In the Court of Appeal of the Northwest Territories

Citation: Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 06

Date: 2008 06 27
Docket: AP-2006/014
AP-2006/015
Registry: Yellowknife

Between:

The Attorney General of the Northwest Territories,
the Commissioner of the Northwest Territories,
the Speaker of the Legislative Assembly of the Northwest Territories and
the Languages Commissioner of the Northwest Territories

Appellants (Defendants)
Respondents on Cross- Appeal

- and -

Fédération Franco-Ténoise, Éditions Franco-Ténoises/L'Aquilon,
Fernand Denault, Suzanne Houde, Nadia Laquerre, Pierre Ranger,
and Yvon Dominic Cousineau

Respondents /Cross-Appellants
(Plaintiffs)

- and -

The Attorney General of Canada

Respondent on Cross-Appeal

- and -

Commissioner of Official Languages for Canada

Intervener

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Judge M.T. Moreau
Entered the 25th day of April, 2006
(2006 NWTSC 20, Docket No: C.S. S-0001-CV-2001000345)

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Memorandum of Judgment

The Court:

I. INTRODUCTION

[1] This appeal and cross-appeal concern the scope of French language rights in the Northwest Territories ("NWT") arising from the *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 ("*OLA*"). This case presents the first occasion for judicial interpretation of the *OLA* and raises important issues about the nature and extent of such rights.

[2] The plaintiffs (respondents and cross-appellants) are the Fédération Franco-ténoise (a community-based organization) ("FFT"); the Éditions Franco-ténoises/L'Aquilon (a French language newspaper) ("L'Aquilon"); and five individual members of the francophone community. They sought a declaration, damages, and other specified relief arising from alleged breaches of their language rights against the Attorney General of the NWT, the Commissioner of the NWT ("Commissioner"), the Speaker of the Legislative Assembly of the NWT ("Speaker"), and the Languages Commissioner of the NWT ("LC") (collectively, the appellants), as well as the Attorney General of Canada ("AGC").

[3] The appellants and the AGC are cross-respondents on the cross-appeal, which concerns the applicability of parts of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*") in the NWT and the availability of damages and punitive damages against the cross-respondents.

[4] The Commissioner of Official Languages of Canada ("COLC") was granted intervener status.

[5] The evidence at trial was presented through 51 witnesses over a period of 31 days. The trial decision is nearly 1,000 paragraphs long: *Fédération Franco-ténoise v. Canada (Attorney General)*, 2006 NWTSC 20, [2006] N.W.T.J. No. 33 (QL). The references in these Reasons are to the unofficial English version of the trial decision.

[6] All the legislative provisions referred to in these Reasons are found in Appendix A. Appendix B contains a table of acronyms employed herein.

THE APPEAL

II. THE FACTS

A. Overview

[7] The background to these matters is explored in great detail in the trial decision. Facts relevant to particular grounds of appeal are contained in the appropriate parts of these Reasons.

[8] The NWT represents one sixth of the land mass of Canada. Its population of about 43,000 is spread over more than 30 communities, many of them small and extremely isolated. Governing this vast territory presents enormous challenges, especially given its harsh climate. Its infrastructure services are underdeveloped compared to most other parts of Canada, making it difficult to provide even the most basic services that are readily available elsewhere.

[9] The *Northwest Territories Act*, R.S.C. 1985, c. N-27 ("*NWTA*") largely governs the relationship between the Government of Canada ("GOC") and the Government of the NWT ("GNWT"). The NWT (and the two other territories) have a different constitutional status than the provinces. Whereas the Constitution of Canada (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, *"Constitution Act, 1867*"), is the source of provincial legislative authority, the *NWTA* is the source of the GNWT's legislative authority.

[10] The NWT and Nunavut are unique in Canada because the majority of their residents are Aboriginal. In the case of the NWT, approximately 50% of the residents are Aboriginal. To deal with a high rate of unemployment among the Aboriginal population, the GNWT has adopted an affirmative action policy whereby a job applicant of Aboriginal heritage will be favoured over a non-Aboriginal applicant of equal merit. This program makes training easier and improves the retention rate among government employees.

[11] There are seven distinct Aboriginal regions in the NWT and nine official Aboriginal languages under the *OLA*. As of 1991, 8.7% of the population indicated that they neither spoke nor understood French or English.

[12] As of 2001, less than 1,000 people (2.5% of the NWT population) declared French as their mother tongue. Of these, some 670 resided in Yellowknife, the capital. Approximately 8.5% of the population (3,165 persons) had knowledge of French.

[13] At paras. 53-94 of her reasons, the trial judge considered the history of language rights in the NWT dating back to Confederation in 1867. The first federal *Official Languages Act*, S.C. 1968-69, c. 54 was adopted in 1969 and ss. 16-20 of the *Charter*, proclaimed in 1982, contain provisions about language rights. Neither makes specific reference to the NWT.

[14] In March 1984 the GOC tabled Bill C-26. Its intent was to amend the *NWTA* so as to insert provisions equivalent to ss. 16-20 of the *Charter*; make the federal *Official Languages Act* of 1968-69 applicable in the NWT; and establish a four-year deadline for the translation of territorial laws and regulations into French. It stated that French and English were the official languages of the NWT and had equal status, rights and privileges as to their use in the institutions of the NWT Council and the GNWT.

[15] Bill C-26 was poorly-received in the NWT, where it was perceived as infringing on territorial jurisdiction at a time when the GNWT was seeking increased autonomy from the GOC. On the other hand, the Executive Council of the GNWT saw the issue as a chance to promote Aboriginal languages and to obtain additional federal funding to that end. Negotiations between the two governments ensued, leading to an agreement on June 28, 1984. Under the agreement, Bill C-26 would not go beyond second reading in the House of Commons; the GNWT would adopt its own official languages law to reflect ss. 16-20 of the *Charter*; the GOC would assume, in perpetuity, the costs of providing French language services to the public in the NWT and implementing French as an official language in the NWT; and the *NWTA* would be amended so that the *OLA* could be amended only with the consent of Parliament.

[16] The same day, the *Official Languages Ordinance*, O.N.W.T., 1984(2), c. 2 was proclaimed. It became the *OLA* in 1988. This legislation required the laws of the NWT to be printed and published in both French and English; stated that new laws would be of no force and effect if not published in both languages by January 1, 1987; and stated that previous laws would be of no force and effect unless printed and published in both languages by January 1, 1988.

[17] Annual agreements were reached between the two levels of government concerning the implementation costs of the *OLA*. In 1988, Parliament tabled Bill C-72, which amended the federal *Official Languages Act* of 1968-69 in order to comply with ss. 16-20 of the *Charter* (*Official Languages Act*, R.C.S. 1985, c. 31 (4th Supp.) (*"OLAC"*)). Bill C-72 also contained amendments to the *NWTA* to prevent diminution of language rights in the NWT without Parliament's consent.

[18] The trial judge summarized this history as follows:

> [94] It is clear from this historical overview of language rights in the NWT, that the *OLA NWT* is the result of a delicate political compromise: (i) it was adopted to resolve the uncertainty surrounding the status of official bilingualism in the NWT; (ii) its background attests to the federal commitment to promote respect for official language rights throughout the country; (iii) through its entrenchment, its provisions were sheltered from unilateral attack by a majority of the Assembly;

> (iv) its adoption as law in the NWT respected local concerns about the legislative autonomy of the NWT; and (v) the NWT used it as an opportunity to preserve and promote Aboriginal languages through Territorial legislative measures and a federal funding commitment.

[19] There were a number of delays in implementing the *OLA*. The deadlines for publishing new and existing laws in both official languages, as well as for providing services to the public and using both languages before the courts in the NWT, were extended several times. The last extension granted was to April 1, 1992.

[20] Between 1984 and 2004, there were many studies conducted, reports written and committees formed to deal with the implementation of the *OLA*, including estimates of the resulting costs. The trial judge reviewed these initiatives at paras. 156-266.

[21] Of primary significance was the Bastarache Report ("Report"), commissioned by the GNWT and published in 1987. With 298 recommendations, it surveyed the legal requirements of the *OLA* and presented a plan for its implementation. Much emphasis was placed by all parties, as well as the trial judge, on its recommendations and the assessments of the Report by others, including officials of the COLC.

[22] The New Economy Development Group Study, commissioned by the GNWT a few years later, concluded that once the existence of French language services is known, demand for those services tends to increase.

[23] The first LC, Harnum, was appointed in December 1991. During her four years in office she made many recommendations to the GNWT. In 1992-1993, for example, she noted in her first annual report that significant available sums had not been expended by the GNWT despite the fact that officials had constantly complained that they lacked resources. The trial evidence revealed that between 1986 and 2003, about $5 million intended for French language services was returned to the GOC. The problem of these "lapsed" funds was apparently resolved by 1994-1995.

[24] Notwithstanding the 1987 recommendations of the Report, little was done by the GNWT to efficiently implement the *OLA*. Numerous studies and reports reveal the absence of a global plan, the chronic lack of long-term planning by the GNWT resulting in the lapsing of funds, and a lack of standards regarding services in French.

[25] In 1997 the NWT Executive Council (which is akin to Cabinet at the federal level) adopted Policy and Guidelines ("PGs") to set minimum standards for the delivery of services in the official languages of the NWT. The PGs and their legal significance are discussed in detail beginning at para. 166.

[26] In November 2000, a special committee comprised of NWT deputies ("Special Committee") was established to examine the effectiveness of the *OLA* and the extent to which its

objectives had been achieved. Its June 2002 progress report revealed that the use of French in the NWT appeared to be declining.

[27] In its final report of March 2003, the Special Committee concluded that the *OLA* did not adequately define the language rights it guarantees, due to the absence of regulatory provisions clarifying its key terms. The Special Committee said the promulgation of regulatory provisions was long overdue and should be made a priority.

[28] The Special Committee also made several recommendations. One was that all departments and organizations implement "active offer". This concept, discussed more fully at para. 139, is an oral or visual greeting that informs a member of the public that they may communicate in French or English. The Special Committee also proposed that procedures be put in place for gathering statistics related to demand for, and provisions of, services in French. It suggested that bilingual positions be favoured for front-line services. The Special Committee also recommended the development of a multi-year implementation plan for the *OLA*. It further noted that the LC's annual reports had been ignored to a great extent since 1993.

[29] As discussed by the trial judge at paras. 247-262, in September 2003, the GNWT responded to the Special Committee's final report. It said that the PGs would be revised to clarify the GNWT's intentions and expectations concerning active offer, and that regulatory provisions and policies on active offer would be drafted. However, no project reviewing active offer was introduced in evidence at trial two years later, and the trial judge concluded that the global plan recommended by the Special Committee still did not exist: at para. 262.

[30] The trial judge summarized the history and deficiencies in the implementation process, as follows:

> [266] Having considered the evidence regarding implementation of the *OLA NWT*, I make the following observations:
>
> 1. Distance, isolation, climate and dispersion of communities are challenges to be faced in the provision of government services and communications in the NWT. As well, the GNWT faces economic and social challenges and challenges of governance.
>
> 2. Published in 1987, the Bastarache Report presents an overall plan for the implementation of the *OLA NWT*. It analyzes the GNWT's obligations under the regime of the *OLA NWT* in relation to: the legislative process, the judicial system and the public service. The author recommends the establishment of a centralized information centre in order to provide direct access to government services in French, as well as the creation of bilingual positions. However, the GNWT has favoured a decentralized approach to the implementation of services in French within the government. Its implementation of the report was "very partial".

3. The New Economy Study (the evaluation of the 1991-1994 Canada-NWT cooperation agreement) noted that the demand for services increased when their existence was known. The study also deplored the lack of standards concerning services in French.

4. NWT LC Harnum's annual reports indicate that, over the years, funds from the cooperation agreements have been repeatedly returned to the federal government. Ms. Harnum recommended that the GNWT clarify: (i) through regulation, the application of the *OLA NWT* to government organizations; (ii) the application of the *OLA NWT* to private suppliers of government services, and (iii) the definition of the terms "significant demand" and "nature of the office". Ms. Harnum recommended that the GNWT develop a framework for implementing the *OLA NWT* in its departments, boards and agencies.

5. The problem of lapsed funding had repercussions on the funding of GNWT services and communications. It contributed to a significant reduction of federal financing starting in 1994-1995. The lapsing of funds resulted, in particular, from a chronic lack of long term planning.

6. The Lutra Report, published in 1996, noted the following shortcomings: (i) the absence of guidelines for expenditures relating to official languages; (ii) the absence of an overall evaluation of official language needs, and (iii) the absence of a global plan for the implementation of the cooperation agreement, and corresponding deficiencies in the use of available resources. The report also recommended that the GNWT work in cooperation with the NWT Francophone community.

7. Prior to September 1997, no policy or guidelines had been issued to clarify the application of the *OLA NWT*. This situation continued despite the following: (i) the development of guidelines by the GNWT was contemplated in the context of the negotiations for the 1991-1992 cooperation agreement; (ii) the need to clarify the application of the *OLA NWT* had been stated in the NWT LC's 1992-1993, 1993-1994 and 1994-1995 annual reports. One of the stated goals of the PG was to ensure "reasonable access" by the public to government services and programs in the official languages. The PG perpetuated the decentralized approach to the extent that individual departments and agencies were given responsibility for provision of programs and services in French, in particular the translation of forms. At the same time, the responsibility for the implementation of the *OLA NWT* was removed from the government's central authority (Department of the Executive) and entrusted by the GNWT to the DECE [Department of Education, Culture and Employment].

8. Reiterating the theme of the reports of the previous NWT LC, the 1996-1997 report of NWT LC Tutcho recommended that the GNWT develop a plan for

promoting official languages and an overall accountability framework that would guide authorities at every level of government regarding language issues.

9. The March 1999 forum reiterated a recommendation made 12 years earlier in the Bastarache Report that the GNWT establish a central documentation and reference service in French, along with a 1-800 number. The forum also reiterated the recommendation from NWT LC Harnum's 1992-1993 report that GNWT employees receive language rights training. In keeping with the call in the 1996 Lutra Report for closer cooperation between the GNWT and the NWT Francophone community concerning the cooperation agreements, the forum recommended setting up a cooperation committee.

10. In her 2000-2001 report, NWT LC Tatti reiterated certain earlier observations of Ms. Harnum to the effect that some officials were not familiar with the *OLA NWT*. NWT LC Tatti recommended for that reason that the departments of the GNWT offer workshops to their staff regarding the *OLA NWT*. Further, echoing the words of her two predecessors, NWT LC Tatti recommended that the government implement an action plan for official languages.

11. In its final report published in March 2003, the Special Committee for the Review of the *OLA NWT* concluded that the implementation of the *OLA NWT* was undermined by significant shortfalls in political and managerial accountability. The provision of programs and services in the official languages generally lacked coordination, or was inadequately coordinated. The Committee recommended: the adoption of regulations and a formal implementation plan for official languages, in order to reinforce the principle of accountability within departments and to clarify policies applicable to all interested parties; the implementation in all government departments and organizations of an adequate "active offer" and a verification system to monitor it; and the implementation of a one-stop pilot project.

12. The Terriplan Study, published in March 2004, noted that funding levels and priorities must reflect the short term needs of the communities and be informed by a longer term vision for the communities.

B. Overview of the *OLA*

[31] Part I of the *OLA* is entitled “Official Languages”. Section 4 declares that English, French and nine Aboriginal languages are official languages of the NWT. Notwithstanding this declaration, the *OLA* treats the Aboriginal languages differently than English and French. Simply put, English and French are given a more elevated status than are the Aboriginal languages.

[32] Although s. 5 declares that all the official languages have equal status and equal rights and privileges as to their use in all government institutions (a term defined since 2003 in s. 1 as

including a department or ministry of the GNWT, the Office of the Legislative Assembly, and certain other bodies so designated by regulations), that is only "to the extent and in the manner provided" in the *OLA* and its regulations. As an example of how the *OLA* differentiates between English and French on the one hand, and the Aboriginal languages on the other, the sections principally engaged by this appeal (ss. 7(1), 8 and 11(1)) apply only to English and French and not to the Aboriginal languages. In contrast, under s. 6 (a section not at issue in this appeal), any official language may be used in the debates and other proceedings of the Assembly.

[33] Section 7 of the *OLA* requires that Acts of the Legislature and "records and journals of the Legislative Assembly" be printed and published in English and French, making both versions equally authoritative. Subject to the *OLA*, s. 8 requires the promulgation in English and French (and in any other official language prescribed by regulation) of "all instruments in writing directed to or intended for the notice of the public", made or issued by or under the authority of the Legislature or the GNWT (and certain other bodies not relevant here).

[34] Section 11(1), which is of prime importance in this appeal, concerns the availability of services. It entitles members of the public to communicate with and receive available services from head or central offices of a government institution in English or French, and, if there is a significant demand or it is reasonable, given the nature of the office, to communicate with and obtain services in these two languages from "any other office of that institution". In contrast, as to the Aboriginal languages, s. 11(2) gives the right of communication and services, in the requested languages, from any regional, area or community office only if there is a significant demand or it is reasonable given the nature of the office.

[35] Part II of the *OLA* provides for the office of the LC, who is empowered to investigate complaints concerning official languages. Section 20(1) states that it is the LC's duty "to take all actions and measures" within his or her authority "with a view to ensuring recognition of the rights, status and privileges" of the official languages and "compliance with the spirit and intent" of the *OLA*. Section 23 requires the preparation of an annual report by the LC.

[36] Part III makes a minister responsible for the *OLA* and for the direction and coordination of government policies relating to official languages. He or she is also required to report annually to the Legislature. An Official Languages Board is established to advise the minister and evaluate the effectiveness of the legislation. An Aboriginal Languages Revitalization Board is established to promote Aboriginal languages.

[37] Part IV (General) contains a remedies provision in s. 32(1). It also authorizes the minister or the LC to enter into agreements concerning the implementation of the *OLA* and contemplates the making of regulations.

[38] Many of the sections of the *OLA* are nearly identical to relevant parts of the *Charter*, although the *OLA* contains some rights that are more extensive than those in the *Charter*. Appendix C summarizes the similarities and differences.

[39] Briefly, s. 16(1) of the *Charter* is reflected in ss. 4 and 5 of the *OLA*. Presumably, the reason the *OLA* has two sections, whereas the *Charter* only has one, is the limiting language of s. 5 of the *OLA*: "to the extent and in the manner provided in this Act". This phrase permits the *OLA* to treat Aboriginal languages differently than English and French.

[40] Like s. 18(1) of the *Charter* (which concerns statutes, records and journals of Parliament), s. 7(1) of the *OLA* requires the printing in French and English of Acts of the Legislature and records and journals of the Legislative Assembly. Like s. 20(1) of the *Charter*, which concerns communications with and services from federal institutions, s. 11(1) of the *OLA* entitles the use of French and English with head or central offices of government institutions and with other offices where there is a significant demand or the nature of the office makes it reasonable.

[41] Section 8 of the *OLA* (concerning the use of English and French in written documents directed to or intended for the notice of the public) has no counterpart in the *Charter*. Finally, the remedies section of the *OLA* (s. 32(1)) is virtually identical to s. 24(1) of the *Charter*.

III. THE TRIAL DECISION

[42] The trial judge found that allegations of systemic violations of the *OLA* were justiciable. She held that the *OLA* is quasi-constitutional legislation that entrenches a regime of mandatory bilingualism in the NWT. The nature of these language rights creates obligations that require a result of substantive equality. She found it unnecessary to decide whether the *Charter* applies to these issues.

[43] The trial judge held that the respondents did not have to exhaust their remedies under the *OLA* before litigating. She concluded that specific and systemic breaches of the *OLA* were caused by the GNWT's poor understanding of language rights and failure to implement the *OLA* efficiently. No breaches were attributed to the AGC.

[44] A structural remedy was ordered to ensure an effective resolution of the infringements. As discussed more fully at paras. 51-52, this directed the GNWT to develop a comprehensive plan for implementing the provision of services in French. The trial judge also awarded compensatory damages to individual respondents for breaches of their language rights, but found that punitive damages were not warranted because there was no malice or bad faith on the part of the GNWT. She awarded solicitor-client costs as part of the remedy.

IV. STANDARD OF REVIEW

[45] This appeal raises questions of law, facts, mixed fact and law, and the exercise of judicial discretion. Each of these questions attracts a different standard of review.

[46] Questions of law are reviewable on the correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8 ("*Housen*"). Questions of mixed fact and law, or of fact alone, are reviewable on the palpable and overriding error standard, barring any extricable legal

issue: *Housen* at paras. 10, 25, 37. This Court will intervene with the exercise of the trial judge's discretion only if she misdirected herself on the law or has made a palpable error in assessing the facts: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 43 ("*Okanagan*").

[47] Given the complexity of the various arguments raised on the appeal and cross-appeal, the applicable standard of review will be discussed under each ground of appeal.

V. GROUNDS OF APPEAL

[48] The following issues arise from the appeal:

1. Did the trial judge exceed her authority by failing to limit the trial to breaches of the *OLA* specified in the pleadings and by granting an order that encroached on the jurisdiction of the GNWT's legislative and executive branches?

2. Did the trial judge err in her interpretation and application of the *OLA* and in finding specific breaches of the *OLA*?

3. Did the trial judge err in concluding that the respondents did not have to exhaust their remedies under the *OLA*?

4. Did the trial judge err in concluding that the *OLA* required the broadcasting of Legislative Assembly debates and the publication of Hansard in French? Did she err in concluding that both matters were not subject to legislative privilege?

5. Did the trial judge err in granting solicitor-client costs to the respondents?

VI. DID THE TRIAL JUDGE EXCEED HER AUTHORITY BY FAILING TO LIMIT THE TRIAL TO BREACHES OF THE *OLA* SPECIFIED IN THE PLEADINGS AND BY GRANTING AN ORDER THAT ENCROACHED ON THE JURISDICTION OF THE GNWT'S LEGISLATIVE AND EXECUTIVE BRANCHES?

[49] The first ground of appeal concerns some of the remedies granted by the trial judge. The appellants allege she erred by not limiting the trial to specific failures to comply with the *OLA*, adding that she wrongly permitted the respondents to adduce evidence from witnesses regarding *OLA* breaches that were not pleaded and then relied on those breaches in formulating the remedies she granted.

[50] They also argue that the remedies granted go beyond what was alleged by the respondents in their pleadings. They suggest the trial became an inquiry into the implementation of the *OLA*, with remedies granted that intrude upon the role of the legislature.

[51] The appellants contend that the trial judge imposed a structural remedy when she should have only granted declaratory relief. Declaratory relief identifies a constitutional or quasi-constitutional breach and may direct that the breach be remedied. A structural remedy not only identifies the breach(es) and directs government to provide a remedy, but also details how government is to proceed in doing so.

A. Trial Decision

[52] The trial judge's formal judgment has several sections, the fourth of which is engaged by this ground of appeal. It requires the GNWT and the appellants to alleviate ongoing systemic problems by establishing various strategies to ensure proper administration and implementation of the *OLA*. In particular, the trial judge directed that, within one year, a comprehensive implementation plan be drafted to address the provision of French language services. She detailed the ways in which that should be accomplished, including consultation, job creation, recruitment, training, and retention of an expert-consultant. She also directed the preparation of regulations designating what institutions were required to comply with the *OLA*.

[53] The trial judge gave several reasons for her decision to grant a detailed structural remedy. She considered that the GNWT's implementation of the *OLA* was flawed, noting that it was in force for many years without any overall plan for its implementation. She observed that funding for the *OLA*'s implementation was available from the GOC but that, in several successive years, the GNWT returned a substantial portion of that funding, unused, to the GOC. These lapsed funds are discussed above at para. 23. She noted that the Executive Committee was in the process of drafting a regulation concerning "institutions", but that, in the meantime, without such a regulation confusion and uncertainty would abound: at para. 895.

