Association des Parents ayants droit de Yellowknife et al v. *Attorney General of the Northwest Territories et al*, 2012 NWTSC 43.cor 1

Date: 20120601
Docket: S-1-CV 2005000108

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ASSOCIATION DES PARENTS AYANTS DROIT DE YELLOWKNIFE, LA GARDERIE PLEIN SOLEIL, YVONNE CAREEN, CLAUDE ST-PIERRE and FÉDÉRATION FRANCO-TÉNOISE

Plaintiffs

-and-

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

Defendants

Corrected judgment: A corrigendum was issued on December 12, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

Application for declaratory relief and an injunction under sections 23 and 24(1) of the *Canadian Charter of Rights and Freedoms*.

Heard at Yellowknife, NT, between October 19, 2010, and December 8, 2010, and on January 13 and 14, 2011.

Reasons filed: June 1, 2012.

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Plaintiffs:	Roger J.F. Lepage Francis Poulin
Counsel for the Defendants:	Maxime Faille François Baril Guy Régimbald

TABLE OF CONTENTS

Association des Parents ayants droit de Yellowknife et al v. *Attorney General of the Northwest Territories et al*, 2012 NWTSC-0 43.cor 1

Date: 20120601
Docket: S-1-CV 2005000108

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ASSOCIATION DES PARENTS AYANTS DROIT DE YELLOWKNIFE, LA GARDERIE PLEIN SOLEIL, YVONNE CAREEN, CLAUDE ST-PIERRE and FÉDÉRATION FRANCO-TÉNOISE

Plaintiffs

-and-

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

Defendants

Corrected judgment: A corrigendum was issued on December 12, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

REASONS FOR JUDGMENT

I) INTRODUCTION

[1] This legal proceeding concerns the scope of the obligations of the Government of the Northwest Territories (GNWT) as regards French-language education for the French linguistic minority population of the Territory, specifically in the city of Yellowknife. The proceeding is based on section 23 of the *Canadian Charter of Rights and Freedoms*, and its outcome depends on the extent and scope of the rights and obligations arising from this provision.

[2] The dispute principally revolves around the adequacy and quality of the infrastructure provided by the GNWT for the French-language education program in Yellowknife and the degree of autonomy and control the Commission scolaire francophone des Territoires du Nord-Ouest (CSFTN-O) should be able to exercise.

[3] The Plaintiffs assert that the Defendants are not in compliance with section 23, and they are seeking various remedies to correct the situation. The relief sought concerns École Allain St-Cyr (ÉASC), the school at which the French first language education program is offered in Yellowknife, and the CSFTN-O's powers of management. The Plaintiffs are also claiming compensatory and punitive damages and an order awarding them solicitor and client costs. They argue that such relief is justified because the Plaintiffs have acted in bad faith and have systematically and flagrantly violated their rights for the past 30 years.

[4] The Defendants submit that, on the contrary, they have complied with their constitutional obligations towards Yellowknife's French linguistic minority population. They argue that the Plaintiffs' claims are based on an interpretation of section 23 of the Charter that goes well beyond that adopted in the case law in this area.

[5] The Plaintiffs are the Association des parents ayants droit de Yellowknife ("APADY") (an association of parents); Yvonne Careen and Claude St-Pierre (two right holder parents); the Garderie Plein Soleil (the association that runs the French daycare in Yellowknife); and the Fédération franco-ténoise (a federation of several Francophone associations in the Northwest Territories (NWT), including APADY).

II) BACKGROUND

A. PROCEDURAL BACKGROUND

[6] This proceeding was instituted in April 2005. At that time, in addition to the permanent relief described above, the Plaintiffs sought an interlocutory order compelling the Defendants to establish an interim plan to provide ÉASC with extra classrooms and provide its students with access to certain special-use areas.

[7] On July 12, 2005, the Court granted an Order compelling the Defendants to provide the Plaintiffs with access to the following spaces by September 1, 2005:

a) the use of a gymnasium that fully meets the school's needs for physical education classes and extracurricular activities during and after school hours;

b) the use of a science laboratory and space for industrial arts and home economics;

c) the use of two portable classrooms adjoining the school via a corridor; and

d) the ongoing use of a school bus to transport students to more distant locations so as not to waste instruction time.

[8] Following this Order, negotiations took place between the parties. As a result of these negotiations, the Court was asked to amend its Order. On consent, the interlocutory order was amended on February 28, 2006. The amendment related to the paragraph concerning the two portable classrooms. The amended paragraph reads as follows:

[TRANSLATION]

a) The defendants will complete the construction of two permanent classrooms at École Allain St-Cyr no later than September 1, 2007, in a manner that is compatible with future expansion plans;

b) In the course of 2007, the defendants will complete the schematic plans for a future expansion plan which will include, *inter alia*, additional classrooms and a gymnasium;

c) The defendants undertake to ensure that the existing spaces are remodelled to accommodate the space needed for the 2006–2007 school year, to a maximum of $75,000, before September 1, 2006;

d) The parties will meet every three months in order to get updates on the progress of the undertakings contemplated by the paragraphs of this order;

e) The action is suspended, except for the purposes of obtaining instructions from this Court regarding this order, and subject to the plaintiffs' right, on 60 days' notice to the defendants of their intention, to reopen the action and to pursue their claims regarding the global expansion plan for École Allain St-Cyr;

> f) If the action is reopened, the parties agree to the designation of a case management judge in accordance with Rule 282 of the *Rules of the Supreme Court of the Northwest Territories*.

[9] The Plaintiffs have notified the Defendants of their intention to reopen the file. The file was the subject of a number of case management conferences in 2009 and 2010. Various preliminary procedural steps have been carried out in preparation for trial.

[10] Another proceeding was instituted in May 2008 regarding the enforcement of section 23 in the Northwest Territories, in that case concerning the French school in the community of Hay River *(Commission scolaire francophone des Territoires du Nord-Ouest, Catherine Boulanger and Christian Girard* v. *Attorney General of the Northwest Territories and Commissioner of the Northwest Territories*, CV2008000133). The parties in that proceeding are represented by the same counsel as the parties in this proceeding. The second proceeding has also been the subject of several case management conferences.

[11] Given that several of each of the parties' witnesses were to testify in both proceedings and that both raised related legal issues, the parties agreed to both proceedings being heard at the same time and on common evidence.

[12] The evidence was heard from October 19, 2010, to December 8, 2010, in Yellowknife. The final submissions were presented in January 2011.

B. LEGISLATIVE FRAMEWORK

[13] The legal basis for the present proceeding is section 23 of the *Canadian Charter of Rights and Freedoms*, which provides as follows:

> 23(1) Citizens of Canada
>
> (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province:
>
> (*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
>
> (*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[14] The GNWT has the jurisdiction to draft legislation regarding education in the NWT. It has exercised this jurisdiction by creating the *Education Act*, S.N.W.T. 1995, c. 28 (the Act), and regulations establishing the parameters of the education system in the NWT.

[15] The implementation of French minority language rights is specifically provided for in the Act. Regulations were adopted to govern this implementation, in particular the *French First Language Education Regulations*, R-166-96, and the *Commission Scolaire Francophone, Territoires du Nord-ouest Regulations*, R-071-2000.

[16] The *French First Language Education Regulations* govern the parameters of the creation of the program and the extent of the powers of management conferred on the parents.

[17] The first step is the creation of the program itself. Section 2 of the Regulations stipulates that where the Minister determines that the right under section 23 of the *Canadian Charter of Rights and Freedoms* of French first language instruction applies in an education district, the Minister shall direct the District Education Authority to establish a program of French first language instruction.

[18] With respect to program management, section 4 states that where a program exists and a "conseil scolaire francophone" (a Francophone education council) or "commission scolaire francophone" (a Francophone school board) is not established, three or more parents may request that the District Education Authority establish a "comité de parents francophones" (a Francophone parents' committee). If such a request is made, the District Education Authority must establish the committee.

[19] Section 5 states that a Francophone parents' committee that has been in existence for at least one year may request that the District Education Authority establish a Francophone education council. Again, if such a request is made, the District Education Authority is required to establish a Francophone education council. Once it has been established, certain powers, enumerated in sections 7 and 8 of the Regulations, must be delegated to it by the District Education Authority.

[20] Section 84 of the Act states that one or more Francophone education councils may request that the Minister establish a Francophone divisional school board. Section 9 of the Regulations specifies the circumstances under which the Minister may establish such a school board. That section sets out two potential bases for the Minister's decision to establish a Francophone school board. The first, set out in paragraph 9(3)(*b*) of the Regulations, is purely numeric: the request may be made if more than 500 students are registered in the program in the area that would be within the board's jurisdiction.

[21] If the number of registered students is less than 500, the Minister nevertheless has the power to establish a Francophone school board under paragraph 9(3)(*a*) if, based on the information provided, he or she is satisfied that the school board will fulfil the duties of an education body under the Act, meet the standards established by the Minister for the education program and be able to fulfil the duties of a Superintendant under the Act. The decision in this case is therefore not based on the number of students registered, but rather on the Minister's assessment of the school board's capacity to exercise the higher level of management required by the Act.

[22] Once a Francophone school board has been established, subsection 84(3) of the Act sets out that the Minister must delegate to it certain powers (those enumerated in sections 117 and 118) and may delegate to it certain other powers (enumerated in section 119).

[23] The powers enumerated in section 119 are those related to buildings, including the power to build, maintain, insure and replace them, as well as powers related to tax collection and the right to borrow money.

[24] The provisions of subsection 84(3) are essentially identical to those in section 81 of the Act, which deals with the delegation of powers by the Minister to district education authorities established to manage the other school programs in the NWT. In fact, section 81 obliges the Minister to delegate to district education authorities the powers set out in sections 117 and 118, but leaves it to his or her discretion as to whether to delegate those powers related to buildings.

C. HISTORY OF THE DEVELOPMENT OF THE PROGRAM IN YELLOWKNIFE

[25] The main steps in the evolution of the French first language instruction program in Yellowknife are covered in the evidence presented during the hearing and are not contested.

[26] The program was established in 1989. It was originally governed by an English school board in Yellowknife, the Yellowknife Education District No. 1 (YK1). During its first year, the program was offered in a classroom of J.H. Sissons School (Sissons School), one of the schools under that school board's jurisdiction.

[27] The following year, portable classrooms were installed on the grounds of Sissons School, and the French first language instruction program was set up there. As the number of students increased, other portable classrooms were added.

[28] Space in these portable classrooms was limited, which created challenges for the teaching staff and students. However, both the parents who wanted their children to benefit from education in French and the teachers still considered it preferable that the French first language instruction program be provided in a separate space rather than within an English educational institution.

[29] In 1996, an official request was submitted to the GNWT for the construction of a separate building to house the school. The building that currently houses ÉASC opened its doors in 1999. The construction of this building cost approximately $3.7 million and was funded in part by the GNWT and in part by the federal government through the Department of

Canadian Heritage. The federal government's contribution was directed to those spaces that, while part of the school building, could be used for community activities.

[30] According to government standards, the school had a capacity of 132 students. The original building had three floors. One of those floors included rooms for kindergarten and a daycare; the second floor had two classrooms, administrative offices and an open space (the rotunda). On the third floor, there were three classrooms, a library and bathrooms. The building did not contain any special-use classrooms (science laboratory, or rooms for the teaching of home economics, art or industrial arts). Nor was there a gymnasium.

[31] Pursuant to orders granted under these proceedings, ÉASC was expanded. The expansion work that resulted from those orders ("Phase 1") went beyond what was required by the initial order. The expansion cost approximately $2.14 million. The federal government also contributed funding to the project. Two classrooms were added and certain spaces were remodelled. According to government standards, the school now has a capacity of 160 students following the expansion.

[32] As stated above, the program was originally under the management of the English school board. A Francophone education council was formed in 1994; the YK1 School Board granted it consultation powers with respect to pedagogy. The French school board was established by the Minister of Education in 2000. It was originally called the "Commission scolaire francophone de division" (French Divisional School Board). This board was granted the powers enumerated in sections 117 and 118 of the Act, in accordance with section 84 of the Act. The board later became the CSFTN-O.

III) THE EVIDENCE

[33] As I mentioned previously, the parties submitted common evidence for this proceeding and for proceeding CV2008000133. Some of the testimony and exhibits entered into evidence concern more particularly one proceeding or the other, but many are for both. The following summary covers aspects of the evidence that are more specifically relevant to this proceeding, but I have taken all of the evidence submitted into account in my deliberations.

A. THE PLAINTIFFS' EVIDENCE

1. The witnesses

a. Suzette Montreuil

[34] Ms. Montreuil was born in Ontario. She has lived in Yellowknife for over 20 years. Her husband is Anglophone, and they have two children, A. and R. She is a right holder for the purposes of section 23 of the Charter.

[35] Ms. Montreuil is well informed about ÉASC's various stages of development since it was founded. She recognizes that the expansion completed following the interlocutory injunction granted in July 2005 corrected some deficiencies, but considers that the infrastructure still does not adequately meet the students' needs.

[36] At the time of the trial, Ms. Montreuil was the chairperson of the CSFTN-O. She confirmed that the school board, although not a party to this proceeding, supported the Plaintiffs' claims.

[37] The more significant parts of Ms. Montreuil's testimony relate to her experience with daycare, the children's schooling and her observations concerning the deficiencies that still exist at ÉASC.

[38] Ms. Montreuil explained that her French had been [TRANSLATION] "very rusty" before her daughter A. started attending school. A. went to Garderie Plein-Soleil daycare for one year before going to kindergarten at ÉASC. Ms. Montreuil's son R. began attending daycare at age two. Ms. Montreuil got involved on the daycare's board of directors and eventually became its chairperson, a position she held for three years. She explained that her participation allowed her to relearn French. She believes that the daycare plays a major role in francization.

[39] Ms. Montreuil also talked about the benefits related to having the daycare located in the same building as the school. She explained that, in the 1990s, the daycare had moved three times, which not only represented an enormous amount of work for the people who managed it, but caused a lot of uncertainty. The inclusion of the daycare in the rest of the school community had always been a major objective, which was accomplished when the daycare was able to move into the building housing ÉASC. Ms. Montreuil explained that, after the daycare was located in ÉASC, most of the children

who attended it were then registered for school at ÉASC, which had not been the case previously.

[40] Ms. Montreuil described the physical space that ÉASC had occupied when there were portable classrooms. In her opinion, the space was limited and inadequate.

[41] Ms. Montreuil also talked about times when she thought of switching her children to a different school. With regard to her testimony that consisted of repeating what her children or their friends had said, the Defendants objected to its admissibility, and I will come back to this issue later. However, beyond this aspect of her testimony, Ms. Montreuil talked from her own point of view about the dilemma she faced as a parent in choosing a school for her children. This aspect of her testimony was related to her concerns and what she felt and experienced at that time, and it is clearly admissible in my opinion.

[42] Ms. Montreuil explained that A. had not had any difficulties in her schooling up to Grade 6. In Grade 7, one of her good friends moved away from the N.W.T. Then, Grade 8 was a difficult year for her. In Grade 9, A.'s group had shared a classroom with the Grade 10 students. This class was held in the rotunda, which had been designed to be used as community space but had been reconfigured and divided in two to create additional classrooms.

[43] Ms. Montreuil explained that she had thought of switching A. to another school. Ms. Montreuil believed in the fundamental importance of language and insisted on having A. go to school in French. However, she felt guilty for depriving her daughter of the experience and infrastructure that she would have benefited from in another school.

[44] Finally, it was decided to continue to send A. to school at ÉASC. She continued to go there until Grade 11, and then A. was selected as the N.W.T. candidate to go to the prestigious Lester B. Pearson School, where she completed Grade 12.

[45] Ms. Montreuil's son, R., was born in 1995. He went to the daycare. He did his pre-school and all of his schooling at ÉASC in the current building. In school, R. excelled at mathematics and social sciences. He was also passionate about music and sports. At the time of the trial, he was in

Grade 10 at ÉASC. Ms. Montreuil explained that the infrastructure deficiencies made a significant impact on R., because of his areas of interest.

[46] To explain her dissatisfaction with the current infrastructures, Ms. Montreuil talked about the lack of space for classrooms, which, among other things, forced the school's administration to change the rotunda's layout. She provided some examples of the resulting difficulties, such as holding a music class in the rotunda at the same time as an English class is held in the other half of the room.

[47] She talked about the difficulties owing to the fact that the school did not have its own gymnasium. She explained that this had an impact, not only on physical education courses, but also on extracurricular activities.

[48] Ms. Montreuil also expressed her dissatisfaction with ÉASC's playing field, which was too small in her opinion.

[49] Ms. Montreuil also explained why she considered that there were deficiencies at ÉASC in terms of the space available for electives (drama, art, music and technical courses). These deficiencies had less of an impact on A., whose main interest was languages. However, according to Ms. Montreuil, they had more of an impact on R., because of his interest in sports, and because he had access to fewer technical courses as options. There is a wide gap with what is available in Yellowknife's other high schools.

[50] Ms. Montreuil emphasized that, because of the limited number of classrooms, the school administration had to have multi-grade (split) classes, which was a problem in her opinion, especially at the secondary level.

[51] Ms. Montreuil considers that, despite improvements resulting from the expansion work in Phase 1, the second expansion phase is required so that ÉASC can offer its students a full, high-quality program. To her knowledge, the GNWT was still negotiating with Canadian Heritage for the project's funding. The Department of Education sent her a letter, dated March 22, 2010 (Exhibit 8), describing the situation. Ms. Montreuil found this letter unsatisfactory because it proposed nothing concrete.

[52] Ms. Montreuil admitted on cross-examination that there needed to be a minimum number of students to justify building certain specialized spaces. Counsel for the Defendants asked her to confirm that the CSFTN-O's position was that ÉASC should be entitled to infrastructure that did not exist at any NWT school with a comparable number of students. Ms. Montreuil

said that the CSFTN-O was not approaching the issue in that manner but had based its requests on achieving equality with the majority of schools in Yellowknife.

[53] In my opinion, the credibility of Ms. Montreuil's testimony was not undermined by her cross-examination. She is not a disinterested witness. On the contrary, she is clearly a committed person who has worked for a long time to further the cause at issue in this proceeding. However, she testified in a clear, direct and straightforward manner. I did not have the impression that she was exaggerating or trying to avoid answering questions. I consider all of her testimony credible and reliable.

b. Carmen Moore

[54] Ms. Moore is originally from Prince Edward Island. Her husband is an Anglophone. They moved to Yellowknife in 1987. They have two children, C. and M., who, at the time of the trial, were aged 17 and 13. She is a right holder for the purposes of section 23 of the Charter.

[55] Ms. Moore has always considered it very important for her children to speak French like her, and she has her husband's support in this regard. Both their sons attended the daycare because it was the only French-language daycare in Yellowknife. Ms. Moore served on the daycare's Board and experienced its many different locations, as Ms. Montreuil had mentioned.

[56] The most significant aspects of Ms. Moore's testimony concern her children's schooling and the deficiencies which, in her opinion, still exist in the school's infrastructure and the consequences thereof.

[57] As in the case of Ms. Montreuil, some aspects of Ms. Moore's testimony regarding comments made by her children and their friends concerning the reasons why they might leave ÉASC were the subject of an objection raised by the Defendants. I will discuss this aspect in the part of the judgment related to the admissibility of evidence. But, once again, to the extent that she talked about dilemmas she experienced as a parent, her opinion was clearly admissible, in my opinion.

[58] C. went to kindergarten at ÉASC when they were still using the portable classrooms on the grounds of Sissons School. There were 11 students in the Grade 1 cohort. At the time of the trial, C. was in Grade 12 and was the only student in his cohort. Of the other 10 students, 6 left ÉASC for other schools in Yellowknife, and the others moved.

[59] Ms. Moore explained that, when C. was ready to go to Grade 9, there was a question of him changing schools. They visited Sir John Franklin High School, a high school in Yellowknife, to ask for information on the immersion program. Ms. Moore noted that this program did not meet her expectations regarding the promotion of French. The courses were held in French, but the students spoke English when they left the classrooms. Ms. Moore, her husband and C. decided together not to change schools.

[60] At the end of Grade 11, C. and his family learned that the only two other students in his cohort were moving from Yellowknife. Ms. Moore was greatly saddened to know that her son would be the only Grade 12 student at ÉASC. She wondered whether she should send him to Sir John Franklin High School or send him to do his Grade 12 outside the N.W.T. She also inquired about the Grade 12 syllabus at ÉASC. She learned that the Math 30 course, which C. wanted to take, would be given in the same classroom as Math 20. That option was not acceptable in her view. She thus took some steps with Sir John Franklin High School to allow C. to take Math 30 in that school. She learned that it was possible to do so, and that a chemistry course that C. wanted to take was also given in the morning at Sir John Franklin High School.

[61] Ms. Moore therefore made arrangements so that C. could spend his mornings in the immersion classes at Sir John Franklin High School, to take these two courses, and afternoons at ÉASC. The ÉASC administration was not in favour of this option at first, but it eventually agreed.

[62] At the time of the trial, Ms. Moore's youngest son, M., was in Grade 8. He had been going to school at ÉASC since kindergarten. M. was very athletic and interested in mechanics. Ms. Moore explained that she was not sure what she and her husband would decide, taking into account their son's wishes about which school he would attend for the rest of his secondary education. The fact that he was going to school in French continued to be a key factor for her. However, she said many times that she considered that, given the deficiencies at ÉASC, regardless of the courses that M. might want to take, she might have no other alternative than to switch him to a different school.

[63] Ms. Moore discussed the problems arising from the fact that ÉASC did not have its own gymnasium and, in particular, the restrictions on the availability of the gymnasium at William McDonald Middle School and the

not very advantageous time slots offered to ÉASC over the years for extracurricular activities.

[64] Ms. Moore said that drama and music were not offered at ÉASC. She admitted that, some years, several teachers had organized drama and music activities outside school hours. She signed up her two sons for private music lessons.

[65] With regard to the selection of courses, Ms. Moore also explained that C. had taken some distance courses, in particular, biology. She was worried about this situation, because C. did not have access to either a laboratory for doing experiments or to an onsite science teacher. The experience was difficult, and C. just barely passed.

[66] With regard to multi-grade classes, while acknowledging that the school must adjust to the number of students at each level when forming its groups, she was of the opinion that multi-grade classes were not appropriate for the secondary level, particularly grades 10, 11 and 12.

[67] Ms. Moore was cross-examined about a number of statements she made during her direct examination. This cross-examination clarified certain points. For example, Ms. Moore had stated that one of the reasons why she had signed up her sons for music lessons was to give them the opportunity to meet other friends, given the limited number of students at ÉASC. It became clear, later in her cross-examination, that the music courses were private courses, and that she had tried to compensate for the small number of students in the school by registering her children in other activities.

[68] In my opinion, there is nothing in Ms. Moore's cross-examination that undermines her credibility. I draw the same conclusions from it as I reached in Ms. Montreuil's case. Ms. Moore has also been involved for a long time in a cause in which she deeply believes. It appears obvious to me in her testimony that she feels frustrated and deeply saddened by the situation her family faced. She has a deep feeling of injustice because her children were penalized for going to school in French and did not have access to the services they would have received in English schools in Yellowknife. This frustration was evident at certain points in her cross-examination, when she sometimes engaged in a debate with the counsel for the Defendants rather than simply answering questions. However, in my opinion, her emotion is understandable, and it does not call into question her sincerity as a witness. I consider that her testimony is, on the whole, credible and reliable.

c. Rachel Simmons

[69] Ms. Simmons is originally from Ontario. She and her husband moved to Yellowknife in 1995. Her husband is Anglophone. They have two children, C. and B. Ms. Simmons is a right holder within the meaning of section 23 of the Charter.

[70] Ms. Simmons has worked in teaching and administrative positions in a number of schools in Yellowknife, including Sir John Franklin High School, Sissons School and William McDonald Middle School, of which she is currently the principal. She is familiar with these schools and is able to describe their physical space and the programs offered there. These aspects of her testimony are not particularly controversial.

[71] Ms. Simmons sent both of her children to Garderie Plein-Soleil. She chose it because it was the only French-language daycare in Yellowknife. Ms. Simmons explained that she wanted her children to speak French, maintain their culture, and be able to communicate with their Francophone relatives. For her, the fact that the daycare was located in ÉASC was an advantage, but she would have sent her children there even if it had been located elsewhere.

[72] The most significant aspects of Ms. Simmons' testimony related to general deficiencies she had noted at ÉASC and deficiencies specifically related to C.'s special needs. She also talked about what she had observed, over the years, regarding the attendance at English-language schools by right holders' children.

[73] As Ms. Montreuil and Ms. Moore had done, Ms. Simmons testified about conversations she had had with her son B., about possibly changing schools. It is this part of the evidence of which the Defendants are contesting the admissibility, and which I will discuss later.

[74] Ms. Simmons is familiar with several English-language schools in Yellowknife because she worked in them. She finds it unfair that ÉASC students are deprived of certain infrastructures, resources and programs to which they would have had access if they attended English schools.

[75] She believes that, if ÉASC had its own gymnasium, no time would be lost by using the Multiplex (a municipal facility where students go to take their physical education courses) and the students would not have to be in an Anglophone environment to take these courses.

[76] She also believes that the school should have the necessary space to offer a varied Career and Technology Studies (CTS) program. Her son B., for example, is good at manual work, and she believes that he should have access to this type of course. Other schools offer a whole range of programs and equipment that allow students to take all kinds of technical courses.

[77] She believes that the practice of having multi-grade classes is acceptable at the primary level but should be avoided at the secondary level. She thinks that secondary-level teachers should not have to split their time between students in two grades. She explained that, when she worked at Sir John Franklin High School, there had been a split physics course, but the experience was not repeated.

[78] She also talked about not having the capacity to teach music and art and emphasized that the space is inadequate for parent meetings organized by the school. Those meetings are held in the rotunda, where half of the space has been made into a classroom, so the space available for meetings is very limited.

[79] Ms. Simmons said that, when she worked in the immersion program at Sir John Franklin High School, the recruiting program included an information evening for parents, usually in May. Each year, from two to three families whose children were at ÉASC attended the information evenings.

[80] She also talked about right holders' children who attended English schools where she worked. At Sissons School, in her homeroom class, there were three right holders' children. At William McDonald Middle School, she knew of four right holder families whose children attended the school. And when she worked at Sir John Franklin High School, two or three students arrived from ÉASC each year. Some students in the immersion group were also right holders' children.

[81] Ms. Simmons' daughter, C, has special needs. Ms. Simmons testified on this subject. Documents submitted into evidence (Exhibits 51 to 54) describe her condition and the resulting needs. At the trial, I ordered that these documents be sealed to protect C.'s privacy. I read them, but I will not refer to them in a detailed manner because it is not necessary to do so in order to address the general issues raised by her situation.

[82] As soon as she started going to the daycare, C. experienced some difficulties. She had perception problems and did not know her own strength, among other things. She had a lot of problems with academic subjects. She had difficulty managing her energy and often had trouble concentrating when it was noisy. However, she was good at sports and benefited a lot from cooking classes, which over and above the skills that she could learn from them, became a useful teaching tool for her.

[83] Ms. Simmons took steps to obtain help for C. as soon as she started school, and various accommodation measures were implemented. However, according to Ms. Simmons, the infrastructure deficiencies at ÉASC created and still create barriers to efficiently meeting her needs.

[84] For example, because she is really bothered by noise, C. must often leave the classroom to work in a quiet area. Before the Phase 1 renovations, there was no physical space where she could go, except in the hall or the library. Neither was adequate for her needs because they were spaces which were frequently used by other students. After the renovations, she started using the office of one of the staff members, which is very small. In comparison Ms. Simmons explained that, at William McDonald Middle School, there are two offices and a research room which are available for special needs students.

[85] For the cooking classes, ÉASC has a small room containing an oven, a sink and tools for measuring ingredients. According to Ms. Simmons, the room is so small that only two people can be in it at the same time. For purposes of comparison, the home economics room at William McDonald Middle School is much larger and contains a full range of kitchen equipment.

[86] Ms. Simmons also considers that the fact that the school does not have its own gymnasium has disadvantaged C., because she is good at sports. It had been recommended that she do more sports than the periods provided in the regular schedule. The fact that she had to go outside the school to participate in sports activities was a disadvantage because the travel time cut into the time available for the activity.

[87] Ms. Simmons admitted on cross-examination that all of the recommendations made in the various psycho-educational reports concerning C. had been implemented. She also acknowledged that no report

contained a specific recommendation for what she was asking for, namely, access to an individual workspace for C.

[88] She was also cross-examined about a statement in her examination-in-chief that she considered the room used as a kitchen to be unsafe. She acknowledged that she would not compromise her daughter's safety and that she allowed her daughter to continue using the room because she believed it to be safe. She admitted that she considered the room safe as long as one other person was there with C. and that there was no particular risk associated with using the kitchen, according to the psycho-educational reports prepared about C.

[89] Ms. Simmons also said that switching her daughter to another school was not an option because the environment at ÉASC was familiar to her and welcoming. She believed that C. would be unable to adapt to another school and would be unable to function in a school with a larger student population or to adapt to an English school environment. Despite the deficiencies identified, Ms. Simmons believes that ÉASC is the best or the only choice for C.

[90] Ms. Simmons explained that, at the time of the trial, three classrooms at William McDonald Middle School were used by ÉASC: one for judo, one for robotics and one for health classes. The ÉASC also had specific gym periods outside class times for extracurricular activities. The hours for gymnasium access at the time of the trial had only been in place for a few weeks, according to Ms. Simmons.

[91] With regard to sharing the gymnasium, Ms. Simmons explained that her priority as the principal of William McDonald Middle School was to meet the needs of her students first. The needs of the other schools using the same space should come second, in her opinion.

[92] She provided a concrete example of how she used this method of setting priorities. The physical education teacher at William McDonald Middle School suggested that a physical activity program be set up early in the day from 8:30 a.m. to 9:00 a.m. This program required that the gym be used and that the equipment be installed approximately 15 minutes before the beginning of the activity.

[93] Ms. Simmons approved the program's implementation. At that time, ÉASC had booked the gymnasium at William McDonald Middle School for

extracurricular activities early in the morning. The new program created a scheduling conflict; so ÉASC lost its access to the gymnasium.

[94] Ms. Simmons discussed her position in a straightforward manner. If her school identified additional needs for gymnasium time that conflicted with gym time blocked for ÉASC, her approach would be to change ÉASC's gym time.

[95] Ms. Simmons was questioned about a memorandum of understanding between the two school boards that dated back to 2005 and provided for equal sharing of gym times between the two schools (Exhibit 31). Ms. Simmons stated that she had never seen this document before the trial.

[96] Ms. Simmons acknowledged that William McDonald Middle School had a lot of space. The school had been able to welcome approximately 126 students from another school board for a two-year period, following a serious fire in their school. She acknowledged that, during the period, the students from the other school were able to use the gym and special-purpose classrooms at William McDonald Middle School. Those students have now returned to their own school, which has freed a lot of space and time for the use of special-purpose space.

[97] Ms. Simmons was cross-examined about her negotiations with Yvonne Careen, ÉASC's principal, in order to reach an agreement about ÉASC's use of space in the William McDonald Middle School. She admitted that Ms. Careen was a personal friend. They had discussed the use of space, and the CSFTN-O was not satisfied with the result of the negotiations. The CSFTN-O had complained to the YK#l school board, and the school board's assistant superintendent had intervened, after which the agreement to share space was entered into mainly regarding gymnasium use time.

[98] It was suggested to Ms. Simmons that, since she supported the Plaintiffs' claims, it was in her interest that ÉASC not have adequate access to the space in William McDonald Middle School. In other words, she did not negotiate in good faith with Ms. Careen, and she even plotted with her in order to improve the chances for the Plaintiffs' success in this proceeding. The Defendants suggested in their representations at the end of the trial that I should draw this conclusion. I am not prepared to do so for two reasons.

[99] First, the evidence showed that the problems of sharing space to meet ÉASC's needs have existed since the school was opened in 1999. Ms. Simmons only became the principal of William McDonald Middle School recently. In my view, it is unfair to suggest that her attitude or personal motivations were the reasons for the failure of negotiations. She and Ms. Careen are not the only principals of these two schools who were unable to agree on an acceptable sharing of space for all the parties.

[100] Second, Ms. Simmons' children go to ÉASC, and it is obvious that physical activity is very important for her daughter C. I have no doubt that Ms. Simmons is devoted to her daughter and is protecting her best interests. I think it is rather far-fetched to suggest that she plotted with Ms. Careen to deliberately sabotage the sharing of space to the detriment of her own children simply to help the Plaintiffs' case in the long term.

[101] I find, on the contrary, that Ms. Simmons, as principal of William McDonald Middle School, whose primary responsibility is to provide the best educational experience for the school's students, is in a very delicate situation because her own children go to ÉASC. I accept her testimony that, as part of her work, she puts her school's interests first because she considers that it is her professional responsibility to do so. I find that her testimony is trustworthy and reliable.

d. Martin Deschênes

[102] Mr. Deschênes has been a teacher at ÉASC since September 2003. In the first two years, he taught physical education, mathematics, computer and humanities courses at different levels. At the time of the trial, he was responsible for teaching physical education at all levels, computer courses from grades 7 to 12 and some mathematics and robotics courses, which were given in a classroom in William McDonald Middle School.

