

# **In the Court of Appeal for the Northwest Territories**

**Citation:** *A.B. v Northwest Territories (Minister of Education, Culture and Employment)*, 2021 NWTCA 8

**Date:** 2021 09 01

**Docket:** A-1-AP-2019-000006

A-1-AP-2020-000009

**Registry:** Yellowknife, N.W.T.

A-1-AP-2019-000006

**Between:**

**A.B. and Commission scolaire francophone des Territoires du Nord-Ouest**

Respondents  
(Plaintiffs)

- and -

**Minister of Education, Culture and Employment of the Northwest Territories**

Appellant  
(Defendant)

A-1-AP-2020-000009

**And Between:**

**A.B., F.A., T.B., E.S., J.J. and  
Commission scolaire francophone des Territoires du Nord-Ouest**

Respondents  
(Plaintiffs)

- and -

**Minister of Education, Culture and Employment of the Northwest Territories**

Appellant  
(Defendant)

**The Court:**

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**The Honourable Justice Frans Slatter  
The Honourable Justice Patricia Rowbotham  
The Honourable Justice Michelle Crighton**

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**Memorandum of Judgment of the Honourable Justice Slatter  
and of the Honourable Justice Crighton**

**Memorandum of Judgment of the Honourable Justice Rowbotham  
Concurring in the Result**

Appeal from the Judgment by  
The Honourable Mr. Justice P. Rouleau  
Dated the 2nd day of July, 2019  
(2019 NWTSC 25, Docket: S-1-CV-2018-000392)

Appeal from the Judgment by  
The Honourable Mr. Justice P. Rouleau  
Dated the 23rd day of July, 2020  
(2020 NWTSC 28, Dockets: S-1-CV-2019-000355,  
S-1-CV-2019-000356, S-1-CV-2019-000357,  
S-1-CV-2019-000358, S-1-CV-2019-000359)

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## Memorandum of Judgment

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### The Majority:

[1] The Government of the Northwest Territories operates minority language schools offering instruction in French. Minority language education has been provided in Hay River since 1988 (École Boréale) and in Yellowknife since 1989 (École Allain St-Cyr). Pursuant to s. 23 of the *Canadian Charter of Rights and Freedoms*, some families have a constitutional right to send their children to those schools.

[2] The respondent families do not enjoy the constitutional right to send their children to the minority language schools in the Northwest Territories, because they do not qualify under s. 23. Their applications to the Minister of Education, Culture and Employment to allow their children to attend the section 23 schools, even though they did not qualify, were dismissed. A chambers judge set aside the Minister's decisions: *A.B. v Northwest Territories (Minister of Education, Culture and Employment)*, 2019 NWTSC 25 and *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Minister of Education, Culture and Employment)*, 2020 NWTSC 28. The Government of the Northwest Territories appeals those decisions.

[3] The appeals must be allowed, and the orders set aside. The orders do not properly reflect the standard of review to be applied to discretionary decisions of this nature. Further, the analysis of the constitutional and other issues given in support of the orders is tainted by reviewable errors.

### The Constitutional Background

[4] Section 23 of the *Canadian Charter of Rights and Freedoms* entrenches specific rights to minority language education in Canada. The section has three subsections. The first two define the families or parents who are entitled to minority language educational rights:

#### 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.

The third subsection sets out the scope of the protected rights, namely that they only apply whenever the “numbers warrant” providing minority language education at public expense.

[5] Section 23 represents “a unique set of constitutional provisions, quite peculiar to Canada”: *Attorney General of Quebec v Quebec Association of Protestant School Boards*, [1984] 2 SCR 66 at p. 79. It is drafted with some precision. The version of s. 23 eventually adopted was clearly not the only policy option that was available to the drafters of the *Charter*. The *Charter* could have been drafted on a “free choice” model. It could have declared that every child in Canada was entitled to select his or her language of education. At the other extreme, the *Charter* could have been drafted on a “vested rights” basis. It could have extended minority language rights only to those students who were then enrolled in a minority language school. Neither option was selected: *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at paras. 23-26, [2009] 3 SCR 208; *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 at para. 8, [2005] 1 SCR 201. Rather, s. 23 was drafted somewhere between these two extremes; obviously numerous other models were conceptually available.

[6] Given the relatively high cost of providing minority language education, governments are naturally interested in the number of s. 23 rights holders. While governments have a constitutional obligation to provide minority language education to those who have the right to it, governments have no obligation to extend to anyone else rights above the “constitutional minimum” set out in section 23: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para. 70, [2015] 2 SCR 282. Thus, governments have every justification for controlling enrollment in minority language schools: *Nguyen v Quebec* at para. 36; *Solski* at para. 48. The *Charter* reflects the importance of language rights, but it also reflects the importance of respect for the powers of the provinces and territories over education: *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42 at para. 56, [2013] 2 SCR 774.

[7] The power to allow non-section 23 children to attend the section 23 schools is reserved to the government: *Yukon Francophone School Board* at paras. 68-69, 74; *Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest*, 2015 NWTCA 1 at paras. 21-23, [2015] 5 WWR 60 leave to appeal refused [2015] 3 SCR vi. The provinces and territories have the power to delegate admission criteria to school boards, but absent that delegation neither the minority language school boards, nor non-section 23 parents can unilaterally decide on admission to the schools.

[8] The *Charter* establishes minimum standards, but the government does have the discretion to allow non-section 23 children to attend the minority language schools. While at the time of the decisions involved in these appeals there was no statute or regulation confirming such a discretion,

or requiring that the Minister exercise it, the Minister showed that she was open to considering on a case-by-case basis requests from non-rights holders to attend the schools. That was a public policy decision, but the Minister was under no constitutional or statutory obligation to do so.

[9] Section 23 of the *Charter* draws lines of eligibility, which inevitably means that “hard” cases will arise falling on one side of the line or the other: ***R. (Animal Defenders International) v Secretary of State for Culture, Media and Sport***, [2008] UKHL 15 at para. 33, [2008] 1 AC 1312. The Minister recognized that some students who did not qualify under section 23 should be admitted to the schools, and adopted the *Ministerial Directive: Enrolment of Students in French First Language Education Programs (2016)*. The Purpose and Rationale of the Directive were stated:

#### PURPOSE

This Ministerial Directive – Enrolment of Students in French First Language Education Programs (“Directive”), made by the Minister in accordance with the *Education Act*, S.N.W.T. 1995, c.28 and its regulations, hereby establishes admission requirements for children of eligible non-rights holder parents in French first language education programs in the Northwest Territories (NWT) and also sets out what documentation must be submitted by parents and retained by Commission scolaire francophone des Territoires du Nord-Ouest (“CSFTNO”) to evidence entitlement to enrolment of all children in French first language schools. It replaces the Ministerial Directive dated July 7, 2008. . . .

#### RATIONALE

The Government of the Northwest Territories (“GNWT”) is committed to respecting the constitutional rights granted to official language minority communities under section 23 of the *Charter* by providing quality French first language education to school-aged children of rights holders pursuant to section 23.

Section 23 guarantees minority language education rights to the children of rights holders. A parent may enrol their child in a primary or secondary French first language education program if they fall into one of the three categories identified in section 23.

The GNWT is also committed to supporting language and culture revitalization. An inherent part of revitalization is supporting population growth. This Directive aims to support the growth of the French first language rights holder population in the NWT by allowing a limited number of children of non-rights holder parents to attend French first language schools in the NWT.

The Directive was complemented by the *French First Language School Non-Rights Holder Admission Policy*. The Policy set out how applications for admission to the schools were to be made, and how the Minister's decisions would be communicated.

[10] The Directive, which was drafted following a public consultation, replaced and expanded the earlier 2008 policy. It was designed to admit "a limited number" of non-section 23 children by setting out three categories of non-rights holders who could apply for permission to attend the schools:

Eligible non-rights holder parent – A parent who is not a rights holder under section 23 of the Charter but is eligible to apply for admission of his or her child under this Directive through one or more of the following streams:

Reacquisition – The parent would have been a rights holder but for his or her lack of opportunity to attend a French first language school or his or her parent's lack of opportunity to attend a French first language school (i.e. the child's grandparent);

Non-citizen francophone – The parent meets the criteria of section 23 of the Canadian Charter of Rights and Freedoms except for the fact that he or she is not a Canadian citizen; or

New immigrant – The parent is an immigrant to Canada, whose child upon arrival, does not speak English or French and is enrolling in a Canadian school for the first time.

Lack of opportunity – refers to physical or legal barriers to a person's participation in French first language education including, but not limited to, no French first language school within a reasonable proximity during childhood, or his or her enrolment in a residential school.

Twenty-six non-rights holders had been admitted to the schools in the four years following 2016, either under the Directive or through the Minister's residual discretion. None of the respondent families qualified under the Directive. These appeals relate to the respondents' applications to be admitted to the schools under the Minister's residual discretion, even though they did not qualify under the Directive.

[11] All of the applications for admission to the schools that are the subject of these appeals were decided when the Directive was in force, although it has since been repealed and replaced. Effective for the 2020-21 school year admission to the section 23 schools is governed by the *Commission Scolaire Francophone, Territoires Du Nord-Ouest Regulations, R-071-2000*. The Regulations delegate admission to the schools of non-section 23 rights holders to the Commission scolaire francophone, Territoires du Nord-Ouest, in accordance with the following criteria:

11(3) For the purposes of subsection (2), the prospective student must fall into one or more of the following categories:

- (a) Category 1 “Reacquisition”: a grandparent or great-grandparent of the prospective student met the test set out in section 23 of the Charter;
- (b) Category 2 “New Arrival”: the prospective student immigrated to Canada and the prospective student
  - (i) is not a Canadian citizen, and
  - (ii) does not have a parent whose first language learned is English;
- (c) Category 3 “Non-Citizen Francophone”: the prospective student has a parent who would be a rights holder parent but for the fact that the parent
  - (i) is not a Canadian citizen, or
  - (ii) did not receive their primary school instruction in Canada;
- (d) Category 4 “Francophile”: the prospective student has a parent who is proficient in French.

Non-section 23 students can be admitted only if they fall into one of these four categories, the school is operating at less than 85% capacity, and “registration of the prospective student would not adversely affect the cultural or linguistic integrity of the French first language education program that is delivered at the school”.

### Facts

[12] Several families who did not have a constitutional right to attend the section 23 schools applied to the Minister under the Directive for permission to attend. Since they did not qualify under the Directive, they also applied to be admitted under the Minister’s residual discretion.

### *The A.B. Family*

[13] The A.B. family came to Yellowknife from the Netherlands in 2014. Their son W.B. was born here a few months later. The A.B. family spoke Dutch and English when they arrived, but they decided to integrate into Yellowknife’s Francophone community. W.B. attended francophone daycare, he speaks Dutch, English and French, and he is most fluent in French. The principal of the school and the Commission scolaire francophone supported the family’s application to have W.B. attend the school on the basis that the family qualified under the New Immigrant category in the Directive, but the Minister turned down its application.

[14] The A.B. family then asked the Minister to consider admitting W.B. even though he did not qualify under the Directive, but the Minister denied that request as well:

. . . admission to École Allain St-Cyr is limited to rights holders under section 23 of the *Canadian Charter of Rights and Freedoms* and to non-rights holders who meet the requirements set out in the Directive and the Policy.

