennes (FCFA), which was then under discussion and to which Beaudoin was reacting.[104] For instance, the FCFA suggested that federal institutions would have, pursuant to the proposed amendments, an obligation to ensure that their policy development process would, from the very outset, consider the needs of OLMCs as distinct from those of the majority. Policies and programs were (and often still are) generally developed using a framework based on the needs of the majority, which can lead to very serious inequalities in their effectiveness

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the former, and not the latter, category: *Forest v Manitoba (Attorney General)*, 98 DLR (3d) 405, [1979] 4 WWR 229 (Manitoba CA) at para 47 [*Forest v Manitoba*].

101 *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 740, 19 DLR (4th) 1, citing *Montreal Street Railway Co v Normandin*, [1917] AC 170 (JCPC) at pp 174-75. See also: Ruth Sullivan, *Sullivan on the construction of statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 78. Interestingly, the OLA 1969 was described by the Supreme Court of Canada as a "directory" statute in *Minister of Justice (Can) v Borowski*, [1981] 2 SCR 575 at p 580, 130 DLR (3d) 588, in the context of a discussion about standing. Specifically, the court noted that in the case of a "directory" statute, which was neither "regulatory" nor "penal", there would never be enforcement procedures undertaken against individual citizens, meaning that the only way to challenge the constitutional validity of the law was through a grant of public interest standing. Thus, in this context at least, the notion that a statute is "directory" did not imply that the OLA not create binding obligations, but merely constituted a statement regarding the subject of those obligations (i.e. the state, rather than private persons).

102 *Forest v Manitoba*, *supra* note 100 at para 47. As Senator Beaudoin pointed out, this decision was later overturned by the Supreme Court. See note 109 below.

103 See generally: *Re Manitoba Language Rights*, *supra* note 101 at paras 37-42.

104 Fédération des communautés francophones et acadienne du Canada, Mémoire présenté au Comité sénatorial permanent aux affaires juridiques et constitutionnelles au sujet du Projet de loi S-32 : Loi modifiant la Loi sur les langues officielles (promotion du français et de l'anglais) [Mémoire de la FCFA].

and in the distribution of benefits.[105] By contrast, the role of s. 41, according to the FCFA, is to ensure that federal policies reflect a more appropriate vision of Canadian society:

> une société pluraliste qui réunit deux communautés de langue officielle et au sein de laquelle les francophones qui vivent à l'extérieur du Québec ne sont pas des citoyens de second plan; une société qui reconnaît aux francophones qui y vivent en situation minoritaire le droit quasi constitutionnel de se développer et de s'épanouir dans leur langue. Ce qui signifie, au bas mot, qu'ils puissent profiter des politiques et des programmes fédéraux aux aussi pleinement que leurs concitoyens anglophones.[106]

This view implies that s. 41 should impose a duty on federal institutions to ensure that OLMCs benefit from federal policies and programs equally, and that the latter support their ability to develop and flourish as minority language communities. It also implies, in the FCFA's view, that the federal government has a broader obligation to develop a "global action plan" to ensure that the various policies being adopted are mutually re-inforcing and are responsive to the real needs of OLMCs.[107] As neither of these obligations could be fulfilled without appropriate consultation with OLMC representatives, there would also be a duty to consult.[108] Beaudoin in fact believed (at the time) that the old s. 41 was executory.[109] While

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[105] See for example: *DesRochers v Canada (Industry)*, [2009] 1 SCR 194.

[106] *Ibid* at 11.

[107] On this point, see also the testimony of the President of Law Reform Commission, Nathalie DesRosiers, who stated that "the draft amendment to section 41 clearly addresses the issue of whether a community has the ability to decide its own fate": Senate of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001-02. Issue No. 28: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French)* at 19.

[108] See generally: *Mémoire* de la FCFA, *supra* note 104 at 7-10.

[109] Beaudoin compared s. 41 to s. 23 of the Manitoba Act, 1870: Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001-02. Issue No. 25: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French) at 16. This provision had long been ignored by the provincial legislature, but was ultimately held to be binding by the Supreme Court, which declared all Manitoba laws enacted since 1890 invalid as a result. The issue arose because the Manitoba Official Language Act, passed in 1890, required that only English be used before the courts and the legislature of the province. However, section 23 of the Manitoba Act, 1870, which had created the province out of a portion of the North West Territories, imposed the exact same requirements as s. 133 of the Constitution Act, 1867 on the provincial legislature

others on the committee shared this view, including Senators Gauthier, Rivest and Joyal, that position was far from unanimous. Professors Sullivan[110] and Magnet,[111] along with the Department of Justice[112] and the Commissioner for Official Languages,[113] amongst others, all argued that the old s. 41 was in all likelihood merely declaratory, and would require substantial amendment—along the lines proposed by Gauthier's bill—to become legally binding.

Senator Bryden, former Minister of Justice of New Brunswick, shared this view, and his comments are instructive with respect to the legal consequences of adopting the 2005 amendments. Responding to the suggestion made by Senator Beaudoin that Gauthier's bill would merely "clarify" the pre-existing legal content of s. 41, Bryden stated that the amendments would "dramatically change the obligations of the Government of Canada", given that the old s. 41 did not in fact contain any legal obligations.[114] To illustrate this, he argued that, under the proposed amendments, if the federal government were to create a cultural centre in Calgary under the auspices of Part VII, the francophone community of Saskatoon would have a right to demand one as well. The new s. 41, in other words, would provide "a commitment not just to enhancing but ensuring that these types of institutions appear."[115] It would therefore be "a considerable undertaking that has significant implications."[116]

In the final analysis, the clear impression one is left with after reading through the transcripts of the hearings is that, regardless of their views on the extent to which the old s. 41 was legally binding, all agreed that the amendments under discussion would impose substantial and fairly specific obligations on the federal government, and open the door to active involvement by the courts in supervising their

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and courts. An initial ruling that s. 23 was binding, and that its requirements needed to be met in order for a statute to be constitutionally valid, was rendered in Attorney General of Manitoba v Forest, [1979] 2 SCR 1032. In a later decision, Re Manitoba Language Rights, supra note 101, the Supreme Court declared all Manitoba laws enacted since 1890 to be of no force or effect, though it suspended its declaration of invalidity for one year.