[54] The trial judge concluded that no single GNWT department or entity took control of implementing the *OLA*, leaving individual departments to give it effect. Although the LC's office was involved in overseeing the *OLA*'s implementation, action taken by that office was far from satisfactory. In fact, the LC's office was often unable or unwilling to communicate in French; its reports were generally only in English; and the LC brought no court proceedings to compel any government institution to comply with the *OLA*.

[55] The trial judge also referred to the long-standing and unresolved nature of numerous language-related complaints and the futility of suggesting improvements. She reviewed several consultants' reports, observing that most recommendations were never acted upon. She acknowledged that some improvements had occurred more recently, but determined these were inconsistent and sporadic. Simply put, the trial judge found that numerous requests made to

numerous government departments over many years, had gone unaddressed. She determined that this failure, on the part of the GNWT, to properly implement the *OLA* warranted the structural remedy set out in the fourth part of her formal judgment.

B. Standard of Review

[56] This ground of appeal includes several sub-issues attracting different standards of review:

1. The interpretation of s. 32(1) of the *OLA* is a question of law to be dealt with on the correctness standard.

2. Whether the pleadings limited the parameters of the trial involves an extricable legal issue that is to be dealt with on the correctness standard. However, its application involves the exercise of discretion, and this Court will only intervene if the trial judge has misdirected herself on the law or has made a palpable error in assessing the facts.

3. Some of the arguments advanced in this part of the appeal involve questions of mixed fact and law or of fact alone. Those are reviewable on the palpable and overriding error standard, barring an extricable legal question.

4. Generally, choice of remedy involves the exercise of discretion by the trial judge and will not be interfered with absent a misdirection on the law or a palpable error on the facts: *Bowlen v. Digger Excavating (1983) Ltd.*, 2001 ABCA 214, 286 A.R. 291 at paras. 10-12, citing *Harris v. Robinson* (1892), 21 S.C.R. 390 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 32 O.R. (3d) 716. As is discussed at para. 60, the language in the *OLA*'s remedial provision is similar to the language in s. 24(1) of the *Charter* and should therefore be interpreted in a similar manner. Section 32(1) of the *OLA*, like s. 24(1) of the *Charter*, provides a superior court with wide and unfettered discretion to grant remedies: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 50 ("*Doucet-Boudreau*"), citing *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 965. Those remedies are subject to challenge only where the party seeking to do so can establish that the order is not "appropriate and just in the circumstances": *Doucet-Boudreau* at para. 50.

C. Analysis

[57] This section begins with a general discussion of how to approach the interpretation of s. 32(1) of the *OLA*. It considers the extent of a court's ability to examine allegations of systemic breaches of constitutional or quasi-constitutional rights, and the effect of the pleadings in this case on the scope of the trial and the remedies granted. It concludes with a consideration of whether the structural remedy granted by the trial judge was inappropriate or unjust because it lacked an evidentiary basis, was premature since this was the first litigation involving the *OLA*, or intruded unduly on the role of the legislature.

1. Interpretation of s. 32(1) of the *OLA*

[58] Section 32(1) of the *OLA* provides:

> 32(1) Anyone whose rights under this Act or the regulations have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just in the circumstances.
>
> 32(1) Toute personne lésée dans les droits que lui confèrent la présente loi et ses règlements peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[59] In determining whether the trial judge erred as to the remedies she granted, it is necessary to begin with an analysis of this provision, in particular the closing words "appropriate and just in the circumstances". The words of a statute "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87; see also *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 10, 127 D.L.R. (4th) 193; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 at para. 22, 139 D.L.R. (4th) 415; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at para. 144, 151 D.L.R. (4th) 32; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 36 O.R. (3d) 418.

[60] Official languages statutes are quasi-constitutional and are to be given a broad purposive interpretation to achieve the goal of fostering official languages: See, for example, *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 ("*Beaulac*"); *Jones v.Att. Gen. of New Brunswick et al.*, [1975] 2 S.C.R. 182, 7 N.B.R. (2d) 526; *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394; *A.G. (Quebec) v. Blaikie et al.*, [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15; *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721, 35 Man. R. (2d) 83 ("*Manitoba Language Rights Reference*"); *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577. Since such statutes mirror parts of the *Charter*, its interpretational principles are also relevant: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 at para. 23. *Charter* rights are to be given a broad and generous interpretation so as to enhance and preserve the underlying rights: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156, 55 A.R. 291; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, 60 A.R. 161; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at 1480, 48 C.C.C. (3d) 193. Further support for this approach is found in s. 10 of the *Interpretation*

Act, R.S.N.W.T. 1988, c. I-8 ("*Interpretation Act NWT*"), which states that all enactments are to be construed as remedial and are to be given fair, large and liberal construction and interpretation.

[61] The trial judge correctly concluded that the *OLA* is a quasi-constitutional statute and should be interpreted as such. However, the broad and purposive approach applied to the interpretation of *Charter* rights should not override the specific words of a statute, which might limit remedies and should be afforded their ordinary meaning. As an interpretive tool, "*Charter* values" are limited to "circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 62; also see *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563 at para. 23.

[62] Both the words "appropriate" and "just" must be considered in fashioning a remedy. The word "appropriate" has many synonyms, including: correct, acceptable, reasonable, apt, becoming, befitting, felicitous, fitting, proper, right, tailor-made, convenient, expedient, suitable, useful, deserved, due, and merited. The juxtaposition of the word "just" suggests that the legislature did not consider that all appropriate remedies would be available to the courts. In considering the meaning of these words in a bilingual context in *Kodellas v. Saskatchewan (Human Rights Commission)* (1989), 77 Sask. R. 94, [1989] 5 W.W.R. 1 at 50 (C.A.) Vancise J.A. observed:

> The remedy must be more than appropriate. The remedy must be one which is in the circumstances fair, equitable and appropriate. A just remedy must of necessity be appropriate, but an appropriate remedy may not be fair or equitable in the circumstances.

The phrase "just and appropriate" in the circumstances implies a degree of proportionality and linkage between the wrong done and the remedy granted.

[63] Searching for justice involves balancing the interests of aggrieved individuals with the state's authority to act in the best interests of its citizens. In the context of remedies for breaches of official languages laws, which concern the rights of individuals or smaller groups, the choice of remedy will generally favour something that meets the state's obligation to individuals or smaller groups, and has the least effect on the interests of the majority. In some cases, a just remedy may be deleterious to the interests of the majority. However, if two remedies would be equally effective, justice requires the imposition of that which respects the role of government and does the least harm to the majority. In that regard, expense may be an aspect of harm, and prohibitive expense is likely to be an aspect of harm.

[64] Although the Supreme Court has not defined the exact parameters of "appropriate and just", it has described five factors or considerations that courts should take into account in determining what is appropriate and just in the circumstances: *Doucet-Boudreau* at paras. 55-59. These are discussed in detail at para. 101.

2. The Effect of the Pleadings on the Scope of the Trial and the Remedies Granted

[65] At trial, the appellants argued that the alleged systemic breaches were not justiciable. In their factum and during oral argument, they described the trial as an inquiry into the implementation of the *OLA*. The respondents argued that, while the trial was wide-ranging, that was a necessary feature of a trial that dealt with extensive systemic breaches. Those breaches could be pleaded, were pleaded, and were proven at trial. We begin with an examination of the role of the courts in assessing allegations of systemic breaches and then consider the effect of the pleadings in this case on the scope of the trial and the remedies granted.

a) Can the courts consider allegations of systemic breaches?

[66] Citizens may employ the courts to pursue allegations of systemic *Charter* breaches: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 ("*Little Sisters #1*"). In *Little Sisters #1*, a gay and lesbian bookstore alleged systemic violations of its ss. 2(b) and 15(1) *Charter* rights by Canada Customs officials, who regularly held up or refused to admit into Canada written and visual materials they deemed obscene. The evidence established systemic problems regarding how Canada Customs implemented its own regulations respecting the imported materials.

[67] The trial remedy granted in *Little Sisters #1* was declaratory, stating that portions of the *Customs Tariff*, R.S.C. 1985, c. 41 (3rd Supp.) and the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) had been construed and applied in a manner contrary to ss. 2(b) and 15(1) of the *Charter*. By the time the issue reached the Supreme Court, there was evidence the systemic implementation problems had been addressed, and the appellants had not proposed any specific measures to address ongoing problems. Thus, the majority of the court declined to grant a more structured remedy.

[68] *Little Sisters #1* demonstrates that courts have the jurisdiction to hear complaints about systemic *Charter* breaches and have a role to play in resolving recurring breaches that take place over a long period of time. Merely because a court hears such a case, with wide-ranging evidence, does not mean that it is conducting a public hearing or commission.

[69] A subsequent case concerned whether the bookstore should be awarded costs, at an early stage of litigation in its second suit which alleged four particular breaches along with continued systemic breaches by Canada Customs: *Little Sisters Book and Art Emporium v. Canada*

(Commissioner of Customs and Revenue), 2007 SCC 2, [2007] 1 S.C.R. 38 ("*Little Sisters #2*"). At para. 53, the majority stated:

> What the appellant is essentially attempting to achieve with the Systemic Review is to expand the scope of the litigation in the hope of bolstering its legal rights in individual cases; as a frequent importer, it will ultimately benefit more from a general investigation now than it would if it were left to challenge each and every detention and prohibition when it happened. This is an efficient and commendable approach ...

Thus, affected litigants can try to demonstrate that an underlying problem is systemic, with the hope that the court will impose remedies that address the problem. See also *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 ("*Chaoulli*").

[70] The jurisprudence establishes that, in general, courts may hear allegations of systemic breaches of *Charter* rights and grant appropriate and just remedies to address such breaches. For reasons discussed at para. 60, similar principles are applicable to quasi-constitutional language cases. It remains to be considered whether the trial judge should have refused to consider alleged systemic breaches of the *OLA* because the pleadings were too narrow to permit this.

b) Did the pleadings narrow the scope of the trial?

[71] The appellants assert that the pleadings did not support the sweeping review of the implementation of the *OLA* that occurred during this trial. They submit that the pleadings define the issues and the trial judge erred by refusing to apply the jurisprudence that requires a trial to be limited to issues thus defined. They also point out that if pleadings lack precision, they may be struck in whole or in part: *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544, 20 B.C.L.R. (4th) 170 at paras. 77-81; *Stevens v. Provincial Remand Centre* (1995), 104 Man. R. (2d) 226, [1995] M.J. No. 303 at paras. 4, 7 (QL); *Harris v. Canada (Attorney General)*, 2004 FC 1051, 34 C.P.R. (4th) 367 at paras. 9-12; *Pellikaan v. Canada*, 2002 FCT 221, [2002] 4 F.C. 169, at paras. 12, 14-15, 36; *Catellier v. Manitoba (Workers Compensation Board)* (1986), 46 Man. R. (2d) 239; 13 C.P.C. (2d) 225 at 225 (Q.B.); *Welco Expediting Ltd v. Harris* (1995), 171 A.R. 341 at paras. 27-28, 30-33, [1995] 8 W.W.R. 428 (Q.B.); *Trang v. Alberta (Edmonton Remand Centre)*, 2005 ABCA 66, 363 A.R. 167 at para. 6. In this case, before the trial commenced, the trial judge rejected an application by the appellants to strike allegedly vague pleadings and to limit the trial to specific complaints only. Instead, she permitted the respondents to adduce evidence of systemic breaches.

[72] The function of pleadings is to set out the relevant facts; if they disclose a cause of action, the cause of action can be dealt with by the court. See, for example, *Odland v. W.S. Johnson & Sons Ltd.* (1989), 104 A.R. 161 (C.A.); *Scott Bros. Gravel Co. v. N.W. Hullah Corp.* (1967), 59 W.W.R. 173 (B.C.C.A.); and *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1987), 77 A.R. 181, 51 Alta. L.R. (2d) 324 (C.A.). Rule 106 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96 ("*NWT Rules*") requires that pleadings contain only

“a statement in a summary form of the material facts on which the party pleading relies for his claim ... but not the evidence by which those facts are to be proved ...”.

[73] In our view, the trial judge did not err in proceeding as she did. Systemic breaches of any right are repetitive and will often involve hundreds, if not thousands, of allegations of the failure to respect the underlying right. Providing precise details of each alleged breach would, in many such cases, require excessively long pleadings. When the issue is the breach of a contract or negligent operation of a motor vehicle, reasonable detail of the alleged breach is required. This principle pertains to the specific complaints of individual respondents. However, when the alleged breach consists of a series of identical breaches it will be sufficient to describe one breach, then state that the breach was repeated a number of times. Similarly, when the breach is systemic, involving allegations of similar but not identical breaches, it is sufficient to describe a reasonable number of representative breaches, indicating that these are part of a pattern of conduct. As noted by the Supreme Court in *Chaoulli* at para. 189:

> [T]he appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration. They make the generic argument that Quebec's chronic waiting lists destroy Quebec's legislative authority to draw the line against private health insurance. From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. ...
>
> (emphasis in original)

[74] Here, part of the respondents’ systemic complaint was the alleged failure of the GNWT to provide services in French. If an office never provided required French language services, it is sufficient to simply say so; it is unnecessary for pleadings to list dates and times, because the alleged breach relates to all dates and times. Similarly, if required service is sporadic, it is sufficient for the pleadings to say so generally, rather than pointing to specific evidentiary examples. All facts in issue will be relevant at trial but may not be necessary in the pleadings: *Hillman v. Imperial Bank of Canada* (1926), 20 Sask. L.R. 507, [1926] 2 W.W.R. 276 (C.A.).

[75] The amended statement of claim in this case discloses the following:

1. The respondents pleaded numerous delays leading to the implementation of the *OLA* and argued that the implementation was still unfinished.

2. The respondents stated that no regulations had been adopted in order to implement the obligations of the GNWT under the *OLA*. Rather, the GNWT adopted the PGs which the respondents alleged to have limited the linguistic obligations of the GNWT contrary to the *OLA*, ss. 16-20 of the *Charter*, and the underlying

constitutional principle of protection of minorities. The respondents listed the alleged infringements of the PGs. They noted that the PGs:

(a) divided the NWT into 60 regions where French is designated an official language for only four of those regions;
(b) designated the offices that can provide services in French;
(c) required the translation orally or in writing of public documents in French only in certain limited circumstances;
(d) required government forms to be available in French only when the public frequently asked for them;
(e) required job offers, notices and public tenders to be published in French in a French newspaper only when the job or project would take place in one of the four regions designated for French; and
(f) listed only the offices in Schedule A of the PGs as being bound by the "active offer".

3. The respondents pleaded the lack of funds for bilingual services in the NWT, and the lack of good faith of the GNWT in taking the necessary steps to provide such services.

The pleadings alleged that the majority of offices did not offer services in French and very few civil servants who dealt with the public were able to communicate in French.

[76] This was sufficient to place in issue the systemic failure of the GNWT to implement the *OLA*. Moreover, pre-trial processes were available to the appellants to investigate the breadth of the respondents' allegations. In some instances, the appellants chose to limit discovery to particular incidents pleaded and not to explore allegations of systemic breaches. Such tactical decisions did not limit the trial judge to dealing with precise allegations of breaches. She properly heard evidence that disclosed systemic breaches of the *OLA*.

c) Did the remedies granted by the trial judge go beyond what was contemplated in the pleadings?

[77] A related argument is that several remedies granted by the trial judge were not contemplated by the pleadings. These include the parts of the order requiring the GNWT to: supervise the *OLA*'s implementation; establish an implementation plan with specific directives for ensuring the provision of French language services at various administrative levels; and retain a consultant for six months to fulfil this mandate. The appellants contend that since the prayer for relief forms part of the pleadings, remedies should be restricted to whatever the plaintiffs demanded.

[78] This argument must be rejected. The respondents sought a remedy that forced the GNWT to properly implement the *OLA* and to provide the francophone community of the NWT with access to government services in French. The amended statement of claim sought detailed

declarations of the GOC's constitutional responsibilities respecting minority language rights in the NWT; the GNWT's constitutional responsibilities respecting minority language rights in the NWT; and contraventions of the *Charter* and the *OLA* resulting from inconsistencies between GNWT policies and provisions of the *OLA* and the *Charter* protecting minority language rights. It also sought specific orders requiring the GOC and the GNWT to take all measures necessary to meet their responsibilities under the *OLA* and the *Charter*, including creating and filling bilingual employment positions; printing and publishing written documents, including Hansard, in French; and providing media communications in French.

[79] Trial judges enjoy a wide discretion in granting remedies, whether or not the prayer for relief demands a specific remedy ultimately granted. This is obvious from Rule 121 of the *NWT Rules*, which states that it is not necessary in a pleading to ask for general or other relief, which may be given to the same extent as if it had been requested. Similarly, s. 27 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, empowers a court to grant "all remedies that any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter". See also *Gaughan v. Sharpe* (1881), 6 O.A.R. 417, [1881] O.J. No. 33 (C.A.) (QL); *Hamilton v. Macdonnell* (1910), 19 Man. R. 385 at 387 (C.A.); and *Northwest Co. v. Merland Oil Co.*, [1936] 2 W.W.R. 577 at 598 (Alta. C.A.).

[80] So long as the pleadings disclose facts that give rise to remedies, a plaintiff may be granted remedies that are not inconsistent with its pleadings. Here, the respondents clearly alleged systemic breaches of the *OLA*, placing into issue the failure of the GNWT to implement the *OLA*. The trial judge was entitled to receive evidence from citizens regarding their experiences in receiving French language services from government offices. It was also open to the respondents to adduce evidence, through examination of GNWT personnel, regarding how and to what extent French language services were being provided in government offices. As well, at least some of the remedies the respondents sought were consistent with relief being granted in the form of a structural remedy.

3. Were the Remedies Granted Otherwise Inappropriate or Unjust?

[81] The remaining issue under this ground of appeal is whether the trial judge committed a reviewable error in granting the structural remedy she did. The appellants assert this is not the appropriate case for a structural remedy because, in many instances, elements of the structural remedy were not supported by the evidence. They also suggest that much of the structural remedy involves political choices that should be left to government, not the courts. As this is the first time the *OLA* has been before the courts, the appropriate remedy was a declaration. This issue requires an examination of recent trends in Supreme Court jurisprudence concerning the use of structural, as opposed to declaratory, remedies.

[82] Before embarking on this analysis, however, it is important to note that a review of the part of the judgment at issue discloses that some of the trial judge's directions are less structural than others. For example, at para. 901(1) of her reasons, the trial judge directed that the

Executive Council of the GNWT be involved in overseeing the implementation and administration of the *OLA*. The specifics of the plan were left to the GNWT. Similarly, when she ordered the GNWT to pass regulations clarifying what bodies were bound by the *OLA*, she did not dictate the contents of the regulations. Although on their face these directions have a structural aspect, they are essentially the result of a declaration that the GNWT has failed to implement the *OLA*. They are similar in effect to a judicial direction that minority language schools be constructed, leaving the details of the construction to government: *Doucet-Boudreau*.

[83] Other directions in the formal judgment, however, are clearly structural and leave little discretion to the GNWT. Whether the more structural portions of the formal judgment were appropriate is considered beginning at para. 103.

a) Evidentiary basis

[84] The appellants point to individual pieces of evidence that the trial judge did not consider or discounted without reason. But trial judges are not obligated to mention every item of evidence in their reasons. In a lengthy trial such as this, that would be impossible. So long as the reasons generally disclose that the trial judge was alive to the respective competing positions, they will withstand appellate scrutiny. In some instances, of course, a single item of evidence can be so critical that it may be a palpable and overriding error to fail to consider it.

[85] Here, the appellants' concerns do not relate to evidence that was crucial or dispositive. The overwhelming bulk of evidence supported the trial judge's conclusions. She was alive to the evidence favouring the appellants' position. For example, she held that the GNWT had not completely failed to meet its obligations, noting some sporadic attempts to provide services and positive steps taken shortly before the trial. The reasons are balanced and provide an accurate assessment of the evidence. At para. 30 we outlined the trial judge's conclusions regarding the implementation of the *OLA*. All these are supported by the evidence. Her failure to mention a few items of evidence that might have favoured the appellants does not constitute palpable and overriding error.

b) Was the declaratory relief premature and did it intrude unduly on the purview of the Legislature?

(i) Trial judge's rationale for granting a structural remedy

[86] The evidence disclosed pervasive systematic breaching of minority language rights by myriad GNWT departments and offices, that, under the *OLA*, were required to provide services in French. The trial judge found that one normal route of addressing such complaints, through the LC, had been foreclosed because that office provided ineffective service over many years. The trial judge also expressed a lack of faith in the LC taking steps to force implementation of the *OLA*. Despite requests by the respondents and others, the LC never directed the GNWT to

properly implement the *OLA*. Since the *OLA*'s inception, no LC has ever employed court proceedings to compel compliance with the *OLA*. The trial judge also held that the GNWT had, in general, ignored its responsibilities under the *OLA* regardless of complaints, requests, and many consultant reports advising of shortcomings and recommending an implementation process. In short, she determined that the GNWT was unwilling to provide the services required by the *OLA* and, therefore, relief in the form of a declaration would inevitably require the respondents to seek follow-up relief in the courts.

[87] In deciding to grant a structural remedy, the trial judge distinguished a decision to upset a directive requiring transfer of bilingual positions to an under-represented area (*Forum des maires de la Péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276 ("*Forum des maires FCA*")). In that case the Federal Court of Appeal concluded that the evidence regarding the breach was thin and the ongoing breaches were episodic. The trial judge found the opposite here. She also relied on two trial decisions where limited structural remedies were granted: *Société des Acadiens et Acadiennes du Nouveau Brunswick v. Canada*, 2005 FC 1172, [2006] 1 F.C.R. 490 (T.D.) and *Lavoie v. Nova Scotia (Attorney General)* (1988), 84 N.S.R. (2d) 387, 50 D.L.R. (4th) 405 (S.C. (T.D.)).

[88] The trial judge further noted that a structural remedy was granted in the *Manitoba Language Rights Reference.* There, the remedy included specific directions to the legislature about how to resolve the underlying problem. At para. 893, the trial judge stated: "it is necessary to order affirmative and concrete remedial measures to ensure an effective resolution of the breaches established by the evidence in this case".

[89] Lastly, the trial judge considered academic articles that raised the spectre of assimilation when language rights implementation is delayed. She relied on evidence about the rate of assimilation in the NWT. Given the already lengthy delay, she was concerned that anything other than a precise directive detailing how the *OLA* was to be implemented would result in assimilation of at least some of the francophone population of the NWT.

(ii) Applicable legal principles

[90] Generally, when a government's failure to respect citizens' constitutional rights is established and the matter is litigated for the first time, a declaration is appropriate because, as stated in *Little Sisters #2* at para. 63, government usually does what is necessary to ensure the provision of constitutional rights following a court declaration. This approach protects governmental rights to make specific choices about the best way to implement the right. We therefore start our analysis by observing that the granting of a structural remedy against government on a first litigation of a constitutional or quasi-constitutional issue requires an exceptional case.

[91] Trial courts are to fashion remedies that respect the legislature's role by intruding in that role only so far as necessary: *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 392-393, 106 A.R. 321 ("*Mahe*"); *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839 at

860-861, 83 Man. R. (2d) 241; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 700, 93 D.L.R. (4th) 1, citing Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness", in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 288; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 96, 151 D.L.R. (4th) 577; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 212 A.R. 237 at para. 136 ("*Vriend*"). The jurisprudence speaks of a dialogue between the courts and the legislature: *Vriend* at paras. 138-139. Courts should generally give legislatures the opportunity to institute corrective procedures before telling the legislature how to do so. But are there cases where courts should go further and, if so, is this one of them?