[103] Mr. Deschênes explained that, when he arrived at the school, William McDonald Middle School had been approached about possibly sharing its gym, but he had been informed at that time that there was no space available. Meetings then took place with municipal authorities to discuss the possible use of the Multiplex. Mr. Deschênes said that the negotiations had been difficult. Eventually, ÉASC obtained two blocks of one hour at the Multiplex, from l:00 p.m. to 3:00 p.m., every day.

[104] During the 2003 and 2004 school years, no transportation was organized for students going to the Multiplex. Mr. Deschênes explained that it meant a 10-to-15 minute walk, depending on the students' ages. Not having any transportation complicated matters where the equipment was concerned, and the principal usually had to take the equipment by car.

[105] Also, when the outside temperature was below -30 degrees Celsius, the students could not walk to the Multiplex. The school then used taxis for their transportation. Using taxis caused other problems. Sometimes the waiting time was long, and the students arrived back too late to take their school buses.

[106] After the interlocutory injunction was granted in July 2005, students were transported by bus, which improved the situation.

[107] Mr. Deschênes identified a number of challenges he faced as a physical education teacher because he had to give courses at the Multiplex. Since the equipment available was very limited, they had to transport a lot of equipment. Mr. Deschênes had already asked to keep equipment in one of Multiplex's storerooms, but, a few weeks later, the equipment disappeared and was never found.

[108] Mr. Deschênes also talked about some aspects of the Multiplex gymnasium that were not adapted for primary school students. For example, the basketball baskets were not mobile and could not be lowered for younger children, so they could not teach younger children to play. He also talked about other obstacles from a teaching perspective: there was no blackboard to write on; there was nowhere to put up posters so that he could, for example, organize activities by station with posters explaining to students what should be done at each station; and the Multiplex's environment (its signs, employees, other users) was very Anglophone for the most part.

[109] In terms of logistics, having to travel, even on the bus, resulted in lost time and limited the quantity of equipment which could be available.

[110] He also talked about other constraints arising from the fact that there were other users at the Multiplex. Canadian Forces members had access every day to a physical fitness room located on the mezzanine above the gymnasium. This room was not closed, with the result that they sometimes heard loud music that fitness room users were listening to while training.

There was also a risk that the children could end up in the locker rooms with adult strangers.

[111] Mr. Deschênes explained that, for various reasons, the municipality sometimes cancelled the time slots reserved for ÉASC at the Multiplex. In some cases, the school was informed in advance, but not in all cases. He sometimes took his students to the Multiplex only to be told after they arrived that it was not available.

[112] One of these situations occurred a few years ago when another school in Yellowknife negotiated an arrangement with the city to use the Multiplex during the same time slots that ÉASC was supposed to be able to use the gymnasium. The municipality had then cancelled access for ÉASC during this period. The ÉASC complained to the municipality, and the solution had been to divide the gymnasium in half and allow both schools to use it at the same time.

[113] Another time, the same school's gymnasium had to be used for a community event, and the municipality cancelled ÉASC's gym time, without notifying the school, to grant the time to the other school.

[114] Mr. Deschênes explained that, if the Multiplex gymnasium was not available, the options were limited for offering physical education courses. Outside activities could be an option, weather permitting, but often it was not possible to stay out for a whole hour, especially with younger children. With regard to activities organized inside ÉASC, the lack of space meant that the options were very limited and, according to Mr. Deschênes, inadequate. He gave an example of the "cup stacking" activity, which consists of building a pyramid with plastic drinking glasses as fast as possible. He explained that this activity [TRANSLATION] "counted" as a physical education activity, but was far from being as beneficial as what could be done in a gymnasium.

[115] Mr. Deschênes also talked about the challenges of not having a gymnasium for extracurricular activities, such as team sport practices. He explained that, for a very long time, the disadvantageous gym time slots offered by William McDonald Middle School, such as early in the morning or at the end of the day, had been an additional challenge for students participating and for parent volunteers. With regard to intramural activities, Mr. Deschênes defined them as sports activities during school hours, as

opposed to extracurricular activities outside school hours. They were almost impossible to organize without a gym.

[116] When cross-examined, Mr. Deschênes acknowledged that the situation had improved at the Multiplex after they organized bus transportation. He also admitted that when the school complained about the withdrawal of their hours at the Multiplex, corrections were made. According to Mr. Deschênes, in the weeks leading up to the trial, he had obtained adequate access to the gym at William McDonald Middle School for extracurricular activities.

[117] He talked about various non-gym programs that ÉASC could have set up, such as squash, gymnastics and soccer. He acknowledged that some of the challenges in forming and training extracurricular sport teams stemmed from the small number of students, rather than the lack of a gymnasium. And he acknowledged that, despite the difficulties he described, ÉASC students were able to meet the criteria for the curriculum and obtain the necessary credits in physical education.

[118] Mr. Deschênes was also questioned about the difficulties of retaining students in the Secondary level. He said that many students left at the secondary level. The Defendants objected to him expressing an opinion on these departures. After listening to the parties' representations, I decided that his opinion, even as an ordinary witness, on the reason for the departures was admissible because of his many years of experience at the school, which included daily contact with his students. Mr. Deschênes said that, in his opinion, students left ÉASC to have access to a more diversified range of courses, better programs in fields such as mechanics and music and more access to gym time and sports activities.

[119] Having decided that this evidence is admissible, I must still assess its probative value. Mr. Deschênes' opinion is partly based on comments made to him by students, and the Defendants contest the admissibility of those comments. Because of the link between the admissibility of the comments and the probative value of Mr. Deschênes' opinion, I will discuss these two issues at the same time.

[120] Mr. Deschênes was cross-examined about factors which had an impact on the school's selection of courses. He acknowledged that, over and above the number of rooms available, the number of students and teachers was also a factor which had an impact. However, he said that, in his opinion, a school

should do everything possible to provide its students with the widest possible choice of courses even if the number of students who wanted to take them was very limited.

[121] With regard to the issue of the departure of students, Mr. Deschênes acknowledged that a number of reasons could motivate a student to change schools. He acknowledged that Yellowknife was a city with a high mobility rate. Mr. Deschênes was questioned about the number of students who had left ÉASC to go to other schools in Yellowknife and those who left because of moving. Counsel for the Defendants asked him if there had been fewer departures for other schools in Yellowknife since the Phase 1 expansion.

[122] Mr. Deschênes found it difficult to answer these questions because he could not remember the exact numbers for each of the years. Counsel for the Defendants asked him questions using the lists of names of students who left ÉASC during the 2007-2008, 2008-2009, and 2009-2010 school years.

[123] Once Mr. Deschênes was given these names, he was able to be much more specific. For the 2007-2008 school year, out of eight departures, Mr. Deschênes said that one student had gone to Sir John Franklin High School, four had moved, and he did not know the reasons for the other three departures. For the 2008-2009 school year, out of nine departures, seven were owing to moving, and two students had gone to Sir John Franklin High School. And for the 2009-2010 school year, out of five departures, two students had gone to specialized schools outside Yellowknife, two others had moved, and Mr. Deschênes did not know the reason why the fifth one had left.

[124] There were times during the cross-examination when Mr. Deschênes tended to avoid the question asked and talk about other subjects. His tendency to stray from the subject of the question led me to intervene several times during his testimony to remind him of the importance of properly listening to questions and trying to answer completely without expanding into other topics.

[125] However, I do not think it is a factor that undermines Mr. Deschênes' credibility as a witness. My impression is instead that he was rather nervous. He said that he was "stressed" several times during his testimony and the questions brought to his mind a large number of subjects and aspects that he tried to include in his answers. With regard to the management of physical education courses at ÉASC, he was asked to summarize and describe his

daily life as a teacher over a period of more than five years. It is not surprising that he had some difficulty in doing so clearly and concisely.

[126] I find that Mr. Deschênes testified honestly. He admitted that he experienced some difficult and frustrating times over the years and that, similar to other witnesses, he had very definite opinions about the importance of teaching in French, ÉASC's outreach in the community and promotion measures that could be taken. This litigation relates to his daily work environment, and he is not a detached or neutral witness. Having said this, I believe that he discussed facts that he witnessed, to the best of his knowledge. I find that his testimony is trustworthy and reliable, subject to admissibility issues and their impact on the probative value of his opinion on why some students left.

e. Jean Gravel

[127] Mr. Gravel is a teacher. His spouse is a Francophone, and they have two children. At the time of the trial, the eldest was attending Grade 5 at ÉASC, and the youngest child was in the Garderie Plein-Soleil daycare. He is a right holder within the meaning of section 23 of the Charter.

[128] Mr. Gravel came to work in Yellowknife for the first time in 1997. At that time, 70% of his work was at Sir John Franklin High School, and 30% was at ÉASC. At that time, ÉASC held its classes in portable classrooms on the grounds of Sissons School. The following year, he worked full time at the Sir John Franklin High School. He and his spouse then left the Northwest Territories. They returned in January 2002, and since that time Mr. Gravel has been a full-time teacher at ÉASC. He used to teach physical education and now teaches science and mathematics.

[129] When he arrived at the new school in 2002, there was a classroom for grades 7, 8 and 9, for all subjects. At that time, hot meals were served in the rotunda.

[130] The following year, the rotunda was reorganized to make other classrooms. Movable walls were installed, and the meal service was abandoned. The ÉASC entered into an agreement with Sir John Franklin High School according to which three Grade 10 students were to take courses at that school. According to Mr. Gravel, this agreement was made because ÉASC had neither the human nor the physical resources to

accommodate the three Grade 10 students. The three students in question all left ÉASC the following school term.

[131] Mr. Gravel gave part of his physical education courses in the gym of William McDonald Middle School. He explained that, when he went there with his students, they did not feel welcome and were given the impression that their presence was inconvenient. Sometimes, if classes from William McDonald Middle School were using the gym at the same time, the gymnasium was divided into two. Mr. Gravel said that [TRANSLATION] "it worked, but it was difficult."

[132] When he did not have access to the neighbouring school's gym, Mr. Gravel gave his physical education courses in the rotunda. He estimated that he had to do that for one class out of every two. He had to reorganize the space, fold the tables and make adjustments for low ceilings. The situation was far from ideal for teaching physical education.

[133] Mr. Gravel no longer teaches physical education, but he has accompanied the students who were walking to and from the Multiplex. He explained that the walk of 10 to 15 minutes between the two locations wasted time, which reduced the teaching time.

[134] Mr. Gravel acknowledged that the renovations of Phase 1 had improved the situation at ÉASC, but he maintained that there continued to be deficiencies, particularly in the space available for secondary-level students. There were now two rooms for the secondary level, including one which was used as both a classroom and a science laboratory. The computer room used by secondary-level students was also used by primary students.

[135] Mr. Gravel believed that the school needed separate science labs for the primary and secondary levels in order to meet their very different needs. He thought that, in general, the school needed space specifically for the secondary level because, currently, there were no real physical separations between the two levels.

[136] When asked about course selection, Mr. Gravel talked about [TRANSLATION] "mandatory electives" because ÉASC can only offer a very limited number of courses. Mr. Gravel acknowledged that ÉASC cannot offer a full range of electives available in a bigger school, but he thought that minimum physical space should be available to offer a program of an equivalent quality to that provided in other schools in Yellowknife.

[137] Mr. Gravel talked about his experience with using classrooms in William McDonald Middle School. He was given access to a room in 2003, but the arrangement was not satisfactory from his point of view. They wasted time travelling to get to this room, the desks were in poor condition, and there was no equipment. The arrangement did not last for the whole term because he decided that it was preferable, and more efficient, to go back and give the course in the rotunda.

[138] Mr. Gravel also talked about multi-grade classes. At ÉASC, he always had multi-grade classes at the secondary level, except once for a math course. He explained that the multi-grade classes were a significant challenge both for the teachers and the students. As for him, with this type of group, he tends to give priority to the higher level. He believes that multi-grade classes disadvantage students because they do not receive the same teaching quality as a single-level group. Multi-grade classes also create a huge workload for the teacher, who has to teach the course material for two levels at the same time. Mr. Gravel thinks that there should not be multi-grade classes for academic courses in grades 7 to 12.

[139] At the end of his examination-in-chief, Mr. Gravel explained that he really liked ÉASC and his sons loved it. However, he was very concerned by the prospect of multi-grade classes for academic courses at the secondary level, which could possibly lead him to switch his son to another school or to even move, if the current situation did not change.

[140] On cross-examination, Mr. Gravel was asked to give his opinion on multi-grade classes. Certain extracts from an information document for parents prepared by the Rights Holders Parents' Association of Yellowknife (APADY) (Exhibit 59) were brought to his attention. The document describes the advantages arising from multi-grade classes and other advantages that ÉASC students have.

[141] Mr. Gravel acknowledged that he was an APADY member and that, in general, he agreed with the statements in the document. With regard to multi-grade groups, he agreed with the statements for the primary level, but not the secondary level. He acknowledged, however, that the document did not make this distinction.

[142] Mr. Gravel also acknowledged that ÉASC students have good pass rates. When asked to compare his students' pass rates with those in other schools, he answered that he had never compared them.

[143] Mr. Gravel was cross-examined about the problem of retaining secondary-level students at ÉASC. Counsel for the Defendants asked him if he considered that the situation had stabilized since 2008, and Mr. Gravel answered that, based on his observations, the school was trending towards stability. Counsel for the Defendants then brought to Mr. Gravel's attention information about the number of students at each level of ÉASC for the years 2006 to 2009. After looking at the numbers, Mr. Gravel conceded that the number of secondary-level students at the school had indeed stabilized since 2008.

[144] With regard to the multi-purpose room added in 2008, which is used as a science laboratory, among other things, Mr. Gravel acknowledged that the CSFTN-O had approved the 2008 expansion plans, and that he had attended a meeting at which the lab was discussed at the request of Gérard Lavigne (who was then the superintendent of the CSFTN-O). However, according to him, the discussion at the meeting was about a lab to be installed elsewhere in the school, but the plans were subsequently changed.

[145] Mr. Gravel reiterated that he acknowledged that ÉASC, with its small numbers, could not provide exactly the same services as a bigger school such as Sir John Franklin. However, he thinks that ÉASC should have the means to offer something equivalent, to protect the continued existence of its secondary-level program. In his opinion, a larger infrastructure would increase retention and allow the school to attract more staff. He acknowledged that his opinion on this issue was based on the statistics and information that he had read in certain documents and was not the result of research or personal expertise on the subject.

[146] Like the other witnesses, Mr. Gravel referred to students' decisions to leave ÉASC. Like Mr. Deschênes, Mr. Gravel felt that the infrastructure deficiencies caused the high-school level retention problem. He based this opinion on comments made to him by his students and on his daily experience in the school. The probative value of his opinion in this regard should be analyzed in the same way as that of Mr. Deschênes.

[147] The comments I made about the credibility and reliability of Mr. Deschênes' testimony apply, in my view, to Mr. Gravel's testimony. I have no reason to doubt his good faith and honesty as a witness. He is also not a neutral observer. As with the other witnesses, I had to intervene to remind him that his role as a witness was not to engage in a debate with the lawyer who was asking him questions. However, it is not surprising that this

should happen in a proceeding such as this one, and Mr. Gravel, despite being strongly opinionated about some subjects, seemed to be sincere. I consider his testimony to be trustworthy.

f. Roxane Poulin

[148] Ms. Poulin is originally from Ontario. Her husband is an Anglophone, and they have two children. Ms. Poulin is a right holder within the meaning of section 23 of the Charter.

[149] At the end of her maternity leave, after the birth of her first child, Ms. Poulin registered the child at Garderie Plein-Soleil. She served on the daycare's board of directors, and at the time of the trial she had just finished her last term as the chairperson. Her testimony touched on her experience as the parent of a child who had attended daycare and on the operation of the daycare, its spaces and clients. It should be remembered that Garderie Plein-Soleil is one of the Plaintiffs in this litigation, and it is asking for additional space.

[150] As a parent, Ms. Poulin explained that she chose Garderie Plein-Soleil because she wanted her child to not only speak French, but to live in a Francophone environment and be exposed to Francophone culture on a daily basis. In her view, there is a difference between [TRANSLATION] "speaking French" and [TRANSLATION] "being Francophone." She explained that in terms of identity and culture, the daycare plays an important role for families. It provides a Francophone network for parents. She talked about the benefits for an exogamous (i.e., linguistically mixed) family such as hers. One of the impacts of the family's contact with the daycare was to contribute to improving her husband's command of French.

[151] Ms. Poulin talked about the links between the daycare and the school, which she thought were excellent. In her opinion, the daycare plays a major role in recruiting students for the school. The transition was all the more natural given the fact that the daycare is located in the same building. The daycare also provides an after-school service in French, which is also an incentive for parents. Ms. Poulin explained that the year before the trial, all the children who had been in the daycare were registered at ÉASC for Grade 1, except for the families who left Yellowknife.

[152] According to Ms. Poulin, the link between the daycare and the school goes beyond the sharing of physical space. Common activities are organized.

ÉASC students are invited to get involved in the after-school program and summer camps. There is regular interaction between the pre-school group and the kindergarten class. Ms. Poulin spoke of [TRANSLATION] "cross-promotion" between the two organizations.

[153] Ms. Poulin spoke of her own children's experience in this regard. She explained that the interaction between the daycare and the school meant that the older children going to ÉASC became models for the younger children. She said that her children's [TRANSLATION] "heros" were the [TRANSLATION] "older kids" at the school who were Francophones. From her point of view, these links and interactions contribute significantly to creating a sense of community and belonging to the [TRANSLATION] "Francophone family."

[154] Ms. Poulin's involvement as the chairperson of the board of directors also allowed her to talk about the daycare's operations. The daycare derives its revenues from a range of sources. Parents pay fees, and the GNWT and the federal government provide the daycare with a certain level of funding. The daycare also receives funding from the CSFTN-O for its francization program.

[155] Daycare expenses mainly consist of salaries and benefits paid to employees. In this regard, the fact that the daycare has free premises at ÉASC gives it more financial flexibility, which allows it to provide better employment conditions. This facilitates the recruiting of quality personnel. This recruiting is often done outside the NWT, and employment conditions must be sufficiently attractive to encourage candidates to come to Yellowknife and settle there.

[156] With regard to space, Ms. Poulin explained that, when ÉASC opened, the daycare occupied one of two rooms on the ground floor of the school. At that time, the other room was used by the kindergarten, and the daycare had 30 spaces.

[157] Since 2008, the daycare has occupied both rooms on the first floor, which has given it more spaces. The daycare has 8 spaces in the nursery, 6 spaces for the ages 18 months to 2 years group, 7 spaces for the ages 2 to 3 group, 8 spaces for the age 3 group and 9 spaces for the age 4 group, for a total of 38 spaces.

[158] A list of children registered at the daycare on August 28, 2009, was submitted as evidence (Exhibit 43). According to this list, on that date,

34 children were registered: 8 in the nursery with 1 space that would become free in January; 5 children from 18 months to 2 years of age; 6 children from 2 to 3 years old; 7 children in the age 3 group and 8 children in the age 4 group.

[159] With regard to the daycare's clients, Ms. Poulin explained that the daycare gives priority to right holder parents within the meaning of section 23 of the Charter. However, when a request is made for a daycare space and there are no right holder parents on the waiting list, a space is given to a non-right holder. Ms. Poulin also stated that the waiting lists were constantly changing. Names are added as soon as new applications are received, and other names are removed if a space becomes available but the parents in question have made other arrangements for their children in the meantime.

[160] Ms. Poulin said that the daycare could not currently meet the demand and there was always a waiting list. She stated in her examination-in-chief that, since the expansion in 2008, there had always been on average from 10 to 15 names on the waiting list, especially for the nursery. Ms. Poulin considers that the nursery needs more space. This type of space is governed by strict standards, and the daycare cannot increase the number of spaces in the nursery, given the space currently available.

[161] Ms. Poulin emphasized the importance of the nursery from a recruitment standpoint, as she considers it to be the gateway to the school. The daycare's ability to meet demand is especially important as, from the parents' perspective, this service is not optional: often, they cannot afford to put their names on a waiting list, hoping that a spot will open up. Consequently, if the daycare cannot meet the demand when it is there, they seek out other options.

[162] Ms. Poulin believes that the daycare's potential client base is such that the daycare could, if it had enough space, fill 25 pre-kindergarten spots and 50 spots for the younger children. In cross-examination, she admitted that, as far as she knew, these figures came from a study done on the issue, but she had not read it personally.

[163] In cross-examination, Ms. Poulin was questioned at length about the daycare's clients. She acknowledged that the daycare did not have a formal investigation process for determining the status (right holder or non-right holder) of parents wishing to enrol their children. In fact, the staff count on

the parents' honesty. She also explained that, based on her understanding, the meaning of the term "right holder" is subject to interpretation and does not necessarily match how counsel for the Defendants defined it in his questions.

[164] The list of children enrolled in August 2009 (Exhibit 43), to which I have previously referred, includes notes about the parents but, in a number of cases, does not indicate their status for the purposes of section 23 of the Charter. Ms. Poulin said that she knew a number of these families and provided additional information in that regard. Her responses established that there are at least seven children on that list whose parents are Anglophone and are not right holders.

[165] Ms. Poulin was cross-examined about the difference between these figures and her answer to a question during her examination for discovery, on June 30, 2009, regarding the number of non-French-speaking parents who had children at the daycare. Ms. Poulin had answered that there was only one family in that category. Ms. Poulin acknowledged the difference between the answer she had given in June 2009 and her testimony at the trial. She explained that in June 2009, she had responded to the best of her knowledge at the time. After doing some research to provide the requested information as she had promised during her examination, she became aware of the details in Exhibit 43.

[166] Ms. Poulin also pointed out that the daycare's clientele changes on a fairly regular basis, especially because clients move away and new ones take their place.

[167] With regard to her testimony on lack of space and waiting lists, Ms. Poulin was confronted with a grant application prepared by the daycare in 2009 (Exhibit 44), which states that the daycare had to [TRANSLATION] "meet the challenge" of filling the additional spots, because its waiting list had shortened after more space was dedicated to the daycare. Ms. Poulin explained that this comment simply reflected the fact that the waiting list had decreased at that time because additional spots had opened up at the daycare.

[168] A waiting list, undated, but given to the Defendants in August 2009, was also entered into evidence (Exhibit 45). It was suggested that this waiting list reflected the situation in August 2009, as that was when it was given to the Defendants. But certain inconsistencies between the waiting list

and Exhibit 43 suggest either that the waiting list goes back to a previous date or that one of the documents is inaccurate. For example, Exhibit 43 indicates that there is one spot to be filled in the age 3 group and one spot to be filled in the age 4 group. The waiting list, however, indicates that there are children in these age groups waiting for spots, which is illogical if there were spots to be filled at that time. An even more evident inconsistency is that one of the names that appear on the list of children in nursery school, H.S., is also on the waiting list. These two facts cannot both be accurate at the same time.

[169] No evidence was submitted with regard to the state of the waiting list at the time of the trial.

[170] I find that Ms. Poulin's testimony regarding her experience as a parent, at the daycare, is reliable and trustworthy. I also find her testimony on the daycare's operations to be credible and reliable. With regard to the waiting lists, I find that the evidence is somewhat incomplete. In terms of the daycare and preschool program's potential client pool, I have no doubt that Ms. Poulin sincerely believes in what she said, but I do not grant high probative value to her testimony on this issue, as her opinion seems to be based primarily on a study which she admitted not having read and which has not been entered into evidence.

g. Gérard Lavigne

[171] Mr. Lavigne is originally from Alberta, where he worked as a teacher in primary and secondary schools. He taught in Anglophone classes, French immersion programs and French as a first language programs.

[172] Mr. Lavigne became superintendent of the CSFTN-O in August 2002 and held this position until 2007. He was therefore very involved in discussions between the CSFTN-O and Department of Education representatives about ÉASC and developments in the file before and after this legal proceeding was initiated.

[173] When Mr. Lavigne assumed his duties, the CSFTN-O had just gone through a difficult time. It had been established one year earlier, and almost immediately after he began, its first superintendent died suddenly in an accident. The CSFTN-O had therefore hired a former public servant from the Department of Education, Chuck Tolley, on an acting basis. Mr. Tolley is not a Francophone, but he was selected because of the urgency of the

situation and his vast experience. He had recently retired after working for many years at the Department of Education and was well versed in the intricacies of administration.

[174] When he arrived, Mr. Lavigne spent a few weeks with Mr. Tolley to familiarize himself with the NWT education system and with the CSFTN-O. He visited the two schools managed by the CSFTN-O and the other schools in Yellowknife. The infrastructure of the English schools was comparable to what he had seen in schools in Alberta during his career. In terms of the schools managed by the CSFTN-O, he felt that the facilities at École Boréale in Hay River were inadequate and that those at ÉASC were incomplete.

[175] Mr. Lavigne decided, with his executive board, that the CSFTN-O needed to develop a long-term strategic plan for both schools and, to do so, needs had to be clearly identified. A consultative process with the Francophone community was launched. A researcher was hired for that purpose. The researcher conducted extensive consultations and eventually issued a report entitled *Vision 20-20* (Exhibit 11). The report was adopted by the CSFTN-O as a strategic plan. It was sent to a number of organizations, including the Department of Education, in July 2003 (Exhibit 19) and used as a basic reference by the CSFTN-O in its negotiations with the government in the years that followed.

[176] In fall 2003, the CSFTN-O decided to submit its requests to the government in a more focused manner. A document entitled *L'égalité des chances, l'égalité des résultats* [equality in opportunity, equality in results] (Exhibit 24) was thus prepared and sent to the government. Its objective was to present the CSFTN-O's requests clearly and persuasively. Some of the information in *Vision 20-20* was used in preparing this document, as well as other information, including references to case law regarding section 23 of the Charter. The document was sent to the Minister of Education and the Department of Canadian Heritage. Mr. Lavigne explained that the CSFTN-O knew that the federal government was one of the parties that might be involved in infrastructure funding and wanted the government to be informed of the steps taken by the CSFTN-O with territorial authorities.

[177] Following its consultative process, the CSFTN-O determined that its most urgent school infrastructure needs were to build a permanent school in Hay River and expand ÉASC. In its dealings with the Department of Education, the CSFTN-O stressed this repeatedly in the years that followed, as shown in a number of letters entered into evidence. As superintendent of

the school board, Mr. Lavigne sent a number of letters to public servants at the Department, and the individuals who chaired the CSFTN-O sent similar letters to the Minister.

[178] Mr. Lavigne explained that meetings were held between representatives of the CSFTN-O and the government to discuss the CSFTN-O's requests. According to Mr. Lavigne, at these meetings, the Department representatives responded in fairly general terms to the CSFTN-O's requests. There were a number of good discussions, but no firm commitments. At these meetings, the government representatives never disputed the content of the reports submitted by the CSFTN-O. Mr. Lavigne thought that the people at the Department were aware of the issues and had already taken steps with the Department of Canadian Heritage to try and obtain financial assistance from them to meet the CSFTN-O's requests.

[179] Mr. Lavigne also explained that, alongside the meetings with Department public servants, the CSFTN-O was also taking political action to advance its issues. The CSFTN-O knew that any project involving the building of infrastructure had to be approved as part of the government process that defines capital projects for the year. Consequently, the CSFTN-O wanted to raise politicians' awareness of the Francophone community's education needs and of the government's obligations under section 23 of the Charter. A meeting was therefore organized in June 2004 with the members of the Legislative Assembly representing the electoral districts of the City of Yellowknife to inform them of the CSFTN-O's position.

[180] The CSFTN-O was obviously aware of the APADY's creation, as well as the steps it had taken and the fact that it was looking into the possibility of initiating legal proceedings. Starting in 2003, Mr. Lavigne raised the possibility of a law suit and insisted on the importance of acting quickly in his correspondence with the Department (Exhibit 22).

[181] The APADY decided to initiate legal proceedings, and the CSFTN-O decided not to join in as a plaintiff. Mr. Lavigne explained that the CSFTN-O had the same objective as the Plaintiffs, to expand ÉASC, but wanted to continue in its administrative efforts with the Department.

[182] Mr. Lavigne explained his role in the events that occurred after the court granted the interlocutory injunction of July 2005. He took part in

discussions that eventually led to the agreement that resulted in the application to amend the Order in January 2006.

[183] With regard to the memoranda of understanding about the use of spaces at William McDonald Middle School, he believes that the intentions were good, but that the sharing did not go particularly well. There were some problems with equipment for technical courses; schedules were difficult to organize; time allocated could sometimes be taken away at the last minute; and, more fundamentally, the students and teachers using the spaces did not feel [TRANSLATION] "at home." Mr. Lavigne said that he always considered space sharing to be a temporary fix, not a long-term solution.

[184] Planning for the Phase 1 expansion, provided for by the amended Order, was done quickly. After that, there were delays in construction. But there were many building projects under way in Yellowknife then, and some time was needed to obtain contractors' services and call up the equipment required to carry out the work. Some problems occurred in blasting the site and delivering certain materials.

[185] The work involved in the second part provided for by the amended Order (preparing schematic plans for Phase 2) was done, and Mr. Lavigne saw the plans and models that showed the work that was expected to be done. His understanding when he left Yellowknife was that the project would continue on. He never thought that the GNWT's intention was to carry out only the Phase 1 work.

[186] A number of exhibits entered into evidence during Mr. Lavigne's testimony are correspondence sent by the CSFTN-O to various people at the Department of Education at various stages in the process between 2002 and 2006, showing its requests regarding ÉASC, and the responses it received. These documents establish the nature of the written communications between the CSFTN-O and the Department when Mr. Lavigne held his position and corroborate the essence of what he spoke about during his testimony on those issues.

[187] The chairperson of the CSFTN-O, André Légaré, also sent a number of letters to the Minister regarding the CSFTN-O's enquiries about requests concerning the schools in Yellowknife and Hay River. A number of letters exchanged between Mr. Légaré and the Minister were entered into evidence. Mr. Légaré's testimony is summarized in further detail in *Commission*

Scolaire Francophone, Territoires du Nord-Ouest et al. v. *Attorney General of the Northwest Territories,* 2012 CSFTN-O 44 because a number of aspects of his testimony dealt with the litigation involving École Boréale. But I also took Mr. Légaré's testimony into account as part of this proceeding.

[188] In cross-examination, Mr. Lavigne was questioned about how multiple-grade classes worked. He acknowledged that this approach has certain benefits and that it is sometimes necessary in managing small schools. He expressed his agreement with a number of the benefits described in the document prepared for parents by the APADY, although he did not have a hand in producing the document.

[189] With regard to the process that led to the creation of the document *Vision 20-20*, counsel for the Defendants suggested to Mr. Lavigne that the objective of the exercise was to produce an advocacy tool for their claims. Mr. Lavigne did not agree with this representation. He explained that the CSFTN-O's purpose was rather to gain a good understanding of the situation on the ground to identify and prioritize needs and develop a strategic plan for the short, medium and long terms.

[190] He was also questioned about the measures adopted while he was superintendent to improve secondary-level student retention at ÉASC. One of the strategies was to put more emphasis on information technology and provide each secondary-level student with access to a laptop computer. The other strategy was to create a bursary system to encourage students to complete their secondary-level studies at ÉASC. According to Mr. Lavigne, this bursary system, intended to help students with their post-secondary education, was very much appreciated by students and parents.

[191] In terms of infrastructure ownership, Mr. Lavigne acknowledged that, except for the two other school boards in Yellowknife, the CSFTN-O is in the same situation as all other school boards in the NWT, which do not own their infrastructure either. It was also admitted that even Yellowknife's two other school boards cannot initiate infrastructure projects themselves; they have to go through the government in order to do this, as these projects must be included in the government's Capital Plan.

[192] Regarding the Phase 1 work, Mr. Lavigne acknowledged that the CSFTN-O was consulted in the development of the plans and that he himself attended a number of meetings with the architects. He confirmed that the

project delays were due to factors out of the government's control and not to errors or bad faith on the part of the government representatives.

[193] Concerning Phase 2, he admitted that there was no set implementation deadline, nor was there any written agreement guaranteeing that the work would be done.

[194] Mr. Lavigne gave clear, direct and accurate testimony. A number of aspects of his testimony are corroborated by documentary evidence. Neither his credibility nor the reliability of his testimony was shaken during his cross-examination. I find that his testimony is trustworthy.

h. Yvonne Careen

[195] Ms. Careen is originally from Saskatchewan. Her husband is Anglophone. They have two children, P. and S., who at the time of the trial were both attending ÉASC. Ms. Careen is a right holder under section 23 of the Charter. She has lived in Yellowknife since 1989.

[196] Ms. Careen has considerable teaching experience. She has worked, as a teacher and in administration positions, in a number of Anglophone schools in Yellowknife. She also held a position at the Yellowknife Catholic School Board for three years and, as part of her duties, regularly visited the schools within that school board. She has been principal of ÉASC since September 2009.

[197] Ms. Careen became involved in the daycare's board of directors when her son P. began attending the daycare. Ms. Careen chose this daycare for her children because she wanted them to be in a Francophone environment. Ms. Careen explained that the spots at the daycare filled up when the daycare moved to ÉASC. When her sons attended the daycare, most of the children who went there were, according to Ms. Careen, the children of right holders. The daycare, in her opinion, enabled the parents to have a Francophone support system and allowed the children to develop a circle of Francophone friends.