110 Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001-02. Issue No. 29: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French) at 12.

111 *Ibid* at 6.

112 "[A] commitment is not necessarily of the same order as a justiciable right or duty." Senate of Canada, *supra* note 64 at 7-9. Newman also compared s. 41 to the *Multiculturalism Act*, which does not contain a justiciable duty: *ibid* at 17.

113 Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001. Issue No. 26: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French) at 6-7.

114 *Ibid* at 20.

115 *Ibid*.

116 *Ibid*.

implementation. This is perhaps demonstrated most elegantly by the testimony of Warren Newman on behalf of the Department of Justice, which reads like an inverted roadmap to the new s. 41.

Newman sought to convince the committee that the old s. 41 was not judicially enforceable, and advanced several points to support this claim. Highlighting the fact that s. 41 spoke only of "commitment", he explained that "a commitment is not necessarily of the same order as a justiciable right or duty",[117] noting:

> If Parliament had wanted to create an obligation or a right, why did it not word the act that way? In Parts IV and V, for example, the words "it is the duty of federal institutions" or "it is the duty of the Government of Canada" were used at least 14 times. Why did it insist on using the term "commitment"?[118]

Newman further added that, if Parliament had meant to create a duty, it would have included s. 41 under the judicial remedy found in Part X of the OLA. Because it did not, and because s. 41 spoke only of a "commitment" and not a "duty", the courts would not be justified in conducting "a fastidious exercise of second-guessing political decisions allocating resources, as long as decision-makers act reasonably, in accordance with the values that underlie our Constitution."[119] Beyond these minimal constraints of administrative law, the only remedy for a failure to respect the spirit of Part VII would be political in nature.[120]

Newman in fact defended this approach as being appropriate given what he took to be Part VII's aims, claiming that "Part VII is eminently "political" in the most noble sense of the term".[121] But it cannot be overlooked that the 2005 amendments explicitly counteract every one of his points. The reference to a "commitment" has been supplemented by the clear imposition of a "duty", which is now judicially enforceable under Part X. Parliament has evidently rejected the premise that the Commissioner of Official Languages can provide the oversight needed to ensure that Part VII is properly implemented. In short, s. 41 has become much more *juridical* in nature.

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[117] Senate of Canada, *supra* note 64 at 7.
[118] *Ibid* at 8.
[119] *Ibid* at 7.
[120] Newman compared the Official Languages Commissioner to the Auditor General, citing *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, 61 DLR (4th) 604 at para 59.
[121] Senate of Canada, *supra* note 64 at 8-9.

The point-and-counterpoint between Newman's interpretation of the old s. 41 and the text of the new version has some obvious implications for the discussion underway here. Clearly, Newman's vision for the old s. 41 corresponds to the Holistic Thesis—minimal judicial review on grounds of reasonableness, with substantial deference to the executive in the exercise of its discretion. If the purpose of the new s. 41 was to repudiate that vision—as seems clear from the changes that were ultimately adopted—then the Holistic Thesis cannot be the proper framework for conceptualizing the structure of the s. 41(2) duty. The Casuistic Thesis, by contrast, is capable of accommodating the intent of these changes, and provides a workable structure for the types of constraints that the committee and the various witnesses clearly expected to follow from the adoption of the amendments.

b) Clarity, certainty and predictability

This reading of the 2005 amendments is reinforced by another major theme in the committee's deliberations, namely, the lack of clarity in what was expected of federal institutions. The murkiness of the old s. 41 led to, or at least compounded, a lack of certainty and predictability with respect to funding and programs for OLMCs. This was considered to be a serious problem, one that the amendments were intended to address.

According to the Commissioner for Official Languages, Dyane Adam, despite some initially promising moves by the government in the early years following the enactment of the OLA 1988, there had been a lack of real progress with respect to the implementation of Part VII, and "[a]mbiguity surrounding the scope of section 41 is certainly largely to blame."[122] The resulting "stasis" was severely problematic, with the Commissioner concluding that "[w]e still have a long way to go before reaching the point where we can say that we are living up to our commitments under Part VII."[123] She therefore urged that steps be taken to clarify the "binding" nature of the s. 41 commitment, including legislative amendments.[124]

The Commissioner proposed a number of amendments to Gauthier's bill, all of which were ultimately adopted in one form or another. One proposal was for the addition of what eventually became s. 41(2): "Federal institutions shall ensure that concrete steps are taken to fulfil [sic] this commitment." Another was to include Part VII under the judicial remedy set out in Part X of the Act, which Gauthier's

[122] Senate of Canada, *supra* note 113 at 5.
[123] *Ibid* at 5-6.
[124] *Ibid* at 6.

original bill did not do. The evident aim of these proposals was to enable OLMCs to overcome executive "stasis", while at the same time involve the courts more deeply in the process of defining the content of Part VII obligations.