[92] In *Little Sisters #1*, the majority declined to impose a structural remedy, both because of the dated nature of the evidence relating to the breaches and because of its assessment that there was a history of legislatures reacting to declaratory relief by implementing necessary changes.

[93] In *Forum des maires de la péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, 2003 FC 1048, [2004] 1 F.C.R. 136, the Federal Court trial division heard an application for judicial review of a decision by the Canadian Food Inspection Agency to transfer four food inspectors from the town of Shippagan to Shediac due to shortage of work. The Forum filed a complaint with the COLC claiming the transfer operated to the detriment of French-speaking regions. The COLC ordered the Agency to review the delivery of inspection services in the Acadian peninsula to ensure they were available in both official languages. When the Agency did nothing, the Forum applied for judicial review. The reviewing judge ordered restoration of the inspectors' positions in Shippagan; implementation of the COLC's recommendations; provision of French language services for the region serviced by Shippagan; completion of staff accreditations in Shippagan; and implementation of the respondents' proposed action plan to undertake consultations with members of the French language community.

[94] The Federal Court of Appeal set aside the trial judge's order: *Forum des maires FCA*. The Forum's leave to appeal from the Supreme Court was later withdrawn because of intervening legislative changes. The Federal Court of Appeal's decision had two rationales: the issues giving rise to the trial judge's order had been resolved between the time of the initial transfer and the appeal, and the evidence regarding reduction of French services was "quite thin". In discussing the frequency of problems in accessing French language services, Décary J.A. stated at para. 76:

> It is no longer a question of the breaches, which I would qualify as collective, that were at the origin of the complaint. It may be that some individuals are still, occasionally, prejudiced in the exercise of their language rights -- no solution is perfect -- in which case they are free to file detailed individual complaints with the Commissioner. However, in so far as the collective complaint before the Court is concerned, I must acknowledge that the violations that persist are so episodic that they are ill-suited to a judicial sanction of the scope sought by the Forum.
>
> (emphasis added)

[95] In this case, we agree with the trial judge that the evidence of breaches was far from thin and established a frequency of breach well beyond that in the *Forum des maires* case.

[96] The appellants argue that the remedies intrude on the functions of the executive. However, respect for the role of legislators or the executive does not prevent remedies that are just and appropriate in the circumstances. Here the GNWT had the benefit of a myriad of reports over many years that emphasized the flawed implementation of the *OLA*. The issue had been studied widely without any meaningful improvement. Several action plans proposed by the GNWT's own consultants were never implemented. Despite having been asked on many occasions to make choices, and despite having been advised by its own consultants and personnel that it should do so, the Executive Council declined to take concrete steps to implement the *OLA*. Although the political, sociological and geographical complexities of the NWT may partly explain the historic failure of the GNWT to meet its obligations under the *OLA*, the trial judge's conclusion that a declaration would not furnish an appropriate remedy was based on extensive evidence.

[97] Respect for the role of the legislature generally makes declaratory relief preferable to structural. Nonetheless, the Supreme Court's decision in *Doucet-Boudreau* suggests that if a strong case is made out, more than declaratory relief may be granted when a trial judge is faced with long-standing, multi-faceted inaction on the part of government to meet its constitutional or quasi-constitutional obligations. One of the authors of the majority decision in *Doucet-Boudreau* was Iacobucci J., who dissented on the issue of remedy in *Little Sisters #1*. In that dissent, he stated that declarations are inadequate in cases where there are clear findings of grave systemic problems and evidence that the administrators of the relevant government program have proven themselves unworthy of trust. At para. 258, he said that merely relying on declarations results in "vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance".

[98] In *Doucet-Boudreau*, a trial judge declared that, pursuant to s. 23 of the *Charter*, parents were entitled to have French school facilities for grades primary to 12 by a specified date, and those responsible for providing the facilities had to do so by a specified date: *Doucet-Boudreau v. Nova Scotia (Department of Education)* (2000), 185 N.S.R. (2d) 246 (S.C.). The trial judge reserved to himself the power to review how the responsible authorities were implementing his directives. The Nova Scotia Court of Appeal overturned his reservation of jurisdiction, determining that he was *functus officio* when he purported to conduct the review hearings: *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2001 NSCA 104, 194 N.S.R. (2d) 323.

[99] On appeal to the Supreme Court, Iacobucci and Arbour JJ., for the majority, restored the trial judge's order. At para. 32, they noted the traditional compliance of legislatures with court decisions and, at paras. 33-35, underscored that courts should respect the roles of legislatures. However, at para. 36, they added:

> Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136:
>
> > Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.
>
> Determining the boundaries of the courts' proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.
>
> (emphasis added)

[100] They concluded, at para. 37, that the trial judge had been guided by historical and contextual factors in crafting a remedy that "would meaningfully protect, indeed implement, the applicants' rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches." They emphasized that by the time of the trial there was no issue between the parties about the entitlement to the schools but merely as to the date when they would be made available. They agreed with the trial judge's conclusion that none of the excuses offered by government (such as lack of funds) justified its failure to fulfill its obligations under s. 23.

[101] In determining whether the trial judge's remedy was appropriate and just in the circumstances, they set out five factors to be considered. First, the remedy must meaningfully vindicate the rights and freedoms of the claimant, taking into consideration the nature of the violated right; the situation of the claimant; and the experience of the claimant in attempting to enforce the right. Second, the remedy must strive to respect the relationship with and the separation of functions between the executive and the judiciary. While a remedy may touch on the function of the executive, courts should not unduly or unnecessarily depart from their roles of adjudicating disputes and granting remedies that address the matter of those disputes. Third, the remedy must vindicate the right at issue while invoking the court's powers. Courts should not leap into decisions and functions for which they are unsuited. Fourth, remedies must be fair to the party against whom they are ordered and should not impose substantial hardships that are unrelated to securing the right. Finally, an appropriate and just remedy is one that is "flexible and responsive to the needs of a given case": at para. 59. *Charter* rights are evolving and may require novel and creative features.

[102] The majority in *Doucet-Boudreau* applied these five factors to the trial judge's order and concluded that his remedy was just and appropriate, cautioning that a reviewing court should

only interfere if the trial judge has committed an error of law or principle in choosing a remedy: at para. 87.

(iii) Application of legal principles

[103] We are not persuaded that the trial judge committed any error of law or principle here. She was alive to the law outlined in *Doucet-Boudreau*, and an application of the five factors supports the remedies she selected.

[104] The right asserted by the respondents is a broad-based right to access French language services when dealing with government offices. The circumstances of the denial are myriad. The trial judge found systemic failure to implement the *OLA* at many levels. This is not a case of one or a few breaches, but rather almost innumerable breaches. The most significant breach is the failure of the GNWT to design an effective system of implementation of the *OLA* throughout the long period since its passage. There are many factors in this case similar to those in *Doucet-Boudreau*, including the danger of assimilation (established by expert evidence and never contradicted by the appellants) and the fact that the respondents have already waited too long and have had to dedicate too much time and energy to realizing their rights.

[105] The trial judge strove to respect the separation of functions between the courts and the legislature, but concluded that the history of the respondents' complaints justified more specific directions being given to the GNWT. The evidence amply supported this conclusion.

[106] The remedy in *Doucet-Boudreau* was supervising an order, while the remedy granted here is similar to a series of mandatory injunctions. Such a remedy may be granted by a superior court and, for the reasons already outlined, was appropriate.

[107] The remedy granted by the trial judge is fair to the GNWT. The order generally compels the GNWT to do that which is required to implement its own legislation. Although there may be other ways in which the *OLA* could be implemented, it is difficult to imagine any effective implementation route which would not include a global plan. The alternative (no comprehensive plan) has persisted for many years, with little visible progress. Although some aspects of the remedy granted by the trial judge are less obviously part of an essential implementation process, all were suggested in one or another of the reports commissioned by the GNWT over the years since the *OLA* was passed.

[108] The part of the order directing the implementation of a regulation concerning which institutions would be bound by the *OLA* falls at the very extreme edge of what role is appropriate for a court. The order did not, of course, direct the content of such regulations but focussed on the well-documented necessity for having them. The trial judge gave compelling reasons why, without such a regulation, the *OLA* could not be implemented. Among other things, neither those asserting a right to service, or indeed the GNWT itself, would know which offices and agencies

were required to provide bilingual services. The fact that, as discussed beginning at para. 166, PGs dealing with such matters were already in place and were said by the appellants, at trial, to demonstrate their implementation of the *OLA*, further supports this part of the order. In these highly unusual circumstances, she was justified in requiring the passage of a regulation. At para. 53, we noted that at the time of the trial the Executive Committee was already drafting regulations so that this part of the structural remedy only required the GNWT to continue doing what it was already doing and in fact this part of the structural remedy has been complied with since the trial. See *Government Institution Regulations*, N.W.T. Reg. 082-2006 ("*Government Institution Regulations*").

[109] Lastly, the trial judge's remedy may be novel, but the circumstances of the case justified the measures she imposed.

[110] We cannot say that her order was an unreasonable response to the evidence before her. Although we might have differed in respect of some of its details, the overall order meets the necessary standard of review.

D. Summary

[111] Trial courts are entitled to entertain constitutional challenges involving systemic violations. The pleadings in this case put in issue systemic violations regarding the respondents' quasi-constitutional French language rights and the trial did not exceed the scope of pleadings. The remedies granted by the trial judge were contemplated by the pleadings. Finally, in general the structural remedy granted by the trial judge was available in law and meets the reasonableness standard. In later parts of these Reasons we consider the appropriateness of some parts of her order given our interpretation of the *OLA* and the application of other legal principles.

[112] We dismiss the first ground of appeal and turn to an examination of the trial judge's treatment of the concept of substantive equality.

VII. DID THE TRIAL JUDGE ERR IN HER INTERPRETATION AND APPLICATION OF THE *OLA* AND IN FINDING SPECIFIC BREACHES OF THE *OLA*?

[113] The second ground of appeal concerns the interpretation of the *OLA*, in particular how the concept of substantive equality as to language rights applies to the special demographic and geographic context of the NWT. The appellants say that, while the trial judge claimed to apply substantive equality, in fact she erroneously imposed a requirement of absolute equality. Moreover, according to the appellants the trial judge erred in applying civil law principles to conclude that ss. 4, 5, 8 and 11(1) of the *OLA* created obligations of result. They assert that this is particularly so with respect to s. 11(1), especially because she held that the GNWT's obligations could rarely be satisfied by the use of interpreters and that the *OLA* generally required an active offer. The appellants contend that the trial judge erred in concluding that s. 8 required certain types of government documents to be translated into French. They further submit that, for various

reasons, the trial judge erred in finding that the GNWT breached its obligations to the five individual respondents.

A. Trial Decision

[114] The trial judge held that the obligations arising from the *OLA* are obligations of result: at para. 147. In reaching this conclusion she relied, in part, on principles of civil law and on *Thibodeau v. Air Canada*, 2005 FC 1156, [2006] 2 F.C.R. 70 ("*Thibodeau*").

[115] She also concluded that the *OLA* confers rights of substantive equality. In the context of institutional bilingualism in the courts, substantive equality is "equal access to services of equal quality for members of both official language communities": *Beaulac* at para. 22. The trial judge rejected the appellants' position that the legislation imposed only a standard of good faith and reasonableness.

[116] The trial judge acknowledged that in the context of substantive equality, the GNWT maintained some choice of method, but that the flexibility of the choice of methods was circumscribed by the wording of the legislation: at para. 147. For example, she said no choice of method arises under s. 7 (which requires the "Acts of the Legislature and records and journals of the Legislative Assembly" to be published in both languages), because the legislation itself dictates the result. At para. 148, she said a similar result applies to s. 8. On the other hand, as regards communication with a head or central office required by s. 11(1), substantive equality does not require that all employees be bilingual. Although there is an obligation of result (the opportunity to communicate with and receive services in French), a choice exists as to the means to achieve that result: at para. 149. With respect to communication with and receipt of services from offices other than head or central offices, the conditions of "significant demand" or "nature of the office" permit inequality in some cases. The trial judge concluded at para. 150 that "where the Act does not explicitly contain such a qualification, the guarantees are not reduced to guarantees of accommodation requiring only reasonable efforts".

[117] She added that, except as a last resort, the provision of an interpreter does not meet the obligations under s. 11: at paras. 723-733. She also concluded that an "active offer" was required for purposes of s. 11(1).

[118] Based on these principles, the trial judge analyzed the claims of systemic breaches and the allegations of the individual respondents. As regards some aspects of the latter, she relied in part on the PGs.

B. Standard of Review

[119] Many aspects of this ground of appeal raise issues about the application of principles of statutory interpretation and the interpretation of various sections of the *OLA* . They are questions of law and subject to review on the correctness standard. As discussed at para. 186, somewhat different considerations arise when assessing her conclusions about individually-claimed breaches of the *OLA.*

C. Analysis

[120] We first consider whether the trial judge employed incorrect interpretive principles in examining the concept of substantive equality and, if so, whether this led to an error in her overall approach. A related question is whether she utilized an overly rigid standard of substantive equality. This leads to an examination of whether she correctly concluded that s. 11(1) mandates the use of an active offer and whether her interpretation of the scope of s. 8 was correct. Our consideration of whether she erred in finding certain specific breaches of the *OLA,* as regards individual respondents, is preceded and informed by a consideration of whether the PGs have binding legal effect.

1. Principles of Interpretation

[121] At para. 134, the trial judge referred to the distinction between "best efforts duty" and "strict duty." In defining these different duties, she cited a text (P.A. Crépeau , *L'Intensité de l'obligation juridique ou des obligations de diligence, de résultat et de garantie* (Cowansville: Éditions Yvon Blais, 1989) at 4-5, 11); a civil law case (*Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at 396, 78 D.L.R. (4th) 666); and an article (J. Bellisent, *Contribution à l'analyse de la distinction des obligations de moyens et des obligations de résultat: à propos de l'évolution des ordres de responsibilité civile* (Paris: LGDG, 2001) at 12-13). She also relied on *Thibodeau.*

[122] We agree that the trial judge erred in relying on principles of civil law to interpret the *OLA*. However, her error did not affect the result.

[123] As discussed at para. 60, official language statutes are interpreted by using *Charter* principles. The underlying principle is the protection of minorities: see *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 at para. 125 (C.A.) ("*Lalonde*") and *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12, 161 C.R.R. (2d) 331 at para. 53 ("*Halotier*"). The trial judge applied principles from language rights jurisprudence, especially *Beaulac* where the Supreme Court confirmed, at para. 22, that substantive equality is the correct norm. We agree with the COLC that substantive equality is the result envisaged by the legislature in enacting s. 16 of the *Charter* and ss. 4 and 5 of the *OLA.* Accordingly, the trial judge's use of the expression "obligations of result", was appropriate and supported by *Beaulac*.

2. Did the Trial Judge Err by Imposing an Overly Rigid Standard of Substantive Equality and Constraining the Government's Choice of Means to Satisfy Its Obligations?

[124] At the heart of this case is the meaning of substantive equality in the context of the provision of bilingual government services in the NWT. There is little helpful authority on this issue. For example, *Beaulac* dealt with the accused's rights to a trial in French under s. 530 (1) and (4) of the *Criminal Code*, R.S.C. 1985, c. C-46. Other cases have addressed substantive equality in the context of s. 23 of the *Charter* (the right to an education in French where numbers warrant.) (See *Mahe* and *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3 ("*Arsenault-Cameron*")). *Lalonde* addressed the *French Language Services Act*, R.S.O 1990, c. F.32 in the context of closure of an Ontario hospital. *Halotier* dealt with whether rules of court had to be in French. This is the first case to address the provision of bilingual government services on a large scale and in a multiplicity of contexts.

[125] The trial judge correctly concluded that the *OLA* intended to create substantive equality with respect to the official languages of the NWT. She applied statements of the court in *Beaulac* at para. 24, that "the exercise of language rights must not be considered as exceptional or as something in the nature of a request for an accommodation" and such rights "require government action for their implementation and therefore create obligations for the State". Her conclusion is also supported by the language of ss. 4 and 5 of the *OLA*.

[126] The more difficult issue, and the one urged on us by the appellants, is whether the trial judge misapplied substantive equality to the circumstances of this case. The appellants submit that substantive equality must be applied in the context of the NWT, giving the GNWT the latitude to choose the means by which to satisfy its obligations, which obligations will vary with the circumstances. They argue that although the trial judge described the obligations as being of substantive equality, her reasoning suggests absolute equality. They say that the effect of her decision is to require complete bilingualism (all oral and documentary communication and services must be in French and English right when the service is requested), rather than a form of bilingualism in which a member of the public requests the service in his or her official language, but the recipient of the request has recourse to translation or an interpreter. They point to the examples of Ms. Houde and Mr. Denault described in more detail at beginning at para. 187. They contend that if absolute equality is the norm, every member of the public would have the right to communicate in French with all civil servants and receive services in French without the assistance of a translator or interpreter, as occurs when an anglophone requests services.

[127] The respondents deny that the trial judge applied absolute equality. They say the institutions, rather than every individual, should be bilingual. This would mean, for example, having someone answer the phone in both languages, who could immediately transfer the call to someone capable of providing the requested service in French. Requiring the caller to phone again on another day would not respect the notion of substantive equality, as an anglophone caller would not be delayed in this way.

[128] Substantive equality does not exist in a vacuum. Its analysis must be purposive and contextual: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 at para. 6. The context of substantive equality of French and English in the provision of services is informed by the wording of the *OLA*, the history of language rights in the NWT, and the demographic, geographic and social challenges of the NWT.

[129] The trial judge relied on the wording of the *OLA*. Section 11 contemplates three different levels of language rights regarding communication with and services from government institutions. The first two are contained in s. 11(1). First, if the contact is with a head or central office, there is a right to communicate with and receive services in French or English. Second, if the contact is with any office other than the head or central office, the member of the public has a right to communicate with and receive services from that office in French or English if (a) there is significant demand for the communication with and services from that office in that language; or (b) it is reasonable, given the nature of the office, that the communications with and services from it be available in both languages. The third right, in s. 11(2), deals with Aboriginal languages and is not relevant here.

[130] Section 11(1) distinguishes between the communication with and services from a head or central office, and those with or from other offices. This distinction supports the trial judge's conclusion that the qualifying words in ss. 11(1)(a) and (b) as regards non-head or central offices ("significant demand" or "reasonable given the nature of the office") grant the government some room to manoeuvre in determining when services will be available. The absence of those qualifying words as to head or central offices reinforces her conclusion that substantive equality in that context provides less flexibility concerning the availability of bilingual services.

[131] As regards head or central offices, the trial judge did not impose a standard of absolute equality. She correctly held that not all employees at such offices must be bilingual: at para. 149. She also correctly reasoned that the public must have the opportunity to communicate with and obtain services from governmental institutions in French.

[132] A contextual analysis requires a consideration of many factors. The trial judge was obviously aware of the context. She thoroughly reviewed the history leading to the enactment of the *OLA*, including the Report's plan for the implementation of the *OLA* and subsequent studies and reports. She emphasized the reports of LC Harnum, who, in her 1992-1993 report, recommended the adoption of regulations to clarify the application of the *OLA* to government agencies and commissions and the adoption of a policy concerning "active offer". The trial judge observed that distance, isolation, climate and dispersion of communities are major challenges to be faced in the provision of government services and communications in the NWT. She considered the other nine official languages, the PGs, the GNWT's affirmative action program for Aboriginal people, and the difficulty of recruiting bilingual employees. She balanced these with the evidence of the risk of loss of the French culture and language.

[133] Although the trial judge's consideration of the context was thorough, in our view she gave inadequate weight to the overall context of the NWT and failed to take proper account of

how the nature of the service being sought might affect the way in which the service is provided. This led to certain errors in her conclusions about how the GNWT could meet its obligations under the *OLA* generally, and, in some cases, whether individual rights had been breached.

[134] As to the overall context, there are few places in Canada outside the northern areas where the task of providing services to the public presents so many challenges. There is no other part of the country where so many official languages are employed. The trial judge acknowledged the extensive evidence about the difficulties of recruiting and training qualified staff to provide a vast array of services in small communities. The social problems of the NWT include poor success rates in education, an excessively high infant mortality and crime and over-consumption of alcohol at rates many times higher than in the rest of Canada. One of the GNWT's strategies for providing effective public service has been the institution of an affirmative action program to address the 20% unemployment rate among the near-majority Aboriginal population. This has proven effective in that it costs less to hire and train local people than to recruit from the outside of the NWT. All these factors have important implications for the way in which the GNWT meets its obligations under the *OLA*.

[135] Moreover, within the offices referred to in s. 11(1), the GNWT offers a broad spectrum of services. At one end are services for the health and safety of the public (for example, at the Stanton Hospital). Often, although not always, the demand for such services is urgent. As regards health, it may involve sensitive or confidential matters. At the other end are services that are not urgent and do not concern the immediate health or safety of the public (for example, the issuance of a birth certificate or a driver's licence). The nature of the service being sought must be factored into an assessment as to how the obligations under the *OLA* can be met.

[136] A consideration of the NWT's unique circumstances and the vast array of services that the government must attempt to provide leads us to conclude that the GNWT's range of options in meeting its obligations under the *OLA* is more broad than that described by the trial judge. When the service sought involves urgent or highly confidential matters, a member of the public is entitled to immediate service in French. Ideally, such service should usually be available without the interposition of a third party interpreter, especially when such confidential and sensitive matters as health are concerned. Similarly, consent forms for medical treatment should be available in French.

[137] On the other hand, when urgency or confidentiality is not immediately engaged, the GNWT has greater flexibility in determining how to provide services in French. For example, while a member of the public is entitled to ask in French for a service mandated by the *OLA*, the front-line employee need not be bilingual. Rather, that individual should have ready access to a person who can respond to the request in French (for example, through a 1-800 number or another bilingual person in the office). Such choices go beyond accommodation. Rather, they provide a contextual means in which to achieve substantive equality in the unique circumstances of the NWT.

[138] Given this context, we do not agree with the trial judge that use of an interpreter will only suffice "as a last resort and temporary solution": at para. 732. That said, the trial judge rightly criticized the GNWT's short-comings in recruiting bilingual service providers. Although para. 4(j) of her formal judgment appropriately requires the global plan to deal with recruitment, we vacate the portion of para. 4(k) requiring interpreters only as a last resort.

3. Did the Trial Judge Err in Concluding that Active Offer Was a Fundamental Part of Section 11(1)?

[139] An active offer is a greeting that informs the member of the public that they may communicate in either French or English. Its purpose, as described by Mr. Wissell, an investigator with the Office of the COLC, is to ensure that an individual feels comfortable requesting a service. It is a sign of respect. An active offer can take the form of a sign, a personal greeting or a message.

[140] The trial judge found that the active offer was an integral part of the substantive equality contemplated by s. 5 of the *OLA*, whether mentioned or not: at para. 693. The appellants submit that if the legislature intended to make active offer an essential part of s. 11(1), it would have said so (as in the case of ss. 28-30 of the *OLAC* and s. 28.1 of the *Official Languages Act*, S.N.B. 2002, c.O-0.5 ("*OLANB*")). They contend that, absent similar provisions in the *OLA*, the legislature is free to enact regulations to provide for active offer.

[141] There is conflicting jurisprudence on whether statutory language rights include active offer. In *R. v. Haché* (1993), 139 N.B.R. (2d) 81, 23 W.C.B (2d) 12 (C.A), in the context of a police officer's failure to provide the accused with his *Charter* cautions in French, the court considered whether an accused has the right to be advised of his linguistic rights when subjected to a police investigation. The majority held that no active offer was required. Rice J.A. referred to the absence in the *Charter* of a specific reference to active offer. Angers J.A., in dissent, held that active offer formed a part of the government's obligation under s. 20(2) of the *Charter*. On the other hand, *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1, [1989] N.B.J No. 1005 (Q.B.) (QL) (reversed on appeal on another ground (1990), 109 N.B.R (2d) 54, 60 C.C.C. (3d) 332 (C.A.), leave to appeal to S.C.C. ref'd [1991] 3 S.C.R. viii), held that where the statute conferred equality to the use of both languages, this mandated the use of active offer. *Gautreau* also addressed the rights of an accused motorist under s. 20(2) of the *Charter* in the context of the language used by the police officer and the language used in a highway traffic ticket.

