In the Court of Appeal for the Northwest Territories

Citation: Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1

Date: 201501xx
Docket: AIAP 2012-000012
Registry: Yellowknife

Between:

Attorney General of the Northwest Territories
and Commissioner of the Northwest Territories

Appellants (Defendants)

- and -

Commission Scolaire Francophone, Territoires du Nord-Ouest,
Catherine Boulanger and Christian Girard

Respondents (Plaintiffs)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice L.A. Charbonneau
Dated the 1st day of June, 2012
Filed on the 1st day of June, 2012
(2012 NWTSC 44, Docket: S-0001-CV-2008000133)

Memorandum of Judgment

The Court:

I. Introduction

[1] This is an appeal from a trial decision (a) ordering the appellants to construct more minority language school facilities, and (b) declaring unconstitutional the Minister's directive on admissions to the minority language school: *Commission Scolaire Francophone, Territoires du Nord-Ouest v Northwest Territories (Attorney General)*, 2012 NWTSC 44. It is the companion to *Northwest Territories (Attorney General) v Association des Parents Ayant Droit de Yellowknife*, 2015 NWTCA 2. Both cases raise issues with respect to the Government of the Northwest Territories' obligations under section 23 of the *Canadian Charter of Rights and Freedoms*. This appeal engages the unique question of the scope of government's discretion regarding admission to the French first language school in Hay River, École Boréale, and the constitutionality of a Ministerial Directive curtailing the Commission Scolaire Francophone, Territoires du Nord-Ouest's (school board's) power with respect to admission.

II. History of École Boréale and Proceedings

[2] The French first language instruction program was established in Hay River in 1998. Hay River is a small community with approximately 3000 inhabitants. The program was initially offered in one classroom of Princess Alexandra School and governed by the Hay River District Education Authority. As the school grew in population, another classroom was made available for half a day for the kindergarten classes. In 2001 the Conseil scolaire francophone de Hay River was established and that same year it joined the Commission scolaire francophone, which became the Commission Scolaire Francophone, Territories du Nord-Ouest. In September 2002 the program moved into portable classrooms, three of which were used for classrooms and one for administrative purposes.

[3] There are three other schools in Hay River; Diamond Jenness Secondary School (grades eight to 12), Harry Camsell Elementary School (kindergarten to grade three), and Princess Alexandra School (grades four to seven). They are all located in an education park close to École Boréale. Neither Harry Camsell School nor Princess Alexandra School are operating at capacity. Each school has between 170 and 200 students.

[4] In 2002 the school board adopted its admission policy:

> [Translation from paragraph 32 of trial judgment]

CLIENTELE AND PROGRAM ELIGIBLITY

Given the high rate of assimilation of Francophones in the NWT and the desire of the CSFD [the Commission scolaire francophone de division] to redress this assimilation, the CSFD sees its potential clientele as being:

- Pre-kindergarten-age children enrolled in a francization program;
- Kindergarten to Grade 12 students;
- Students that fulfill the eligibility criteria but who are not participating in these programs;
- Adults, native Francophones or members of a mixed conjugal relationship, interested in a francization or literacy program.

Every student who fulfills the above eligibility criteria and who resides within the CSFD's territory of jurisdiction has the right to enrol in French-language programs offered by the CSFD, without cultural restrictions.

- Any child of a right holder, as defined by section 23 of the *Canadian Charter of Rights and Freedoms*
- Children of third-generation Francophones (sworn or notarized statement)
- Children of permanent residents who speak and understand French

Moreover, to meet the specific needs of Francophone communities outside Yellowknife:

- Children of non-right holders who will participate in and complete a pre-kindergarten francization program will be eligible for the kindergarten program *and, afterwards, the full education program offered by the Board.*

To ensure that children enrolled in the French school develop their Francophone identity, the number of non-right-holding students in this category should not exceed 20% of the school's student body.