An example of the consequences flowing from the lack of clarity in s. 41 was given by Senator Gauthier, and his comments in this connection are quite suggestive with respect to what his amendments were expected to achieve from a legal standpoint. Gauthier raised the fact that he had initiated judicial review proceedings against a decision of the Canadian Radio-Television and Telecommunications Commission (CRTC), which had refused to order broadcasters in Quebec to include a French-language channel produced in Ontario (TFO) in their cable packages. Doing so would have substantially expanded the TFO audience and strengthened it as an institution (as well as improving awareness within Québec that francophone communities continue to exist outside its borders, a fact that is often unknown to Quebecers).[125] However, Gauthier's application failed, and the decision was allowed to stand. Before the committee, Gauthier stated his belief that the amendment being considered would enable an interested party to successfully challenge this decision as a failure of the CRTC's duty under Part VII.[126] Again, only the Casuistic Thesis is consistent with such an outcome.

The lack of clarity in what was expected of federal institutions was compounded by a lack of certainty regarding the legal status of those measures actually adopted pursuant to s. 41. A number of programs had in fact been put in place since 1988, along with substantial financial support, but as the FCFA noted, "[s]uch measures depend entirely too often on the authority in power, always under the threat of sinking into oblivion with the departure of those who launch them".[127] Not only did this create problems on a case-by-case basis, it also prevented the development of a comprehensive development policy of the sort demanded by OLMCs. Such a policy would be impossible to implement without "putting an end to the precariousness of past achievements, and to guarantee a certain durability, if not continuity, of support programs intended to help francophone communities."[128] The only solution was a more rigorous legal framework to constrain and discipline executive action in these areas. The FCFA therefore proposed amendments very

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[125] Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001. Issue No. 23: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French) at 10. On francophone Quebeckers' lack of awareness regarding francophones outside the province, see for example : Jean-Benoît Nadeau, "Les cinq francophonies", Le Devoir, online: <http://www.ledevoir.com/societe/actualites-en-societe/431271/les-cinq-francophonies>.

[126] Senate of Canada, *supra* note 125 at 26-27.

[127] Senate of Canada, *supra* note 109 at 14.

[128] *Ibid*.

similar to those put forward by the Commissioner—i.e. imposing a specific duty on federal institutions to take all "necessary measures", backed by a judicial enforcement mechanism.[129]

One of the ways in which these proposed amendments might contribute to greater stability was suggested by the Law Reform Commission of Canada. The President of the Commission, Nathalie DesRosiers,[130] discussed at great length the potential impact of the Montfort decision on the way in which the proposed amendments would be interpreted by the courts.[131] Specifically, she argued that the effect of the Ontario Court of Appeal's decision in that case was to recognize a "ratchet" principle of sorts that would protect minority institutions which depended on governmental support.

The notion of a "ratcheting" effect had actually been suggested by Montfort hospital as a possible means of interpreting s. 16(3) of the Charter.[132] It had argued that the effect of this provision was to constitutionalize any legislation whose purpose was to advance the equality of English and French in Canadian society, such as Ontario's *French Language Services Act* (FLSA), or at least any rights created by such legislation. That argument was rejected by the Ontario Court of Appeal, which held that the purpose of s. 16(3) was merely to protect such legislation from attack on constitutional grounds—for instance, under s. 15 of the Charter[133]—and not to elevate it to a constitutional level in its own right.

However, as DesRosiers pointed out, another aspect of the OCA's decision had the effect of recognizing a variation on the ratchet principle. The court held that, when exercising a discretionary power vis-à-vis a minority institution such as Montfort, a governmental body was constrained by the unwritten constitutional principle of

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[129] *Mémoire* de la FCFA, *supra* note 104 at 6.

[130] DesRosiers, a law professor, went on to be President of the Canadian Civil Liberties Association and Dean of both the Civil Law and Common Law faculties at the University of Ottawa (at different times).

[131] Senate of Canada, *supra* note 107 at 17. In *Lalonde v Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505, 208 DLR (4th) 577 (CA), the Ontario Court of Appeal struck down a decision by the Health Services Restructuring Commission to close and/or downsize a major French-language hospital in Ottawa.

[132] "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French."

[133] In effect, the OCA held that s. 16(3) merely entrenched the principle affirmed by the Supreme Court of Canada in *Jones v AG of New Brunswick*, [1975] 2 SCR 182, 1974 CanLII 164 where it held that s. 133 of the *Constitution Act, 1867* represents a "floor" rather than a "ceiling" on language rights, meaning that Parliament or the provincial legislatures are free to expand upon its protections.

the protection of minorities, as articulated by the Supreme Court in the *Secession Reference*.[134] Given the great importance of institutions to the vitality of Canada's French-language minority, this meant that governmental support for such institutions could only be reduced or altered for the most compelling of reasons, and only after having first consulted with the minority to ensure that the detrimental impact of the interference was both necessary and, if so, minimized. In short, designating a minority institution for support under the mechanisms of the FLSA—as had been done with Montfort—had a "ratcheting" effect, through the operation of this unwritten principle.

DesRosiers went on to suggest that the same logic would apply to measures taken under the amended s. 41 of the OLA.[135] Even though a federal institution might have some discretion in selecting which measures to adopt, and thus whether or not to support a specific minority institution in a particular way, once that support had been granted, it could not be withdrawn except under the conditions stipulated in the OCA's ruling in *Lalonde*. If that were the case, then s. 41 would indeed provide greater stability and predictability for OLMC organizations.

c) Comparisons with ss. 23 and 16.1 of the Charter

A final point worth highlighting in the present context are the frequent comparisons to ss. 16.1 and 23 of the Charter. Section 41 was viewed by many participants as being (or as aiming to be, under the proposed amendments) analogous to those provisions. This sheds some further light on both the structure that s. 41 was expected to have as a legal norm, as well as its substantive scope.

Section 16.1 of the Charter was added in 1993, for the purpose of constitutionalizing the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* (NB Equality Act), first adopted in 1981.[136] As its title suggests, the Act granted recognition not only to two official languages, but to two linguistic communities. It guaranteed both communities equal rights and privileges, "and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on."[137] It further specified that in

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[134] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at paras 79-82.

