

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMMISSION SCOLAIRE FRANCOPHONE,
TERRITOIRES DU NORD-OUEST, CATHERINE
BOULANGER and CHRISTIAN GIRARD

Plaintiffs

- and -

ATTORNEY GENERAL OF THE NORTHWEST
TERRITORIES, and COMMISSIONER OF THE
NORTHWEST TERRITORIES

Defendants

This document is an unofficial English translation of the Reasons of Judgment of the Honourable Justice L.A. Charbonneau dated August 21, 2008. This document is placed on the Court file for information only.

**REASONS FOR JUDGMENT
(APPLICATION TO VARY AN ORDER)**

1. In this application, the Defendants seek a variation of my Order dated July 22, 2008. My Reasons for Judgment granting that Order are reported at *Commission Scolaire Francophone, Territoires du Nord-Ouest et al. v. Attorney General of the Northwest Territories*, 2008 NWTSC 53.

2. The Plaintiffs cited case law pertaining to the admissibility of new evidence in an application to vary an interlocutory order. They appear to be challenging the right of the Defendants to submit evidence filed in support of their application. However, the Plaintiffs, too,

say that the Order should be varied. Since both parties agree that the Order should be varied, I see no point engaging in an analysis of the principles governing an application to vary an order. In any event, the evidence is indicative of real and serious obstacles to the implementation of my Order. It would be irresponsible on my part not to take them into account.

3. The part of the Order that is the subject of the application is paragraph 3, which reads as follows:

[TRANSLATION]

I order that the Defendants immediately implement an interim plan to ensure that, as of the beginning of the 2008–2009 school year, the following elements are in place:

...

3. The use by École Boréale of three classrooms in another secondary school in Hay River, with the fit-ups necessary to create a physically distinct space for the students who will make use of them.

4. I made that Order because I concluded that the Plaintiffs had established the existence of a serious issue to be tried with respect to the lack of space at École Boréale in Hay River, and because I also concluded that the other criteria for obtaining an interlocutory injunction had been met.

5. At the hearing of the injunction application, the Plaintiffs set out different options that could be considered if the Court were to conclude that additional space should be provided to École Boréale. The Plaintiffs favoured the option whereby the Court would order the Defendants to lease space in a building near the school where classrooms could be set up. Another possibility, and one that was specifically formulated in the notice of motion, was for the Court to order the Defendants to acquire portable classrooms. The third possibility was for other Hay River schools to provide space to École Boréale.

6. The Defendants had submitted evidence suggesting that the first two options could not be implemented by the start of the new school year and would be costly. In one of those affidavits, Edward McLeod, who works for Public Works and Services (the department responsible for governmental infrastructure, including schools, in the Northwest Territories) explained the likely time constraints if the Court were to order implementation of the first or second options proposed by the Plaintiffs.

7. In an affidavit filed June 20, 2008, Don Morrison, an employee of the Department of Education, referred to the anticipated cost of implementing the first two options. He concluded that there are only two options that could ensure additional space for École Boréale in time for the start of school: either the children of non-right-holders would have to receive their instruction someplace other than this school, or space available in other Hay River schools would have to be used. In a subsequently filed affidavit, Mr. Morrison reiterated that although his department

does not believe there is really a lack of space in École Boréale, it was still possible to make unused space in other Hay River schools available to École Boréale, if need be.

8. At first glance, Mr. Morrison's assertions as to his department's authority seem to contradict paragraph 3 of the Notice of Motion that the Defendants filed to bring this application. That paragraph reads as follows:

[TRANSLATION]

Further to the Order, the Department of Education contacted the Hay River District Education Authority (DEA), which is responsible for the operations of all Hay River schools, except the École Boréale. The Department has no power over the allocation of classrooms, teachers' schedules or other administrative decisions. The DEA must, accordingly, be consulted prior to the implementation of any Order of the Court.

9. When I raised this issue at the hearing, counsel for the Defendants confirmed that the Department of Education did indeed have the authority to order the Hay River District Education Authority (HRDEA) to free up certain space in schools falling under its authority. Practically speaking, of course, the department would certainly have to discuss procedures for doing so with the HRDEA.

10. In discussing the issue of possible relief in my written reasons dated July 22, 2008, I outlined the various options and explained why I felt it was preferable to order the use of existing infrastructure:

[TRANSLATION]

I therefore conclude that the balance of convenience requires that certain remedies be granted, but that these remedies must take into account what it is logistically possible to achieve between now and the beginning of the school year, as well as the financial consequences they entail. The government does not have an unlimited budget, and we are at the interlocutory stage. It seems doubtful that portable classrooms could be delivered and properly installed in time for the beginning of the school year. It also seems doubtful that the renovations that would have to be done in the neighbouring building could be completed in time. Moreover, this solution would require the government to commit to leasing premises for a period exceeding a year. If the Plaintiffs are unsuccessful, it might be possible to cancel the lease, but there would certainly be considerable costs and penalties, especially if the building had been renovated specifically to house a school.