[198] According to Ms. Careen, the daycare, which at the time had 28 to 30 spots, did not meet all needs, and there were waiting lists.

[199] Ms. Careen explained that the daycare was also a significant means of recruitment for the school. For the children, the transition between daycare and school was made naturally. When her children went there, most of the

children who attended the daycare enrolled in ÉASC when the time came. According to her, that was not the case when the daycare was located elsewhere. (P. attended the daycare before it moved to ÉASC.)

[200] Ms. Careen expressed her agreement with the decision to devote more space to the daycare after the Phase 1 expansion in 2008. The APADY also agreed, as the daycare is a significant recruitment pool for the school.

[201] Ms. Careen was president of the APADY, from its foundation in 2003 until 2009. She took part in consultations that led to the production of the *Vision 20-20* report. The APADY generally agrees with the report's findings, as well as the content of the document *L'égalité des chances, l'égalité des résultats*.

[202] Ms. Careen was also on a committee which visited various school-community centres in Alberta and Saskatchewan, in April 2004. The committee prepared a report of its findings (Exhibit 63). Ms. Careen, on behalf of the APADY, is one of the co-signers of a letter sent to both the Minister of Education and the Department of Canadian Heritage, requesting their involvement in the creation of a school-community centre (Exhibit 67).

[203] Ms. Careen explained the circumstances that led to the foundation of the APADY. The parents who founded the APADY wanted a parents' association with a mandate to advocate to government. Ms. Careen's testimony to that effect is confirmed by some documents entered into evidence, including the open letter she sent to right holder parents after the APADY was formed, various communications from the APADY to its members outlining new developments, and correspondence exchanged between the Department of Education and the CSFTN-O.

[204] Ms. Careen explained that, following the interlocutory injunction in July 2005 and the discussions held in the months that followed, the Plaintiffs agreed to suspend this proceeding because they had understood that the GNWT was not only going to proceed with the Phase 1 expansion work, but also move forward with Phase 2 once the schematic plans were complete. She said that the Plaintiffs would never have suspended their proceeding if they had thought that the Defendants were not going to implement Phase 2.

[205] Ms. Careen gave a detailed explanation of how the spaces at ÉASC were used. She admitted that the expansion in 2008 improved the situation in some ways but said that there are still significant deficiencies. She finds that

space is still lacking at ÉASC. She stated that all spaces are used and that this leaves very little room for flexibility, especially to offer a more varied range of courses.

[206] She spoke about how ÉASC uses certain spaces at William McDonald Middle School; these spaces include the gymnasium, for extracurricular activities, and three classrooms. Ms. Careen acknowledged that ÉASC could have access to other rooms in the school, but she feels that this type of arrangement is inadequate in the long term, as using space in an Anglophone school threatens the homogeneity of the program. She also explained that it is difficult to negotiate schedules. The ÉASC is always susceptible to the imposition of changes, and it is a challenge to adjust the schedules of two schools that do not necessarily use the same timetable.

[207] With regard to the use of the gymnasium, Ms. Careen described the steps she took at the end of the 2009-2010 school year to implement a stable usage schedule for the fall. She knew that there would be more space the next year because the students at the school that had been damaged by fire would no longer be going to William McDonald Middle School in 2010-2011. More space would therefore be available at William McDonald Middle School.

[208] Ms. Careen had trouble obtaining a firm commitment from William McDonald Middle School's administration regarding the use of space. She also knew that YK1 was going to do a comprehensive review of the use of its infrastructure, which created uncertainty. There was a discussion about guaranteeing ÉASC access to William McDonald Middle School's gymnasium for physical education classes, but the commitment was for only one year. Ms. Careen explained her reluctance to accept this arrangement. She feared that it would be difficult, if she forfeited gymnasium time at the Multiplex, to renegotiate the same time slots if William McDonald Middle School's gymnasium were to become unavailable in the future.

[209] Ms. Careen met with Ms. Simmons to discuss using the gymnasium for extracurricular activities. When Ms. Careen met with Ms. Simmons to discuss sharing gymnasium time, Ms. Simmons was surprised to learn that she had to negotiate this with Ms. Careen. Ms. Simmons had already prepared her gymnasium use schedule based on her school's needs. Ms. Careen became angry and sent an e-mail to the CSFTN-O and Ms. Simmons to express her dissatisfaction. The e-mail in question was not

entered into evidence, but Ms. Careen herself called it impolite (she used the English term “rude” to describe it).

[210] The two school boards became involved following this e-mail. Two weeks before the start of the trial, ÉASC was offered gymnasium time on Tuesdays to Fridays after school, and on Saturdays. Ms. Careen finds this agreement to be inadequately detailed and refused to sign it. However, she did acknowledge that, as Mr. Deschênes said, the time slots in question are good for extracurricular activities.

[211] Ms. Careen said that the fact that ÉASC does not have its own gymnasium still poses a considerable challenge in organizing extracurricular sports activities. It makes intramural activities virtually impossible, unless the rotunda is used, but the rotunda is not an adequate space for physical education activities. She spoke about the measures she took to offer students the widest range of physical education activities possible, by using community spaces. Gymnastics, hockey, squash and judo activities were thus organized.

[212] With regard to multi-grade classes, Ms. Careen explained that she, in consultation with her teachers, determined what she considered to be the best student groupings, given the number of classrooms available.

[213] She admitted that multi-grade classes could have their benefits, as indicated in the document prepared for parents by the APADY. But she said that she does not think there should be multi-grade classes for grades 10, 11 and 12. She feels this way for the school’s students overall and for her own children. She finds it unfair that English school students do not have to be in multi-grade classes in these grades while those who complete their secondary-level studies in French as a first language have to be. Ms. Careen confirmed that the Plaintiffs want to have six additional classrooms at ÉASC for a total of 13 rooms—one class per grade, from kindergarten to Grade 12.

[214] For CTS courses, Ms. Careen said that she works within the limits imposed by the current situation and the fact that ÉASC has very little equipment and space to provide its students with a variety of options.

[215] Certain measures are taken, to the extent possible, to correct these deficiencies. For example, the school rented St. Patrick High School’s beauty salon so that students could take a course. Ms. Careen emphasized that a number of these measures, organized on a case-by-case basis with the

spaces negotiated each time, are part of the regular program in majority English schools.

[216] She spoke about the use of the rotunda, which according to her is already used to full capacity, since in addition to having been reconfigured for a classroom, it is used for after-school service, parent meetings, certain shows and, to a certain extent, storage.

[217] With regard to ÉASC's potential client base, Ms. Careen explained that because she has lived in Yellowknife for over 20 years, she knows a lot of people from the Francophone community. She knows a number of right holder families whose children do not attend ÉASC, and estimates that there are about 60 of them. She said that ÉASC competes with Sir John Franklin High School and St. Patrick School at the secondary level. At the primary level, its competitors are William McDonald Middle School and St. Joseph School, which both have an immersion program.

[218] A portion of Ms. Careen's testimony was given as part of the same voir dire as that applicable to other testimonies, because the Defendants objected to its admissibility. These aspects of the testimony relate to her son's desire to leave the school; this same desire expressed by other students; Exhibit D, a document which provides a list of the students who left ÉASC and their reasons for leaving; and Exhibit E, which includes the answers to a survey of students of the school, done by Ms. Careen.

[219] Ms. Careen's cross-examination was extensive and sustained. It gave rise to some rather tense exchanges between her and counsel for the Defendants. Ms. Careen clearly has a strong personality, is very committed and is convinced of the merit of the Plaintiffs' claims in this case. She is obviously also used to pleading for this cause. I had to intervene on a few occasions during her cross-examination to remind her of the importance of answering the questions rather than arguing.

[220] She admitted that infrastructure is not the only factor that influences which school is chosen. But she stated numerous times that she believes it to be a significant factor. With regard to the reasons for leaving, she acknowledged that she personally spoke only to two students about their reasons for leaving the school. She also admitted that people living in Yellowknife move around a lot.

[221] She confirmed that the APADY's position is that the definition of right holder under section 23 includes Francophone immigrants who are not Canadian citizens, Anglophones who would like to assimilate into the French language and culture, and individuals who have French-speaking ancestors, even if they do not speak or understand French themselves.

[222] Ms. Careen was confronted with some answers she had given during her examination for discovery, which at times were somewhat different from those she gave at the trial. For example, on examination for discovery, she had said that parents were [TRANSLATION] "very satisfied" with Phase 1, although there was [TRANSLATION] "some unfinished business". Her response to the same question at the trial was more equivocal; she said that parents were satisfied because they knew that Phase 2 was also to come.

[223] The differences in themselves are not particularly significant, but they show Ms. Careen's tendency, which I observed at various times in her testimony, to add a great deal of nuance to answers that could harm the Plaintiffs' case, while being very categorical and clear-cut in giving answers that tended to help them.

[224] At times, Ms. Careen also tended to use an argumentative tone in some of her responses. I acknowledge that she was cross-examined at length by counsel for the Defendants and that this experience can be difficult for a witness. However, the questions she was asked were generally appropriate for a cross-examination.

[225] Some aspects of her testimony appeared somewhat contradictory to me. For example, when she was cross-examined about the document prepared for parents by the APADY and the comments in it regarding the benefits of multi-grade classes, counsel for the Defendants pointed out to her that the document made no distinction between the primary and secondary levels. Ms. Careen first said that the document was meant to be a general advocacy tool, which was not specifically focused on the high school level. But later in her cross-examination, she said that one of the document's objectives was to promote the school because at the time, ÉASC was losing its secondary-level students. To me, there is a certain contradiction between these two aspects of her testimony.

[226] Moreover, when she was cross-examined about her objective in giving the survey to the students (Exhibit E), Ms. Careen's answers differed somewhat from what she had said on examination-in-chief. The answers to

the questions on this topic are relevant not only to the issue of the admissibility, but also to the assessment of Ms. Careen's credibility and the reliability of her testimony.

[227] On examination-in-chief, Ms. Careen said that she had prepared the questionnaire when she became principal of the school, because she wanted to get an idea of the impact of the school's expansion and the impact that a future expansion could have. She acknowledged that she had also distributed the questionnaire on behalf of the APADY, with a view to advancing the case for expanding the school.

[228] The questionnaire's introductory remarks mention the legal proceedings and asks for the students' help in advancing the case. Counsel for the Defendants suggested to Ms. Careen that this language might have influenced the students' answers. She agreed that this may have been the case, but only for one or two students. She maintained that the purpose of the introduction was not to influence answers. Considering the content of the paragraph in question, I have difficulty accepting this answer. The introduction specifically asks the students for their help in advancing the case.

[229] Ms. Careen was also cross-examined about her objective in preparing Exhibit D. On examination-in-chief, she had explained that the document had been prepared to get an idea of the trends with regard to departures from ÉASC. In cross-examination, she admitted that the document had also been prepared for Mr. Kubica, one of the witnesses whom the Plaintiffs were going to call as an expert witness.

[230] When it was suggested to Ms. Careen that the document had been prepared in English specifically because it had been prepared for Mr. Kubica, she explained that the draft had been done in French, but that she had then translated the document for Mr. Kubica. Counsel for the Defendants asked her why, then, had the document not been disclosed in French, and she answered that she had not had time to translate it. Confronted with the apparent contradiction between this and what she had said earlier, she stated that she had started to write the document in French, had translated it into English and completed it in English for Mr. Kubica, and had never retranslated it in full into French.

[231] Ms. Careen explained that Exhibit D was the product of conversations and consultations with a number of staff members. She admitted that it did

not result from exit interviews. She also acknowledged having seen a draft of Mr. Kubica's report, the final version of which was entered in evidence at trial (the report is Exhibit 7, its appendices Exhibit 17.1). In the final version of the report, Mr. Kubica wrote:

> Yvonne Careen, Directrice, Principal of l'École Allain St-Cyr, provided the available course information plans for École St-Patrick High School and student exit interviews.

[232] Ms. Careen said that she does not remember if these words appeared in the draft she saw. She said that she had not seen the final version before it was sent to the Defendants because she was on vacation.

[233] Ms. Careen is one of the Plaintiffs in this proceeding. She has been actively involved for a very long time in the claims regarding ÉASC. She is clearly not a disinterested witness. She obviously has, like other parents who testified at the trial, experienced significant frustration and disappointment. This in itself is not a reason to reject her testimony. In fact, I believe that Ms. Careen testified in a sincere manner, to the best of her knowledge and perception of things.

[234] However, I think that her perceptions with regard to the commitments made by the Defendants and the school's needs must be treated with caution. Her way of seeing problems in terms of space and possible fit-ups is obviously influenced by her beliefs with regard to ÉASC's entitlements. This is true for a number of the Plaintiffs' witnesses, who have been involved in the claims regarding ÉASC for a long time, but I feel that this is particularly the case for Ms. Careen.

[235] However, I accept that Ms. Careen, as principal of ÉASC, has made, in consultation with her staff, decisions regarding the use of space with a view to best serving her students. I do not believe that her decisions were made strategically, so to speak, to advance this legal proceeding. There is no doubt that Ms. Careen is firmly committed to this cause. But this does not mean that she is not also devoted to her students and able to carry out her duties as principal in a professional manner. I simply do not believe that she would deliberately make decisions that would have a negative impact on the students of the school in order to advance the Plaintiffs' position in this proceeding, especially since her own children attend ÉASC.

i. Lee Kubica

[236] The Plaintiffs asked me to allow Mr. Kubica to testify as an expert in two areas: comparison of infrastructure and programs in various Yellowknife schools, and factors affecting the retention of students in secondary schools. At the conclusion of the voir dire, I allowed Mr. Kubica to give his opinion only on the issue of comparisons of infrastructure and programs. I took into account only the parts of his report that cover this topic.

[237] In his testimony, Mr. Kubica reviewed the main topics covered in his report. He talked about the differences between ÉASC's facilities and those of Sir John Franklin High School and St. Patrick High School. I will not go over the differences in detail because no one is contesting the fact that these two schools have many more specialized facilities than ÉASC and are able to provide a much broader variety of courses.

[238] Mr. Kubica explained that, in general, government standards for allocating space in schools are applied on the basis of a target number of enrolments. The greater the number of expected enrolments is, the more space is allocated. It is a purely mathematical formula based on set standards. When the expected number of students is high and more space is allocated, the result is much greater flexibility in the setting up of specialized classrooms. In smaller schools, most of the space has to be used for regular classrooms. Mr. Kubica said that this was why ÉASC had very little space available for special classes, unlike the two other schools, which have a full range of special classrooms for music, industrial arts, theatre studies and science.

[239] Mr. Kubica also talked about the importance of having some classrooms fitted up specifically for secondary school students. He gave the example of the science lab. Typically, the labs used for science courses at the primary level are multi-purpose rooms that can be used to teach other subjects, whereas a science lab for secondary school courses is a more specialized room. Mr. Kubica said that sharing a single lab for primary- and secondary-level classes caused many more scheduling conflicts over the use made of the space.

[240] He explained that the room used for teaching science at ÉASC allowed him to meet curriculum requirements, but it had shortcomings. The teachers could teach chemistry and physics in the room, but they could not,

for example, teach biology. The students could take a distance-learning course broadcast from a centre based in Alberta, but they did not have a lab or a teacher certified to teach the subject.

[241] As for elective courses, including CTS courses, ÉASC students did not really have any choices. Whereas the other schools offer a full range of options for these types of courses, ÉASC offers a computer science program, which became the [TRANSLATION] "mandatory elective".

[242] Mr. Kubica also pointed out that there was no gymnasium, which was another difference between ÉASC and the other two schools. This clearly had an impact on physical education courses and on extracurricular and intramural activities. However, he pointed out that a gymnasium is a space that is often used for other school purposes (concerts, student assemblies, meetings, etc.).

[243] With respect to multiple-level classes, Mr. Kubica explained that these existed in some other schools, but the difference between ÉASC and the other two high schools is that all of the students are in multiple-level classes all of the time. He said that in the other schools, levels are sometimes combined, but usually in non-academic programs. In the case of mathematics and science, for example, the other two schools do not have multiple-level groups.

[244] Mr. Kubica noted that the number of students at ÉASC had gradually increased in the past few years, but this increase was due to an increase in the number of primary-level students (whom ÉASC, for its program purposes, defined as students up to the end of Grade 6). The number of students at the secondary level had remained unchanged.

[245] During cross-examination, Mr. Kubica acknowledged that he had not calculated ÉASC's capacity. He also acknowledged that he had not compared ÉASC with NWT schools with similar numbers of students. He acknowledged that if the space allocated to the daycare were freed up, there would be additional space for teaching. But he explained that this would not meet the needs for specialized classrooms.

[246] In regard to his opinion that ÉASC did not have enough staff, Mr. Kubica acknowledged the following: the number of teachers was partly influenced not only by the amount of available space, but also by the number of enrolments; the number of enrolments also had an impact on the number

of programs that could be offered; and, even if ÉASC had additional space, it would never be able to offer the same variety of programs as was available in the bigger schools. He thought that the gap could be narrowed, but not eliminated.

[247] I find Mr. Kubica's testimony to be credible and trustworthy. The part of his testimony about comparisons of buildings, available space and programs was not truly contested and is similar to what other witnesses have said on the topic. His explanations concerning the impact of government standards on smaller schools were logical and consistent with the standards themselves, which are entered in evidence. His credibility was not damaged during his cross-examination. I found that he was honest, realistic and objective in his replies to the questions he was asked. He does not live in the NWT and is not an interested witness.

j. Dr. Rodrigue Landry

[248] The Plaintiffs requested that the Court allow Dr. Rodrigue Landry to testify as an expert in the following areas: ethnolinguistic vitality, cultural autonomy and revitalization factors, the role of education in the vitality of cultural communities, demographic and linguistic statistics, teaching in minority communities, and factors contributing to student identity building in Francophone communities.

[249] Dr. Landry's resumé and its appendices (Exhibit 1) set out his many research projects and publications. The Defendants, very reasonably, did not contest his expertise.

[250] In his testimony, Dr. Landry reviewed the main themes of his report. He provided a detailed explanation of the models he had developed with colleagues to illustrate some of the developments and concepts in his field of expertise, including psychological and linguistic development in a minority inter-group context (Appendix A); cultural autonomy (Appendix B); and self-determined and learned language behaviour (Appendix C). These concepts, and the models representing them, were complex and difficult to summarize. But Dr. Landry's explanations provided a substantial amount of background to help understand his opinions on some of the more concrete topics raised in these proceedings. I will not discuss all of the topics covered in his report and his testimony, but I would like to review the main aspects that I consider to be the most significant.

i) Vitality of language communities and cultural autonomy

[251] Dr. Landry explained that it was the social organization of a minority language group, not just its individuals, that enabled it to express its collective identify. He said that the heritage and shared history of group members could be a source of solidarity among group members; however, this solidarity also included the idea of building what he called [TRANSLATION] "a community of destiny" based on voluntary choices with respect to the future.

[252] Dr. Landry said that a community's ethnolinguistic vitality depended on demographic factors, institutional control, and the status of the language and the group. He explained the concept of diglossia, a social concept that describes the relationships between two linguistic groups and is based on the social distribution of the languages within a given area. He said that in a classic case of diglossia, the members of the majority group speak the so-called [TRANSLATION] "high" language, which has higher status and dominates in the public domain, while the members of the minority group speak a so-called [TRANSLATION]"low" language, which dominates only in the minority group's areas of activity. In circumstances where members of the two groups come into contact, the high language tends to dominate. How diglossic a situation is depends on a number of factors; the more diglossic the situation is, the greater the risk of assimilation will be. However, some factors may, on the contrary, help the minority community to assert itself and achieve greater vitality.

[253] Dr. Landry also covered the concept of cultural autonomy. He said that collective identity is at the core of this autonomy and depends on three variables, which are similar to those forming the basis for ethnolinguistic vitality: demographics, institutional control and status. He described these three components more specifically as being [TRANSLATION] "socializing proximity[,] . . . institutional completeness . . . [and] ideological legitimacy".

[254] Socializing proximity is the basic component ensuring primary socialization in the minority group's language and culture. The presence of institutions in the community promotes and supports this primary socialization. Dr. Landry said that this was especially true for exogamous families because there was often a tendency in such families to transmit the dominant language at the expense of the minority language.

[255] Institutional completeness means that there are social and cultural institutions that take charge and promote the minority community's presence in the public sphere and help it become a distinct and active entity. In that regard, Dr. Landry said that even with the best intentions, bilingual institutions never have the same scope as institutions managed by the minority in the minority group's language. He said that the school is the cornerstone of institutional completeness. It is also an extension of socializing proximity because it helps families and communities to promote primary socialization in the minority language. The school also helps to create an identity and networks in the minority language.

[256] The third component that had an impact on the collective identity is ideological legitimacy. A government's ideological positions can either support or harm the development of a collective identity.

ii) School's impact on the vitality of a minority language community

[257] Dr. Landry said he thought, based on research he had done on the impacts of various language behaviours, that contact with other language speakers in the school acts as an extension of what takes place in the private sphere (in families and in the community), even if the school is a public institution. This contact therefore has an effect not only on young people's language skills, but also on their identity building. In that regard, he believes that the school experience is very important and played a vital role in identity building, as did the family.

[258] In his report, Dr. Landry covered some of the differences between the educational mission of minority-language schools and that of majority-language schools. The objective of all schools, whether minority group or majority group schools, is to develop the potential of their students. However, in a minority-language school, schools also have to worry about the students' identity building. In other words, identity building is an integral part of the school program, whereas in a majority group school, the students' identification with the language spoken in the school is usually taken for granted. Moreover, minority group schools are responsible for preparing the next generation and providing leadership in the minority community. Recruiting students was another aspect of the minority school's educational mission.

[259] Dr. Landry said that in order to develop and implement this special educational mission, the minority group's school boards has to have complete autonomy, including control over their budgets.

[260] Dr. Landry also talked about ÉASC's problems with retaining its secondary school-level students. Based on his experience and research, it was an observable trend in many Francophone minority schools. To maximize student retention, he believed it is necessary to recruit a maximum number of students as early as possible in order to promote francization. There has to be an excellent primary school program to encourage students to stay in school. The secondary school program has to be attractive in order to offset the fact that the school would be unable to compete with the variety of courses and activities offered in the majority-language school. Lastly, the infrastructure has to be up-to-date in order for the school to be truly able to compete with the other schools.

iii) Linguistic continuity index

[261] Using data from the 2006 Census, Dr. Landry concluded that the linguistic continuity index was cause for concern. The measurement used by Statistics Canada was the language spoken in the home. He said that if a language was not spoken in the home, there was little likelihood of the language being transmitted to the next generation.

[262] Using figures on the number of respondents who had identified French as their first language and the number of respondents who said that they spoke French most often in the home, Dr. Landry concluded that the linguistic continuity index was 42% in the NWT and 50.4% in Yellowknife. He said that the non-use of French in the home was very often related to exogamy (i.e., a spousal relationship with a person outside one's group), and the rate of exogamy in the NWT was very high.

[263] For Dr. Landry, the non-transmission of the French language could be offset only by making parents more aware of the consequences of their language choices and through institutional completeness.

[264] In his examination-in-chief of Dr. Landry, counsel for the Plaintiffs asked Dr. Landry questions specifically related to the claims put forward by the Plaintiffs concerning the situation at ÉASC and asked him to comment on the impact of this situation, based on his expertise.

[265] He said that the fact that the CSFTN-O does not have full authority over its buildings is an obstacle preventing it from carrying out its educational mission. He reiterated that school boards had to have some freedom to be able to carry out their mission.

[266] In regard to retrofitting community facilities and the overall shortage of space, Dr. Landry explained that not only was the shortage of space detrimental to teaching conditions, but also that deficiencies in infrastructure has a cumulative negative impact on the students and parents concerned and makes them feel like second-class citizens.

[267] He also talked about the importance of having separate homogeneous areas. He explained that in an environment where the structure was bilingual, the majority language quickly became dominant. He gave the example of a study conducted of mixed schools in New Brunswick, including a school where 95% of the students were Francophone but where there were also a few Anglophone students in a wing of the school. The study demonstrated that the presence of Anglophone students had a considerable impact on the school environment and that the Francophone students tended to speak to them in English.

[268] Dr. Landry was also asked about the importance of daycare centres in minority-language communities. He explained that daycare centres and kindergartens were an excellent francization method and could provide substantial support for exogamous families. In regard to the locations of daycare centres, Dr. Landry said that he did not know of any studies that had concluded that a daycare centre's location was a significant factor. But he said that in his experience, most school boards tried to have daycare centres set up within schools.

iv) Numbers of children covered by section 23

[269] Dr. Landry said he had serious reservations about the use of Census results to determine the number of children in Yellowknife covered by section 23.

[270] He said he believed first of all that the sample consisting of 20% of the population, not broken down by language, made the figures very unreliable. Random rounding of the figures was another factor that compromised the reliability of the figures.

[271] Dr. Landry gave some examples of inconsistencies in the 2006 Census results. The example he provided in his report concerned Yellowknife. According to the Census results, 35 children spoke French most often in the home, whereas it was reported in the same Census results that only 15 children had two French-speaking parents. Dr. Landry thought that this was an irregularity because, according to his research, the vast majority of households where French was the language spoken most often in the home were households where both parents were French-speaking.

[272] I understand Dr. Landry's opinion on this matter, but I also think that this so-called inconsistency should be viewed with caution: It may be that a family choice is made within exogamous families in favour of using French as the main language in the home. I acknowledge that Dr. Landry explained that it is often the opposite that occurs, that is, that the dominant language is the language that most often prevails in an exogamous situation. However, that does not mean that it is impossible, and that may explain the apparent discrepancy in the above-mentioned figures.

[273] But Dr. Landry provided other reasons why the Statistics Canada data on the number of children covered by section 23 did not truly reflect the potential ÉASC clientele. The questions asked in the Census took into account only one category of persons covered by section 23, the category concerning the first language of the parents. The other two categories of persons covered by section 23 were not identifiable. Dr. Landry believed that the inclusion of persons from these other categories could increase the numbers by about 20%. He also pointed out that the Census data did not make it possible to identify a child living in a single-parent family where the resident parent was Anglophone, but the other parent was Francophone.

[274] Lastly, Dr. Landry pointed out that the size of the target clientele could increase even more if access to the program were granted—which was what several Francophone school boards across Canada were doing—to persons to whom section 23 did not strictly apply (Francophone immigrants who were not Canadian citizens, and persons whose parents did not speak French, but whose grandparents were French-speaking).

[275] Dr. Landry acknowledged that it was not easy to estimate the target clientele for a Francophone minority school, but he thought that the actual potential clientele for ÉASC was larger than what current enrolments suggested. He concluded by saying that increased awareness building for

eligible parents and improvements to ÉASC programs and infrastructure would help to increase the number of students enrolled in the school.

[276] Dr. Landry said he agreed up to a certain point with the suggestion that [TRANSLATION] "the supply creates the demand, not the opposite", but he acknowledged that it was very difficult to say to what degree this was true. He also acknowledged the dilemma facing governments when the time came to make decisions on whether or not to invest public funds to build or expand schools for the minority. He wrote as follows:

> [TRANSLATION]
>
> There is always a dilemma to be faced when a decision must be made as to whether or not to build a new school or carry out costly renovations. On the one hand, small numbers may be cited as the reason for not building the school or for not providing new facilities, which can contribute to lower enrolment or prevent the school from growing. On the other hand, we can take the risk of building the school or carrying out major renovations in the hope that enrolment will increase because of better school infrastructure. However, experience has shown that in most cases, the new schools (e.g., community school centres) helped to increase enrolment, sometimes to the point that new construction was needed to expand the amount of available space.

[277] Dr. Landry was cross-examined at length about the opinions expressed in his report and his testimony.

[278] He acknowledged that there are many complex factors that influence decisions to send children to minority French-language schools. He also acknowledged that a high percentage of parents in exogamous relationships send their children to majority English-language schools. He also acknowledged that there is considerable population movement in the NWT.

[279] Dr. Landry also acknowledged that the rate of enrolment in ÉASC in relation to number of children eligible for enrolment was very close to the Canadian average. He acknowledged that, given the very high exogamy rate in Yellowknife, the school's enrolment was higher than the national average.

[280] Dr. Landry acknowledged that he did not know of any study that had concluded that infrastructure had an impact on whether or not students left minority-language schools. However, he maintained his opinion that it was one of the factors and said that he based this opinion on his experience. He acknowledged that he did not know of any scientific research in which the

reasons why students left minority-language schools had been specifically analyzed.

[281] In regard to the reliability of statistics produced from the Census, Dr. Landry acknowledged that the statisticians took the size of the sample into account when determining the margin of error in results. He also acknowledged that the calculation of the margin of error was a very sophisticated process. However, he stuck to his opinion that even when the margin of error was taken into account, the problem of a lack of stratification caused him to doubt the reliability of the results.

[282] There were some slightly tense moments during Dr. Landry's cross-examination. I intervened to call for a recess because the cross-examination was close to being a political debate between counsel and the witness rather than what testimony was supposed to be in a trial. In my view, this was due as much to the tone and wording of the questions as to the tone and wording of the answers. But things then returned to normal.

[283] Many of Dr. Landry's research projects focus on education in minority communities. It is clearly not only an area of expertise for him, but also a passion. Every time that he has been called upon to be an expert witness, it has been at the request of parties seeking to exercise French-language minority rights.

[284] But Dr. Landry's level of expertise is not contested, and I accept the opinions he expressed about identity building, the linguistic vitality of minority-language communities and the importance of schools in a minority-language context. He has a vast amount of expertise in this area, and his findings are supported by extensive research.

[285] Some aspects of his testimony concerned topics that had not been specifically identified as areas of expertise in which the Plaintiffs wanted him to be qualified as an expert (for example, factors affecting the recruiting and retention of minority-language community students, and factors affecting assimilation in minority-language communities). However, I believe these areas are integral to the areas for which Dr. Landry is qualified to testify as an expert. These topics are interrelated and, to some degree, difficult to dissociate one from another.

[286] In short, given his experience and the breadth of his research, I find that Dr. Landry's testimony is credible and trustworthy. He even qualified

some aspects of his testimony, which in my opinion enhances his credibility as a witness and the probative value of his testimony.

[287] The opinions expressed by Dr. Landry are also supported by Dr. Wilfrid Denis, another expert witness called by the Plaintiffs.

[288] Dr. Wilfrid Denis was called to testify in the second round of testimony submitted by the Plaintiffs, which concerned the legal proceeding involving École Boréale and the validity of a ministerial directive concerning the right of admission to the French-language instruction program. I understand that the Plaintiffs called upon Dr. Denis especially to support their claims in this case. However, they make reference to testimony of Dr. Denis in the closing brief that they submitted for this proceeding.

[289] I set out Dr. Denis's testimony in paragraphs 337 to 359 of my Reasons for Decision in *Commission Scolaire Francophone, Territoires du Nord-Ouest et al* c. *Procureur général des Territoires du Nord-Ouest, supra.* The aspects of his testimony that are relevant to these proceedings are essentially similar to the opinions expressed by Dr. Landry. In addition, Dr. Denis uses some of Dr. Landry's research as a basis for developing his own opinions. Dr. Denis says he has the same type of reservations as Dr. Landry about the reliability of data taken from the Census. Because I find Dr. Denis's testimony with respect to these issues reliable, this testimony supports that of Dr. Landry and enhances its probative value.

k. Excerpts from Paul Devitt's Examination for Discovery

[290] In accordance with the *Rules of the Supreme Court of the Northwest Territories*, the Plaintiffs submitted into evidence excerpts from the Examination for Discovery of Paul Devitt, who is a senior public servant in the Department of Education (Exhibit 77).

[291] These excerpts concern, among other things, the federal government's contribution to the Phase 1 activities and the GNWT's requests concerning the federal government's financial contribution for Phase 2 (in both cases, a 50% contribution, according to Mr. Devitt). Mr. Devitt did not go into the details of the negotiations but confirmed that the plan submitted to the federal government in April 2008 concerned a 2,000-square-metre expansion, about one quarter of which would be used for school purposes and the remainder, for community purposes.

[292] In his answers, Mr. Devitt also explained how the government determined the floor area that a school would have, based on the former and new standards that the Department used.

[293] Mr. Devitt was called as a witness by the Defendants. The excerpts from his examination-in-chief are consistent with the things he talked about in his testimony at trial, to which I will refer further on.

2. Admissibility of the contested evidence

[294] The Defendants contest the admissibility of several items of evidence submitted by the Plaintiffs, on the grounds that they were hearsay.

[295] The Defendants' objection concerns the testimony of several witnesses who reported what some students had said about why they wanted to leave or had left ÉASC. The Plaintiffs argue that this evidence is admissible for the truth of its content and that it establishes that a lack of infrastructure and programs at ÉASC was a major reason for the loss of secondary school students. The Defendants' say that this was inadmissible hearsay.

[296] The Defendants also object on the same grounds to the admissibility of Exhibit D, which also contains information on the reasons why some students left. They also object to the admissibility of Exhibit E, which contains students' answers to a questionnaire on the issue of school infrastructure.