[135] In fact, DesRosiers even went so far as to argue that passing the amendments was a constitutional duty pursuant to the unwritten principle of minority protection: Senate of Canada, *supra* note 107 at 21.

[136] *Charlebois c Mowat*, 2001 NBCA 117, 242 NBR (2d) 259 at para 62 [*Charlebois*].

[137] Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, LRN-B 2011, c 198, s 2 [NB Equality Act].

the allocation of public resources, policies and programs, the government of New Brunswick must promote "the cultural, economic, educational and social development of the official linguistic communities".[138]

The specific reference to institutions is especially important, for as the New Brunswick Court of Appeal stated in *Charlebois v Mowat*, s. 16.1 differs from s. 16(2) of the Charter, which provides for equality between English and French as languages, in that it protects "collective rights whose holders are the linguistic communities themselves".[139] A collective right to institutions will necessarily require the adoption of specific measures in particular circumstances. As the Court went on to note,

> [t]he purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes on the provincial government an obligation to take positive measures to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community. The obligation imposed on the government derives both from the remedial nature of subsection 16.1(1), in recognition of past inequalities that have gone unredressed, and the constitutional commitment made by the government to preserve and promote the equality of official language communities. The principle of the equality of the two language communities is a dynamic concept. It implies provincial government intervention which requires at a minimum that the two communities receive equal treatment but that in some situations where it would be necessary to achieve equality, that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.

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[138] *Ibid*, s 3. This idea can be read into s. 41 via the principle of substantive equality: "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner", *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577. See also: *Beaulac*, *supra* note 20 at para 24.

[139] *Charlebois*, *supra* note 136 at para 63. The case was primarily concerned with the scope of s. 18(2) of the Charter and whether it applied to municipal by-laws. However, the court relied extensively on s. 16.1 when interpreting s. 18(2), and its decision is the most extensive judicial treatment to date of the former provision.

Thus, at a minimum, s. 16.1—and, by extension, the NB Equality Act on which it is based—creates a right to remedial measures in cases where a particular public policy scheme or piece of legislation places one community at a disadvantage relative to the other.

In presenting his bill to amend s. 41, Gauthier explicitly stated that its wording was based directly on the NB Equality Act.[140] He explained that, in his view, the purpose of s. 41 of the OLA was, like the NB Equality Act, to entrench the concept of linguistic "duality", which he contrasted with "bilingualism".[141] The point of this distinction was to highlight the fact that languages are embedded in a deeper social reality, and that protecting languages from assimilation—which s. 41 was intended to do[142]—means protecting that social reality. Language rights are thus not simply concerned with facilitating communication, but also—even primarily—with recognizing, respecting and promoting a certain social structure, in which both English and French can flourish. This requires, amongst other things, that the role of institutions in maintaining that social structure be recognized and protected.[143]

Similar comments were made by a number of other participants.[144] For instance, Senator Rivest drew a contrast between the individual rights found in other parts of the OLA and Part VII, which was intended to have a collective—and thus an *institutional*—focus:

> Part VII is not the Official Languages Act as it is normally understood. The Official Languages Act gives linguistic equality in Canada to individuals. The courts and the Commissioner of Official Languages can easily sanction those who contravene it.
>
> Reference is made to support measures for community activity. Over the years, we have realized that linguistic equality and linguistic

[140] Cited in: Senate of Canada, *supra* note 125 at 7. Gauthier had initially wanted to include the concept of "positive measures", which is found in the NBEA, but was advised against it, and so it was not in his original draft of the bill. However, that wording eventually found its way into the final version that was enacted in 2005.

[141] *Ibid* at 6-7.

[142] *Ibid* at 8.

[143] *Ibid* at 14.

[144] Senator Bryden: *Ibid* at 31. Julius Grey: Senate of Canada, *supra* note 110 at 10. DesRosiers: Senate of Canada, *supra* note 107 at 26. Minister of Heritage: Senate of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-seventh Parliament, 2001-02. Issue No. 31: Bill S-32, An Act to amend the Official Languages Act (fostering of English and French)* at 47.

> duality do not only apply to individuals and can only be supported and viable if they are based on dynamic minority communities. This is the spirit in which programs — very few programs — have been developed.
>
> …We have realized that the phenomenon of the assimilation of minority groups in Canada cannot be countered merely by granting individual rights. In order for the minority communities to be able to survive, there must be institutions. We came to this conclusion because in the Constitution, Quebec was given rights for anglophones, such as schools, for example. This was then extended to the rest of Canada and francophones can count on such school networks. In Quebec, this was extended to social services.[145]

The comparison to s. 23 at the end of this passage suggests that what was being sought in amending s. 41 was to create, amongst other things, a legal entitlement to federal assistance in developing and maintaining the institutional infrastructure needed for OLMCs to survive. The comparison is also revealing in other respects, as it provides some indication as to how the committee understood the relationship between legal constraints and discretion in this context.

Section 23 of the Charter combines a definite right with substantial executive and legislative discretion.[146] In *Mahe*, the SCC noted that s. 23 must be interpreted as giving the provinces considerable discretion with respect to the "institutional means" for achieving its underlying objective.[147] Provinces have, aside from the obligations imposed by s. 23 of the Charter and s. 93 of the Constitution Act, 1867, complete discretion in the management of their education systems. This can lead to substantial variation from one jurisdiction to the next, as provinces vary considerably in terms of size, linguistic and cultural makeup, history, population density and wealth. In light of this, the SCC concluded that s. 23 rights must be interpreted in a way that allows sufficient leeway to the provinces in selecting the means by which to meet their constitutional obligations. That does not mean that

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[145] The missing section of the quote is also of some relevance: "The point raised by Senator Gauthier, and very frequently raised by the reports of the different commissioners of official languages is that the departments and federal government organizations have a very negligent attitude towards minority language community needs in Canada, whether it be anglophones in Quebec or francophones outside Quebec. We often receive reports about the efforts of the departments to implement Part VII of the *Official Languages Act*. These reports are ridiculous. They are completely lacking in conviction." Senate of Canada, *supra* note 125 at 30.