The Minister's position was that many parents would like to have access to the section 23 schools, and that allowing requests like this would make the Directive meaningless.

[15] The A.B. family applied for judicial review. The chambers judge concluded that the Minister had fettered her discretion when she dismissed the subsequent request that W.B. be admitted to the school even though he did not qualify under the Directive. The Minister also erred because her decision was "incorrect and contrary to the remedial nature of section 23": 2019 NWTSC 25 at para. 47.

[16] The chambers judge set aside the Minister's decision, and remitted the application of the A.B. family back to her for reconsideration. After reconsideration, the Minister again rejected the application. W.B. attended a French immersion school, but the family thought it was inadequate. The family applied for judicial review for a second time. The chambers judge considered the second judicial review application together with the applications of four other families. He allowed the second judicial review application, and once again remitted the issue to the Minister for reconsideration: 2020 NWTSC 28.

#### *The Four Other Families*

[17] Four other families, comprising five children, also applied for admission to the section 23 schools. None of these families enjoyed section 23 rights, and they did not fit into any of the three categories in the Directive. Their applications were all rejected by the Minister, both under the Directive and under the Minister's residual discretion, and they applied for judicial review.

[18] The parents of child A described themselves as Anglophones who have chosen to assimilate with the Francophone community. They applied "so that our children can become fully proficient in both spoken and written French and can fully experience French culture" (AR Vol. 4, P502). They are bilingual and work in French in the health sector, and use French on a daily basis: 2020 NWTSC 28 at para. 22. They applied for admission of their child under the reacquisition category, or alternatively under the Minister's residual discretion. The reacquisition category is intended to identify families who do not qualify under section 23 because French education has "skipped a generation" due to unavailability of French language education. Child A has subsequently been admitted to the school under s. 11(3)(d) of the new Regulations, under the "Francophile" category.

[19] The child V and her parents speak Vietnamese and very little English. V's maternal grandfather spoke French during his childhood, and his parents applied under the new immigrant

category: 2020 NWTSC 28 at para. 24. The Minister rejected the application, and declined to reconsider it when asked.

[20] The children T and N are from the United States. They are trilingual, speaking English, French and Spanish: 2020 NWTSC 28 at para. 26. They performed well in a French immersion school. This family has subsequently left Canada.

[21] The parents of child E immigrated from the Philippines and speak Tagalog and English: 2020 NWTSC 28 at para. 29. Neither the child nor the parents speak French. They applied under the new immigrant category, and alternatively under the Minister's residual discretion.

[22] All of the applicant families wished to assimilate with the Francophone community, and all had been recommended for admission by the Commission scolaire francophone. While the Minister acknowledged that admission to the schools would likely be in the best interests of the children, she denied the applications because she was of the opinion that the circumstances of the applicant families were not sufficiently distinctive to justify their admission despite their failure to qualify under the Directive.

[23] The Minister gave detailed written reasons for her decisions. The reasons given to the family of child A are representative (AR Vol. 4, P420-P440). The Minister's letter:

- commenced with some background, including reference to the first decision of the chambers judge respecting the A.B. family;
- confirmed that the basis for the family's application was a dedication to the French language, and a desire to assimilate with the Francophone community;
- noted that the application was supported by the Commission scolaire francophone, which regarded the admission of additional students as being beneficial to the school and the community;
- acknowledged that admission to the school would likely be in the best interests of the child;
- stated that the benefits to the child and the community must be balanced with other factors, such as "the interests of the NWT and the need to exercise my discretion in a consistent manner";
- summarized population trends and enrolment at the schools;
- reviewed the provisions of the 2016 Directive, which was not intended as "an 'open door' policy for everyone wishing to integrate into the Francophone community or wishing a French first language program for the benefit of their children";

- noted that 26 non-rights holder children had been admitted under the Directive, along with one other student who did not qualify under the Directive;
- concluded that the growth of the Francophone population and the stability of school enrolments demonstrated that the “2016 Directive . . . is therefore working”;
- noted that per-student costs were higher in the minority language schools, and while the incremental cost of an individual student was not significant, the addition of many non-rights holder students “could eventually require additional teaching staff which inevitably results in additional financial resources”;
- pointed out that the NWT was a small territory, with scarce financial resources, and that competing priorities had to be balanced, and that “it is not ‘practically possible’ to admit all non-rights holders who believe that it is in the best interests of their child to obtain French education in a minority school, even if they have the support of the minority school board. . . . Rather, the admission process must provide for a predictable criteria allowing Government to forecast and control the budgetary resources it may invest in minority education”;
- stated that the Minister’s discretion must be applied in a fair and consistent manner to all current and future applicants, and that non-rights holders who did not fit within the Directive must show “a distinctive and unique reason why she would be admitted, one that is not normally present in other cases”; and
- concluded that admitting too many applicants “would give rise to budgetary unpredictability”, would render the 2016 Directive and its categories moot, and “Moreover, the admission of all children wishing to learn French for the reasons noted in your application, and that of all others currently before me, would in essence represent an ‘open door’ policy for access to the minority school”. This would be contrary to the objective of preserving and promoting minority language education.

The Minister’s reasons in each case contain these common elements, which was not surprising considering that all of the applications were made in the same context and relied on overlapping arguments.

[24] Following this background discussion, commencing on page 8 of her letter the Minister addressed the particular circumstances of child A:

#### **Application to [A]**

In the case of [A], I note that one of the main reasons for the request for admission, as noted above, is that she, as well as your entire family, speaks French and you wish that she becomes fully proficient in written and spoken French. I also

note your family's remarkable involvement in the francophone community. However, the desire for one's children to be proficient in French, along with participation in the francophone community, is also true for other non-rights holders in the NWT and in Yellowknife, as was demonstrated in past NWT court cases.

Moreover, all the applications currently before me for admission outside the 2016 Directive present these elements as reasons why parents wish to obtain admission in the minority school program. Moreover, the fact that [A] already knows French is also not distinctive, as some of the other current applicants for admission (outside the 2016 Directive) present similar facts; and this was true as well historically as demonstrated in past NWT court cases. The admission of any student on the basis of knowledge of French would likewise bring unpredictability to the Government's budget in minority education (and could open access to non-rights holders who first attended an immersion program in Yellowknife or elsewhere thereby increasing the impact on the unpredictability of the Government's budget in education).

Other factors that are submitted by yourself as well as the CSFTNO and principal of EASC [École Allain St-Cyr] are equally true for other parents and children. It is normal for children to leave daycare and then attend a new school in a different environment, with new peers. While it would be preferable that each school continues with the same groups each year to favour integration into the school, that does not exist everywhere in Yellowknife and equally applies to both rights holders and non-rights holders. If I admit [A] on the basis that she attended the [the French daycare] Garderie Plein Soleil, I would then have to admit any child seeking admission from the daycare at EASC. That in my view engages the Government's budgetary issues noted above, but would also not be fair to other non-rights holder parents that would also seek admission to EASC but were not able to gain admission to the daycare due to the limited spaces or for any other reason.

In the end, the distinctive elements favouring admission in this case are that you, as parents, would hope for admission to support your child's proficiency in French, given her actual knowledge of the language. Unfortunately, admission under that basis would result in the admission of too many children outside the 2016 Directive, which in turn would lead to unforeseen and unpredictable financial budgetary consequences for the Government. If I admit [A] on this basis, I must in all fairness admit all other applicants currently before me, and then all others in the future. Past NWT court cases have demonstrated that many non-rights holder parents also wish admission in the minority program to provide a linguistic advantage to their child. Many of these children already speak French, many have attended a French daycare, and most families participate and wish to integrate in the

francophone community. Admission of each of these children is not financially possible or “practically possible” for the Government.

Therefore, while at the individual level, the interest of each child is favoured by attending the minority school, this is not the only element that I must consider. A more distinctive or unique element is required to justify admission, one that responds to my concerns related to the predictability of the Government’s budget in minority education. For example, ECE recently admitted a child outside the 2016 Directive. This child, in addition to the same elements you note favouring admission of [A] also did not speak English but spoke French. In such unique circumstances, where the favourable exercise of discretion maintains the predictability of the Government’s financial situation and budget in relation to minority education, ECE is able to grant admission outside of the 2016 Directive.

This being said, none of the elements that I considered as “interests of the NWT” above are conclusive. The costs, budget constraints, consistency and fairness in my decision-making are not individually overriding considerations. Similarly, the individual interests of [A] or the revitalization of the minority community are not, on their own, conclusive.

In my view, the Census numbers showing that the Francophone community is growing, the enrolment numbers of EASC that are also growing, and the admission of 22 non-rights holders under the 2016 Directive demonstrating its efficiency, are all very significant elements. Likewise, the fairness and consistency of my decisions for other applicants outside the 2016 Directive as well as the necessity for the Government to forecast and manage the annual budgetary resources necessary for minority language education are very important. Considered together, all of these considerations together tilt the balance, unfortunately, in favour of denying admission to EASC.

## **Conclusion**

Consequently, while I appreciate the advantages of attending EASC for [A] and for the community, in my view and on balance, an admission in this case makes the admission process for non-rights holders as well as budget implications unpredictable. Costs, consistency and fairness for the francophone community, but also for the entire population of the NWT, do not favour admission in this case.

In this case, as your request is outside the 2016 Directive, and following the analysis of the object and purpose of s. 23 noted above, the refusal to admit [A] is not in breach of s. 23 of the Charter in either its individual or “collective” aspects.

The breadth and detail in the Minister's letters is important, because, as noted *infra*, para. 44, judicial review focuses on the decision actually made, with the reasonableness of the outcome and the reasons articulated for reaching that outcome being reviewed together.

#### Reasons of the Chambers Judge

[25] The initial judicial review application brought by the A.B. family was disposed of by the reasons reported as 2019 NWTSC 25. The chambers judge confirmed that there was no challenge to the validity of the Directive:

39. However, the rationale of the Directive is to target groups of people who may have access to French first language schools, which requires distinctions that are necessarily arbitrary. The Directive aims to allow “a limited number of children of non-rights holder parents” to attend French first language schools in the NWT. It is therefore inevitable that limits will be imposed and distinctions made. The Directive provides special access to French first language schools for those who are included in the groups set out in the Directive. The groups set out in the Directive were chosen by the Minister after consultation with the community and, as stated above, the applicants did not argue that the Directive and the choices it reflects violate the *Charter* or are otherwise invalid.

The chambers judge concluded that the Minister's decision that the A.B. family did not qualify under the New Immigrant category in the Directive was reasonable: 2019 NWTSC 25 at paras. 37, 40.

[26] However, the chambers judge concluded that the Minister fettered her discretion when she dismissed the subsequent request that W.B. be admitted to the school even though he did not qualify under the Directive. The Minister had an obligation to consider whether she would exercise her discretion to admit him outside the parameters of the Directive, and the explanation that his request was being turned down because he did not meet those parameters was unreasonable: 2019 NWTSC 25 at paras. 75-79.