[297] I must also decide on the use that can be made of Exhibit 11 (*Vision 20-20*) because the parties do not agree on this issue. The Defendants say that the document is admissible to the extent that it is part of the context and of the actions taken by the CSFTN-O and of its discussions with the government, but no more than that. The Plaintiffs state that the document should be used to prove the truthfulness of the information that it contains. Once again, the Defendants' position is based on the fact that the information in the document is hearsay and is not admissible for the truth of its content.

a. Legal framework governing the admissibility of hearsay

[298] First of all, it is necessary to review the legal framework governing the admissibility of hearsay evidence.

[299] Hearsay is defined as a statement that was made out of court and is presented in court through a witness who heard the statement for the purpose of establishing the truth of its contents.

[300] The essential defining features of hearsay are (1) the fact that the out-of-court statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.

[301] Having the opportunity to cross-examine a witness in order to test the witness's evidence is a fundamental tenet of our legal system. This opportunity does not exist when, instead of making a person testify about what he or she knows, observed or feels, that person's statements are presented through a third person.

[302] The basic rule is that hearsay is inadmissible. The central reason for the presumptive exclusion of hearsay statements is the general inability of the trier of fact or the adverse party to test their reliability:

> Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts.
>
> *R.* v. *Khelawon,* [2006] SCC 57, paragraph 2

[303] However, the case law has always recognized a number of exceptions to the rule excluding hearsay. The justification for these exceptions was that certain circumstances could alleviate the inherent dangers of hearsay. The case law therefore gradually came to recognize a series of exceptions to the rule against the admission of hearsay evidence.

[304] The Supreme Court of Canada eventually decided to take a different approach to the issue of the admissibility of hearsay. Instead of relying on specific categories of exceptions, each having its own criteria for admissibility, it established guiding principles for ruling, in all cases, on the issue of whether or not hearsay evidence is admissible. Thus the concept of the "principled exception" to the hearsay rule was born and was developed and explained by the Supreme Court of Canada in several subsequent judgments: *R.* v. *Khan* (1990), 79 C.R. (3d) 1 (S.C.C.); *R.* v. *Smith* (1992), 15 C.R. (4th) 133 (S.C.C.); *R.* v. *B. (K.G.),* [1993] 79 C.C.C. (3d) 257 (S.C.C.); *R.* v. *U. (F.J.),* [1995] 3 S.C.R. 764; *R.* v. *Starr,* [2000] 2 S.C.R.

144; *R.* v. *Parrott* [2001], 150 C.C.C. (3d) 449; *R.* v. *Mapara* 2005 SCC 23; and *R.* v. *Khelawon, supra.*

[305] The twin criteria that now govern the admissibility of hearsay are necessity and reliability. For hearsay to be admissible, the trial judge must be satisfied that it is necessary to allow this type of evidence rather than proceed in the usual manner, that is, by having the declarant testify. The trial judge must also be satisfied that the evidence concerned has sufficient threshold reliability. It is not a matter of deciding on the ultimate reliability or the probative value of the evidence, but rather of deciding whether or not it has sufficient threshold reliability to be submitted as evidence in the trial and assessed by the trier of fact. The party submitting the evidence has the burden of establishing, on a balance of probabilities, that the admissibility conditions have been met. In the present case, the burden is therefore on the Plaintiffs.

[306] The necessity criterion was developed in *Khan*, the first Supreme Court judgment setting out the principled exception to the hearsay rule. This criterion was reviewed and further developed in several subsequent judgments.

[307] The concept of necessity does not mean absolute necessity. Instead, the party requesting that the hearsay evidence be admitted must demonstrate that it is reasonable and necessary to do so.

[308] Necessity does not necessarily presume that the witness is not available, but rather that the testimony is not available. There is no absolute rule governing how necessity is to be demonstrated. It must be given a flexible definition, capable of encompassing diverse situations: *R.* v. *Smith, supra,* paragraph 36.

[309] The case law contains a wide variety of situations where the necessity criterion has been met. Some examples are cases where the declarant is deceased or has disappeared; the declarant has no independent recollection of events at the time of the trial; the declarant is unable to testify because he or she is too young; the declarant has a mental or psychological incapacity; the declarant is not a compellable witness; the declarant is available but hostile to the party seeking to introduce the declarant's statements into evidence; the declarant testifies but contradicts a previous statement; or it is established that there is a real possibility of psychological trauma if the declarant is compelled to testify.

[310] The second criterion to be considered is reliability. Like the first criterion, reliability must be given a flexible definition. It is not a question of absolute reliability of the evidence or of its probative value. Instead it is a question of determining whether or not the evidence concerning the statement and the circumstances in which the statement was made establishes sufficient indicia of reliability to make it admissible.

[311] This reliability threshold can be established in various ways. Sometimes, the circumstances of the statement give it inherent reliability. It may also be that the circumstances of the statement are such that there is no actual concern as to the truth of the statement. For example, if the statement is made under oath, this enhances its reliability. If the declarant was under cross-examination at the time of the statement (as part of a preliminary inquiry, for example), the statement has been tested and may be considered to be more reliable.

[312] The admissibility of the hearsay evidence submitted by the Plaintiffs must be examined on the basis of these principles.

b. Admissibility of the students' comments

i) Content of the evidence

[313] It is useful to recall the content of the testimonies about what the school's students had allegedly said. These are statements that parents heard their children and friends of their children make, as well as statements that ÉASC's teaching staff and administrators had heard. In every case, the statements concern the reasons why these students wanted to leave ÉASC.

[314] Ms. Montreuil talked about conversations she had had with her daughter. She said that she had thought about sending her daughter to a different school and had had conversations with her daughter about it when she was in Grade 7 and looking ahead to Grade 8. Her daughter had talked about the differences between the facilities available at ÉASC and those of other schools.

[315] Ms. Montreuil testified that she had also had specific conversations with students in her son's cohort about their reasons for leaving ÉASC. Of the 18 pupils who were in his grades 2 and 3 group, 6 left to attend other schools in Yellowknife. She talked about two of them: One had left because he wanted access to more sports activities, and the other had said that he wanted to go to a bigger school.

[316] Ms. Moore talked about conversations she had had with her two sons about the possibility of leaving the school. She and her older son discussed the advantages and disadvantages of going to high school at ÉASC, compared with Sir John Franklin High School. She said that some of the advantages that her son saw in Sir John Franklin High School were the more developed infrastructure and the greater selection of courses and specialized rooms.

[317] Ms. Moore also talked about conversations she had with her younger son. She explained that he had often asked to go to a different school. He was interested in mechanics and wanted to be able to take practical courses in his field in order to decide whether it was really what he wanted to do. He could not take this type of course at ÉASC, whereas it would be available at Sir John Franklin High School.

[318] Ms. Moore talked about a conversation she had heard between her son and one of his friends who had decided to leave the school. She explained that she had not heard all of the conversation, but that in the part that she had heard, the friend concerned had said that he wanted to go to the other school so that he could make more friends.

[319] She also talked about her older son's cohort, the number of which had started to decrease in Grade 7. She said that in conversations between her son and his friends when they saw each other outside the school, a topic that came up frequently was the time of morning sports practices for extracurricular activities at ÉASC.

[320] Ms. Simmons testified about conversations she had had with her son. He often said to her that he wanted to change schools. He told her, for example, that he wanted access to rooms where they had specialized courses and that he wanted greater access to sport facilities.

[321] Mr. Deschênes testified that he had had several conversations with former ÉASC students about the reasons why they had left the school. He was unable to talk about the specific circumstances of the conversations he had had with these students; he only had a general recollection of them. With the help of lists of students who had attended the school in the past three years, he was asked questions, and he identified two students with whom he recalled having conversations about their leaving the school. One student had said to him that he wanted more options for sports activities and

competition, and the other one had said that he wanted to learn English more quickly.

[322] Mr. Gravel had also heard students, particularly in grades 7 and 8, talking about their reasons for leaving to go to other schools. He said that these reasons included shortcomings in the infrastructure, access to a wider choice of courses and the fact the primary and secondary schools were together.

[323] Mr. Gravel was able to name only one student (who was one of the two students identified by Mr. Deschênes) whom he had heard make such statements. He could not remember the names of the others.

[324] Ms. Careen said she had had conversations with some of the students who had left the school, including the same student identified by Mr. Deschênes and Mr. Gravel. This student had said that the other school had better sports facilities. She had talked to another student, who told her that he had left ÉASC because the choice of academic subjects was better at the other school.

[325] Ms. Careen also explained that over the years, there had been many discussions among parents about what ÉASC did not have.

[326] Mr. Lavigne had also had conversations with students who had changed schools. These had taken place at the end of the 2003 school year, which was the year when there were only three students at the secondary school level at ÉASC and they were sent to take some of their courses at Sir John Franklin High School on a trial basis. One of these students moved the following year, and the other two transferred to the Sir John Franklin High School. Mr. Lavigne talked to these students about their experience and their reasons for leaving. He said that they had told him that their experience with time-sharing between the two schools had not been positive and that they felt they did not belong to either school.

ii) Analysis

[327] When the Defendants objected to the testimony of parents reporting what they had heard their children say, counsel for the Plaintiffs argued that the objection should be dismissed because parents could report what their own children said about a matter of this kind. In my opinion, this claim is not supported by the rules of evidence. There is no kinship-based exception to the inadmissibility of hearsay.

[328] Of course, parents may talk about their observations and concerns about their children, including concerns about the school their children are attending. The parents are therefore testifying about their own feelings and own responses to a given situation.

[329] However, allowing parents to testify concerning what their child said to them in order to prove truthfulness and the child's reasons for acting in a particular way is quite another thing. The admissibility of such statements must be examined in the same way as any other hearsay evidence, that is, in the light of the principles established in the case law. This is also the case for statements reported by teachers and administrative staff.

[330] In regard to the necessity criterion, the situation that arises in this case is not analogous to any of the examples where the courts concluded that the necessity criterion was established. The declarants are not children who are too young to testify. There is no evidence suggesting that they would be unable to testify for other reasons or that they would be traumatized if they testified. The evidence shows that some of them, on the contrary, were in Yellowknife during the trial and could have been called as witnesses. Some of the declarants are no longer in Yellowknife, but no evidence concerning their availability was submitted. I point out again that the burden of establishing that the admissibility and necessity criteria have been met rests with the party submitting the evidence.

[331] The Plaintiffs rely solely on practical considerations to state that the necessity criterion has been met in this case. They submit that calling all of the declarants as witnesses would have required too much time and too many resources. This is not a persuasive argument. As I said when summarizing the testimony on this topic, the number of declarants who have been specifically identified by the witnesses is not large. Making them testify would not have taken a disproportionate or unreasonable amount of time.

[332] I acknowledge that there are situations where practical considerations are such that it is reasonably necessary to use hearsay evidence, but in my opinion there is insufficient evidence to establish that in this case.

[333] Even if I accepted the Plaintiffs' position that the necessity criterion has been met, I would still find that it has not been established that the evidence meets the necessary reliability threshold in order to be admissible.

[334] The evidence concerning the circumstances in which the statements were made and, in some cases, the precise nature of the statements, is fairly vague. That said, I am not criticizing the witnesses who mentioned these conversations. No one would expect the parents or teachers to have noted down or recorded the students' statements when they were made. No one could have known, at the time, that they would have to testify about it years later during a trial.

[335] However, their recollection of what was said and the circumstances in which it was said is not very specific. Because the indicia of reliability for a statement largely depend on the circumstances in which the statement was made, it is very difficult to assess reliability when the evidence of these circumstances is vague or limited.

[336] The other problem, from the standpoint of reliability, is the fact that, as all of the witnesses acknowledge, a teenager may very well not tell his or her parents everything that he or she is thinking. I do not think that we can state that, generally speaking, the conversations between parents and children are inherently reliable, such that they can be deemed to be true.

[337] This is also the case where school staff members are concerned, perhaps even more so. Their ties to the school and their commitment to the French first language instruction program may very well have an impact on what the students or former students would choose to say to them about their reasons for leaving, even if they have a very good relationship with the school staff.

[338] I therefore do not think that the circumstances in which these statements were made and the conversations occurred make them inherently reliable. In addition, there is too little evidence to allow sufficient verification of the truth and accuracy of the reported statements and conversations.

[339] The Plaintiffs seemed to suggest in their representations that the truthfulness of these statements is not truly contested and that this is an argument in favour of allowing them to be admitted into evidence. However, that is not the case at all. These very statements—the cause and effect relationship between the quality of ÉASC infrastructure and the loss of students—are strongly contested by the Defendants in this case.

[340] The Plaintiffs have also pleaded that the issue of admissibility must be decided by taking the nature of these legal proceedings into account as well as the fact that this is not a criminal trial.

[341] I find that the fact that the case involves individual rights and collective rights has no impact on the rules of evidence as such. Certainly, the nature of the right invoked necessarily has an impact on what a party must establish in order to be successful, i.e., the facts to be proven. But in my view, this does not have an impact on how those facts are established, i.e., the rules of evidence. They are two separate issues.

[342] As for the difference between application of the rules in a criminal case and in a non-criminal case, it is true that the overarching principled exception to the inadmissibility of hearsay stems from criminal case law. Certain considerations specific to criminal law, particularly measures for protecting the rights of the accused, do not apply in civil cases, and this can have an impact of the rules of admissibility.

[343] In their work on evidence, Sopinka, Lederman and Bryant raise this issue and write as follows:

> 6.95. Is the standard of proof to establish admissibility less in civil cases, where the ultimate burden of proof is only on a balance of probabilities and other considerations such as expediency and the crippling costs of litigation come into question? Adams J., in Clark v. Horizon Holidays Ltd, in considering a wrongful dismissal case, had regard to the general flexibility in respect to the admission of hearsay evidence in the determination of such disputes as follows:
>
> This is a wrongful dismissal case where alternative dispute resolution Systems abound. All of these forums freely admit hearsay evidence in the name of informality, expediency and the reduction of costs. Indeed those Systems have arisen in reaction to the austere formalism of courts. In my view, *Khan* and *Smith* signal a willingness in the judiciary to design procedures and evidentiary rules to enhance the accessibility, and therefore the relevance, of our courts
>
> Sopinka, Lederman & Bryant, *The Law of Evidence in Canada,* 3d ed., at p. 257

[344] It seems to me that these comments do not apply in a case such as this one. Clearly, this is not a criminal law case where the freedom of the accused is at stake; however, the potential consequences of this case for the

Defendants are huge. I do not believe that the type of legal proceeding is grounds for relaxing the rules of admissibility of evidence.

[345] The Plaintiffs cite *Lavoie et al.* v *Attorney General of Nova Scotia et al*, (1988) 47 D.L.R. (4th) 586 (N.S.S.C.T.D.) in support of their claim concerning the admissibility of hearsay evidence in a proceeding where language rights are at stake. In this case, the Court accepted the hearsay evidence in order to establish that very few parents would send their child to a minority-language school if that school was in a certain location. However, there are important distinctions between this case and that one. First, in *Lavoie*, the other party did not object to the admissibility of the evidence. Second, it seems that the Court was satisfied that the evidence was obtained in a properly conducted survey. Third, the only other way to submit the evidence would have been to have all of the rights holders testify. Fourth, the evidence in that case concerned the determination of numbers of persons who would send their children to the minority-language school if it were built in a certain location. In my opinion, this type of fact is very different from what the Plaintiffs wish to establish here through hearsay evidence.

[346] I would also point out that *Lavoie* is a decision that was rendered before the Supreme Court of Canada established the overarching principled exception to the inadmissibility of hearsay. Therefore, the judge did not have the benefit of the Supreme Court of Canada's stated principles concerning the approach to be taken in deciding on the admissibility of such evidence.

[347] The principled exception to the rule prohibiting hearsay evidence was not developed for reasons of convenience or for purely practical reasons. It was developed on the basis of principles associated with the basic reasons why hearsay is not usually permitted, that is, the fact that the adverse party is not allowed to test the reliability of this type of evidence.

[348] I conclude that in the circumstances, the Plaintiffs have not established that the necessity and reliability criteria are met. I therefore find that, for the purposes of proving their truthfulness, all of the statements made by the students and to which reference was made in the trial testimonies are inadmissible.

[349] In the alternative, the Plaintiffs say that these aspects of the testimony are admissible in order to prove that the comments were in fact made.

[350] In regard to what the declarants said to their parents, it is true that these statements may partly explain the parents' state of mind (for example, why they considered sending their child to a different school). I accept that the parents said in their testimony that the statements were made, and I accept that this contributed to the apprehensions they might have had about allowing their children to go to ÉASC. However, it is the only use, and it is a very limited one, that can be made of this evidence.

[351] As for the statements heard by Mr. Deschênes and Mr. Gravel, these statements must have influenced their opinion about the reasons why the students left. I find that their opinion is based for the most part on what the students said to them. Therefore, the fact that the statements are not admissible greatly reduces the probative value that can be attributed to these opinions.

c. Exhibit D

[352] Exhibit D is a document entitled "Students from École Allain St-Cyr Who Left Prior to Graduation from 2002 to 2010". Ms. Careen explained during her testimony that she had prepared this list after consulting several people, some of whom still work at ÉASC, while others worked at the school in the past and had known the students who left.

[353] During her examination-in-chief, Ms. Careen said that she got involved in this exercise in order to have a clear picture of the situation with respect to the secondary-level students that ÉASC had lost over the years. On cross-examination, she acknowledged that another objective was to provide information to Mr. Kubica, one of the two experts retained by the Plaintiffs for the purposes of the trial. One of the topics that the Plaintiffs had asked Mr. Kubica to deal with in his report was the issue of problems in retaining secondary-level students at ÉASC. At the start of his report (Exhibit 7), Mr. Kubica says that he consulted what he called "exit interviews" provided by Ms. Careen.

[354] It is clear to me, based on the evidence, that Exhibit D is the "exit interviews" to which Mr. Kubica refers. It is also clear that Exhibit D is not the product of exit interviews with the students concerned. Instead, it is a compilation of what various ÉASC staff members remember with respect to the reasons why the students left the school.

[355] The table includes, for the school years from 2003–2004 to 2009–2010, the names of students who left ÉASC and, in the right-hand column, the reason why they left. This column indicates whether the student moved or transferred to another school in Yellowknife. In most cases where the student transferred to another school in Yellowknife, additional information on the student's reason for leaving is noted. For example, it is noted that the student wanted a more varied choice of courses, wanted access to more sports activities or wanted a broader choice of academic courses.

[356] The Plaintiffs are requesting that Exhibit D be admitted as evidence for the truth of its contents or, in other words, to establish that the reasons noted in the table are indeed the reasons why these students left ÉASC. The admissibility of this evidence must be analyzed in the light of the overarching principled exception to the inadmissibility of hearsay.

[357] With respect to the necessity criterion, for several students whose names are on the list, there is no evidence submitted as to where they are now living, nor was any evidence submitted as to whether or not they are available to testify at trial to explain the reasons that prompted them to leave ÉASC. Once again, the Plaintiffs base their request on practical considerations in order to maintain that the table is admissible for the purpose of proving the reasons that prompted these students to leave.

[358] It is a question here of a fairly large number of students, as indicated in the table identified in paragraph 50 above. Half of them allegedly changed schools to have access to better infrastructure, better programs or both. This lends a certain weight to the Plaintiffs' position on necessity.

[359] However, I do not have to draw a firm conclusion about this criterion because I have concluded that, once again, the evidence is clearly insufficient to establish the reliability threshold required for the document to be admissible.

[360] Ms. Careen prepared the table, but she was not at the school when the majority of the students mentioned in the table left. The information in the table was obtained in consultations with several people who were all trying to recall various cohorts of students and the reasons why they left the school. The information entered in the table is not only hearsay coming from Ms. Careen, but also hearsay coming from persons she consulted. We are talking about double hearsay, possibly triple hearsay, depending on how the persons consulted by Ms. Careen obtained the information concerned.

[361] In most cases, we do not know exactly what was said, by whom (student or parents), when or in what circumstances. I say "in most cases" because some of the students were those with whom Ms. Careen had spoken, while others were students referred to in the testimony of Mr. Deschênes and Mr. Gravel. But this represents a very small percentage of the persons whose names are entered on this table.

[362] For the vast majority of the students, we do not know which person or how many persons provided information that was used to identify the reason why the students left the school. We also do not know the basis on which the consulted persons drew their conclusions: Could it be their impression at the time, a conversation with the student, a conversation with the student's friends, or a meeting with the parents? The submitted evidence does not answer these questions.

[363] Ms. Careen's initiative was certainly worthwhile for her purposes as school principal insofar as she wanted to compile and keep information in order to understand past events as much as possible and, if possible, attempt to take measures to prevent students from leaving the school. It was a useful initiative to compile information provided by people who had worked at ÉASC and to attempt to recreate and preserve the "collective memory" with respect to events that had affected the school. There was nothing inappropriate in Ms. Careen's subsequent use of this information in her work as school principal.

[364] However, there is a huge difference between using this type of information for administrative purposes and using it at trial to prove its contents.

[365] In everyday life, people are—thankfully—not limited in their decisions by the principles of evidentiary law. They continually make decisions based on information obtained from other people, without necessarily going back to the source of the information. However, the Court does not have this freedom in a trial.

[366] I find that Exhibit D is inadmissible.

d. Exhibit E

[367] Exhibit E is a document that includes students' answers to a questionnaire that Ms. Careen distributed to them at the beginning of the 2009 school year. In her examination-in-chief, Ms. Careen explained that

when she became school principal in 2009, she decided to consult the students to find out what impact the Phase 1 expansion and the potential Phase 2 expansion had had on the retention of students. She also wanted to find out what technical courses the students were interested in.

[368] She prepared a questionnaire that she herself distributed in all of the classrooms to all students in grades 7 to 11 (there were no students in Grade 12 that year). She explained the objective of the questionnaire to the students and gave them about 30 minutes to fill out the questionnaire individually.

[369] The questionnaire read as follows:

> [TRANSLATION]
>
> Thursday, September 24, 2009
>
> Dear secondary school students:
>
> The APADY is going to court to obtain the Phase 2 expansion of the École Allain St-Cyr. They have a difficult task. We ask for your help in advancing this important case.
>
> Please answer the following questions:
>
> 1. Does the fact that an extension to the École Allain St-Cyr was built (secondary school wing) and that we expect to have a second extension built (gymnasium, classrooms and other facilities) encourage you to stay at the school?
>
> 2. If you had an opportunity to go to the Kimberlite Career and Technical Centre (KCTC), what courses would you want to take?
>
> | | | |
> |---|---|---|
> | Carpentry (Grades 7 to 12) | Yes | No |
> | Mining Industry Training (Grades 9 to 12) | Yes | No |
> | Engineering and Technology – Multi-Station Lab (Grades 10 and 11) | Yes | No |
> | Hairsyling (Grades 7 to 12) | Yes | No |
> | Lego Robotics (Grades 6 to 9) | Yes | No |
>
> Thank you very much! Yvonne Careen, President, APADY

[370] Exhibit E comprises 32 pages. The first five pages are a typed re-transcription of answers to the first question, while the other pages are copies of the forms filled out by the students.

[371] Ms. Careen was cross-examined about her objective in having the students fill out the questionnaire. She explained that when she had them fill out the questionnaire, she had done so not only in her capacity as school principal, but also on behalf of APADY. She had done this openly because her title, "President, APADY", appeared at the bottom of the questionnaire.

[372] She was cross-examined about the difference between her description of the objective in her examination-in-chief and this description in her cross-examination. For the purposes of the issue of the document's admissibility, the difference is not particularly relevant because she eventually acknowledged that she had taken this initiative on behalf of the APADY.

[373] When cross-examined about the introduction preceding the questions, Ms. Careen acknowledged that this introduction had perhaps influenced one or two students, but no more than that. It was suggested to her that the introduction was intended to influence the students' answers, but she maintained that it was simply an introduction. She acknowledged that the questions could have been asked without including the introduction on the form.

[374] The admissibility of Exhibit E is governed by the same principles as those governing the other hearsay evidence I have already discussed.

[375] There are fewer students in this case than there were for Exhibit D, but the number is still fairly high. It is clear that some of them are still in Yellowknife, and the Plaintiffs have not submitted evidence to establish that they were not available or willing to testify at the trial. The Plaintiffs, again, are relying on practical considerations to justify the need to allow the students' responses to be admitted as hearsay evidence.

[376] Again, I conclude that even if the necessity criterion was met, the reliability criterion would not be. It is true that the students' responses are handwritten. The evidence establishes that these are their answers to the questions. The accuracy of the statements is not called into question here, but that does not necessarily guarantee the reliability of their responses.

[377] The students received this questionnaire from the principal of their school. The questionnaire is also signed by the principal, as president of the APADY. The introduction specifically refers to this proceeding and asks the students for their help in [TRANSLATION] "advancing" the case.

[378] It is a fact that, despite those introductory remarks, some students provided answers that do not advance the Plaintiffs' position. Some responded that they would have stayed at the school regardless and were not influenced by the possibility of future expansion. Another student outright stated that she does not like the school and is going to leave it for reasons that have nothing to do with the lack of a gym.

[379] It is therefore clear that the introduction did not sway all of the respondents to focus on infrastructure and answer in a way that would help the APADY in this proceeding.

[380] But each person is different. Just because some people were not influenced does not mean that no one was.

[381] Because of the content of the introduction, I conclude that the primary objective of the process, in terms of the questions regarding Phase 1 and Phase 2, was to gather information to strengthen the Plaintiffs' position in this proceeding, specifically regarding the causal connection between the nature of the infrastructure and student retention.

[382] Some factors that call the reliability of the responses into question, even though they are in the students' handwriting, are Ms. Careen's position of authority in relation to these students, the introduction to the questionnaire and the fact that the questionnaire, on its face, was not anonymous.

[383] I now return to the heart of the matter, and the reasons why hearsay evidence is generally not admissible, as summarized in the excerpt from *Khelawon, supra*, paragraph 302. If one or more of these students had testified at the trial, the Defendants could have asked them questions, namely, whether they were influenced by the introduction to the questionnaire or if they were fully comfortable answering truthfully, knowing their school's principal was involved in this litigation. But admitting this hearsay information deprives the Defendants of any opportunity to test the evidence. And this evidence, I repeat, concerns a fact that is adamantly disputed by the Defendants.

[384] I find that Exhibit E is inadmissible. Exhibits F and G, which concern a survey prepared by the CSFTN-O for parents and students of the two French schools, were raised by counsel for the Defendants during Ms. Careen's cross-examination, because counsel wanted to suggest that the results were not necessarily consistent with the content of Exhibit E. Very little evidence regarding the CSFTN-O's survey was provided at the trial. As I declared Exhibit E to be inadmissible, and since the evidence, in my opinion, has not established a legal basis on which Exhibits F and G can be declared admissible, I have not taken them into consideration in my deliberations.

e. Use of the document *Vision 20-20* (Exhibit 11)

[385] The document entitled *Vision 20-20*, which Mr. Lavigne and other witnesses discussed, was entered into evidence during Ms. Montreuil's testimony, but the parties do not agree on how it may be used as part of this proceeding. I note that the document is a report prepared by a consultant hired by the CSFTN-O in 2003 to conduct a comprehensive analysis of the NWT Francophone community's education needs, to enable the CSFTN-O to identify priorities and develop a strategic plan. The final report details consultations with many people, refers to the history of the development of the French as a first language program in the NWT and refers to studies led by other researchers on topics related to French language instruction in the NWT.

[386] The Plaintiffs state that this document is admissible to prove the truth of its contents. The Defendants object to its admission.

[387] There are a number of reasons why I fail to see how this document could be used for the truth of its contents. The document was entered into evidence during Ms. Montreuil's testimony, as chairperson of the CSFTN-O. The author of the document did not testify at the trial.

[388] Even if the author had testified, the vast majority of the content is a summary of opinions and facts shared by a large number of people, including certain people who testified at the trial, one of whom was Ms. Montreuil herself, but a wide range of others as well. Some other information in the report comes from documents and studies prepared by other people, such as the study done by Angéline Martel, who did not testify either.

[389] I will not repeat here what I previously said in my analysis of the principles governing the principled exception to the hearsay rule. But in my opinion, Exhibit 11 utterly fails to meet the criteria established in the case law. I acknowledge that, given the scope of the issue and the number of people consulted as part of this study, certain practical considerations could give the Plaintiffs some ammunition to meet the criterion of necessity, but the evidence is clearly insufficient to establish the threshold of reliability required to make it admissible.

[390] It is true that Ms. Montreuil, Mr. Lavigne, and other individuals who testified at the trial are among those consulted during the process leading up to this report and during the feedback process undertaken before the final version of the report was drafted. But without the testimony of the document's author, the bulk of the evidence concerning the document's reliability is itself hearsay because it comes from witnesses who are not personally familiar with the document.

[391] I therefore find that Exhibit 11 cannot, under our rules of evidence, establish the truth of its contents. That does not mean that the document is not relevant or useful for the purposes of this proceeding. The document was submitted to the GNWT and provides a detailed explanation of the grounds for the CSFTN-O's claims. CSFTN-O representatives and the Plaintiffs in this proceeding have referred to it repeatedly in their correspondence and discussions with GNWT representatives throughout this process. The document is therefore admissible to establish that the Defendants were aware of the Plaintiffs' claims, and the factual and legal basis that they were relying on.

f. Exhibit C

[392] During Mr. Lavigne's testimony, the Plaintiffs presented him with Exhibit C, a 55-page document entitled, "Affirmer l'éducation en français langue première fondements et orientations". The document was developed by the Government of Alberta and sets out that province's French as a first language teaching program. It is a public document and could be admissible. Its relevance, however, is questionable. The document establishes the policy and approach used in another jurisdiction to implement section 23. I fail to see how the recommended approach in Alberta has any probative value in identifying the issues I must address in this proceeding. Therefore, I did not take Exhibit C into account in my deliberations.

B. THE DEFENDANTS' EVIDENCE

1. Summary of the testimonies

a. Brian Nagel

[393] Mr. Nagel is a senior official of the GNWT Department of Public Works. He has over 20 years of work experience in this department. As part of his current duties, he is responsible for a number of files regarding the management of GNWT capital asset infrastructure.

[394] He explained that the GNWT owns a number of infrastructures, including approximately 670 major facilities (hospitals, airports, schools, medical centres). As part of his duties, Mr. Nagel is responsible for financial planning for the maintenance and repair of these buildings (this program is called the Deferred Maintenance Program). Such a program is necessary because maintenance and repair needs far exceed the budget that can be allocated to them each year. Therefore, these needs must be assessed regularly and prioritized.

[395] Mr. Nagel is also responsible for the Capital Plan and is involved in its development. The plan identifies how the budget that the government allocates to capital projects will be used. It is the result of a multi-step process.

[396] Mr. Nagel chairs a committee, on which all departments are represented, that reviews all requests. The departments provide supporting documentation for the projects they are proposing.

[397] Since the capital budget is never sufficient to fund all the projects proposed, priorities need to be established. A series of criteria called primary and secondary filters is used to prioritize the projects. Exhibit 78 lists and defines these criteria. Mr. Nagel explained them and gave examples of how they are applied. He also helped to develop them.

[398] Mr. Nagel's committee assesses each project in light of these criteria and assigns it a score. This is how the top priority projects are identified, and these are the projects that are included in the draft plan prepared by his committee.

[399] This draft is then studied by another committee (Deputy Ministers' Steering Committee), which is chaired by the Deputy Minister of Finance.

All the deputy ministers of departments responsible for capital assets sit on this committee. The committee reviews the draft plan and sends it back to Mr. Nagel's committee with recommendations and approvals. The draft plan is then revised in light of the deputy ministers' recommendations. The revised plan is resubmitted to the deputy ministers' committee, which sends it to the Department of Finance. The plan is then submitted to the Treasury Board (Financial Management Board) of the GNWT. Final approval has to be given by the Legislative Assembly.

[400] Exhibit 79 is the 2011–2012 Capital Plan. This document contains details of capital projects that have been approved. Pages 8-1 to 8-8 concern projects under the jurisdiction of the Department of Education. The list includes projects of varying scope. For example, one of the projects concerns the two schools in Inuvik and is valued at $115 million; another concerns a school in Hay River and is valued at $29 million; others, such as replacement of the gymnasium floor in another school in another community, is valued at $400,000.

[401] Mr. Nagel explained that a number of projects submitted in the process that led to the 2011-2012 plan were not selected. The total value of the projects reviewed by his committee was approximately $220 million. Whether a project is included or not depends on the priority level that is attributed, based on the primary and secondary filters.

[402] Mr. Nagel spoke about some projects that had been submitted for 2011-2012 but were not selected. Among others, there were two projects involving schools in Yellowknife: Sissons School and ÉASC.

[403] Mr. Nagel said that, in his opinion, building a gymnasium at ÉASC would cost approximately $11 million. He explained that the only way to absorb it into the current capital budget would be to eliminate another project.

[404] In cross-examination, Mr. Nagel was questioned about the priority rating that ÉASC project received when it was studied by the committee. In terms of the primary filters, he said that this project fell into Category 5, "Program Need of Requirement", and Category 4, "Financial Investment". In Category 4, a contribution by a third party (the federal government, for example) will increase the priority rating of a project.