[146] Consider the exchange between Senator Joyal and the DoJ during the committee hearings: Senate of Canada, *supra* note 64 at 18-19.

[147] *Mahe v Alberta*, [1990] 1 SCR 342 at 393, 68 DLR (4th) 69 [*Mahe*].

the provinces are completely unfettered in their choice of education policy, for they must still establish education systems that respect the core entitlements enshrined in s. 23. However, those entitlements are framed in terms of broad principles, the specific meaning of which can easily vary from one context to another, and which can be satisfied through a variety of institutional mechanisms.

If we interpret s. 41(2) through the lens of s. 23, this enables us to explain the apparent indeterminacy of its wording while still holding to the view that it was meant to impose "precise obligations". As the courts have recognized in other contexts, it is important that a standard provide flexibility when it applies to "the full galaxy of federal decision-makers … who operate in different decision-making environments under different statutes with distinct grants of decision-making powers."[148] Given that the clear intent of Parliament in amending Part VII was to make it judicially enforceable, it seems reasonable to infer that the operative duty was pitched at a high level of abstraction, not to confer a broad and relatively untrammelled discretion insulated from judicial review, but rather to enable the courts to adapt the requirements of s. 41 to the mission and purpose of the federal institution at issue, thereby providing a degree of flexibility analogous to that found in s. 23.[149]

B - Applying the language rights interpretive paradigm

Thus, the evidence from the Senate committee hearings where the new s. 41 was developed strongly suggests that the Casuistic Thesis offers a better description of what Parliament hoped to achieve with the 2005 amendments. This reading is further supported by the relevant principles of statutory interpretation.

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[148] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 28, 33.

[149] Consider the following comments from the Director of Government Policy Analysis in the Office of the Commissioner for Official Languages: "One can wonder, for example, if the federal government and the Department of Canadian Heritage, perhaps because of its legal mandate, have done enough to meet the stated commitments [in s. 41 of the OLA]. This is the kind of question that must be raised to ensure that section 23 of the Charter, which provides for the right to instruction in the minority language, be fully upheld everywhere in the country. Has the federal government done everything it possibly can to comply with this provision? The issue is very complex and does not lend itself to the same type of implementing regulations as institutional bilingualism. Therefore, considerable thought must be given to how one can frame the spirit, parameters, implementation terms and management systems required so that each federal institution, incapable when taken alone of achieving the stated aims of section 41, can contribute to the process based on its mandate, programs, resources and sphere of influence." Senate of Canada, *supra* note 113 at 14.

Over the years, the courts have developed a specific set of interpretive principles applicable to official language rights. At one time, there was a great deal of controversy surrounding the proper approach to interpreting such rights. The history of that debate has been recounted elsewhere, and I will not rehearse it here.[150] Suffice it to say that the conflicting lines of case-law have now been reconciled—or rather, one of them has been effectively overturned—and a single unified approach prevails. This approach might be said to consist of five key tenets: (1) courts must give language rights a liberal and purposive interpretation; which means, amongst other things, that (2) these rights must always be interpreted "in a manner consistent with the preservation and development of official language communities in Canada" and their respective cultures; that (3) language rights protect a right to substantive equality; that (4) they establish a norm, not an accommodation; and that (5) they are "remedial" in nature, meaning that they are intended to reverse past harms as well as prevent or correct future ones.[151]

A plausible if weak case can be made that the Holistic Thesis is consistent with these principles. While the Holistic Thesis requires greater deference to the policy-making judgment of the executive and would limit the availability of judicial remedies to cases of irrationality on the part of decision-makers, it might be argued that this approach is preferable given the underlying aims of Part VII, which are inherently and insurmountably "political". At least one leading expert on issues relating to language and public policy (Linda Cardinal),[152] as well as the Department of Justice, have argued along these lines.

Indeed, as the Supreme Court has noted, when the purpose and role "of the decision-maker are conceived not primarily in terms of establishing rights between parties, or as entitlements, but rather as a delicate balancing of different constituencies, then the appropriateness of court supervision diminishes."[153] The Casuistic Thesis, by imposing more granular requirements capable of dictating a specific course of conduct by a federal institution, might be said to overly "judicialize" s. 41, distorting the nature of the exercise and involving the courts too

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[150] See, for instance: Alyssa Tomkins, "Does Beaulac Reorient Judicial Bilingualism?" in Joseph Eliot Magnet, ed, *Official Languages of Canada: new essays* (LexisNexis Canada, 2008); Denise Réaume, "Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2001) 47 McGill LJ 593; A Riddell, "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988) 29 C de D 829.

[151] *Beaulac*, *supra* note 20 at paras 13-25.

[152] House of Commons of Canada, *supra* note 88 at 3.