[5] In November 2002 the school board made an official request to the government for the construction of a separate school building. The government agreed and applied to the federal government for a financial contribution of about $3 million, given that some of the areas in the building would be used for community purposes. The federal government responded with its intention to contribute $2.6 million to the project. The government accordingly revised its total budget and constructed a smaller building which now houses École Boréale. Construction of the school began in 2004 and in September 2005, École Boréale opened its doors with 68 students enrolled from kindergarten to grade eight. The school has five classrooms, an open central library

area, a central office with a small workroom and an administration office, and one medium sized break out space. The school also has one combined staff/home-economics/canteen room.

[6] In May 2008 the respondents initiated these proceedings. By that time, the student population had increased to approximately 115 (including pre-kindergarten). The court below granted an interlocutory injunction, directing the government to provide École Boréale with three extra classrooms. Given the limited options in Hay River, the government was unable to do so. As a result, approximately 20 students had to attend class in the Ptarmigan Inn for the 2008 to 2009 school year. Three portable classrooms were provided for the beginning of the 2009 school year.

[7] In July 2008 the Minister adopted the following directive which significantly limited the school board's 2002 admission policy.

> [TRANSLATION – from paragraph 33 of trial judgment]
>
> (1) With the exception of the provisions set out in subsection 2, no new student may be enrolled in a program of French first language instruction unless the Commission scolaire des Territoires du Nord-Ouest (the Commission scolaire) has verified that the student is eligible for this program under section 23 of the *Canadian Charter of Rights and Freedoms*.
>
> More explicitly, a new student cannot be enrolled in a program of French first language instruction:
>
> > (a) if he or she is of Francophone descent but unable to provide evidence supporting his or her eligibility for French first language instruction, under section 23 of the *Canadian Charter of Rights and Freedoms*; or
> >
> > (b) if he or she is not a Canadian citizen;
>
> (2) The Minister may approve the enrolment of students who are not eligible for the program of instruction under section 23 of the *Canadian Charter of Rights and Freedoms*.
>
> (3) The Commission scolaire must verify the eligibility of each new student to be enrolled in a program of French first language instruction, document its eligibility verification process and retain the documents provided by the student's parent(s) or guardian(s) to prove the student's eligibility. Information on students' eligibility must be transmitted to the Department of Education, Culture and Employment upon request within a reasonable timeframe.

> (4) The Commission scolaire must provide the Department of Education, Culture and Employment, in writing, with the procedure used to verify students' eligibility for enrolment in a program of French first language instruction.

[8] In response the school board adopted a new policy in 2009, which clarified its position and set out two admission types. The first group were those rights holders covered by section 23. The second group were admissible only with the school board's permission and included: Canadian parents with a Francophone Canadian ancestor (the ancestor category); non-Canadian parents who spoke French or who spoke neither French nor English (the immigrant category); and Canadian parents wishing to establish an authentic link to the Francophone community (the francization category). The total number in the francization category could not exceed 10% of the total student body.

III. Relevant *Charter* Provisions

[9] **Minority Language Educational Rights**

> Language of instruction
>
> **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.
>
> Continuity of language instruction
>
> (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.
>
> Application where numbers warrant

(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.

Enforcement

Enforcement of guaranteed rights and freedoms

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.

IV. Decision of the Trial Judge: 2012 NWTSC 44

[10] The two main issues before the trial judge were the constitutionality of the directive and whether the government was obligated under section 23 to expand the school. On the first issue, the trial judge determined that the school board had the discretion to administer admissions and that the directive was unconstitutional. She further concluded that based upon the expert evidence that she accepted, the numbers warranted an expansion of École Boréale. The respondents also sought a declaration regarding the constitutional protection of the pre -kindergarten program and of a daycare program. There is no daycare program presently in the school. Although the trial judge was not prepared to find that the pre-kindergarten program and daycare program enjoyed the protection of section 23, she granted a remedy pursuant to section 24 of the *Charter*, which included a provision related only to the pre-kindergarten program. She was not satisfied on the evidence that she ought to grant the same remedy with respect to the daycare program. She issued the following comprehensive and detailed order at paragraph 894:

1. The building that houses École Boréale will be expanded in accordance with the following parameters:

    a. The school will have a capacity of 160 students; and

    b. In addition to the classrooms required for this capacity to be reached, the expansion must include, at the minimum,

> (i) a gymnasium of 500 square metres or more, with locker rooms, showers, bleachers and an office for the staff member in charge of the gymnasium;
>
> (ii) a space adequately equipped for teaching cooking and home economics classes;
>
> (iii) a multi-purpose room for teaching music and art;
>
> (iv) a laboratory for teaching science at the secondary level with equipment meeting the applicable standards (including a storage cabinet for the products, access to water, and a fume hood);
>
> (v) a designated room for teaching English as a second language; and
>
> (vi) a closed room for individual work to meet the needs of students with special needs.