[405] Counsel for the Plaintiffs asked Mr. Nagel many questions about the priority ratings his committee had assigned to various projects involving NWT schools in past years. Counsel also asked him questions about the budgets associated with these projects. Mr. Nagel could not answer these questions because he did not remember the details of each of the projects. This does not surprise me.

[406] Counsel for the Plaintiffs presented Mr. Nagel with excerpts from the government's last three capital plans, showing the list of Department of Education-related projects included in each one (Exhibit 80). The budgets for these projects are much higher in the 2009-2010 and 2010-2011 plans than in the 2011-2012 plan.

[407] Mr. Nagel said that each department that submits a project to the committee prepares a "project substantiation sheet" which explains the project and why it should be approved. He is certain that there would have been one for ÉASC project, but he did not have the document with him when he testified. He did not remember if the document referred to the government's constitutional obligations regarding the right to education.

[408] Mr. Nagel also acknowledged that the primary and secondary filters do not contain any criteria which increase the rating of projects related to minority language teaching programs.

[409] I find that Mr. Nagel's testimony is reliable and trustworthy. I think that his inability to answer certain questions regarding the details of past projects is understandable, given the number of projects his committee reviews each year.

b. Margaret Melhorne

[410] At the time of the trial, Ms. Melhorne was Deputy Minister of Finance and Secretary of the Financial Management Board and had held this position for two years. She had previously held other positions at the Department of Finance. She has worked there for over 20 years.

[411] Ms. Melhorne testified about the GNWT's financial situation and, more specifically, the impact of the economic crisis of 2008. When the crisis began, the government had predicted considerably reduced economic activity in the private sector in 2009 and, consequently, decreased government revenues from business taxes. This prediction turned out to be accurate.

[412] Ms. Melhorne explained that one of the GNWT's responses to the crisis had been to invest heavily in infrastructure projects to mitigate the impact of the drop in private sector activities. To stimulate the economy, the federal government had made significant sums available for infrastructure projects.

[413] Thus, in 2009, the GNWT's capital project budget was approximately $425 million, and in 2010, $220 million (these figures do not include the Housing Corporation budget, which is managed separately). According to Ms. Melhorne, a third of the budgets for these projects came from the federal government. These capital expenditures far exceeded those of previous years. Ms. Melhorne spoke in general terms about certain areas where the money was spent.

[414] Ms. Melhorne also spoke about the government's intentions for the future in terms of its capital expenses. She explained that the GNWT's strategy of increasing its budget to that level was in response to the economic situation and could not be maintained in the long term. At the time of the trial, the Capital Plan that had just been approved was $126 million. The government intended to complete the projects already under way and to return to an annual capital project budget of $75 million.

[415] Ms. Melhorne explained that the GNWT did not have much flexibility to increase its expenses because it does not anticipate an increase in revenues in the short term and feels that, in the current economic context, a tax increase would not be a good strategy. The government could borrow but is constrained in that regard because of the borrowing limit set by the federal government. Exhibit 81 is a document prepared by Ms. Melhorne explaining the situation and her projections concerning the borrowing limit and where the GNWT is positioned in that regard.

[416] Ms. Melhorne also explained that the NWT currently has significant infrastructure needs that have not been met because of a lack of funding.

[417] On cross-examination, Ms. Melhorne was questioned about certain aspects of the 2011-2012 Capital Plan. She acknowledged that it includes $126 million in education expenditures.

[418] She also confirmed that 80% of the GNWT's budget comes from federal government transfer payments. Consequently, fluctuations related to

the decrease in corporate tax revenue, for example, affect only 20% of the government's total budget.

[419] Counsel for the Plaintiffs also presented Ms. Melhorne with a transcript of a speech made by the Minister of Finance during a session of the Legislative Assembly (Exhibit 82). The speech was given in 2010, the day after the 2011-2012 Capital Plan was tabled. The Minister spoke about economic growth forecasts for 2010 and 2011 and promising signs of economic recovery. He highlighted the GNWT's investments in infrastructure and mentioned that the global economic situation remained uncertain and that the government would have to exercise discipline in managing its expenses. In my opinion, Ms. Melhorne's testimony is consistent with the Minister's remarks on these issues.

[420] I find that Ms. Melhorne is a credible, trustworthy witness.

c. Metro Huculak

[421] At the time of the trial, Mr. Huculak was superintendent of the YK1 School Board and had been in this position for six years. He spent part of his teaching career in Alberta, where he also held school and school board administration positions.

[422] William McDonald Middle School is one of the schools of the YK1 School Board. Mr. Huculak spoke about his student populations over the last few years. He said that, at the time of the trial, given the number of students who attend William McDonald Middle School, ÉASC could use nearly half of the gymnasium time (20 out of 48 periods over a six-day cycle). He said that he had made this offer to the CSFTN-O but it was not fully accepted because ÉASC's administration wanted to keep its time at the Multiplex.

[423] Mr. Huculak explained that William McDonald Middle School has an art room, a music room, a home economics room and an industrial arts room. These facilities are sometimes used by students from other schools that do not have specialized rooms. The CSFTN-O was offered access to these rooms.

[424] With regard to gymnasium access for extracurricular activities, Mr. Huculak said that he had asked his principal to meet with the principal of ÉASC and to get the physical education teachers involved to come to a fair arrangement for sharing the available time. He confirmed that his school board had become involved following a complaint by the CSFTN-O about

the time that had been offered to ÉASC. He said that he was prepared to intervene again if the CSFTN-O was not satisfied with the arrangements.

[425] Mr. Huculak also talked about the infrastructure needs of some of the schools under his jurisdiction. He explained that there is work to be done at Mildred Hall School and that Sissons School, the oldest school in Yellowknife, needs to be renovated. He confirmed that the Department of Education requested funding for Sissons School as part of the development of the 2011-2012 Capital Plan but the project was not approved.

[426] Mr. Huculak spoke about Kalemi Dene School in N'Dilo, which has a capacity of 125 students. The school does not have a gymnasium, a music room or an industrial arts room.

[427] Mr. Huculak spoke about his school board's schools' use of the Multiplex. The schools with students in kindergarten to Grade 8 use it to complement a specific program (the Athletic Excellence Program) intended to enable all students to take part in certain activities, such as hockey, soccer, gymnastics and speed skating.

[428] Counsel for the Defendants asked Mr. Huculak some questions about his experience in Alberta, more specifically, his observations regarding retention problems that existed at a relatively small school (it had 97 students in grades 10, 11 and 12). Mr. Huculak worked there for a year and said that there was a retention problem at that school. A number of students left it to go to another, much bigger, high school which had 700 to 800 students.

[429] Counsel for the Plaintiffs objected, stating that Mr. Huculak was expressing his opinion, as an ordinary witness, on the reason why students were leaving these schools. I dismissed the objection and allowed him to express such an opinion for the same reasons I allowed Mr. Deschênes and Mr. Gravel to share their opinions on the same matter. Mr. Huculak said that the primary reason was that these students wanted to have access to the wider range of activities that would be available to them at a larger school and had a number of friends who went to the larger school.

[430] Counsel for the Defendants also asked Mr. Huculak to testify about things he was told by students who left the schools he worked at in Alberta, regarding their reasons for leaving. The Defendants stated that if I had to allow hearsay evidence regarding the reasons given by students in ÉASC's

case, I should also allow the statements made by Mr. Huculak. Because I declared the Plaintiffs' evidence inadmissible and, in my opinion, the same principles apply to Mr. Huculak's statements, I declare this aspect of his testimony inadmissible as well.

[431] In cross-examination, Mr. Huculak acknowledged that all the schools within his school board have a gymnasium and, therefore, use the Multiplex only for complementary activities.

[432] He explained that one of the reasons why his school board could not commit, in 2010, to sharing its spaces beyond one year was that the Sissons School renovation project might go forward. If the project had been approved, the students at that school would have had to use other facilities during the renovations, and the school board had to remain flexible in using its spaces. Because the project was not approved, he said that the school board could now commit to sharing its spaces for longer than just one year.

[433] Mr. Huculak was not aware of the first memorandum of understanding about the sharing of spaces between ÉASC and William McDonald Middle School (Exhibit 31). He had never seen this document before the trial. But he knew about the signed agreement of August 2005 regarding ÉASC's use of certain spaces at William McDonald Middle School.

[434] Mr. Huculak acknowledged that William McDonald Middle School has been identified as being in need of renovation. He confirmed that if renovations were to take place, its students would have to go to another school while the work was being done. He said that there are no teachers at William McDonald Middle School who can teach industrial arts and home economics in French. But on re-examination, he said that if ÉASC had any teachers available to give courses in French, spaces could be made available for them to teach those courses.

[435] Mr. Huculak acknowledged that, overall, his school board's priority is to serve its own students. He also admitted that schools' schedules are prepared by their administrations but added that school boards can, if need be, provide their administrative staff with some instructions.

[436] I find that Mr. Huculak is a credible and trustworthy witness. He seemed sincere when he described how he pictured the sharing of spaces

between his school board's schools and other schools, and I accept his testimony that he is willing to co-operate with the other school boards.

d. Angela James

[437] Ms. James is the principal of Kalemi Dene School in N'Dilo. This school opened in 1998 and originally had 15 students. In 2010, the school had 100 students, from kindergarten to Grade 12.

[438] The building that houses the current school was built very recently. Ms. James believes that it cost approximately $9 million to build it. The school was previously located in the same old portable classrooms that had been used by ÉASC.

[439] The school is in the centre of N'Dilo. This community is located at the northern end of Latham Island, which is within the limits of the City of Yellowknife. As Ms. James said, it takes no more than 15 minutes by car to get from Kalemi Dene School to downtown Yellowknife.

[440] Ms. James described the school's physical spaces. It does not have a gymnasium. Students use the community gymnasium near the school, to which they have access every afternoon and some mornings if no one else is using it. They do not have a science laboratory; Ms. James said that there is no urgent need for one right now but the need will become greater when the school develops its senior secondary grades. The school does not have an official library, but books are kept in a classroom. In her opinion, that works well.

[441] Ms. James explained that multi-grade classes benefit her school greatly. A number of students arrive in kindergarten with certain shortfalls and deficiencies, especially in terms of language and growth, and they progress more slowly. She explained that it is beneficial for these students to spend a number of years with the same teacher. She also said that the school chooses not to focus on grades, to avoid putting pressure on the students. The students work and progress at their own pace, according to their grade level, and she finds that this works better.

[442] Ms. James has spoken of the special challenges facing many of the students at her school. Many of them have to overcome all sorts of difficulties, which in some cases includes problems at home and various traumas. Ms. James is very proud of her school and staff, and rightly so. In June 2010, the school graduated its first four Grade 12 students.

[443] Ms. James was not cross-examined by counsel for the Plaintiffs. I find her testimony credible and trustworthy.

e. David Dolson

[444] Mr. Dolson has been employed by Statistics Canada for 32 years. For the past 12 years, he has been working on the census carried out every four years by the federal government. He explained Statistics Canada's methodology for the 2006 Census, the most recent one at the time of the proceeding. He explained certain differences between the methodology used in the 2006 Census and the one used in the 1996 and 2001 censuses.

[445] Two forms are used for the census: a long form and a short form. The short form contains only one question about language (the question is about identifying the first language learned and still understood by the respondent). The long form asks more questions about language (for example, the language spoken most frequently at home) and about cultural background and ancestral origins.

[446] In the 2006 Census, in the city of Yellowknife, the short form was used by 80% of residents, and the long form, by 20%.

[447] Exhibit 158 shows the results of the 1996, 2001 and 2006 censuses with regard to the number of children with at least one parent whose mother tongue is French. The document also specifies how many of these children are of school age. For the city of Yellowknife, the results are as follows: in 1996, a total of 380 children, of whom 285 were of school age; in 2001, a total of 355, of whom 270 were of school age; and in 2006, a total of 295, of whom 245 were of school age.

[448] Mr. Dolson explained that the census results were rounded up or down (which is why all the figures reported end in either "0" or "5"). He also acknowledged that the results are less reliable when the sample surveyed is small, but he explained that Statistics Canada takes this into account by calculating the margin of error attributable to the results. For the 2006 results, he explained that the margin of error is [TRANSLATION] "more or less 80, in 19 cases out of 20", which is quite a wide spread.

[449] Mr. Dolson's cross-examination was relatively brief, and neither the credibility nor the reliability of his testimony was called into question. He presented the census results and explained the general methodology to the

best of his knowledge. I consider his testimony to be reliable and trustworthy.

f. Vishni Perris

[450] Ms. Perris works for the NWT Bureau of Statistics. During her testimony, a document was filed in evidence (Exhibit 163), listing the "social indicators" for Canada and the NWT. The social indicators include such things as graduation rate, child mortality rate, proportion of smokers and violent crime rate. According to the data reported in this document, the percentage of people aged 18 and over who graduated from high school is lower than in the NWT than in the rest of Canada. Other indicators suggest that certain social problems are more acute in the NWT than in the rest of Canada (for example, the violent crime rate is much higher, as are the homicide, suicide and accident-related death rates.

[451] The Defendants wanted to file another document in evidence during Ms. Perris's testimony (Exhibit Z), but the Plaintiffs challenged the document's admissibility. I deal with it later on, along with the other questions related to the admissibility of evidence presented by the Defendants.

[452] Ms. Perris's testimony is not particularly controversial, and I find that she is a credible, reliable witness.

g. Paul Devitt

[453] Mr. Devitt is a senior official in the Department of Education. He has been employed in that department for over 20 years. In his current duties, he is responsible for the Department's corporate services, including financial management, policy and infrastructure planning.

[454] Mr. Devitt talked about the process leading to construction of ÉASC. He said that when the school was built, the government had no intention of expanding it in the short term. He explained that in the interests of efficiency, when planning construction of new buildings, his department generally counts on a new school fulfilling needs for at least 10 years.

[455] According to Mr. Devitt, when the school opened, it had a capacity of 132 students. This figure takes into account that the school had six classrooms, each able to accommodate 22 students. He also confirmed that by the standards applied by the Department, a school accommodating that

many students is not entitled to a gymnasium or other specialized spaces. Provision was therefore made for the students at ÉASC to use a gymnasium and certain other infrastructure outside their school.

[456] Mr. Devitt mentioned the standards which provide the Department with guidelines on school space. The ones currently in force were adopted in July 2005 (Exhibit 162) and effected certain changes. According to the current standards, a school with 150 students is entitled to a gymnasium of 550 square metres.

[457] Mr. Devitt explained that when ÉASC was built, its total area was larger than what government standards allowed, thanks to the federal government's financial contribution. He said that the Francophone school board was involved throughout the planning of the school's construction.

[458] Mr. Devitt also talked about the funding formula used by the government to establish a budget for teachers in the schools. Exhibit 185 shows the teacher-student ratios for each of the school boards in the NWT. Mr. Devitt explained that the teacher-student ratio at CSFTN-O is better than in other boards because the federal government provides funding for teaching in minority situations. Exhibit 186 compares teacher-student ratios at ÉASC and in the schools of other Yellowknife boards. The ratio at ÉASC is higher.

[459] Mr. Devitt also testified on the subject of enrolments at various schools. Exhibit 188 shows the occupancy rates in Yellowknife schools over several years. For the last two years shown on the table (2005-2006 and 2006-2007), ÉASC's occupancy rate was lower than that of several other schools, including Sir John Franklin High School and St. Patrick's School. The current occupancy rate for Sir John Franklin High School, in particular, is very high.

[460] Mr. Devitt confirmed that the Department of Education had proposed the Phase 2 expansion project in the process of developing its 2011-2012 Capital Plan, but the project was set aside by the committee that assigns priorities to projects. It therefore does not show up in the current GNWT Capital Plan.

[461] In cross-examination, Mr. Devitt acknowledged that the Department of Education had not conducted any studies or research to establish the number of right holders in NWT.

[462] He acknowledged that, fundamentally, the standards used to assign space to schools are based on numbers. Thus, entitlement to specialized spaces, such as gymnasiums, music rooms and industrial arts rooms, depends on projections of the number of students who will be attending the school. Mr. Devitt confirmed that the standards are guidelines and that the Department of Education can decide to exceed them. However, he explained that to his knowledge, the Minister had had never granted such permission

[463] Mr. Devitt was questioned on the process that led to the changes made to the standards in 2005, in particular the raised threshold for a school to qualify for a gymnasium. He explained that the Department had done some research, reviewed what was being done in other jurisdictions and eventually developed new standards and a new approach to school space allocation. Counsel for the Plaintiffs asked him if the people who had developed the new standards had taken section 23 of the Charter into consideration. Mr. Devitt replied that they had considered the needs of all the students. Counsel asked him if they had taken into consideration the government's legal obligations under section 23, and Mr. Devitt stated that his answer was the same as the one he gave to the previous question. He reiterated that the Department's standards are applied uniformly to all NWT schools.

[464] Mr. Devitt admitted that the two Francophone schools in NWT are the only ones that have to share a gymnasium with another school but pointed out that several schools use gymnasiums that are also used by the community. He further acknowledged that many small NWT communities have a gymnasium that is often a community facility adjoining the school.

[465] Mr. Devitt recognized that, in general, the cost of instruction per student is higher in small schools in the NWT than in large ones and that this reality is not specific to the Francophone minority schools.

[466] Mr. Devitt explained that the Department has the technical capacity to gather data about the students enrolled in NWT schools. At present, for example, the Department is gathering information on whether or not students are Aboriginal. He acknowledged that other data could be gathered, for instance, on whether students have Francophone ancestry.

[467] With regard to Phase 2, Mr. Devitt said that negotiations with the federal government were ongoing. He explained that the project currently being negotiated would cost some $11 million. In the project presented for

the purposes of the 2011-2012 Capital Plan, the federal government's contribution was $3 million.

[468] Counsel for the Plaintiffs sought to put questions to Mr. Devitt about the details of the state of the ongoing negotiations with the federal government on Phase 2. The Defendants objected to these questions to protect the confidentiality of the negotiations, and I have upheld this objection, though I have allowed certain questions of a general nature. Mr. Devitt said that GNWT is asking the federal government for a contribution amounting to about 50% of the costs. He said that contributions of this order are in line with what the GNWT has asked for in the past. He feels that the negotiations are progressing and are not a waste of time.

[469] Mr. Devitt confirmed that the Department's position is that ÉASC is large enough to meet the needs of its present student body, but the Department nonetheless wants to continue negotiations with the federal government with a view to eventually proceeding with the expansion work.

[470] Mr. Devitt was questioned about how the Department calculates ÉASC's capacity. He said that the Department had not taken into account the space originally created for the daycare or space in certain community facilities. He specified, though, that the Department's calculation of school capacity and floor area is not related to the details of construction financing. He sees the process in the following terms: federal government financing is negotiated, taking into account space with a community vocation, in whole or in part; once the budget is established, the scale of the project is planned on the basis of the overall budget. The federal funding, however, is not subject to conditions as to the eventual use of the space.

[471] Mr. Devitt confirmed that the GNWT does not own either the Multiplex or the schools of the other two Yellowknife boards.

[472] Mr. Devitt was also cross-examined on the contractual relationship between the Department of Education and Donald Kindt, whom the Defendants have called as an expert witness. Mr. Devitt confirmed that Mr. Kindt's services were regularly retained for the planning of school space and that the GNWT has had a service agreement with him for several years.

[473] As I noted in summarizing the evidence submitted by the Plaintiffs, they filed various excerpts from Mr. Devitt's examination for discovery. There was no inconsistency between his answers at trial and those in the

examination for discovery. Cross-examination served to clarify certain aspects of the Defendants' position, but for the most part the matters addressed by Mr. Devitt have not, in my view, cast doubt on his credibility.

[474] As was the case with a number of other witnesses, the questions put to Mr. Devitt related to these proceedings, but also to file number CV2008000133. That proceeding deals with the adequacy of infrastructure at École Boréale in Hay River, but also covers the validity of a ministerial directive adopted in July 2008 governing access to the French language instruction program. In my reasons for decision in that case, I voiced reservations as to Mr. Devitt's testimony on the circumstances leading to adoption of that directive. *Commission Scolaire Francophone, Territoires du Nord-Ouest et al* v. *Attorney General of the Northwest Territories*, *supra*, paragraphs 493-97.

[475] I have taken these reservations into consideration in my evaluation of the credibility and reliability of Mr. Devitt's testimony in general. I have come to the conclusion that, in general, his testimony concerning the facts relevant to this case is credible and reliable. Moreover, several aspects of his testimony are supported by documents entered in evidence.

h. Janet Grinsted

[476] Ms. Grinsted has been the director of education operations and development in the Department of Education since 2001. Before that, she held a position in a division of the Department that handled policy and planning. As part of her current duties, she compiles information from school boards on students' academic performance.

[477] According to her, the academic performance of ÉASC students is very good. At this school, the proportion of students performing at an age-appropriate level is higher than in other schools in Yellowknife.

[478] Ms. Grinsted was also questioned on the discussions between her department and the CSFTN-O in the fall of 2010 on the possibility of obtaining certain data when students enroll. The Department proposed asking certain questions at the time of enrolment to identify students to whom section 23 applies. Exhibit 203 includes the questions that the Department proposed to ask, together with the CSFTN-O's response. In this response, the superintendent of the CSFTN-O, Philippe Brûlot, explains that the board finds the questions too limited and declines to participate in

gathering data unless the range of questions asked is broadened. Mr. Brûlot's e-mail gives a number of sample questions that the CSFTN-O would like to see included in the questionnaire.

[479] Ms. Grinsted's cross-examination bore chiefly on questions concerning the ministerial directive of July 2008 and applications for permission to enroll submitted following its adoption. These aspects of her testimony are relevant to the other proceedings, and I will not deal with them here.

[480] With regard to her testimony on matters relevant to this case, there is nothing in Ms. Grinsted's cross-examination, or indeed in her testimony in general, that undermined her credibility. I find Ms. Grinsted's testimony to be credible and reliable.

i. Donald Kindt

[481] Mr. Kindt has lived in NWT for over 30 years and has made a career in the field of education, first as a teacher, then in the Department of Education, and subsequently as a manager for one of Yellowknife's Anglophone school boards.

[482] For over ten years, he has been a consultant in the field of education and has done much work on the planning of school infrastructure. In particular, he worked on the plans for St. Patrick's School. There is no doubt that Mr. Kindt has extensive experience in school infrastructure planning and the standards applicable in the NWT.

[483] The Defendants sought to qualify Mr. Kindt as an expert witness to give his opinion on four subjects: (1) the adequacy of ÉASC's current facilities for teaching now and over the next four to five years; (2) a comparison, from the point of view of infrastructure, between ÉASC and schools of similar size within the NWT and minority schools outside the NWT; (3) the soundness of having both primary and secondary levels in the same school, and to what extent this happens in the NWT and elsewhere in Canada; and (4) the causes of migration from Francophone minority schools to Anglophone schools, and the part played in this phenomenon by lack of infrastructure and programs.

[484] The Plaintiffs objected to Mr. Kindt's qualification as an expert witness, on several grounds. They argued that his contractual relations with the Department of Education cast considerable doubt on his objectivity as an

expert witness. They further pointed out that Mr. Kindt's direct involvement as a consultant for the Department in the study of the two schools to which this case pertains made him a factual witness, so that he could not also testify as an expert. Regarding the comparison between the schools, the Plaintiffs contended that this testimony was not relevant, since comparisons should be made with the schools with which ÉASC is in competition. As to his proposed testimony on the causes of student migration, the Plaintiffs claimed that the reasons I gave for barring Mr. Kubica from testifying on these issues apply equally to Mr. Kindt.

[485] On conclusion of the voir dire, I decided to allow Mr. Kindt to testify as an expert on the first three issues only. I found that the concerns raised by the Plaintiffs were relevant to the probative value of his testimony but were not an obstacle to his qualification as an expert witness. The evidence presented on voir dire has been entered into the record, including his expert report (Exhibit 157).

[486] Mr. Kindt explained the nature of his work in the planning of school infrastructure. The government retains his services to develop an "Educational Plan". He meets with parents, students, teachers and administrators to determine their aspirations and needs, then helps them set priorities within the limits set by the Department's standards for infrastructure. In this type of process, though hired by the government, Mr. Kindt sees himself as a spokesman, a defender even (several times he used the word "advocate") of the users of the institution, helping them to make their case to the government.

[487] He explained that it is always a challenge to take the measure of what people want and to formulate a plan which fulfills those wishes to the extent possible while keeping within the parameters set by the government.

[488] Mr. Kindt was involved in such a process for ÉASC in December 2005 and January 2006. The parameters that the government gave him for this study included the addition of a gymnasium, classrooms, a multi-purpose room and other space, and the expansion of the school's total capacity to 245 students.

[489] The report prepared by Mr. Kindt following this process was entered into evidence (Exhibit 160), as was a letter from Mr. Kindt to Mr. Devitt laying out various scenarios for the use of the school's existing space and the prospective use of the additional space (Exhibit 161).

i) Mr. Kindt's opinion on the adequacy of the space

[490] Mr. Kindt visited ÉASC in March 2010. He also had discussions with Ms. Careen on the use of the existing space. He was therefore aware of the changes that had taken place since his report was written in 2006. His expert report refers to the additions made in connection with Phase 1 and describes the current use of the space.

[491] Mr. Kindt identified a certain number of deficiencies in ÉASC's current programming and space but concluded that this could be remedied by making minor renovations and rearranging the current space. For example, he suggests installing a sink in the classroom that does not yet have one so that the room can be used for multiple purposes, particularly art classes. He suggests dismantling the rotunda classroom so that the rotunda can revert to its original vocation, and perhaps extending the kitchen area adjoining it.

[492] His report mentions a "perceived space crunch" resulting from the decision to make the former kindergarten classroom available for the daycare. He explained that if the space devoted to the daycare were to be made available to the school, its capacity could be increased by 36 students, or 18 per room, though renovations would be needed to refit the space currently occupied by the nursery.

[493] According to Mr. Kindt, ÉASC must increase the time devoted to physical education, but in his view, physical education activities need not be equated with gym time. In his view, the approach to the teaching of physical education should be more flexible. He identifies several options, apart from construction of a gymnasium, for increasing physical education time, such as greater use of municipal sports facilities, and a change in timetabling to reduce time wasted in getting to the Multiplex gymnasium.

[494] He also feels that the school suffers from serious shortcomings in terms of the space available for the teaching of cooking and home economics. His testimony reflects the opinion of Ms. Simmons on the existing facilities. Mr. Kindt explained that in his experience, cooking courses are among the most popular in NWT schools. He believes that the kitchen should be expanded and renovated and that the same could be done with the rotunda if the classroom now there were dismantled.

[495] Mr. Kindt feels that ÉASC offers good programming in specialized and technical studies. To offer a wider range of courses, such as mechanics or carpentry, for example, sharing of community space and partnerships with private enterprise should be considered. He stresses that the challenge is not so much lack of space outside the school that could be used by ÉASC, but the difficulty of finding teachers who can give the courses in French.

[496] Mr. Kindt concludes that from a pedagogical standpoint, ÉASC's current space and infrastructure are adequate and that existing shortcomings can be remedied by other means than expanding the school.

ii) Comparison of ÉASC with schools of similar size

[497] According to Mr. Kindt, the best school with which to compare ÉASC is Kalemi Dene School, since it has about the same number of students. He analyzed the two schools' infrastructure and concluded that they are comparable. Each school has advantages that the other lacks (for example, ÉASC has better facilities for teaching science, but Kalemi Dene has better space for teaching home economics).

[498] Mr. Kindt's report also mentions research he conducted on the infrastructure of Francophone minority schools in other provinces. In his view, the Francophone schools of British Columbia are too big for comparison with ÉASC. He has identified certain schools in Alberta, Saskatchewan and Manitoba with enrolments comparable to that of ÉASC. After comparing the facilities available to each of them, he concludes that, apart from the absence of a gymnasium, ÉASC is in a similar situation to these schools. Most of these schools do have a gymnasium, but, like ÉASC, they have no specialized space for industrial and household arts.

iii) Combining primary and secondary levels in the same school

[499] In his expert report, Mr. Kindt refers to the various schools in the NWT which house both primary and secondary levels. In the NWT, 78% of schools house all levels from kindergarten to Grade 11 or 12.

[500] In British Columbia, Alberta, Saskatchewan and Manitoba, the percentage of schools with all levels combined is higher than the percentage of separate secondary schools. This is also true for Francophone minority schools, except in British Columbia, where the percentage of secondary schools is higher. Mr. Kindt is of the opinion that the larger number of

Francophone students in British Columbia probably explains why that province has more separate Francophone secondary schools.

[501] Mr. Kindt therefore concludes that the fact of having a single school accommodating all levels from kindergarten to Grade 12 is not in the least unusual and is in fact the norm in NWT and the western provinces for schools with a student body comparable to that of ÉASC. Mr. Kindt therefore feels that it is not necessary to build a separate secondary wing for the school.

iv) Other remarks

[502] Counsel for the Defendants asked Mr. Kindt to comment specifically on the Plaintiffs' claims in this case. In his answer regarding specialized space (music room, art room, etc.), Mr. Kindt stressed the importance for small schools of developing their own niche and making choices. He explained that the standards no longer provide for a cafeteria in schools. He stated that he knew of no school designed to necessarily have one class per grade regardless of numbers.

[503] With regard to students with special needs, the approach established by the Department, in accordance with section 8 of the *Education Act*, is the concept of universal instruction, which means integrating these students with the rest of the school to the greatest extent possible. Because of that, according to Mr. Kindt, it is no longer the practice to have a class specially designated for these students, but rather to arrange smaller spaces for individual work as needed.

[504] He was questioned on the differences between the content of his 2006 report on ÉASC and the expert report submitted at trial. In reviewing these two documents, it is important, in my view, to take into account the differing context in which they were written, especially the parameters given to Mr. Kindt when he made his consultations and wrote his 2006 report.

[505] Mr. Kindt testified as an expert in both cases and was therefore cross-examined on his involvement with the two schools. A number of the questions put to him in cross-examination bore on his work on École Boréale. I will not deal with this here, but as with the other people who have testified in both cases, I have taken into consideration all of his testimony, including that given on voir dire, in assessing its credibility and reliability.

[506] Mr. Kindt acknowledged that he had never taught in French. His teaching experience in Yellowknife schools has always been in schools with a gymnasium. He has never held a position as school principal.

[507] However, Mr. Kindt clearly does have broad experience in the planning of school infrastructure in NWT. He has worked on the planning of several major projects and is thoroughly familiar with the workings of the Department of Education.

[508] He explained during voir dire that between 50% and 70% of his consulting contracts come from the GNWT and that this provides about 50 to 60% of his income. His professional and contractual links with the Defendants cannot be ignored.

[509] However, the NWT is a jurisdiction which, in many ways, is unique because of its distinctive geographical and social characteristics. There may be similarities between the realities of the NWT and those of the other two territories or of the remote regions of the provinces, but all the same, it is the people who live and work there who have the most immediate experience of those realities, and it has to be acknowledged that in a jurisdiction such as ours, it would be hard for a person to acquire the type of experience and knowledge that Mr. Kindt possesses without ever having done business, in some way or other, with the government, as either employee or consultant.

[510] Therefore, I do not think that Mr. Kindt's credibility is automatically tainted by the fact that a significant portion of his income derives from contracts with the government. My observations during his testimony lead me to conclude that the opinions which he has given were sincere and were not swayed by inappropriate motives.

[511] That being said, I have certain reservations about the probative value of some of the opinions he has expressed, chiefly because his work experience, though broad, does not include teaching or administration in a school operating in a Francophone minority context. He is thoroughly conversant with the standards used by the Department of Education, and I am in no way questioning his competency in school planning and infrastructure generally, but it is clear that for him, each school is unique and has special needs, and the special needs of a Francophone minority school are but one instance among many which have to be accommodated within the standards and parameters established by the Department of Education. I shall return to this question later in these reasons.

2. Admissibility of disputed evidence

a. Exhibit “Z”

[512] During Ms. Perris’s testimony, the Defendants sought to enter into evidence projections she had prepared using the results of the 2006 Census, and certain projections made by the NWT Bureau of Statistics.

[513] Ms. Perris explained that the NWT Bureau of Statistics (the Bureau) regularly makes projections on various matters, including fluctuations in the population of NWT. In so doing, the Bureau takes into account a number of factors, such as historical trends, mortality and birth rates, and migration.

[514] According to the results of the 2006 Census, the number of children between the ages of 5 and 17 in NWT was 8,325. The number of children in Yellowknife was 735, of whom 245 had at least one parent reporting French as his or her mother tongue.

[515] Using these data and territorial projections on general population trends, Ms. Perris made projections of the number of children with at least one parent reporting French as his or her mother tongue for the years 2014 and 2019.

[516] Ms. Perris made these projections on a purely mathematical basis. The Bureau predicts that the number of children between ages 5 and 17 in 2014 will be 7,692 in the NWT, 3,262 of them in Yellowknife. Ms. Perris assumed that the proportion of children with at least one parent reporting French as his or her mother tongue will remain stable, used the percentage from the 2006 Census and applied this same percentage to the projected figures for the general population for 2014 and 2019. Using this percentage, she calculated that the number of children with at least one parent reporting French as his or her mother tongue will be 234 in 2014 and 261 in 2019.