[153] Pushpanathan v Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982, 160 DLR (4th) 193 at para 36.

deeply in a decision-making process far outside their institutional competence.[154] This reading is supported by the fact that the 2005 amendments also conferred on the Governor in Council the power to enact regulations "prescribing the manner in which any duties of [federal] institutions under [Part VII] are to be carried out."[155]

That being said, the regulations were intended to be complimentary to the judicial enforcement mechanism, not a condition precedent upon its exercise.[156] Moreover, it seems very hard to square the Holistic Thesis with the overall purpose of the amendments, as revealed by the discussions in committee. The evidence in fact suggests that Parliament desired greater judicial involvement and oversight because federal institutions were, left to their own devices, incapable of implementing Part VII commitments in a satisfactory way. And, as Martineau J noted in *Canada (Commissioner of Official Languages) v CBC* specifically in relation to s. 41 of the OLA, there is an "exception to the non-justiciability of political issues … when Parliament itself demonstrated intent for certain actions by the government or a federal institution to be examined by an independent third party".[157]

This is particularly important in light of tenet (5), which holds that language rights provisions are deemed to have a remedial purpose. It may be, as Linda Cardinal has argued, that achieving the objectives of Part VII would be easiest if the courts were kept at arms' length, so that policy-makers might deliberate free of the sword of Damocles-like threat of judicial oversight.[158] However, that is only true to the extent that there exists the necessary political will to pursue those objectives in a serious way. Too often, as the Supreme Court has recognized, governments take a passive approach to language issues, assigning them a low priority, meaning that absent the threat—or indeed, the aggressive use—of judicial remedies, many a language right would remain a dead letter.[159] Given that broad dissatisfaction amongst OLMCs with the way in which the original Part VII had been implemented was a major driving force behind the amendments, it seems more sensible to conclude that Parliament desired more rather than less judicial involvement.

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[154] This point was made by, amongst others, the Minister of Justice before the House of Commons Standing Committee on Official Languages when the amendments were being considered: House of Commons of Canada, *Standing Committee on Official Languages, Evidence, Vol. 28, 1st Session, 38th Parliament (2004-2005)* (2005) at 8.

[155] OLA, *supra* note 4, s 41(3).

[156] House of Commons of Canada, *supra* note 88 at 7.

[157] *Canada v CBC*, *supra* note 54 at para 63.

[158] House of Commons of Canada, *supra* note 88 at 3.

[159] *Doucet-Boudreau*, *supra* note 66 at paras 38-40.

To put this in somewhat more theoretical terms, we might say that this is a prime instance of what Jacob Levy calls "counter-balancing". In cases where a state has a natural tendency to commit a certain type of injustice, justice may require that the constitution[160] include certain features that "lean against" this tendency, even if they are not strictly required by justice in their own right. [161] An example of such measures are self-government rights, which are often necessary as a prophylactic against oppression regardless of their inherent moral value. In fact, Levy gives the example of partial control over the education system, like that provided by s. 23 (as interpreted by the Supreme Court), as an illustration.[162]

The tendency towards injustice need not be wilful. As Dickson CJ noted in *Mahe,* while majorities often neglect the concerns of the minority, "[s]uch neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which [governmental] practices may influence the language and culture of the minority."[163] Nevertheless, it is a reality that must be dealt with. While the proposed solution may involve some degree of overreach of the sort that Cardinal fears, as Levy notes, "[c]onstitutional engineers have only relatively blunt tools at their disposals, at least when compared with the fine work done distinguishing philosophical theories."[164]

Given the tendency towards inaction under the old s. 41, and the extreme difficulty of reversing sociolinguistic harms like assimilation, Part VII would appear to be a strong candidate for being treated as an instance of counter-balancing. And, in light of the problems identified by Parliament with respect to the old s. 41, only the Casuistic Thesis seems apt to ensure that the new s. 41 can play such a role.

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[160] Although the OLA is not part of the Constitution of Canada in the technical sense, it is clearly part of the broader "constitution" with which political theorists are concerned, i.e. "a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority": Wil Waluchow, "Constitutionalism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, spring 2014 ed (2014).

[161] Jacob T Levy, "Language Rights, Literacy, and the Modern State" in Will Kymlicka & Alan Patten, eds, *Language rights and political theory* (Oxford: Oxford University Press, 2003) at 244 [Levy].

[162] *Ibid*.

[163] *Mahe*, *supra* note 147 at p 372.

[164] Levy, *supra* note 161 at 247.

PART III – CASE STUDY: STATISTICS CANADA

The discussion thus far has been highly conceptual. I have been concerned with exploring certain issues related to the basic structure of s. 41 as a legal norm—issues which the courts have only engaged with in a very superficial way—so as to better define the range of circumstances in which it might plausibly be said to impose some justiciable constraint on executive action. While much remains to be said about s. 41 as a whole—especially with respect to the eligibility and sufficiency criteria, each of which turns on the definition one gives to the concept of the vitality of a linguistic minority community—it is possible to illustrate in more detail how the Casuistic Thesis might operate in practice. In order to do so, I turn now to the decision of the Federal Court in *Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General)*,[165] which I believe was—in light of the foregoing—wrongly decided. My analysis of this provides both an illustration of the Casuistic Thesis in practice, as well as a further argument in its favour.

A - Case background

The issue in that case was whether the federal government's decision to abolish the mandatory long-form census (in which a randomly selected subset of the population was required to fill out a more detailed census questionnaire) contravened Part VII of the OLA. It was widely argued at the time—including by the head of Statistics Canada, who resigned in protest over the decision[166]—that the long form census needed to be mandatory in order to produce accurate and reliable data on a range of social and economic phenomena.[167] The applicant in the case, the FCFA, argued that because accurate census data was essential both to ascertaining the number of francophones in a given area—and thus to determining a range of governmental obligations that explicitly depend on numbers—as well as to the on-going study of OLMC vitality and development (a necessary precondition to pinpointing targets for action and setting priorities, as well as rational policy-making more generally), the decision to make the long form census voluntary would directly undermine the

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[165] FCFA v Canada, supra note 5.

[166] Steven Chase & Tavia Grant, "Statistics Canada chief falls on sword over census", *The Globe and Mail* (21 July 2010), online: <http://www.theglobeandmail.com/news/politics/statistics-canada-chief-falls-on-sword-over-census/article1320915/>.