[142] These cases were decided prior to *Beaulac*. The trial judge relied on *Beaulac* to conclude that active offer was an integral part of the rights conferred by s. 11(1). She made several practical observations. For example, she noted that a unilingual English greeting did not satisfy the GNWT's obligation under s. 11(1) because it presumed the ability of the unilingual French speaker to read English, and failed to present a bilingual person with a real choice between French and English. Further, without an active offer, the GNWT would be unable to assess whether there was "significant demand" under s. 11(1)(a).

[143] We disagree with the trial judge's conclusion on this point. The notion of active offer was not overlooked in the *OLA*. Section 34(e) provides that the Commissioner may make regulations respecting active offer. The GNWT did not enact regulations. Rather, it developed the PGs (discussed in detail beginning at para. 166), which provide for active offer in specified government offices. This distinguishes the *OLA* from the *OLAC* and the *OLANB*. Enactments on the same topic from other jurisdictions "form part of the legal context in which statutes are enacted and operate": Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths Canada Ltd., 2002) at 331 ("*Sullivan*"). "When statutes that are otherwise similar use different words or adopt a different approach, this suggests a different meaning was intended": *Ibid*.; also, see *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] 2 S.C.R. 493 at 504-505, 25 Man. R. (2d) 302; and *Reference Re Canada Labour Code*, [1992] 2 S.C.R. 50 at 106, 91 D.L.R. (4th) 449. These principles and s. 34(e) of the *OLA* suggest that it was not the legislature's intention to make active offer a fundamental part of s. 11(1).

[144] We conclude that the trial judge erred in finding that active offer was necessary in all head or central offices. Nevertheless, in those contexts where urgent or highly confidential matters are likely to arise, the person who seeks such services in French cannot easily access it or know it is available without an active offer. As an example, unless the Stanton Hospital provides signage or a greeting in French a person who seeks services in French in the emergency room cannot know it is available. Interestingly, this is consistent with the GNWT's own policy as found in the PGs.

4. Did the Trial Judge Err in Concluding that s. 8 Requires Official Government Notices and Certificates that Attest To a Person's Status to be Published in French?

[145] The trial judge found that s. 8 of the *OLA* encompassed official government notices and certificates that attest to a person's status. At issue were GNWT's employment offers, public notices and calls for tenders, the birth certificate of respondent Nadia Laquerre's daughter Océane, as well as the apprenticeship form and certificate of respondent Yvon Dominic Cousineau. The latter allegations of specific breaches are dealt with below beginning at paras. 215 and 235.

[146] The trial judge examined the grammatical meaning of the words "acte" and "instrument" and considered the meaning of the word "promulgated". She concluded that the legislature intended to include "documents of a formal or official nature" within the scope of s. 8: at para. 716.

[147] She reasoned that the terms "instruments in writing" did not include all documents produced by government institutions. For example, documents used for the provision of services and communications with the public are covered by s. 11(1). To conclude otherwise would limit the meaning of the term "communication" in s. 11(1) to verbal communications: at para. 823.

[148] She noted that a birth certificate is defined in s. 1 of the *Vital Statistics Act*, R.S.N.W.T. 1988, c. V-3 ("*Vital Statistics Act*") as "a certified extract of the prescribed particulars of a registration filed in the office of the Registrar General": at para. 718. Its usefulness arises from its public nature as it is proof "to the world of the facts recorded therein" and constitutes a document of a formal or official nature subject to s. 8.

[149] As for official government notices, the trial judge held that s. 8 encompasses employment offers and calls for tenders because both are formal notices intended for the public: at para. 747. She noted that the GNWT may choose the means of distribution once announcements have been promulgated. Since the organizations listed in s. 8 are subject to the principle of substantive equality, once an organization commits to publishing a notice in an English newspaper, it must also publish it in a French newspaper.

[150] She found support for this in PG #8, which provides that when an employment opportunity for a position located in a region designated for French appears in English, the advertisement must appear in French in a French newspaper. PG #9 sets out that when a proposed project, advertised in English, is to be carried out in a region designated for French, bids and calls for tenders must appear in French in a French newspaper.

[151] Finally, the trial judge concluded that even if the documents at issue were not subject to s. 8, they were covered by s. 11(1) because they constitute "invitations to communicate": at paras. 768, 823-824.

[152] The appellants accept the trial judge's conclusion that s. 8 encompasses "documents of a formal or official nature". They suggest that the words "instruments in writing ... shall be promulgated in English and French" refer to legal and formal writings. However, they say the trial judge erred in finding that s. 8 includes certificates that attest to a person's status as well as official government notices. They argue that since the English version of s. 8 is narrower, she should have attempted to reconcile the shared meaning of the French and English versions.

[153] The general rule for the interpretation of statutes promulgated in two languages is that both versions are equally authoritative and must be read together. The shared meaning will be preferred, unless it does not express the intention of the legislature: *Sullivan* at 75-78, 80-81.

[154] Two additional principles apply in searching for commonality between the two versions. On the one hand, when one version is ambiguous and the other clear, the clear version is preferred: *Sullivan* at 83. On the other, when one version provides for a greater scope than the other, commonality is found in the more restrained version: Pierre-André Côté, *Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at 327. Throughout, the objective is to determine the intention of the legislature: *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at 630, 113 N.R. 373.

[155] Section 8 of the *OLA* reads:

> 8. Subject to this Act, all instruments in writing directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of the Legislature or Government of the Northwest Territories or any judicial, quasi-judicial or administrative body or Crown corporation established by or under an Act, shall be promulgated in English and French and in such other Official Languages as may be prescribed by regulation.
>
> 8. Sous réserve des autres dispositions de la présente loi, sont établis en français et en anglais et dans toute autre langue officielle désignée par les règlements les actes écrits qui s'adressent au public et qui sont censés émaner de la Législature ou du gouvernement des Territoires du Nord-Ouest, ou d'un organisme judiciaire, quasi judiciaire ou administratif, ou d'une société d'État, créés sous le régime d'une loi.

[156] The *Le Petit Robert*, Paris 2006, at p. 27 gives the following definition of the word "acte":

> 1. DR. Acte ou acte juridique : manifestation de volonté qui produit des effets de droit. Acte conservatoire, exécutoire. Acte d'administration, de commerce. Acte législatif. - Faire acte d'héritier, de commerçant, de propriétaire, exercer ces qualités.
>
> 2. Pièce écrite qui constate un fait, une convention, une obligation. = certificat, document, titre. Acte de vente, de donation, de partage. = contrat, convention. Acte de dernière volonté. = testament. Acte de notoriété*. Actes de l"état civil (de naissance, de mariage, de décès). Acte d'huissier*. Acte sous seing privé, notarié, authentique. Validité, nullité d'un acte. La minute*, la copie d'un acte. Collationner, dresser, établir, enregistrer, ratifier, signer un acte.

[157] The *Le Petit Larousse,* Paris, 2001, at p. 37 defines "acte" as:

> Acte juridique: décision, opération destinée à produire un effet de droit. Écrit constatant une opération ou une situation juridique. Actes de l'état civil. Acte de vente. […] Les actes peuvent être authentiques (établis par un officier public [notaire, officier de l'état civil…] et obligatoires dans certains cas [contrat de mariage, vente d'immeuble…]) ou sous seing privé (établis et signés par les parties elles-mêmes et en principe non soumis à des conditions de formes particulières).

[158] The *Dictionnaire de droit québécois et canadien* (Montréal: Wilson & Lafleur, 1994) at p. 10 defines "acte", which it translates as "act, instrument", as:

> Écrit qui constate légalement un fait.

[159] The English version of s. 8 uses the expression "instruments". The *Oxford English Dictionary*, 2d ed., 1989 defines the term "instrument" as:

> Instrument: ... a. Law. A formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form, so as to be of legal validity.

[160] *Black's Law Dictionary*, 8th ed., Bryan A. Garner, ed. (St. Paul, Minn.: Thomson/West, 2004) at 813, defines "instrument" as:

> A written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.

[161] An earlier edition, *Black's Law Dictionary*, 6th ed., 1990, defines "instrument" as:

> A formal or legal document in writing, such as a contract, deed, will, bond, or lease. ... Anything reduced to writing, a document of a formal or solemn character, a writing given as a means of affording evidence. A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right. A writing executed and delivered as the evidence of an act or agreement. ...

[162] In our view, the English version of s. 8 is not narrower than the French. On the contrary, the shared meaning of both is that an "instrument" or "acte" is a document of a formal character that establishes a fact. We therefore agree with the trial judge that s. 8 encompasses "documents of a formal or official nature". When such a document is intended for the notice of the public and purports to be made or issued by the GNWT, it must be promulgated in French and English. The phrase "instruments in writing" may include, but is not limited to, legal writings.

[163] Thus, government notices, whether in the form of employment offers, public notices or calls for tenders, are formal notices intended for the public. Similarly, certificates that attest to a person's status are documents of a formal or official nature intended for the public. We have already said, at para. 125, that the trial judge correctly concluded that the *OLA* intended to create substantive equality with respect to French. It follows that when documents of a formal or official nature intended for the notice of the public are promulgated in English, they must also be in French. The GNWT does not enjoy room to manoeuvre under s. 8 because the section itself dictates the result.

[164] Given our view that government notices and certificates that attest to a person's status are subject to s. 8, we need not determine whether they constitute "invitations to communicate" subject to s. 11(1).

5. Allegations of Specific Breaches

[165] The final part of this ground of appeal concerns whether the trial judge erred in her conclusions about specific breaches of the *OLA* alleged by individual respondents. In reaching some of her conclusions, she relied on the PGs. Before assessing the specific breaches, it is necessary to consider the legal status of the PGs and whether the trial judge employed them appropriately.

a) Policy and Guidelines (PGs)

[166] In 1997, the Executive Council adopted the PGs. The trial judge said that the PGs "set minimal standards for the delivery of services in the Official Languages" but do not supersede any obligations arising from the *OLA*: at para. 207. Of the PGs' 11 guidelines, a few are especially pertinent.

[167] PG #1, "Designated Regions", designates four regions of the NWT in which the services of the GNWT may be provided in French: Fort Smith, Hay River, Yellowknife and Iqaluit (this predated the establishment of Nunavut in 1999, with Iqaluit as its capital). The francophone population in the three remaining regions was respectively 60, 75, and 660, according to a 1996 census. Inuvik is not a region designated for French under the PGs.

[168] PG #2 deals with "Designated Offices", meaning offices that provide services to the public and must do so in the official languages of the designated regions. It applies to the departments, the boards and agencies of the GNWT listed in its Schedule A, which includes hospitals. It states that in all the designated regions, offices providing social and health services to the public must do so in French.

[169] PG #3, which deals with active offer, applies to the institutions listed in Schedule A. PG #4, concerning the provision of services, applies to designated offices and therefore to hospitals as per PG #2.

[170] PG #7, which relates to the forms that must be completed by the public, applies to the institutions listed in Schedule A of the PGs if the institutions determine that the forms are frequently used. PG #8, relating to the publication of job offers, applies to all the ministries of the GNWT. It states that when an employment offer for a job in a designated region is published in English, it must also be published in French in a French newspaper. PG #9, concerning tenders and notices, applies to all the ministries of the GNWT. It requires that when a proposed project, to be conducted in a designated region, is published in English, it must also be published in French in a French newspaper.

[171] Although the trial judge concluded that the PGs are only a policy, she nevertheless considered whether they had been violated and whether they were in keeping with the *OLA:* at para. 698. She justified her approach in several ways at para. 699. First, the appellants took the position at trial that the PGs complied with the *OLA* and that, by following their

provisions, they had fulfilled their obligations. Second, according to some courts, directives are subject to judicial review when they are used to justify the exercise of a power that infringes individual rights. Third, she was required to determine the source of the breaches of the *OLA*. Fourth, the PGs might be relevant to the respondents' allegations of bad faith. She concluded that some of the specific breaches highlighted problems with the PGs, even taking into account the discretion implicit in ss. 11(1)(a) and (b). Insofar as the PGs added supplementary requirements to justify the use of French, she held that they contravened the *OLA*.

[172] Knowing how to treat the PGs for the purposes of this case is challenging, partly because, at trial, the appellants took the position that the PGs complied with the *OLA*. For example, they suggested that PG #1 (Designated Regions) determined when there is a significant demand under s. 11(1)(a): see trial decision at para. 783. The trial judge also relied on PGs #1 and #2 to evaluate Mr. Cousineau's claim: at paras. 737, 773-774. The question as to the status of the PGs is magnified because the GNWT continually refused to follow many recommendations (some by its own advisers) that it ought to pass regulations under the *OLA*.

[173] We invited supplementary written submissions concerning the status and legal effect of the PGs. To summarize, the appellants replied that the PGs have no binding legal effect, while in the respondents' view they are equivalent to a regulation. We now assess those competing views.

[174] Regulations, rules, by-laws and orders are generally legally binding, whereas directives, policy statements and guidelines are not legally enforceable unless the statute that authorizes them states that they are binding: *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884 ("*Bell Canada*"); *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)*, 2001 ABQB 624, 292 A.R. 86.

[175] The statutory provision at play in *Bell Canada* authorized the Human Rights Commission to issue a guideline setting out the extent to which any provision of the legislation applied to a class of cases. Such a guideline was stated to be binding on the Commission. In considering the legal effect of such guidelines, McLachlin C.J. and Bastarache J. noted:

> [37] While it may have been more felicitous for Parliament to have called the Commission's power a power to make "regulations" rather than a power to make "guidelines", *the legislative intent is clear*. A functional and purposive approach to the nature of *these guidelines* reveals that they *are a form of law, akin to regulations*. It is also worth noting that the word used in the French version of the Act is ordonnance -- which leaves no doubt that the guidelines are a form of <u>law</u>.
>
> (italics added; underlined in original)

[176] In contrast, s. 34 of the *OLA* states that the Commissioner "may make regulations" *inter alia* designating government institutions, respecting active offers, and respecting any other matter necessary for carrying out the *OLA*.

[177] While the *OLA* refers to regulations, nowhere does it mention guidelines. This suggests that only regulations (not PGs) passed under the *OLA* were intended to have legal effect. The respondents rely in part on s. 26(2)(b), which requires the minister responsible for the *OLA* to "oversee the development of policies and regulations". However, that provision simply reinforces the view that there is a dichotomy in the *OLA* between legally binding regulations and non-binding policies or directives.

[178] Although the trial judge said that the PGs were only policy, she nevertheless relied on them to determine whether some of the specific allegations were well-founded: at para. 698. She took the view that they represented, at the least, a minimum standard, acknowledged by the GNWT, with which it did not always comply.

[179] We appreciate that this situation was created by the GNWT's past failure to pass regulations. We nevertheless conclude that the trial judge erred in relying on the PGs to assess whether the specific breaches were made out. If the PGs do not have the force of law, a failure to comply with them cannot be the basis of an award of damages. Since the trial, the GNWT has passed some regulations under the *OLA*, namely *Aboriginal Languages Revitalization Board Regulations*, N.W.T. Reg. 050-2004; *Official Languages Board Regulations*, N.W.T. Reg. 049-2004, and notably, the *Government Institution Regulations* discussed at para. 108. The absence of regulations concerning institutions at the time when certain specific complaints arose creates a difficulty in this case in assessing some of those complaints. Our view about the non-binding nature of the PGs requires us to revisit the trial judge's determinations about s. 11(1) breaches.

b) The assessment of individual complaints under s. 11(1) in light of the non-binding nature of the PGs

[180] The individual complaints arise in three ways. If the allegation concerns a head or central office, services in French are required. If the allegation concerns an office that is not a head or central office, services in French will be required only pursuant to s. 11(1)(a) or (b), namely, if there is a significant demand or if the nature of the office requires services in French. Since the trial judge looked to the PGs to determine significant demand (through reliance on PG #1 (Designated Regions)), she did not need to make findings about significant demand. Similarly, she did not generally need to make determinations about the nature of the office, because she relied on Schedule A to PG #2 (Designated Offices) to determine what government facilities were bound to comply with the PGs. In particular, the fact that "hospitals" were listed on Schedule A enabled her to draw conclusions about the adequacy of French services in hospitals and the need for such services at the Office of Vital Statistics ("Inuvik Office").

[181] We are not positioned to make findings about significant demand. Indeed, we doubt that the evidence presented by the individual respondents would generally show significant demand, since in many cases it appears that they sought services as part of FFT's strategy of establishing the inadequacy of services.

[182] We are able to draw some conclusions about whether, under s. 11(1)(b), "it is reasonable, given the nature of the office, that communications with and services from it be available in both French and English". In our view, such a designation is justified in the case of the Stanton Hospital because it is the referral centre for the NWT. This point was apparently conceded at trial as regards Stanton Hospital: at para. 724. There is inadequate evidence to support the same conclusion about the Hay River Hospital and it is unclear whether a similar concession was made at trial.

[183] A different rationale applies to the Inuvik Office. It is the central service point chosen by the Department of Health and Social Services for the issuance of any official certificate. It deals with the registration of all vital events that occur in the NWT, such as births, deaths, stillbirths and marriages. Its nature brings it under s. 11(1)(b). Similarly, the Department of Transportation in Yellowknife deals with the public in the capital and so requires the provision of French services pursuant to s. 11(1)(b). The same point applies to the apprenticeship office in Yellowknife.

[184] A like conclusion cannot be reached about the Public Works office in Fort Smith. The appellants' evidence showed that it did not offer services to the public. Accordingly, it cannot be said that its nature required the provision of French services under s. 11(1)(b).

[185] These conclusions, along with other conclusions previously reached, guide our analysis of the appellants' complaints concerning certain specific allegations of breaches.

c) Did the trial judge err in finding specific breaches in the case of the individual respondents?

[186] We deal in turn with individual respondents. The standard of review is the same throughout. The trial judge's findings constitute questions of fact, while the application of legal standards to these facts raises questions of mixed fact and law. Both are reviewable on the palpable and overriding error standard, absent extricable error of law. Questions of law are reviewable on the correctness standard. Because the trial judge partially erred in her interpretation of the *OLA* and her conclusions about the GNWT's options for determining how to provide required services, some of her conclusions with respect to individual respondents must be reviewed on the correctness standard.

(i) Allegations of Fernand Denault against the former Department of Natural Resources, Wildlife and Economic Development

(aa) Background and trial decision

[187] Mr. Denault's complaint concerns the Hunter Harvest Questionnaire ("questionnaire") he received in English over a number of years from the Department of Natural Resources, Wildlife and Economic Development ("Department"). In June 1999, he received such a copy of the questionnaire and returned it to the Department with a note written on it "en français s.v.p." ("in French, please"). He received neither an answer nor another questionnaire in French. Around September 1999, he received an identical questionnaire in English, with no offer of a French version.

[188] On November 19, 1999, he twice attempted to reach the official languages coordinator of the Department by telephone. The first time he reached a voice-mail message in English. Mr. Denault believed he had found that telephone number in the telephone directory.

[189] The second time, he called another number which he believed was the Department's head office. The woman who answered in English indicated that an employee able to speak French would be available "on Monday", which was the next working day. Mr. Denault did not pursue his inquiry or lodge a complaint with the Department or the LC.

[190] He alleged his right to government services in French was infringed (i) when he twice received a questionnaire in English without an active offer of a French version; (ii) when he was greeted by an English-only recording in his attempt to reach the Department's languages coordinator; and (iii) when he was greeted in English by an employee after having placed another telephone call to the Department.

[191] The appellants' witness, Ms. Judy McLinton, testified that a French version of the questionnaire did not exist in 1999; one of the telephone numbers dialled by Mr. Denault in November 1999 was that of an administrative assistant in a division of the Department that does not offer services to the public; and the other was that of the communications and public affairs manager for the Department, which position was then vacant. She added that the Department had one employee in Yellowknife and another in Norman Wells, both of whom receive a bilingual bonus and can be reached on demand.

[192] The trial judge found breaches of s. 11(1) and a failure to respect the PGs because (i) the questionnaire was not accompanied by an offer of a French version; (ii) Mr. Denault was greeted in English when he contacted the Department; and (iii) he was told he had to wait until the next working day to receive service in French. She concluded that it was up to the Department to inform the public of the means of communicating with its head office. In the context of s. 11(1), she held the greeting, by telephone or in person, must be in English and French. She granted Mr. Denault compensatory damages in the amount of $750.

(bb) Analysis

[193] We reject the appellants' arguments that the note Mr. Denault wrote on the questionnaire was never in evidence at the trial or otherwise corroborated. The trial judge accepted Mr.

Denault's evidence, as she was entitled to. Nevertheless, we allow the appeal with respect to Mr. Denault for two reasons.

[194] First, given our earlier conclusion that s. 11(1) of the *OLA* does not generally require an active offer, the trial judge erred in law in finding a breach of s. 11(1) because the questionnaire was not accompanied by an offer of a French version. She likewise erred in concluding that the Department was obligated to make known a telephone number at which to obtain services in French (as that is also a form of active offer) and that s. 11(1) was breached by the use of a voice-mail message in English only.

[195] Second, given the services he sought when he contacted the office (which were not urgent or confidential), access to a bilingual employee on the next working day met the GNWT's legal obligation under s. 11(1).

[196] The award of damages to Mr. Denault is vacated.

(ii) Allegations of Suzanne Houde regarding the Stanton Regional Hospital

(aa) Background and trial decision

[197] The global shortage of physicians and nurses has a particular impact in the NWT. Its geographical isolation and climate render especially challenging the recruitment of health care professionals. In 2004, for example, the turnover rate of medical personnel was 22%. The situation is worse as regards specialists. Although efforts are made to recruit health care professionals who speak French, the trial judge noted that the GNWT lacks a structured or organized strategy of doing so.

[198] Ms. Houde attended the Stanton Hospital numerous times beginning in 1997 for treatment of various health problems. The trial judge summarized her experience as follows:

> [723] Ms. Houde attended many times over the years at the Stanton Hospital reception and emergency room and was greeted in English only. These incidents occurred despite the presence of welcome signs in French. Ms. Houde's testimony is supported by the evidence that there were no designated bilingual positions at the hospital's reception. Ms. Houde has rarely been treated by a Francophone doctor or nurse in the emergency room. There was no interpreter available during some of her visits to the doctor. Moreover, the hospital felt that it was up to her to make the necessary arrangements for an interpreter during a consultation with an Anglophone orthopaedist. The interpreters used by the hospital had not received any professional training in interpretation or any formal education in medical terminology. The hospital made a habit of having her husband, Mr. Légaré, act as interpreter. This occurred during Ms. Houde's frequent visits to the emergency room and when it was necessary to complete consent forms relating to her tests

> and treatment. Mr. Légaré had no training in medical terminology. On one occasion, Ms. Houde was left alone, without an interpreter, in a recovery room and she was unable to communicate her request for medication.

[199] The trial judge found that Ms. Houde's rights under s. 11(1) were breached because (i) despite the presence of welcome signs in French, Ms. Houde did not benefit from a French greeting at the hospital on a number of occasions; (ii) several times, she was prompted by the hospital to rely on the interpretation skills of her husband and, in some cases, she had to depend on her husband's translation of consent forms; (iii) she was encouraged to make her own arrangements for an interpreter for a consultation with an orthopaedist; and (iv) she did not have access to an interpreter in the recovery room following surgery. The trial judge awarded Ms. Houde $12,000 in compensatory damages as well as $750 for her travel to Qu_bec in 2002 for surgery.