[517] The Plaintiffs object to the admissibility of this document on the grounds that it is opinion evidence.

[518] At the case management conferences held prior to the proceedings, counsel for the Defendants had raised the question of the statistics he intended to submit in evidence precisely in order to clarify whether the Plaintiffs would object to having this evidence presented by an ordinary witness rather than an expert one. More specifically, the point at issue in these discussions was the 2006 Census results. Counsel for the Plaintiffs said

that he would not object to the results being brought into evidence through an ordinary witness, but he would contest the reliability of the figures.

[519] In objecting to having Exhibit "Z" entered into evidence, the Plaintiffs stress that their position on the admissibility of statistics applies solely to statistics. In their view, there was never any question in the case management conferences of projections as evidence. The Plaintiffs point out that they never conceded that projections could be admitted through a lay witness.

[520] I agree with the Plaintiffs that there is a distinction between purely statistical evidence, such as census results, and projections. I also believe it is true to say that there was no specific mention of projections in the case management conferences. I do not think that there was bad faith on anyone's part, but rather that there was a misunderstanding as to the scope of the evidence which the Defendants intended to present at the time when they raised the issue.

[521] On the other hand, several other documents entered into evidence in these proceedings include projections, some by the Defendants and others by the Plaintiffs. These documents were introduced as evidence through ordinary witnesses in all cases.

[522] In so far as Ms. Perris is the person who prepared the projections and was able to explain the method she had used, I do not consider her testimony on this matter to be, strictly speaking, opinion testimony. The question is rather, in my view, what evidentiary weight can be attributed to these projections. I therefore declare Exhibit "Z" to be admissible.

b. Exhibit "CC"

[523] Exhibit "CC" is a report prepared by the Office of the Auditor General of Canada on education in the NWT. Counsel for the Defendants referred to this report during the testimony of Ms. James. She confirmed that she was familiar with the report. Her attention was drawn specifically to a graph on page 16 of the report showing that graduation rates in the NWT are much higher among non-Aboriginal students than among Aboriginals. The rate for non-Aboriginal students is distinctly higher than the territorial average, while the rate for Aboriginal students is substantially lower. This trend emerges consistently between the years 1994-1995 and 2007-2008. Ms. James confirmed that these data are consistent with what she has

observed during her career and point to certain obstacles and challenges that continue to stalk many Aboriginal students.

[524] Ms. Grinsted, for her part, testified that the Department of Education had provided the Auditor General's office with much of the information used in preparing this report. Ms. Grinsted also said that the table showing graduation rates for the NWT seemed to her to reflect the situation and the information in the Department's possession.

[525] The Plaintiffs object to the admissibility of this report. In my view, this objection is unfounded, since the document has been tabled in the Legislative Assembly, making it a public document admissible under the *Evidence Act*, R.S.N.W.T. 1988, c. E-8. I declare Exhibit "CC" to be admissible.

c. Exhibit "AA"

[526] Exhibit "AA" is a document listing NWT schools, with their capacity, enrolment and use rate. The Defendants sought to enter this document into evidence during Mr. Devitt's testimony. The Plaintiffs object to this document's admission as evidence on the grounds that it was not among the documents disclosed to them before the trial. Counsel for the Plaintiffs states having seen this document for the first time on the day of the testimony, when the Defendants tried to enter it as evidence.

[527] Counsel for the Defendants retorted that a number of documents entered by the Plaintiffs had likewise been supplied to him only during the proceedings and not before, which is normal given the dynamic nature of court proceedings.

[528] Counsel for the Defendants has not explained what, in the course of the proceedings, made it necessary to use this document or when the decision to do so was made. The document is dated January 15, 2010, and deals with utilization rates of NWT schools, particularly in Yellowknife. This subject has been addressed by other witnesses during the trial, notably during Mr. Huculak's testimony, which was heard a few days before Mr. Devitt's. There is thus no really satisfactory explanation for the failure to disclose this document.

[529] However, I recognize that certain documents entered into evidence by the Plaintiffs were likewise provided to the Defendants during the trial. In a

number of cases, these were updates of documents already disclosed, but the fact remains that this made it hard for the Defendants to verify the contents.

[530] In the circumstances, I declare Exhibit "AA" to be admissible, despite its late disclosure.

d. Exhibit "BB"

[531] Exhibit "BB" is a seven-page document which the Defendants also sought to enter into evidence during Mr. Devitt's testimony. It consists of descriptions of the schools in the communities of Colville Lake, Dettah, Jean Marie River, Kakisa, Nahanni Butte, Trout Lake and Wrigley. Included are plans of the schools, student numbers by level, and information on the year of construction and utilization rates.

[532] The Plaintiffs object to the admission of these documents as evidence, again on the grounds that they were not disclosed in advance. Counsel for the Plaintiffs added that, during examination for discovery, he had asked Mr. Devitt for an undertaking to provide him with the plans of schools comparable in size to École Boréale in Hay River, and that in response to this undertaking, he had been given a few plans. He therefore feels that it would be unfair to allow the Defendants to present evidence that is more detailed than what he was given in response to this undertaking.

[533] The documents constituting Exhibit "BB" are dated October 6. It seems to me that it was quite clear before this trial began that one of the points at issue, in both this case and CV2008000133, would be the comparator to be used to determine whether the two NWT Francophone schools were offering their students true equality with students attending majority schools.

[534] Insofar as the Defendants intended to present evidence on other NWT schools to substantiate this argument, this evidence should have been disclosed, especially as the Plaintiffs had explicitly asked to be provided with the plans of certain schools in the course of discovery. It would have been all the more important, in the circumstances, to disclose to the Plaintiffs any school plan that they intended to enter into evidence.

[535] I agree with counsel for the Defendants that the parties to a trial must be allowed a certain latitude, since trials are dynamic and sometimes complex. This was certainly so in the case at bar. However, the rules of civil procedure were established to prevent either party being taken by surprise.

[536] In the circumstances, I find that Exhibit "BB" is not admissible.

IV) ANALYSIS

[537] The Plaintiffs allege that the GNWT has committed several violations of section 23 in implementing the French first language instruction program in Yellowknife. The relief they are seeking includes a certain number of declarations of their rights, compensatory and punitive damages and an order for solicitor and client costs.

[538] The Plaintiffs' claims concern two of the rights protected by section 23 of the Charter: the right to infrastructure that provides the minority language students with substantive equality with majority language students, and a minority school board's right to manage. It would be useful to begin by reviewing the basic principles established by the case law governing the scope and enforcement of section 23.

A. SECTION 23 OF THE CHARTER

[539] The general purpose of section 23 is to preserve and promote the two official languages of Canada and their respective cultures; its aim is to ensure that each language flourishes, as far as possible, in provinces and territories where it is not spoken by the majority of the population: *Mahe* v. *Alberta*, [1990] 1 S.C.R. 324, paragraph 31.

[540] Section 23 has a remedial purpose: creating a right for the minority group, and a corresponding obligation for governments, namely, the obligation to alter or develop major institutional structures: *Mahe*, *supra*, paragraphs 36–37.

[541] The rights created by section 23 are not absolute; they must be understood and interpreted using a sliding scale. The lowest level of this scale is set out in paragraph 23(3)(*a*) ("instruction"), and the highest, in paragraph 23(3)(*b*) ("the right to have them receive that instruction in minority language educational facilities provided out of public funds"). The provision guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved: *Mahe*, *supra*, paragraph 38.

[542] When the issue is whether the number of students warrants a certain level of service, the numbers standard must be worked out by examining the particular facts of each case. The relevant number for the purposes of this

analysis is the number of persons who will potentially take advantage of the service, which can be roughly estimated as being somewhere between the known demand and the total number of persons who could potentially take advantage of the service: *Mahe, supra*, paragraph 78, *Arsenault-Cameron* v. *Prince Edward Island*, [2000] 1 S.C.R. 3, paragraph 32.

[543] The "numbers warrant" provision requires that two factors be taken into account: the services appropriate, in pedagogical terms, for the number of students; and the cost of the contemplated services, which is the other aspect of the qualified nature of the right created by section 23. However, the remedial nature of this provision means that pedagogical considerations have more weight than financial requirements in determining whether numbers warrant: *Mahe, supra*, paragraphs 79–80.

[544] Because of its remedial nature, section 23 is not meant to reinforce the status quo by adopting a formal vision of equality that would treat the majority and minority official language groups alike. The pedagogical needs of minority language children should therefore not be assessed solely by reference to the pedagogical needs of majority language children: *Arsenault-Cameron, supra*, paragraph 31.

[545] Section 23 also creates the right to a measure of management and control for the minority language group where the numbers warrant. As early as 1990, the Supreme Court of Canada explained why such management and control were necessary:

> [The purpose of section 23] is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.
>
> Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not

> necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.
>
> . . .
>
> If section 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that minority language groups have a measure of control over the minority language facilities and instruction.
>
> *Mahe*, *supra*, paragraphs 51–52.

[546] Ten years later, the Supreme Court reiterated these principles, again emphasizing that the right to manage and control is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns. The Supreme Court also pointed out that exhaustive specifics of what the right to manage and control included could not be given because of the sliding scale of rights and the need to adapt modalities to the particular circumstances of each province or territory: *Arsenault-Cameron, supra*, paragraphs 45–46.

[547] The case law also recognizes that a government can decide to give greater management powers to the minority language group than required by section 23. The provision creates a minimum threshold that the government must respect but does not set a ceiling or a maximum limit: *Mahe*, *supra*, paragraph 65.

[548] It is therefore clear that the specific modalities of the implementation of the rights conferred by section 23, including management rights, vary according to the circumstances.

[549] The Supreme Court of Canada also recognized that governments should have the widest possible discretion in selecting the measures to take to meet their obligations: *Mahe*, *supra*, paragraph 96. The exercise of this discretion is not limitless however; it is limited by the remedial aspect of section 23, the specific needs of the minority language community and the right of representatives of the minority to the management of minority language instruction: *Arsenault-Cameron*, *supra*, paragraph 44.

[550] The provinces and territories have a legitimate interest in the content and qualitative standards of educational programs and can regulate the content of these programs as well as the size of establishments,

transportation and grouping of students. But since all of these elements have an effect on language and culture, they must be regulated with regard to the specific circumstances of the minority and the purposes of section 23: *Arsenault-Cameron*, *supra*, paragraph 53.

[551] The present proceeding is different from many others that have been instituted under section 23. It does not involve complete inaction on the part of the government; the dispute concerns the adequacy of the measures taken to meet its obligations.

[552] With respect to infrastructure, the issue is not whether a school should be built; the school already exists. The issue that has been raised is the extent to which it complies with the requirements of section 23. With respect to management rights, the minority has its own school board, which has powers of management in certain areas. What is in dispute is the fact that certain powers have not been delegated to it.

[553] The dispute also raises a new issue regarding the constitutional status of a daycare and a preschool program in a minority context.

[554] The following are the issues that must be decided in this proceeding:

(a) the constitutional validity of the Minister of Education's decision not to delegate powers under section 119 of the Act to the CSFTN-O;

(b) ÉASC's compliance with section 23 requirements;

(c) the constitutional status of the daycare and pre-kindergarten program;

(d) the appropriate remedies if the Court concludes that the Defendants have indeed violated section 23.

B. THE MINISTER OF EDUCATION'S DECISION NOT TO DELEGATE POWERS UNDER SECTION 119 OF THE ACT TO THE CSFTN-O

[555] The Plaintiffs submit that the Minister's decision not to delegate the powers set out in section 119 of the *Education Act* to the CSFTN-O violates the right of management protected by section 23. The powers enumerated in section 119 concern the management of lands and buildings (the right to

acquire and maintain these and the right to borrow money, including money on the security of a mortgage).

[556] For any education body established under the Act, the Minister has the power, but not the obligation, to allocate these powers to an education authority. Section 119 therefore does not apply exclusively to the CSFTN-O. But the Plaintiffs argue that, regarding the minority language school board, this absence of delegated powers violates the right of management protected by section 23.

[557] The Plaintiffs submit that, by establishing the CSFTN-O, the GNWT necessarily recognized that the number of right holders in the NWT warranted the delegation of the highest level of management possible after application of the sliding scale principle, and that the maximum degree of management in all cases entails the right to own the infrastructure and to manage it in a fully autonomous manner.

[558] In my opinion, the case law does not support this position. On the contrary, the judgments dealing with section 23 have established that its enforcement must be flexible and adapted to the circumstances. The Plaintiffs' position on the right of management—essentially an all-or-nothing approach—goes against these principles.

[559] All school boards in the NWT are in the same situation as the CSFTN-O, apart from the two English school boards in Yellowknife, which own their own buildings for historical reasons. The evidence on this matter was not very detailed. But the powers of these two school boards do not flow from a decision of the GNWT to treat them differently from the other school boards.

[560] What is more significant, to my mind, is that the evidence has established that even though they own their own buildings, these two school boards do not enjoy complete autonomy with respect to their infrastructures. Capital projects concerning the schools under the authority of these school boards are proposed by the Department of Education and submitted for inclusion in the government's Capital Plan, as are projects for the schools under the jurisdiction of the CSFTN-O or other school boards. For example, Mr. Huculak explained that the YK1 school board believes that Sissons School requires renovations. However, the project was not included in the 2011–2012 Capital Plan. It will not take place in the immediate future, and there is nothing the school board can do about it.

[561] No school board in the NWT enjoys the full autonomy, as regards their infrastructure, that the Plaintiffs are claiming. The case law recognizes that the minority community must on occasion be treated differently to achieve substantive equality. But it also recognizes the importance of giving the government the broadest discretion and the greatest flexibility possible in selecting the measures to take to meet its obligations towards the minority language group.

[562] Dr. Landry explained that the more autonomy a school board has in managing its infrastructure, the more effectively it can promote the remedial goals of section 23. While I accept this, I do not believe that this means that, legally, full autonomy is required in all cases.

[563] For me, the *French First Language Education Regulations* adequately reflect the flexibility required for governments in implementing the objectives of section 23.

[564] Section 9 of the Regulations stipulates that the Minister may establish a "commission scolaire francophone", that is, a French-language school board, when a threshold number has been attained (more than 500 students registered in the program). But the provision also recognizes that the Minister may do so even if this threshold number is not attained, if he or she is satisfied that the French-language school board will fulfil the duties of an education body and meet the educational standards established by the government. The effect of this provision is to allow the Minister to establish a school board for the minority language group even when the number of right holders is relatively small. The Regulations recognize that while the number of enrolments is a reason to create a school board, it is not the only reason.

[565] In the present case, the Minister availed himself of this opportunity. It is clear that the number of students enrolled in the French-language education program when the CSFTN-O was created was below 500 (as it still is). The Minister's decision to create a school board was therefore necessarily based on paragraph 9(3)(*a*) of the Regulations.

[566] This decision is not without consequence. The Act imposes a duty on the Minister to delegate a number of powers to a school board so established. It therefore implies, in my opinion, recognition that the numbers warrant a certain degree of management.

[567] The first conclusion the Plaintiffs have asked me to draw is that the Defendants' decision to establish a school board represents an admission that they were constitutionally obliged to do so. This argument does not take into account the legislative framework I have just described, nor does it take into account the case law that recognizes that a government may be proactive and go beyond its strict constitutional obligations regarding the right of management.

[568] But even if the Plaintiffs are correct, the real problem is the second submission they make, namely that, under section 23, if the numbers warrant the establishment of a school board, they also necessarily warrant that the school board be given full autonomy over the infrastructure.

[569] In my view, the sliding scale principle means that numbers have an impact on the necessity to establish a minority language school board, but they also have an impact on the degree of autonomy to be given to that school board.

[570] In my opinion, it is inconsistent with the case law to argue that any school board, be it responsible for 100 students or 10,000, must necessarily have exactly the same power of management and the same level of autonomy as the government.

[571] This interpretation, if it were accepted, could harm the implementation of the objectives of section 23 rather than promote them. Such a rigid approach could have a dissuasive effect on governments and incite them to avoid, as much as possible, establishing minority language school boards in order to maintain greater control over public spending. In some cases, this would deprive right holders of several other benefits that arise from having their own school board.

[572] In my opinion, a more nuanced approach is more compatible with the sliding scale principle and the flexibility the courts have allowed governments in implementing section 23.

[573] It is not the fact of establishing a minority language school board that determines the scope of the right of management it should have, but the numbers. The establishment of a school board therefore does not lead to a series of predetermined consequences for the scope of its right of management.

[574] In this case, the CSFTN-O enjoys, in accordance with the Act, the powers enumerated in sections 117 and 118. I will deal with the issue of the target student body below, but even using the figures submitted by the Plaintiffs, the numbers remain relatively modest.

[575] In my view, the Plaintiffs have not established that, in accordance with the sliding scale principle, the CSFTN-O's right of management must necessarily include the powers set out in section 119 of the Act, as well as the other powers they are claiming. I am therefore not satisfied that the Minister's decision not to delegate those powers to the CSFTN-O is a violation of section 23, nor am I satisfied that the Plaintiffs are entitled to the other declarations they are seeking with respect to the powers that should be held by the CSFTN-O.

[576] That said, the establishment of a minority language school board creates obligations for the government and has consequences for the way the government must proceed in respect of right holders, including in decision-making processes regarding infrastructure. The government must be consistent: in the context of section 23, if it decides to create a minority language school board, it must accept its role in managing the French-language education program, including identifying its needs.

[577] The government must therefore work closely with the minority language school board with regard to programs and infrastructure. It is in the government's interest to seriously consider the needs identified by the school board. The case law recognizes that the school board is often in the best position to assess its pedagogical needs. When it decides not to satisfy the requests of the school board, the government must be able to justify those decisions.

C. ÉASC'S COMPLIANCE WITH SECTION 23 REQUIREMENTS

[578] The fundamental question the Court must answer about ÉASC's current infrastructure is whether this infrastructure is adequate for providing the students who attend the school with substantive equality with the students of the English linguistic majority. This general issue raises several sub-issues.

1. Point of comparison to be used for the analysis

[579] The first thing to be decided is which point of comparison to use for this analysis. The Plaintiffs submit that the point of comparison should be

Yellowknife's English schools. The Defendants argue that this would be an error since the English schools have a much greater number of students than ÉASC. In their opinion, ÉASC should be compared with schools, in the NWT or elsewhere, with a comparable number of students.

[580] This question is critical since, in many ways, the remainder of the analysis depends on it. To answer the question, we must return to the fundamental objectives of section 23, which are to preserve the two official languages of Canada, French and English, and to ensure that each language, and the culture it represents, flourishes across the country.

[581] One of the essential purposes of the obligation to provide an infrastructure that provides minority language students with substantive equality is to allow them to receive their schooling in their language, since this is one of the ways of counteracting assimilation. Dr. Landry spoke of the crucial importance of the school as an institution in a minority language community. The parents who testified at the hearing noted how important it was to them to be able to send their children to school in French so as to be able to preserve their language and culture.

[582] The reality in Yellowknife is that students of the French linguistic minority have a choice between frequenting ÉASC or a school of one of the two English school boards. This is how the issue presents itself to them. The parents and their children do not have to choose between ÉASC and Kalemi Dene School, or between ÉASC and the schools of Norman Wells, Inuvik, Paulatuk or Kakisa. Nor do they have to choose between ÉASC and a French school in Alberta or Saskatchewan. Any comparison with these schools is completely divorced from reality and the options the members of the minority community actually have.

[583] Consequently, the main comparator in the analysis of the adequacy of ÉASC's infrastructure must be the schools of Yellowknife's Anglophone majority, because they represent the French linguistic minority students' other option, especially given that several of them offer an immersion program.

[584] Clearly, there are significant differences between the number of students who attend these schools and the number who attend ÉASC. These differences are relevant to the determination of the level of services that must be provided, according to the two criteria established in *Mahe*

(pedagogical needs and cost of services). However, they are not relevant to the determination of the initial point of comparison.

2. Differences between majority schools and ÉASC

[585] The schools managed by Yellowknife's two English school boards are divided into three categories: elementary, middle and high schools. Some of these schools have been described in detail by witnesses who are familiar with them, either from having taught there or having visited. The two high schools are also described in Mr. Kubica's report. I do not believe that the nature or scope of the infrastructure of the schools in question are in dispute.

[586] Two of Yellowknife's elementary schools that were discussed in particular were Sissons School and St. Joseph School. St. Joseph School was completely renovated recently following a fire (the students from that school used the space at William McDonald Middle School for two years during the renovations). The new school has a regular gymnasium and a mini-gymnasium, a home economics room, a music room, a science laboratory and spaces for students with special needs. It also has extensive school grounds and a play area.

[587] Sissons School also has a gymnasium, a music room and spaces for students with special needs. As mentioned above, it needs renovations, but there is no provision for such renovations in the 2011–2012 Capital Plan.

[588] The evidence dealt extensively with William McDonald Middle School, the middle school located right next to ÉASC. This school has a gymnasium, fitness rooms, a music room, a home economics room, a science laboratory, two industrial arts rooms and a computer laboratory. It also has extensive school grounds, a running track and a soccer field. The school has a capacity of 484 students, but only 121 students are currently attending. ÉASC uses certain spaces in that school, such as the gymnasium, for extra-curricular activities. Given the small size of that school's student body, it would be possible for ÉASC to increase its use of its special-use areas and other spaces.

[589] Mr. Kubica's report describes the facilities available to Yellowknife's two high schools, Sir John Franklin High School and St. Patrick High School. His conclusions are corroborated by what several other witnesses have said about these schools.

[590] Both serve students from Grades 9 through 12 and have significantly larger student bodies than the total student body of ÉASC (about 750 students at Sir John Franklin High School and about 570 students at St. Patrick High School).

[591] Sir John Franklin High School has a French immersion program. It has a large gymnasium and special-use areas for the teaching of industrial arts, home economics, art and music. The students have access to the Northern Arts Cultural Centre, a large concert hall attached to the school. However, the school's occupancy rate is very high.

[592] St. Patrick High School also has a large gymnasium and special-use areas for the arts and theatre. Students also have access to the Kimberlite Career and Technical Centre, which is located across the street and offers a wide range of equipment and facilities for industrial arts instruction.

[593] Both high schools also have science laboratories, spaces where students can gather and work spaces for students with special needs. Neither school has combined-grade classes.

[594] At ÉASC, the number of classrooms available requires the administration to combine classes at both the primary and secondary levels. Ms. Careen explained that the school attempts to combine the groups in the best way possible based on the numbers. Even the special-use room used as a laboratory doubles as a regular classroom.

[595] With regard to special-use areas, ÉASC has no gymnasium, no dedicated science laboratory for the secondary level, no music room or theatre, no adequate space for home economics instruction and no facilities suitable for instruction in industrial arts, such as mechanics, carpentry or welding.

[596] The lack of such spaces means that ÉASC cannot offer a variety of electives as part of its program. It can offer certain courses and meet the curriculum requirements, but the students do not have any real choice. This is the phenomenon of [TRANSLATION] "mandatory electives" to which Mr. Gravel referred.

[597] In his expert report, Mr. Kindt recognizes that ÉASC has no equipment for the teaching of technical courses such as carpentry, welding or mechanics and that the facilities for home economics instruction were

inadequate. Despite this, he states that the school offers [TRANSLATION] "a good selection of Career and Technology Studies courses".

[598] The evidence shows that the school has developed a good information technology program. This is the only type of technical course that ÉASC could hope to offer its students without relying on off-site facilities. According to Mr. Kindt, the development of [TRANSLATION] "specialized niches" is the best approach for small schools, since they have less space and are unable to offer as varied a program as the larger schools. In his planning and development work with small schools, he encourages this specialization approach.

[599] To the extent that ÉASC offers a variety of information technology courses, Mr. Kindt may be right when he says that the school offers [TRANSLATION] "a good selection of courses". However, it must be understood that this "selection" is limited to a single field, one that does not necessarily correspond to the aspirations and interests of all of the students. A student who has no interest in or aptitude for information technology but who leans more toward mechanics, for example, is confronted with a difficult choice. This is not merely a theoretical problem; it is precisely the dilemma described by Ms. Moore, Ms. Montreuil, and Ms. Simmons.

[600] With respect to courses, Mr. Kubica's stance differs from that of Mr. Kindt in his report. He identifies the absence of specialty programs and a range of electives as being a problem:

> . . . No specialty programs are available to students at École Allain St-Cyr. This identifies that a major difference between programming at the Anglophone schools in Yellowknife and École Allain St-Cyr is choice. Anglophone students can choose among the above program offerings or a regular diversity of courses as compared to the Francophone students who are all enrolled in the same series of courses by grade.

[601] Mr. Kubica recognizes, along with several other witnesses, that a school's capacity to offer a diversified selection of courses depends to some extent on the size of its student body.

[602] No matter how we describe or characterize the phenomenon, it is clear that in terms of both space and programming, there are major differences between what is available in the schools of the Anglophone majority and what is available at ÉASC. Nobody is denying that reality. However, the parties hold diametrically opposed positions as to whether this situation

violates the rights protected by section 23. In my view, neither of the approaches put forward by the parties is in line with the section 23 case law.

3. Parties' proposed approaches for assessing the differences between the majority and minority infrastructure

[603] It is difficult to imagine how the parties' positions could be any more polarized. The Plaintiffs submit that section 23 imposes on the Defendants a duty to build an extension to ÉASC that would create a separate secondary wing and offer all of the special-use areas and equipment that exist in Yellowknife's English schools, particularly the two large high schools, irrespective of the differences in numbers and irrespective of the costs that would be incurred by such a project.

[604] The Plaintiffs submit that the Court should order the Defendants to provide them with the following spaces: 13 regular classrooms (one for each grade); a dedicated science laboratory for the secondary level; an art room; a music room; a theatre arts room; a computer and technology laboratory; a space for francization; a space for English second language instruction; a French resource centre; spaces for Career and Technical Studies; a home economics room attached to the gymnasium; a gymnasium of 500 square metres or more, with locker rooms, showers and bleachers; a cafeteria; spaces for students with special needs; a space for the student council; spaces for teachers and specialized staff; storage space; and an outdoor play area for the primary and secondary levels.

[605] The Defendants, on the other hand, submit that the existing building is fully adequate to meet the school's needs, and that any deficiencies can be overcome through the use of spaces in other schools or elsewhere in the community.

[606] In my view, neither one of these approaches respects the parameters of section 23. The Defendants' approach ignores the true meaning of substantive equality. The Plaintiffs' approach to a large extent ignores the sliding scale principle.

a. The Defendants' approach

[607] The Defendants' approach is to allocate infrastructure to minority language schools in exactly the same manner as infrastructure is allocated to majority language students.

[608] This approach is evident in the way the Department of Education attributes school spaces. It is also evident, more generally, in the budget allocation process for capital projects.

[609] In attributing school spaces, the Department of Education applies standards. These standards determine the floor area of the spaces to which the school is entitled for classrooms and special-use areas.

[610] The standards were revised in 2005, and, in some respects, the space allowance approach has changed. Before, the standards were mostly based on a threshold number, that is, the number of students determining the school's entitlement to certain spaces, such as a gymnasium and other specialized facilities.

[611] The new standards are based on numbers, but the approach differs in some respects. For recreational spaces such as a gymnasium, the threshold approach still applies. Now, schools designed to house between 150 and 300 students are entitled to a gymnasium of 500 square metres; those designed to house between 300 and 600 students are entitled to a gymnasium of 850 square metres; those designed to house between 50 and 150 students are entitled to a recreational area of 70 square metres (which is not a gymnasium).

[612] For other types of special-use areas (laboratories and rooms for music, art and industrial arts), the standards no longer set a threshold number related to a fixed number of students. Instead they allocate a certain number of square metres per student for this type of space to determine the total area to be allocated to the school for special-use areas. The standards allow for 0.5 square metres of space per student, plus one extra square meter per student for Grades 7 to 12.

[613] This approach means that a school with a large student body will be entitled to a gymnasium and will be granted sufficient square metres in special-use areas to have several special-use rooms, each with its own purpose. A small school, with less total space, is much more limited. Mr. Devitt acknowledged this and explained that for smaller schools, the creation of multi-purpose rooms is encouraged for this reason.

[614] In my opinion, these standards systemically disadvantage minority language schools for two reasons. First, by definition, minority language schools are smaller than majority language schools. They are therefore likely

not to have the numbers required to benefit from flexibility in setting up special-use areas. The creation of multi-purpose rooms is a partial solution, but there are limits to the ways in which the uses of a single room can be combined. Moreover, a school that houses students from kindergarten to Grade 12 is consequently often forced to use have the same multi-purpose spaces used by both primary and secondary students. This can be difficult to manage, since the space requirements are very different for each group. Furthermore, having a single classroom serve multiple purposes can cause serious logistical problems in managing the timetable of a school that, regardless of how few students it has, still has them spread out across 13 grades.

[615] The second reason that this type of standard risks having a more negative impact on minority language schools, and this is true for ÉASC, is that minority language schools tend to lose some of their students when they reach high school. The evidence has established that ÉASC has historically had trouble retaining its secondary students. Dr. Landry explained that it is a very common occurrence at French minority schools. Regardless of what causes this migratory phenomenon, its result, and this is the case with ÉASC, is that a large proportion of the student population is concentrated at the primary school level.

[616] According to the standards, the floor area allocated per student for special-use areas is three times smaller for a primary student than for a secondary student. If the enrolment projections used to determine what capacity the school should have and the application of the standards reflect this fact (for example, by using the cohort survival calculation method used by the government), the projections for secondary enrolment will likely be relatively low for a minority language school. This will have a significant impact on the amount of space attributed and on the specialized infrastructure available to the school.

[617] The fundamental importance of special-use areas at the secondary level is a subject addressed by Mr. Kubica in his report. I accept his opinion in that respect. This is confirmed by the standards themselves: if the Department allocates three times more special-use space per secondary student than per primary student, it is because it recognizes that the requirements for special-use areas are much greater at the secondary level.

[618] The application of the departmental standards therefore puts ÉASC at a considerable disadvantage, partly because of factors that are an integral

part of the reality of a minority language environment. I am of the view that section 23 obliges the Defendants to make adjustments to ensure substantive equality between minority language students and those in the majority.

[619] The developers of the standards recognize that in some cases, adjustments may be necessary: the Minister may decide to allocate larger spaces than what is provided for in the standards. However, Mr. Devitt stated that, to his knowledge, such permission has never been granted by the Minister.

[620] According to Mr. Devitt's testimony, when the standards were reviewed in 2005, the reviewers did not consider the special nature of minority language schools or the government's constitutional obligations in that respect. Mr. Devitt's answers under cross-examination reveal that he feels that minority language schools should be subject to the same standards as those that apply to majority language schools.

[621] This approach of applying the standards uniformly is an error, not only because it does not take into account the negative impacts described above, but especially because it assumes that the most appropriate ways to address deficiencies in majority language schools are equally appropriate for minority language schools. In my view, this is not the case. Having to rely on off-site spaces when a school lacks the necessary facilities for certain courses has a much more negative impact on a minority language school than on a majority language school.

[622] At first glance, one can understand the logic of wanting to maximize use of existing infrastructure instead of building new infrastructure for small numbers of students. There are certain drawbacks (loss of time, logistical challenges and other disadvantages) that affect the majority and minority schools in the same way.

[623] However, the use of off-site spaces has another impact that is specific to minority language schools: the erosion of the linguistic homogeneity of the school environment. In a minority language school, this linguistic homogeneity is very important. I accept Dr. Landry's opinion about the importance of the school as an institution in a minority community and the importance for a minority language school to have its own distinct spaces. In fact, this was recognized by the Supreme Court of Canada:

> As a space must have defined limits that make it susceptible to control by the minority language education group, an entitlement to facilities that are

> in a distinct physical setting would seem to follow. As [the Court of Appeal] held . . . :
>
> > To be "of the minority" ("de la minorité"), the facilities should be, as far as is reasonably possible, distinct from those in which English-language education is offered. I do not question the importance of milieu in education. In the playground and in extra-curricular activities, as well as in the classroom, French-speaking pupils should be immersed in French. The facility should be administered and operated in that language, right down to the posters on the wall.
>
> Such a finding would also be consistent with the recognition that minority schools play a valuable role as cultural centres as well as educational institutions.
>
> *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, paragraphs 24–25.

[624] Another difference in terms of impact is that in the NWT, in most cases, the schools with a population comparable to that of ÉASC are in small communities where parents and students do not have a choice of schools. Therefore, even if the school has to share space or do without certain infrastructure, is it unlikely for this to become a factor that contributes to the migration of students to another school in the community, because there is no other school. The situation is different in Yellowknife, where students and parents do have a choice.

[625] There was much discussion of student retention at the hearing, particularly at the secondary level. The Plaintiffs state that the difference between what is available at ÉASC and what is available elsewhere is *the* principal cause of student departures. I understand, having heard the evidence adduced in the course of the voir dire, that several witnesses are persuaded that this is the case.

[626] In my opinion, however, on the basis of the evidence that I ruled admissible, this fact has not been established. That is not what Dr. Landry stated in his testimony; his opinion was much more nuanced. Dr. Landry stated that, in the minority community context, choice of school and student retention were complex phenomena that were influenced by a range of factors. He thought that the availability of programs and infrastructure was a factor, but he recognized that there were several others. He also recognized

that, to his knowledge, there were no studies that have examined the link between student retention and infrastructure.