2. The atrium space will not be counted for the purposes of calculating the school's capacity.

3. The building expansion will also have to include a space that can accommodate up to 15 children for the purposes of the pre-kindergarten program.

The order also directed the parties to establish a schedule for planning and construction, and that the work be completed for the beginning of the 2015 school year. The order made a provision for access to space during the expansion. The trial judge awarded solicitor-client costs to the respondents.

V. Grounds of Appeal

[11] The central ground of appeal is that the trial judge erred in declaring the directive unconstitutional. The appellants submit that the right of management under section 23 does not include absolute control over admissions. This is a question of law which attracts the correctness standard: *Housen v Nikolaisen*, 2002 SCC 33 at paragraph 8, [2002] 2 SCR 235. The appellants contend that this error tainted the remainder of the trial judge's analysis with respect to the school's expansion. They submit that she erred in ordering the expansion of École Boréale, as the school is not at full capacity and a significant number of the pupils admitted are not rights holders.

[12] The appellants also adopt the same grounds of appeal advanced in the Yellowknife appeal. They assert that the trial judge applied the wrong test when determining whether École Boréale needed to be expanded. Further they say that she erred in: (1) comparing École Boréale to other schools in Hay River rather on the basis of the population of the school itself; (2) ordering the construction of multiple additional classrooms; (3) granting a remedy under section 24 for a pre-school even though she found that this program was not *Charter* protected; (4) finding that the government was not facing considerable financial difficulties, and; (5) awarding solicitor-client costs to the respondents.

VI. Analysis

A. Constitutionality of the Ministerial Directive

[13] The trial judge recognized that much of the increase in the student population at École Boréale after the implementation of the 2002 admission policy was a result of the enrolment of students whose parents were not section 23 rights holders. She also recognized that the school board's admission criteria had a direct impact on governmental resources. The trial judge acknowledged the tension between the school board's management rights under section 23 and the government's clear and legitimate concern over its resources. She concluded that, given the remedial aspect of section 23, and the purpose of the admission policy which was to enhance the language and culture of the minority language group, it was the role of the school board, and not of the government, to determine the extent to which the minority language program could be extended to revitalize the community.

[14] The trial judge found that the 2002 admission policy contributed to the revitalization of the Francophone community in Hay River. In so doing, she relied on the expert opinions of Drs. Landry and Denis. Dr. Landry's qualifications and opinions are summarized in the companion case. Dr. Denis is a sociologist who specializes in ethnic studies, and was qualified to give opinion evidence in those areas.

[15] Dr. Denis testified to the effect of government policies on minorities. When the policies are restrictive, they can have a demoralizing effect on the minority language communities. He testified to the "downward funnel" phenomenon. A lack of adequate infrastructure in a minority language community can contribute to high rates of assimilation. This assimilation contributes to the eradication of section 23 rights holders. Infrastructure is no longer provided (because the numbers do not warrant), and a vicious cycle ensues. The less frequently the rights are exercised, the more they erode. The trial judge determined that by broadening the group of people who could access the French language program, the school board created a revitalisation process, which countered the effect of the "downward funnel". She said at paragraph 634:

> The pre-kindergarten francization program and the CSFTN-O admission policy have made the French language instruction program accessible to many children who would not otherwise have access to it. This has contributed to francizing not

> only the children, but also their parents. This, in turn, initiated the upward funnel phenomenon that can reverse the effects of assimilation.