[167] These fears now appear to have been confirmed: Tavia Grant, "Scrapping of long-form census causing long-term issues for business", *The Globe and Mail* (6 February 2015), online: <http://www.theglobeandmail.com/report-on-business/scrapping-of-long-form-census-causing-long-term-issues-for-business-groups/article22846497/>.

ability of federal institutions to carry out their mandate under Part VII of the OLA, as was therefore invalid.

There was much debate, conducted largely through expert evidence, over the impact of the changes to the reliability and usefulness of future census data, with Boivin J opting for a Solomonic course of action and refusing to make a determination on the issue. He rested his decision instead on his reading of s. 41(2) of the OLA:

> Part VII of the Act – and specifically subsection 41(2) – does not in any way compel the government to collect any data whatsoever by means of the census. As a result, it does not, a fortiori, in any way require that data be collected by means of a mandatory long-form questionnaire. In fact, no provision of Part VII of the Act, or any other part of that Act – or, in fact, any part of the Charter – requires that data be collected by means of the census as the sine qua non of the rights it protects.[168]

Boivin J went on to note that, in the past, the Governor in Council had proceeded by way of regulation when he wished to impose a specific methodology for counting the number of French and English speakers for the purposes of the OLA, as in the case of Part IV.[169] The lack of such a regulation adopted under s. 41(3) indicated that Part VII imposed no requirements in this regard.

B - Analysis

There are many problems with Boivin J's reasoning here. The first has to do with his way of framing the relationship between language rights and census methodology. Boivin J advances a very general proposition, namely, that neither the OLA nor the Charter imposes an obligation to collect data by means of a census. This is very clearly wrong. Numerous language rights provisions—ss. 20 and 23 of the Charter, for instance—specifically incorporate a numerical threshold for the crystallization of certain rights. While they do not stipulate the use of a particular methodology, such as the long-form census in use prior to 2010, they necessary entail that there be a duty on the government to carry out an accurate and reliable count of the population, without which its primary obligations cannot be fulfilled. While the government clearly enjoys some discretion in this respect, any method

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168 *FCFA v Canada*, *supra* note 5 at para 40.

169 See the Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48.

chosen by it to perform that duty must be reasonable, i.e. rationally capable of achieving the desired goal.[170] If a particular methodology (or type of methodology) were the only way of producing sufficient and reliable statistical data in a given context, the government would be required, as a corollary to its primary obligation, to employ that method.[171] Similarly, if a particular method were selected that was demonstrably incapable of producing complete and accurate data, the decision to employ it could be quashed.[172]

Some language rights, like s. 23 of the Charter, might conceivably be satisfied by a relatively straightforward head-count of the population based on strictly linguistic factors (e.g first language learned and still spoken), although this seems highly unlikely.[173] In any event, the nature of the duty imposed by Part VII of the OLA requires that federal institutions have access to a much more comprehensive statistical portrait of OLMCs so as to determine the proper course of action. An institution can "enhance" the vitality or support the development of an OLMC only if it has access to reliable information regarding those communities.[174] Therefore, if the long-form census were the only viable means (amongst those being considered) to produce such a portrait, Part VII would, as a corollary to the main obligation, impose a duty on Statistics Canada to employ it.

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[170] Dunsmuir, supra note 81 at para 46; Baker, supra note 78 at para 63; Associated Provincial Picture Houses Ltd v Wednesbury Corp, [1947] 2 All ER 680 (EWCA).

[171] For example, in 2006 the federal government carried out a special study on the vitality of OLMCs (Survey on the Vitality of Official-Language Minorities). This study was conducted based on the data produced by the long-form census. See: http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=5099 (verified on 12 September 2015).

[172] See for instance: *Doucet v Canada*, 2004 FC 1444, [2005] 1 FCR 671.

[173] It seems doubtful to me that it would, given that the Supreme Court has repeatedly construed the mandate contained in s. 23 as including a broader concern for the minority community's linguistic and cultural vitality. These are issues that can only be adequately addressed if one has a "thicker" dataset regarding the sociological composition and structure of the rights-bearing community.

[174] Indeed, StatsCan itself has taken this position in its dealings with the Official Languages Commissioner. For instance, in the context of a complaint regarding the methodology used under the Part IV regulations to determine the number of minority language speakers in a given area for the purposes of offering services to the public, StatsCan informed the Commissioner that, in order to respect its obligations under s. 41 of the Act, it undertook numerous analyses of sociolinguistic statistics. Commissariat aux langues officielles du Canada, *Rôles et obligations relativement au Règlement sur les langues officielles - communications avec le public et prestation des services: Secrétariat du Conseil du trésor et Statistique Canada. Rapport préliminaire d'enquête - janvier 2015* (2015) at 10.

Boivin J sought to buttress his reasoning by pointing out that no regulations had been adopted under s. 41(3) stipulating the use of a particular statistical method, as was done under the general regulations adopted for the purposes of Part IV of the Act.[175] Yet his observations in this respect are both irrelevant and unfounded. They are irrelevant because if, properly construed, s. 41(2) imposes a duty to produce accurate and complete statistical data, restrictions as to methodology necessarily flow from this. The fact that the Governor-in-Council has not exercised its power to make regulations under s. 41(3) is immaterial, as this decision can have no impact on the content of the free-standing statutory duty imposed by s. 41(2).

Boivin J's comments are also unfounded, in that there is no evidence whatsoever that Parliament intended the implementation of the duties set out in s. 41(2) to be regulated exclusively by way of subsequent regulation. As I noted above, the evidence from the Senate committee hearings indicates that Part VII regulations were meant to *complement* the inherently justiciable content of the s. 41(2) duty, not replace it. Indeed, were one to hold otherwise, s. 41(2) would become a dead letter, as to this day no regulations have been adopted under s. 41(3). While considered important to the ultimate effectiveness of Part VII, there was never any suggestion in the Parliamentary debates that these regulations were intended to be the only proper means for implementing the s. 41(2) duty.