[200] These findings are justified by the evidence and the law.

(bb) Analysis

[201] As we have said at para. 182, it was conceded that Stanton Hospital was obliged to provide bilingual services. Ms. Houde's experiences demonstrate the importance of a contextual approach. Because her interactions were related to her health and largely of a confidential nature, service in French had to be offered immediately. This is the type of situation where a contextual approach requires the use of an active offer, without which the person requiring services in French cannot know that they exist.

[202] The nature of the required care necessitates the use of front line personnel who can greet and respond to patients in French. The hospital's recourse to Mr. Légaré's skill in interpreting and translating medical consent forms shows a blatant misunderstanding of a patient's needs in a hospital context. Asking a person untrained in interpretation and medical terminology to translate the risks of a treatment or surgery to a loved one is an unacceptable approach to the provision of services.

[203] Similarly, Ms. Houde's rights to services in French were breached when she was encouraged to make her own arrangements for an interpreter when consulting an orthopaedist at the hospital and when she had no access to French services in dealing with health care professionals and was therefore, on one occasion, unable to communicate her need for medication following surgery. Moreover, the delicate and confidential nature of the information exchanged between health care professionals and patients mandates that efforts be made to recruit francophone employees before providing services through an interpreter. The trial judge dealt with this issue appropriately and her damage award to Ms. Houde was justified.

(iii) Allegations of Suzanne Houde regarding the Inuvik Office

(aa) Background and trial decision

[204] On arrival in Yellowknife from Ontario in 1997, Ms. Houde continued using her Ontario health card for a period of time. On that card, her first name was correctly spelled “Suzanne”. On her first visit at the Stanton Hospital, her given name was incorrectly spelled “Susanne” on the hospital identity card. Her given name was also incorrectly spelled “Susanne” on the first health insurance card she received from the GNWT.

[205] In an attempt to correct her name on the health card, on July 30, 1999 a staff member at the hospital filled out the English side of a bilingual change of name request, noting “wrong spelling on my name” on the form that Ms. Houde signed. Although the form was received by the Inuvik Office on August 5, 1999, she did not receive a reply. She tried three or four times to contact the Inuvik Office but was unable to obtain service in French. Ms. Houde filled out a second change of name request in English with the help of a hospital staff member. It was received by the Inuvik Office on November 18, 1999. She completed these forms in English because the staff helping her spoke English.

[206] The subsequent dealings between Ms. Houde and the Inuvik Office were set out by the trial judge:

> [405] Ms. Houde received an English form from the Inuvik office on January 5, 2000 asking her to provide several pieces of information. The Territorial Defendants suggested that having already received from Ms. Houde two change of name requests completed in English, the Inuvik office had perfectly good reason to correspond with her in English. However, Mr. Légaré testified that Ms. Houde had received, prior to November 18, 1999, the same form as the one dated January 5, 2000. He explained that he sent the former in November to the Inuvik office, uncompleted, accompanied by a note indicating that Ms. Houde did not speak English, but he did not keep a copy of these documents. It is clear from the evidence that the Inuvik office sent a document to Ms. Houde in November 1999. In fact, another envelope sent by the Inuvik office to Ms. Houde, bearing a postal date stamp of November 23, 1999, was entered in evidence. I accept Mr. Légaré's testimony to the effect that his spouse had received in this envelope a first form asking her (in English) to provide information.
>
> [406] I also accept Mr. Légaré's testimony to the effect that he sent the uncompleted form to the Inuvik office with a note about the language problem and that the Inuvik office continued to send documents in English to Ms. Houde. Mr. Légaré testified that when he received the same form in English once again, now dated January 5, 2000, from the Inuvik office, he believed he returned it by facsimile, again uncompleted, but accompanied this time by the following note: "Ms. Baxter - for the second time, I am writing you to tell you that <u>I do not read and I do not speak English.</u> Therefore, please send me a form in French" [translation].

> [407] I accept Mr. Légaré's version of these events. I note that the Inuvik office used Mr. Légaré's facsimile number to communicate with him on February 23, 2000. I conclude that he did return the January 5, 2000 form by fax, which allowed him to retain his original note (a yellow Post-It note) as well as the January 5 form and to submit these two documents in evidence.
>
> [408] Having received another communication from Mr. Légaré in French, the Inuvik office nonetheless replied in English in a fax dated February 23, 2000, essentially asking for the same information as was requested in the form dated January 5, 2000.
>
> (emphasis in original)

[207] The trial judge concluded that Ms. Houde was unable to obtain services in French from the Inuvik Office between the end of November 1999 and March 2000, although the use of English in calls made to Ms. Houde, after she sent the July 30, 1999 form, was justified because the form was in English. She found that the Inuvik Office is the head office of a GNWT institution. Her reasoning was that since the GNWT considers hospitals to be of a nature which justifies the use of French, the nature of the Inuvik Office (in relation to the issuance of cards needed to access hospitals) justifies the use of French in the provision of these services. Further, Ms. Houde was never informed that French services were available, nor was she directed to a francophone employee. These facts constituted violations of s. 11(1). The trial judge found the misspelling of her name on the health insurance card was only a typographic error.

[208] The trial judge awarded Ms. Houde $1,200 in compensatory damages for these breaches.

(bb) Analysis

[209] We reject the appellants' argument that the trial judge accepted uncorroborated evidence or evidence of questionable weight. Not only is there no reason to interfere with her fact findings, those findings did not ground her conclusions about breaches of Ms. Houde's rights in any event.

[210] For reasons set out at para. 183, we are of the view that s. 11(1)(b) applies to the Inuvik Office. As such, the trial judge correctly concluded that Ms. Houde was entitled to receive services from it in French. Obtaining a health card is not of such an urgent nature that the GNWT should be denied a choice as to the means by which it provides such services. Ms. Houde, however, sought service in French and never received it. Unlike Mr. Denault, she was never offered any method by which to obtain service in French. The damage award was justified.

(iv) Allegations of Pierre Ranger regarding the Health Services in Hay River

(aa) Background and trial decision

[211] On November 12, 1999, Mr. Ranger attended the H.H. Williams Memorial Hospital in Hay River after suffering a back sprain. Despite the active offer sign offering services in three languages including French, Mr. Ranger was greeted in English at the hospital reception desk. He asked to receive services in French but the hospital indicated that no translator was available.

[212] The trial judge concluded that s. 11(1) had been breached based on the GNWT's own criteria because PG #2 requires hospitals in designated regions (including Hay River) to offer services in French. Despite the active offer and Mr. Ranger's request, the service was not available and he was not served in French.

(bb) Analysis

[213] The appellants submit that Mr. Ranger's evidence should not have been admitted by the trial judge because it was hearsay. He testified that a doctor told him in English that no one could provide him with services in French. The trial judge did not err in accepting the fact that the conversation took place. The appellants further argue that an interpreter would have been available to translate for Mr. Ranger.

[214] As we concluded at para. 182 , the evidence does not show that the Hay River Hospital falls under s. 11(1)(b). Accordingly, the damages awarded to Mr. Ranger are vacated.

(v) Allegations of Nadia Laquerre regarding the Inuvik Office

(aa) Background and trial decision

[215] Following the birth of her second child, Ms. Laquerre received, from her midwife, a "Registration of Live Birth" on which the given name of her daughter "Océane" was correctly entered. She sent the signed document to the Inuvik Office on July 22, 2002 in order to register the birth and obtain an original birth certificate. The Registration of Live Birth was received by the Inuvik Office and returned to her.

[216] In order to register Océane in a registered education savings plan, Ms. Laquerre required an original birth certificate. She twice contacted the Inuvik Office to inquire about Océane's birth certificate which she had yet to receive. Both times she was answered in English and told that no one could speak French to assist her. The Inuvik Office suggested that she contact the Yellowknife office. The latter indicated that Océane's name was a "special case" because of the acute accent, hence the delay in sending her Océane's birth certificate. Eventually, she was informed that the technology did not allow for the "é". She was provided with a wallet-size certificate issued March 31, 2003, but without the acute accent. The certificate was in English and an Inuit language. She received a legal size birth certificate in English with an acute accent on July 6, 2003.

[217] The trial judge concluded that s. 8 applies to birth certificates and that Ms. Laquerre's rights were breached under that section, as well as s. 11(1). She based her conclusions on the 10-month delay preceding the issuance of Océane's birth certificate with the correct accent; the fact that the legal size birth certificate issued in July 2003 was in English; and the fact that she was not served in French by the Inuvik Office or the Department of Health in Yellowknife. She awarded Ms. Laquerre $1,200 in compensatory damages.

[218] The appellants argue that the problem regarding the impression of French characters on birth certificates was resolved a few years before the start of trial and that the issue before the trial judge was moot.

(bb) Analysis

[219] We reject the appellants' suggestion that the issue concerning accents was moot by the time of the trial. The fact that the technical problems with French accents had been resolved does not answer the frustration suffered by Ms. Laquerre over a 10-month period.

[220] We agree with the trial judge that a birth certificate is a "document of a formal or official nature" under s. 8. As the trial judge noted, it is defined as "a certified extract of the prescribed particulars of a registration filed in the office of the Registrar General" in s. 1 of the *Vital Statistics Act.* Its usefulness is based on its public nature as it is proof to the world of the facts recorded therein. Ms. Laquerre's rights were breached when she was required to wait 10 months for the issuance of Océane's birth certificate with the correct accent and because the legal size birth certificate, issued in July 2003, was in English.

[221] We also agree Ms. Laquerre was entitled to be served in French by the Department of Health in Yellowknife and the Inuvik Office. She was not served in French by either, nor was she given such an opportunity. The appeal is dismissed in this regard.

(vi) Allegations of Nadia Laquerre regarding the Department of Public Works

(aa) Background and trial decision

[222] Ms. Laquerre, acting as a community development officer for the francophone association of Fort Smith, telephoned the Public Works office in Fort Smith on November 12, 1999 to inquire about the business hours. She was greeted in English and not offered the opportunity to speak to a francophone employee. She did not know if the office in Fort Smith was a head or central office, nor did the trial judge make any finding in that regard.

[223] Of the 260 Department of Public Works employees, only nine serve the public by supplying fuel to 15 small communities (a service not offered by the Fort Smith office) and performing safety inspections and granting mechanical and electrical work permits. None of these services received a request for service in French. The greeting in person and on the telephone at

the Department of Public Works' reception area is in English. There are no signs offering the possibility of service in French. Two departmental employees receive a bilingual bonus and reception staff are asked to refer requests for services in French to them.

[224] The trial judge concluded that s. 11(1)(a) was breached when Ms. Laquerre was not greeted in French and her call was not directed to another office of the Department of Public Works where she could be served in French. She noted that Fort Smith is a designated region as per PG #2. Since the GNWT took the position that this designation was a way of defining "significant demand", she held that the public has a right to use French to communicate with the offices located in that region pursuant to s. 11(1)(a).

[225] Because Ms. Laquerre contacted the Department of Public Works on behalf of the FFT, the trial judge determined that her complaint was in fact the FFT's complaint. Since the phone call was compatible with the FFT's role, it was inappropriate to grant damages.

(bb) Analysis

[226] The appellants argue that the trial judge applied the wrong test:

> [781] [E]ven if an office does not offer direct service to the public, the public has the right to communicate in French with that office if there is a significant demand. One can imagine various circumstances where the public would be justified in communicating with a local office of Public Works, for example, to complain about actions by the latter which affect the public.

[227] For the reasons given at para. 184 and absent a finding that it was a head or central office, we agree with the appellants that the Fort Smith Public Works office was not subject to s. 11(1). The appeal is allowed in that regard.

(vii) Allegations of Yvon Dominic Cousineau regarding the Department of Transportation

(aa) Background and Trial Decision

[228] In 2001, Mr. Cousineau took a course to obtain his Class 1 professional truck driver's permit. At the transport office in Yellowknife, he was greeted in English. He was given two manuals for the course, which he asked for in French. After an investigation was carried out by the office, he obtained one of the manuals in French from New Brunswick. Although a computerized French version of the other existed, he never obtained it because staff at the office were unaware of its existence.

[229] The trial judge found a breach of s. 11(1) because Mr. Cousineau was not greeted in French at the office and did not receive one of the manuals in French. She emphasized that there

was no obligation to publish the manual in French but there was an obligation to make it available once it was published.

[230] The evidence was unclear as to whether the office was a head or central office. Although PG #2 (Designated Offices) applies to "all GNWT departments and to the boards and agencies listed in Schedule A", the transport office was not on Schedule A. Nonetheless, the trial judge concluded that PG #2 covered all offices in Yellowknife providing services to the public, so the transport office was subject to s. 11(1)(b) because of its nature.

[231] Alternatively, since Yellowknife was a designated region for French under PG #1, it would apply to the office in Yellowknife because of the criterion of "significant demand". Her conclusion was reinforced by the wording of the English version of s. 11(1), which uses the word "or" between (a) and (b), suggesting that the criteria of (a) and (b) were not meant to be cumulative.

[232] The trial judge awarded Mr. Cousineau $750 for these breaches and those of the Department of Education, Culture and Employment ("DECE") (discussed beginning at 235).

(bb) Analysis

[233] For reasons given at para. 73, we agree with the appellants' argument that the absence of a French greeting at the transport office could not ground a finding by the trial judge because that breach was not specifically pleaded in the amended statement of claim. Moreover, since there was no obligation to publish the manual in French, no legal liability arose as a result of a failure to do so. These facts did not entitle Mr. Cousineau to damages.

[234] That said, the fact that Mr. Cousineau did not benefit from the existence of the driver's manual in French is symptomatic of the GNWT's lack of organization and implementation of the *OLA*. It provides another justification for the trial judge's structural remedy.

(viii) Allegations of Yvon Dominic Cousineau regarding the DECE

(aa) Background and trial decision

[235] Mr. Cousineau decided in September 2002 to register for an electrician apprenticeship program. No private firm of electricians in Yellowknife offered an apprenticeship in French. Mr. Cousineau did his first year of apprenticeship with an anglophone company. He did not ask to take his apprenticeship courses in French nor did he try to find out about the possibility of taking his training in another province. Nor was this option offered to him.

[236] In August 2003, the company completed the "time credit sheet" to confirm his hours. Neither he nor his employer asked for a French version of the form. He received a certificate of apprenticeship in English and never asked for a French version.

[237] The trial judge concluded that s. 11(1) had been breached because Mr. Cousineau was not informed of the possibility of taking his apprenticeship programme in French in New Brunswick. The failure to provide a French version of the apprenticeship form and apprenticeship certificate, moreover, breached s. 8 as both documents have official status: the certificate confers official apprenticeship status and the form sets out the components necessary to meet the GNWT's eligibility criteria.

[238] Because the apprenticeship office is located in the same building as the office of the Deputy Minister of Education, the trial judge held that it constituted the "head office" of a government institution. She also noted that in the proposed regulations, the Apprenticeship and Trade Certification Board would be subject to s. 11(1).

(bb) Analysis

[239] Again, we accept the appellants' argument that the trial judge should have refused to rule on Mr. Cousineau's apprenticeship certificate because it was not explicitly pleaded in the amended statement of claim. We also disagree with her conclusion that s. 11(1) was breached because Mr. Cousineau was not informed of the possibility of taking his apprenticeship programme in French in New Brunswick. Although for reasons given at para. 183 we agree that the office was subject to s. 11(1)(b), Mr. Cousineau never asked for services in French and, given the non-urgent nature of the services, there was no obligation to provide an active offer. The apprentice form (defined by the trial judge as a "time credit sheet" to confirm Mr. Cousineau's hours) did not constitute a "document of a formal or official nature" within the scope of s. 8. The damage award to Mr. Cousineau is vacated.

D. Summary

[240] The trial judge erred in limiting the latitude to be given to the GNWT in choosing the means to meet its obligations under s. 11(1). The context is extremely important. Given the NWT's unique circumstances, complete bilingualism is impossible to achieve in the provision of all government services. When a required service involves urgent or confidential matters, a member of the public is entitled to communicate with and receive services in French without delay. Ideally, such services will be provided without resort to an interpreter, but given the difficulties of recruitment and other contextual factors in the NWT, that will not always be possible. The trial judge's requirement that a global plan deal with recruitment should assist in making bilingual service providers more available. If the service in question does not involve confidential or urgent services, the GNWT has greater latitude in providing its services. A 1-800 number may fulfill this obligation, and short delays in making services available in French will not constitute violations of the *OLA*. Although active offers are not generally required, in the context of urgent or confidential circumstances, only with a French greeting will it be obvious that French services are available.

VIII. DID THE TRIAL JUDGE ERR IN CONCLUDING THAT THE PLAINTIFFS DID NOT HAVE TO EXHAUST THEIR REMEDIES UNDER THE *OLA*?

[241] The appellants argue that the trial judge erred in concluding that the respondents did not have to exhaust the complaint process under the *OLA* before seeking a judicial remedy. This ground of appeal cannot be sustained.

A. Facts and Trial Decision

[242] In 1998 and 1999, the FFT lodged 46 complaints with the LC, alleging 151 violations of the *OLA* regarding the absence of government notices in L'Aquilon. LC Tutcho forwarded the complaints to the relevant departments for reply. A number of departments acknowledged their omissions and undertook to rectify the situation.

[243] In August 1998 the FFT filed a complaint alleging that the LC had not published a French version of her 1996-97 annual report. The LC replied that she was not legally required to do so since the annual report was not a document contemplated by s. 11 of the *OLA*. In May 2001, the FFT lodged a complaint with the LC on behalf of one of the individual respondents, Yvon Dominic Cousineau, regarding the language of the professional driver's manual and the examinations for a Class 1 driver's permit.

[244] The trial judge carefully reviewed the evidence relating to the respondents' complaints and the responses they received, if any. She noted their dissatisfaction in dealing with the LC, and indicated that the large number of complaints filed with respect to government notices illustrated the practical difficulty of requiring that remedies under the *OLA* be exhausted. These complaints were not isolated incidents and the limited responsibilities and powers of the LC could hardly resolve problems of this magnitude.

[245] The trial judge found, at para. 653, that the respondents were not required to employ the complaints mechanism before initiating litigation because:

> (i) s. 32 does not require such recourse as a condition precedent to litigation; (ii) NWT LC Tutcho and Deputy Minister Cleveland favoured direct resort to individual departments; (iii) neither NWT LC Tutcho nor the departments in question responded systematically to all of the filed complaints regarding the notices and, in the case of some governmental organizations, the omissions that were the subject of complaints were repeated; (iv) there was no evidence of DECE establishing a procedure to follow up, as had been the case during NWT LC Harnum's mandate (providing copy of all complaints to the Official Languages Unit); (v) NWT LC Tutcho evaluated complaints by reference to the PG, which provided little hope that the fundamental issues raised by certain allegations of breaches would be resolved in an effective manner within the framework of the complaints procedures, and [vi] NWT LC Harnum's recommendations were largely ignored by the GNWT.

B. Standard of Review

[246] Whether the respondents had to exhaust their remedies under the *OLA* is a question of law to be dealt with on the correctness standard. However, because its application involves the exercise of discretion, this Court will only intervene if the trial judge misdirected herself as to the applicable law or made a palpable error in assessing the facts.

C. Analysis

[247] Section 15 requires the LC to exercise his or her power and perform his or her duties as set out in the *OLA*. The LC may conduct and carry out investigations, either on his or her own initiative or pursuant to any complaint (s. 20), and is required to deal with any reasonable complaint about an act or omission of any government institution (s. 21).

[248] Section 32 grants an injured party recourse before a competent court. Unlike the *OLAC*, it does not require a party to lodge a complaint with the LC before initiating legal action under the *OLA*. Nonetheless, the appellants argue that the trial judge should have encouraged recourse to the complaint mechanism of the *OLA* so as to preserve the integrity of this administrative mechanism. They cite *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 595, 96 D.L.R. (3d) 14 ("*Harelkin*") where Beetz J., writing for the majority, noted:

> Sections 78(1)(c) and 33(1)(e) are in my view inspired by the general intent of the Legislature that intestine [adj. Latin from *intestinus* 'internal'] grievances preferably be resolved internally by the means provided in the Act, the university thus being given the chance to correct its own errors, consonantly with the traditional autonomy of universities as well as with expeditiousness and low cost for the public and the members of the university. While of course not amounting to privative clauses, provisions like ss. 55, 66, 33(1)(e) and 78(1)(c) are a clear signal to the courts that they should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors with its own institutional means.

[249] Unlike the legislation in *Harelkin*, the *OLA* contains neither a privative clause nor any mechanism for an appeal from the LC's recommendations.

[250] It is for courts to determine whether a statutory remedy is adequate. The courts must "isolate and balance the factors which are relevant to the inquiry into adequacy", per Dickson C.J. in *Canada (Auditor General) v. Canada (Ministry of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604 at para. 58. Dickson C.J. went on to say:

> [W]hen Parliament fails to state explicitly that a statutory remedy is the sole or exclusive remedy, it will always be the case that exclusivity cannot be

> automatically assumed. The starting point for the courts' determination of their constitutional role in such matters is that the courts should not bow before inadequate relief for citizens' statutory and common law rights. ...

[251] The *OLA* has no privative clause similar to that found in s. 77 of the *OLAC*. As a result, exclusivity of remedy cannot be assumed. The trial judge was entitled to assess the adequacies of the remedies available under the *OLA* and made no error in concluding that this was not an appropriate case for requiring the exhaustion of remedies under the *OLA* before commencing litigation. There is no basis on which to interfere with her conclusion that it did not provide an adequate alternative remedy.

IX. DID THE TRIAL JUDGE ERR IN CONCLUDING THAT THE *OLA* REQUIRED THE BROADCASTING OF LEGISLATIVE ASSEMBLY DEBATES AND THE PUBLICATION OF HANSARD IN FRENCH? DID SHE ERR IN CONCLUDING THAT BOTH MATTERS WERE NOT SUBJECT TO LEGISLATIVE PRIVILEGE?

A. Trial Decision

[252] At para. 763 the trial judge concluded that the Assembly is the head office of a government institution for the purposes of s. 11(1) of the *OLA*. She added that the broadcasting of debates is a service or communication of the Assembly which, if offered in English, must also be offered in French.

[253] In addressing whether the *OLA* requires that Hansard be published in French, the trial judge framed the issue succinctly at para. 744: is Hansard covered by the English expressions "records and journals" and the French expressions "archives, comptes rendus et procès-verbaux" in s. 7(1)? The evidence reveals that whether the GNWT has a legal obligation to publish Hansard in French has long been a point of contention.

[254] The trial judge noted that Hansard is an "almost verbatim record of speeches and debates of the Assembly", while the Votes and Proceedings contain a list of tabled documents: at para. 484. Hansard is available in English by subscription, or on the website of the Assembly, while the Votes and Proceedings are published in both languages. She considered evidence about Hansard's origins to the effect that the verbatim report of speeches by members of the Assembly is not an official record of proceedings. She also examined the fact that the *Rules of the Northwest Territories Legislative Assembly* ("Rules") require the Speaker to publish Hansard, thereby giving Hansard an official status.