[16] Dr. Denis was favourably impressed by the school board's admission policy because it included persons with French-speaking ancestors, and recognized the importance of making up for "lost generations" (i.e. those who had been assimilated). Dr. Denis also commended the policy for its inclusion of French speaking immigrants, thereby reflecting the increase in Canadian immigration. He opined that the inclusion of Anglophones was good for revitalization of minority language communities. In his view the policy helped to create an "upward funnel" (an increase of community member numbers). Dr. Denis acknowledged that the admission of too many non-rights holders into minority language schools could create problems. It was important to ensure that the school was a minority language school and not a French immersion program for Anglophones or a bilingual school. He noted the important role played by École Boréale in promoting and revitalizing the French language and culture in the Northwest Territories. According to Dr. Denis, the school board's admission policy was a tool that could assist the minority group to properly manage the deterioration of French in the Northwest Territories.

[17] The trial judge recognized that the school board's admission policy had the effect of creating new rights holders, but in her view, this was contemplated by section 23 as it revitalized the community and recaptured generations lost to assimilation.

[18] Important to the trial judge's conclusion was her interpretation of subsection 23(2). She found that it specifically provided for the potential of creating rights for people who were not originally members of the minority community, as brothers and sisters of a child who attends a minority-language school eventually acquire the right to attend that school too. She reasoned that the constitutional protection of section 23 was not limited to members of the minority language community. She relied upon the following passage from the judgment of Abella JA (as she then was) in *Abbey v Essex County Board of Education* (1999), 42 OR (3d) 481(Ont CA) at paragraph 28, 169 DLR (4^{th}) 451:

> Even though the overriding purpose of s. 23 is the protection of the language and culture of the linguistic minority through education, **this does not preclude interpreting s. 23(2) according to its plain meaning, even if this means that rights accrue to persons who are not members of the linguistic minority. The more fluency there is in Canada's official languages, the more opportunity there is for minority language groups to flourish in the community.** (emphasis added)

[19] The trial judge found no evidence to suggest that the school board's generous admission policy compromised École Boréale's Francophone character or its homogeneity. There was no risk of the school becoming a French immersion or bilingual school. Rather, the evidence established that there was a pedagogical benefit in having a critical mass of students. Further, she noted that

some French school boards across Canada have policies that permit the admission of children other than those covered by section 23(1).

[20] The government relied upon the Supreme Court's decisions in *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 SCR 238, *Solski (Tutor Of) v Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 SCR 201, and *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 SCR 208. It argued that these cases hold that provincial governments must have the power to ensure that the criteria of section 23 are respected, and that numbers are not artificially inflated, thus forcing governments to increase their funding. The trial judge distinguished these decisions on the basis that they were not directly concerned with the minority community's right of management. Moreover, in these cases the examination of governmental powers was done in the very unique linguistic context that exists in Quebec.

[21] The trial judge erred in her interpretation of section 23 and erroneously inflated the powers of the school board, elevating it to a government institution. The Supreme Court has clearly stated that school boards are malleable and subject to legislative reform: *Ontario English Catholic Teachers' Assn v Ontario* (*Attorney General*), 2001 SCC 15 at paragraph 62, [2001] 1 SCR 470. In our view, even the most generous interpretation of section 23 cannot mean that the school board has the unilateral power to admit anyone to its schools without governmental oversight.

[22] Education falls within the purview of provincial (and, by virtue of legislative extension, territorial) power and each province has a legitimate interest in the provision and regulation of minority language education: *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, at paragraph 53, [2000] 1 SCR 3, *Solski* at paragraph 10. The Supreme Court has recognized on numerous occasions the importance of governments maintaining the responsibility to meet their constitutional obligations. In interpreting the requirement for participation in subsection 23(2), it has been clearly stated in *Solski*, *Gosselin*, and *Nguyen* that provincial governments must retain the power to ensure that the criteria of section 23 are respected.

> Provincial governments are entitled to verify that registration and overall attendance in the program… are consistent with participation in the class of beneficiaries defined in s. 23(2). (*Solski* at paragraph 48)

[23] This interpretation has been upheld in the recent Yukon Court of Appeal decision, *Commission Scolaire Francophone du Yukon no 23 v Yukon (Procureure Générale)*, 2014 YKCA 4 (leave granted: [2014] CSCR no 146), which unequivocally recognized that governments have the power to control admissions. The observation of the Yukon Court of Appeal at paragraph 223 is apposite: none of the considerable body of case law that has developed under section 23 concerning the rights of particular categories of students to attend minority language schools supports the contention that a school board can usurp a government's power to manage admissions.

[24] The rights conferred under section 23 must be applied and interpreted in a uniform manner throughout Canada: *Solski* at paragraph 21. The effect of the trial judge's decision is to permit members of the majority community in the Northwest Territories to attend the minority language institution without any governmental oversight. Given the outcomes in *Solski, Gosselin* and *Nguyen*, this is not possible in Quebec. The framers did not intend that section 23 be applied in such an inconsistent manner across Canada.

[25] Even a contextual consideration of the situation of the Northwest Territories does not lead us to the same conclusion as that of the trial judge. Section 23 has several purposes, one of which is to encourage the development of the minority language community. However, section 23 protects specific, well-defined, categories of rights holders: *Solski* at paragraph 23. Section 23 confers individual rights (*Nguyen* at paragraph 23) and its implementation depends on the number of qualified pupils: *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69, *Arsenault-Cameron* at paragraph 32. The focus of section 23 is not to allow children of non-rights holders to learn a second language. Such an interpretation distorts the purpose and "raison d'être" of section 23 and erases the well-marked delineation around the constitutionally protected classes of rights holders.

[26] Section 23 requires a narrower interpretation than that given by the trial judge. The Supreme Court has consistently stated that section 23 is the result of a political compromise. If the framers had intended for minority language schools to be accessible to any member of the majority community, it could have been drafted as a "free choice" section; any child in Canada could select education in either official language. On the other hand, it could have been much more restrictive, protecting for example only children already enrolled in a minority language school. The result is a carefully crafted compromise, which protects the children of those whose first language learned and still understood is the minority language. These rights do not trickle down to the grandchildren or "all descendants", but only the "children".

[27] The respondents argue that subsection 23(2) "opens the door" to creating new classes of rights holders. This court does not read it so broadly. Subsection 23(2) is a mobility provision. The heading, "continuity of language instruction", is relevant. The Supreme Court described the purpose of subsection 23(2) in *Solski* at paragraph 30:

> **The specific purpose of s. 23(2) is to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity.** The framers intended that a child who has received or is receiving his or her education in one official language should be able to complete it in that language when it is the minority language. The Honourable Mr. Jean Chrétien, then Minister of Justice, explained:
>
> > Mr. Speaker, this government holds the view that such rights must be protected in the constitution because they are fundamental to what Canada is all about. When minority language education rights

> are taken away, the right to take up a job in any part of Canada is seriously impaired. English-speaking Canadians, if they move to Quebec, want to have the right to send their children to school in their own language... .
>
> Similarly French-speaking Canadians do not want to move to other parts of Canada unless they can send their children to school in their own language. The only way to achieve this is to guarantee such rights in the constitution. In effect, without a guarantee of minority language education rights, there can be no full mobility rights.
>
> (House of Commons Debates, vol. III, 1st Sess., 32nd Parl., October 6, 1980, at p. 3286) (emphasis added)

[28] Thus, if a child is educated in French in New Brunswick, and later the parents move to Yellowknife, the child and siblings can continue in French. If a Greek child is educated in English in Toronto, and the parents move to Montréal, the child and siblings can continue in English. This section also prevents "rolling back". Once a child has started education in the minority language, the province cannot raise the entry standard to disqualify that student or her siblings.

[29] Further, subsection 23(2) must be considered in conjunction with the remainder of section 23. Interpreting subsection 23(2) as intending to create new rights holders would essentially make the "first language learned and still understood" test largely redundant. The Supreme Court has consistently held that the purpose of section 23 is to protect, preserve and develop minority language communities in Canada by providing them with an education consistent with their linguistic and cultural identity. The trial judge's interpretation of section 23 comes close to creating a "free choice" model, which is not consistent with the plain language of section 23. Allowing the school board to create new categories of rights holders, without any governmental oversight, would make the "where numbers warrant" test meaningless. It would then read "where the number of right holders warrant, or where you can admit enough non-right holders to warrant". This cannot have been the intention of our framers and this interpretation cannot be supported.

[30] Giving the school board exclusive control of admissions has important financial consequences on the government. It is not up to the school board to dictate how public funds are spent. The main issue here is a pure question of law, reviewable for correctness. As such, the trial judge erred in law in finding that the directive was unconstitutional.

B. Expansion of École Boréale

[31] Having determined that the directive was unconstitutional, the trial judge went on to address the question of whether the school should be expanded. She determined that the main comparators were the schools of Hay River's Anglophone majority. She also reasoned that the

Anglophone schools represented the only other realistic option. She continued her analysis by applying the sliding scale approach mandated by *Mahe* and *Arsenault-Cameron*.

[32] The appellants reiterate many of the same arguments put forth in the companion case in support of their position that the trial judge erred in ordering the expansion. For the reasons set out in the Yellowknife appeal, the trial judge adopted the correct test: "the number [of persons] who will potentially take advantage of the service, which can be roughly estimated as being somewhere between the known demand and the total number of persons who could potentially take advantage of the service": *Arsenault-Cameron* at paragraph 32.

[33] Given our finding that the directive is constitutional, the difficult question arises of the extent to which that finding affects the balance of the trial judge's analysis. The specific concern is with her determination that the numbers warranted the expansion requested by the respondents. As mandated by *Mahe* that number is somewhere between the current enrolment and the target enrolment. The trial judge found that number to be 160.

[34] The enrolment at École Boréale at the date of trial was 85 students (kindergarten to grade 12). At trial, the respondents argued that the target enrolment ought to be 195. This was based upon the expert testimony of Dr. Landry who testified that that there could be as many as 200 rights holder children in Hay River and upon a predicted enrolment of 15 new students per year.

[35] The government's position was that the target enrolment was the number posited in the 2006 Census which was 25 school-aged children having at least one parent whose first language was French. The trial judge rejected the government's position that the 2006 Census data should be used to determine the target enrolment in Hay River. The government argued that as the school had a capacity of 126 students and at the time of trial, there were 85 students enrolled, the school was not at full capacity and there was no need for expansion.

[36] The government also argued that the 2002 admission policy which allowed for the admission of non-rights holders artificially inflated École Boréale's enrolment numbers. In 2005 there were 40 students whose parents were rights holders. Although the numbers provided to us for the years following 2005 are not entirely consistent, the record is clear that the number of students whose parents were rights holders remained relatively stable at around 40 to 50. However, the total number of students had increased sharply. It had effectively doubled. Some of the non-rights holders had been admitted under the policy while others were siblings of those who had been admitted as non-rights holders. As the trial judge found the directive to be unconstitutional, and the rationale behind the school board's policy for admitting non-rights holders to be within the spirit of section 23, she made no discount for this.

[37] The trial judge's conclusion that the relevant number was 160 students was influenced by two reports prepared by Mr. Kindt. The first, Education Plan for École Boréale, February 15, 2008, was prepared at the school's request and was described as a document outlining the educational desires of École Boréale. It evolved from meetings with the school administration, staff, students, trustees, parents and members of the community. In assessing the growth of the school to the years 2026 to 2027 Mr. Kindt used the school projections provided by the Department of Education,

Culture and Employment. Based upon new enrolment of 10 students per year, the department projected the enrolment to be 150 kindergarten to grade 12 students. Mr. Kindt noted that "[department] staff have indicated that this projection is based on current parameters which include non-right holders. If you take this factor into consideration, the number of right holders entering kindergarten will significantly reduce future enrolments." In 2010 Mr. Kindt was asked by the government to answer a series of questions about the ability of the school to provide an appropriate learning environment over the following four to five years. He was also asked about appropriate utilization of space, gymnasium access, and specialized classes such as industrial arts. Mr. Kindt was also asked how École Boréale compared with other schools of comparable student population in the Northwest Territories and elsewhere and in particular minority language schools. The parameter given to him by the government was to work towards an enrolment of 150 students. He again noted that a change in the policy regarding admissions would have an impact on the projected enrolment and require a revision to his report. He also acknowledged this in his testimony at trial.

[38] The trial judge relied upon Mr. Kindt's reports in arriving at the conclusion that the appropriate capacity for the school was 160 students. Indeed, she said at paragraph 760 that the capacity should be somewhere between the number expressed in Mr. Kindt's 2008 report (150) and the respondents' position of 195.