In fact, this reading is supported by the text of s. 41(3) itself. The latter states only that the Governor in Council "may" adopt such regulations, which, arguably, indicates that Parliament wished to leave the Cabinet free to refrain from doing so if it wished.[176] If, as Boivin J suggests, regulations were necessary to transform s. 41(2) into a set of binding and justiciable obligations, this would mean that the existence of these obligations would be left entirely to the discretion of Cabinet. Not only is that contrary to the explicit language of s. 41(2), which clearly imposes a duty rather than merely conferring a power, it would lead to an absurd result, given the purpose that Parliament hoped to achieve in enacting the 2005 amendments—namely, to ensure that s. 41 was binding and justiciable in its own right. One might counter this argument by claiming that "may" should be

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[175] "It must be noted that the *Official Languages Act* does not prescribe any obligations that require the government to use a specific methodology such as the mandatory long-form questionnaire census. In fact, when Parliament wishes to proceed in such a way, it does so by way of regulations." *FCFA v Canada*, *supra* note 5 at para 42.

[176] "The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Conflict of Interest and Ethics Commissioner, prescribing the manner in which any duties of those institutions under this Part are to be carried out." OLA, *supra* note 4, s 41(3).

interpreted as meaning "shall" in this case,[177] and that Cabinet has a duty to enact said regulations. That might arguably obviate the conflict outlined above, but it would still conflict with the understanding that prevailed during the Parliamentary debates, in addition to being a highly strained interpretation of the statute in this particular case.

C - Section 41: a beam refracting through different institutional prisms

Taking a step back, what can be said about the obligations of Statistics Canada under s. 41(2)? What sort of "positive measure" can such a department be expected to take to enhance the vitality of OLMCs and support their development? A statutory body can only adopt such measures as are contemplated in its enabling legislation. StatsCan could not simply make an unconditional donation of money to the FCFA, nor fund the operations of francophone theatre groups in Saskatchewan, because these actions are not within its statutory powers. Section 41(2) must therefore be read harmoniously with the legislative framework of each institution, such that it produces obligations that are consistent with the mission and character of that institution.[178] This is no doubt why Part VII, unlike other parts of the OLA, does not benefit from the "primacy" clause found in s. 82 of the Act. Given its very broad ambit, imbuing it with the power to override all other statutes would have created a great deal of legal chaos.

The starting point for a correct analysis of s. 41 in individual cases must therefore be the statutory mandate of the federal institution in question. According to s. 3 of the Statistics Act, StatsCan has the duty to, *inter alia*:

> (a) to collect, compile, analyse, abstract and publish statistical information relating to the commercial, industrial, financial, social, economic and general activities and condition of the people;
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> […]
>
> (c) to take the census of population of Canada and the census of agriculture of Canada as provided in this Act;
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> […]

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[177] There is some precedent for this. See for example: *R v Johnson*, 2003 SCC 46, [2003] 2 SCR 357.

[178] *Thibodeau*, *supra* note 53 at para 112.

> (e) generally, to promote and develop integrated social and economic statistics pertaining to the whole of Canada and to each of the provinces thereof and to coordinate plans for the integration of those statistics.

Its duty to take positive measures under s. 41(2) of the OLA should therefore be construed in light of these overarching institutional obligations. StatsCan must, at a minimum, take *some* action within the context of its general activities to enhance the vitality of OLMCs. But, in light of its statutory framework, its contribution can *only* be one of producing statistical information regarding these communities. Furthermore, certain types of activities may be *necessary* in light of the institution's statutory mandate, as I explained above.

The question then of course is: *how far* does this obligation extend? How do we know when Statscan has discharged its obligations under Part VII of the OLA? It is difficult to say much more on the topic at this juncture, as there remain too many unknowns. First of all, the obligation at issue can only be described as what I have called a standard, and so this question cannot be answered in the abstract. The extent of the obligation can only be specified with a complete factual matrix. But secondly, and perhaps more importantly, significant aspects of s. 41 itself remain to clarified. As I indicated above, the content of the standard(s) flowing from the Casuistic Thesis is defined in relation to certain terms which remain undefined: linguistic minority community, vitality, and development. In the absence of a workable definition for these terms, s. 41 is doomed to remain hopelessly vague as a legal norm. Developing a better understanding of them should therefore be a priority.

CONCLUSION

In this article, I set out to analyse the content of s. 41 as a legal norm. In doing so, I determined that there were two aspects of the norm that required clarification: (1) its basic structure, with respect to the types of constraints it imposed on federal action, and (2) the substantive content of those constraints. So far, only the first of these has been addressed.

With respect to issue (1), I argued that s. 41 should be interpreted in accordance with the Casuistic Thesis, meaning that it is capable of imposing "precise obligations" entitling OLMCs to "specific measures" in particular cases. However, I also argued that, because of the breadth of circumstances to which it applies, and the need to accommodate the legislative mandate of many different federal institutions, s. 41 can only be read as a "standard", not a rule. Standards are legal norms whose precise content cannot be specified fully in advance, unlike a rule,

thus requiring case-by-case adjudication. While indeterminate to a certain degree, such norms are capable of generating obligations to do (or not do) specific things, under the right conditions. For instance, I argued that Statistics Canada is under a duty to generate the statistical data needed in order for public institutions to fully comply with their language rights obligations. In some cases, there may be a range of possible decisions that will satisfy this obligation, while in others it may that only one course of action is acceptable.