[255] At para. 755, the trial judge consulted various dictionary definitions, concluding that the words "records" and "archives" were the same, as were "journal" and "procès-verbal". She noted that the French version of s. 7(1) uses an additional term, "comptes rendus", which she suggested could be translated as report, record or minutes. She observed that on the Assembly's website, the terms "compte rendu" and "report" are used to describe Hansard, and concluded that Hansard

falls within the French term “comptes rendus” and the English term “records”: at para. 756. She stated:

> [758] In my view, the meaning of the term “compte rendu” corresponds perfectly to the nature of the Hansard kept and published in the NWT. In addition, such an interpretation accords with the principles of interpretation of entrenched language rights: it respects the fundamental principle of interpretation which seeks the intent of the legislator, and it takes into account the fact that the legislator adopted an additional and slightly different French term than that which appears in s. 133 of the *Constitution Act of 1867*.
>
> [759] For these reasons, I conclude that, whatever the origins of Hansard may be, it currently constitutes an *official record* of the work of the Legislative Assembly and that, as a result, Hansard is covered by the expression “records and journals” in s. 7 of the *OLA NWT.*

[256] At para. 760 she added that, if her conclusion about s. 7(1) was erroneous, Hansard had to be published in French pursuant to s. 8 as an instrument “in writing directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of the Legislature ...”. One of her rationales for this conclusion was that Hansard is a means of communicating with the public about the daily activities of the Assembly.

B. Standard of Review

[257] The first two aspects of this ground of appeal raise issues of statutory interpretation which are questions of law reviewable on a standard of correctness. If a subject is part of legislative or parliamentary privilege, the courts do not have jurisdiction to interfere: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 11 (“*Vaid*”). Questions of jurisdiction are reviewable on the correctness standard: *Phillips v. Avena*, 2006 ABCA 19, 384 A.R. 34 at para. 60. Therefore, the third aspect of this ground of appeal (whether a matter is subject to legislative privilege) is also a question of law reviewable on the correctness standard.

C. Analysis

[258] Several principles of statutory interpretation, discussed previously at paras. 59, 143, 153 and 154, are particularly helpful in approaching the first two parts of this ground of appeal. First, the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, its object, and the intention of Parliament. Second, when interpreting bilingual statutes it is necessary to seek the shared or common meaning. Third, account can be taken of statutes from other jurisdictions that deal with the same subject matter. Although there is no presumption of coherence, the use of the same words in legislation from different jurisdictions suggests that the same meaning was intended.

[259] We start with a statutory interpretation of ss. 7, 8 and 11(1) of the *OLA* to determine whether, on their face, any of these provisions require the broadcasting of legislative debates or the publication of Hansard in French. If they do not, no question of legislative privilege arises. Beginning at para. 281, we turn to the question of whether, despite that interpretation, the concept of legislative privilege insulates from judicial scrutiny the Assembly's language decisions on these two matters.

1. Broadcasting the Legislative Debates

[260] In 1999 the Management Board of the Assembly adopted a policy regarding the Assembly's workplace language. It provided that ninety minutes of the Assembly's debates are to be broadcast in English on television. The following day, the same portion is broadcast in two of the other official languages, in turn, on an equal basis. In other words, for the purposes of broadcasting the debates, French is treated the same as the Aboriginal languages.

[261] Apart from the matter of privilege, the appellants' main argument arises from s. 7(3), which obliges the GNWT to provide "copies of the sound recordings of the public debates of the Legislative Assembly, in their original and interpreted versions", to any person on reasonable request. The appellants assert that if the legislature had intended to require the broadcast of debates in both languages, it would have said so more clearly and that the trial judge's interpretation of s. 11(1) has the effect of reading a requirement into the law that is not otherwise there. Essentially, the argument is that because the *OLA* deals specifically with the availability of sound recording of debates in s. 7(3), s. 11(1) should be interpreted to exclude broadcasting of the debates as a service that must be available in French and English.

[262] This argument has some superficial attraction because when there is a conflict between a general and a specific provision, the conflict may be avoided by applying the specific provision to the exclusion of the more general: *BG Checo Intl. Ltd. v. B.C. Hydro*, [1993] 1 S.C.R. 12 at 24, 99 D.L.R. (4th) 577. The argument cannot be sustained here, however, because there is no conflict between ss. 7(3) and 11(1).

[263] The right to obtain "sound recordings" contained in s. 7(3) is not the same as the right to receive "available services" found in s. 11(1). The debates are broadcast on television. Thus, the medium employed is different than that of a "sound recording". Moreover, although s. 7(3) contemplates the provision of sound recordings, it is up to an individual to request the recording. In contrast, a television broadcast is freely available to anyone who has access to a television. Further, the sound recording will be provided on "reasonable request", a term that gives discretion to whomever considers the request.

[264] The fact that the right in s. 7(3) to obtain a sound recording is more narrow than the unlimited right in s. 11(1) to receive "available services" from a head office suggests that s. 7(3) was not intended to limit the scope of s. 11(1). The broadcasting policy was put into place long

after passage of the *OLA*, which also undermines any argument that the policy informs the interpretation of s. 11(1).

[265] The trial judge correctly concluded that broadcasting of the debates is an "available service". In *Quigley v. Canada (House of Commons)*, 2002 FCT 645, [2003] 1 F.C. 132, moot appeal 2003 FCA 465, 314 N.R. 375, a similar conclusion was reached as regards the obligation of the House of Commons under s. 25 of the *OLAC* to ensure that "available services" provided on behalf of a federal institution be provided in both official languages. There, the problem was that some service providers failed to make available to the public all the types of signals that had been provided by the House of Commons to the Cable Public Affairs Channel. The Federal Court concluded that "available services" under s. 25 included the broadcast of debates. Indeed, the appellants in this case did not press the argument that the broadcast of debates is not a "service".

2. Hansard

[266] The appellants suggest that the trial judge committed several errors when she held that, on its face, s. 7(1) requires Hansard to be published in French. They allege that she failed to consider the fact that, in other jurisdictions where Hansard is published in both languages (such as Canada and New Brunswick), the governing statutes contain more specific language than s. 7(1). They assert that she failed to give effect to the rules of statutory interpretation concerning bilingual statutes because she neglected to compare the English and French versions of s. 7(1). They say that the evidence about the nature of Hansard supports the interpretation of s. 7(1) that they urge upon the Court.

[267] As for s. 8, the appellants submit that the trial judge gave too large a meaning to "actes écrits/instruments in writing" in concluding that Hansard fell within those terms. Moreover, they say that Hansard is not "établi" in the sense of the counterpart English word "promulgated".

[268] The respondents reply that s. 5 of the *OLA* gives English and French equal status, making the NWT a bilingual jurisdiction. Alternatively (and although that was not the trial judge's reasoning) they assert that Hansard is a "service" under s. 11(1). They also rely on the description of Hansard in the Rules and elsewhere to support their position.

a) Section 7 of the *OLA*

[269] Whether Hansard falls under s. 7(1) must be resolved by a consideration of the English terms "records and journals of the Legislative Assembly" and the French terms "les archives, comptes rendus et procès-verbaux de l'Assemblée législative".

[270] The following table compares this language with the counterpart language of other relevant provisions:

OLA s. 7	"records and journals" "les archives, comptes rendus et procès-verbaux"

OLAC s. 4(3)	“official reports of debates or other proceedings” “comptes rendus des débats et d’autres comptes rendus des travaux”
OLAC s. 5	“journals and other records” “archives, comptes rendus et procès-verbaux”
OLANB s. 8	“the records, journals and reports of the Legislative Assembly and its committees” “les archives, les comptes rendus, les procès-verbaux et les rapports de l’assemblée législative et de ses comités”
Charter s. 18(1)	The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.
Constitution Act, 1867 s. 133	Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais dans la rédaction des archives, procès-verbaux et

> journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité de la présente loi, et par-devant tous les tribunaux ou émanant des tribunaux de Québec, il pourra être fait également usage, à faculté, de l'une ou de l'autre de ces langues.

[271] This summary reveals that s. 4(3) of the *OLAC* refers specifically to "debates" in the English version ("débats" in the French version), while s. 8 of the *OLANB* refers to "reports" ("rapports") of the Legislative Assembly. Neither the English nor French versions of the *OLA* are as specific. This could suggest that the legislature did not mean to include Hansard in s. 7(1) because its words are more general than those employed in other official language statutes.

[272] The *OLA* uses the same English words as s. 133 of the *Constitution Act, 1867*, while the French version is marginally different (s. 133 employs "journaux" instead of "comptes rendus"). Section 18(1) of the *Charter* contains the same words as the *OLA* except for the use of the word "statutes" in s. 18(1) of the *Charter* as opposed to "Acts of the Legislature" in s. 7 *OLA*. There is no relevant authority about the meaning of s. 18(1) of the *Charter*. As the trial judge noted, the Manitoba Court of Appeal has expressed the view that the term "records and journals" in s. 23 of the *Manitoba Act*, *1870* 33 Vic., Cap. 3 (Canada), (which reflects s. 133 of the *Constitution Act, 1867*), includes Hansard: *Forest v. Manitoba (Registrar of Court of Appeal)* (1977), 77 D.L.R. (3d) 445, [1977] 5 W.W.R. 347 (Man. C.A.). There is no analysis of this passing point in the decision, however, and it is *obiter dictum*. Although the Supreme Court has considered s. 133 of the *Constitution Act, 1867*, it has not opined on the meaning of "records and journals": *Manitoba Language Rights Reference.*

[273] To resolve this issue it is necessary to understand exactly what Hansard is. The appellants point to evidence that it is not an "official record": *Beauchesne's Rules & Forms of the House of Commons of Canada with Annotations, Comments and Precedents*, 6th ed. (Toronto: Carswell, 1989) at 7. On the other hand, the Rules, which are published only in English, define Hansard in s. 2(c) as "the edited official record of the Assembly proceedings". The term "Transcript" is defined in s. 2(n) as the "unedited record of the Assembly proceedings". Section 103 of the Rules (entitled "Hansard") at times uses the term "Transcript". It also uses the undefined term "report", but this is always in the context of ensuring the accuracy of the contents of Hansard.

[274] The appellants criticize the trial judge's reliance on language of the Assembly's website which describes Hansard as "the official *verbatim* report of the proceedings of the Legislature" and "le compte rendu quotidien", arguing that the website was not intended to create legal obligations. The same complaint, however, cannot be made about the English-only Rules, which define Hansard as the "official record". Given this definition, the trial judge cannot be faulted for concluding that, whatever its origins, Hansard in the NWT is an "official record" covered by s.

7(1). Her view that the French words “archives” and “comptes rendus” are equivalent to the English word “record” further supports her analysis.

b) Section 8 of the *OLA*

[275] Although it is unnecessary, we add that we disagree with the trial judge’s alternative conclusion that Hansard falls under s. 8. Whether or not Hansard is “an instrument in writing directed to or intended for the notice of the public”, s. 8 refers to instruments “purporting to be made or issued by or under the authority of the Legislature or Government of the Northwest Territories.” The trial judge found that Hansard is published under the authority of the Speaker: at para. 486. For that reason alone, s. 8 does not embrace Hansard.

[276] The term “Legislative Assembly” means something different than “Legislature or Government of the Northwest Territories” employed in s. 8, since ss. 6 and 7 of the *OLA* use the former term, while s. 8 employs the latter. This view is confirmed by the definition of “Legislature” in s. 28(1) of the *Interpretation Act NWT*: “the Commissioner acting by and with the advice and consent of the Legislative Assembly”. That definition makes it plain that the Assembly is not the same as the Legislature.

[277] “Government of the Northwest Territories” is not a term defined in the *Interpretation Act NWT*. However, in a provincial context, the term “government” means the executive or administrative branch of government, whereas the Assembly is a component of the Legislature that, together with the Lieutenant Governor, comprises the Legislature: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212 (“*New Brunswick Broadcasting*”). In the NWT context, a like approach would mean that “Legislative Assembly” does not fall under the term “Government”.

[278] As neither the terms “Government” nor “Legislature” is synonymous with “Legislative Assembly”, and because Hansard is a publication of the Speaker, it follows that Hansard is not covered by s. 8.

[279] The counterpart provisions in the *OLAC* and *OLANB* differ from the *OLA*. Section 12 of the *OLAC* refers to instruments made or issued under the authority of a “federal institution”. The *OLANB* has two similar provisions, both of which are worded more generally than the *OLA*. Section 14 refers to “Notices, advertisements and other announcements of an official nature” without mentioning their source. Section 15 relates to notices, announcements and other documents required to be published under the *OLANB* or another Act “by the Province or its institutions”. The wording of these statutes further supports the conclusion that Hansard does not fall under s. 8 of the *OLA*.

c) Section 11(1) of the *OLA*

[280] In any event, we agree with the respondents that, for the reasons given above with regard to the broadcasting of the debates, the publication of Hansard is a “service” emanating from a

head or central office of a government institution (defined in s. 1 as including the Office of the Legislative Assembly) for the purposes of s. 11(1).

3. Legislative Privilege

[281] Because of our conclusions that, on their face, certain provisions of the *OLA* require that legislative debates be broadcast and Hansard be published in French, it is necessary to consider the effect of legislative privilege on this interpretation. In a brief passage in their factum, the appellants say that legislative privilege attaches to both the publication of Hansard and the broadcasting of debates, and such privilege can only be circumscribed by a clear and express indication on the part of the legislature. They argue that the *OLA* is not worded explicitly enough to abrogate the privilege. In an even briefer reference, the respondents do not deny that both matters are subject to legislative privilege, but take the position that privilege was expressly waived when the *OLA* was enacted.

A. Trial Decision

[282] The trial judge rejected the appellants' argument that privilege applied to the publication of Hansard, concluding that if it did, the Assembly had circumscribed it by adopting s. 7(1) of the *OLA* with no conditions or restrictions: at para. 761. She relied on *Roberts v. Northwest Territories (Commissioner)*, 2002 NWTSC 68, [2003] 1 W.W.R. 98 at para. 8 ("*Roberts*"), adding that this was because of the obligation of result and the remedial nature of the *OLA*.

[283] She also held that, although the Assembly's privilege permitted it to decide whether or not to broadcast the debates, once it decided to do so, substantive equality mandated an equivalent broadcast in French: at para. 763.

[284] Given the complexity of the topic of privilege, it is unfortunate that so little argument or analysis was devoted to this point.

B. Analysis

[285] At the relevant time, the NWT's legislative privilege mirrored that of Parliament. Sub-section 12.1(1) of the *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22 states:

> In addition to the rights, privileges, immunities and powers conferred by this Act, the Legislative Assembly, its members and its committees have the same rights, privileges, immunities and powers as those held by the House of Commons of Canada, the members of that House and the committees of that House.

In addition to being part of the preamble and section 18 of the *Constitution Act, 1867*, Parliament's privilege is set out in ss. 4-13 (titled "Privileges, Immunities and Powers") of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1.01, which codified the U.K. law of inherent and

statutory privilege existing at the time of Confederation. This body of law includes Article 9 of the *Bill of Rights, 1689* (U.K.), 1 Will. & Mar. sess. 2, c. 2, which specifically protects "debates, or proceedings in Parliament". In the result, the NWT legislature's privilege does not exceed that of Parliament, and is informed by the common law.

[286] The respondents appear to accept that the Assembly's decisions to broadcast the debates in French less often than in English, and to publish Hansard only in English, are matters that fall under legislative privilege. There is strong authority to suggest that both these matters are generally subject to privilege as being part of the publication of proceedings and the control of internal procedures. See generally *Vaid*; *New Brunswick Broadcasting*; Sir William McKay, KCB, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 23rd ed. (London, LexisNexis UKL 2004) at 111 ("*Erskine May's Treatise*"); J.P. Joseph Maingot, Q.C., *Parliamentary Privilege in Canada*, 2d ed. (Ottawa: House of Commons, 1997) at 76.

[287] The difficult question raised here is whether the trial judge correctly concluded that the privilege had been circumscribed by the passage of the *OLA* without any restrictive language protecting legislative privilege. Although the matter is not free from doubt, we conclude that she erred in law on this point because the language of the *OLA* itself is not sufficiently explicit to abrogate the legislative privilege. Absent express language, abrogation of legislative privilege cannot be assumed. There are two reasons for this conclusion.

[288] First, at common law a recognized privilege is not abrogated unless by express words in the statute: *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661 ("*Duke of Newcastle*"). That case concerned the privilege of Members of Parliament not to be arrested for bankruptcy. In a previous version of the statute at issue, that privilege had been expressly reserved. The question was whether the privilege could subsist under the newer version that contained very general language and did not mention the privilege. The Lord Chancellor noted that the privilege originated at common law, although it had been "protected by special clauses inserted in the various Acts of Parliament, the general provisions of which might seem to militate against the privilege." *id.* at 667. He nonetheless concluded that the "privilege will not be annihilated because it is not specially dealt with in this Act of Parliament." *id*. at 671-672.

[289] The effect of the *Duke of Newcastle* is that the general provisions of a law do not overcome a recognized privilege even when that privilege has been expressly reserved in a previous version of the same statute. The same outcome seems even more compelling where, as here, there has never been a legislative reservation of the privilege in the statute.

[290] There has been little discussion of this principle in Canada. *Roberts*, relied on by the trial judge, does not discuss *Duke of Newscastle*. *Roberts* is distinguishable on several grounds, including the fact that it held the challenged act was not an aspect of legislative privilege.

[291] *Roberts* was distinguished but in any event not followed in *March v. Hodder*, 2007 NLTD 93, 62 Admin. L.R. (4th) 281 ("*March*"), where the House of Assembly was authorized

by legislation to pass a resolution removing the Citizens' Representative from office. In dismissing a judicial review application by the Citizens' Representative, Orsborn J. held that "[a]n area of privilege may indeed be circumscribed by statute, but ... clear wording is required to achieve this": at para. 86. He did not specifically mention *Duke of Newcastle.*

[292] That case, however, was mentioned at para. 80 of *Vaid,* where it was suggested that the presumption in *Duke of Newcastle* was out of step with modern principles of statutory interpretation. The privilege claimed there, however, was disallowed on the ground that it was overbroad. Indeed, the suggestion about the presumption was not even made in the context of legislative privilege, but as to whether federal human rights laws apply to Parliamentary employees.

[293] In some statutes, the intention to abrogate or waive privilege is expressly stated. Although the following examples pertain to privileges other than legislative privilege, they demonstrate how an intention to abrogate privilege can be expressed:

> Nothing in any rule of law or the law or practice of Parliament prevents proceedings being instituted before an industrial tribunal under Part II or before any court under Part III.
>
> *Disability Discrimination Act 1995* (U.K.), 1995, c. 50, s. 65(5)

> Nothing in any rule of law or the law or practice of Parliament prevents a relevant member of the House of Commons staff from bringing before the High Court or a county court - (a) a claim arising out of or relating to a contract of employment or any other contract connected with employment, or (b) a claim in tort arising in connection with employment.
>
> *Employment Rights Act 1996* (U.K.), 1996, c. 18, s. 195(4)

> Notwithstanding any other Act or any privilege that is available at law, the court may, on an appeal, examine any record in the possession or under the control of a government institution, and no information shall be withheld from the court on any grounds.
>
> *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01, s. 58(2)

[294] A second and related reason for our conclusion that legislative privilege is not abrogated by general statutory language arises from the Supreme Court's views about the function of that privilege, including the appropriate interaction between the courts and the legislatures and the fact that even the *Charter* does not have the effect of abrogating legislative privilege.

[295] These topics are fully explored in *Vaid* and *New Brunswick Broadcasting*, where the Supreme Court explained that each branch of government must show respect for the legitimate sphere of activity of the other. The purpose of privilege is to enable legislative bodies to perform their functions. If they are to be effective, these privileges "must be held absolutely and

constitutionally ... the legislative branch of our government must enjoy a certain autonomy which even the ... courts cannot touch": *New Brunswick Broadcasting* at para. 117. The Court favorably cited *Erskine May's Treatise,* which said "privilege, though part of the law of the land, is to a certain extent an exemption from the general law": *id.* at para. 120. At para. 126, the court summarized the applicable legal principles:

> In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.
>
> (emphasis added.)

[296] The issue in *New Brunswick Broadcasting* was whether the *Charter* prevented the Nova Scotia House of Assembly from excluding the media from its chambers. The majority concluded that because the Assembly had the constitutional right to do what it did, the *Charter* could not cut down that right, "on the principle that one part of the Constitution cannot abrogate another part of the Constitution": at para. 144. This point was clearly re-iterated in *Vaid* at para. 30. Moreover, at para. 34, Binnie J. cited with approval the proposition from *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271 that the legislature is not subject to review by the courts "in its administration of that part of the statute-law which has relation to its own internal proceedings."

[297] If even the *Charter* cannot cut down the exercise of legislative privilege, and if the courts are not empowered to review decisions made pursuant to privilege, it seems that more would be required than passage of a general statute (such as the *OLA*) to support the conclusion that a legislative privilege has been abrogated. In this case, the Assembly made an express decision concerning the extent to which debates would be broadcast in French and an implicit decision not to publish Hansard in French. These decisions are protected by privilege.

[298] At the hearing of the appeal, but especially in correspondence subsequently received from some counsel, there was debate about the effect of *Knopf v. Canada (Speaker of the House of Commons)*, 2007 FCA 308, [2007] F.C.J. No. 1474, leave to appeal to the SCC dismissed [2008] S.C.C.A. No. 26. In particular, counsel for the appellants and for the AGC disagreed whether the Federal Court of Appeal had there accepted that, by the wording of s. 4(1) of the *OLAC*, Parliament had abrogated its privilege. We do not read *Knopf* as so holding. It is made clear at paras. 10 and 19 of the decision that no ruling about privilege is being made. Rather, the Court was pre-occupied about whether Knopf's rights under s. 4(1) of *OLAC* (the right to use either French or English in any debate or proceedings of Parliament) had been abridged when the Committee before which he appeared and filed documents in English chose not to distribute the documents to Committee members. In *obiter dictum*, the trial judge held that the Committee's

decision was immune from review in the courts because "the distribution of documents falls within the parliamentary privilege of the Committee to control its internal procedure" 2006 FC 808, 144 C.R.R. (2d) 155 at para. 59. The Federal Court of Appeal did not comment on this point. As a result, we reject any suggestion that, by implication, the Court was of the view that the wording of s. 4(1) of the *OLAC* amounted to an abrogation by Parliament of its privilege.

C. Summary

[299] The language of s. 11(1) required the GNWT to broadcast the legislative debates in French with the same frequency as in English and Hansard falls under the language of s. 7(1) and s. 11(1), but not s. 8. However, legislative privilege over decisions about the publication of Hansard and the broadcasting of the debates has not been abrogated merely by the passage of the *OLA.* Accordingly, the Assembly's decisions about language use in this regard cannot be reviewed by the courts.

X. DID THE TRIAL JUDGE ERR IN GRANTING SOLICITOR–CLIENT COSTS TO THE RESPONDENTS?

[300] The appellants assert that the trial judge improperly exercised her discretion when she awarded solicitor-client costs. They say that none of the factors on which she relied justify her costs order and she neglected to take account of the "reprehensible" conduct of the respondents and their failure to co-operate with the GNWT in implementing the *OLA.* They also argue that she failed to give the parties an opportunity to make submissions on costs.

A. Trial Decision

[301] The trial judge dealt with costs beginning at para. 961. Relying on *Arsenault-Cameron*, she noted that a costs award can form part of an appropriate and just remedy under s. 24(1) of the *Charter*.

[302] At para. 963, she set out the factors that justified solicitor-client costs. These included the vigorous efforts of FFT to arrive at a political solution before embarking on a lawsuit; the failure of the GNWT to heed recommendations of various consultants, including recommendations about the need for a global action plan, a centralized approach, one-stop service and a regulation identifying government institutions covered by the *OLA*; the strong public interest element of the lawsuit; and the fact that the respondents had economized by hiring only one solicitor for the trial. She factored in the respondents' failure to demonstrate a lack of good faith by the GNWT, explaining that it had been very difficult for them to obtain reliable information about the funding arrangements between the two governments. She considered the costs award part of an appropriate and just remedy under s. 32(1) of the *OLA*: paras. 961, 963, 969 and 971. She also stated that she would take account of the of the *OLA* breaches suffered by the FFT when she made her costs award, even though she refused to grant damages to the FFT: at para. 925. (See discussion in cross-appeal at para. 359).