To give the secondary school students proper access to science laboratories, they would, in any case, have to use the laboratory of another secondary school. There seem to be classrooms available in other schools in Hay River. If there is an existing infrastructure, it is appropriate to use it as a temporary measure. On a temporary basis, and mainly because there are very few options given the time remaining before the beginning of the school year, the use of space in one of the

community's other educational institutions is the most realistic solution. I recognize that this is far from being an ideal solution and that it will entail costs, as it will be necessary to provide a distinct area for École Boréale students within another school, but, in the circumstances, I think that it is the most reasonable solution given the time constraints.

Commission Scolaire Francophone, Northwest Territories et al v. Attorney General of the Northwest Territories, supra, at paragraphs 78-79.

11. Following my Order, the Defendants retained the services of Mr. Kindt, an educational consultant, regarding the viability and the impact of implementing certain other options for providing three additional classrooms to École Boréale. His report on that issue is in evidence. Mr. Kindt also wrote a detailed report on École Boréale that was submitted in evidence at the hearing on the application for interlocutory injunction.

12. The Defendants also submitted documents showing that my decision of July 22 had generated a great deal of commotion at the HRDEA.

13. The evidence shows that implementation of my Order would have a serious impact on programs delivered to Diamond Jenness School. It is in that school, the only other secondary school in Hay River, that three classrooms would have to be freed up unless my Order is varied. According to the evidence submitted by the Defendants, it would not be possible to free up three classrooms in this school without significantly disrupting its educational program and relocating a portion of its student population. This evidence had not been before the Court at the July hearing.

14. The Defendants state that they were surprised by my Order and had not expected me to order such specific details regarding the infrastructure that must be made available to École Boréale. They note that the Plaintiffs' Notice of Motion did not specifically seek space at the Diamond Jenness School. That is true.

15. However, one of the documents submitted in evidence by the Plaintiffs, namely a letter dated April 8, 2008, from André Légaré to the Deputy Minister of Education, demonstrated that the possibility of using space in this institution had been discussed with departmental representatives.

16. Furthermore, during his submissions at the July 9 hearing, counsel for the Plaintiffs made representations in which he asked the Court to favour one of the first two options to which I previously referred. He then made representations as to what his clients would consider to be acceptable if the Court decided that the use of existing infrastructure were preferable. He referred to Mr. Légaré's letter and reiterated his clients' position that if École Boréale had to use existing infrastructure, such space should be at the Diamond Jenness School. In other words, that possibility had clearly been raised. If the Defendants had felt it was unacceptable

or impossible to put it into practice, it would have been useful for the Court to have been advised of that on July 9.

17. Having said that, the evidence being what it is, I am satisfied that my Order should be varied. It is neither fair nor wise to prevent irreparable harm to one party by causing a similar wrong to the other party, even if that party is not one of the parties to the dispute before the Court. The very difficult question that arises is what relief should now be ordered, based on all of the evidence.

18. Counsel for the Defendants alluded to the possibility that I hold a conference at which all parties concerned could be represented and present their points of view on the impact of the different options. In other circumstances, at a different stage of the proceedings, that might be an excellent idea. It is sometimes quite appropriate and useful for courts to participate in settlement conferences. However, at the interlocutory stage of a case as contentious as this one is, I do not think this would be the best approach. In any case, I believe that if such a process were to have any chance of success, the parties to the dispute would have to agree to it. At this stage, such is not the case.

19. In addition to that suggestion, the Defendants are asking me to adopt the same approach as the one I favoured in my July 22 decision, which was to use existing infrastructure. They say that it would not be possible to free up three classrooms in a single Hay River school. In their view, the possible options would be the following:

1. That the Order be varied to compel the Defendants to provide École Boréale with three classrooms while allowing the Defendants to determine the schools in which this space would be freed up.
2. That the Order be varied to compel the Defendants to provide École Boréale with one classroom at the Diamond Jenness School and two classrooms at the Princess Alexandra School.
3. That the Order be varied to compel the Defendants to provide École Boréale with one classroom at the Diamond Jenness School, one classroom at the Princess Alexandra School, and one classroom at the Harry Camsell School.