[627] However, I accept Dr. Landry's opinion that infrastructure quality is among the factors that can influence the choice of school in a minority context. There is, moreover, some circumstantial evidence that supports this opinion. First, enrolments at ÉASC increased when the school moved from the portable classrooms to the new building. The improvements to the infrastructure seemed to have a positive effect of enrolment. Second, there was a relative stabilization of the high school population after the Phase 1 expansion work. This evidence tends to show that infrastructure is a factor influencing recruitment and retention.

[628] I therefore conclude that infrastructure and programming are among the factors that can influence student recruitment and migration. As I have explained, for many small schools in the NWT, migration of students to another school in the community is simply not a factor. This is another reason that the application of the Department's standards for allocating school spaces and infrastructure has a more negative impact on ÉASC than on the small majority language schools.

[629] The Defendants' approach, which is to treat minority language schools in the same way as majority language schools, is also evidenced by on the budget allocation process for the government's capital projects, in the development of the Capital Plan. The primary and secondary filters used to prioritize the various projects fail to give any consideration to the government's constitutional obligations under section 23.

[630] Mr. Nagel, who is familiar with the filters and the process in general, explained that it is up to the department concerned to promote such considerations when presenting its project to the committee that establishes priorities. But the fact remains that the main tool for prioritizing investment ignores the specific conditions that arise from the government's obligation to enforce section 23 rights. This government mechanism (which is very important, since it serves as the basis for drawing up budgets) therefore also deals with projects regarding minority language schools in exactly the same way as those regarding majority language schools.

[631] I recognize that the Defendants have established that, in some respects, ÉASC has an advantage compared with other schools, in terms of the student-teacher ratio for example. They also emphasize that the current

building is larger than what the school would be entitled to under Department standards. But these advantageous conditions are not the result of the Defendants' decision to treat this minority language school in a different or preferential manner; they are the result of contributions of the federal government, which has various programs to support the country's linguistic minorities.

[632] Some would say there that there is nothing unfair about allocating space and money for a minority French language school in the same manner as for a majority English language school. Some would even say that doing otherwise would be unfair. In many ways, it is this issue that lies at the root of the present dispute.

[633] The arguments of both parties can be understood, but from a legal perspective, the answer to the debate is simply that the issue has been dealt with by the Supreme Court of Canada. The Supreme Court has already decided that applying standards used to determine the needs of the majority is not sufficient to achieve the purposes of section 23. Thus, by applying the same parameters to the minority language school as to any other school, the Defendants are in my view doing exactly what the Supreme Court of Canada has said not to do:

> As discussed above, the object of s. 23 is remedial. It is not meant to reinforce the status quo by adopting a formal vision of equality that would focus on treating the majority and minority official language groups alike; see *Mahe*, *supra*, at p. 378. The use of objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, does not take into account the special requirements of the s. 23 rights holders.
>
> *Arsenault-Cameron*, *supra*, paragraph 31.

[634] I find that, when it comes to deciding on the space and infrastructure that will be allocated to a minority school, the Defendants cannot content themselves with applying the general standards but must instead address the issue by taking the special needs of the minority population into account and making the necessary adjustments to fulfil their obligations under section 23.

b. The Plaintiffs' approach to substantive equality

[635] The Plaintiffs, in turn, have an approach that I do not believe takes into account the fact that the rights protected by section 23 are not absolute. By submitting that ÉASC should have all the facilities that schools with a

much larger student population have, their analysis disregards the sliding scale principle, as defined by the Supreme Court of Canada:

> The idea of a sliding scale is simply that s. 23 guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved.
>
> *Mahe*, *supra*, paragraph 39.

[636] I note that the Supreme Court has long established that the numbers warrant approach requires consideration of what services are appropriate, in pedagogical terms, given the number of students in the target group, and the cost of the services contemplated. Regarding cost, the Supreme Court clarified as follows:

> Cost, the second factor, is not usually explicitly taken into account in determining whether or not an individual is to be accorded a right under the Charter. Section 23 does not, like some other provisions, create an absolute right. Rather, it grants a right which must be subject to financial constraints, for it is financially impractical to accord to every group of minority language students, no matter how small, the same services which a large group of s. 23 students are accorded.
>
> *Mahe*, *supra*, paragraph 80.

[637] The Plaintiffs state that the Defendants have, by their actions, conceded that the number of right holders in Yellowknife entitles them to the maximum level of service possible based on the sliding scale principle. I have already explained, at paragraphs 555 to 577, why I reject this all-or-nothing type of argument with respect to the school board's management rights. I also reject it with respect to substantive equality at the infrastructure level.

[638] The level of services to which Yellowknife's French linguistic minority population is entitled must therefore be established by considering the pedagogical needs, given the number of students and the cost of the services contemplated. The all-or-nothing approach is inconsistent with the flexible, highly fact-driven analysis required by case law.

4. Analysis of the current infrastructure using the sliding scale approach

a. The numbers

[639] The Supreme Court stated the following in its discussion of the numbers warrant analysis:

> In my view, the relevant figure for s. 23 purposes is the number of persons who will eventually take advantage of the contemplated programme or facility. It will normally be impossible to know this figure exactly, yet it can be roughly estimated by considering the parameters within which it must fall—the known demand for the service and the total number of persons who potentially could take advantage of the service.
>
> *Mahe*, *supra*, paragraph 78.

[640] In *Arsenault-Cameron*, the Supreme Court provided further clarification:

> As Dickson C.J. pointed out in *Mahe*, supra, the "sliding scale" approach to s. 23 means that the numbers standard will have to be worked out by examining the particular facts of each case that comes before the courts. The relevant number is the number who will potentially take advantage of the service, which can be roughly estimated as being somewhere between the known demand and the total number of persons who could potentially take advantage of the service.
>
> *Arsenault-Cameron*, *supra*, paragraph 32.

[641] These comments were made in a context where the issue was, in *Mahe*, whether the government had the obligation to create an autonomous school board and, in *Arsenault-Cameron*, whether the government had an obligation to build a primary school in a particular area of Prince Edward Island. But the sliding scale principle also applies when it is a matter of determining, as is the case here, whether a government has the obligation to expand existing infrastructure.

[642] The Plaintiffs state that the most reliable evidence on which to determine the number of right holders in Yellowknife is that drawn from Statistics Canada's 2006 Census. According to those results, at the time of the census, there were a total of 295 children in Yellowknife having at least one parent whose first language was French, and 245 of those children were school aged.

[643] The Defendants state that those are the numbers that should be used to determine the target enrolment of the French first language program and the adequacy of the existing space based on the sliding scale principle. They submit that the current school is adequate because the number of students that it can accommodate (the current school has a capacity of 160 students) lies somewhere between the number of students currently attending (110 students at the time of the hearing) and the target population (245 school-aged children according to the census results).

[644] The Plaintiffs challenge the reliability of the census data and submit that the school's target population should not be determined solely on that basis.

[645] Dr. Landry is of the view that the target population is greater than the census numbers seem to indicate, for several reasons.

[646] First, the question as posed in the census does not provide a means to identify persons belonging to all three categories of section 23 right holders: only persons belonging to the first category (whose first language learned and still understood is French) are identified by this means. The children covered by section 23 under the other two categories (a child having one parent who has received his or her primary school instruction in French or whose brother or sister has received or is receiving primary or secondary school instruction in French) are not included in the results.

[647] Dr. Landry expressed the opinion, in a recent study on the children of Francophone right holders in Canada, that the addition of these two criteria could represent an increase of approximately 20 percent over the figures from the census. In this case, this would increase the number for the city of Yellowknife to a total of 354 children, of which 294 would be school aged.

[648] In addition, Dr. Denis spoke of sociological factors that can lead to the under-identification of right holders (in other words, even certain persons who belong to the first category of section 23 do not necessarily identify French as being their first language when answering that question).

[649] Dr. Landry also noted that the census provides no means to identify a child of an exogamous couple who, following their separation, lives with his or her Anglophone parent. He states that this can be significant in a community such as Yellowknife where there is a high rate of exogamy.

[650] Dr. Landry and Dr. Denis suggest other factors that they believe contribute to skewing the results, such as the lack of stratification of samples according to language, and random rounding.

[651] Beyond these considerations, Dr. Landry is also of the view that the target population of a minority language school should include persons who are not included in the three categories listed in section 23. He notes that elsewhere in Canada, such groups (for example, persons with Francophone ancestors and Francophone immigrants who do not yet have Canadian citizenship) have access to French first language instruction.

[652] This was also the case in the NWT until July 2008. The CSFTN-O's admission policy had always allowed for the admission of certain persons not strictly falling under section 23. This enrolment policy became inoperative following a ministerial directive adopted in July 2008, limiting access to the program to those persons covered by section 23, subject to ministerial approval in the case of exceptions.

[653] In my reasons for judgment in docket CV2008000133, I concluded that it is up to the CSFTN-O to make decisions regarding enrolment in its program. Therefore, under the CSFTN-O's current enrolment policy, the target population indeed goes beyond the strict limits of section 23.

[654] But even if we only take into account persons falling under the three categories of section 23, and for the other reasons raised by Dr. Landry, the census results do not, in my view, paint a reliable portrait of the target population of the French first language instruction program.

[655] For the same reason, Ms. Perris's projections, which are based on the census data, are not a completely reliable measure of the target student population for the coming years. Furthermore, they fail to take into account potential improvements to student recruitment and retention. I therefore attribute very little evidentiary weight to these projections.

[656] The projections of the Department of Education are based on the cohort survival method. They take into account current levels of retention and recruitment. They take into account neither the possibility of increased recruitment nor the possibility of higher retention, for example, at the secondary level. They ignore the potential effects of a revitalization of the minority community.

[657] The evidence presented by the Plaintiffs does not establish with surgical precision the number of children eligible under section 23 who live in Yellowknife. Like any plaintiff in a legal proceeding, they have the burden of proving that they are entitled to the remedies they are seeking, which, in the case of an application based on section 23, includes establishing that the numbers warrant such remedies.

[658] However, there is a degree of precision that it is unreasonable to require of those invoking their section 23 rights:

> The province has the duty to actively promote educational services in the minority language and to assist in determining potential demand. This duty is . . . recognized in *Reference re Public Schools Act (Man.)*, [citation omitted]. The province cannot avoid its constitutional duty by citing insufficient proof of numbers, especially if it is not prepared to conduct its own studies or to obtain and present other evidence of known and potential demand.
>
> *Arsenault-Cameron*, *supra*, paragraph 34.

[659] Mr. Devitt recognized that the Defendants have never done any studies to attempt to determine the number of right holders in the city of Yellowknife. Mr. Devitt was also unaware of any such study that might be currently underway. The Plaintiffs are content to rely on the data from the 2006 Census.

[660] There is nothing wrong with relying on the census results for certain purposes. Dr. Landry and Dr. Denis acknowledged that despite their reservations regarding the reliability of the numbers, they used them in their own research and studies.

[661] However, in light of the context, using them to determine the target enrolment of the French first language program is something else entirely. The Defendants have been aware since at least 2003 of the CSFTN-O's position regarding the target enrolment of its two schools and the numbers upon which this position is based. The subject is addressed in detail in the *Vision 20-20* report and in *L'égalité des chances, l'égalité des résultats*.

[662] If the Defendants had a problem with the numbers put forward by the CSFTN-O, they should have let them know, which they did not do. The letter sent to the CSFTN-O chair by the Minister in February 2004 (Exhibit 183), in response to the document *L'égalité des chances, l'égalité des résultats*, expresses disagreement with certain aspects of the document,

including the conclusions in the legal opinion prepared on behalf of the APADY. The Minister expresses in particular disagreement with the way in which the sliding scale is applied. But there is no indication in that letter or in any other written communication from the Defendants to the CSFTN-O that challenges its position on the target enrolment for the French first language instruction program in Yellowknife.

[663] Furthermore, if the Defendants disagreed with the numbers, the onus was on them to take measures to clarify the number of right holders in Yellowknife. The CSFTN-O did not simply propose a number without explaining how it was derived. Its documents explain to the government its position with respect to the numbers, and the basis for that position. If the Defendants saw things differently, it was incumbent upon them to carry out their own studies.

[664] It is true that the Department asked the CSFTN-O to participate in an initiative to collect certain information about the students at the time of enrolment. The Department proposed that a questionnaire be filled out during the enrolment process to determine whether one of the parents was covered by one of the three section 23 categories.

[665] In his response to the Department on August 10, 2010 (Exhibit 203), the superintendent of the CSFTN-O, Mr. Brûlot, asked that the range of questions be expanded so that certain groups of parents (Francophone immigrants, persons with Francophone ancestors, etc.) could also be identified. It appears that Mr. Brûlot received no response. In any case, there is no evidence that he received one, and in her testimony, Ms. Grinsted was unable to shed further light on the subject. The idea of gathering information seems to have simply been abandoned by the Department.

[666] The CSFTN-O's position must be placed in its proper context. First, the Department's request seems to have been made in response to a letter from Mr. Brûlot dated January 29, 2010 (Exhibit 150). In that letter, Mr. Brûlot explained that counsel for the Defendants had asked the CSFTN-O to provide a list of potential right holder students in Hay River. Mr. Brûlot wrote the following:

> [TRANSLATION]
>
> The purpose of this letter is to ask the Government of the Northwest Territories to help us with the identification process, as you have resources that are not available to us. We ask that you communicate with all of the

> school boards in the Territories and request that they add questions to their enrolment forms. These questions will help us to identify the target student population.

[667] At the time that this request for participation in the process was made, the dispute was well under way between the CSFTN-O and the Department of Education regarding the school board's admission policy and the ministerial directive overriding it. The CSFTN-O's opinion differed markedly from that of the government as to what legitimately constituted its target population. The CSFTN-O asked that a wider range of questions be asked so that it could identify those persons that it believed made up part of its target population.

[668] The difference in opinion between the CSFTN-O and the government did not represent an obstacle to the collection of such information. This could have been done without prejudice to the positions that the parties intended to take in the context of the legal proceedings. In other words, the Department could have expanded the range of questions while maintaining its position as to the relevance of the information.

[669] Nor was anything preventing the Defendants from gathering information on right holders from the other school boards. This would have been the most relevant information for determining what proportion of 23 students who were not attending minority language schools in the NWT even though they have the right to do so pursuant to section 23.

[670] The Defendants have been aware of the CSFTN-O's position on target enrolment since at least 2003. The CSFTN-O's refusal to participate in the data-gathering process a few months before the start of the hearings does not change my conclusion that the Defendants had an obligation to conduct their own studies if they took issue with the target population numbers put forth by the Plaintiffs.

[671] In my opinion, Statistics Canada's data provide a good starting point for evaluating the number of right holders in Yellowknife, but I find, contrary to the Defendants' claims, that its reliability is limited and that they should be revised upwards.

[672] Dr. Landry, whose opinion I accept (no contradictory evidence has been adduced on this subject) is of the view that, at the very least, an increase of 20 percent is required over the figures from the census data to take into account the two section 23 categories not covered by the census.

Applying this formula, the number of school-aged children with at least one right holder parent increases from 245 to 294.

[673] This ignores the other factors mentioned that could affect the reliability of the results, as well as any potential students who are not specifically covered by section 23 but could have access to the program under the CSFTN-O's admission policy. It therefore seems reasonable to revise this number slightly upwards. The number proposed by Dr. Landry is 400, but I consider this a bit too optimistic.

[674] I find, in light of all the evidence, that a reasonable target enrolment for ÉASC's French first language instruction program in Yellowknife is approximately 350 students.

b. Analysis of existing infrastructure

[675] I agree with the Defendants on the following point: in deciding on the nature and scope of the infrastructure necessary to comply with section 23, we must consider the numbers. But for the reasons explained above, one must not simply apply the pre-set standards that apply to majority schools. Mechanically applying these standards systematically disadvantages minority schools; it is not compatible with the concept of substantive equality and the purpose of section 23.

[676] The question is not whether ÉASC complies with the Department's standards, but whether, in the circumstances, it ensures substantive equality for students from the minority population.

[677] The answer to this question must come from a nuanced analysis that takes into account the infrastructure available to the majority population, using the comparator that I have identified (schools with which ÉASC competes in Yellowknife), but also taking into account the differences in numbers, the educational needs of the minority population, the importance of its having a separate educational space and costs.

i) Does ÉASC currently meet the requirements of section 23?

[678] According to the Department, ÉASC has a capacity of 160 students, and 110 were enrolled at the time of the hearing. This does not mean that the space is compliant with section 23, as potential needs must also be taken into account. But it is useful, as a starting point, to review the situation of the

existing school with respect to its spaces, as the adequacy of these spaces to meet even the present needs is in dispute.

[679] A considerable amount of evidence was adduced during the hearing about the lack of space at ÉASC. Members of the school's staff talked about it, as did certain parents. Mr. Kubica concluded that there was indeed a lack of space and that the administration had very little flexibility. This is corroborated by Ms. Careen's testimony. Mr. Kubica also concluded that there were serious deficiencies with respect to the special-use areas, particularly at the secondary level.

[680] Mr. Kindt has a different opinion. In the first part of his report, he discusses the existing spaces. He concludes that they are adequate, from a pedagogical point of view, to meet students' current needs and for the next four or five years. He does believe that the space needs to be reorganized to some extent to improve the way it is used.

[681] Mr. Kindt's opinion clashes with the testimony of several other witnesses who are at the school on a daily basis. Obviously, it should be noted that the other witnesses are not objective or neutral observers. However, Mr. Kubica shares their opinion. There is no evidence that he has anything to gain from one outcome or another in this dispute. He does not even live in the NWT.

[682] In discussing the present situation at the school, Mr. Kindt used the term "perceived space crunch". He seemed to say that this "perception" is the result of having moved the kindergarten, which was done to make more room for the daycare. He raised the possibility of recovering this space, and potentially even the entire space occupied by the daycare, for use by the school. This would increase the school's capacity from 144 to 180 students, an increase of 18 students for each room so recovered (Exhibit 157, pages 13–14 and 39–40).

[683] This approach to the issue ignores a very important factor: the building housing ÉASC is intended for both educational and community use, and the federal government has made a substantial financial contribution to it. As noted by Canadian Heritage in a letter sent to the Defendants in March 2009 during negotiations regarding the funding of Phase 2, the federal government has, to date, contributed a total of $4.7 million to ÉASC (Exhibit 198).

[684] The Defendants do not contest the fact that the federal government is not responsible for financing the construction of school facilities. Its contributions are for community-use spaces.

[685] In my view, recovering the space that has been dedicated to the daycare since the school was opened would contradict the community purpose that ÉASC has always had. The Defendants seem to recognize this at least in part, with respect to the space that has been dedicated to the daycare since the beginning: Mr. Devitt said that the Defendants did not count this space in their calculation of the school's capacity.

[686] As for the additional space allocated to the daycare after Phase 1, it is true that it was originally an educational space: it was used by the kindergarten class. But given the federal government's significant contribution to Phase 1 (more than a third of the costs), it is logical that part of the new space be dedicated to community use. Therefore, the CSFTN-O's decision to dedicate more space to the daycare following the expansion was totally legitimate.

[687] The fact that Mr. Kindt did not take this into account and seems to consider it an option to move the daycare to address what he calls the perceived space crunch reduces the evidentiary weight that I attribute to his opinion on this issue. In my view, his opinion does not give sufficient weight to the important community purpose served by the building that houses the school.

[688] More generally, with respect to the lack of space, while I recognize that several of the Plaintiffs' witnesses are not disinterested persons in this dispute, I nevertheless consider their testimonies to have significant probative value because they are in the school on a daily basis. Their observations are based on many years of experience within the school. There are certain realities that cannot be adequately or fully captured in plans, figures and square metres.

[689] Any concerns I may have that these witnesses have exaggerated, or that their perception of the situation is less reliable because of their commitment to promoting the school and their desire to move this action forward are dissipated by the fact that Mr. Kubica, a disinterested witness, corroborates their testimony. He is clearly of the view that the school's space problems are real and not merely perceived.

[690] According to the witnesses who work at the school, the completion of Phase 1 improved the situation but did not solve all of the space problems. The rotunda, which should be a community space, is still being used in part as a classroom. Mr. Kindt recognizes that this space should be freed up to serve its original purpose.

[691] In his report, Mr. Kindt suggests certain changes and reorganizations that could render the use of the space more efficient and free up the rotunda. Ms. Careen explained how she reached her decisions regarding the use of space in the school. She did not deny, upon cross-examination, that there were certain things that could, theoretically, have been done differently, in the combining of grades and in various other respects. Nor did she deny that she could ask to use more space at William McDonald Middle School. She explained that she did not want to compromise the homogeneity of the program.

[692] She states that she made, in consultation with her teaching staff, the best decisions from a pedagogical standpoint. I accept her testimony on these issues.

[693] Mr. Kindt has teaching experience and has extensive experience in infrastructure planning, but, unlike Ms. Careen, Mr. Gravel, and Mr. Deschênes, the bulk of his experience does not come from teaching in a school. What is more, Mr. Kindt has no experience teaching in a minority language environment.

[694] The use of space in a school is certainly a subject on which different people may reasonably have divergent opinions. Such is the case here. Having reviewed the evidence, I prefer the evidence provided by those who work at the school to that of Mr. Kindt, given that they are intimately familiar with its day-to-day operations and believe that the problem is not the way the space is used, but rather that it is inadequate. I accept those people's evidence, especially given that Mr. Kubica is of the same opinion.

[695] I therefore find that ÉASC currently has insufficient space. I also find that the school's capacity must be increased to take into account the target enrolment of 350 students that I identified above at paragraph 674. The school's capacity should fall between this number and the known demand, namely, the number of students enrolled at ÉASC at the time of the hearing. I find that ÉASC's capacity should be increased to accommodate 250 students.

[696] With respect to the special-use areas, the facts are clear: ÉASC has no gymnasium, no dedicated science laboratory, no music room, no theatre arts room and no equipment for industrial arts instruction. There is a small kitchen, but Mr. Kindt considers it inadequate, and this is corroborated by the testimony of Ms. Simmons. It is therefore uncontested that in several respects, ÉASC does not benefit from the special-use areas that are available in the majority schools.

[697] To compensate for these deficiencies, the Defendants continue to promote the solution of using off-site spaces. They submit that this solution complies with the requirements of section 23 because the numbers at ÉASC do not warrant the construction of new infrastructure.

[698] The Plaintiffs state that the deficiencies are such that the students at ÉASC do not enjoy substantive equality with majority-language students. They submit that equality cannot be achieved if the school is forced to use the spaces of other schools or of the community.

[699] I agree with the Plaintiffs. From an administrative standpoint, the school should not have to negotiate, year after year, the use of all of its special-use areas with other schools. This type of arrangement may work temporarily, but it should not be the long-term strategy, as it exposes the school to all kinds of unknown variables.

[700] However, I do not believe that the sliding scale principle demands that the Plaintiffs be awarded all of the spaces they are claiming. Each of the claims must be considered, and I agree that particular attention must be paid to the secondary level in this analysis. The numbers must also be kept in mind.

ii) What spaces are necessary to make ÉASC compliant with the requirements of section 23?

(a) a classroom for each grade

[701] The Plaintiffs submit that ÉASC should have a classroom for each grade, therefore a total of 13 classrooms. In particular, they emphasize the need to have one classroom per grade at the secondary level. They claim that combined-grade classes at the secondary level prohibit adequate instruction.

[702] The evidence shows that multi-grade classes are the norm in small schools. The APADY lists the advantages of multi-grade classes in a

promotional document that it has prepared for parents. Even the Plaintiffs' witnesses acknowledge that multi-grade classes are commonplace and are acceptable at the primary level. In my view, the evidence does not establish that it is necessary for a school to have one classroom per grade, without regard to numbers, at the primary level. The majority schools have single-grade classrooms because of their numbers. The numbers at ÉASC do not warrant that.

[703] The evaluation is more difficult for the secondary level. Some witnesses, such as Mr. Gravel, are of the view that multi-grade classes are unacceptable for secondary students, particularly for grades 10, 11 and 12, when the subject matters become more complex. It was when Ms. Moore learned that her son, a 12th grader, would be in a multi-grade class for his mathematics course that she sought to make special arrangements with Sir John Franklin High School.

[704] I recognize that sometimes multi-grades can be advantageous, even at the secondary level. Ms. James explained that at Kalemi Dene School, for example, the use of multi-grade classes meant that students could work and learn at their own pace, without too much emphasis on a particular level. In the context of that school, Ms. James sees this as an approach that benefits students.

[705] That said, there is a major difference between the contexts of the two schools. I find that for ÉASC, ideally, it would be preferable not to combine grades, particularly in the senior secondary levels. However, the need to combine the classes is not only a result of the available space. It is sometimes simply the result of a limited number of students.

[706] According to Exhibit 71, in September 2010, ÉASC had 9 students in Grade 7, 8 students in Grade 8, 4 students in grades 9, 10 and 11, and 1 student in Grade 12, for a total of 30 students. There were a total of 9 students in Grades 10 through 12. Would it be reasonable to compel the government to provide three classrooms and three teachers for 9 students? I do not think so. Even if we assume that student retention at the secondary level will improve, I do not think it justifiable to order that ÉASC be given a separate classroom for each of the six secondary grades.

[707] I am also taking into account the fact that, according to the evidence, the academic performance of the students at ÉASC is excellent, and above the territorial average. It is possible that the better student-teacher ratio and

the very personalized attention that the high school students receive have something to do with it. To go by the students' performance, it seems clear that the challenges created by having multiple-grade classes at the secondary level are counterbalanced by other factors.

[708] That said, the school should have additional classrooms. I note that the number to consider when examining the level of services required by section 23 falls between the known demand and the total target population, recognizing that it will never be possible to recruit 100% of that population. In this case, taking the target population into account means that the school's capacity must be increased, and therefore that classrooms must be added.

[709] I concluded in paragraph 695 that ÉASC should have a capacity of 250 students. With additional classrooms, the school administration would have more options for the use of its space and could make the combinations that it considered the most appropriate. However, I will not make an order specifically granting one classroom for each of the school's 13 grades.

(b) a gymnasium

[710] In my view, the evidence establishes that the lack of a gymnasium at ÉASC has a significant impact on the physical education program and extracurricular activities available to the students.

[711] Space sharing, while logical in theory, particularly when facilities are available nearby, has not worked in practice. Discussions to negotiate gym times have not led to satisfying results. As far back as 2003, in its report entitled *L'égalité des chances, l'égalité des résultats*, the CSFTN-O expressed its dissatisfaction with this situation and the difficulties inherent in relying on the neighbouring school's gymnasium. It wrote that the so-called "sharing" of the gym in fact meant that ÉASC was offered the blocks of time that William McDonald Middle School did not want ([TRANSLATION] "the leftovers").

[712] The first written space-sharing protocol (Exhibit 31) was signed in July 2005, after this action was initiated and a few days before the Court rendered a decision on the motion for an interlocutory injunction. A second agreement (Exhibit 165) was signed in August 2005, after the injunction was granted. I have no reason to doubt that the persons who signed the agreement did so in good faith and accepted the idea that the space should be shared equitably. Nor do I doubt Mr. Huculak's sincerity when he states that

he is prepared to collaborate with the CSFTN-O to ensure that ÉASC be given fair access to the gymnasium and other spaces at William McDonald Middle School.

[713] However, these good intentions have not translated into an acceptable arrangement on the ground. The written agreements recognize the need for equitable sharing, but they have not produced the desired results. The Defendants surely recognized that the gym-sharing arrangement was not working, as they agreed, even before this action was initiated, to cover the rental fees for the Multiplex so that ÉASC could hold its physical education courses there.

[714] The use of the Multiplex, which continues to this day, has not been unproblematic. Mr. Deschênes spoke of the difficulties faced in the first year (a [TRANSLATION] "horrible" year, as he described it in his testimony) and related a host of other problems that have plagued him in the interim. Some of these problems have been logistical (loss of time due to transportation, the poor state of some of the equipment, and cancellations without warning).

[715] Others are related to environmental aspects potentially detrimental to teaching (noise from the mezzanine adjoining the gymnasium, to which members of the armed forces have access; the inability to post signage, in the organization of station-based activities, for example). I will not repeat all of Mr. Deschênes's testimony here. I find that he did everything that was reasonably possible to deliver the best instruction possible in the Multiplex environment (and even before the Multiplex was used). However, on the basis of his testimony, it is clear that the school's lack of a gymnasium of its own has rendered his task much more difficult.

[716] The lack of a gymnasium has also had a detrimental effect on extracurricular sports activities. Mr. Deschênes has had great difficulty obtaining adequate blocks of time to hold practices in the William McDonald Middle School gymnasium. Parents who testified confirmed that practice times for the extracurricular sports teams were often very early in the morning. A few weeks before proceedings began, following a complaint from Ms. Careen and the intervention of the two school boards, better time blocks were granted to ÉASC for extracurricular activities. Everyone recognized that this represented a major improvement, but it came about in the fall of 2011, 11 years after the school first opened. It should be noted that when Ms. Simmons took over the administration of William McDonald

Middle School, nobody informed her of the existence of a space-sharing protocol between her school and ÉASC.

[717] Efforts have been made from time to time to rectify the specific problems faced by ÉASC, but this always seems to have been done in response to a complaint, a crisis or in the context of imminent judicial proceedings.

[718] The Defendants submit that the cost of building a gymnasium is unwarranted given the proximity of existing facilities that ÉASC can use. The problem with this position is that it has been demonstrated that the proposed solution, space sharing, has not worked in practice. This failure, over nearly 11 years, cannot simply be attributed to personality conflicts, the increased enrolment at William McDonald Middle School when it took in the students from St. Joseph School or a conspiracy between two principals deliberately seeking to sabotage the space-sharing system. Over the course of 11 years, with different people in place, problems occurred on a regular basis.

[719] However, this is not my sole reason for concluding that the solution advocated by the Defendants is inadequate and does not meet the requirements of section 23.

[720] A gymnasium, unlike other special-use areas, is used by all of a school's students. It gets daily use and is also used for activities outside of school hours. Since ÉASC does not have its own gymnasium, it has no separate, homogeneous space for any of those activities. This significantly erodes the linguistic cohesion of the school and is considerably detrimental to its mission as a minority school. In my opinion, the degree of erosion is both enormous and unacceptable if the students from the minority population must leave their school every day or almost every day to use spaces where the usual language is the language of the majority population. Dr. Landry spoke of the importance of the school's having its separate space, and I accept his opinion in that regard. Moreover, this opinion is consistent with the case law on educational language rights.

[721] Furthermore, a gymnasium is used for much more than physical education and extracurricular sporting activities. It is also used as an assembly space and for parent meetings, performances and a host of other activities that are part of the normal life of any school. At this time, the rotunda is the only place that can be used for school assemblies, and I accept

the testimony to the effect that it is much too small, for example, for holding parent meetings, school assemblies, performances or fundraising activities. For activities organized by the school that require more space, ÉASC is forced to use off-site spaces.

[722] Without question, the cost of building a gymnasium is high. However, it is also necessary to put things into perspective. According to the Department's standards, a school having a student population of between 150 and 300 students is entitled to one gymnasium. Given its current capacity, ÉASC is already eligible for a gymnasium. Taking into account the capacity that I believe it should have to meet its future needs, the justification for a gymnasium is even greater.

[723] In his report, Mr. Kindt states that ÉASC must improve its physical education program and emphasizes the importance of this aspect of the school program. Mr. Kubica also notes the importance of physical education in a school program.

[724] Mr. Kindt states that it is important not to equate "physical education" with "gymnasium time". I accept his opinion that not all hours devoted to physical education need necessarily take place in a gymnasium. However, Mr. Kindt also acknowledges that access to a gymnasium is a necessary component of a physical education program.

[725] I find that the construction of a gymnasium for ÉASC is necessary to ensure substantive equality for the minority students.

(c) other special-use areas

[726] The Plaintiffs argue that ÉASC must be equipped with all of the special-use areas set up in schools for the majority population that are for the teaching of music, arts, theatre and the industrial arts; they are also calling for a cafeteria, a student lounge and spaces that may be dedicated to special-needs students.

[727] These claims, in my view, do not take into account the sliding scale principle. The effect of section 23 is not to require the government to build facilities for a school meant to house 200 students that are identical to the facilities that exist in a school built to house 700 students.

[728] However, I find that to comply with the requirements of section 23, the school must have enough space to be able to offer a wider range of

courses than that which currently exists. The school has developed a good information technology program, but it must be able to offer additional choices, especially at the secondary level. In my opinion, the present situation of "mandatory electives" is not compliant with the requirements of section 23.

[729] As I have discussed above, the minority's right to distinct educational spaces requires that offering a diversity of electives not depend entirely on the use of off-site spaces. For the reasons I listed when discussing the need for a gymnasium, the school must have a certain number of facilities of its own to prevent undue erosion of the linguistic homogeneity of its school program.

[730] Mr. Kindt explained that the Culinary Arts course is one of the most popular courses in the NWT and said that ÉASC did not have adequate equipment to teach it. I agree. The existing space is very small and is not properly equipped. In my view, ÉASC must be equipped with a room suitable for teaching home economics.