B. Standard of Review

[303] A trial judge has considerable discretion in making a costs award: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405 at para. 86 ("*Mackin*"). An appellate court may interfere only if the trial judge made a palpable error in assessing the facts, or erred in law by failing to apply, or by misapplying, the appropriate criteria: *Okanagan* at para. 43.

C. Analysis

[304] Solicitor-client costs should not be awarded "unless there is something in the behaviour of the losing party that takes the case outside the ordinary": *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at para. 79, 177 D.L.R. (4th) 94. Solicitor-client costs have been upheld when defendants failed to respect constitutionally guaranteed rights without legitimate reasons, even in the absence of bad faith: *Arsenault-Cameron* at para. 63, restoring a trial award of solicitor-client costs: *Arsenault-Cameron v. Prince Edward Island*, [1997] P.E.I.J. No. 7. The public interest aspect of a case will sometimes justify solicitor-client costs: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 80, 88 D.L.R. (4th) 1 ("*Oldman River Society*"); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 109, 88 D.L.R. (4th) 1.

[305] The appellants argue that they should not be faulted for their position about their legal obligations under the *OLA* since this is the first lawsuit to define those obligations. In this regard, they distinguish their situation from those in *Arsenault-Cameron* and *Doucet-Boudreau*, where previous litigation had established responsibilities that the defendants had refused to follow.

[306] It is true that this case is somewhat different from *Arsenault-Cameron* and *Doucet-Boudreau*, where there had been previous jurisprudence concerning French education rights under s. 23 of the *Charter*. Nevertheless, it is noteworthy that the Supreme Court upheld the trial judge's award of solicitor-client costs in *Arsenault-Cameron*, in circumstances where the trial judge had clearly stated that the costs award was part of an appropriate remedy.

[307] The trial judge's reasons make it clear that she considered solicitor-client costs part of an appropriate remedy under s. 32(1). Her rational for such a remedy included the FFT's efforts to find a political solution before litigating and the failure of the GNWT to adopt a global action plan or otherwise implement the many recommendations that had been made concerning effective implementation of the *OLA*. She appropriately took account of these factors in fashioning a remedy that included solicitor-client costs. Since she did not err in law or principle in making these costs part of the remedy, we cannot interfere: *Doucet-Boudreau* at para. 87.

[308] There is no merit to the appellants' suggestion that the trial judge neglected to give the parties an opportunity to make submissions about costs. Solicitor-client costs were specifically requested in the amended statement of claim. The point was mentioned by the respondents in their written submissions. There is no suggestion that the appellants ever requested an additional

opportunity to address costs. The appellants could not possibly have been taken by surprise nor can it be said that they were deprived of a chance to make submissions.

[309] As for the appellants' argument about their offers, the respondents point out that the NWT *Rules of Court* contain clear provisions governing the making of formal offers (see Rules 193-206). In this case, there were no formal offers.

[310] Similarly, the appellants' suggestion that the trial judge failed to consider the respondents' conduct cannot be sustained. The appellants' factum underscored their view of the long and sometimes acrimonious history between the parties. It is apparent that the trial judge took a different view of that history, generally favouring the respondents. That was a key part of her role and we cannot interfere given that there is no palpable and overriding error in her assessment of the facts.

[311] There are no grounds upon which to interfere with the trial judge's costs award.

XI. CONCLUSION ON THE APPEAL

[312] In our view, both the evidence and evolving law justify the trial judge's overall decision to grant a structural remedy that gave the GNWT fairly explicit directions about how to fulfill its obligations to implement the *OLA*.

[313] Although she erred in relying on a civil law concept to help her define the parameters of substantive equality, this did not affect the correctness of her general approach. While she appropriately took a contextual approach to substantive equality, in applying that concept to s. 11(1) she gave inadequate weight to the unique circumstances of the NWT, including the composition and location of its population, its challenges in providing even elementary services, and the nature of services being sought. She was wrong to conclude that s. 11(1) generally requires the use of active offer, although active offer may be required when services are needed immediately in urgent or confidential situations. Her interpretation of the scope of s. 8 was correct although she misapplied it in regard to Mr. Cousineau. She also erred in awarding him damages for alleged specific breaches which were not explicitly pleaded. She correctly held that the PGs did not create binding legal obligations, but her reliance on the PGs led to some inappropriate findings as to allegations by individual respondents.

[314] The trial judge correctly found that the respondents were not required to exhaust their remedies under the *OLA* before litigating.

[315] The trial judge correctly interpreted s. 11(1) of the *OLA* as requiring legislative debates broadcast in English to be similarly broadcast in French. Sections 7 and 11(1) dictate a similar result as to the publication of Hansard. However, as regards both topics, the concept of legislative privilege insulates from judicial review the Assembly's decisions in this regard. The trial judge did not err in her costs award.

[316] Accordingly, the appeal is allowed in part. Specifically, the following amendments are made to her formal judgement:

- Para. C(1) is amended by adding at the end “when the services in question involves urgent or confidential matters”;
- Para. C(3) is vacated;
- Para. D(4)(a) is amended by inserting the words “when required” after the words “services” in line 2;
- Para. D(4)(k) is amended by removing the first line and the first two words of the second line;
- Para. D(6) is vacated; and
- Paras. E(1), (4) and (5) are vacated.

THE CROSS-APPEAL

[317] The following issues are raised by the cross-appeal:

1. Should the trial judge have decided whether the *Charter* applies?

2. Did the trial judge err in not concluding that the GOC had breached Part VII of the *OLAC*?

3. Did the trial judge err in refusing to award damages to FFT and L’Aquilon?

4. Did the trial judge err in refusing to award punitive damages?

XII. SHOULD THE TRIAL JUDGE HAVE DECIDED WHETHER THE *CHARTER* APPLIES?

[318] The cross-appellants sought remedies jointly and severally against both the cross-respondents and the AGC. Against the former, it alleged breaches of the *OLA* and ss. 16-20 of the *Charter*. Against the latter, its claim was based on the *OLAC* and ss.16-20 of the *Charter*.

A. Trial Decision

[319] The trial judge decided it was unnecessary to consider the claims under the *Charter*. With respect to the claims against the cross-reponents, she reasoned that because ss. 4-11 of the *OLA* provide similar guarantees to those in ss. 16-20 of the *Charter*, and since the same remedies are available under both s. 32(1) of the *OLA* and s. 24(1) of the *Charter*, it was open to her to decide the case on non-constitutional grounds.

[320] At para. 131, she found that this conclusion was strengthened by s. 43.1 of the *NWTA*, which “entrenched a regime of mandatory bilingualism in the NWT”. By adopting s. 43.1,

Parliament ensured that the rights guaranteed by the *OLA* would not be limited through abrogation or amendment. She concluded that the *OLA* and s. 43.1 of the *NWTA* constituted legislated responses to the *Charter*'s initiative to promote both official languages throughout Canada: at para. 849. Accordingly, Parliament was entitled to assume that the *OLA* would be applied by the GNWT in accordance with the *Charter* and, if not, the *OLA* provided a remedy consistent with *Charter* remedies.

[321] The cross-appellants alleged that the GOC breached its obligations in three ways. First, it agreed to amend the *NWTA* on two occasions to delay the implementation of French as an official language in the NWT. The trial judge found there was no evidence that the delay caused the breaches. Second, by reducing its funding, the GOC breached its obligation to provide French language services. The trial judge concluded that the dearth of funding following federal reductions resulted from the absence of a global plan by the GNWT, rather than the actions of the GOC: at para. 854. Third, by adopting a passive approach in the face of territorial deficiencies, the GOC breached its undertaking to promote the flourishing of the francophone community in the NWT, contrary to s. 16(3) of the *Charter*. The trial judge concluded that the GOC had met its obligation; indeed, it was Parliament's initiative that led to the introduction of the current regime of bilingualism in the NWT.

[322] In short, the trial judge found that all the breaches were at the territorial level and that the evidence did not establish any breaches at the federal level. Given this conclusion about causation, she determined that it was unnecessary to consider the application of the *Charter*.

B. Standard of Review

[323] The cross-appellants and the COLC submit that the trial judge's failure to address the constitutional issue is an error of law, reviewable on a standard of correctness. We see the standard of review differently.

[324] When an issue can be decided on both constitutional and non-constitutional grounds, a trial judge has discretion to determine the basis on which the case will be decided. The exercise of that discretion is challenged. The test is whether the trial judge gave sufficient weight to all relevant considerations: *Oldman River Society* at paras. 103-104; *Reza v. Canada*, [1994] 2 S.C.R. 394 at 404-405, 116 D.L.R. (4th) 61. Appellate review of the trial judge's findings that the actions of the GOC did not cause the breaches is reviewable on the basis of palpable and overriding error: *Okanagan* at para. 43.

C. Analysis

1. Application of the *Charter* to the Allegations Against the GNWT

[325] The cross-appellants acknowledge that the remedies ordered by the trial judge would be no different had she applied the *Charter*. However, they submit that different principles of

interpretation apply when one scrutinizes governmental conduct in light of the *Charter*. Further, the cross-appellants seek a ruling on whether the GNWT is "an institution of the Parliament and government of Canada" under s. 16(1) of the *Charter*.

[326] The *OLA*'s status is higher than that of other legislation. As discussed at para. 60, it is quasi-constitutional in nature and must be interpreted in accordance with principles used to interpret the *Charter*. That is precisely what the trial judge did.

[327] Moreover, as the cross-respondents submit, this case is not about whether they have an obligation to the cross-appellants. They recognize that they have such an obligation. At issue is the extent of their obligation and whether it was breached. The cross-respondents argue that it does not matter whether one analyzes those issues in the context of the *OLA* or the *Charter*, the result is the same.

[328] We agree. This case can be decided on non-constitutional grounds, a constitutional ground or both. Judicial restraint is appropriate when the decision can be made on the non-constitutional ground: P.W. Hogg, *Constitutional Law of Canada*, loose-leaf edition (Scarborough: Carswell, 1997) at 56-21; R.J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding whether to Decide", in R.J. Sharpe ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 329; *R. v. Skoke-Graham*, [1985] 1 S.C.R. 106 at 121-122, 16 D.L.R. (4th) 321.

[329] The trial judge followed the correct legal principles. She weighed the relevant considerations, in particular noting that the result would be the same if the case was analysed pursuant to the *Charter*. She applied appropriate interpretation principles to the *OLA*. She did not err in the exercise of her discretion.

2. Application of the *Charter* to the Allegations against the AGC

[330] The trial judge approached the issue of the *Charter*'s application by analyzing the case on its merits to determine what obligations existed, whether they were breached and, if they were, who caused the breaches. She considered the allegations against the AGC and held that no alleged breach had caused the resulting harm to the cross-appellants. She therefore concluded it was unnecessary to consider the *Charter*.

[331] The cross-appellants submit that the trial judge approached the case in the wrong way, putting the cart before the horse. They say it was incumbent on her to first consider the *Charter* issue. Because she did not, the GOC has been permitted to abdicate its responsibility for language rights in the NWT. The COLC supports this position.

[332] The trial judge found that the GOC was not obliged to employ a single solution to its *Charter* obligations. Even if Parliament was obliged to legislate with respect to bilingualism in the NWT, "it nevertheless enjoy[ed] some room to manoeuver": at para. 844.

[333] We agree. The GOC did not abdicate its responsibility. Following negotiations with the GNWT, it agreed that the GNWT could pass its own *OLA*, so long as it was compatible with ss. 16-20 of the *Charter*. Parliament enacted s. 43.1 of the *NWTA* to ensure that language rights could not be unilaterally diminished by the GNWT. The trial judge carefully reviewed the relationship between the two governments, having heard extensive evidence about the contributions, financial and otherwise, of the GOC. This helped her to determine whether to exercise her discretion in favour of applying the *Charter*. She did not err in the exercise of her discretion.

[334] Further, her approach was not erroneous. By first analyzing the cause of the breaches and the GOC's responsibility in that regard, the trial judge made economical use of judicial resources. Her conclusions about causation made it unnecessary to enter into issues about the application of the *Charter*.

[335] The cross-appellants challenge the trial judge's conclusions on causation, but each is amply supported by the evidence. The pre-1994 delays in the implementation of the *OLA* were not causally linked to the breaches she found.

[336] As for federal funding reductions, the evidence of Mr. Louis Chagnon, Director of the Department of Canadian Heritage for Manitoba and Nunavut (and acting director for Saskatchewan and the NWT) established that the GOC had contributed $40 million over 20 years to finance French language services in the NWT. As early as 1989, the GOC requested that the GNWT develop a global plan to support its funding needs. Without a global plan, the GOC could not justify funding increases. Mr. Chagnon also testified that in 1997, when the GOC contributed $1.6 million, it refused the GNWT's request to transfer $100,000 of that amount to the Aboriginal language program. In other words, the GNWT wanted to use available French language funds for other purposes.

[337] In the *OLA*'s early years, significant federal funding supported the translation of the NWT laws and the implementation of some programs. Once translation was complete, the funding was reduced by approximately 10%. However, these reductions were universal and not restricted to the French language programs. The evidence supported the trial judge's conclusion that funding reductions did not cause the failure to provide services.

[338] In conclusion on this issue, the trial judge made no error in exercising her discretion to decide this aspect of the case on non-constitutional grounds. She applied the correct legal principles and gave sufficient weight to the relevant considerations. Application of the *Charter* would have been moot given her conclusions on the causes of the breaches. The cross-appellants submit that even when the issue is moot, a court should answer the constitutional question. However, this is unlike the situation in *Doucet-Boudreau*, where the court decided a moot constitutional question because its decision would "provide guidance on the important question of the nature and extent of remedies under s. 24 of the *Charter* in similar cases": at para. 21. Here, the remedy granted is the same as would be available under the *Charter*. Thus, there was no need to consider the *Charter*'s application.

[339] Several months after this appeal was argued, the Supreme Court of Canada issued its decision in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] S.C.J. No. 15 (*"Paulin"*). It considered "whether, by agreeing in a contract to provide police services in the province, the Royal Canadian Mounted Police ("RCMP"), a federal institution, is bound by the more generous rules respecting language in New Brunswick or is required to meet only the federal official languages standards"" at para. 2. The Court concluded that since the New Brunswick legislature had authorized the RCMP to administer justice in the province, the RCMP performed the role of an "institution of the legislature or government of New Brunswick" as described in s. 20(2) of the *Charter* and was therefore obligated to comply with that provision and provide services to the New Brunswick public in French or English according to New Brunswick's more demanding requirements than those pertaining to the federal government under s. 20(1).

[340] Although none of the parties to this appeal or cross-appeal relied on the lower court decisions in *Paulin*, we invited them to file short submissions on the impact of the Supreme Court decision, if any, on their arguments. The cross-respondents and the AGC replied that *Paulin* supported their position or was not helpful in resolving the issues raised here. The cross-appellants and the COLC suggested that *Paulin* supported their arguments in several ways.

[341] We are of the view that *Paulin* does not inform the issues in this case. A fundamental issue on the cross-appeal is whether the trial judge erred by refusing to consider the application of the *Charter* when the *OLA* contains the same rights and remedies as the relevant parts of the *Charter* and when the GOC did not cause any breaches of the *OLA*. In *Paulin*, the question was whether the RCMP was an institution of New Brunswick that had to comply with s. 20(2). Because we uphold the exercise of the trial judge's decision not to determine the *Charter* issue, the question addressed in *Paulin* has no relevance. As we discuss at para. 329, the outcome would be exactly the same under the *Charter* as under the *OLA*. That was not so in *Paulin.*

[342] *Paulin* is also distinguishable on other grounds. *Doucet v. Canada*, 2004 FC 1444, [2005] 1 F.C.R. 671, had decided that the RCMP was a federal institution for the purposes of the *Charter*. Here, the cross-appellants seek a decision on whether the GNWT is an institution of Parliament under s. 16(1). *Paulin* largely turns on the construction of a contract between Canada and New Brunswick and the interpretation of federal and provincial policing statutes; there are no counterparts here. Finally, to the extent that any issue of "delegation" would arise here if the *Charter* issue was determined, it is difficult to fathom how the RCMP could be equated to the GNWT, a democratically-elected government.

XIII. DID THE TRIAL JUDGE ERR IN NOT CONCLUDING THAT THE GOC HAD BREACHED PART VII OF THE *OLAC*?

[343] The cross-appellants allege that the trial judge erred in law by failing to consider whether Part VII of the *OLAC* (Advancement of English and French) required the GOC to actively promote French language services in the NWT. They also argue that this obligation was never

delegated to the GNWT, nor could it be delegated. They rely on s. 41 of the *OLAC*. Prior to its amendment coming into force on November 25, 2005, that section provided:

> 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.

[344] The November 25, 2005 amendment (*An Act to amend the Official Languages Act (promotion of English and French)*, S.C. 2005, c. 41) changed the numbering of s. 41 to 41(1) and added the following subsections:

> (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 or office of the Ethics Commissioner, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

[345] This ground of appeal fails for several reasons.

[346] First, we adopt the reasoning of the Federal Court of Appeal that s. 41 of the *OLAC* (now s. 41(1)) is merely a declaration of principle and therefore not justiciable: *Forum des maires FCA* at para. 46. Although ss. (2) and (3) arguably place a duty on the GOC to actively promote minority languages, those subsections did not become law until after this trial concluded and long after many of the relevant events occurred. Sections 6 and 10 of the *Interpretation Act*, R.S.C. 1985, c. I-21 require that the *OLAC* be interpreted as it was at the time of the events at issue.

[347] In *Forum des maires FCA*, the court referred to debates in Parliament and the Senate which disclosed that supporters (Senators and Members of Parliament) of the *OLAC* regarded s. 41 as declaratory only and not justiciable. This was evidenced by their attempts to amend the provision and make it executory (which it now is, by virtue of ss. (2) and (3)). The court also noted the similarity between the wording of s. 41 and the seventh "whereas" in the *OLAC*'s preamble (as distinguished from other obligatory provisions). As well, it commented on the marginal note accompanying the English text, "Government policy", which also indicates the

declaratory nature of that provision. This supported its conclusion that s. 41 of the *OLAC* merely stated a principle and was not justiciable.

[348] Second, and in any event, the trial court lacked jurisdiction to adjudicate this issue. Section 77 of the *OLAC* provides remedies for breaches of Part VII and states that "any person ... may apply to the Court". Section 76 of the *OLAC* identifies the "Court" as the Federal Court.

[349] The cross-appellants argue that their attempt to proceed in the Federal Court was defeated on the basis that its action should be heard by the NWT trial court. This litigation included a large number of claims, the bulk of which were properly within the jurisdiction of that court. This is the only one which falls within the exclusive jurisdiction of the Federal Court. A trial court's jurisdiction is not enlarged simply because some or most claims contained in pleadings are within its jurisdiction, even when the parties are common and the causes are related.

[350] Third, s. 77 of the *OLAC* contains prerequisites. To obtain a remedy from the Federal Court for breach of the *OLAC*, claimants must first lodge complaints with the COLC. Once the COLC has investigated the complaint and rendered a report, the complainant may commence proceedings against the party breaching the *OLAC*, provided the action is commenced within 60 days or such enlarged time as the Federal Court may direct.

[351] None of the parties advanced proof at trial that they had lodged complaints with the COLC or that they commenced proceedings within 60 days of the COLC's report or any court-enlarged time limit.

[352] Finally, proceedings under the *OLAC* are statutory in nature. The right to such proceedings flows from the statute and is limited by it. The remedy portion of the *OLAC* is Part X, which, as stated above, requires that complaints be made to the COLC. However, the scope of the complaints at the relevant time was limited by s. 77 to specific parts of the *OLAC*, which do not include Part VII. Consequently, no remedy could be granted by any court for breaches of Part VII.

[353] This ground of appeal is without merit.

XIV. DID THE TRIAL JUDGE ERR IN REFUSING TO AWARD DAMAGES TO FFT AND L'AQUILON?

A. Trial Decision

[354] The trial judge was alive to the general principles governing the crafting of an "appropriate and just remedy": at paras. 865 *et seq.* For example, at para. 867 she mentioned the Supreme Court's view in *Doucet-Boudreau* at para. 52, that the judge must "exercise a discretion based on his or her careful perception of the nature of the rights and of the infringement, the facts of the case, and the application of the relevant legal principles" and at para. 59 "the judicial approach to remedies must remain flexible and responsive to the needs of a given case".

[355] She was also alive to the principles governing damages in constitutional cases: at paras. 902 *et seq.* There is no suggestion that she misunderstood these principles. Nevertheless, the cross-appellants assert that by denying damages to FFT and L'Aquilon the trial judge failed to grant an "appropriate and just remedy" and thus exercised her discretion incorrectly.

[356] It is important to note that in her careful assessment of the behaviour of the GNWT, in the context of whether punitive damages ought to be awarded (see discussion below beginning at para. 366), the trial judge was unable to conclude that its behaviour was abusive, contemptuous or malicious. She also mentioned that allegations of bad faith by the GNWT were not established by the evidence: at para. 965.

B. Standard of Review

[357] The principles governing the standard of review of a trial judge's decision concerning a s. 24(1) *Charter* remedy have been discussed earlier at para. 56 and are applicable in this quasi-constitutional context. Simply put, deference is owed and the exercise of a trial judge's discretion must be respected.

C. Analysis

1. FFT

[358] FFT claimed two heads of damages, both of which were rejected by the trial judge.

[359] First, it claimed compensatory damages as a result of the GNWT's and LC's refusal to communicate with it in French and the fact that the latter's annual report was not available in French until 1998. The trial judge refused to award these damages, stating that the remedial measures she had ordered would redress these problems and that FFT's activities in promoting French language rights were part of its role: at para. 925. She also observed that she would take these matters into account in considering costs, a topic addressed above beginning at para. 300.

[360] At para. 926, the trial judge considered the second damages claim by FFT; namely, that its efforts to promote language rights had deprived the francophone community of resources for other purposes. She noted that FFT sought the creation of a trust fund containing $1 million/year in damages since the proclamation of the *Charter*, on behalf of French-speakers whose rights were alleged to have been breached.

[361] The trial judge accepted that damages could be awarded for breaches of language rights but considered that such awards were generally much more conservative than those sought by FFT: at para. 928. She noted FFT's failure to adduce evidence as to the losses it suffered, adding that there was an insufficient causal link between the alleged breaches and the proposed trust fund: at para. 929. In her view, "an effective solution" would be to require the GNWT to define

and implement the rights guaranteed by the *OLA*. She also considered that FFT's claim for $23 million in damages was more properly treated as an application for punitive or exemplary damages. That matter is considered below beginning at para. 366.

[362] The trial judge's reason for rejecting the payment to FFT under both heads of damages was largely based on her view that the declarations she granted would be "appropriate and just". Absent an error of law, we should not second-guess her assessment of this matter. The cross-appellants have not established any error that would justify our interference in this aspect of the trial judge's decision.

[363] Moreover, her finding that there was an absence of evidence to justify FFT's claim for loss of resources for other purposes provides a complete answer to the second part of its damages claim.

2. L'Aquilon

[364] L'Aquilon sought over $1 million for its loss of income from 1986 to 2005, because the GNWT refused to publish government notices in both English and French. The trial judge held that any such claim could not predate 1993, the year in which L'Aquilon first complained about this: at para. 931. L'Aquilon also sought $50,000 for loss of reputation since francophone business people could not rely on it for information on GNWT projects. The trial judge rejected the latter claim, describing the evidence as "quite thin" and adding that nothing obligated the GNWT to use L'Aquilon to publish notices in French: at paras. 932-933. She noted that in its claim for loss of income, L'Aquilon was not asserting its right to use a particular language in dealing with the GNWT or in obtaining services. She also observed, at para. 934, that the object of s. 8 of the *OLA* is to preserve and maintain the minority language community, whereas GNWT's failure to publish notices in L'Aquilon was merely an effect.

[365] This ground of cross-appeal must be rejected. The cross-appellants have not established an error permitting the interference of this Court based on the standard of review set out in *Doucet-Boudreau*. The loss of reputation claim is completely answered by the trial judge's view that the evidence to support this was lacking. Finally, we agree with her view that the GNWT had no obligation to publish anything in L'Aquilon and was free to use whatever means it wished to meet its obligation to publish notices in French.

XV. DID THE TRIAL JUDGE ERR IN REFUSING TO AWARD PUNITIVE DAMAGES?

[366] The cross-appellants argue that the trial judge applied the wrong principle in rejecting their claim for punitive damages against the AGC and the cross-respondents. They say she erred when she considered whether the actions of the cross-respondents intensified the moral anguish of the cross-appellants. Instead, she ought to have asked, according to *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 ("*Hill*"), whether the actions shocked the sense of dignity of the court. They outline in great detail the facts upon which they

claim that punitive damages are justified, although they cite no case in which punitive damages have been awarded for a *Charter* breach or breach of language rights.

A. Standard of Review

[367] An appellate court's role in evaluating whether an award of punitive damages ought to be made, as well as the resulting quantum, is to determine whether, in the particular case, punitive damages serve a rational purpose: *Hill* at para. 197; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 101. The question for the appellate court is whether the conduct was so outrageous that punitive damages were rationally required to act as a deterrent: *Hill* at para. 197. Although an appellate court may have a somewhat broader role in evaluating punitive damages than as regards other damages awards, deference is still accorded to the trial judge. See *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 ("*Fidler*"), where the Supreme Court reinstated the trial judge's refusal to award punitive damages against an insurance company relying on his careful assessment of the facts.

[368] The Supreme Court recently re-affirmed that punitive damages are designed to address retribution, deterrence and denunciation: *Fidler* at para. 61. "[T]he impugned conduct must depart markedly from ordinary standards of decency — the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency": *ibid.* at para. 62. Punitive damages should be awarded with restraint, only in exceptional cases: *ibid.*

[369] Any allegation of the trial judge's error regarding a punitive damages award against the AGC cannot be sustained given our conclusion, at para. 335, that the trial judge's causality finding about the AGC must be upheld. In any event, her explicit findings that the GOC did not exhibit bad faith are solidly based in the evidence: at paras. 956-959.

[370] As for her refusal to award punitive damages against the cross-respondents, the trial judge appropriately set out the functional differences between compensatory and punitive damages, noting that the latter are intended to punish and deter: at para. 937. Beginning at para. 939, she carefully outlined the cross-appellants' claim for punitive damages, including the evidence upon which they relied. At several points she considered particular allegations, rejecting any suggestion that these actions constituted "abusive, contemptuous or malicious behaviour": at paras. 942, 945, 947. At para. 949, she summarized:

> [A]ll of the evidence taken together ... does not establish that the Territorial Defendants exhibited abusive, contemptuous or malicious conduct that would justify the granting of punitive or exemplary damages.

[371] Although the trial judge may have misstated the test from *Hill*, at para. 938, in the same paragraph she correctly stated the test from *Mackin*, a constitutional case where punitive damages were sought against the government of New Brunswick because one of its laws was unconstitutional. As the trial judge noted, in that case it was held that punitive damages should be

awarded only in the case of "conduct that is clearly wrong, in bad faith or an abuse of power": *Mackin* at para. 79.

[372] The trial judge's painstaking assessment of the evidence belies the cross-appellants' assertion that she erred in law or fact in rejecting their claim for punitive damages against the cross-respondents. Her justifiable findings that there was no abusive, contemptuous or malicious behaviour on the part of the GNWT, nor any bad faith, at para. 965, is a complete answer to this ground of the cross-appeal: *Fidler* at para. 75.

XVI. CONCLUSION

[373] The cross-appeal is dismissed.

XVII. COSTS OF THE APPEAL & CROSS-APPEAL

[374] Given the fact that there has been divided success, we will accept written submissions on costs.

[375] The appellants are to file their costs submissions on the appeal within 15 days of this decision, and the cross-appellants will file theirs within 15 days thereafter. The cross-respondents and the AGC will then have an additional 15 days to provide submissions concerning the costs of the cross-appeal.

[376] The following double–spaced page limits will apply:

1. Appellants: 10 pages
2. Respondents/cross-appellants: 15 pages
3. Cross-respondents and AGC: 5 pages.

Appeal heard on November 19 - 21, 2007

Memorandum filed at Yellowknife, Northwest Territories
this 27th day of June, 2008

Hunt J.A.

Ritter J.A.

Rowbotham J.A.

Appearances:

Roger Tassé, Q.C.
Maxime Faille

for the defendants (appellants/cross-respondents) Attorney General of the Northwest Territories, Commissioner of the Northwest Territories, Speaker of the Assembly of the Northwest Territories, Languages Commissioner of the Northwest Territories

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Appendix A
Relevant Legislative Provisions

Canadian Charter of Rights and Freedoms, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

16.(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16.1.(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18.(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20.(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

23.(1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Constitution Act, 1867 **(U.K.), 30 & 31 Victoria, c. 3.**

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Interpretation Act**, R.S.N.W.T. 1988, c. I-8**

10. Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

28.(1) In an enactment,

“Legislature” means the Commissioner acting by and with the advice and consent of the Legislative Assembly; (Législature)

Interpretation Act**, R.S.C. 1985, c. I-21**

6. (1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force on the expiration of the previous day, and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect on the commencement of the following day.

(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

(a) in the case of an Act, on the expiration of the day immediately before the day the Act was assented to in Her Majesty's name; and

(b) in the case of a regulation, on the expiration of the day immediately before the day the regulation was registered pursuant to section 6 of the Statutory Instruments Act or, if the regulation is of a class that is exempted from the application of subsection 5(1) of that Act, on the expiration of the day immediately before the day the regulation was made.

(3) Judicial notice shall be taken of a day for the coming into force of an enactment that is fixed by a regulation that has been published in the Canada Gazette.

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

***Judicature Act*, R.S.N.W.T. 1988, c. J-1**

27. A court in the exercise of its jurisdiction in every cause or matter pending before it has power to grant and shall grant either absolutely or on reasonable terms and conditions that it considers just, all remedies that any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter, so that as far as possible all matters so in controversy between the parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning those matters avoided.

***Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22**

12.1.(1) In addition to the rights, privileges, immunities and powers conferred by this Act, the Legislative Assembly, its members and its committees have the same rights, privileges, immunities and powers as those held by the House of Commons of Canada, the members of that House and the committees of that House.

***Manitoba Act, 1870*, 33 Vict., c. 3 (Canada)**

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the

respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province, The Acts of the Legislature shall be Printed and published in both those languages.

***Northwest Territories Act*, R.S.C. 1985, c. N-27**

43.1 Subject to section 43.2, the ordinance entitled the *Official Languages Act*, made on June 28, 1984 by the Commissioner in Council, as amended on June 26, 1986, may be amended or repealed by the Commissioner in Council only if the amendment or repeal is concurred in by Parliament through an amendment to this Act.

***Official Languages Act*, R.S.N.W.T. 1988, c. O-1**

1. In this Act,

“government institution” means a department or ministry of the Government of the Northwest Territories, the Office of the Legislative Assembly, and an agency, board, commission, corporation, office or other body designated in the regulations; (institution gouvernementale)

4. Chipewyan, Cree, English, French, Gwich’in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tåîchô are the Official Languages of the Northwest Territories.

5. To the extent and in the manner provided in this Act and any regulations under this Act, the Official Languages of the Territories have equality of status and equal rights and privileges as to their use in all government institutions.

6. Everyone has the right to use any Official Language in the debates and other proceedings of the Legislative Assembly.

7.(1) Acts of the Legislature and records and journals of the Legislative Assembly shall be printed and published in English and French and both language versions are equally authoritative.

(2) The Commissioner in Executive Council may prescribe that a translation of any Act shall be made after enactment and be printed and published in one or more of the Official Languages in addition to English and French.

(3) Copies of the sound recordings of the public debates of the Legislative Assembly, in their original and interpreted versions, shall be provided to any person on reasonable request.

8. Subject to this Act, all instruments in writing directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of the Legislature or Government of the Northwest Territories or any judicial, quasi-judicial or administrative body or Crown corporation established by or under an Act, shall be promulgated in English and French and in such other Official Languages as may be prescribed by regulation.

9.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislature.

(2) Chipewyan, Cree, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tåîchô may be used by any person in any court established by the Legislature.

(3) A court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one Official Language into another where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

10.(1) All final decisions, orders and judgments, including any reasons given for them, issued by any judicial or quasi-judicial body established by or under an Act shall be issued in both English and French where

> (a) the decision, order or judgment determines a question of law of general public interest or importance; or
>
> (b) the proceedings leading to the issue of the decision, order or judgment were conducted in whole or in part in both English and French.

(2) Where a body by which a final decision, order or judgment including any reasons given for it is to be issued in both English and French under subsection (1) is of the opinion that to issue it in both English and French would occasion a delay

> (a) prejudicial to the public interest, or
>
> (b) resulting in injustice or hardship to any party to the proceedings leading to its issue, the decision, order or judgment, including any reasons given for it, shall be issued in the first instance in its version in one of English or French and after that, within the time that is reasonable in the

circumstances, in its version in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in one only of the Official Languages, of any decision, order or judgment or any reasons given for it.

(4) A sound recording of all final decisions, orders and judgments, including any reasons given for them, issued by any judicial or quasi-judicial body established by or under an Act shall be made in one or more of the Official Languages other than English or French and copies of the sound recording shall be made available to any person on reasonable request, where

(a) the decision, order or judgment determines a question of law or general public interest or importance, and

(b) it is practicable to make available that version or versions, and it will advance the general public knowledge of the decision, order or judgment.

(5) Nothing in subsection (4) shall be construed as affecting the validity of a decision, order or judgment, referred to in subsection (1), (2) or (3).

11.(1) Any member of the public in the Northwest Territories has the right to communicate with, and to receive available services from, any head or central office of a government institution in English or French, and has the same right with respect to any other office of that institution where

(a) there is a significant demand for communications with and services from the office in that language; or

(b) it is reasonable, given the nature of the office, that communications with and services from it be available in both English and French.

(2) Any member of the public in the Northwest Territories has the right to communicate with, and to receive available services from, any regional, area or community office of a government institution in an Official Language other than English or French spoken in that region or community, where

(a) there is a significant demand for communications with and services from the office in that language; or

(b) it is reasonable, given the nature of the office, that communications with and services from it be available in that language.

15.(1) The Commissioner, on the recommendation of the Legislative Assembly, shall appoint a Languages Commissioner to exercise the powers and perform the duties set out in this Act.

20.(1) It is the duty of the Languages Commissioner to take all actions and measures within the authority of the Languages Commissioner with a view to ensuring recognition of the rights, status and privileges of each of the Official Languages and compliance with the spirit and intent of this Act in the administration of the affairs of government institutions.

21.(1) The Languages Commissioner shall investigate any reasonable complaint made to the Languages Commissioner arising from any act or omission to the effect that, in any particular instance or case, in the administration of the affairs of any government institution

(a) the status of an Official Language was not or is not being recognized;

(b) any provision of any Act or regulation relating to the status or use of the Official Languages was not or is not being complied with; or

(c) the spirit and intent of this Act was not or is not being complied with.

23.(1) The Languages Commissioner shall, by October 1 in each year, prepare and submit to the Speaker a report on the activities of the Languages Commissioner and the discharge of his or her duties under this Act during the preceding fiscal year including recommendations, if any, for proposed changes to this Act that the Languages Commissioner considers necessary or desirable in order to give effect to its spirit and intent.

(2) The Speaker shall lay the annual report before the Legislative Assembly as soon as is reasonably practicable.

(3) The annual report laid before the Legislative Assembly shall be referred to a committee designated or established by it, and that committee shall report on its review of the annual report within 180 days of the referral.

26.(2) In carrying out his or her responsibilities under subsection (1), the Minister shall

(b) oversee the development of policies and regulations necessary to implement this Act;

32.(1) Anyone whose rights under this Act or the regulations have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just in the circumstances.

34. The Commissioner, on the recommendation of the Executive Council, may make regulations

(a) designating agencies, boards, commissions, corporations, offices or other bodies as government institutions;

(b) respecting the implementation of section 9;

(c) designating English or French, or both, as Official Languages in which communications with and services from an office of a government institution, other than a head or central office, shall be provided under subsection 11(1);

(d) designating an Official Language or Languages in which communications with and services from regional, area and community offices shall be provided under subsection 11(2);

(e) respecting the active offer for the provision in an Official Language of available services from a head, central, regional, area or community office of a government institution, where such services are to be provided to members of the public in that Official Language under subsection 11(1) or (2);

(f) prescribing persons, bodies or organizations to serve as the representatives of specified language communities for the purposes of subsections 28(2) and 30(2);
(g) respecting the structure, operations and functions of the Official Languages Board and the Aboriginal Languages Revitalization Board; and

(h) respecting any other matter the Commissioner considers necessary for carrying out the purposes and provisions of this Act.

***Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31**

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.

(3) Everything reported in official reports of debates or other proceedings of Parliament shall be reported in the official language in which it was said and a translation thereof into the other official language shall be included therewith.

12. All instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution, shall be made or issued in both official languages.

25. Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

28. Every federal institution that is required under this Part to ensure that any member of the public can communicate with and obtain available services from an office or facility of that institution, or of another person or organization on behalf of that institution, in either official language shall ensure that appropriate measures are taken, including the provision of signs, notices and other information on services and the initiation of communication with the public, to make it known to members of the public that those services are available in either official language at the choice of any member of the public.

29. Where a federal institution identifies any of its offices or facilities with signs, each sign shall include both official languages or be placed together with a similar sign of equal prominence in the other official language.

30. Subject to Part II, where a federal institution is engaged in communications with members of the public in both official languages as required in this Part, it shall communicate by using such media of communication as will reach members of the public in the official language of their choice in an effective and efficient manner that is consistent with the purposes of this Act.

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 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.

76. In this Part, “Court” means the Federal Court.

77. (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

***Official Languages Act*, S.N.B. 2002, c. O-0.5**

8. The records, journals and reports of the Legislative Assembly and its committees shall be printed and published in English and French and both language versions are equally authoritative.

14. Notices, advertisements and other announcements of an official nature, whether required to be published in The Royal Gazette or not, shall be printed and published in both official languages.

15. Notices, announcements and other documents required to be published under this Act or any other Act by the Province or its institutions shall be printed and published in both official languages.

28.1. An institution shall ensure that appropriate measures are taken to make it known to members of the public that its services are available in the official language of their choice.

***Parliament of Canada Act*, R.S.C. 1985, c. P-1**

4. The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

> (a) such and the like privileges, immunities and powers as, at the time of the passing of the Constitution Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and
>
> (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

5. The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

6. On any inquiry concerning the privileges, immunities and powers of the Senate and the House of Commons or of any member of either House, any copy of the journals of either House, printed or purported to be printed by order thereof, shall be admitted as evidence of the journals by all courts, justices and others, without proof that the copy was printed by order of either House.

7. (1) Where any person is a defendant in any civil or criminal proceedings that are commenced or prosecuted in a court in any manner for, on account of or in respect of the publication of any report, paper, votes or proceedings, by that person or the servant of that person, by or under the authority of the Senate or the House of Commons, that person may bring before the court or any judge thereof, after twenty-four hours notice of intention to do so given in accordance with subsection (2), a certificate

> (a) given under the hand of the Speaker or the Clerk of the Senate or the House of Commons, and
>
> (b) stating that the report, paper, votes or proceedings were published by that person or servant, by order or under the authority of the Senate or the House of Commons, together with an affidavit verifying the certificate.

(2) The notice of intention referred to in subsection (1) shall be given to the plaintiff or prosecutor in the civil or criminal proceedings or to the attorney or solicitor of the plaintiff or prosecutor.

(3) On the bringing of a certificate before a court or judge in accordance with subsection (1), the court or judge shall immediately stay the civil or criminal proceedings, and those proceedings and every writ or process issued therein shall be deemed to be finally determined and superseded by virtue of this Act.

8.(1) Where any civil or criminal proceedings are commenced or prosecuted in a court for, on account of or in respect of the publication of any copy of a report, paper, votes or proceedings referred to in subsection 7(1), the defendant, at any stage of the proceedings, may bring before the court, or any judge thereof, the report, paper, votes or proceedings and the copy, together with an affidavit verifying the report, paper, votes or proceedings and the correctness of the copy.

(2) On the bringing before a court or any judge thereof of any report, paper, votes or proceedings and a copy thereof with affidavit in accordance with subsection (1), the court or judge shall immediately stay the civil or criminal proceedings, and those

proceedings and every writ or process issued therein shall be deemed to be finally determined and superseded by virtue of this Act.

9. In any civil or criminal proceedings commenced or prosecuted for printing an extract from or abstract of any report, paper, votes or proceedings referred to in subsection 7(1), the report, paper, votes or proceedings may be given in evidence and it may be shown that the extract or abstract was published in good faith and without malice and, if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

10. (1) The Senate or the House of Commons may administer an oath to any witness examined at the bar of the Senate or the House.

(2) The Senate or the House of Commons may order witnesses to be examined on oath before any committee.

(3) Any committee of the Senate or the House of Commons may administer an oath to any witness examined before the committee.

11.(1) Where any witness to be examined under this Part conscientiously objects to take an oath, the witness may make a solemn affirmation and declaration.

(2) Any solemn affirmation and declaration made under subsection (1) has the same force and effect, and entails the same consequences, as an oath taken in the usual form.

12. Any person examined under this Part who wilfully gives false evidence is liable to such punishment as may be imposed for perjury.

13. (1) Any oath or solemn affirmation and declaration under this Part may be administered by

(a) the Speaker of the Senate or the House of Commons;

(b) the chairman of any committee of the Senate or the House of Commons; or

(c) such person or persons as may be appointed for that purpose either by the Speaker of the Senate or by the Speaker of the House of Commons or by standing or other order of the Senate or the House.

(2) Every oath and solemn affirmation and declaration under this Part shall be in the Forms 1 and 2 in the schedule.

***Rules of the Legislative Assembly of the Northwest Territories*, amended June 2, 2005**

103 (1) A printed transcript of the deliberations and proceedings of the Assembly and Committee of the Whole, known as the "Hansard", shall be compiled, edited, printed and distributed under the authority of the Speaker.

(2) The unedited transcript shall be produced daily and one copy distributed to each Member.

(3) Every Member has until 10:00 a.m. of the sitting day following receipt of the transcript to correct it as to grammar, obvious errors in transcription and other mistakes in form in accordance with Rule 103(4). Corrections may not affect the substance of the transcript.

(4) The Clerk shall provide for the editing of the transcript in accordance with the following:

> (a) revisions shall be limited to correcting grammar, spelling and punctuation, ensuring that the correct parliamentary forms are observed, and minimizing repetition and redundancies;
>
> (b) revisions shall not include material alterations or amendments which would in any way tend to change the sense of what has been spoken;
>
> (c) the Transcript shall remain an accurate and, as far as possible, an exact report of what was said;
>
> (d) a Member has no right to alter the report of any speech or remarks attributed to him or her in any way, and the Speaker shall determine whether or not a Member's suggested correction shall be admitted;
>
> (e) unless a Member can demonstrate to the satisfaction of the Speaker that he or she has been misreported, a Member may not change the sense of anything that he or she has been recorded as having said. A Member is not permitted to make any insertion as an afterthought nor to strike out a passage which he or she regrets having spoken.

***Rules of the Supreme Court of the Northwest Territories*, N.W.T. R-010-96**

106. A pleading must contain only a statement in a summary form of the material facts on which the party pleading relies for his or her claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

121. In a pleading, costs need not be claimed and it is not necessary to ask for general or other relief, both of which may be given to the same extent as if they had been asked for.

***Vital Statistics Act*, R.S.N.W.T. 1988, c. V-3**

1. In this Act,

“certificate” means a certified extract of the prescribed particulars of a registration filed in the office of the Registrar General; (certificat)

Appendix B
Acronyms

AGC	Attorney General of Canada
Assembly	The Legislative Assembly of the NWT
Charter	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11
COLC	Commissioner of Official Languages of Canada
Commissioner	Commissioner of the NWT
FFT	Fédération Franco-ténoise
GNWT	Government of the NWT
GOC	Government of Canada
L'Aquilon	Éditions Franco-ténoises/L'Aquilon
LC	Languages Commissioner of the NWT
NWT	Northwest Territories
NWTA	*Northwest Territories Act*, R.S.C. 1985, c. N-27
OLA	*Official Languages Act*, R.S.N.W.T. 1988, c. O
OLAC	*Official Languages Act*, R.C.S. 1985 (4th Supp.), c. 31
OLANB	*Official Languages Act*, S.N.B. 2002, c. O-0.5
PGs	Policy and Guidelines
Report	Bastarache Report
Rules	Rules of the NWT Legislative Assembly
Speaker	Speaker of the Legislative Assembly of the NWT
Special Committee	a special committee comprised of NWT deputies established in November 2000 to examine the effectiveness of the *OLA*

Appendix C
Similarities and Differences between
the *Charter* and the *OLA*

Charter	***OLA***
16.(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.	4. Chipewyan, Cree, English, French, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tåîchô are the Official Languages of the Northwest Territories. 5. To the extent and in the manner provided in this Act and any regulations under this Act, the Official Languages of the Territories have equality of status and equal rights and privileges as to their use in all government institutions.
17.(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.	6. Everyone has the right to use any Official Language in the debates and other proceedings of the Legislative Assembly.
18.(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.	7.(1) Acts of the Legislature and records and journals of the Legislative Assembly shall be printed and published in English and French and both language versions are equally authoritative.
19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.	9.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislature. (2) Chipewyan, Cree, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tåîchô may be used by any person in any court established by the Legislature.

Charter	***OLA***
20.(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French	11.(1) Any member of the public in the Northwest Territories has the right to communicate with, and to receive available services from, any head or central office of a government institution in English or French, and has the same right with respect to any other office of that institution where (a) there is a significant demand for communications with and services from the office in that language; or (b) it is reasonable, given the nature of the office, that communications with and services from it be available in both English and French. (2) Any member of the public in the Northwest Territories has the right to communicate with, and to receive available services from, any regional, area or community office of a government institution in an Official Language other than English or French spoken in that region or community, where (a) there is a significant demand for communications with and services from the office in that language; or (b) it is reasonable, given the nature of the office, that communications with and services from it be available in that language. (3) In interpreting subsection (2), consideration shall be given to collective rights of Aboriginal peoples pertaining to Aboriginal languages and exercised within the traditional homelands of those peoples, consistent with any applicable lands, resources and self-government agreements, including land claim and treaty land entitlement agreements, and any other sources or expressions of those collective

	rights.
Charter	***OLA***
24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	32.(1) Anyone whose rights under this Act or the regulations have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just in the circumstances.

AP 2006/014/015

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

Between:

The Attorney General of the Northwest Territories, the Commissioner of the Northwest Territories, the Speaker of the Legislative Assembly of the Northwest Territories and the Languages Commissioner of the Northwest Territories

Appellants (Defendants)
Respondents on Cross- Appeal

- and -

Fédération Franco-Ténoise, Éditions Franco-Ténoises/L'Aquilon, Fernand Denault, Suzanne Houde, Nadia Laquerre, Pierre Ranger, and Yvon Dominic Cousineau

Respondents /Cross-Appellants (Plaintiffs)

- and -

The Attorney General of Canada
Respondent on Cross-Appeal

- and -

Commissioner of Official Languages for Canada
Intervener

MEMORANDUM OF JUDGMENT