20. The Plaintiffs say that they no longer believe the use of existing infrastructure is a viable option. They claim that the level of tension between the two school boards is so great that this option is unworkable. They also object to being allocated classrooms in two or three different schools, because they think it would be unreasonable to force École Boréale to function on three or four different campuses. They are therefore asking that I reconsider one of the options I proposed in July: compelling the Defendants to lease space in a building near École Boréale so

that three classrooms can be set up in it. The Defendants claim that what the Plaintiffs are advocating would amount to reversing my decision of July 22, in which I rejected that option.

21. I must to some extent reconsider certain issues that I previously examined. As I said during the application hearing, I do not feel that it would be appropriate to reverse my decision regarding the amount of space that should be provided to École Boréale. I should, nonetheless, reconsider the different methods of implementing that decision, because the one that I selected is not viable.

22. The reconsideration should take place in view of the new evidence. I cannot consider this evidence solely in terms of the ends sought by the party that submitted it. The evidence clearly, in my opinion, establishes that it would not be appropriate to maintain the Order obliging the Defendants to provide three classrooms in the Diamond Jenness School. However, the evidence establishes other relevant facts that I cannot overlook.

23. First, it does not appear to be possible to free up three classrooms in a single school. Temporary accommodations must, accordingly, be provided in at least two, possibly three schools to create a distinct space for the students of École Boréale.

24. Second, the evidence demonstrates that the creation of this distinct space within existing institutions could be very problematic. At paragraph 13 of his affidavit dated August 13, 2008, Paul Devitt states:

Mr. Kindt was not able to comment on any school's ability to create a distinct physical environment for the students i.e. segregation, which was another condition of the Order. The Department has only been able to do a cursory assessment thus far and has already identified significant problems. For example, the washrooms at DJSS [Diamond Jenness Secondary School] are centrally located and cannot be isolated to a particular wing of the school or restricted for the use by a select group of students. There are also concerns about the entrance and egress from the classrooms and concerns that physically isolating a particular region of the school by construction of interior walls would violate fire and building codes. These are not problems that can be solved in short order.

25. The problems to which Mr. Devitt refers seem quite significant.

26. Third, some aspects of the evidence submitted by the Defendants illustrate a level of tension that I cannot ignore when considering what relief should be granted. The evidence submitted and the representations made during the first application hearing had to some extent alluded to this issue, but it is more clearly demonstrated by various documents that are now in evidence.

27. In his report prepared following his assessment of the situation at École Boréale, Mr. Kindt alluded to the fact that his discussions with HRDEA representatives revealed that this organization perceived the Commission scolaire's admission policy as an obstacle to forming partnerships. At page 46 of his report, Mr. Kindt writes:

In speaking to the Chair and Vice-Chair of the Hay River DEA, it was indicated that the DEA is quite open to partnerships once the issue on student entry (i.e. policy on student eligibility) at Ecole Boreale is clarified as per recent discussions with the Director of the Commission scolaire. The current policy is viewed as competitive in nature, while a change to that policy would be perceived as opening the doors to closer dialogue and partnering.

28. The Commission scolaire's admission policy is the subject of dispute because it permits children of non-right-holders who meet certain criteria to be accepted at École Boréale. That policy was the subject of submissions from both parties at the first application hearing. The Minister of Education subsequently issued a directive requiring the Commission scolaire to restrict enrolment in its schools to children of right-holders. The Plaintiffs dispute the constitutional validity of that directive. In the reasons issued today and reported in *Commission Scolaire Francophone, Northwest Territories et al v. Attorney General of the Northwest Territories, (No.2)*, 2008 NWTSC 65, I dismissed the Plaintiffs' application to stay that directive but gave them permission to amend their Statement of Claim so as to include their challenge to the directive in their action.

29. The Plaintiffs believe that their admission policy is consistent with the remedial purposes of section 23 of the *Canadian Charter of Rights and Freedoms*. They are of the view that their admission policy has a legitimate objective, namely remedying past wrongs by reversing certain effects of assimilation. According to the representations that I heard during the hearing on the application to stay the directive of the Minister, the Commission scolaire sees its admission policy as a fundamental aspect of its right to manage its schools. If the HRDEA believes that a change in this policy is a prerequisite to forming a partnership, the likelihood of such a partnership appears to be very low indeed, at least until such time that some of the legal issues raised in this case have been permanently resolved.

30. Then there is the evidence submitted in support of this application. One of the exhibits to Mr. Devitt's affidavit dated August 13, 2008, is a letter from HRDEA's chairperson to the Minister of Education. The writer of that letter listed the adverse impact that the Commission scolaire's admission policy has had on schools falling under the HRDEA's authority. He writes:

It is apparent that the needs of Ecole Boreale Students must be met, but at what expense? You are aware of how much our Public

System has suffered over recent years due to the aggressive expansion and recruitment of Non-right-holders.

31. In reference to the serious impact of the Order, issued so close to the start of the school year, he adds:

The level of disruption will have a hugely negative impact on Staff morale, which has already sustained damage over the rate of expansion at the Ecole Boreale.

32. In my view, this evidence raises serious questions about the wisdom of issuing an Order whereby space in schools run by the HRDEA would be used as classrooms by École Boréale. The current climate does not seem conducive to the level of cooperation and compromise that will be necessary to share classrooms in two or three schools until a final substantive decision is made in the case, which could take several years.

33. My conclusion that the use of existing infrastructure was the best solution in the circumstances had been based on several factors: the costs that the other options could entail, since these measures are being ordered on an interlocutory basis; the practical impossibility of implementing other options in time for the start of the school year; and finally, the existence of a real alternative, namely, the creation of a distinct space for École Boréale within another school. For the reasons I have just given, this possibility no longer appears viable to me.

34. Having concluded that the use of existing infrastructure is not a suitable alternative, the only solution would be that new space for École Boréale be set up elsewhere, as quickly as possible. I have arrived at this conclusion with great reluctance. Unfortunately, I am now satisfied by the evidence that there is no other option. In *Association des parents ayants droits de Yellowknife c. Northwest Territories (Procureur Général)* 2005 CSTNO 58, this Court ordered the acquisition of portable classrooms on an interlocutory basis—a very costly solution.

35. The Plaintiffs have asked me to order the Defendants to enter into a contract with a specific party to lease a specific site. I do not think that this would be appropriate. The Defendants may be able to obtain access to adequate space more quickly or at lesser cost. In my view, they must have some flexibility in how they implement this Order. However, they will be obliged to comply with certain parameters. They must immediately take steps to lease or provide space for creating these classrooms, either in the building proposed by the Plaintiffs or in some other location. That location must be organized to create a distinct space for students of École Boréale, and the Defendants must carry out this implementation on an urgent basis and exercise all legally available options to reduce the time involved in conducting calls for tenders or other procedures required for implementing the Order.

36. I am obviously convinced that it will not be possible to have these three classrooms in place for September 2. I have no other choice but so set guidelines for what the situation must be when classes resume on September 2. This situation should be temporary.

37. Submissions have been made regarding availability of space in the “high rise” building neighbouring École Boréale. The Defendants might be able to identify another space that could be available sooner or at lesser cost. My Order will allow them this leeway. If the Defendants are unable to find another space, or if for any reason the “high rise” is not available or suitable, the only remaining solution would be to acquire portable classrooms. One can only hope that this will not be necessary.

38. It is clear that this Order and this remedy in two stages will disrupt the start of the 2008–2009 school year for students, teachers and administrative staff at all of the schools concerned. That is very unfortunate. However, the Court can only rule on applications that have been submitted to it, when they are submitted to it, and on the basis of the information that it is given. Everyone will agree that it would have been better for these matters to have been decided well before the resumption of classes. The parties have different points of view on who should bear the responsibility for the situation in which they all presently find themselves. This is not a matter that I must decide to dispose of this application.

39. For these reasons, the Order that I made on July 22, 2008, is varied. Paragraph 3 of that Order is replaced with the following:

3. A) The Defendants shall take immediate measures to set up three classrooms that will be provided to École Boréale, in accordance with the following parameters:
 - i) the space will be organized to create a separate physical premises for the students who will use it;
 - ii) the Defendants will take all legally available measures to accelerate any tendering or contract signing processes needed to implement this Order;
 - iii) the classrooms will not be set up within another school, unless the Plaintiffs so consent in writing through their counsel; and
 - iv) the Defendants will provide the Plaintiffs with a written report on progress made in implementing this Order by September 12, 2008, and will continue to provide such reports to the Plaintiffs every three weeks until the classrooms are ready.

B) Until such time as the space described in paragraph 3 has been set up, the Defendants shall provide École Boréale with the use of

(i) a classroom in the Diamond Jenness school and two classrooms in the Princess Alexandra school, or

(ii) space in another premises, with the Plaintiffs' consent.

40. The parties wish to make submissions on the matter of costs and wish to do so in writing.
For that purpose:

1. The written brief of the Plaintiffs must be filed with the court clerk and served upon the Defendants by September 5, 2008.
2. The written brief of the Defendants must be filed with the court clerk and served upon the Plaintiffs by September 19.

/signed/
L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT,
this 21st day of August 2008

Counsel for the Plaintiffs: Roger Lepage
Counsel for the Defendants: Maxime Faille

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