[731] Mr. Kindt spoke of the importance of having a classroom dedicated to teaching English as a second language. I agree with him on this point; ÉASC should have a room dedicated exclusively to this purpose.

[732] To be able to offer more choice to the students, and to maximize the number of courses that can be offered within the school, I conclude that an additional multi-purpose room, which could be used for teaching visual arts and music, is required.

[733] In my opinion, the school should also have a space for individual work to meet the needs of students with special needs. It is unacceptable for students with special needs, who are sometimes required to leave the classroom, to be forced to use the hallway or the office of a staff member. The approach in the NWT is to integrate these students into regular classes to the maximum extent possible, but there must nevertheless be space available when they have to work individually.

[734] To improve the quality of its high school teaching, the school must also, in my opinion, have a dedicated laboratory for teaching science at the secondary level.

[735] However, for the so-called "dirty" Career and Technology Studies courses (mechanics, welding, etc.), the numbers do not, in my opinion,

warrant requiring the Defendants to build facilities similar to those that are available to majority high schools. Even assuming improvements to high school retention, the installation of all the equipment necessary to teach subjects as varied as mechanics, welding and carpentry would incur costs that would be disproportionate to the number of students who would benefit. The numbers at ÉASC, even if one takes the target clientele into account, do not warrant the construction of a facility like the Kimberlite Technical Training Center. For this type of course, ÉASC will have to use off-site spaces.

[736] I recognize that from the perspective of the school, the parents and the students, this approach to offering "dirty" CTS courses is not ideal and has its limitations. But in my opinion, it is the only possible solution in light of the numbers. It is not possible for all schools to be able to offer to their secondary students the full range of technical classes within their walls. This is a reality not only for minority schools but also sometimes for those serving the majority population.

[737] However, ÉASC will have to have access to a budget to retain the services of a teacher to teach this type of class in French, if there is a demand. Finding such a teacher might be difficult, but the school should at least have this option. It will be up to the school administration to decide how to proceed. In the event that it does decide, for example, that there is enough demand to offer a woodworking class in a given year, it must have the budget necessary to at least try to hire a qualified person to teach this class in French.

[738] The Defendants should also ensure that ÉASC has access, if necessary, to facilities belonging to the other school boards for the teaching of CTS courses. The Defendants argued that space sharing was a viable option, and I understand from their submissions that even though they do not own the facilities of the two English school boards, they are in a position to guarantee the minority students access to these facilities. If this turns out not to be the case, it may be that the only solution will be to build a separate facility. Let us hope that this will not be the case.

(d) a separate secondary wing

[739] The Plaintiffs argue that ÉASC must have a separate secondary wing. In my opinion, section 23 does not guarantee the right to completely separate spaces for the secondary level. Dr. Landry explained that, in schools spanning from kindergarten to Grade 12, it is beneficial to have some separation or at least a transition area between the primary and secondary levels, and I understand the advantages that this can have, particularly from the students' point of view.

[740] However, as we are not talking about the construction of a new school but rather the expansion of an existing building, I do not consider it appropriate to order the Defendants to build a [TRANSLATION] "separate secondary wing". I have concluded that ÉASC must be expanded, but it is not up to the Court to draw up the plans or to decide how the different spaces within the existing structure are to be used. The details will have to be worked out in consultation with the CSFTN-O. Ideally the rooms to be used by the secondary students would be concentrated as far as possible into one section of the building, as was done during Phase 1.

(e) the playground

[741] The evidence shows that the outdoor playground is much smaller than those of several of the majority schools. The evidence also shows that the physical environment near the school presents certain challenges because the school is surrounded by rock.

[742] ÉASC should have a larger playground than the one it currently has. This should be incorporated into the expansion plans and into the organization of the site. However, I will not set strict parameters, as I do not have all of the information available to me regarding the constraints imposed by the site.

(f) other spaces

[743] The Plaintiffs have made several additional claims (cafeteria, student lounge and other separate spaces). In my opinion, these types of facilities are not required by section 23. The sliding scale principle does not require that minority schools have facilities identical to those of majority schools when there is a significant difference in numbers, as is the case here.

iii) Evidence on the economic and social context in the NWT

[744] As I have already stated several times, the rights guaranteed by section 23 are not absolute. Cost must be considered when those rights are implemented, and I took that factor into account in the previous section, in deciding to what extent it was appropriate to grant the Plaintiffs' claims. I would, however, like to add a few comments regarding the costs in the specific context of the NWT.

[745] The Defendants, through Ms. Melhorne, presented evidence on the GNWT's financial situation. Ms. Melhorne spoke of the impact of the economic crisis on the NWT and the stimulus action taken by the GNWT, including increased expenditures on infrastructure projects in recent years. She explained that the government now wishes to reduce that budget considerably. She also spoke of the various needs to which the government must respond.

[746] However, the Defendants' defence is not based on section 1 of the Charter. In this proceeding, they did not argue that they are unable to comply with section 23 because they must respond to other needs.

[747] I accept that the GNWT has considerable infrastructure needs. I also accept that the government does not have unlimited resources when it plans its budget and decides the amount to be allocated to infrastructure.

[748] In the evidence, allusions were made to the fact that if the Court were to order the Defendants to incur expenses for minority schools, certain other infrastructure projects would necessarily have to be set aside. I do not accept that this consequence is inevitable.

[749] The GNWT can take out loans. It may prefer not to do so, but the possibility exists. The GNWT can also reorganize its budget and increase the amounts that will be allocated to capital projects. The government has chosen to go back to allocating a much more modest portion of its budget to capital projects than has been spent for a number of years. It has the option of reducing its capital project allocations more gradually. Governments have the power to make adjustments to their budget if necessary.

[750] I am well aware that the social context of the NWT is very particular. The land mass is immense, and many communities are small and geographically isolated from one another. The Territory has 11 official languages, including 9 Aboriginal languages. These Aboriginal languages, in

the Canadian context, and even more so in the global context, are spoken by a very limited number of people. There are significant differences between the situation of the Francophone minority in the NWT and that of the Aboriginal communities, but certain parallels can be drawn with the challenges related to language preservation and cultural erosion. Those needs and aspirations exist in both of these communities. But one difference, from a legal perspective, is that French and English are subject to constitutional protection while the others are not.

[751] The sliding scale principle acknowledges the reality that the Defendants described in their submissions (the fact that the governments do not have unlimited budgets and must set priorities). It is also true that the cost analysis is problematic. In terms of setting priorities, the comparison of needs in areas as varied as health, education and transportation is an admittedly difficult and sometimes wrenching exercise.

[752] In matters of language rights, risk of assimilation and cultural vitality, it is much more difficult to measure and visualize the impact of shortcomings in services than for hospitals and roads. This is one of the dangers faced by linguistic minority populations: having their requests refused or seen as unreasonable or exaggerated in comparison to other critical and immediate needs to which governments must respond. However, one of the purposes of section 23 is to protect linguistic minority populations against such reasoning and to give them an effective tool for asserting their rights.

[753] Neither the GNWT's financial situation nor the specific context of the NWT constitutes a valid reason not to give full effect to section 23.

c. Constitutional status of the daycare and the pre-kindergarten program

[754] Besides additional spaces for educational purposes, the Plaintiffs are seeking declarations from the Court regarding the spaces that they want to see set aside for the Garderie Plein Soleil and the pre-kindergarten program for three- and four-year-old children.

[755] The Plaintiffs argue that the daycare benefits from constitutional protection. They also submit that the Defendants must provide space for the pre-kindergarten program because the CSFTN-O, in its enrolment policy, includes pre-kindergarten in its primary program. The Plaintiffs argue that

the CSFTN-O's right of management gives it the right to exceed the parameters of the school program as set by the *Education Act*.

[756] In the alternative, the Plaintiffs argue that the Court should order the Defendants to provide additional space for the daycare and pre-kindergarten program as a remedial measure to remedy past harms and delays by the GNWT in implementing section 23.

[757] The Plaintiffs have submitted that it is not necessary to address the issue of whether the daycare and pre-kindergarten program are constitutionally protected, since there are other legal bases on which the remedy they are seeking may be founded. I do, however, consider it necessary to decide the issue. The Garderie Plein Soleil is a Plaintiff in this proceeding, and the pleadings clearly raise the issue of its constitutional status.

[758] In my view, the daycare does not benefit from constitutional protection, regardless of the context. Section 23 creates a right to receive education at the primary and secondary levels. I do not see how its language could be interpreted as including a daycare service, even under the most generous interpretation. To my knowledge, there is no case law giving constitutional status to a daycare in a minority setting.

[759] As for the pre-kindergarten program, it is clear that the CSFTN-O has the right to establish such a program. However, I cannot agree with the argument that, in so doing, it ascribes a constitutional status to that program. The GNWT has jurisdiction over education, and it has the authority to set the parameters for the primary and secondary school programs. In my opinion, the CSFTN-O's right of management does not give it the power to create a school program that exceeds the parameters set by the government.

[760] In my opinion, the only legal basis available to the Plaintiffs for requesting an order that the Defendants cover the cost of spaces for the daycare or pre-kindergarten program is to establish that this constitutes an appropriate and just remedy within the meaning of subsection 24(1) of the Charter.

V) RELIEF

[761] Section 24 (1) of the Charter gives the Court a broad discretionary power to grant relief in response to the infringement of a constitutional right:

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

[762] The Court must exercise this discretion by relying on a prudent assessment of the nature of the right and of the infringement, the facts of the case and the application of the relevant legal principles. The approach must remain flexible and responsive to the needs of a given case: *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, paragraphs 52–59.

A. DECLARATIONS REGARDING SPACES TO BE PROVIDED

[763] I have already explained my findings regarding the inadequacy of ÉASC's existing facilities. I consider it appropriate and just to grant the Plaintiffs a detailed declaration regarding the spaces that the Defendants will be required to create at ÉASC for educational purposes.

B. ADDITIONAL SPACE FOR DAYCARE AND PRESCHOOL

[764] For the reasons provided above, I do not find that the daycare and pre-kindergarten program benefit from constitutional protection. Under normal circumstances, the Defendants would have no obligation to finance spaces for these programs out of public funds on the basis of section 23. What I must now decide is whether it is appropriate to order them to do so as a remedial measure in the particular circumstances of this case.

[765] To answer this question, it must be recalled that the building housing ÉASC has always had both an educational and a community purpose. The federal government made a substantial financial contribution to the construction of the original building and provided more than a third of the funds required for the Phase 1 expansion. This contribution was premised on the fact that certain spaces within the school would be used by the community.

[766] A co-operative approach, through which the resources of both levels of government are pooled to meet the needs of a linguistic minority

population, is very desirable. It enables the creation of institutions for the minority that serve as true community and educational centres, with all of the resulting benefits.

[767] Mr. Devitt explained that during the project planning and funding negotiation phase, the identification of dedicated areas for community use served as a basis for determining how much the federal government would contribute to the project.

[768] While this process may be relatively precise, it is not an exact science. In light of the evidence, it seems that some "creativity" is called for to maximize the federal government's contribution. I say this because, for example, in the Phase 2 negotiations, Mr. Devitt acknowledged that in the plan submitted by the GNWT to the federal government, the gymnasium was identified as a space dedicated 100% to community use. It is clear that in practice, the gymnasium would serve an important educational purpose. Mr. Devitt said upon cross-examination that this kind of allocation was meant to [TRANSLATION] "help Canadian Heritage with its analysis". Another way of putting it could be to say it was meant to help the GNWT benefit from the maximum financial contribution possible from the federal government, including for the spaces meant for educational use.

[769] Mr. Devitt was unable to identify precisely which spaces the Department considered to be for educational use and which for community use in the existing building, beyond the fact that the original daycare space is not considered part of the school.

[770] Obviously, it is neither possible nor desirable to perform an analysis of the building by the square metre to identify which spaces were funded by which government and for which use they will be dedicated. At the same time, the building's community purpose must be acknowledged. It is for this reason that I concluded, at paragraphs 682 to 686, that any suggestion that ÉASC could or should recover in whole or in part the space currently dedicated to the daycare to transform it into school space is unacceptable. In my opinion, the CSFTN-O is fully justified in granting space to the daycare as it currently does, given the contribution made by the federal government to the Phase 1 expansion work.

[771] The room formerly used by the kindergarten should not be counted as educational space. The rotunda space should not be considered educational

space either. This space must be restored to its original use, which will be possible as soon as ÉASC has the additional space it requires.

[772] All of the witnesses who spoke of the use of the rotunda for educational purposes explained that the space was inadequate for such use. The space has been used for music classes even though it is insufficiently sound-proofed; it has occasionally been used for physical education classes. Clearly, it is not an adequate educational space, but the school administration has had no choice but to use it. This situation will probably continue for some time yet, until the expansion work resulting from my Order has been completed.

[773] The CSFTN-O has repeatedly asked the Defendants to acknowledge its lack of space over the past several years. The Defendants were aware that the rotunda was being used for educational purposes at the expense of its community purpose. The Defendants have refused to proceed with expansion work in the absence of an order from the Court. In 2005, in connection with the motion for an interlocutory injunction, and now, in the course of this proceeding, they have continued to claim that the school has adequate space.

[774] I find that the Defendants have knowingly allowed this situation, of educational spaces encroaching on the spaces intended for community use, to continue. I consider it appropriate and just to provide a remedy that takes into account the Defendants' inaction and the fact that this inaction has been detrimental to both the school's educational and community purposes.

[775] I find it appropriate and just that the remedy be to increase the daycare capacity and create a space for the pre-kindergarten program. These programs have a community purpose and a direct link with the school, and they can contribute to a great extent to achieving the objectives of section 23. This link was established by the evidence during the hearings.

[776] In any community, the daycare is an important institution. All parents who must entrust their young children to a daycare hope that it will offer them a safe and stimulating environment that is conducive to their development. But the evidence has established that in a minority context, and specifically in the context of the city of Yellowknife, the impact of the daycare and preschool program is significant, multi-dimensional and closely linked to the success of the school program, for several reasons.

[777] The evidence revealed that the Garderie Plein Soleil plays a much greater role than an ordinary daycare and has a significant impact on the right holder parents of Yellowknife. (The daycare does not serve right holders exclusively, but, according to the evidence, they form a majority of its clientele and have priority access.)

[778] Like all daycares, it offers childcare. But it also offers that service in French, which, according to all of the witnesses who spoke about it, is very important for the francization of children. Moreover, it offers parents a point of entry into an important network, a community of French-speaking parents.

[779] Ms. Montreuil, for example, explained that it was her contact with the daycare that enabled her to relearn her French, which was quite rusty at the time. Ms. Poulin mentioned the fact that her family's contact with the daycare helped her husband, an Anglophone, to improve his French. All of the parents who testified mentioned the role that the daycare played, both for their children and themselves, in their integration into the Francophone community.

[780] The evidence also established the importance of the daycare as a recruitment tool for the school, especially because it is located in the same building. Parents whose children attended the daycare when it was located off-site, and then later once it had moved into the school, talked about the difference between the two scenarios.

[781] Since the daycare moved into ÉASC, almost all the children who have attended have gone on to enrol at ÉASC. Of course, some parents would have sent their children to ÉASC even if there were no Francophone daycare, or if the daycare were located off-site, but there is no doubt in my mind that the existence of the daycare contributes to the school's recruitment, even more so now that the daycare is situated in the school. This is illustrated by the testimony of some parents, who explained that their children, while still attending the daycare, had already begun thinking of ÉASC as "their" school and were looking forward to attending.

[782] I also find that the physical proximity between the daycare, the preschool program and the school contribute to building the children's identities as Francophones. In the words of Ms. Poulin, the [TRANSLATION] "heroes" of the children attending the daycare were the [TRANSLATION] "big kids" at ÉASC.

[783] One might claim that the experiences recounted by the parents are merely anecdotal, a reflection of their personal experience, and that it would not be appropriate to draw broad conclusions on that basis. However, the evidence establishes the contrary. The parents' testimony is corroborated in many respects by Dr. Landry's statements about the factors that influence identity building, revitalize the community and curb assimilation, particularly when the rate of exogamy is very high.

[784] In my view, the experiences described by the parents are the practical manifestation of that which Dr. Landry explained in theoretical terms. There is significant overlap and consistency between the experiences reported by the parents and Dr. Landry's opinion on these subjects, an opinion that, it should be noted, is based on extensive research that he has conducted in minority settings.

[785] Having space at ÉASC is advantageous to the daycare in several ways that help it better fulfil its mandate. It enjoys a stability that it did not have previously (it had moved three times before setting up in ÉASC). Because the space is provided to it free of charge by the CSFTN-O, its savings on rent—and rental prices in Yellowknife are very high—enable it to offer better working conditions in its efforts to recruit quality staff. This is hardly a negligible point, given that the recruitment of Francophone staff, as Ms. Poulin explained, must often be done outside of the NWT.

[786] I therefore find that the daycare is an important link in the chain of the school's promotion and long-term survival. This contributes to the achievement of the fundamental objectives of section 23, and for this reason, a remedy involving the daycare is an appropriate response to a section 23 violation.

[787] As for the pre-kindergarten program, it is not part of the education program within the meaning of the *Education Act*, but I accept that it also plays an important role with respect to both recruitment and francization. Like the daycare, then, it is an important tool for the implementation of section 23, and it is appropriate and just that the allocation of space to this program constitute one of the remedies granted in the circumstances of this action.

[788] The Plaintiffs are seeking sufficient space to increase the daycare's capacity from 37 to 50 and to provide the preschool program with a capacity

of 24. A remedy ordered under subsection 24(1) must be reasonable. It must also be grounded in the evidence.

[789] The evidence regarding the daycare's waiting lists could have been clearer and more specific. It did, however, establish that the daycare does generally have a waiting list, particularly for the infant spots. I also recognize that people seeking a daycare spot often do not have the luxury of taking the risk of remaining on a waiting list and waiting for a spot to become available. If the daycare cannot respond to the request when it is made, there is a significant chance that the parents will go elsewhere.

[790] I consider it just to require that the Defendants provide sufficient space to ensure that the daycare has a capacity of 45 children and that the preschool program has a capacity of 20 children.

C. DAMAGES

[791] Subsection 24(1) of the Charter grants courts a broad discretion in the choice of remedies and does not exclude making an award of damages in addition to declaratory relief.

[792] Here, the Plaintiffs are claiming compensatory and punitive damages and have requested that they be paid to the CSFTN-O even though they are not a party to this dispute.

[793] The principles concerning the award of damages in a dispute involving language rights were reviewed by this Court in *Fédération Franco-Ténoise* v. *Canada (Attorney General)*, 2006 NWTSC 20. That proceeding was based on the *Official Languages Act*, RSNWT 1988, c O-1, not on the Charter, but the provision of that statute concerning relief uses language very similar to that of subsection 24(1), and the Court found that the same principles applied. The Court's analysis of the principles governing the awarding of compensatory damages (paragraphs 902–8) and punitive damages (paragraphs 937–38) was upheld by the Court of Appeal. (*Northwest Territories (Attorney General)* v. *Fédération Franco-Ténoise*, 2008 NWTCA 05, pages 93–94.) Those are the principles that I have applied in this case.

[794] As a general rule, the courts do not award damages for harm sustained as a result of the adoption of a statute that is later declared unconstitutional, unless the evidence reveals conduct that is clearly wrong, an abuse of power or in bad faith. In other words, the government enjoys a limited immunity, as

long as it acts in good faith. *Mackin* v. *New Brunswick (Minister of Finance),* [2002] 1 S.C.R. 405.

[795] This principle also applies when a government action, rather than a statute, is declared unconstitutional. *Wynberg* v. *Ontario,* (2006) 269 D.L.R. (4th) 435 (Ont. C.A.).

[796] The case law on section 23 of the Charter contains plenty of situations in which courts have held that governments had infringed section 23. There are several examples in which the courts have granted declaratory judgments forcing governments to take concrete steps to rectify the situation. The Plaintiffs have not, however, been able to show me any cases in which compensatory or punitive damages have been awarded in addition.

[797] The Plaintiffs submit that monetary compensation is warranted for the collective damage caused by the Defendants' delays in implementing section 23. They also state that punitive damages would be appropriate in order to discourage what they call the Defendants' reactionary and minimalist approach.

[798] They way I see it, the Defendants' position in the course of this proceeding - that ÉASC is adequate to meet the needs of the minority Francophone population - is inconsistent with what they communicated to the federal government during the Phase 2 negotiations. This position also strikes me as incompatible with their undertaking to have the schematic plans drawn up for Phase 2. It seems logical to conclude that, particularly in light of high capital needs and a limited budget, the commitment of resources to such planning and the efforts to obtain a financial contribution to this project from the federal government indicate recognition of the need to act.

[799] As I have mentioned above, the desire to reach an agreement with the federal government to pool resources and enhance the project is understandable. But to the extent that the need exists, the GNWT cannot put off indefinitely its obligation to act. It has already been given an opportunity to act, with a contribution from the federal government for Phase 2. Unfortunately, it did not acknowledge, in its budget planning process, the importance of seizing this opportunity and moving the project forward.

[800] On the other hand, I do not think it would be accurate to say that the Defendants have only taken steps to implement section 23 when ordered to do so by the courts.

[801] Neither of the Francophone schools in the NWT was built in response to a court order, contrary to what has occurred in several section 23 disputes. In those cases, damages were not awarded.

[802] Phase 1 did result from a court order. The Defendants challenged the need for space at the time, but once the order was given, according to Mr. Lavigne, they acted quickly to plan its implementation and, ultimately, decided to go beyond what was ordered. The same thing occurred in the dispute regarding École Boréale.

[803] I am not calling into question the very concrete negative consequences of the delays for the members of the linguistic minority in Yellowknife. Parents were forced to make extremely difficult choices for much longer than they should have been. They should not have been forced to choose between sending their children to school in French, to preserve their language and culture, and sending them to a school with a gymnasium. And it is unfair that they were forced to make this same choice again and again for years.

[804] I am not calling into question the harmful effects, for the linguistic minorities, of the government's delays in implementing section 23, nor the fact that such delays contribute to assimilation. I also acknowledge that the reduction in numbers can potentially be harmful to the community when it attempts to assert its rights.

[805] I have kept that reality in mind in my decision regarding relief. Its purpose is not only to render the existing school compliant with section 23 and to ensure that it meets the present and future needs of the minority, but also to repair past harms by supporting the vitality of the minority community, in particular by providing extensive support to the preschool programs.

[806] However, taking into consideration the criteria for awarding damages, the whole of the evidence and the other remedies that I have decided to grant to the Plaintiffs, I find that an order compelling the Defendants to pay damages is not called for.

D. COSTS

[807] The Plaintiffs are claiming solicitor and client costs.

[808] Awarding solicitor and client costs is not the norm. It is an exceptional measure, usually reserved for situations where there has been reprehensible, scandalous or outrageous conduct by one of the parties. *Young* v. *Young,* [1993] 4 S.C.R. 3. In such cases, costs are a means for the court to penalize the conduct of the party in question.

[809] However, in the context of a dispute where constitutional rights are at issue, costs may be a type of remedy that is appropriate and just under subsection 24(1) of the Charter. In this context, there is no need for the court to make a finding of reprehensible or outrageous conduct. Solicitor and client costs may be awarded to the extent that a defendant has infringed the rights guaranteed by the Constitution without a legitimate reason, even in the absence of bad faith: *Arsenault-Cameron* v. *Prince Edward Island, supra*, paragraph 63; *Attorney General of the Northwest Territories* v. *Fédération Franco-Ténoise,* 2008 NWTCA 05, page 83.

[810] The Defendants argue that unlike the case in *Arsenault-Cameron,* this dispute and docket CV2008000133 raise novel issues, particularly with respect to the right of management protected by section 23. This is true. Indeed, I have not exclusively found in favour of the Plaintiffs on the issues that deal with the right of management. Nor did I grant all of the remedies they were seeking with respect to the adequacy of the buildings.

[811] On the other hand, the evidence makes it clear that the central issue of this dispute was the space issue. The claims for space for the daycare and preschool program were novel, but the largest part of the dispute revolved around the educational spaces.

[812] This action is the first that deals with the implementation of section 23 in the NWT. The issue of which point of comparison to use (the majority schools in Yellowknife or the schools in the NWT with a comparable number of students), for example, had never been considered in the context of this jurisdiction.

[813] However, it is clear that beyond the comparator issue, the Defendants applied a concept of equality that was rejected more than a decade ago by the Supreme Court of Canada in *Arsenault-Cameron,* as I noted in paragraph 633. The GNWT's stubborn insistence on applying the same

standards to minority schools as to majority schools goes against the long-established principle of substantive equality.

[814] What is more, in arguing that ÉASC could solve its space problems by recovering the space dedicated to the daycare, the Defendants have failed to acknowledge the building's community purpose and the significant financial contribution made by the federal government toward its construction.

[815] Furthermore, before initiating this action, the Plaintiffs spent several years doing everything possible to communicate and explain their needs to the Defendants. The Defendants received detailed reports and a steady stream of correspondence specifying their requests, explaining the challenges and asking the government to act. The Plaintiffs tried to settle the dispute outside of court for years.

[816] The Plaintiffs also suspended the action for several years. They did so because they thought the dispute could be resolved without a hearing in light of the Defendants' undertakings. It is entirely true that in the amended order of February 2006, the Defendants did no more than undertake to prepare the schematic plans for Phase 2. They did not undertake to begin construction by a certain deadline. However, one can understand why the Plaintiffs believed that Phase 2 would go ahead. No individual or level of government sets aside the resources necessary for planning such a large-scale expansion for the fun of it, without intending to proceed to the next step once the plans are in place.

[817] The Defendants were given the opportunity to proceed with Phase 2 with financial assistance from the federal government. They chose, through their Capital Plan planning process, not to seize that opportunity.

[818] I do not agree with the Plaintiffs' characterization of the Defendants' conduct. I am not prepared to conclude that the Defendants acted in bad faith. However, solicitor and client costs can be awarded even in the absence of bad faith. That is what the Court did in *Fédération franco-Ténoise* v. *Canada (Attorney General)*. In this case, for the reasons mentioned above, I find that granting solicitor and client costs is an appropriate and just remedy in the circumstances.

[819] The costs issue could have been complicated by the fact that this proceeding and docket CV2008000133 were heard simultaneously. However, the problem does not present itself, as I have found that that granting

solicitor and client costs is equally justifiable in the other proceedings. *Commission Scolaire Francophone, Territoires du Nord-Ouest et al* v. *Attorney General of the Northwest Territories, supra*, paragraphs 832–81.

E. REQUEST THAT THE COURT RETAIN JURISDICTION IN THE CASE

[820] The Plaintiffs are adamant that the Court should retain jurisdiction in this case and ensure that the relief ordered is monitored and supervised. The Supreme Court of Canada has held that this is one of the broad discretionary powers provided by subsection 24(1) of the Charter. *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

[821] I acknowledge that this power exists, but I am of the opinion that it should be exercised very prudently. The dissenting judges in *Doucet-Boudreau* stated (and the judges of the majority did not contradict them on this point):

> [The role of the courts] is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities. Beyond these functions, an attitude of restraint remains all the more justified, given that Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.
>
> *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, *supra*, paragraph 106.

[822] The Plaintiffs state that it is necessary for the Court to retain jurisdiction on the basis of the same interpretation of events that supported their claim for damages, namely, that the Defendants had been acting in bad faith toward the NWT's minority Francophone community for several decades and that the Court should not trust them to implement the orders arising from this judicial proceeding.

[823] As I already stated, I do not agree with this description of the Defendants' actions. In my opinion, they erred in their evaluation of ÉASC's needs, and they should have accorded much more weight to the CSFTN-O's input in this matter. I also find that they used the wrong approach in their application of the concept of substantive equality.

[824] However, unlike in the situations which have led to many disputes involving section 23, the Defendants in this case still took steps, and incurred considerable expenses, to implement section 23 in the NWT. They built two schools. They created a French-language school board. In my view, they did not deny or ignore their constitutional obligations arising under section 23. They simply gave them an unduly narrow interpretation.

[825] Above all, the Defendants complied with the orders of the Court. The Phase 1 work was completed with delays, but as I have already stated, the evidence clearly shows that these delays did not result from the Defendants' conduct.

[826] In *Fédération Franco-Ténoise* v. *Canada (Attorney General)*, *supra*, in declining to retain jurisdiction in the case despite the GNWT's refusal to act for several years in response to the plaintiffs' claims, Moreau J. said the following:

> [TRANSLATION]
>
> > It is true that the Plaintiffs have had to obtain a judicial determination because of the GNWT's inaction which has persisted in certain areas for many years. Moreover, the GNWT had at its disposal a number of reports and recommendations that essentially came to some of the same conclusions as this Court. However, this ruling is the first to take an in depth view of the nature and scope of the language rights guaranteed by the [*Official Languages Act* of the] NWT. I have no reason to believe that the GNWT will not respect my orders.
>
> *Fédération Franco-Ténoise* v. *Canada (Attorney General)*, *supra*, paragraph 978.

[827] Similarly, I do not have any reason to believe that the Defendants will not respect my orders. They have complied with the interlocutory injunctions granted in this proceeding and in the proceeding involving École Boréale.

[828] Subsection 24(1) of the Charter gives the courts considerable discretion, but the relief ordered must take into account the nature of the right at issue. The case law on section 23 acknowledges the role of governments and their interest in having broad discretion to implement those rights. In this case, I concluded that this discretion had not been exercised in accordance with the Charter, but that does not mean that it is appropriate to

create a judicial trusteeship to supervise the way in which the Plaintiffs will implement the relief ordered.

[829] In the ordinary course of matters in our constitutional democracy, a court should not retain jurisdiction in a case, barring exceptional circumstances. In my opinion, it is not necessary to do so in this proceeding.

VI) CONCLUSION

[830] For all of these reasons, I order the following relief under subsection 24(1) of the Charter:

1. The building that houses École Allain St-Cyr will be expanded in accordance with the following parameters:

    a. The school will have a capacity of 250 students; and

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

        (i) a gymnasium of 500 square metres or more, with locker rooms, showers, bleachers and an office for the staff member in charge of the gymnasium;

        (ii) a space adequately equipped for teaching cooking and home economics classes;

        (iii) a multi-purpose room for teaching music and art;

        (iv) a laboratory adequately equipped for teaching science at the secondary level, separate from the space used as a laboratory by the primary students;

        (v) a designated room for teaching English as a second language;

        (vi) a closed space, for individual work, for students with special needs;

        (vii) work spaces for staff members; and

(viii) to the extent possible, and taking into account the conditions of the terrain, the creation of a larger playground for the primary and secondary levels.

2. In calculating the school's capacity, neither the space used by the Garderie Plein Soleil at the time of the hearing nor the rotunda shall been counted.

3. The building's expansion should also include the following spaces for the preschool programs:

(i) additional space to enable the Garderie Plein Soleil to increase its capacity to 45 places; and

(ii) sufficient space to enable the pre-kindergarten program to accommodate 20 children.

4. Within 21 days following the filing of these reasons, or at a later date upon written consent by the Plaintiffs through their counsel, representatives of the Defendants will meet with representatives of the Plaintiffs to establish a schedule and undertake planning the work. Following that, the Defendants will provide the Plaintiffs or the Commission scolaire francophone, Territoires du Nord-Ouest with written updates at a minimum of every 45 days.

5. The Defendants will take all legally available measures to accelerate the tendering process and the other budgetary processes necessary to implement this Order.

6. The Defendants will ensure that the work is completed in time for the beginning of the school year in September 2015.

7. The Defendants will ensure that École Allain St-Cyr has fair access to spaces for the teaching of Career and Technology Studies courses and will provide the necessary funding, upon request by the CSFTN-O, to hire a Francophone teacher to teach these courses.

8. From now until the expansion work is complete, the Defendants will ensure that École Allain St-Cyr has qualitatively and quantitatively fair access to the following spaces:

(i) a gymnasium for educational and extracurricular activities;

(ii) the spaces required for teaching home economics;

(iii) the spaces required for teaching plastic and visual arts;

(iv) the spaces required for teaching music and theatre arts; and

(v) additional classrooms, as needed.

9. The Defendants will pay the Plaintiffs' solicitor and client costs.

"L.A. Charbonneau"
L.A. Charbonneau
J.C.S.

Dated at Yellowknife, NT, this
1st day of June 2012.

Counsel for the Plaintiffs:	Roger J.F. Lepage Francis Poulin
Counsel for the Defendants:	Maxime Faille François Baril Guy Régimbald

---

Corrigendum of the Reasons for Judgment

of

The Honourable Justice L.A. Charbonneau

---

1. The following correction has been made to this judgment:

[816] The Defendants also…

Should read

[816] The Plaintiffs also …

2. The citation is modified to read:

Association des Parents ayants droit de Yellowknife et al v. *Attorney General of the Northwest Territories et al*, 2012 NWTSC 43.cor 1

SC S-0001-CV-2005000108

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ASSOCIATION DES PARENTS AYANTS DROIT DE YELLOWKNIFE, LA GARDERIE PLEIN SOLEIL, YVONNE CAREEN, CLAUDE ST-PIERRE and FÉDÉRATION FRANCO-TÉNOISE

Plaintiffs

-and-

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

Defendants

Corrected judgment: A corrigendum was issued on December 12, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU