September 30, 2016

Subject: Update on the release of the trial decision in the CSF, the FPFCB, and the co-plaintiff parents' court case against the Government of British Columbia

Dear partners in Francophone Education,

We write further to our press release of September 26, 2016, in order to keep you informed with respect to the conclusions that the plaintiffs are drawing with regard to the decision in the Conseil scolaire francophone de la Colombie-Britannique (CSF), the Fédération des parents francophones de Colombie-Britannique (FPFCB), and the co-plaintiff parents' court case against the province of British Columbia. We remind you that the trial judge, Loryl Russell of the Supreme Court of British Columbia, issued her decision last Monday, September 26, 2016.

As explained in our previous press release, the decision represents a partial victory for the plaintiffs. We assure you that, where the plaintiffs were not victorious, the CSF and the FPFCB are considering all options, including appealing the decision. The CSF's and FPFCB's Boards of Directors will continue to meet in the coming days and weeks in order to make fully informed decisions.

At this stage in our analysis of the court ruling, we are able to share the following list of significant advancements for the French-language community in British Columbia, which is non-exhaustive given that it is the fruit of our analysis to this point. These advancements are certainly cause for celebration, but there are elements of the decision that are worrisome. Both aspects will continue to be assessed. The gains are clear evidence that the resources invested in this litigation have already borne fruit and will benefit all of the community for many years to come, in the form of many hundreds of millions of dollars in capital funding.

We also take this opportunity to highlight that the decision marks an important step forward relative to the community's position in 2010, when the litigation against the Province commenced. French-language education in British Columbia continues to grow: in the spring of 2010, the CSF's student enrolment was 4,371 students, and it has grown to 5,713 today. The CSF's secondary program is also flourishing and retention rates between elementary and secondary are improving. This year, there are 1,127 students enrolled in CSF secondary programs.

1) <u>Important Advancements for the French-language Community of British Columbia (non-exhaustive list, as of today's date)</u>

a) The Provincial Funding System (non-exhaustive list)

i) Justice Russell reached a number of conclusions that represent important victories for the French-language community of British Columbia in relation to the systemic issues she considered, including the following:

(1) **The Province *must* develop a separate long term budget envelope for the CSF** which will guarantee that financing is available in response to the infrastructure needs of the CSF. This is a significant result and will ensure that the Province can no longer choose to fund majority infrastructure projects over those of the minority. The Court concluded that this remedy will have the same effect as the trust fund for French-language schools that the plaintiffs requested (paragraphs 6050-6765). Justice Russell concluded that the Province *must* develop this envelope for many reasons, some of which include:

(a) **The Province's refusal to award funding to the CSF for infrastructure requests between 2005 and 2011 was contrary to section 23 of the *Charter*.** The Province did not fund the CSF's expansion projects during a period in which there was significant growth in enrolment. During this period, no resources were allocated to the CSF and the Province erred in comparing the CSF's requests to those of the English-language school boards who had greater financial resources at their disposal for capital expenses (paragraphs 6036-6037, 6042-6044, 6046-6048, 6051 and 6053). It is for this reason that the CSF and the FPFCB reluctantly turned to the courts, in the face of the intransigence, or indifference, of the government.

(b) Despite suggestions by the CSF, **the Province refused to create a distinct funding envelope for CSF infrastructure projects**, in other words, an envelope that would allow them to satisfy their constitutional obligations. **This refusal has led to infringements of section 23 of the *Charter*** as the CSF requests were often for smaller schools than those requested by the majority school boards and were therefore evaluated as less urgent (Paragraphs 6720-6721).

(c) Due to the system adopted by the Province, the CSF had no secure access to funding. Consequently, in multiple instances, the CSF was not able to acquire sites, in both the Vancouver area and elsewhere (Paragraph 6751).

(d) In providing the CSF with deficient enrolment projections, the Province did not fulfill its obligations under section 23 of the *Charter*. **The Province must provide the CSF with useful projections and must help the CSF in determining the number of students admissible to its schools.** One way to accomplish this would be to require English-language school boards to collect information from the parents about their language and education background, as it pertains to language of instruction (paragraphs 6644-6646,

6654, 6656-6659 and 6669). This bodes well for future CSF infrastructure planning.

(e) The Province has neglected its obligations under section 23 of the *Charter* by not actively supporting the CSF in identifying school sites, negotiating leases and acquiring sites (paragraph 6317). Justice Russell also determined that the adoption of the *Education Mediation Regulation* does not absolve the Province of these obligations (paragraph 6823). The Ministry's policy of neutrality—no matter the cost—in relation to English-language school boards and the CSF, its practice of refusing numerous requests for assistance from the CSF, and its neglect in defending the interests of the CSF constitute policies or practices that resulted in the effective abandonment of the CSF. Justice Russell found that the CSF was left at the mercy of English-language school boards when it was required to negotiate a lease or the acquisition of a facility or site (paragraphs 6824-6825). Justice Russell further found that these policies and practices are contrary to section 23 of the *Charter*. The Province *must* therefore develop a policy or adopt legislation in order to ensure the active participation of the Ministry of Education in the resolution of challenges faced by the CSF in relation to its space needs as well as in negotiations with majority language school boards (paragraphs 6826-6827, 6830-6833, 6324-6325, 6336, 6347, 6352-6356, 6409, 6414-6415, 6418-6420 et 6425). **The Province must assist the CSF in finding and acquiring sites.**

(2) **The Province must assist the CSF in negotiating its leases** (paragraphs 5763, 5765 à 5766).

(3) **The Province must finance the CSF's leases**, and, based on the French-language Community's right to management and control which the CSF exercises for the community's benefit, the CSF has the right to decide where to open new programs.

ii) **The Province's decision to freeze the CSF's funding for leases at 2013-14 levels was contrary to section 23 of the *Charter*; it was an infringement of the right to management and control guaranteed to the community and exercised by the CSF on its behalf**. The CSF has the right to choose to finance space for the development of new programs, such as the program requested in Burnaby (paragraphs 5919-5926, 5928, 5938 et 5941).

iii) **The CSF's transportation funding was chronically underfunded for a decade. Consequently, the court awarded 6 million dollars in damages to the CSF** (paragraphs 1698-1705, 1762, 1777-1781 et 1786-1790).

iv) **Section 23 of the *Charter* guarantees French-language school boards the right to board office facilities equivalent to those of the majority** (paragraph 5436).

b) Individual Communities

i) Justice Russell drew the following conclusions with respect to individual communities which were at issue in the trial. Although the CSF and FPFCB are disappointed that the Court has taken a more restrictive approach to the individual communities than it took to the overall funding system, the French-language community is still in a better position today in many communities because of the decision. Several of Justice Russell's findings represent important advances for the French-language community of British Columbia. Again, this list is not exhaustive, in part due to the 1601-page count of the decision of which the CSF and the FPFCB have not yet completed their analysis**.** The list represents our analysis to date.

ii) We also highlight that the plaintiffs were successful in **coming to an agreement**, during the litigation, **in relation to two communities**: Port Coquitlam and Rossland. **In Port Coquitlam, a new kindergarten to grade 12 school is currently under construction. The CSF acquired what was previously Maclean Elementary in Rossland.**

iii) **The parents in Vancouver, west of Main Street are entitled to at least one kindergarten to grade 6 school, with a combined capacity of 500 students**, that is homogeneous and equivalent to the competing Vancouver Board of Education schools (paragraphs 3743-3744 ad 3749). In her decision, **Justice Russell finds that the province must assist the CSF in acquiring the necessary site or sites west of Main Street** (paragraphs 3746 and 3751). The court concludes that the **situation in Vancouver, west of Main street is an infringement of section 23 of the *Charter* due in part to the Province's policy of requiring the CSF to identify a site in Vancouver without the help of the Ministry** (paragraphs 3717 and 3750) and in part due to the Province's failure, or refusal, to take advantage of opportunities to acquire sites in Vancouver, which would have alleviated the overcrowding problems at École élémentaire Rose-des-vents (paragraphs 3707, 3708, 3710 and 3731).

iv) **Parents in Sechelt are entitled to a homogeneous kindergarten to grade 7 school with capacity for 90 students** that is equivalent to the smaller elementary school of the Sunshine Coast region and proportional to other schools in the region (paragraphs 2697 and 2835).

v) **Parents in Penticton are entitled to a homogeneous kindergarten to grade 8 school with a capacity for 175 students** that is equivalent to elementary schools in the region, and which includes facilities for the intermediate grade levels (grades 8 and 9) which are comparable to those offered at Summerland Middle (paragraphs 3079 and 3234).

vi) **The numbers in Abbotsford warrant access to French-language elementary and secondary education** and the government must therefore allow the CSF to offer a program (paragraph 5075) by paying the reasonable costs of a lease and by helping the CSF to negotiate a lease. Once a program takes hold in Abbotsford, this community **will have the right to a homogenous school** with infrastructure that is

equivalent to that offered by the majority English schools of a similar size in the area.

vii) **The numbers in the Western sector of Victoria warrant access to French-language elementary education** (Colwood, Sook and Langford). In addition, once the program has taken hold in west Victoria, this community will have the right to its own equivalent homogeneous school facility with a student capacity of 299 (paragraph 4068).

viii) **The numbers in the Eastern sector of Victoria warrant access to French-language elementary education** (Oak Bay and James Bay). In addition, once the program at the Victor-Brodeur annex has taken hold, this community will have the right to its own equivalent homogeneous school facility with a student capacity of 275 (paragraph 4068).

ix) **The numbers in Burnaby warrant access to French-language education** (paragraphs 5220-5221). In addition, once the program has taken hold in Burnaby, this community will have **a right to a homogenous and equivalent facility** with a student capacity of 175 students (paragraphs 5220-5221, 5237 and 5396-5398.)

x) **The numbers in the North-East sector of Vancouver warrant access to French language elementary education** (paragraphs 3982 and 3987-3990). In addition, once the program has taken hold in North-East sector of Vancouver (the northern part of the current École Anne-Hébert catchment area), this community will have the right to its own equivalent homogeneous school facility (paragraph 4068).

xi) The numbers warrant:

(1) **access to the necessary infrastructure to offer a quality French-language elementary program in Whistler** (paragraph 2208);

(2) **access to the necessary infrastructure to offer a quality French-language elementary program in Pemberton** (paragraph 2344);

(3) **a homogeneous facility equivalent to those of the majority in Richmond** (paragraph 3294);

(4) **a homogeneous facility equivalent to those of the majority in Nelson** (paragraph 2902).

These conclusions guarantee a greater stability to the programs in Whistler, Pemberton, Richmond, and Nelson, each of which operate in leased space, than was the case before the court case, as the Ministry of Education must now actively assist the CSF if one of the English-language school districts from which the CSF leases space decides to refuse the CSF access to facilities or to reduce the number of classrooms available to the CSF (paragraphs 5763, 5765, and 5766).

c) Early childhood learning

i) The Ministry of Education must provide **operating funding sufficient to operate Strong Start programs** everywhere that the CSF has space for such a program and desires to open one (paragraph 1872);

ii) The CSF **has the right to community space in its newly constructed schools** pursuant to the provincial programme to create *Neighbourhoods of Learning Centres* (paragraph 1873).

2) <u>Worrisome aspects of the judgment (non-exhaustive list)</u>

a) Despite these numerous and important positive aspects of the decision, our analysis to this point has identified several aspects of the decision that are concerning. For this reason, we will consider the possibility of pursuing an appeal. The following list is non exhaustive. A decision regarding an appeal is still being considered.

b) First, the entire decision is tarnished by a **cynical and defeatist interpretation of section 23**, ignoring the clear jurisprudence of the Supreme Court of Canada that establishes that section 23 of the *Charter* must be interpreted according to its purpose, which is to preserve and encourage the French-language linguistic minority to flourish, and must be interpreted with a view to its remedial purpose to redress past injustices. According to Justice Russell, French-language schools can, at best, only hope to slow the inevitable assimilation of French-language in British Columbia.

c) In addition, our analysis to this point allows us to conclude that the decision seems to adopt a new legal test for evaluating substantive **equivalence** of French-language schools vis-a-vis competing English-language schools. This test seems incompatible with the Supreme Court's decision in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*. Justice Russell's decision drastically limits the scope of that judgment and goes against the principle of substantive equality, which requires that official language minorities be treated differently, if necessary, according to their situation and their particular needs. According to the test adopted by Justice Russell, which is based on formal rather than substantive equality, the right to educational facilities that are complete, distinct, and of equivalent quality to those of the majority only exists where the French-language schools in a given region have an enrolment comparable to that of the English language schools.

d) The Court accepted that the section 23 infringements could be justified far too easily (by virtue of **section 1 of the *Charter***). This problem flows in part from its narrow view of section 23. Similarly, it seems counter-intuitive that Justice Russell considered the seriousness of the problem of assimilation in British Columbia a justification for a section 23 infringement. Such a view is illogical: the greater the community's needs, the more the Province has a duty to fully and quickly comply with its constitutional obligations to *combat* assimilation.

e) While our preliminary analysis allows us to conclude that Justice Russell recognized the very serious problem of assimilation in British Columbia, she refused to consider the

possibility that the CSF could accept additional students via the **admission committees**. These students might include the children of French-language grand-parents and children of "Francophile" parents, for whom admission to French-language schools is not permitted under the *School Act*. She concluded that an exception to the provincial rules on admissibility can only be granted where the viability of a program is at stake. According to the Justice Russell, no exception is available to encourage the vitality of a school or a community.

f) Finally, regarding the **individual communities**, Justice Russell's limited interpretation of section 23 of the *Charter* lead to a far too conservative approach regarding communities' immediate needs. Among other things, as explained above, Justice Russell applied the wrong test to evaluate substantive equivalence, and too often accepted the Province's argument that the section 23 infringements were justified. As a consequence, she did not grant the required remedies in most of the individual communities in this proceeding. Moreover, it goes without saying that we are extremely disappointed that the Court concluded that the CSF must continue to operate heterogeneous programs, especially in the first years of a program, even in the larger communities with a sizeable French-language population.

We are considering these points, and many others, in deciding whether to pursue an appeal.

Yours sincerely,

President of the CSF Board of Trustees

Marie-France Lapierre

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