[27] The chambers judge also concluded that the Minister was required to take section 23 into account in exercising her discretion. The Minister could not, as she suggested, impose a complete ban on non-section 23 families attending the schools: 2019 NWTSC 25 at paras. 46-48. The chambers judge reasoned:

50. Thus, language rights, including s. 23, “must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada” [emphasis in original] (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25).

While the Supreme Court of Canada had confirmed that the discretion to admit non-section 23 children to the schools rested with the government, that did not mean that the government could “disregard s. 23 and its remedial purpose”: 2019 NWTSC 25 at paras. 50-52.

[28] The chambers judge summed up his reasoning on the obligation of the Minister to consider *Charter* values as follows:

65. I therefore conclude that, in the exercise of her power over the admission of children of non-rights holder parents to French first language schools in the NWT, the Minister must strike a balance between her discretion and the broad purpose of s. 23. She must consider *Charter* rights, including the needs of the linguistic minority and the need to foster the preservation and development of this community, in the exercise of her power over the admission of non-rights holders to minority language schools. In exercising her discretion, the Minister must consider not only the interests of the NWT, including the cost of French first language education, and the best interests of the children, but also the purposes of section 23 and the rights it grants to the linguistic minority.

The Minister’s rejection of A.B.’s application “. . . shows that the Minister lacks a proper understanding of her s. 23 obligations and the rationale for her own Directive”: 2019 NWTSC 25 at para. 83. The government appealed: #A-1-AP-2019-000006.

[29] The chambers judge had set aside the Minister’s decision, and remitted the application of the A.B. family back to her for reconsideration. After reconsideration, the Minister again rejected the application. As noted, W.B. attended a French immersion school, but the family thought it was inadequate. They applied for judicial review for a second time. The chambers judge considered the second judicial review application together with the applications of the four other families. He allowed the application, and once again remitted A.B.’s application to the Minister for reconsideration: 2020 NWTSC 28.

[30] In the reasons disposing of the second judicial review application, the chambers judge concluded that the Minister had not violated the principles of procedural fairness, nor had she acted in bad faith: 2020 NWTSC 28 at paras. 41, 124-25. Applying the recently released decision in *Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65, the chambers judge concluded that the applicable standard of review was reasonableness: 2020 NWTSC 28 at para. 44. A decision can be unreasonable if it is internally irrational, or if it is unjustified in light of the factual and legal constraints that bear on the decision: 2020 NWTSC 28 at paras. 53-54. When a decision engages *Charter* rights, the discretion must be exercised in light of constitutional guarantees and the values they reflect: 2020 NWTSC 28 at para. 55, citing *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

[31] The chambers judge, in summarizing the Minister's lengthy decisions, observed that the Minister acknowledged that admission to the schools would likely be in the best interests of the children, but the Minister denied the applications because:

- (a) The Francophone communities were thriving, and enrolment in the schools was rising, indicating to the Minister that the Directive was achieving its purposes.
- (b) Allowing exceptions would render the Directive moot, and lead to budgetary unpredictability.
- (c) In order to promote consistency and predictability in decision making, children who did not qualify under the Directive should only be admitted in unique and distinctive situations.

The Minister was of the opinion that the circumstances of the applicant families were not sufficiently distinctive to justify their admission despite their failure to qualify under the Directive: 2020 NWTSC 28 at paras. 33-37.

[32] The chambers judge repeated the views he expressed in his earlier reasons that the Minister must take section 23 into account when exercising her discretion: 2020 NWTSC 28 at para. 60. The enrolment rate was important to the long-term viability of the schools, and the admission of non-section 23 children would support the objectives of revitalization of minority culture and language: 2020 NWTSC 28 at para. 63-68. The Directive provided for the admission of non-section 23 children, but also limited those admissions by "favouring three categories" of families. This was designed to manage the costs of the school system, and to ensure the viability of the majority schools: 2020 NWTSC 28 at paras. 69-71.

[33] The chambers judge then analyzed the reasons given for the Minister's decisions. When those decisions were compared to the reasons given for them (*supra*, para. 31), ". . . the Minister drew a number of conclusions that were not supported by the evidence before her": 2020 NWTSC 28 at para. 72. The Minister's conclusion that the minority community and the minority schools were flourishing arose from an erroneous analysis of the statistical evidence. A detailed re-examination of the evidence demonstrated that enrolment at the schools was not increasing: 2020 NWTSC 28 at para. 76-84. Likewise, the Minister's conclusion that the Francophone communities were "continually growing" was not necessarily supported by census data: 2020 NWTSC 28 at paras. 84-89. In any event ". . . while it was not unreasonable to conclude that the minority population is growing, the significance of this conclusion is limited, especially given the challenges of assimilation and exogamy threatening the viability of minority communities in the long term": 2020 NWTSC 28 at para. 89.

[34] On the other hand, the Minister's conclusion that additional costs would be generated by the admission of more children was reasonable on the record before her, although the incremental costs may have been overestimated: 2020 NWTSC 28 at paras. 91-96.

[35] The chambers judge did not accept the Minister's concern that admitting students who did not qualify under the Directive would undermine the policy reflected in the Directive:

97. The main difficulty with the approach taken by the Minister, which in my view is in itself a determinative error of logic, was that she misunderstood how her decisions would affect the exercise of her discretion. . . .

Requiring that there be a distinct and unique reason to depart from the policy set out in the Directive failed to recognize the different circumstances of the schools and the communities in Yellowknife and Hay River. Further, “. . . each admission granted changes the circumstances in which she is required to exercise her discretion on the next application”, and each decision also changes the fiscal consequences of the next: 2020 NWTSC 28 at paras. 98-100. The Minister's concerns about consistency were “greatly exaggerated”, and it was “unreasonable for the Minister to give such weight to this concern in her reasoning process”: 2020 NWTSC 28 at para. 101.

[36] The decisions were unreasonable “based solely on the errors identified” to this point in the analysis, because they created “fundamental flaws in the rationality internal to the Minister's reasoning process”: 2020 NWTSC 28 at para. 102. While this was a sufficient basis to set aside the decisions, they also failed to achieve the necessary proportionate balancing of *Charter* considerations and the government's interests as required in *Doré*: 2020 NWTSC 28 at para. 103.

[37] The proportionality analysis of *Charter* considerations required that the Minister consider the positive impact that admitting additional children would have on the viability of the schools. Further, the opinions of the Commission scolaire francophone were not given due weight. Merely allowing one or two more students into the schools would have no impact on the majority language schools. These errors were compounded by the fact that the Minister erred in her assessment of the government's interests, by overestimating the fiscal implications, and by misunderstanding how admission of the students would affect the fairness of the admissions process in the future: 2020 NWTSC 28 at paras. 104-15.

[38] The chambers judge accordingly set aside all of the decisions, and referred all of the applications back to the Minister for reconsideration: 2020 NWTSC 28 at paras. 120. The second appeal followed: #A-1-AP-2020-000009.

#### Issues and Standard of Review

[39] These appeals raise the following issues:

- (a) Is the Directive *ultra vires* or unreasonable?
- (b) Do the Directive and the Minister's decisions comply with *Charter* values?
- (c) Did the Minister unlawfully or unreasonably fetter her discretion?

- (d) Were the Minister's decisions with respect to the applications by the respondent families reasonable?

[40] The Minister's decisions under review were discretionary decisions. An exercise of a statutory discretion must be consistent with the rationale of the statutory scheme, and reasonably exercised. The standard of review is generally reasonableness: *Vavilov* at paras. 108, 116; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 49-55, [2013] 2 SCR 559; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 27, [2012] 1 SCR 364; *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29 at para. 43, [2012] 2 SCR 108. A discretion may not be exercised in a way that breaches a *Charter* right: *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras. 133-34, [2000] 2 SCR 1120. However, none of the respondents assert such a right.

[41] The *Vavilov* analysis applies most directly to a review of the merits of administrative decisions: *Vavilov* at paras. 23, 25. Judicial review generally involves reviewing whether decisions respecting legal rights, rules of law, or questions of statutory interpretation are "reasonable". There are no such issues here. There is no disputed question of law about the interpretation of s. 23 of the *Charter of Rights and Freedoms*. It is agreed that the respondent families do not qualify under s. 23, and that they have no other legal or statutory right or expectation to attend the schools.

[42] In these appeals there is therefore no statutory or constitutional right to be interpreted and applied. The situation is more analogous to the exercise of a ministerial prerogative. While the standard of review can be said to be reasonableness, in this particular context the range of available decisions that could be described as reasonable is very wide: *Vavilov* at para. 89. Unless the Minister's decisions were unlawful, capricious or arbitrary, they were likely immune from review on the basis that they were unreasonable: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras. 34, 37 [2002] 1 SCR 3. It goes without saying that the chambers judge is not entitled to substitute his or her own assessment of whether a child should be admitted to the schools for that of the Minister: *Suresh* at para. 34. The reviewing court is not entitled to engage in a new weighing of the relevant factors, and if the decision maker considered all of the relevant factors, it is not open to the reviewing court to characterize the decision as being unreasonable: *Agraira* at para. 91.

[43] The flexibility accorded to the decision maker depends on the circumstances. An important factor is the source and scope of the discretion: *Vavilov* at para. 110. Another important factor is that the discretion is exercised directly by the Minister, an elected public official who should be assumed to have a wide-ranging discretion over sensitive and policy driven matters like admission to the section 23 schools. This is a matter of "high policy", not "pure law": *Vavilov* at para. 88. In short, the discretion involved here is very wide, which significantly expands the scope of decisions that would be justified in relation to the relevant constellation of law and facts. In these appeals, reasonableness is a very big place.

[44] Reasonableness review focuses on the decision actually made, including both the reasoning and the outcome: *Vavilov* at para. 83. The reasonableness of the outcome, and the reasons articulated for reaching that outcome, are reviewed together: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 14, [2011] 3 SCR 708.

[45] The Directive is admitted to be valid, but the scope of any challenge to the validity of the Directive itself would in any event be narrow. Even if the Directive was a form of statutory instrument, it would traditionally only be reviewed by the courts for constitutionality or *vires*: *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras. 24-8, [2013] 3 SCR 810; *Vavilov* at para. 111; *Bell Canada v Canada (A.G.)*, 2019 SCC 66 at paras. 32, 57. The content of subordinate legislation is, at the highest, reviewed for whether it is unreasonably inconsistent with the purposes of the statute, in the sense that no reasonable body could have enacted it: *Green v Law Society of Manitoba*, 2017 SCC 20 at paras. 20, 26, [2017] 1 SCR 360.

#### Validity and Reasonableness of the Directive

[46] The validity and reasonableness of the Directive is conceded, but it is important to examine why. The Minister's decisions were made within the framework of the Directive, and the reasonableness of her decisions are directly tied to the Directive. Further, given the admitted validity of the Directive, the Minister's decision not to depart from it unless there were unusual circumstances was itself reasonable.

[47] The law recognizes the legitimacy and desirability of a decision maker adopting policies: *Vavilov* at para. 130; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para. 66, [2011] 2 SCR 504; *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at pp. 6-7; *Z., R. (On the Application of) v Hackney London Borough Council*, [2020] UKSC 40 at paras. 85-86.

[48] The justifications for allowing administrative policies include that:

- (a) policies provide notice to the public of what the decision maker expects of them, and what the public might expect of the decision maker: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 98, [2013] 2 SCR 559;
- (b) policies encourage consistency in decisions where many public officials or employees are involved in making similar decisions: *Vavilov* at para. 130;
- (c) published policies make decision making more transparent; decisions consistent with the policy have a known source, while inconsistent decisions call for justification: *Vavilov* at para. 131; *Begum, R. (on the application of) v Special Immigration Appeals Commission*, [2021] UKSC 7 at para. 124;
- (d) policies are necessary or expedient when a large volume of decisions must be made;

- (e) while policy might emerge from a series of decisions, a formally stated policy is likely to be more comprehensive, rational and accessible: ***Thamotharem v Canada (Minister of Citizenship and Immigration)***, 2007 FCA 198 at para. 55, [2008] 1 FCR 385.

The Minister was entitled to formulate and publicize the policies she would apply in processing applications to attend the schools. The existence and contents of the Directive are important factors in determining if the Minister's decisions meet the reasonableness standard.

### *Validity*

[49] As noted, there is no challenge to the validity of the Directive. The Directive could have been implemented under the Minister's plenary power under s. 126(1) of the *Education Act*, SNWT 1995, c. 28, which provides that: "The Minister shall administer this Act". Alternatively, s. 113(1)(c) of the *Act* allows the Minister to "give directions to the education body regarding the administration and delivery of the education program", which would include directions on admissions policy.

[50] The statute does not constrain the Minister's discretion to set general policies on admission, or on any particular application for admission to the schools. Given the breadth of her discretion, it could not be argued that the Directive was in any sense *ultra vires*. It was a valid administrative tool, and the Minister was entitled to use it in making her decisions. Since the Government could have adopted a policy that only section 23 families could attend the section 23 schools, there is no basis for challenging the Directive as being *ultra vires*: ***Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife***, 2015 NWTCA 2 at paras. 45-46, [2015] 3 WWR 490.

[51] As noted, the Directive is also not challenged as being unconstitutional: 2019 NWTSC 25 at para. 39. It deals, by definition, with those who do not have constitutional rights.

### *Reasonableness*

[52] Where the exercise of discretion would be reviewable for reasonableness, but there is a policy in place respecting how that discretion will be exercised, a threshold question is whether the policy itself is reasonable. As stated in ***R. (Tigere) v Secretary of State for Business, Innovation and Skills***, [2015] UKSC 57 at para. 88, [2015] 1 WLR 3820:

88. Those who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self-evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable. . . .

The three categories of eligible families listed in the Directive are clearly reasonable policy choices; they are intelligible, transparent, and justified based on the relevant constellation of law and facts: **Vavilov** at paras. 79-81. They have a rational connection to the reason for the existence of the section 23 schools, and recognize the position of certain categories of family that do not hold section 23 rights. The Directive itself could not be challenged as being unreasonable.

[53] It follows that when making decisions in individual cases, the Minister was not required to justify the underlying policy decision to admit to the schools only a “limited number” of non-rights holders, or the contents of the Directive. The Minister’s lengthy reasons (summarized, *supra*, para. 23) were only made necessary as a response to the non-deferential standard of review applied by the chambers judge. The Directive, as a valid background policy, was in fact a part of the Minister’s “reasons” in individual cases.

[54] In summary, the Minister’s decisions could not be challenged because they relied on the Directive, because the Directive reflected legitimate policy choices that met the **Vavilov** standard of reasonableness. It was also reasonable for the Minister to regard the Directive as limiting the circumstances in which she would exercise her residual discretion.

#### Compliance with *Charter* Values

[55] The appellant argues that the chambers judge reversed the burden of proof, and effectively called on the Minister to prove that her decisions were compliant with the *Charter* or *Charter* values. The appellant is correct that the burden of proof was on the respondents: **Conseil scolaire francophone de la Colombie-Britannique v British Columbia**, 2020 SCC 13 at paras. 58-59, 71, 447 DLR (4th) 1. There was, however, a more foundational error.

[56] The central flaw in the chambers judge’s reasoning is that he proceeded as if the respondent families were asserting *Charter* rights. They were not. It is admitted that the respondent families do not fall within section 23 of the *Charter*. The chambers judge’s reasoning on constitutional values, however, proceeded on the mistaken assumption that he was interpreting and enforcing constitutional rights. In addition, the chambers judge failed to recognize that the Directive itself was designed to foster the viability of the minority French language community. The Directive was constitutional, and was sensitive to the overall objectives of s. 23.

[57] It is a truism that public decision makers should always have regard to fundamental societal values, such as liberty, dignity, and equality. These appeals, however, deal with the very precisely defined provisions of section 23. Unlike almost all the other provisions of the *Charter*, section 23 does not set out broadly defined and universal rights. It was carefully crafted to give a narrow bundle of rights to a defined sub-population of Canada. Section 23 was obviously a tool designed to achieve a secondary objective, namely protection of minority language communities, and when it is being directly applied, it should always be interpreted with that objective in mind. For example, when deciding within the four corners of s. 23 an issue like whether “numbers warrant”, regard must be had to the broader purposes of s. 23: **Conseil scolaire francophone de la Colombie-**

*Britannique* (SCC 2020) at paras. 15-17. It does not follow, however, that the Minister was obliged to exercise her discretion in a way that expanded section 23 rights to those who are admittedly non-rights holders. Having regard to fundamental societal values does not require the extension of constitutional rights to those who do not hold them. The extent that the Constitution was intended to be preventative, remedial and unifying in nature is to be found within the four corners of s. 23.

[58] The chambers judge therefore misstated the issue. Further, his criticism of the Minister's decisions for not respecting *Charter* values failed at the factual level.

*Misstatement of the Issue*

[59] The chambers judge's assumption that he was interpreting and enforcing constitutional rights permeates the reasons:

- The quotation from *Beaulac* (supra, para. 27) expressly relates to “ language rights, including s. 23”.
- The observation that “the provincial and territorial legislatures are required to play a role in implementing section 23”: 2019 NWTSC 25 at para. 53.
- In concluding that the Minister had to “strike a balance” considering “the rights [s. 23] grants to the linguistic minority”: 2019 NWTSC 25 at para. 65.
- In finding that “the Minister lacks a proper understanding of her s. 23 obligations”: 2019 NWTSC 25 at para. 83.
- The statement that the Minister “must take section 23 into account”: 2020 NWTSC 28 at para. 60.
- The observation that the provinces and the territories “must ensure compliance with section 23 and not prevent the realization of its purpose” 2019 NWTSC 25 at para. 55.
- The observation that if the Minister failed to consider section 23, that would “. . . be contrary to s. 23's purpose of halting the progressive erosion of the minority culture and language” 2019 NWTSC 25 at para. 60.
- The reliance on cases like *Doré*, which apply when *Charter* rights are engaged.
- The assumption that “the decisions bring into play the protections afforded by s. 23 of the *Charter*”: 2020 NWTSC 28 at para. 103.
- The assumption that the Minister had to consider “. . . each admission application as they relate to the protections afforded by s. 23”: 2020 NWTSC 28 at para. 104.

The respondents' arguments are premised on the assumption that these appeals involve section 23 rights. These appeals, however, are not about section 23, or the rights it creates. It is admitted that the respondents do not have *Charter* rights. There are no constitutional "protections" involved. The obligations of the provinces and territories to observe and respect the *Charter* are collateral to the issues that were before the chambers judge.

[60] The chambers judge essentially proceeded as if the broader Francophone community was a party to the litigation, and that it had independent rights that were being enforced. For example, the chambers judge concluded that: "... the Minister should have therefore, at a minimum, considered the contribution that an additional student joining the Francophone community in the NWT would make to the vitality and flourishing of that linguistic minority": 2019 NWTSC 25 at para. 85. Even though it was admitted that the respondents had no "individual constitutional rights", the chambers judge concluded that the government was under an obligation to promote collective rights when deciding on the admission of individual students to the schools: 2019 NWTSC 25 at para. 49. He stated in 2020 NWTSC 28 at para. 62:

62. Although the applicant parents do not have any rights under s. 23 of the *Charter*, the decision whether or not to admit their children was the subject of a recommendation by the CSF as representative of the rights holders. The recommendation concerned the impact that the admission of the children would have on the viability of the CSF schools and the Franco-tenoise community. The impact is of two types. (Emphasis added)

This approach reflects an error of law. Neither the interests of the Commission scolaire francophone nor the "rights holders" were engaged. The only "rights" in issue were those of the individual applicants: *Solski* at para. 23. They had no constitutional rights, and they cannot piggyback on those of the rights holders. The only issue was whether the Minister's decisions with respect to the particular applications were reasonable.

[61] *Conseil scolaire francophone de la Colombie-Britannique* (SCC 2020) at para. 17 confirms that section 23 rights have a collective aspect. However, interpreting section 23 in accordance with its collective objectives does not justify extending individual section 23 rights to non-rights holders, or undermining territorial policies that do not engage section 23 rights.

[62] Section 23 is seen as one manifestation of a broader policy of promoting and protecting minority language rights in Canada. It would turn that concept on its head, however, to suggest that section 23 should then be expanded to cover persons who do not have section 23 rights, in pursuit of the general objective. The situation of non-rights holders is "fundamentally and constitutionally different from" those of rights holders: *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para. 9, [2005] 1 SCR 238.

[63] There is clearly an overlap between the objectives of section 23, and the objectives of the Directive. While both are directly focused on education and individual families, they both also have

an indirect objective of ensuring the long-term viability of minority language communities in Canada. This consistency in purpose is laudable, and within the spirit of Confederation: *Solski* at para. 6. However, the sources of section 23 rights, compared to any expectations created by the Directive, are entirely different. Section 23 creates constitutional rights. The Directive was merely an expression of governmental policy. The interpretation and scope of that governmental policy was in the hands of the Minister. It was not open to the superior court to second guess the underlying policy choices by comparing them to related, but inapplicable, constitutional rights under the *Charter*.

[64] The three objectives of section 23 were outlined in *Conseil scolaire francophone de la Colombie-Britannique* (SCC 2020) at para. 15: “. . . it is at once preventive, remedial and unifying in nature. It is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of those communities”. It is one thing to say that section 23 should itself be interpreted and applied in a manner that is consistent with these objectives. It is desirable for the provinces and territories to adopt policies that complement those objectives. But it is something else to say that section 23 rights must be extended to those who admittedly do not enjoy those rights, or that provincial or territorial decisions can be overruled for non-compliance with those objectives. Respect for provincial and territorial jurisdiction over education must be maintained: *Solski* at para. 10; *Conseil scolaire francophone de la Colombie-Britannique* (SCC 2020) at para. 7.

[65] It follows that *Doré* does not apply, because the *Doré* analysis is not engaged unless a *Charter* right is infringed: *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para. 58, [2018] 2 SCR 293. *Doré* at para. 56 deals with balancing “the severity of the interference of the *Charter* protection with the statutory objectives”. Again, it is admitted that the respondent families enjoy no “*Charter* protection” entitling them to attend the schools; there can be no “interference” with nonexistent rights. *Doré’s* call for proportionality does not require or justify extending constitutional rights to those who do not have them: *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, (SCC 2013) at paras. 55-57.

[66] The respondents point out that *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para. 34, [2015] 1 SCR 613 held that the Minister had to have regard to religious freedoms, even though Loyola High School, as a corporation, perhaps did not enjoy that freedom. However, in that case there were others, namely the Catholic students at Loyola High School, who were entitled to freedom of religion and would be directly impacted by the decision. In this case it is admitted that the respondents do not enjoy any rights under section 23, and the Minister’s decisions would, at most, have a tangential and remote connection to the rights of section 23 families.

[67] The chambers judge relied on a passage in *Yukon Francophone School Board*, but out of context: 2019 NWTSC 25 at para. 52; 2020 NWTSC 28 at para. 56. As noted, *Yukon Francophone*

**School Board** confirmed that it is the government (not the school board, or the parents) that has the ability to decide who may attend the section 23 schools, with the proviso:

74 . . . This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon’s approach to admissions prevents the realization of s. 23’s purpose: see *Mahé*, at pp. 362-65.

This statement does not assist the respondents. As the reference to *Mahé v Alberta*, [1990] 1 SCR 342 confirms, it merely states that when interpreting whether a family does or does not fall within section 23, the government must act lawfully and consistently with the *Charter*. Where, as here, it is admitted that the families are outside section 23, no issue of “compliance with s. 23” arises, and “s. 23’s purpose” does not extend to giving section 23 rights to families who have no such rights.

[68] This passage from para. 74 of *Yukon Francophone School Board* has been read by some as holding open the potential that the government may have an obligation to admit non-rights holders to the schools, if the viability of the schools would be placed in jeopardy without those additional students: see for example *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2018 BCCA 305 at paras. 193-94, 14 BCLR (6th) 52. That interpretation would appear to be inconsistent with the qualification in section 23 that minority language schooling need only be provided “where numbers warrant”; the “numbers” relate to present and future rights holders only: *Conseil scolaire francophone de la Colombie-Britannique* (SCC 2020) at paras. 25, 58, 60, 183; *Commission Scolaire Francophone, Territoires du Nord-Ouest* at para. 29. It is also inconsistent with the core finding in *Yukon Francophone School Board* that it is the government that controls admissions. In any event, it was not argued before the Minister or the chambers judge that the schools in the Northwest Territories, or the Francophone community are in any jeopardy. As the appellant points out, the respondent Commission scolaire francophone had previously argued in *Commission Scolaire Francophone, Territoires du Nord-Ouest* that the schools needed to be expanded in size because of increasing enrolment.

[69] The chambers judge therefore erred when he concluded that, when deciding on applications for admission, the Minister was legally obliged to consider the broader objective of promoting the flourishing of official language communities that underlies section 23. This approach undermines the carefully drafted parts of section 23 defining which families do, and which do not, enjoy rights under that provision. It also undermines the binding ruling of the Supreme Court of Canada that admission of non-section 23 rights holders to the schools is the prerogative of the government: *Yukon Francophone School Board* at paras. 68-69. It was up to the government and the Minister to decide what criteria should be considered. This was a policy decision, not vulnerable to judicial review.

[70] In summary, the Minister was not legally obliged to allow any child who does not qualify under section 23 to attend the schools: *Association des parents ayants droit de Yellowknife* at paras. 45-46. Minority language education rights above the “constitutional minimum” set out in

section 23 are within the discretion of the government: *Yukon Francophone School Board* at para. 70. If there was good reason, the Minister could have refused admission whether or not a student qualified under the Directive. That would be entirely consistent with *Charter* values. “*Charter* values” do not oblige the extension of *Charter* rights in those citizens who are not entitled to those rights.

*The Directive Respects Charter Values*

[71] The chambers judge’s criticism of the Minister’s decisions for an alleged failure to take section 23 into account in the exercise of her powers also fails at the factual level.

[72] The chambers judge held: “. . . the Minister erred in her assessment of the viability of the CSF schools and the community”: 2020 NWTSC 28 at para. 104. However, in its submission to the Minister before she made her decisions, the Commission scolaire francophone had not argued that either the schools or the community would be at jeopardy if these non-rights holders’ children were not admitted. Likewise, no such arguments were made before the chambers judge, and no evidence was introduced to support them. The Commission scolaire francophone did not challenge the Directive on this basis. There was no factual basis on this record to support these conclusions.

[73] Further, the very existence of the Directive, and the express wording of its Purposes and Rationale, demonstrate that the whole system of admitting students who did not have section 23 rights was directed in part at those objectives. The chambers judge acknowledged that: 2019 NWTSC 25 at para. 39, quoted *supra*, para. 25. Even if the government was obliged to consider a broader preventative, remedial and unifying purpose behind s. 23, aimed at the collective aspect of minority language rights, the Directive did so.

[74] The factors that the chambers judge found had to be reflected in the Directive and the Minister’s decisions, were in fact all considered: compare the Directive with 2019 NWTSC 25 at para. 65, quoted *supra* para. 28; 2020 NWTSC 28 at para. 62. In effect, while having acknowledged the reasonableness and validity of the Directive, the chambers judge then concluded that the Minister’s exercise of her discretion within the parameters of the Directive was unreasonable. The chambers judge may not have agreed with the weight given to the various factors, but that is not within the mandate of the reviewing court. The chambers judge essentially applied a correctness standard of review to the Minister’s assessment of the underlying objectives.

[75] Therefore, to the extent that the Minister was under any stand-alone obligation to consider *Charter* values, that was done in the drafting of the Directive. It was not necessary for the Minister to consider those factors again when making each individual decision. One of the reasons for having a policy is to incorporate into decision making the consistent consideration of factors that apply to most or all applications, obviating the need to reconsider them every time.

[76] It follows that the chambers judge’s objection could not be that the Minister had ignored the interests of the minority language community in the Northwest Territories, but simply with the

weight given to them. There was clearly nothing objectionable about the three categories of eligible students listed in the Directive. Allowing the admission of those categories of students, who did not enjoy section 23 rights, promoted the same values as those reflected in section 23. The real objection is that the Directive did not contain even more categories, or that the Minister simply did not admit every student who had some connection with the Francophone community. That approach essentially turns the carefully formulated provisions of section 23 into an “open choice” system by creating constitutional rights in those who clearly do not possess them.

[77] In summary, at a factual level, the Minister did consider the broader interests of the minority Francophone community. There was no basis to judicially review the weight given to those interests. The setting aside of the Minister’s decisions was not consistent with the applicable standard of review for discretionary, policy-based decisions.

### Fettering of Discretion

#### *Overview*

[78] With respect to the application of A.B., the Minister concluded that the family did not qualify under the Directive. When the family asked to be admitted to the school anyway, the Minister reiterated that the family did not qualify under the Directive, and that admission to the schools was limited to those who did so qualify. The chambers judge concluded that the Minister “fettered” her discretion by declining to consider whether she should admit W.B. to the school, even though the family did not qualify under the Directive: 2019 NWTSC 25 at para. 79.

[79] This record, however, does not disclose any unlawful or unreasonable limitation of the Minister’s discretion. On this specific record, the Minister was entitled to regard the establishment and application of the Directive as being an exercise of her discretion, not a fettering of her discretion. When the A.B. family applied to be admitted to the schools even though they did not qualify under the Directive, the Minister was entitled to repeat that they would not be allowed to attend because they did not qualify. At best, the family’s complaint is about the adequacy of the Minister’s reasons. The Minister, however, was indicating, and was entitled to indicate, that her discretion in their case had been exhausted by the terms of the Directive.

[80] When the reviewing court set aside the decision respecting A.B. for fettering, and directed the Minister to reconsider her decision, the Minister advised the other four families that she would reconsider their applications as well. The Minister advised that she proposed to appeal the decision respecting A.B., but in the meantime she would follow its guidance. In doing so, the Minister showed appropriate respect for the decision of the reviewing court, pending these appeals. However, the Minister subsequently indicated that she was not prepared to exercise her residual discretion to admit the children of the other four families. With respect to these four families, the respondents argue that the Minister only feigned considering whether to exercise her residual discretion, but in fact applied a fixed policy to the applications.

[81] Overall, the record does not disclose any unlawful fettering of the Minister's discretion.

*Mootness*

[82] First of all, at this stage of the proceedings, the issue of fettering is moot. Even if the Minister was required to consider the exercise of a residual discretion, outside the four corners of the Directive, she did so. The respondents' complaint at this stage is merely that the Minister did not exercise her discretion in their favour. Their complaints, particularly the allegation that the Minister only feigned exercising a residual discretion, are only attempts to step around the standard of review. The respondents argue, in essence, that on this record the Minister had no alternative but to grant their applications. That is a correctness standard of review.

*Fettering discretionary powers*

[83] Discretionary powers are ubiquitous in public law. Many public law questions are not capable of reasonable decisions based on fixed rules, and discretion must be vested in the decision makers. There are outside boundaries on discretionary powers. One outer limit is that the law will not assume that a discretion may be exercised in an arbitrary or capricious way: *Vavilov* at para. 88. At the other end of the spectrum, some statutory powers require the consideration of some factors, require that other factors not be considered, or provide presumptive rules respecting when the discretion must be exercised in favour of the citizen. An error in selection and consideration of the factors may taint the exercise of discretion.

[84] In some instances, a refusal of the decision maker to exercise a discretion will amount to a "fettering" of the discretion. The establishment of policies to guide the exercise of discretion, however, does not itself amount to fettering. Fettering generally occurs when a policy is adopted that potentially narrows the discretion established by the statute. An exercise of the discretion within the scope of the policy is acceptable, as long as the decision maker recognizes that he or she still has the discretion to decide outside the scope of the policy, but inside the scope of the statute. Recognizing a residual discretion does not, however, mean that the decision maker has to ignore that it is "residual", being outside the mainstream policy, and therefore that it calls for exceptional circumstances.

[85] The premise of the rule against fettering is therefore that while decision makers may validly adopt policies or guidelines to assist them in exercising their discretion, they are not free to adopt mandatory policies that leave no room for the residual exercise of their statutory discretion. Notwithstanding the policy, each application must be considered on its own: *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para. 71, [2004] 3 FCR 195. That general rule, however, does not apply where the decision maker is entitled to treat the policy itself as exhaustive of the discretion. For example, the Regulations (*supra*, para. 11) that govern admission to the schools after 2020-21 state that to be admitted families "must" fall within the four categories. There is no residual discretion.

[86] In general, openness to consider applications outside a stated policy is a requirement with respect to many statutory discretions; failure to do so may result in “fettering”. However, in this particular case that is not so. Firstly, since the government could bar admission to the schools of any non-section 23 students, no applicant has a legal right to insist that the Minister exercise her discretion at all (*supra*, paras. 6-7, 50). Secondly, as noted (*supra*, paras. 49-54), the Directive cannot be attacked because it is *ultra vires* or unreasonable. It is one that a reasonable decision maker could make, and the Minister is not required to justify its content or limits to any individual applicant. The Minister is, in effect, entitled to say when and if her discretion will be exhausted if the three categories in the Directive are assessed and applied. Thirdly, in exercising her residual discretion, the Minister is not required to ignore the Directive, and can conclude that the Directive has already weighed many or all of the relevant factors advanced by any individual applicant. Fourthly, while the Minister retains a residual discretion, the suggestion that she must recite its exercise in each case is merely formalistic.

#### *The Scope of the Minister’s Discretion*

[87] The Directive was adopted by the Minister after public consultation. She took the view that it was “binding” on her, in the sense that if a student fell within one of the three categories, she would have to allow admission to the school. However, she did reserve to herself, and sometimes exercised, a residual discretion to admit a student who did not qualify. No applicant, however, had any statutory right to have her exercise that prerogative, and she could decide that in any particular case her discretion had been exhausted by the Directive. For example, if an applicant only made arguments, or presented a profile, that had already been considered when the Directive was drafted, the Minister was entitled to take the view that her discretion had been exhausted by the Directive.

[88] The effect of the respondents’ argument is that the Minister was required by law to have a fourth category in the Directive (set out *supra*, para. 10):

4. Other. Any other family that does not qualify under section 23 or the previous three categories, but would like to attend the French first language school.

Alternatively, the respondents argue that the Minister was required, in every case, to effectively state: “I am rejecting your application because you do not fall into one of the three categories in the Directive, and I am not prepared to exercise any residual discretion in your favour”. The Minister was not required to do either.

[89] The rule against fettering does not apply in this circumstance, because the preconditions for it are not met. There was no “gap” between a statutory discretion and the policy reflected by the Directive. The Minister was entitled to adopt mandatory policies. Whether the policies she actually adopted were mandatory was also within her discretion, and not subject to judicial review unless her decision was unreasonable. Since there were no statutory boundaries to her discretion, she was entitled to enact the Directive as encompassing the exclusive circumstances under which she would

exercise her discretion in any particular case. Finally, it was up to the Minister to decide if the application of the Directive exhausted her discretion in any particular case.

[90] As previously pointed out, the Minister's discretion was very wide, and was more akin to the exercise of a prerogative. It was not an adjudicative or quasi-judicial discretion as in *Thamotharem*. Asking whether a policy on the granting of a prerogative benefit "has the force of law" is contradictory. No legal rights are involved. The fact that the Minister felt "bound" to grant admission if the Directive was met does not change that.

[91] The premise of the fettering argument is that the decision maker has an obligation to decide whether or not to exercise the discretion, even if the applicant does not meet the criteria in any stated policy. Since there is no constitutional, statutory, or common law right for any non-section 23 child to attend the schools, whether absolutely or on a discretionary basis, the Minister retained the discretion not to exercise her discretion. The fettering argument may be available where there are statutory or other legally binding provisions requiring that a discretion be exercised. However, there are none here. The Minister had no legally enforceable obligation to exercise her discretion in any case, and the fact that a Directive was issued does not change that. There was no "residual discretion" that the Minister was legally obliged to exercise.

### *The Standard of Review*

[92] In addition, the chambers judge's decision on fettering was inconsistent with the established standard of review at three different levels.

[93] Firstly, the Minister's interpretation of the Directive is only reviewable for reasonableness. The Directive contains wording indicating that families who wish to attend the section 23 schools must fall into one of the three listed categories. It recites that it "establishes admission requirements", and that those who fall within the three categories are those who are "eligible to apply for admission". The Policy states that the Minister's decision is final and not subject to appeal. The Minister was entitled to conclude that the Directive was generally intended to be exhaustive, even though she reserved the ability to respond to extraordinary situations. As long as the Minister's interpretation of the Directive was intelligible, reasonable, transparent, and available on the relevant constellation of law and facts, it was not subject to review. That standard of review extends to the Minister's decision on whether in any specific case the Directive was mandatory, exhaustive or binding, or just an "administrative guide".

[94] Secondly, adoption of a policy by the decision maker limiting the scope of possible outcomes does not necessarily render the resulting decisions unreasonable. As noted, *supra*, para. 44, reasonableness review focuses on the decision actually made, including both the reasoning and the outcome. Where a decision is made by application of a policy, the contents of the policy are themselves a part of the context behind the decision. Given the context in which they were made, and the contents of the Directive, there was nothing unreasonable about the Minister's decisions, nor was there any deficiency in the reasons she gave. Denial of an application for failure

to comply with an established policy is transparent and reasonable. Considered together, the Minister's decisions and her articulated reasons for those decisions were reasonable. The fact that her reasons did not expressly refer to any residual discretion she may have had, outside the parameters of the Directive, did not justify setting aside that decision. Considered in context, apparent shortcomings in the reasons may not in fact reflect an absence of justification, intelligibility or transparency: *Vavilov* at para. 94.

[95] Thirdly, the existence of a residual discretion does not require the Minister to exercise it in any particular case. The Minister was entitled to conclude that none of the applicants exhibited the kinds of unusual and extraordinary circumstances that would justify exercising her residual discretion. The respondent families are not entitled to self-categorize as being extraordinary.

### *Summary on Fettering*

[96] In summary, the key answer to the “fettering” argument in these appeals is the absence of any statutory or constitutional requirement that the discretion even had to be exercised, and the absence of any statutory boundaries to the discretion when it was exercised. Absent any binding legal parameters, the Minister had a wide discretion over when she would exercise her discretion to allow entry to the schools, and the criteria that she would consider. Applying the reasoning in *Vavilov*, the scope of “reasonableness” in her decisions was exceptionally wide. Her rejection of the applications in this case was transparent: it was based on an application of the Directive, which was itself reasonable. The decisions were available on the relevant constellation of law and facts. There is no basis for challenging them on the basis of “fettering”. In this particular case the Minister was entitled to proceed as if the establishment and application of the Directive involved an exercise of her discretion, not a fettering of her discretion.

### Reasonableness of the Minister's Decisions

[97] None of the Minister's decisions in the individual cases, when considered in context together with the reasons given for those decisions, were unreasonable. They were rational, intelligible, and transparent, and they were all available on the relevant constellation of law and facts. The chambers judge erred by failing to give appropriate deference to those highly discretionary decisions, by incorporating different criteria and arguments, by disregarding concessions made by the respondents, and by substituting decisions he thought were preferable in the circumstances.

[98] It is worth repeating that the respondent families assert no statutory or constitutional right to attend the schools. They do not even argue that they qualified under the Directive, and they all rely on the Minister's residual discretion over admissions. They essentially seek the exercise of a ministerial prerogative. In such circumstances, the reasonableness standard of review accommodates a very wide range of outcomes. Unless the Minister's decisions were capricious or arbitrary, it is very hard to challenge them on the basis that they were unreasonable: *supra*, para. 42. The respondents advance, and chambers judge essentially established, a “free choice” model of

admission to the schools, and set a test for refusing admission to non-rights holders that would be virtually impossible for the Minister to meet.

[99] It should be emphasized that the Minister was entitled to conclude that many of the background factors relied on by the respondents had already been considered in the formulation of the Directive. Having established the Directive, it was reasonable for the Minister to decide that applications that did not comply with the Directive would only be allowed in exceptional circumstances. That was a decision for the Minister, not the reviewing court. Recognizing that the Minister has a residual discretion does not mean that she had to ignore the Directive when exercising it; the discretion was only “residual” to the core policy she had adopted.

[100] As noted (*supra*, para. 72), the appellant argues that the respondents are raising new issues. In its submission to the Minister, the Commission scolaire francophone did not argue that the viability of the schools or the Francophone community was threatened or endangered. The Commission scolaire francophone cited the same census data relied on by the Minister. It did not argue that enrolment statistics supported the applications, and indeed argued that the school in Yellowknife needed to be expanded. It recognized the higher costs of minority language education as being a relevant consideration. A reviewing court should not find a decision to be unreasonable based on factors that were never raised before the original decision maker: ***Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association***, 2011 SCC 61 at paras. 22-26, [2011] 3 SCR 654.

#### *Extraordinary Circumstances*

[101] The Minister was entitled to decide that she would only exercise her residual discretion in extraordinary circumstances.

[102] The background again is that the government controls admission to the schools. The Directive was designed to admit only a “limited number” of non-rights holders. That was a legitimate policy choice for the Minister to make, and only subject to judicial review on narrow grounds amounting to capriciousness or arbitrariness. The Directive was adopted as the policy to be followed on admissions, and the “limited number” would presumptively fall within its three established categories. The Minister accepted she had a residual discretion, but in that context, it makes sense that the residual discretion would only be exercised in narrow circumstances, described as “extraordinary”. It would turn the system on its head to make the residual discretion more generous than the base policy.

[103] As previously noted, the Minister was entitled to establish a policy. She was entitled to set the parameters of that policy, including the extent to which it was exhaustive of her discretion. She was then entitled to apply that policy. She was entitled to decide that she would only depart from the policy in unique and unusual circumstances. She was entitled to conclude that departures from the Directive would encourage *ad hoc*, inconsistent decisions, and would leave admissions open to political influence. None of that was unreasonable, illogical, or irrational. Where a policy is

constitutionally and legally compliant, it is not irrational to make decisions that are consistent with that policy.

[104] The fact that none of the respondents could demonstrate extraordinary circumstances, resulting in a dismissal of all the applications, is likewise no indication of unreasonableness. The Minister was not required to allow a certain quota of applications under her residual discretion in order to demonstrate reasonableness. The fact that none of the respondents was successful merely demonstrates that none of them met the test, not that the Minister's decisions were unreasonable. As the appellant points out, none of the respondents made arguments for admission that had not already been found to be insufficient: compare the circumstance of the unsuccessful families in *Commission Scolaire Francophone, Territoires du Nord-Ouest v Northwest Territories (Attorney General)*, 2012 NWTSC 44. The respondents' arguments for admission had already been considered in the *Final Report: Review of the [2008] Ministerial Directive* that led to the adoption of the 2016 Directive. The respondents' complaint that all of the applications were unsuccessful is merely an invitation to apply a correctness standard of review.

[105] The respondents argue that the Minister's answer cannot always be "No". That is not so. The Directive was intended to be exhaustive of the categories of non-rights holders that could justify admission to the schools. If no applicant could raise a compelling argument, or point to a unique and unusual constellation of factors not already considered in the drafting of the Directive, the answer must be "No". The student M.S. was the only one admitted under the Minister's residual discretion, but she was a child who was integrated into the francophone community before she came to Canada, and she spoke only French and no English. The fact that she was the only one able to meet the test is not, in context, unexpected.

[106] It is hardly surprising that few can meet the standard of showing "extraordinary circumstances". No inference can be drawn from the lack of success of all of the respondents. The fact that applicants can rarely meet the test for the exercise of the Minister's residual discretion merely shows that the Directive was carefully and reasonably drafted, leaving little room for the admission of those who did not qualify under it.

#### *Establishing and Weighing the Relevant Factors*

[107] Unconstitutionality is not alleged. It was therefore up to the Minister, not the reviewing court, to establish the relevant factors to be considered when deciding on admission to the schools. A decision is not rendered unreasonable merely because the reviewing court disagrees with the weight given to the various factors.

[108] For example, the chambers judge acknowledged that in her reasons "the Minister stated that she had taken into account this recommendation [of the Commission scolaire francophone] and the assessment that the admission of the children would benefit the minority community and the children concerned": 2020 NWTSC 28 at para. 107. The chambers judge continued, however, that "the reasons suggest that the Minister did not give due weight to the CSF's recommendation and to

particular circumstances of each application”. The chambers judge provides two examples, which confirm that he was not conducting a review for reasonableness, but was re-exercising the discretion without any deference to the Minister’s mandate. This is not the applicable standard of review.

[109] Judicial review is marked by deference. The respondents disagree with the weight given by the Minister to various factors, her interpretation of some of the information, and the ultimate outcome, but they are unable to demonstrate the consideration of any irrelevant factors, or any overall unreasonableness. The respondents argue that the decisions do not demonstrate that the Minister “conducted a proportionate balancing of the interests at stake”, but this simply means that the respondents do not agree with the outcome. The respondents argue that the Minister over-emphasized some factors, such as the desire for the children to become bilingual, but the Minister was merely responding to the arguments advanced by the applicants. For example, the parents of child A emphasized their desire for a bilingual education, so the Minister addressed that issue. In short, the respondents are not entitled to ask the reviewing court to simply re-exercise the discretion *de novo*.

[110] The Minister was entitled to analyze and interpret the statistics on attendance at the schools, the status of the Francophone community in the Northwest Territories, and trends with respect thereto. There was nothing “arbitrary” about her selection of statistics; she relied on the same statistics presented by the Commission scolaire francophone. Her conclusions were internally coherent, and justified, transparent and intelligible. The chambers judge selected and emphasized certain aspects of the statistics, which the appellant argues had the effect of minimizing the impact of the 2016 Directive on enrolment. In any event, the standard of review did not permit the chambers judge to reweigh the evidentiary foundation of the Minister’s decisions. The reviewing court is not to substitute its own preferred decision for that of the Minister. The respondents may disagree with the Minister’s interpretation of the statistics, but that does not render her decisions unreasonable.

[111] As the chambers judge acknowledged, budgetary considerations were relevant, and the Minister’s consideration of them was reasonable: *Conseil scolaire francophone de la Colombie-Britannique* (SCC 2020) at paras. 55, 81. The weight to be given to budgetary factors is quintessentially within the mandate of the Minister.

[112] The chambers judge stipulated that the Minister must consider the best interests of the child when deciding applications for admission to the section 23 schools: 2019 NWTSC 25 at para. 65; 2020 NWTSC 28 at paras. 124-25. Parents undoubtedly consider the interests of their children when applying for admission, and the Minister would likely refuse admission if she perceived it was not in the child’s best interest. The record demonstrates that the Minister expressly accepted that proficiency in a second language would be beneficial to, and in the best interests of the children. It was, however, an error for the chambers judge to consider this a factor which would justify review of the Minister’s decisions. First of all, the standard of review does not permit the reviewing court to specify what factors should or should not be considered in exercising the Minister’s wide discretion. Secondly, the “best interests of the child” is not a factor under section 23, which does

not establish a “free choice” model. It is likewise not a mandatory or optional consideration under the Directive or the Regulations. Since the best interests of the child is not even a factor under section 23, it cannot possibly be a mandatory factor that curtails the Minister’s discretion when deciding on the admission of families who do not enjoy section 23 rights.

[113] The Minister was entitled to note that section 23 was not intended to provide children with a linguistic advantage by learning the minority language. If that was the objective, section 23 would have provided for universal education in the language of choice. The respondents’ claim of a legally enforceable right to attend the minority language schools because it is their preferred choice cannot be justified as being “consistent with *Charter* values”. It is, in fact, inconsistent with the precisely defined rights created in section 23.

[114] Similarly, the desire of a family to assimilate with the Francophone community is not something that the Minister was obliged to accommodate. That too is outside the objectives of section 23, which does not require minority language education for any student who has assimilated with the minority language community. This is a mere personal preference, and not supported by any constitutional or legal right. Some such families would now qualify under the “Francophile” category in the Regulations, but at the time of these decisions, the Minister was not under any legal obligation to accommodate them.

[115] The respondents also argue that the Minister considered and rejected each of their arguments individually, but never considered them collectively. A review of the reasons of the Minister demonstrates that this is simply not the case. When reaching her decisions, the Minister stated that she “considered together” and balanced all of the competing considerations before her: *supra*, para. 24.

[116] Each of the individual challenged decisions was reasonable. For example, the connection of the A.B. family to the Francophone community was entirely a matter of personal choice. “The framers did not intend, in enacting s. 23, to re-establish freedom of choice of the language of instruction in the provinces”: *Nguyen v Quebec* at para. 35; *Gosselin* at paras. 30-31. It is significant that the A.B. family would not have had the right to attend the section 23 schools, even if the whole family had been born in Canada. They did not qualify under the Directive, and also do not appear to qualify under the Regulations. This family chose to raise their child such that French was his preferred language, and he would undoubtedly be comfortable being schooled in that language. However, families cannot create a right to attend the section 23 schools by grooming their children with that objective in mind. This is the equivalent of creating an institution “for the sole purpose of artificially qualifying children for admission to the publicly funded [minority language] school system”: *Nguyen v Quebec* at para. 36. The denial of their application to attend the section 23 school was clearly one that was available on the facts and law.

[117] Similarly, the family of child A is a classic example of an Anglophone family which had decided to assimilate into the Francophone community. They asserted a “freedom of choice” model of education that was specifically rejected by the drafters of the *Charter*. The government has

subsequently added a category of “Francophile” to the Regulations under which this family qualifies, but it was not unreasonable for the Minister to reject its original application under the ministerial policies as they then existed. The evolution of public policy does not make previous decisions unreasonable.

[118] It is likewise significant that the other families would also not have had a constitutional right to attend the section 23 schools, even if the whole family had been born in Canada. As noted, an Anglophone family from Ontario, that was otherwise similar to the A.B. family, would have no right or expectation to attend the schools. The respondents essentially argue that the respondent families have a right to attend the section 23 schools above the rights possessed by any Canadian family that would prefer a Francophone education. The Minister’s rejection of these applications cannot be described as being inconsistent with *Charter* values, or as otherwise being unreasonable.

[119] The Minister was entitled to conclude that any legitimate expectations of the children T and N were adequately met in the French immersion school, where they had done very well. Their family was not Francophone, and the Minister was not required to admit French immersion children to the section 23 schools, which are distinct from immersion schools. The Minister was entitled to consider that admitting one immersion student would make it difficult to justify rejecting other immersion students without undermining consistency in decision making.

[120] There is no indication that the Minister relied on irrelevant factors or failed to consider relevant factors. Neither the Directive nor any of the individual decisions were unreasonable or in breach of the *Charter*. They were not unlawfully or unreasonably insensitive to “*Charter* values”, to the extent that such values were even in play. The argument that the Minister’s individual decisions were unreasonable comes down to a disagreement over the weighing of the applicable factual circumstances. That is effectively a review for correctness, not reasonableness.

### *Consistency in Decision Making*

[121] The chambers judge incorrectly concluded that the Minister was not entitled to be concerned about whether routine departure from the Directive would undermine the utility of that Directive. This reasoning violates the standard of review in several respects. It incorrectly suggests that the Minister is not entitled to adopt policies. It implies that the Directive itself is somehow unreasonable, but as discussed that is not so: *supra*, paras. 49-53. The fact that each exercise of the discretion subtly changes the circumstances underlying the exercise of the next discretion is trite. It is unreasonable to think that this universal consequence of decision making renders it illogical and irrational to ever apply a policy.

[122] The chambers judge concluded that the Minister “misunderstood how her decisions would affect the exercise of her discretion”, rendering her decisions illogical: 2020 NWTSC 28 at para. 97. This criticism is unwarranted. The Minister was entitled to consider that if she allowed entry to the respondents, she would have difficulty justifying the rejection of similarly situated applicants in the future. Similarly situated applicants had been turned down in the past. Consistency in decision

making, and compliance with established policies, are legitimate considerations. It is no answer to say that the Minister still had a discretion to reject future similar applications. On the test proposed by the respondents, the Minister could only ensure a consistent and fair exercise of her discretion by admitting all good faith applicants with a plausible reason to attend the schools. This, together with the standard established by the chambers judge that would justify rejecting applications, would essentially devolve into a “freedom of choice” admissions system.

[123] The Minister was also entitled to observe that many Anglophone families would welcome the opportunity to attend the minority language schools. Many immersion students, or others who had acquired some proficiency in French, might apply for admission. Consistency and fairness in future decision making was a relevant consideration. The Minister was also entitled to be concerned about how many additional applications would be received if it became known that a “free choice” model of admissions had been adopted. The respondents argue that the Minister’s concerns are exaggerated, but it was not unreasonable for her to consider this factor.

[124] The respondents argue that some of the Minister’s decisions were unreasonable because another Minister, in what the respondents argue are factually similar circumstances, allowed admission to the schools. The appellant denies there is similarity, but the prospect that different decision makers may come to different conclusions on similar facts is inherent in the existence of a discretion. As pointed out in *Vavilov* at para. 72, a lack of unanimity among decision makers is the price paid for the decision making freedom and independence given to successive decision makers. One Minister cannot fetter the discretion of his or her successors. Further, two opposite decisions might both be within the wide range of reasonableness, even if they are facially inconsistent in some respects.

[125] The respondents point specifically to the admission of the student M.S., who did not qualify under the Directive, but who only spoke French and not English. This decision merely shows that the other Minister recognized a residual discretion, that he had not “fettered” it, and that he was prepared to exercise it in extraordinary circumstances. Just because one Minister recognized extraordinary circumstances in one case does not require his successor to do so in every case, and it does not make future denials of admission unreasonable. The standard of review does not permit the respondents or the reviewing court to assert that two cases are so similar that they must generate the same outcome. That decision is up to the Minister.

### *“Double Fettering”*

[126] The respondents argue a type of “double fettering”. Firstly, they argue that the Minister fetters her discretion if she limits admissions to those allowed by the Directive, without regard to her residual discretion. However, they argue the Minister also fetters her discretion when exercising her residual discretion if she routinely considers any background considerations when exercising her discretion. The respondents argue that the Minister must evaluate each case on its individual merits, disregarding systemic factors. For example, the respondents argue that any consideration of whether the viability of the schools or the community is at risk implies that the Minister would not

exercise a residual discretion absent proof of such a risk. This argument implies that the Minister's residual discretion is legally required to be even more generous and open-ended than the discretion exercised through the adoption of the Directive.

[127] The Minister, however, was entitled to a) establish the Directive as the main basis for admitting non-rights holders, and b) decide that extraordinary circumstances would have to be shown to justify the admission of those who did not qualify under the Directive: *supra*, paras. 101-104. Requiring "extraordinary circumstances" for the exercise of the residual discretion is not fettering, but rather a lawful and reasonable definition of the scope of the residual discretion.

[128] The respondents argue that these appeals are "not within the Directive, but only within the residual discretion". This is an artificial distinction, because the residual discretion only exists because there is a Directive. As noted, recognizing a residual discretion does not mean that the Minister had to ignore that it was "residual" to the Directive, therefore calling for exceptional circumstances. Further, it was up to the Minister (not the respondents or the reviewing court) to decide what weight she would give to systemic factors when exercising her residual discretion. Recognition of a residual discretion also does not require that decisions be made on an *ad hoc* basis, starting from a blank slate, without regard to established policies, precedent, predictability, consistency, or universal background considerations. Discretion is not the same thing as randomness.

[129] The "double fettering" argument is without merit. Further, the respondents' insinuation that the chambers judge was "generous" in holding that the Minister had not acted in bad faith is unsupported by this record. On this record there is no evidence whatsoever of bad faith by the Minister.

#### *Adequacy of the Minister's Reasons*

[130] The respondents rely on a truncated quote from *Vavilov* at para. 86, which is underlined here:

86 Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes

may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. (*Italics in original, underlining added*)

The respondents use this, and other passages, to challenge the reasons given by the Minister. As this passage confirms, however, courts are to demonstrate respect for the decision making process. This passage is intended to state that where reasons are required, the decision must be justified by the reasons given, and it is not sufficient that the decision could have been justified by other reasons that were not given.

[131] The respondents criticize the similarity in the reasons given by the Minister on the various applications, arguing that this indicates that the Minister did not really exercise any residual discretion, but applied a fixed policy. This argument arises from two things a) the Minister's universal conclusion that none of the respondents presented the kind of extraordinary circumstances that would justify admission even though they did not qualify under the Directive, and b) the Minister's reasons in each case reproduced the same background information, and responded to the same arguments.

[132] Reproducing the same background information in multiple decisions is not unexpected when the Minister is applying the same Directive to each application, and there was a considerable overlap in the arguments being presented by the applicants. Reasons for decision are not a creative writing exercise, in which the author has to express the same ideas in different ways in order to be reasonable. Each decision included a consideration of the background factors as well as the particular circumstances and arguments made by the individual applicant, which is all that the law requires.

### *Summary*

[133] In summary, the Minister's decisions not to exercise her "residual discretion" were reasonable. As the respondents acknowledge, she recognized the potential contribution of these students to the Francophone minority community, their proficiency in French, and their best interests. The reasons at 2019 NWTSC 25 incorrectly held that the Minister was even legally obliged to consider these factors. Determining the relevance of these factors, and the weight to be given to them, was a matter of public policy that was up to the Minister, not the reviewing court. Further, none of these are factors that would give the respondent families section 23 rights, and they are not sufficient to compel their admission as non-rights holders. The Minister was, in any event, entitled to say that these factors were not "extraordinary", because they would effectively lead to a "freedom of choice" system. The fact that her reasons in each case were similar is not surprising, since she was deciding similar applications based on the same policies. The respondents' argument that the Minister did not consider these considerations collectively is artificial.

### Conclusion

[134] The respondents propose a paradigm in which any student who wishes to have an education in French should be admitted to the section 23 schools. Under the proposed test, it would be virtually impossible for the Minister to deny admission, even though the student had no section 23 rights, because admission would be in the broader interests of the Francophone minority community and the Commission scolaire francophone. Admission would almost always be in the best interests of the child. This essentially creates a “freedom of choice” system, and nullifies the Minister’s admitted discretion over admissions to the section 23 schools.

[135] The decisions under appeal reached well beyond the applicable standard of review set in *Agraira* and *Vavilov*. They are also tainted by errors of law. The Minister’s decisions were reasonable. The appeals are allowed, the orders under appeal are set aside, and the decisions of the Minister are restored.

Appeal heard on May 31, 2021

Memorandum filed at Yellowknife, NWT  
this 1st day of September, 2021

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Slatter J.A.

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Crighton J.A.

**Rowbotham JA (Concurring in the Result):**

[136] I agree with my colleagues that the Minister’s ultimate decision to deny admission to the respondents’ children to the École Allain St-Cyr and École Boréale was reasonable. However, I reach that conclusion by a different path. I agree with the reviewing judge that in the exercise of the Minister’s residual discretion, she was required to consider s. 23 of the *Charter*. Accordingly, I would dismiss the first appeal (Appeal No AP 2019-000006). Nevertheless, when the matter was directed back to the Minister to reconsider her decision in light of s. 23, she did so and her ultimate decision regarding W.B. and the five other applicants was reasonable. I would allow the second appeal (Appeal No AP 2020-000009).

*Appeal No AP 2019-000006*

[137] The Minister acknowledged that she retained a residual discretion to admit a child of non-rights holder parents even if the child was not admissible under one of the three categories set out in the Directive. The individual respondents are not rights holders. My colleagues conclude that as non-rights holders they, and the Commission scolaire francophone, are precluded from asserting that s. 23 of the *Charter* has any place in a consideration of the Minister’s residual discretion. Indeed, as I interpret their reasons, the door is closed to arguments based on *Charter* values because the respondents have no rights under s. 23.

[138] Section 23 has three purposes. It is preventive, remedial and unifying in nature: *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 15 (*Conseil scolaire SCC*).

[139] The admission of the children of non-rights holder parents into the French language school is a recognition of the need to revitalize and to promote the flourishing of minority language communities because these communities face challenges as a result of attrition and of exogamous marriages. Provincial and territorial governments have put in place guidelines, such as the Directive, to address this.

[140] Unlike most rights protected by the Constitution, s. 23 rights are assessed not only in individual terms but also on a collective level: *Conseil scolaire SCC* at para 17. Indeed, it appears that only s. 23 of the *Charter*, aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 and denominational school rights under s. 93 of the *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3 have this collective aspect. See Klinck, Mackenzie and Rusko, “Distinctively Canadian: Litigating the Constitutional Rights of Canada’s Protected Linguistic, Denominational and Indigenous Communities” in Justice Todd Archibald, ed, *Annual Review of Civil Litigation* (Toronto: Carswell, 2020).

[141] Although the individual respondents are non-rights holders, the Commission scolaire francophone is also a respondent. It is a democratically elected body who speaks on behalf of the minority language community which consists primarily of rights-holders and is accountable to that

community. In *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2011 BCSC 1219 at para 63, rev'd on other grounds 2012 BCCA 422, the court confirmed the standing of the Conseil scolaire francophone in s. 23 litigation and recognized the unique collective aspect of minority language rights. The Conseil scolaire francophone exercises management and control over the constitutionally established minority language schools.

[142] Litigation involving non-rights holders has to date focused on who, as between the government and the Conseil scolaire francophone, has the power to set admission criteria for non-rights holders. That was definitively answered in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 (*Yukon Francophone School Board*). The court confirmed that in the absence of delegation by the territorial government, the Conseil scolaire francophone did not have the power to unilaterally set admission criteria. See also *Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest*, 2015 NWTCA 1, leave to appeal to SCC dismissed 2015 CanLII 69432 (SCC).

[143] Nevertheless, in *Yukon Francophone School Board*, Abella J stated at para 74:

In this case, however, the Yukon has not delegated the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the *Regulation*. This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose: see *Mahe*, at pp. 362-65. But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*.

[emphasis added]

[144] The reviewing judge interpreted this as supportive of the Minister's obligation to take s. 23 into account in the exercise of her discretion. He concluded that the court in *Yukon Francophone School Board* affirmed that the provinces and territories must ensure compliance with s. 23 and not prevent the realization of its purpose which includes the flourishing of official language communities and the development of the community. He further observed that depending upon the circumstances, this purpose may not be achieved unless there are active efforts to counter the "progressive erosion of minority official language cultures": *AB, Commission scolaire francophone v Minister of Education*, 2019 NWTSC 25 at para 55, citing *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 27. I agree.

[145] Section 23 must also be interpreted with respect to place and time. As regards place, provincial and territorial governments must fulfill their roles in implementing s. 23 based on the

“unique historical and social context” of the linguistic minority of each province and territory: *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 at para 21.

[146] As regards time, the minority community’s situation is affected by the population of the majority and the minority at different times. The government recognized this in its *Final Report: Review of the Ministerial Directive – Enrolment of Students in French First Language Education Programs*, June 30, 2016. Without government support and the addition of children of non-rights holders, the number of schools in the Francophone community in the Northwest Territories would decline.

[147] Although the reviewing judge acknowledged the Directive’s goal of admitting some children of non-rights holder parents in the three designated categories, he concluded that the government’s obligation did not end there. The exercise of the Minister’s discretion must also be done with reference to the purpose of s. 23. The Minister’s decisions of May 28, 2018 and August 29, 2018 simply concluded that W.B. did not fall into one of the three categories set out in the Directive. The reviewing judge held at para 65:

I therefore conclude that, in the exercise of her power over the admission of children of non-rights holder parents to French first language schools in the NWT, the Minister must strike a balance between her discretion and the broad purpose of s. 23. She must consider Charter rights, including the needs of the linguistic minority and the need to foster the preservation and development of this community, in the exercise of her power over the admission of non-rights holders to minority language schools. In exercising her discretion, the Minister must consider not only the interests of the NWT, including the cost of French first language education, and the best interests of the child, but also the purposes of s. 23 and the rights it grants to the linguistic minority.

[148] The reviewing judge did not err when he found that the Minister’s decisions regarding the applications for W.B. to be admitted to École Allain St-Cyr were unreasonable. It follows that I would dismiss Appeal No AP 2019-000006.

*Appeal No AP 2020-000009*

[149] The Minister followed the directions of the reviewing judge. She gave detailed reasons for her decision regarding W.B. and the five other applicants. A sample of her reasons is described in paras 23 and 24 of the majority reasons.

[150] In reaching her decisions, the Minister considered the census data which was also relied upon by the Commission scolaire francophone. Notably, the Commission scolaire francophone did not contend that the viability of the schools or of the francophone community were threatened. In addition to the census data which showed a growth in the francophone community, the Minister considered the increased costs of education. The reviewing judge found the Minister’s conclusions

as to costs to be reasonable. The Minister also considered the precedential effect of admitting the students. Further, she had regard to the individual circumstance of each applicant.

[151] The standard of review is reasonableness. Were the Minister's decisions internally coherent, justified, transparent and intelligible? As the majority correctly states at para 107, "a decision is not rendered unreasonable merely because the reviewing court disagrees with the weight to be given to the various factors." Here, the reviewing judge engaged in an exercise of reweighing.

[152] For the reasons expressed by the majority at paras 110 and 112, the standard of review did not permit the reviewing judge to reweigh the factors in order to arrive at a different conclusion. He erred in so doing.

[153] In the result, I would allow Appeal No AP 2020-000009.

Appeal heard on May 31, 2021

Memorandum filed at Yellowknife, NWT  
this 1st day of September, 2021

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Authorized to sign for: Rowbotham J.A.

**Appearances:**

G. Regimbald  
for the Appellant

F. Poulin  
for the Respondents

A-1-AP-2019-000006

A-1-AP-2020-000009

IN THE COURT OF APPEAL  
FOR THE NORTHWEST TERRITORIES

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**Between:**

**A.B. and Commission scolaire francophone des Territoires  
du Nord-Ouest**

Respondents  
(Plaintiffs)

- and -

**Minister of Education, Culture and Employment of the  
Northwest Territories**

Appellant  
(Defendant)

**And Between:**

**A.B., F.A., T.B., E.S., J.J. and Commission scolaire  
francophone des Territoires du Nord-Ouest**

Respondents  
(Plaintiffs)

- and -

**Minister of Education, Culture and Employment of the  
Northwest Territories**

Appellant  
(Defendant)

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MEMORANDUM OF JUDGMENT

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