[39] Although the trial judge's conclusion is a finding of fact which attracts appellate deference, she erred in her determination of the relevant number for the purposes of section 23. When one takes into account the admission of non-rights holders, the department's prediction of 150 students and Mr. Kindt's reliance upon that prediction are unreliable, as is the respondents' prediction of 195 students. Accordingly, the trial judge's conclusion cannot stand.

[40] The more difficult question is what this court should do. One could argue that given the trial judge's finding that the rights holders admissions had been relatively stable at between 40 and 50 students, this is the proper number. However, the reality is that at the time of trial there were 85 students and as of 2013, there were 113 students (including pre-kindergarten) in the school. It is reasonable to conclude that at least one-half of the students are non-rights holders admitted through the school board's policy from 2002 to 2008 or are siblings of those students. Nevertheless, they were admitted under a policy which accorded with the school board's interpretation of section 23. It was not challenged until 2008 and was in place until the directive was issued. In addition, the government has admitted six students of those who applied under the directive. All of these students are now rights holders. They are in the school.

[41] The school has a capacity of 126 students. The school's capacity will not satisfy the government's obligations in all cases. However, as emphasized in *Arsenault-Cameron*, due consideration must be given to the particular facts of each case. In this case, the court is faced with the unusual question of the government's constitutional obligations under section 23 in a situation where one-half of the students were admitted as non-rights holders.

[42] The right at issue under section 23 is the right to receive instruction in minority language facilities provided out of public funds, where numbers warrant. The trial judge erred in determining that the numbers warranted the expansion of a facility which even with the admission of non-rights holders, was only at 67% (85/126) capacity at the time of trial. It is acknowledged that it is higher now. The numbers do not warrant the expansion at this time. A school is a dynamic institution, and the required capacity will have to be reassessed from time to time.

[43] Given the conclusion that the numbers do not warrant the expansion, it is unnecessary to consider the other factors in the sliding scale test: the comparator and the cost to the government. Nor is it necessary to address the detailed order.

C. Pre-Kindergarten

[44] With respect to the constitutional status of the pre-kindergarten program, we adopt the reasoning in the companion case and accordingly, the cross-appeal is dismissed. The appellants argue that the trial judge erred in granting, as a section 24(1) remedy, sufficient space to ensure that the pre-kindergarten program had a capacity of 15 children. For the reasons set out in the companion case, we allow this ground of appeal. The trial judge ought not to have used section 24(1) in granting a remedy that effectively awarded the pre-kindergarten program constitutional status.

D. Solicitor-Client Costs

[45] In awarding solicitor-client costs to the respondents, the trial judge was critical of the directive and the manner in which it was enacted. Given our conclusion regarding the constitutionality of the directive, the award of solicitor-client costs order is unreasonable. The issues were novel. As stated in the companion case, the government was entitled to advance its position in order to better understand its constitutional obligations under section 23 in a situation where a school existed and the question was its expansion. For these reasons, this ground of appeal is allowed.

VII. Conclusion

[46] In conclusion, the trial judge erred in determining that the government had breached its obligation under section 23 of the *Charter*. She erred in declaring the ministerial directive to be invalid and her analysis of whether the numbers warranted the expansion of École Boréale was flawed as a result. For the reasons given in the companion appeal, the trial judge also erred in awarding a remedy under section 24 of the *Charter* in relation to the pre-kindergarten space. The appeal is also allowed with respect to the award of solicitor-client costs.

[47] In the result, the appeal is allowed and for the reasons given in the companion case, the cross-appeal is dismissed. As the appellants have succeeded, they are entitled to their costs in the

court below and on appeal. If the parties have further submissions to make with respect to costs they may do so in writing within 60 days of the date of this judgment.

Appeal heard on March 24, 2014

Memorandum filed at Yellowknife, NWT
this 9th day of January, 2015

Watson J.A.

Slatter J.A.

Authorized to sign: Rowbotham J.A.

Appearances:

M. Faille and F. Baril and G. Régimbald
for the Appellants

R.J.F. Lepage and F. Poulin
for the Respondents